

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>TOWN OF BOOTHBAY, MAINE</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<i>Civil No. 98-125-P-DMC</i>
	)	
<b>GETTY OIL COMPANY, et al.</b>	)	
	)	
<i>Defendants</i>	)	

**MEMORANDUM DECISION ON DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT<sup>1</sup>**

Invoking this court’s diversity jurisdiction, the Town of Boothbay, Maine sues Getty Oil Company, Texaco Refining and Marketing Inc. and Texaco Inc. for damages arising from the leakage of gasoline at a former service-station site on Route 27 in Boothbay. Corrected Amended Complaint (Docket No. 2a) ¶¶ 1-13. The town seeks recompense exceeding \$500,000, including the cost of improving or extending town water mains and “lost present and [future] real estate tax revenues,” on the basis of the defendants’ alleged negligence and maintenance of a nuisance and an

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<sup>1</sup>Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

ultrahazardous activity.<sup>2</sup> *Id.* ¶¶ 14-26. The defendants move for summary judgment. Defendants’ Motion for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 8). For the reasons that follow, the defendants’ motion is granted.

### **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

### **II. Factual Context**

The material facts in this case, which are as follows, are not in dispute.

By complaint dated September 11, 1990 the state of Maine and the Department of Environmental Protection (together, the “State”) filed suit against Getty Oil Company, Texaco

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<sup>2</sup>The Town of Boothbay concedes that its cause of action for trespass cannot be maintained. Plaintiff’s Opposition to and Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 14) at 1 n.1.

Refining and Marketing, Inc. and Texaco, Inc. (collectively, “Texaco”) in Maine Superior Court (Kennebec County) Docket No. CV-90-465 (“*State v. Texaco*”). Affidavit of John F. Lambert, Jr., Esq. (“Lambert Aff.”) (Docket No. 9) ¶ 1; Complaint in *State v. Texaco* (“*State v. Texaco* Complaint”), Exh. C(1) to Defendants’ Statement of Undisputed Material Facts (“Defendants’ SMF”) (Docket No. 7). The State brought that action pursuant to 38 M.R.S.A. § 347-A, as well as the Oil Discharge Prevention and Pollution Control Act, 38 M.R.S.A. § 541 *et seq.*, and the Underground Oil Storage Facilities and Ground Water Protection Act, 38 M.R.S.A. § 561 *et seq.* *State v. Texaco* Complaint ¶ 1. Those statutes empower the Department of Environmental Protection (the “DEP”) to remediate oil discharges by means including the restoration or replacement of contaminated water supplies. 38 M.R.S.A. §§ 548, 568. Such restoration and replacement, in turn, may include the construction or extension of public water systems. 38 M.R.S.A. § 568(2). The DEP is authorized to sue a “licensee”<sup>3</sup> or alleged “responsible party” for reimbursement of funds expended in abating discharges. 38 M.R.S.A. §§ 552, 570.

In *State v. Texaco*, the State sought to recover for “damages and cleanup related to gasoline contamination caused by Defendants in the Town of Boothbay . . . .” *State v. Texaco* Complaint ¶ 1. The State alleged that from the 1930s until 1982, the defendants or their predecessors in interest “owned and were responsible for supplying, maintaining and replacing . . . underground oil storage tanks, lines and pumps” at a gasoline service station on Route 27 in Boothbay last known as “Practical Mechanics.” *Id.* ¶¶ 14-15. The State further alleged that “[g]asoline has contaminated

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<sup>3</sup>38 M.R.S.A. § 545 provides that “[n]o person shall operate or cause to be operated an oil terminal facility as defined in this subchapter without a license.” An “oil terminal facility” is defined to include oil storage facilities capable of being used to store more than 1,500 barrels or 63,000 gallons of oil. 38 M.R.S.A. § 542(7).

the groundwater under and in the proximity of the Practical Mechanics site as a result of discharges of petroleum products related to the filling and storage of gasoline in the underground storage facilities located at the Practical Mechanics site . . . .” *Id.* ¶ 16. These discharges, according to the State, took place some time between 1939 and 1976. *Id.* The State sought to hold Texaco liable for all disbursements from two state funds in connection with the gasoline contamination at the Practical Mechanics site and for the restoration of the contaminated area. *Id.* ¶¶ 23-28.

Beginning in early 1991 the parties to the *State v. Texaco* litigation engaged in settlement discussions. Correspondence between the State and Texaco, Exh. C(2)(A) to Defendants’ SMF. In these communications, the State made clear that its lawsuit against Texaco included a claim for reimbursement of the cost of a proposed extension of the public water system in the Town of Boothbay to serve properties with water contaminated or threatened by the gasoline discharges at the site. *Id.* By letter dated August 5, 1992 the State advised Texaco that it would not permit Texaco to “cash out” of the lawsuit by payment of remediation costs to date or some percentage thereof, thereby avoiding liability for future costs incurred, if any, for “financing alternate water supplies.” Exh. C(2)(B) to Defendants’ SMF.

By October 28, 1993, as reflected in correspondence of that date, the State “believe[d] that the remediation planned by the Department [would] obviate the need for installation of a water line.” Exh. C(2)(C) to Defendants’ SMF. As a result, the State was willing to accept a lower settlement figure in exchange for a limited release. *Id.* Through March 1996 the State and Texaco continued settlement negotiations relating to the Practical Mechanics site. Lambert Aff. ¶ 3; Exhs. C(2)(D), C(2)(E), C3 to Defendants’ SMF.

In early 1994 the Town of Boothbay hired the engineering firm of Wright-Pierce to calculate

the cost of extending the public water main north along Route 27. Letter from Wright-Pierce to Carlo Pilgrim, Exh. D to Defendants' SMF. In May 1994 Carlo Pilgrim, the town manager of Boothbay, was in touch with DEP geologist John Beane. Deposition of Carlo Pilgrim ("Pilgrim Dep."), Exh. G to Defendants' SMF, at 120-22. In or about October 1995 the Town of Boothbay asked Wright-Pierce to provide an estimate for a further extension of the water main, as well as an extension of the sewer line. Letter from Wright-Pierce to Carlo Pilgrim, Exh. J to Defendants' SMF.

By letter dated November 27, 1995 the Town of Boothbay requested that the State fund an approximately 6,000-foot extension of a water main along Route 27. Letter from Carlo Pilgrim to Scott Whittier, Exh. L to Defendants' SMF. In that letter, the town expressed its concern that the DEP would "settle with Texaco, reimburse itself for the expenses incurred, and leave us to deal with the clean-up." *Id.* By letter dated December 21, 1995 the DEP declined to fund the proposed water-main extension. Letter from Scott D. Whittier to Carlo Pilgrim, Exh. N to Defendants' SMF. As grounds for its decision, the DEP stated: "Due to the low risk now posed to the public health by this site, and the fact that the site has been substantially remediated to the Department's satisfaction, the Department is not authorized and cannot justify the contribution of funds as requested by the Town." *Id.*

On February 20, 1996 members of the DEP met with Pilgrim, members of the Town of Boothbay Board of Selectmen and town attorney James N. Katsiaficas. Letters from James N. Katsiaficas to Scott Whittier and Allan R. Ball, Exhs. P, Q to Defendants' SMF; Pilgrim Dep., Exh. R to Defendants' SMF, at 129-31. The purpose for the meeting was "to discuss the matter of a proposed water main extension in the Town of Boothbay and the level of the Department's funding of that project." Exh. P to Defendants' SMF.

On March 7, 1996 the DEP provided to the town, at the town's request, a package of information detailing third-party damage claims with respect to the site, an accounting of funds spent by the DEP with respect to remediation of the site, and the DEP's evaluation of continuing risks posed by the site. Letter from Scott D. Whittier to Carlo Pilgrim and attachments thereto, Exh. S to Defendants' SMF. On the latter subject, the DEP expressed its view that there remained a "negligible risk of human exposure to gasoline vapors or risk of explosion of gasoline vapors . . . ." Attachment IV to *id.*

On March 28, 1996 a Settlement Agreement and Release disposing of the *State v. Texaco* litigation was executed. Exh. C(3) to Defendants' SMF. Texaco agreed to pay the State \$400,000 in full and final settlement of all claims relating to petroleum contamination at the Practical Mechanics site, in exchange for which the State furnished Texaco a general release with respect to the site. *Id.*; Lambert Aff. ¶ 3. *State v. Texaco* was dismissed with prejudice. Lambert Aff. ¶ 3; Exh. U to Defendants' SMF.

None of the Town of Boothbay's management was made aware contemporaneously by the State of Maine Attorney General's office, the DEP or otherwise of the filing of *State v. Texaco*. Affidavit of Carlo Pilgrim in Opposition to Defendants' Motion for Summary Judgment ("Pilgrim Aff.") (Docket No. 15) ¶ 2. Town management never was served with a formal or courtesy copy of the complaint, Texaco's answer or any other pleading. *Id.* Town management at no time was involved in any respect in the litigation of the action: It was not copied on any correspondence relating to the matter, was never a party to any telephone conference call or in-person meeting related to the action and received no discovery materials or documents produced by either side. *Id.* Nor was town management made aware contemporaneously of the settlement of that action, the amount of

the settlement or that the settlement occasioned the consummation of a release document. *Id.* ¶ 3. The Town of Boothbay has received no monies whatsoever from the settlement proceeds of *State v. Texaco*. *Id.* ¶ 4. The State has made no offer to provide any monies from the settlement for the extension of water through the affected areas, or otherwise. *Id.*

In April 1996 the Town of Boothbay Board of Assessors reduced the assessed property values of ten properties at or near the Practical Mechanics site by twenty percent each to reflect the impact of ground-water contamination. Handwritten notes, Exh. V to Defendants' SMF; Deposition of John W. Washington ("Washington Dep."), Exh. X to Defendants' SMF, at 62, 65. These reductions were in followup to a February 20, 1996 letter from the chairman of the town's Board of Assessors, John W. Washington, to its Board of Selectmen. Exh. W to Defendants' SMF. None of these property value reductions resulted in any loss of revenue to the Town of Boothbay. Washington Dep., Exh. X to Defendants' SMF, at 67-70. Rather, the town shifted the distribution of taxes among all taxpayers to make up for the deficiency. *Id.* In February 1996 the owners of one of the affected properties, Hazen and Jennifer Smith, submitted an application for abatement of property taxes. Exh. Y to Defendants' SMF. The Town of Boothbay Board of Assessors granted the Smiths an abatement of property taxes in the amount of \$60.59. Washington Dep., Exh. Z to Defendants' SMF, at 73. No other property owner applied for or received an abatement of taxes in connection with contamination at the Practical Mechanics site. Washington Dep., Exh X to Defendants' SMF, at 62-63, 67.

The Town of Boothbay filed its amended complaint against Texaco in the instant action on May 29, 1998. Corrected Amended Complaint. The town's factual allegations as set forth in paragraphs seven through thirteen of its complaint are nearly identical to those set forth in the State's

complaint in *State v. Texaco*. Compare Corrected Amended Complaint ¶¶ 7-13 with *State v. Texaco* Complaint ¶¶ 14-16, 21-22.

### III. Discussion

As its primary ground for the grant of summary judgment, Texaco asserts that the instant action is barred by the doctrine of *res judicata* — at least to the extent that the town seeks to recover the cost of improving or extending its public water mains. Defendants’ Motion at 10. In *State v. Texaco*, Texaco notes, the State considered the precise question whether Texaco should be held responsible for the cost of extending water mains at the former Practical Mechanics site, ultimately concluding that it should not. *Id.* This, Texaco contends, closed the door as to Texaco’s liability in that particular respect; the town cannot now come knocking. *Id.*

The Law Court has held that a party may successfully invoke the doctrine of *res judicata* upon three conditions: “if (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.” *Camps Newfound/Owatonna Corp. v. Town of Harrison*, 705 A.2d 1109, 1113 (Me. 1998) (citations and internal quotation marks omitted). The Town of Boothbay does not contest that the final two of these conditions are met. Plaintiff’s Opposition at 5. It does, however, vigorously protest any characterization of itself as a “privy” of the State for purposes of the *State v. Texaco* litigation. *Id.* at 5-16.

Privity, the Law Court has observed, hinges on the existence of a “commonality of interest” in disproving or proving the same fact or legal issue. *See, e.g., Northern Sec. Ins. Co. v. Dolley*, 669 A.2d 1320, 1323 (Me. 1996) (interests of insureds and their insurer not aligned inasmuch as insureds’ position that injury not covered by workers’ compensation contrary to insurer’s interest);

*Department of Human Servs. v. Comeau*, 663 A.2d 46, 48 (Me. 1995) (interests of mother and child in establishing paternity not aligned in that mother’s interest purely financial, whereas that of child broader, including having identity legally established); *Northeast Harbor Golf Club, Inc. v. Town of Mount Desert*, 618 A.2d 225, 227 (Me. 1992) (interests of golf club, golf committee in opposing subdivision aligned). “A privity relationship generally involves a party so identified in interest with the other party that they represent one single legal right.” *Comeau*, 663 A.2d at 48 (citing Restatement (Second) of Judgments § 41). The first litigation, in addition “must provide substantial protection of the rights and interests of the party sought to be bound by the second.” *Id.* (citations and internal quotation marks omitted).

In the context of governmental entities, the Law Court has discerned privity between town officials and a town, *Harrison*, 705 A.2d at 1114, and between the state and the Governor Baxter School for the Deaf, a state instrumentality, *Brown v. Osier*, 628 A.2d 125, 128 (Me. 1993). These cases, however, concerned the privity of different players within the same level of government. The Law Court apparently has not had occasion to consider the circumstances under which a municipality can be said to be in privity with the state. The Restatement, to which the Law Court likely would turn were such a situation presented, is instructive.

A person not a party to a previous action can be said to be in privity with “[a]n official or agency invested by law with authority to represent the person’s interests[.]” Restatement (Second) of Judgments § 41(1)(d). If (as is the case here), the official or agency is not vested with exclusive authority to bring suit regarding the issue, a person may bring subsequent suit to the extent that “the remedies that a public official is empowered to pursue may be interpreted as being supplemental to

those which private persons may pursue themselves.”<sup>4</sup> *Id.* cmt. d.

In this case, the DEP manifestly was empowered to represent the interests of the Town of Boothbay with respect to cleanup of gasoline spills and mitigation of resultant damage. *See, e.g.*, 38 M.R.S.A. §§ 541, 561 (declaring intent of Legislature “to exercise the police power of the State through the Department of Environmental Protection” to require prompt containment of ground-water contamination and to make whole persons suffering damage therefrom). The DEP, moreover, was expressly authorized to order the extension or improvement of water mains. 38 M.R.S.A. § 568(2). To the extent the town seeks the extension or improvement of its water mains, the remedy is cumulative of, rather than supplemental to, the remedies that the DEP was empowered to pursue. Absent an exceptional circumstance, the town accordingly was in privity with the DEP as regards the issue of water-main extensions or improvements.

The Town of Boothbay attacks the State’s job of representation on a number of fronts, including that (i) the town was left out of the loop in the *State v. Texaco* litigation, (ii) the town’s interest in a broader, ongoing remediation clashed with the narrower interest of the DEP in recouping state funds already expended, and (iii) the town has not received one penny from the proceeds of the *State v. Texaco* settlement.<sup>5</sup> Plaintiff’s Opposition at 6-10.

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<sup>4</sup>Although the Restatement comment addresses subsequent suit by “private” parties, it is pertinent to the Town of Boothbay in the circumstances of this case. The town stands on equal footing with private parties as regards its ability to participate in or initiate litigation in cases of ground-water contamination. Municipalities are considered “persons” for purposes of statutes administered by the DEP. *See, e.g.*, 38 M.R.S.A. §§ 361-A(4), 542(9), 562-A(16). As such, they are entitled to participate in DEP enforcement settlements, to recover damages directly from certain state funds and to bring suit directly against responsible parties. *See, e.g.*, 38 M.R.S.A. §§ 347-A(6), 551(2), 569-A(2).

<sup>5</sup>The Town of Boothbay, however, does not claim that it was unaware of the litigation, *see*,  
(continued...)

The general rule of privity articulated in section 41 of the Restatement is subject to exceptions enumerated in section 42, one of which is potentially relevant here. “A person is not bound by a judgment for or against a party who purports to represent him if . . . [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.” Restatement (Second) of Judgments § 42(1)(e). The record evidence fails to bear out a lack of either diligence or reasonable prudence on the part of the DEP. To the contrary, the DEP diligently prosecuted the action, engaging in rounds of negotiation with Texaco over the course of five years. The DEP changed its mind regarding the necessity of extension of the water main as the result of careful analysis of conditions at the Practical Mechanics site. The town adduces no concrete evidence on the basis of which the validity or prudence of the DEP’s apparently carefully reasoned determination can be assailed.

In a further attempt to avoid the impact of the defense of *res judicata*, the Town of Boothbay next argues that application of the doctrine in this instance would run afoul of various state statutory schemes. First, the town contends that application of the doctrine would effectively nullify 38 M.R.S.A. §§ 551(2) and 569-A(2), pursuant to which a third-party claimant may seek restitution from state funds and/or file suit directly against a responsible party. Plaintiff’s Opposition at 10-11. Sections 551(2) and 569-A(2), the town points out, expressly provide a “nonexclusive” remedy to third-party claimants. *Id.* To interpose a *res judicata* bar, the town suggests, would impermissibly inject an element of “exclusivity” into these statutes. *Id.* at 12. In so arguing, the town loads the principle of nonexclusivity with more weight than it can bear. The nonexclusivity clauses at issue

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<sup>5</sup>(...continued)  
*e.g.*, Plaintiff’s Opposition at 12, in which, inasmuch as appears from the record, the town did not seek to join.

merely permit third parties to bring direct actions against those responsible for ground-water contamination. They do not bulletproof such third-party claims against otherwise valid defenses.

In a similar vein, the town posits that application of the doctrine of *res judicata* clashes with statutes pursuant to which municipal powers regarding environmental matters are preserved. Plaintiff's Opposition at 12-13. One of the statutes upon which the town relies for this proposition, 22 M.R.S.A. § 2647-A, pertains to a municipality's power to address ongoing leakages — inapposite here inasmuch as the last reported leak at the Practical Mechanics site was in 1976. Equally inapposite is 38 M.R.S.A. § 410 (recodified at 38 M.R.S.A. § 480-F), which provides that a municipality may issue permits under certain conditions. The remaining two statutes cited by the town, 38 M.R.S.A. §§ 556 and 570(C), merely express the intent of the Legislature that the enactment of the environmental legislation at issue not be construed to deny municipalities from exercising general police powers. The Legislature has expressed no intention whatsoever concerning the impact of the doctrine of *res judicata* on environmental litigation.<sup>6</sup>

The Town of Boothbay's protestations, though valiant, are in the end unpersuasive. The doctrine of *res judicata* both applies in this case and operates to bar the town's claims with respect to the extension or improvement of its water mains.

Turning to the town's next and final claim, for lost tax revenues, Texaco concedes that the doctrine of *res judicata* is inapplicable inasmuch as this claim is supplemental to remedies that the State was empowered to pursue. Defendants' Motion at 18-19. Texaco asserts, however, that this

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<sup>6</sup>Indeed, in enacting both the Oil Discharge Prevention and Pollution Control Act and the Underground Oil Storage Facilities and Ground Water Protection Act, the Legislature noted its intent "to minimize direct and indirect damages and the proliferation of 3rd-party claims." 38 M.R.S.A. §§ 552(2), 570.

claim suffers from a fundamental flaw: that Boothbay can demonstrate no loss of tax revenues whatsoever, with the exception of a single abatement in the amount of \$60.59. *Id.* at 19-20. The record corroborates that this indeed is the case. The chairman of the Town of Boothbay Board of Assessors concedes that, except for the solitary abatement, the town never actually lost tax revenue as a result of contamination at the Practical Mechanics site. Rather, upon devaluing ten properties to reflect the impact of the contamination, it simply shifted the burden to the tax base as a whole to make up the deficiency.

The Town of Boothbay insists that a genuine issue of material fact exists as to whether it will continue to be able to make up the deficiency, precluding summary judgment. Plaintiff's Opposition at 18-19. The record is, however, barren of evidence that this might come to pass. Such speculative future harms do not form a sufficiently solid basis upon which to premise an award of damages. *See, e.g., In re Maine Cent. R.R. Co.*, 134 Me. 217, 219-20 (1936) (towns lacked standing to challenge removal of railroad properties from tax rolls in that they were not aggrieved thereby).

Inasmuch as the Town of Boothbay's only cognizable claim for damages totals \$60.59, and the amount in controversy necessary to sustain a diversity action pursuant to 28 M.R.S.A. § 1332(a) must exceed \$75,000, the entire suit must be dismissed with prejudice as to all claims except that for \$60.59.

#### **IV. Conclusion**

For the foregoing reasons, the defendant's summary judgment motion is **GRANTED** as to all

claims except that concerning tax abatement in the amount of \$60.59, which is hereby dismissed without prejudice.

Dated this 7th day of December, 1998.

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David M. Cohen  
United States Magistrate Judge