

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MACK P. WILLIS,
Plaintiff and Appellant,

v.

CITY OF RIALTO et al.,
Defendants and Respondents;

KEN THOMPSON, INC. et al.,
Real Parties in Interest and
Respondents.

E051792

(Super.Ct.Nos. CIVSS708001 &
CIVSS708002)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,
Judge. Affirmed.

Gibson, Dunn & Crutcher, Jeffrey D. Dintzer and Matthew Wickersham;
Hunsucker Goodstein & Nelson, Brian L. Zagon and Allison E. McAdam, for Plaintiff
and Appellant Mack P. Willis.

Pillsbury Winthrop Shaw Pittman, Scott A. Sommer and Martin Sul; Paul
Hastings LLP and Nicholas J. Begakis for Defendants and Respondents City of Rialto
and Rialto City Council.

No appearance by real parties in interest and respondents.

Plaintiff Mack P. Willis appeals the judgment and order granting the demurrer to his petition for writ of mandate to compel the City of Rialto (City) to enforce its own environmental mitigation measure against Real Party in Interest Ken Thompson, Inc. (Thompson). Finding no errors, we affirm.¹

I. PROCEDURAL BACKGROUND AND FACTS²

“From approximately 1957 through 1963, Goodrich [Corporation (Goodrich)] owned and operated a small research and development rocket production facility on a 160-acre parcel in the City. From 1968 through 1988, Pyrotronics Corporation, a fireworks manufacturer and distributor, operated on the same 160-acre parcel. In 1972, Pyrotronics constructed a ‘fireworks residual pit’ referred to as the ‘McLaughlin Pit’ for the purpose of disposing waste fireworks powder, pyrotechnic composition, defective and off-specification fireworks. After Pyrotronics left, Thompson sought to construct a concrete products manufacturing plant (the Project) in the same area. Pursuant to California Environmental Quality Act (CEQA) (Pub. Res. Code, §§ 21000 et seq.), on or about March 12, 1987, the City adopted a Mitigated Negative Declaration (MND) for the Project, which permitted Thompson to proceed with its proposed construction of a 15,000 square-foot precast concrete products manufacturing plant (and an equal-sized expansion

¹ Initially Paul Souza had joined in this appeal; however, prior to oral argument the parties stipulated to a dismissal of his appeal, which this court granted on June 6, 2012.

² Because this case is related to a case that was previously before this court, namely, *Goodrich Corporation v. City of Rialto* (Nov. 23, 2009, E045057 [nonpub. opn.] modified 12/17/2009) (*Goodrich*), we take judicial notice of our prior opinion and modification and refer to them where relevant.

in the future), as well as a 5,000 square-foot office building and associated facilities. The MND [contained Mitigation Measure No. 2, which] required Thompson to complete a satisfactory cleanup of the McLaughlin Pit and to certify the completion in a report to the City Engineer. The City approved the Project on June 4, 1987, and issued a CEQA Notice of Determination. The grading plan was approved and grading began on July 15, 1987. Thompson allegedly burned any remaining material and filled the McLaughlin Pit in December 1987.

“Ten years later, in 1997, perchlorate was reported in several municipal water supply wells in the Rialto/Colton area. The California Regional Water Quality Control Board, Santa Ana Region (the Water Board) acted as lead agency in investigating the contamination and designing and implementing a final remedy. The Water Board issued a number of cleanup and abatement orders. Adjudicatory administrative proceedings at the State Water Quality Control Board began February 2007. The City filed actions against Goodrich[, Pyro Spectaculars Inc. (Pyro)]^[3] and other parties in federal court under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq. and state law.” (*Goodrich, supra*, E045057.)

Willis is a resident of Rialto and a former employee of Goodrich. Souza is also a resident of Rialto and the president of Pyro. As noted above, Pyro is a codefendant with Goodrich in the City’s actions in federal court. On October 31, 2007, Souza and Willis

³ Pyrotronics and Pyro are distinct companies.

filed verified petitions for writ of mandate, which were later amended on October 26, 2009, seeking to compel the City to interpret and apply its 1987 Mitigation Measure No. 2 to require Thompson to clean up and remediate the perchlorate contamination relating to the McLaughlin Pit located within the 160-acre Goodrich Superfund Site.⁴ Neither petition alleges any insufficiency in the posting or supplying of any requisite notices under CEQA and the Government Code to the public at all times during the CEQA approval process of the Mitigation Measure No. 2. The petitions note that the McLaughlin Pit was burned on December 4, 1987, by the pouring of four 55-gallon drums of diesel fuel in the pit, then placing a “‘very significant’ amount of black powder” on top, followed by placing “six to eight pairs of magnesium flares” at various locations around the pit on top of the powder. “Photographs show a spectacular explosion and a large cloud of smoke after ignition.” “The burn lasted for approximately eight hours, burning ‘bright white’ for about four hours There were several explosions during the burn.” They further noted a substantial burn of “approximately 54,000 pounds (25 tons) of perchlorate-laden waste material . . . on December 4, 1987.”

In September 2009, the month prior to Willis and Souza filing their Second Amended Petitions, the United States Environmental Protection Agency (EPA) listed the Goodrich Superfund Site on the National Priorities List (NPL) as part of its ongoing removal and remedial actions for perchlorate contamination in the Rialto-Colton basin. The NPL guides the EPA “in determining which sites warrant further investigation,” and

⁴ Although the petitions were filed separately, given the fact that they raised the same claims, the cases were consolidated.

allows the EPA “to assess the nature and extent of the human health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate.” By listing the Goodrich Superfund Site, the EPA has identified the following as potentially responsible parties: Goodrich, Pyro, and Thompson.

On December 14, 2009, the City demurred to the petitions, to which Willis and Souza filed their oppositions.⁵ On May 3, 2010, the trial court granted the City’s demurrer as to both petitions without leave to amend on the grounds that the state law claims were preempted by CERCLA, and were barred by the statute of limitations. Subsequently, on June 30, 2010, the City’s motion to dismiss the petitions was granted, and on September 7, 2010, notice of entry of judgment was served. Willis appeals.

II. STANDARD OF REVIEW

In evaluating an order sustaining a demurrer to a pleading, we give the pleading a reasonable interpretation by reading it as a whole and all of its parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 564 [Fourth Dist., Div. Two].) We assume the truth of all material facts that have been properly pleaded, of material facts that may reasonably be inferred from those expressly pleaded, and of any material facts of which judicial notice has been requested and may be taken. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Mead v. Sanwa Bank of California, supra*, at p. 564.) We do not,

⁵ The City also moved to strike the petitions; however, upon granting the demurrer, the court denied the motion to strike as moot.

however, assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.)

“A complaint [or petition] is sufficient if it alleges facts which state a cause of action under any possible legal theory. [Citation.] However, because it is not a reviewing court’s role to construct theories or arguments which would undermine the judgment [citation], we consider only those theories advanced in the appellant’s briefs.” (*Mead v. Sanwa Bank California, supra*, 61 Cal.App.4th at p. 564.)

Because the factual allegations are assumed to be true, the determination of whether the petition is sufficient—or in this case, whether the action is preempted pursuant to CERCLA and/or barred by the applicable statute of limitations—is purely an issue of law that we decide independently, without deferring to the trial court. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

III. STATUTE OF LIMITATIONS

The trial court held that the four-year statute of limitations under Code of Civil Procedure section 343 had run on Petitioners’ claims regarding a violation of Mitigation Measure No. 2,⁶ which required Thompson to clean the McLaughlin Pit prior to beginning construction of the Project. According to the court, “once the grading,

⁶ “*Prior to any grading, construction or installation of equipment on Parcel 11, the applicant shall have completed a satisfactory cleanup program of the fireworks residual pit on Parcel 11 and shall have certified the satisfactory completion of that program in a report to the City Engineer. As part of that cleanup program, the applicant shall obtain all necessary permits or approvals from local, state and/or federal agencies as required.*” (Italics added.)

construction or installation occurred without the certification of a satisfactory completion of a cleanup program to the City Engineer, the mitigation measure was violated. . . . [¶] It is the nature of the violation that determines whether it is a continuing violation or a one-time event that triggers a statute of limitations.” Because the court held there was a one-time violation, not a continuing one, it ruled the petitions were time-barred.

A. Continuing Duty or One-Time Violation

On appeal, Willis challenges the trial court’s ruling. He argues that the trial court “failed to recognize that under California law a continuing duty extends the statute of limitations. . . . The [trial court] also improperly applied the facts of this case, where the continuing duty is [the City’s] ongoing failure to enforce Mitigation Measure No. 2, not the ‘grading, construction and installation of equipment’ which occurred. [Citation.]” According to Willis, “Mitigation Measure No. 2 was not put into place simply to mitigate the effects of grading or construction on the [Thompson] property. Its purpose was to mitigate against the possibility of harm from contamination caused by the McLaughlin Pit, and this purpose remains as relevant and necessary today.” In support of his contention, Willis cites *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601 (*Katzeff*).

In *Katzeff*, our colleagues in Division Four of the First District were called upon to “decide whether the California Department of Forestry and Fire Protection (CDF) properly granted an exemption allowing the harvesting of less than three acres of timber without environmental review, when one of the mitigation measures to two prior timber harvesting plans for the same property was that the trees in question remain in place to

protect a neighboring property from excessive wind.” (*Katzeff, supra*, 181 Cal.App.4th at p. 606.) According to the facts, Paul Katzeff owned property adjoining property owned by Ed Powers. In 1988, CDF approved a Timber Harvest Plan (THP) on Powers’ land which included a mitigation condition requiring that ““no trees . . . be removed from within 200 feet of [Katzeff’s home] unless prior approval is obtained from [Katzeff].”” (*Ibid.*) Apparently, the removal of trees in a certain area would “allow wind to be funneled and accelerated, creating a threat of damage to Katzeff’s property and home.” (*Ibid.*) Ten years later, another THP was approved with the same wind buffer mitigation condition. (*Ibid.*) Under the Forest Practice Act of 1973 (Pub. Res. Code, § 4511 et seq.), THP’s, including their mitigation conditions, are “effective for no more than three years unless extended pursuant to specified procedures. (*Katzeff, supra*, at p. 610.)

Powers sold the property to Greg Kuljian, who agreed to seek a “conversion exemption” to give Powers the right to log and sell the timber on the land. (*Katzeff, supra*, 181 Cal.App.4th at pp. 606-607.) In April 2008, CDF approved the conversion exemption. (*Id.* at p. 607.) Katzeff filed suit against CDF, Kuljian and Powers, alleging, among other things, CEQA violations. The trial court granted judgment on the pleadings in favor of defendants and Katzeff appealed. (*Katzeff, supra*, at p. 607.) The appellate court reversed. (*Id.* at p. 615.) On appeal, there were no issues regarding statutes of limitation, tolling, or alleged continuing duty. Instead, the issue was whether the CDF could approve the conversion exemption that would destroy a mitigation required under an expired THP without further environmental review. (*Id.* at p. 610.) Thus, the appellate court was called upon to address only the additional environmental review on

the 2008 permit application, not the previous 1988 and 1998 ones. (*Id.* at pp. 610, 611, 614.) The court noted, “There may be good reasons for CDF to conclude that the wind buffer is no longer necessary [T]he passage of time may have eliminated the need for the mitigation” (*Id.* at p. 614.)

Because the *Katzeff* court opined that the mere passage of time “does not on its own render the mitigation inoperative,” (*Katzeff, supra*, 181 Cal.App.4th at p. 614) Willis claims that “a mitigation measure, once adopted, cannot be deleted and is always subject to enforcement thereafter unless and until the agency has provide[d] a satisfactory reason to cancel it.” We disagree. To begin with, such statement contradicts a prior statement from the First District: “In short, we find nothing in established law or in logic to support the conclusion that a mitigation measure, once adopted, never can be deleted.” (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359.) Rather, the continuing need of a mitigation measure must be evaluated on its own merits. (*Ibid.*)

Second, and more importantly, Willis misinterprets the language in *Katzeff*. The central issue in the case was not the violation of a mitigation measure, or the continuing duty to enforce a mitigation condition. Rather, the issue was the approval of the 2008 permit application (involving a pending harvest of timber that had not yet occurred) in the absence of an environmental review. If there had been such duty, the existence of the 1988 mitigation condition would have been continued and there would have been no need to impose a new one in 1998, or to consider the need for another in 2008. Thus, as the City aptly notes: “In this case, we are dealing solely with the now-expired 1987

Mitigation Measure No. 2, and there is **no** pending permit application whatsoever alleged in the Second Amended Petition[*s*.” (Boldface in original.) Moreover, as the trial court observed, unlike the facts in this case, *Katzeff* did not involve the violation of a mitigation measure.

For the above reasons, we conclude that if there was no certification of a satisfactory completion of the cleanup program to the City Engineer as required by Mitigation Measure No. 2, this amounted to a one-time violation, not a continuing one. Accordingly, even if we apply the four-year statute of limitations under Code of Civil Procedure section 343, Willis’s claims (filed in 2007) are time-barred.

B. Delayed Discovery

Notwithstanding the above, Willis argues that the statute of limitations was tolled because he was unable to discover the City’s failure to enforce the mitigation measure until 2007. Regarding any possible delay in the accrual of the statute of limitations, the trial court found that Willis failed to “specifically plead the relevant facts to support [their delayed discovery] claim” Willis challenges this finding, contending his claims against the City did not accrue until he gained actual notice of the violation. He argues that “no reasonable person could have been on notice of the basis for the claims alleged in the [p]etitions until early 2007, well within the four-year statutory period under Code of Civil Procedure Section 343.”

According to the petitions, the relevant facts are: Thompson was required to clean up the McLaughlin Pit in 1987, prior to grading and constructing the Project. The requisite CEQA notices were posted and supplied to the public. Thompson’s actions in

December 1987 regarding cleaning up the McLaughlin Pit were visible to the public. Perchlorate in groundwater was not a concern until mid-1997, when (1) regulators devised a chemical method to detect concentrations below 400 ppb (parts per billion) in water, and (2) it was first detected in the Rialto/Colton Groundwater Basin. Even after detecting its presence, it took several years to determine that the McLaughlin Pit was a potential source. And finally, the City's file is void of any certifications, permits or approvals required by Mitigation Measure No. 2.⁷

Based on these facts, specifically, the inability to detect perchlorate in groundwater and the absence of any certifications, permits or approvals required by Mitigation Measure No. 2, Willis argues he has “sufficiently alleged grounds for tolling of any statute of limitations.”

In response, the City contends the “public notices and a publicly visible project, not to mention the visible burn of the pit on December 4, 1987, constitute constructive public knowledge,” and the City's file was open to inspection at all times under the California Public Records Act, Government Code section 6253, subdivision (a). Thus, the City argues that “a diligent plaintiff should be able to discover, within the statutory

⁷ To the extent Willis faults the trial court's factual findings as “directly refuted by the allegations in the [p]etitions, which must be treated as true for purposes of the [d]emurrers,” we remind Willis that we assume the truth of all material facts that have been properly pleaded[and] of material facts that may reasonably be inferred from those expressly pleaded (*Crowley v. Katleman, supra*, 8 Cal.4th at p. 672; *Mead v. Sanwa Bank of California, supra*, 61 Cal.App.4th at p. 564.) We do not, however, assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at p. 967; *City of Morgan Hill v. Bay Area Air Quality Management Dist., supra*, 118 Cal.App.4th at pp. 869-870.)

period, whether a cause of action exists,” quoting *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1197.

A plaintiff whose claims would be barred without the benefit of the discovery rule must specifically plead and prove facts to show (1) the time and manner of discovery, and (2) the inability to have made an earlier discovery despite reasonable diligence. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) “The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer. [Citations.]” (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160, superseded by statute on other grounds as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8.) “The test for belated discovery is whether the plaintiff has information of circumstances ““. . . sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.’ [Citations.]”” (*Bastian v. County of San Luis Obispo* (1988) 199 Cal.App.3d 520, 527.)

Regarding Willis’s inability to detect the pollution in the groundwater, the City questions how Willis could have learned about the pollution as a result of the federal litigation but not any sooner. Willis alleges (1) he is a private citizen resident of the City, (2) he is not a party to the federal litigation, and (3) information of the City’s failure to enforce Mitigation Measure No. 2 was only discovered through the federal litigation, which is not available to the public. Assuming discovery in the federal litigation was not open to the public, the City questions how Willis could have obtained discovery in an action to which he is not a party but was unable to access the City’s own public records

regarding Mitigation Measure No. 2 and Thompson’s Project pursuant to the California Public Records Act. “The premise of the California Public Records Act (Gov. Code, § 6250 et seq. . . .) is that ‘access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.’ ([Gov. Code,] § 6250.) To implement that right, the act declares that ‘[p]ublic records are open to inspection.’ ([Gov. Code,] § 6253.)” (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1064.) Given the fact that such records were available by inspection or by request for public records, the City argues, “This discovery in federal court, 16 years after expiration of the four-year statute of limitations . . . in 1991, has no legal significance here.” We agree.

As the City notes, there are no allegations in Willis’s petition that the files and records regarding Mitigation Measure No. 2 were not available to the public in 1987 and continuing throughout the progress of the Project. In his reply brief, Willis cites to his petition, which alleges that “Documents and testimony concerning the City’s failure to enforce the mitigation measures were not produced by the City until April 2007, although they had been formerly requested from the City as far back as 2002, when the 160-acre site first became known to State regulators as a possible source of perchlorate contamination in the Rialto/Colton basin.”⁸ Other than these general assertions, Willis has failed to specifically plead facts to show his reasonable diligence and his inability to

⁸ Paragraph 26 in Souza’s petition, which alleges, “the critical file that contained the 1987 [Mitigated Measure No. 2] was concealed by the City and only produced in April 2007, despite previous Public Records Act requests for these relevant files.”

have discovered the City's acts earlier. (*McKelvey v. Boeing North American, Inc.*, *supra*, 74 Cal.App.4th at p. 160.) Who requested the documents? When was the first request made?

Notwithstanding the above, neither Willis's nor Souza's petition alleges that even if all the certifications, permits or approvals required by Mitigation Measure No. 2 had been completed, the City would have discovered the McLaughlin Pit was or would be a potential source of perchlorate contamination in the groundwater. Moreover, even if the City would have discovered that the McLaughlin Pit was a potential source of perchlorate contamination in groundwater, there is no allegation that the level of perchlorate contamination would have been considered a concern in 1987, given the fact that regulators did not devise a chemical method to detect concentrations below 400 ppb in water until mid-1997.

Based on the above, we agree with the trial court's conclusion that "the violation of the mitigation measure is the construction without certification of the cleanup, not the failure to cleanup itself." Construction of the Project resulted in Mitigation Measure No. 2. Again, there is no allegation that the mitigated negative declaration was not publicly available when it was adopted. While Willis claims "It is beyond reason and common sense to assume that an average person walking by the Site in 1987 would have been put on notice" that the City had enacted a mitigated negative declaration containing Mitigation Measure No. 2 which it did not enforce, we note that Willis is not an average person. According to his petition, he is a citizen, property owner, and taxpayer in the City, and is "within the class of persons beneficially interested in the City's faithful

performance of its public duty to enforce Mitigation Measure No. 2 against [Thompson].” As such, Willis initiated this action despite the fact he was not a party to the federal litigation and thus would not have had access to the City’s documents produced through discovery. Yet he was able to “discover [the City’s] failure to comply with its duty to enforce Mitigation Measure No. 2.” However, unlike the private federal litigation, construction of the Project is not something that could have been hidden from public view. As a citizen who was beneficially interested in the City’s faithful performance of its public duty, a diligent petitioner should have been able to discover the City’s failure to enforce Mitigation Measure No. 2 within the statutory period. (*Utility Cost Management v. Indian Wells Valley Water Dist.*, *supra*, 26 Cal.4th at p. 1197.) We therefore conclude the trial court correctly found that the statute of limitations had expired and that Willis was unable to allege a tolling.⁹

IV. ARE WILLIS’S CLAIMS PREEMPTED BY CERCLA?

The trial court found that because Willis sought an order requiring the City to enforce Mitigation Measure No. 2 against Thompson, which required Thompson to properly clean up and close the McLaughlin Pit, his action directly impacted the cleanup of the McLaughlin Pit. As such, the trial court held that Willis’s action was preempted by CERCLA.

⁹ Because we affirm the trial court’s finding that Willis’s claims are barred by the four-year statute of limitations under Code of Civil Procedure section 343, we need not reach the City’s alternate contention that such claims are barred by the 180-day statute of limitations under Public Resources Code section 21167, subdivision (a).

On appeal, Willis challenges the trial court's finding that his claims are preempted by CERCLA, contending his action does not "seek to challenge or alter any cleanup being overseen by the EPA." He argues that his only cause of action is for a writ of mandamus under Civil Code section 1085, which "plainly is not a cause of action arising under CERCLA." (Underling in original.) On its face, an action that merely seeks to compel the City to enforce Mitigation Measure No. 2 does not appear to be preempted by CERCLA. However, a closer look reveals that Willis's action seeks to compel Thompson "to fulfill its obligation to properly cleanup and close the McLaughlin Pit and remediate the contamination caused by the McLaughlin Pit, obtain all required public agency approvals and permits associated with the cleanup and closure of the McLaughlin Pit, and provide a report to the Rialto City Engineer certifying completion of the cleanup of the McLaughlin Pit." As such, the action does challenge the CERCLA cleanup and thus it is preempted by CERCLA.

"CERCLA was enacted "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." [Citation.] CERCLA is 'a comprehensive environmental statute principally designed to effectuate two goals: (1) the cleanup of toxic waste sites; and (2) the compensation of those who have attended to the remediation of environmental hazards.' [Citation.] The elements of a claim by a government agency to recover costs associated with a cleanup conducted under CERCLA are: (1) the site is a 'facility'; (2) a 'release' or 'threatened release' of a hazardous substance occurred; (3) the government agency incurred costs not inconsistent with the national contingency plan;

and (4) the defendant is a responsible party. [Citations.]” (*Redevelopment Agency v. Salvation Army* (2002) 103 Cal.App.4th 755, 764-765.)

As of September 2009, the EPA assumed jurisdiction over the Goodrich Superfund Site (which includes the McLaughlin Pit) under CERCLA and included it on the NPR as part of its ongoing removal and remedial actions for perchlorate contamination in the Rialto-Colton Basin. Cleanup of this site is currently being litigated in the federal courts. The EPA has identified parties who may be responsible for cost of the cleanup and drafted a groundwater cleanup plan. The EPA has also initiated and completed the Remedial Investigation and Feasibility Study (RI/FS) Report. By virtue of Title 42 United States Code section 9613(b), federal courts have exclusive original jurisdiction over all controversies arising under CERCLA. Because the EPA has initiated a remediation action regarding the McLaughlin Pit, Willis’s action is jurisdictionally barred. (42 U.S.C. § 9613(b) [“Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act”] and § 9613(h) [“No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under [section 9621 of this title] (relating to cleanup standards) to review any challenges to removal or remedial action selected under [section 9604 of this title]”]; *Razore v. Tulalip Tribes of Washington* (9th Cir. 1995) 66 F.3d 236, 239.)

Although Willis maintains his petition “do[es] not seek to enforce CERCLA laws or to challenge any action taken pursuant to CERCLA,” the prayer for relief suggests otherwise. “An action constitutes a challenge if it is related to the goals of the cleanup. [Citation.]” (*Razore v. Tulalip Tribes of Washington, supra*, 66 F.3d at p. 239.) Thus, Willis’s claims are necessarily federal claims under Title 42 United States Code section 9613(b) if they constitute a challenge to CERCLA cleanup. (*Fort Ord Toxics Project, Inc. v. California E.P.A.* (9th Cir. 1999) 189 F.3d 828, 832 (*Fort Ord*)). The Ninth Circuit found “actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, *see* [citation]; to postpone the cleanup, *see* [citation]; to impose additional reporting requirements on the cleanup, *see* [citation]; or to terminate the RI/FS and alter the method and order of cleanup, *see* [citation].” (*ARCO Envir. Remed. v. Dept. of Hlth and Envir.* (9th Cir. 2000) 213 F.3d 1108, 1115 (*ARCO*)). An action may also be considered a challenge under Title 42 United States Code section 9613(h) when the relief sought would interfere with the cleanup plan. (*McClellan Ecological Seepage Situation v. Perry* (9th Cir. 1995) 47 F.3d 325, 330 (*MESS*)).

In *MESS*, the complaint sought to “compel McClellan’s [Air Force Base] compliance with [the Resource Conservation Recovery Act’s] individual reporting and permitting requirements, in addition to the Interagency Agreement’s comprehensive requirements.” (*MESS, supra*, 47 F.3d at pp. 329-330, fn. omitted.) The Ninth Circuit observed that “the entire purpose of a permit requirement is to allow the regulating agency to impose requirements as a condition of the permit. The injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA

cleanup . . . would clearly interfere with the cleanup.” (*MESS, supra*, at p. 330.) We find the facts in *MESS* similar to the situation before this court. As in *MESS*, Willis seeks to compel the City’s compliance with an expired 1987 mitigation measure which required Thompson to obtain certifications, permits or approvals prior to grading the Project. In order to obtain those certifications, permits or approval, Thompson must clean up the McLaughlin Pit; however, cleanup of the pit is already subject to the EPA’s remediation action. Thus, Willis’s action qualifies as a challenge to a CERCLA cleanup.

Likewise, we reject Willis’s challenges to preemption on the grounds that (1) the language in Title 42 United States Code section 9613(h) expressly limits its application to federal courts, and (2) the federal district court recently stated that CERCLA does not preempt Willis’s state law claims.¹⁰ First, the language in the statute is clear and to the extent Willis’s state law claims challenge a CERCLA cleanup, they are necessarily federal claims under Title 42 United States Code section 9613(b) regardless of the fact that they were brought in a state court action. (*ARCO, supra*, 213 F.3d at p. 1115; *Fort Ord, supra*, 189 F.3d at p. 832 [“Congress only removed *federal* court jurisdiction from ‘challenges’ to CERCLA cleanups because only federal courts shall have jurisdiction to

¹⁰ On August 23, 2011, Willis requested that this court take judicial notice of the “June 14, 2011 (In Chambers) Order Denying Defendants’ Motion for Partial Summary Judgment, filed in the United States District Court, Central District of California, by the Honorable Philip S. Gutierrez, United States District Court Judge, in Case No. CV 09-1864 (SSx).” The City opposed the request on the grounds that (1) the order was not before the trial court when it granted the City’s demurrer and dismissed this action, (2) the order by itself is meaningless without the operative pleadings and motion papers, and (3) the state claims which the federal court stated were not preempted by CERCLA are not the same as Willis’s claims. We agree with the City and deny Willis’s request.

adjudicate a ‘challenge’ to a CERCLA cleanup in the first place.”].) Second, we have denied Willis’s request to take judicial notice of the June 14, 2011, order from the federal district court. Even if we were to consider the language in the order, the state law claims (state law Hazardous Substances Account Act, Porter-Cologne Act, negligence and nuisance claims) identified as not being preempted by CERCLA are not the same claims before this court.

For the above reasons, we conclude that Willis’s claims are preempted by CERCLA.

V. DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

MILLER

J.