DANGER! BOMBS MAY BE PRESENT. *CANNON V. GATES*: A JAMMED *CANNON* PREEMPTS CITIZEN SUIT INDEFINITELY[1]

INTRODUCTION

Jesse Fox Cannon was a patriotic citizen who, during World War II, leased property to the U.S. Army for just one dollar.[2] Mr. Cannon provided the Army with key lands for testing chemical and biological weaponry against Japanese caves and underground fortifications.[3] In six months, the Army dropped "3,000 rounds of ammunition and twenty-three tons of chemical weapons" on his property.[4] More than sixty years later, the land continues to be littered with hazardous waste while the Cannon family is left waiting for the Government to uphold its agreement to return the property to "as good [of a] condition as it [was] on the date of the government's entry"[5] in 1945.

Less than four years earlier, on December 7, 1941, the Japanese Navy attacked Pearl Harbor, killing 2,433 American soldiers and civilians.[6] The next day, in an address to Congress and the American public, President Franklin D. Roosevelt declared war on the Japanese Empire, marking the United States' entrance into the war.[7]

As part of our nation's war strategy, the U.S. War Department initiated weapons testing. In February 1942, President Roosevelt withdrew 126,700 acres of land in Tooele County, Utah, creating the Dugway Proving Ground.[8] This facility immediately became the military's test site for incendiary bombs, chemical weapons, and biological agents.[9]

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1. Cannon v. Gates, 538 F.3d 1328 (10th Cir. 2008).

2. *Id.* at 1330.

3. *See* ARCHIVE SEARCH REPORT, FINDINGS FOR YELLOW JACKET RANGES, TOOELE COUNTY, UTAH § 1.2 (Nov. 1993), *available at* http://home.comcast.net/~dpgsurvivors/YJR_FUDS_Site.htm; TECHNICAL STAFF, DUGWAY PROVING GROUND, TOOELE, UTAH, MEMORANDUM REPORT: ATTACK AGAINST CAVE-TYPE FORTIFICATIONS 7 (Oct. 21, 1945) (to Chief, Chemical Warfare Service; declassified by DOD Directive No. 5200.9 on Sept. 27, 1958), *available at* http://www.dugway.net (follow "Yellow Jacket Ranges" hyperlink; then follow "Project Sphinx" hyperlink).

4. *Gates*, 538 F.3d at 1330.

5. *Id.*

6. PETER JENNINGS & TODD BREWSTER, THE CENTURY 230 (1998).

7. *See generally Our Heritage in Documents: FDR's "Day of Infamy" Speech: Crafting a Call to Arms*, PROLOGUE MAGAZINE, Winter 2001, at 284, 288, *available at* http://www.archives.gov/publications/prologue/2001/winter/crafting-day-of-infamy-speech.html (noting that by the end of Dec. 8, 1941, Congress sent President Roosevelt a declaration of war).

8. Cannon v. United States, 338 F.3d 1183, 1184 (10th Cir. 2003); West Desert Test Center, Dugway History, http://www.wdtc.army.mil/History.htm (last visited Mar. 7, 2009). The Dugway Proving Ground was officially activated on March 1, 1942. *Id.* "Open air testing of chemical agents was performed at [the Dugway Proving Ground] until 1969, when all such activities were sus-

By 1945, the Army initiated Project Sphinx, a testing program in chemical and biological weapons designed to "explore means of battling Japanese forces entrenched in caves in the Pacific Islands."[10] Project Sphinx tests were to determine "[t]he best material, either available or under development, for reducing Japanese caves and underground fortifications . . . ."[11]

Mr. Cannon owned nearly 1,500 acres of mining land adjacent to the Dugway Proving Ground.[12] There were 86.5 patented mining claims on the land,[13] including the Yellow Jacket Mines, the Great Western Mines, and Old Ironsides Mine.[14] Because Project Sphinx was created to test chemical weaponry against "cave type fortifications,"[15] this land—and its mines—was invaluable to the Army's mission.

On May 25, 1945, Mr. Cannon signed a "Construction, Survey & Exploration Permit" with the U.S. War Department.[16] In exchange for one dollar, Mr. Cannon agreed to a six-month lease, allowing the Army to "enter onto his land 'in order to survey and carry out such other exploratory work as may be necessary in connection with the property; to erect buildings and any other type of improvement; and to perform construction work of any nature.'"[17] At the end of the lease, the Government agreed to "leave the property of the owner in as good [of a] condition as it is on the date of the government's entry."[18]

During this lease, the Army dropped twelve-thousand-pound "Fall Boy" bombs, and "Tiny Tim" rockets.[19] The Army used incendiary weapons such as "aviation gasoline, butane, gasoline, Napalm, PT Jell, and Napalm-gasoline mixtures,"[20] and released chemical toxins, including "the choking agent phosgene, the blood agent hydrogen cyanide, and the blistering agent mustard."[21] By the time Mr. Cannon returned to his

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pended." ARCHIVE SEARCH REPORT, *supra* note 3. The Dugway Proving Ground continues to test chemical and biological warfare, as well as battlefield smokes and obscurants. West Desert Test Center, http://www.wdtc.army.mil/History.htm (last visited Mar. 7, 2009).

9. West Desert Test Center, *supra* note 8.

10. *Cannon*, 338 F.3d at 1184.

11. MEMORANDUM REPORT, *supra* note 3, at 7.

12. *Cannon*, 338 F.3d at 1184.

13. *Id.*

14. ARCHIVE SEARCH REPORT, *supra* note 3, at §§ 5.1, 6.1.1.

15. *Id.* at § 1.2; *see also* MEMORANDUM REPORT, *supra* note 3.

16. Appellant's Opening Brief at 5, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107). The brief refers to an agreement with the Department of Defense. The U.S. War Department became part of the National Military Establishment on September 18, 1947, which was renamed the Department of Defense on August 10, 1949.

17. Cannon v. Gates, 538 F.3d at 1330 (10th Cir. 2008).

18. *Id.*

19. Appellants' Opening Brief at 5, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107).

20. *Id.* at 6.

21. Cannon v. United States, 338 F.3d at 1185 n.1 (10th Cir. 2003).

land in September, 1945, the Army had "used at least 3,000 rounds of ammunition and twenty-three tons of chemical weapons . . . ."[22]

Nearly five years later, Mr. Cannon was still waiting for the Army, the Department of Defense ("DOD"), or anyone in the Government, to return his land to its original condition.[23] In the last of three claims filed against the Government, Mr. Cannon asserted that chemical agents used in his Yellow Jacket Mine remained in the workings of the mine and "make it impossible for me to ever operate the mine again . . . ."[24] Decades after the war ended, The Cannon property—which provided vital testing grounds for the war effort—continues to be overwhelmed with hazardous waste.[25]

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), [26] creating a "mechanism for the prompt and efficient cleanup of hazardous waste sites."[27] Six years later, the Superfund Amendments and Reauthorization Act ("SARA")[28] amended CERCLA, including adding a comprehensive and critical revision: a provision for citizen suits.[29] Following SARA, however, a citizen suit under CERCLA is restricted until all cleanup actions are complete.[30]

In the 1990s, the DOD initiated a number of studies[31] on the Yellow Jacket Target Area,[32] which includes the Cannons' land. These studies marked the initial stages of a CERCLA cleanup of the Cannon property,[33] and triggered the ban on citizen suits[34] until removal of the hazardous material is complete.

Federal courts recognize the disparity between CERCLA's underlying policy of prompt and efficient cleanup and the reality faced by families such as the Cannons, who have waited decades for the government to remediate their property.[35] Responding to such concerns, the Seventh

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22. *Gates*, 538 F.3d at 1330.

23. *Id.*

24. *Cannon*, 338 F.3d at 1185.

25. *See generally Gates*, 538 F.3d at 1330-31.

26. 42 U.S.C.A. §§ 9601-9675 (West 2009); Brian Patrick Murphy, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 FORDHAM ENVTL. L.J. 587, 587 (2000).

27. United States v. City and County of Denver, 100 F.3d 1509, 1511 (10th Cir. 1996).

28. Murphy, *supra* note 26, at 588.

29. 42 U.S.C. § 9659 (2008).

30. Murphy, *supra* note 26, at 599.

31. Appellants' Opening Brief at 6-9, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107).

32. *Id.* at 7 n.5 ("The Yellow Jacket Site or the Yellow Jacket Target Area is the name given the FUDS area bombed by the DOD during Project Sphinx. It is named for the Yellow Jacket patented mining claim owned today by Margaret Louise Cannon.").

33. Cannon v. Gates, 538 F.3d 1328, 1334 (10th Cir. 2008).

34. *See id.* at 1336.

35. *See generally Gates*, 538 F.3d at 1336 ("We are sympathetic to the Cannons' frustration with the long delays . . . ."); Frey v. EPA (*Frey II*), 403 F.3d 828, 836 (7th Cir. 2005) ("We recog-

Circuit, in *Frey v. EPA* ("*Frey II*"),[36] determined that without "active steps"[37] toward cleanup, CERCLA could not require such a prohibition to citizen suits.[38] The court held that the government "cannot preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight."[39]

After more than sixty years, the Seventh Circuit's ruling gave the Cannons hope that their request for injunctive relief[40]—compelling the DOD to remediate their land—would be granted.

Unfortunately for the Cannons, the Tenth Circuit held otherwise. Disagreeing with the Seventh Circuit, the Tenth Circuit held in *Cannon v. Gates* that although the government was only monitoring, assessing, and evaluating "the hazardous substances on the Cannons' land,"[41] the Cannons' suit was barred. Because of the Tenth Circuit's interpretation of CERCLA's ban on citizen suits until remedial actions are "complete,"[42] the Cannons may need to wait an additional sixty years before their property is restored to its pre-lease state.

Part I of this Comment begins by discussing the enactment of CERCLA, pre- and post-SARA. Part II discusses the Seventh Circuit's break from precedent in allowing citizen suits to proceed prior to completion of remediation. Part III addresses *Cannon v. Gates* in light of the Seventh Circuit's ruling in *Frey II*. Part IV discusses whether courts in the future should allow citizen suits when there is no cleanup relief in sight. Finally, this Comment concludes that the Tenth Circuit was justified in holding that during remediation and removal activities, CERCLA is a complete bar to citizen suits.

I. CERCLA

A. Background of CERCLA

In the waning days of the Carter Administration, Congress enacted CERCLA[43] to provide an efficient, effective means for the cleanup of abandoned hazardous waste sites.[44] Prior to CERCLA's enactment in

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nize that Congress intended for remedial action to be complete before permitting judicial review. Congress did not, however, intend to extinguish judicial review altogether.") (citation omitted).

36. *Frey II*, 403 F.3d at 828.

37. *Id.* at 834.

38. *Id.*

39. *Id.* at 835.

40. Cannon v. Gates, 538 F.3d 1328, 1336 (10th Cir. 2008).

41. *Id.* at 1334.

42. *Id.* at 1334-36.

43. Megan A. Jennings, Frey v. Environmental Protection Agency*: A Small Step Toward Preventing Irreparable Harm in CERCLA Actions*, 33 ECOLOGY L.Q. 675, 677 (2006). *See also* Murphy, *supra* note 26, at 593.

44. *See, e.g.*, Murphy, *supra* note 26, at 591. "There are 'two overriding goals of CERCLA: (1) to clean up hazardous waste sites promptly and effectively; and (2) to ensure that those responsi-

1980, the public became outraged over sites such as the Love Canal, the Valley of the Drums, and Times Beach.[45] In response to this outrage, Congress provided the Environmental Protection Agency ("EPA") authority to implement CERCLA's cleanup policies while also creating a funding mechanism for the cleanup.[46]

CERCLA creates a process that the EPA must follow in implementing cleanup.[47] Initially, an abandoned hazardous waste site is placed on the EPA's National Priority List, which identifies the most serious threats and thereby initiates the cleanup action.[48] A Remedial Investigation and Feasibility Study ("RI/FS") evaluates options.[49] Then, the EPA selects a remedial action plan ("RAP") and issues a report.[50] At this time, the public and other interested parties are able to provide comments on the plan.[51] After receiving and responding to such comments, the EPA publishes a record of decision ("ROD"), and implements the plan.[52]

There are two types of actions that fall under CERCLA: removal and remedial.[53] A removal action is a short-term action taken to reduce risk in an urgent situation.[54] A remedial action, on the other hand, is either independent of, or in conjunction with, a removal action, and provides a permanent solution to hazardous risks.[55] Ultimately, the action must "attain a degree of cleanup . . . at a minimum which assures protection of human health and the environment."[56]

CERCLA was drafted in a hurry,[57] without the assistance of legislative counsel,[58] and passed under a suspension of the rules with little floor debate.[59] Partly because of this haste, CERCLA contains inconsistencies and absurdities that require interpretation by the courts.[60]

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ble for the problem bear the costs and responsibility for remedying the harmful conditions they created.'" *Id.* at 591 n.16.

45. Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 189 (1996).

46. Jennings, *supra* note 43, at 678.

47. *Id.* at 678.

48. *Id.*

49. *Id.* (noting the Remedial Investigation "evaluate[s] the nature and extent of contamination" while the Feasibility Study "evaluate[s] costs and benefits associated with potential cleanup methods"); Murphy, *supra* note 26, at 595.

50. Murphy, *supra* note 26, at 595-96.

51. *Id.* at 596.

52. *Id.*

53. Frey v. EPA (*Frey II*), 403 F.3d 828, 835 (7th Cir. 2005).

54. 42 U.S.C.A. § 9601(23), (24) (West 2009); *Frey II*, 403 F.3d at 835; Jennings, *supra* note 43, at 678.

55. 42 U.S.C.A. § 9601(23), (24) (West 2009); *Frey II*, 403 F.3d at 835; Jennings, *supra* note 43, at 678.

56. Jennings, *supra* note 43, at 678 (quoting 42 U.S.C. § 9621(d) (2000)).

57. Murphy, *supra* note 26, at 593.

58. *Id.* at 594 n.31.

59. *Id.* at 593-94.

60. *Id.* at 594.

B. Common Law Decisions Pre-SARA

Originally, CERCLA was silent on the issue of whether parties could seek judicial review while remediation is ongoing.[61] As a result, the federal courts had to decide how to respond to claims by citizen groups and potentially responsible parties ("PRPs") attempting to delay cleanup actions.[62] While some courts held the constitutionality of CERCLA could be challenged at any time, other courts maintained that all challenges—statutory or constitutional—were barred during remediation.[63] Ultimately, federal courts created a "'clean up first, litigate later' doctrine" that interpreted Congress's intent to bar suit until remediation is complete.[64]

C. SARA: Legislative History and its Implications

In 1986, Congress addressed many of CERCLA's issues when it enacted SARA.[65] Most notably, Congress added a timing of review provision,[66] codifying the "clean up first, litigate later" doctrine.[67] The timing of review provision, section 113(h),[68] makes it clear that PRPs cannot stall remediation actions in order to delay or avoid paying for cleanup costs.[69] However, this timing of review provision also bars citizens from access to judicial review when response actions—or a lack thereof—could potentially exacerbate environmental hazards.[70]

Section 113(h) provides a broad rule barring judicial review, then provides five exceptions to the rule. The pertinent part states:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (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, or to review any order issued under section 9606(a) of this title, in any action except . . . :
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> . . . .
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> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in

61. Jennings, *supra* note 43, at 679.
62. *Id.*
63. ALLAN J. TOPOL & REBECCA SNOW, *The Validity of the Basic Legal Structure and the Role of the Courts, in* SUPERFUND L. & PROC. § 2:13 (2007).
64. Jennings, *supra* note 43, at 679.
65. *See, e.g., id.*
66. 42 U.S.C.A. § 9613(h) (West 2009).
67. Jennings, *supra* note 43, at 679.
68. 42 U.S.C.A. § 9613(h) (West 2009).
69. Jennings, *supra* note 43, at 675.
70. *Id.*

> violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.[71]

While exception (4) appears to allow judicial review for citizen suits, the timing restriction effectively bars such suits during remediation actions.[72]

In enacting SARA, Congress balanced potential harms to the environment against the right to immediate access to the courts.[73] Congress determined that "the priority must be placed on cleaning up toxic waste sites as quickly as possible,"[74] and therefore created a ban on judicial review until remediation actions are complete.[75]

The legislative record, however, shows conflicting opinions on the part of SARA's proponents.[76] Senator Tom Stafford stated, "It is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented . . . ."[77] Alternatively, Senator Strom Thurmond said, "Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur."[78] Further, Representative Dan Glickman stated that "the conferees did not intend to allow any plaintiff . . . to stop a cleanup by what would undoubtedly be a prolonged legal battle."[79]

The Joint Conference Committee Report summarizes the legislative discussion:

> In the new section [9613(h)] of the [statute], the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather, an action under section [9659] would lie following completion of each distinct and separable phase of the cleanup. . . . Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.[80]

Despite the citizen suit exception, federal courts have routinely looked to the legislative history and plain language of the timing of re-

71. 42 U.S.C.A. § 9613(h) (West 2009).
72. Jennings, *supra* note 43, at 680.
73. Murphy, *supra* note 26, at 599-600.
74. *Id.* at 600.
75. *Id.* at 601.
76. Jennings, *supra* note 43, at 680.
77. *Id.* at 681-82 (quoting 132 CONG. REC. 28,429 (1986)).
78. *Id.* at 682 (quoting 132 CONG. REC. 28,441 (1986)).
79. *Id.* at 682 n.35 (quoting 132 CONG. REC. 29,736-37 (1986)).
80. Murphy, *supra* note 26, at 607 (quoting *Joint Explanatory Statement of the Comm. of Conference*, H.Conf. Rep. No. 99-962, at 224).

view provision when holding that they lack subject matter jurisdiction to adjudicate such suits until after a cleanup action is complete.[81]

D. Federal Court Interpretations of CERCLA Following SARA

The plain language of section 113(h) permits citizen suits when the "selected" action was "taken" and "was in violation."[82] This language is critical. Congress' use of the past tense implies that once the removal or remedial action is initiated, it must be complete before courts have jurisdiction to hear the claim.[83] Courts have consistently followed this reasoning.

1. *McClellan Ecological Seepage Situation v. Perry*[84]

The citizens group McClellan Ecological Seepage Situation ("MESS") filed suit against the Secretary of Defense alleging that "past and present treatment, storage and disposal of hazardous wastes" at McClellan Air Force Base violated various environmental laws.[85] Since the 1930s, McClellan had been using toxic materials while maintaining aircraft for the military.[86] In 1979, McClellan began its first stages of cleanup with a groundwater monitoring program.[87] After CERCLA's enactment in 1980 and the SARA amendments in 1986, McClellan modified its cleanup program.[88] While the district court found that MESS's suit lacked subject matter jurisdiction because of CERCLA's timing of review provision, MESS argued that it was not challenging cleanup efforts, but merely seeking compliance with existing laws.[89]

The Ninth Circuit affirmed the district court's interpretation of CERCLA's timing of review provision. The court stated, "Section 113(h) is clear and unequivocal. It amounts to a 'blunt withdrawal of federal jurisdiction.'"[90] The court acknowledged that because of CERCLA's mission to provide a quick response, judicial review was unavailable during cleanup, and may even be delayed permanently.[91] The court summarized, "We must presume that Congress has already balanced all concerns and 'concluded that the interest in removing the hazard of toxic waste from Superfund sites' clearly outweighs the risk of irreparable harm."[92]

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81. TOPOL, *supra* note 63, § 2:13.
82. 42 U.S.C.A. § 9613(h) (West 2009); Jennings, *supra* note 43, at 680.
83. Jennings, *supra* note 43, at 680.
84. 47 F.3d 325 (9th Cir. 1995).
85. *Id.* at 326-27.
86. *Id.* at 327.
87. *Id.*
88. *Id.*
89. *Id.* at 327-28.
90. *Id.* at 328 (quoting North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991)).
91. *Id.* at 329.
92. *Id.* (quoting Boarhead Corp. v. Erickson, 923 F.2d 1011, 1018-19 (3d Cir. 1991)).

2. *Razore v. Tulalip Tribes of Washington*[93]

Following the initiation of an RI/FS of a former landfill site operated by the plaintiffs and located on the Tulalip Indian Reservation, the plaintiffs filed suit, alleging that the Tribes' management of the site violated environmental laws.[94] The plaintiffs argued that the RI/FS does not constitute a remedial or removal action under CERCLA, so therefore they should be allowed to proceed with their claim.[95]

The Ninth Circuit disagreed, and upheld the district court's grant of a motion to dismiss.[96] The court reasoned, "CERCLA defines a removal action to include 'such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . .'"[97] An RI/FS, the court held, meets this definition.[98]

3. *Clinton County Commissioners v. EPA*[99]

The Clinton County Commissioners and a citizens group attempted to block a trial burn and ultimate incineration of hazardous soils at a chemical site in Pennsylvania.[100] The plaintiffs argued that the planned incineration "would result in the emission into the air of dangerous amounts of highly toxic chemicals that would contaminate the local air, soil, and food chain . . . ."[101] The plaintiffs' allegations of "irreparable harm to public health" fell on deaf ears at the district court level, where the suit was dismissed for a lack of subject matter jurisdiction.[102]

The Third Circuit agreed with the district court's reasoning that "challenges to remedial action under CERCLA's response provision [are available] only *after* the remedial action has been completed."[103] In affirming the district court, the Third Circuit relied on similar holdings of other federal courts regarding barring suit during cleanup actions, even when "impending irreparable harm is alleged."[104] This decision overruled the Third Circuit's previous decision in *United States v. Princeton Gamma-Tech, Inc.*,[105] where the court "allow[ed] a challenge to an un-

93. 66 F.3d 236 (9th Cir. 1995).
94. *Id.* at 238.
95. *Id.* at 239.
96. *Id.* at 239, 241.
97. *Id.* at 239 (quoting 42 U.S.C. § 9601(23) (1994)).
98. *Id.*
99. 116 F.3d 1018 (3d Cir. 1997) (en banc).
100. *Id.* at 1020.
101. *Id.* at 1021.
102. *Id.*
103. *Id.* at 1022.
104. *Id.* at 1024-25 (citing Hanford Downwinders Coal., Inc. v. Dowdle, 71 F.3d 1469, 1484 (9th Cir. 1995); Ark. Peace Ctr. v. Ark. Dep't of Pollution Control & Ecology, 999 F.2d 1212 (8th Cir. 1993); Schalk v. Reilly, 900 F.2d 1091, 1095-96 (7th Cir. 1990); Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989)).
105. 31 F.3d 138 (3d Cir. 1994).

completed remediation based on the danger of irreparable environmental harm."[106]

The *Clinton County* court held that "Congress intended to preclude *all* citizens' suits against EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause."[107] The court noted that the plaintiffs should have voiced their concerns during the public notice and comment period instead of trying to block the selected cleanup action.[108] The court stated, "Congress made the policy choice to substitute elaborate *pre-remediation* public review and comment procedures for judicial review."[109]

II. *FREY V. EPA*: CITIZEN SUITS NECESSARY FOR UNDETERMINED REMEDIES

Breaking with precedent, the Seventh Circuit in *Frey II* made it clear that the EPA and all other parties responsible for cleanup actions of hazardous waste cannot hide behind the CERCLA curtain to avoid suit during remediation.[110] While the *Frey II* court upheld the bar on certain citizen suits, it opened the door where remediation actions have "no clear end in sight."[111]

A. Frey II*: Facts and Procedural History*

In 1983, the United States brought a civil action against Viacom to remediate Superfund sites near Bloomington, Indiana.[112] The sites contained polychlorinated biphenyls ("PCBs"), among other toxins.[113] A consent decree directed Viacom to "excavate fully . . . and incinerate the PCBs" at six sites.[114] Following citizen concern, the State Legislature banned the incinerator's construction.[115] When Viacom and the EPA came to an impasse over alternate remedies, the district court appointed "a special master 'to see that the aims of the consent decree are carried out expeditiously and to resolve possible disputes between the parties.'"[116]

EPA and Viacom reached an agreement on PCB excavation measures, and Viacom further agreed to "investigate water treatment and sediment remediation solutions" at three of the sites: Neal's Landfill,

106. Jennings, *supra* note 43, at 682.
107. Clinton County Comm'rs, 116 F.3d 1018, 1022 (3d Cir. 1997).
108. *Id.* at 1024. The court stated, "Congress clearly intended that such differences of opinion be communicated directly to EPA during the pre-remediation public notice and comment period, not expressed in court on the eve of the commencement of a selected remedy." *Id.*
109. *Id.* at 1025.
110. Frey v. EPA (*Frey II*), 403 F.3d 828, 834-35 (7th Cir. 2005).
111. *Id.* at 835.
112. *Id.* at 830.
113. *Id.* at 829.
114. *Id.* at 830.
115. *Id.*
116. *Id.*

Lemon Lane Landfill, and Bennett's Dump.[117] Pursuant to the EPA's ROD for each of the sites, PCB removal was completed at each of the sites.[118] However, in the ROD for both Neal's Landfill and Lemon Lane Landfill, the EPA stipulated that "future remedial decisions will be made regarding" water treatment measures.[119] At Bennett's Dump, the EPA discovered PCBs continuing to leak into an adjacent creek.[120] There, further investigation was needed before a final decision on groundwater treatment could be made.[121]

B. Frey I

Because water and sediment contamination was still at issue, Sarah Frey and others ("Frey") brought suit in April, 2000 ("*Frey I*"),[122] alleging violations of state and federal law,[123] and challenging the selected remediation plan as causing continued PCB releases to the air, groundwater, and surface water.[124] While the district court denied the motion and dismissed the claim for lack of subject matter jurisdiction, [125] the Seventh Circuit remanded the case for "further findings of 'jurisdictional' fact."[126]

In evaluating subject matter jurisdiction, the court described three interpretations of the word "complete" as it relates to a removal or remedial action under CERCLA.[127] Most restrictive was EPA's definition that "complete" is when the planned remedial and removal procedures are finished, and all subsequent monitoring is final.[128] Least restrictive was Frey's argument that "complete" is reached as particular stages of the plan are finished.[129] However, the court settled on a middle ground, "between the active steps designed to clean up a site and later measures designed to monitor success."[130] The court differentiated between active remediation measures and monitoring, noting that such monitoring efforts after cleanup should not allow responsible parties to bar judicial review.[131]

With this decision, the *Frey I* court remanded the case back to the district court.[132] On remand, the district court held that since investiga-

117. *Id.*
118. *Id.* at 831-32.
119. *Id.* at 831.
120. *Id.* at 832.
121. *Id.*
122. Frey v. EPA (*Frey I*), 270 F.3d 1129, 1131 (7th Cir. 2001).
123. *Id.* at 1130.
124. Jennings, *supra* note 43, at 689.
125. *Id.*
126. *Frey I*, 270 F.3d at 1133.
127. *Id.* at 1133-34.
128. *Id.* at 1133.
129. Jennings, *supra* note 43, at 690.
130. *Frey I*, 270 F.3d at 1134.
131. *Id.*
132. *Id.* at 1135.

tion of the contaminated groundwater was underway, Frey's citizen suit was barred under § 113(h) of CERCLA.[133]

C. Frey Gets a Day in Court

On appeal, the Seventh Circuit reversed the district court's ruling in favor of EPA's request for summary judgment.[134] No longer could the EPA hide behind studies to protect itself from citizen suits.[135]

In *Frey II*, the Seventh Circuit found that "selected" remedies for each of the PCB sites were complete and that "no further remedies have been 'selected' pursuant to federal regulations."[136] Although the EPA argued that PCB excavation was only one step in the overall remediation process,[137] the EPA failed to show a timeline for completion.[138] The court asked EPA counsel "whether a reviewing court could invoke the Administrative Procedures Act . . . to compel agency action unlawfully withheld or unreasonably delayed, if EPA dragged its feet for decades."[139] The court commented that the EPA believes CERCLA's timing of review provision shields it from suit "as long as [the EPA] has any notion that it might, some day, take further unspecified action with respect to a particular site."[140]

The *Frey II* court maintained that responsible parties must provide a reasonable target completion date, and present "some objective indicator that allows for an external evaluation."[141] While the court failed to define what actually constitutes a reasonable target completion date, a 100-year plan, in the court's view, was unreasonable.[142] The court noted that it is reasonable for EPA to study the sites before selecting a remediation plan dealing with groundwater issues.[143] However, "EPA cannot preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight."[144] In assessing the EPA's action toward further planning, the court found "only a desultory testing and investigation process of indefinite duration."[145]

Because the EPA's "selected" remedy of removing the PCB "hot spots" was complete,[146] and because there were no further selected plans

133. 42 U.S.C. § 9613(h) (2000).
134. Frey v. EPA (*Frey II*), 403 F.3d 828, 836 (7th Cir. 2005).
135. *Id.* at 836.
136. *Id.* at 833.
137. Jennings, *supra* note 43, at 691.
138. *Frey II*, 403 F.3d at 834; Jennings, *supra* note 43, at 691.
139. *Frey II*, 403 F.3d at 834 (referring to the Administrative Procedure Act, 5 U.S.C. § 706(1) (2000)).
140. *Id.*
141. *Id.* at 835.
142. Jennings, *supra* note 43, at 692.
143. *Frey II*, 403 F.3d at 834-35.
144. *Id.* at 835.
145. *Id.*
146. *Id.* at 833.

for remediation, the court determined that the Frey parties should finally get their day in court.[147] The Seventh Circuit stated, "We recognize that Congress intended for remedial action to be complete before permitting judicial review. Congress did not, however, intend to extinguish judicial review altogether. After a very long wait, the citizens of Bloomington are finally entitled to their day in court."[148]

III. *CANNON V. GATES*

When Mr. Cannon leased his property to the U.S. War Department for one dollar in 1945, he likely had no idea that his family would still be attempting to get the land back to its original condition more than sixty years later.[149] Mr. Cannon provided the Army with key lands for testing chemical and biological weaponry against Japanese caves and underground fortifications during World War II.[150] In return, the Army left Mr. Cannon with a lifetime of lawsuits[151] as he and his family have attempted to compel the Army to uphold its part of the agreement to leave the property in "as good [of a] condition as it [was] on the date of the government's entry."[152]

After decades of ignoring the contamination issues, the Government finally took an interest in the lands at the Dugway Proving Ground and the Cannon property in the late 1970s when it conducted a comprehensive study of the Proving Ground.[153] It took another twenty years, however for the Government to release an engineering evaluation and cost analysis ("EE/CA") draft report for the Army's Dugway Proving Ground, and the Yellow Jacket Target Area, which encompass the Cannon property.[154] The EE/CA indicated that the Cannon property was highly contaminated, and estimated that full-scale removal of ordinance-related debris and other hazardous materials would cost approximately $12.3 million.[155]

147. *Id.* at 836.

148. *Id.* (internal citations omitted).

149. Cannon v. Gates, 538 F.3d 1328, 1330 (10th Cir. 2008).

150. *See* ARCHIVE SEARCH REPORT, *supra* note 3, at § 1.2; MEMORANDUM REPORT, *supra* note 3, at 7.

151. These lawsuits include suits by Mr. Cannon against the government in 1945 and 1950, *Gates*, 538 F.3d at 1330, and a suit by his grandchildren against the government in 2003, *Cannon v. United States*, 338 F.3d 1183 (10th Cir. 2003). The lawsuits are discussed in Section A of Part III of this Comment.

152. *Gates*, 538 F.3d at 1330.

153. *Cannon*, 338 F.3d at 1185-86 (citing the U.S. Army Toxic & Hazardous Materials Agency, Report No. 140, INSTALLATION ASSESSMENT OF DUGWAY PROVING GROUND (1979)). "[T]he Government conducted a comprehensive study of contaminated lands at the DPG. In 1979, the Government issued a detailed report of its study. The report noted testing had occurred in the Yellow Jacket Area adjacent to DPG." *Id.*

154. *Id.* at 1187. The Yellow Jacket Ranges refer to the Cannon property, adjacent to the Dugway Proving Ground. ARCHIVE SEARCH REPORT, *supra* note 3, at § 6.1.1. They are named such because of the Yellow Jacket Mines on the Cannon property, among others. *Id.*

155. *Cannon*, 338 F.3d at 1188.

While the *Frey II* court clearly stated that the government "cannot preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight,"[156] the Tenth Circuit declined to follow this reasoning when it stated the twenty-year-old draft study "constitute[s] the Government's efforts thus far to 'monitor, assess, and evaluate' the hazardous substances on the Cannons' land, and therefore qualif[ies] as an ongoing removal action."[157]

A. Cannon Versus the Government: Six Decades of Litigation

When Mr. Cannon reentered his property in September, 1945, he found "the entire area . . . covered with shell, rocket, and bomb fragments."[158] In just six months, the Army's testing turned the Cannon property into a graveyard of ammunition and toxic chemicals.[159] Although Mr. Cannon had previously leased the patented mining claims on his property to private individuals, he found that many of these mines were inoperable because of the chemical weaponry left inside the shafts.[160]

Mr. Cannon successfully filed two administrative claims against the Government in the Fall of 1945.[161] In the first claim, he was awarded $755.48 to "compensate him for cessation of mining operations 'due to the use of toxic chemical agents and explosive munitions.'"[162] The Government further paid Mr. Cannon $2,064 on his second claim "for destruction of mine shaft timbering due to 'the use of toxic chemical agents, incendiaries, and explosive munitions.'"[163]

In July, 1950, Mr. Cannon once again attempted to sue the Government. As part of the claim, Mr. Cannon stated:

> I realize that when I accepted this $2064 payment from the Government it constituted full satisfaction for the claim against the Government for damages done to the Yellow Jacket Mine. However, I did not believe at that time that the chemical agents used by the Army would remain in the workings and make it impossible for me to ever operate the mine again without some sort of decontamination of the underground workings. . . . It is now five years since the Army dropped their poison gas bombs on the mine and I am certain that there is still a concentration of poison gas present in the mine that would preclude its operation by anybody without some sort of decontamination. I do not know if the gas is present in dangerous quantities or even if the odorous material present is a poison gas but I do

156. Frey v. EPA (*Frey II*), 403 F.3d 828, 835 (7th Cir. 2005).
157. Cannon v. Gates, 538 F.3d 1328, 1334 (10th Cir. 2008).
158. *Cannon*, 338 F.3d at 1185 n.2.
159. *See Gates*, 538 F.3d at 1330.
160. *See generally Cannon*, 338 F.3d at 1185.
161. *Id.*
162. *Id.*
163. *Id.*

> know that the miners who have looked at the property with a view of taking a lease have shied away when they learned of the Army's use of the mine. . . . I believe [ ] that it would require about $5000 to put the mine in condition to be worked on again."[164]

This third claim was denied.[165]

In 1954, Mr. Cannon conveyed the property to his son, Dr. J. Floyd Cannon, who, in 1957, conveyed a seventy-five percent interest to his children, Mary Alice, Margaret Louise, Allan Robert, and Douglas F. Cannon.[166] Although Dr. Cannon asked the Dugway Proving Ground to clean up the property on numerous occasions,[167] he never filed suit.[168] At Dr. Cannon's death in 1980, his children inherited the remainder of the property.[169]

The U.S. Army Corps of Engineers ("Corps") initiated the EE/CA[170] and a geophysical survey of the Cannon property[171] by 1994. As part of the EE/CA, the Corps interviewed Margaret Louise Cannon, who expressed distrust toward the Government and "stated private land owners affected by the [Project Sphinx] testing were 'probably going to have to hire an attorney.'"[172] Four years later, Margaret Louise and Allan Robert Cannon filed an administrative claim with the Army for injury to their mining interests, which was denied.[173]

On December 11, 1998, the Cannons filed a lawsuit against the United States under the Federal Tort Claims Act ("FTCA")[174] for "not less than $8 million."[175] In a bench trial, the district court concluded that the hazardous materials left by the Army's Project Sphinx testing created a "continuing trespass and nuisance,"[176] and found for the Cannons. They were then awarded $160,936.85 in damages.[177] On appeal, however, the Tenth Circuit reversed the judgment and the district court's damages award.[178]

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164. *Id.*
165. *Id.*
166. *Id.* at 1185-86.
167. *Id.* at 1187.
168. *Id.* at 1185.
169. *Id.* at 1186.
170. *Id.* at 1187.
171. *Id.* at 1186.
172. *Id.* at 1187.
173. *Id.* at 1188.
174. 28 U.S.C. § 1346(b) (1994).
175. *Cannon*, 338 F.3d at 1188.
176. *Id.* at 1189.
177. *Id.* at 1189 n.11. The award for $160,936.85 was based on a reduced estimated value in property from $176.26 per acre to $25 per acre because of the ordinance on the property. *Id.* This estimate was based on Margaret Louise and Allan Robert Cannon's seventy-five percent interest in ownership of the property. *Id.*
178. *Id.* at 1194.

Applying Utah law, the Tenth Circuit held that "Utah state courts look solely to the *act* constituting the trespass [or nuisance], and not to the *harm* resulting from the act."[179] The court explained that "[u]nder Utah law, a continuous tort requires 'recurring tortuous . . . *conduct* and is not established by the continuation of *harm* caused by previous but terminated tortuous . . . conduct.'"[180] The Tenth Circuit reasoned that because the act of dropping ordnance and chemical weapons ended in 1945, there is not a "continuing trespass or nuisance under Utah law."[181]

Further, the court looked to the FTCA, which waives the United States Government's immunity from suit for

> civil actions on claims . . . accruing on and after January 1, 1945, for . . . loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act . . . occurred.[182]

An FTCA claim limits the government's waiver of immunity, stating that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."[183]

While the district court overlooked the FTCA discussion in its ruling for the Cannons, the Tenth Circuit focused on the statute of limitations found within section 2401(b) of the FTCA. Pursuant to this two-year limitation, the court held that the Cannons' claim lacked subject matter jurisdiction.[184] The court reasoned that Margaret Louise Cannon acknowledged that there was contamination on the property during her 1994 conversation with the Corps.[185] All of the Cannon children knew about the biological and chemical weaponry testing from conversations with their father, Dr. Cannon, and had knowledge of his multiple requests for remediation to the Dugway Proving Grounds.[186] Further, in 1994, the Army held a public meeting and informed the community—including the Cannons—of concerns with environmental contamination.[187]

179. *Id.* at 1193 (quoting Breiggar Props., L.C., v. H.E. Davis & Sons, 52 P.3d 1133, 1135 (Utah 2002)) (internal quotations omitted).
180. *Id.* (quoting *Breiggar*, 52 P.3d at 1136).
181. *Id.* at 1194.
182. 28 U.S.C. § 1346(b) (2000).
183. 28 U.S.C. § 2401(b) (2000).
184. *Cannon*, 338 F.3d at 1192.
185. *Id.* at 1191.
186. *Id.*
187. *Id.*

The court found it unreasonable that the Cannons waited until the draft EE/CA report was released before filing a claim.[188] The court further held that "[a] surface investigation of their mining property would have revealed the likely extent of the Cannons' property damage long before the Government's study did."[189] The Tenth Circuit rejected the idea that once the Cannons were aware of the contamination and its cause, they "need not initiate a prompt inquiry."[190] The court concluded that "the Cannons undoubtedly had notice of the general nature of their injury and its cause no later than August 1994."[191]

Because the Cannons were aware of the hazardous materials on their property but failed to file suit until the Government issued the draft report, the FTCA's two-year statute of limitations barred their claim.[192]

B. Cannon v. Gates: *Facts and Procedural History*

In November, 2005, the Cannons used a new approach in attempting to obtain relief: they sued the DOD under the Solid Waste Disposal Act.[193] The Cannons "alleged that the United States was in violation of federal and Utah regulations applicable to generators of hazardous waste"[194] and "that the United States has contributed to conditions on their property that endanger the Cannons, other individuals mining on the property, and members of the general public who come onto the Cannons' property."[195] However, the district court dismissed these claims, citing CERCLA's timing of review provision.[196] The district court reasoned that the Government had begun cleanup actions when it initiated investigations regarding "whether clean up efforts were needed."[197]

In 1993, an Archives Search Report stated that the Yellow Jacket Target Area site was "potentially hazardous,"[198] and recommended additional investigation.[199] The report noted that under the SARA amendments, a CERCLA response action is required whenever "imminent and substantial endangerment is found at . . . [a] facility or site that was under the jurisdiction of the Secretary of Defense and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to

188. *Id.* at 1192.
189. *Id.*
190. *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 118 (1979)).
191. *Id.*
192. *See id.* at 1190-92.
193. Cannon v. Gates, 538 F.3d 1328, 1331 (10th Cir. 2008). Solid Waste Disposal Act, 42 U.S.C. §§ 6901-81 (2006).
194. *Gates*, 538 F.3d at 1331 (supporting the Cannons' 42 U.S.C. § 6972(a) claim).
195. *Id.* (supporting the Cannons' 42 U.S.C. § 6972(a)(1)(B) claim).
196. *Id.* at 1331-32.
197. *Id.* at 1332.
198. ARCHIVE SEARCH REPORT, *supra* note 3, at § 7.0.
199. Appellant's Opening Brief at 7, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107).

contamination."[200] Later that same year, the Corps conducted an inventory project report, which initiated the CERCLA process by determining that the area qualified as a Formerly Used Defense Site.[201] This report stated that the Army had "conducted tests using persistent and non-persistent gases and flame type munitions" on the Cannon land.[202]

In July, 1994, the Corps requested access to the Cannon property to "determine whether or not these lands have been impacted by unexploded ordinance."[203] A press release announcing an August 1994 public availability session stated that Project Sphinx testing included "toxic, smoke, and flame agents in bombs, mortar and artillery shells, rockets, and . . . light case tanks. Gasoline, butane, the non-persistent agents Phosgene, Hydrogen Cyanide, and Cyanogen Chloride, and the persistent agent Mustard Gas were [also] used in the tests."[204] A fact sheet at the public session read, "[I]t is highly probable that these mine areas are contaminated with hazardous ordnance and explosive waste (OEW). It is suspected that there is subsurface OEW throughout the area which may come to the surface through erosion, frost heaving, intrusive work such as digging, or recreational land use."[205]

In August 1996, the Corps issued its EE/CA draft report of the Yellow Jacket Target Area.[206] The draft report noted the prevalence of hazardous materials on the Cannon property.[207] It concluded, "The density of the geophysical anomalies and ordinance-related debris, the presence of UXO [unexploded ordinance] and UXO-related items on the surface, and the presence of multiple spent ordinance items imply that a relatively higher hazard exists . . . ."[208] While the draft EE/CA estimated that a full-scale removal could cost approximately $12.3 million,[209] it has never been finalized, and there has been no action to remediate the property.[210]

However, further studies have taken place. A draft addendum to the Archive Search Report was issued in 2001, and a draft Site Inspection Work Plan was released in 2006.[211] Nonetheless, each study remains in

200. ARCHIVE SEARCH REPORT, *supra* note 3, at § 1.1 (citation omitted).
201. Appellant's Opening Brief at 6, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107).
202. *Id.*
203. *Id.* at 7.
204. Cannon v. United States, 338 F.3d 1183, 1187 (10th Cir. 2003).
205. *Id.*
206. *Id.*
207. *Id.* at 1187-88.
208. *Id.* at 1188 (quoting United States Army Corps of Engineers Engineering and Support Center, *Draft: Formerly Used Defense Site Engineering Evaluation/Cost Analysis Report: Yellow Jacket Ranges, Site No. J08UT109800, Tooele County, Utah* (1996)).
209. *Id.*
210. Appellant's Opening Brief at 10, Cannon v. Gates, 538 F.3d 1328 (10th Cir. July 23, 2007) (No. 07-4107).
211. *Id.* at 11.

draft form, and the government has failed to provide a timeline or any further indication of cleanup actions on the property.[212]

In upholding the district court's decision to dismiss the Cannons' claim, the Tenth Circuit addressed (1) whether a removal or remedial action had been "selected" and (2) whether the Cannons' claims "challenge" that action.[213] The court first established that through CERCLA, the Government is authorized to respond to hazardous releases, and the substantial threat of such releases, with removal and remedial actions that it "deems necessary to protect the public health or welfare of the environment."[214]

Concluding that CERCLA's timing of review provision barred the Cannons' suit, the Tenth Circuit recognized its split with the Seventh Circuit, stating, "While we share the Seventh Circuit's concern regarding open ended remedial and removal actions undertaken by the Government, we conclude that the plain language of the statute mandates the result we reach here."[215] The Tenth Circuit held that the draft studies released by the Government constituted ongoing removal actions at the Yellow Jacket Target Area, and therefore triggered the timing of review provision.[216] The court reasoned that once the Government had begun to "monitor, assess, and evaluate the release or threat of release of hazardous substances,"[217] parties must wait until the action is complete before initiating suit.

The court determined that the Cannons' suit was a "challenge" to the cleanup action.[218] Because the Cannons "requested injunctive relief ordering remediation of their property," the court reasoned that this suit would "undoubtedly interfere with the Government's ongoing removal efforts."[219] Following the Tenth Circuit's decision, the Cannons continue to wait for the start of a meaningful cleanup action on their property. Meanwhile, the Government continues its decades-long process of monitoring and evaluating the parcel.

IV. ANALYSIS

With the Tenth Circuit's holding, the Cannons are required to wait—perhaps another sixty years—for Mr. Cannon's lease agreement to be upheld by the Government, and for the land to be restored. The Seventh Circuit clearly stated that the Government "must point to some objective referent that commits it . . . to an action or plan" in order to pre-

212. *See id.*
213. Cannon v. Gates, 538 F.3d 1328, 1332-33 (10th Cir. 2008).
214. *Id.* at 1333 (quoting 42 U.S.C. § 9604(a)(1) (2008)).
215. *Id.* at 1335 n.7.
216. *Id.* at 1334.
217. *Id.* (quoting Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 239 (9th Cir. 1995)).
218. *Id.* at 1335.
219. *Id.*

clude judicial review.[220] However, the Tenth Circuit determined that although more than twenty years of government studies have passed without identifiable cleanup measures, CERCLA's timing of review provision applies.[221] While the *Cannon* analysis follows precedent[222] and the plain language of the statute, it provides no relief—or justice—for the Cannons.

A. What the Frey II *Court Tried to Accomplish*

In stating that Congress never intended the timing of review provision to be "an open-ended prohibition on a citizen suit,"[223] the Seventh Circuit broke from post-SARA judgments that instilled an absolute ban on such claims while removal or remedial actions are ongoing.[224] The *Frey II* court has been hailed as giving citizens "a new opportunity to raise . . . claims in the future."[225]

Although federal courts have held that CERCLA's timing of review provision appropriately restricts citizen suits "even if there is a possibility that plaintiffs' claims will never be heard in federal court,"[226] the *Frey II* court held in favor of the citizen when there is "no clear end in sight."[227] The Seventh Circuit recognized that by continuously studying a hazardous environmental situation, responsible parties can postpone judicial review indefinitely.[228] The court called for transparency in cleanup actions, and mandated that there be an objective measure of some future date of completion.[229]

Unfortunately, the court failed to define the factors that led to its conclusion and therefore failed to provide a clear roadmap for future courts and future litigants.[230] Because the *Frey II* court did not require the EPA "to actually select additional remedial measures to gain protection from suit, or at a minimum, require EPA to specifically show that it will select them,"[231] the Cannons, and similarly situated parties, only have a vague outline to base their own claims on.

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220. Frey v. EPA (*Frey II*), 403 F.3d 828, 834 (7th Cir. 2005).
221. *Gates*, 538 F.3d at 1334-35.
222. *See* Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1027 (3d Cir. 1997); Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 239 (9th Cir. 1995); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328-29 (9th Cir. 1995).
223. *Frey II*, 403 F.3d at 834.
224. *See* Clinton County Comm'rs v. EPA, 116 F.3d at 1027; Razore v. Tulalip Tribes of Wash., 66 F.3d at 239; McClellan Ecological Seepage Situation v. Perry, 47 F.3d at 328-29.
225. Jennings, *supra* note 43, at 675.
226. *Id.* at 693 (quoting Hanford Downwinders Coal., v. Dowdle, 71 F.3d 1469, 1484 (9th Cir. 1995)).
227. *Frey II*, 403 F.3d at 835.
228. *Id.* at 834.
229. *Id.*
230. *See* Jennings, *supra* note 43, at 693.
231. *Id.* at 695.

B. Why Cannon v. Gates *Failed to Follow* Frey II

The Tenth Circuit sympathized with the Cannons' frustration in attempting to compel remediation of their property,[232] but determined that the plain language of the statute mandated a jurisdictional bar on the Cannons' claim.[233] Instead of following the *Frey II* court's reasoning that the Government cannot delay judicial review by conducting studies indefinitely, the Tenth Circuit instead followed an interpretation of Congressional intent underlying CERCLA.[234]

The court disagreed with the Cannons' reasoning that there must be "a site inspection, an engineering evaluation and cost assessment report, public comment, and a final decision based on the administrative record" before a cleanup action is "selected."[235] While decades of draft studies may strike some courts as a failure to select a remedy,[236] the Tenth Circuit found the Cannons' argument too restrictive.[237] The Tenth Circuit did find that because the Government had completed an initial assessment of the property, determined that the property was contaminated, and because the Government planned a future site inspection, CERCLA's timing of review provision applied.[238]

Following reasoning from the Eight Circuit's assessment of what constitutes a "challenge,"[239] the *Cannon* court noted that challenges to the studies and other efforts put into the decision-making process of selecting the cleanup action can result in unwarranted delays.[240] The Tenth Circuit read CERCLA provisions broadly, allowing a twenty-year-old study to constitute a removal action.[241] The court believed that the Government was moving toward a remediation action, and therefore denied the Cannons an opportunity for judicial review until that action was complete.

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232. Cannon v. Gates, 538 F.3d 1328, 1336 (10th Cir. 2008).

233. *Id.* at 1335 n.7.

234. *See generally id.* at 1332 ("Congress enacted CERCLA to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites. CERCLA protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." (citations omitted)).

235. *See Feds are Protected from Weapons-Test Suit, for Now*, 29 No. 4 ANDREWS ENVTL. LITIG. REP. 5 (2008).

236. *See* Frey v. EPA (*Frey II*), 403 F.3d 828, 835 (7th Cir. 2005).

237. *See* Contribution, *Tenth Circuit: Bar on Pre-Enforcement Review Doesn't Require Selection of Removal Action*, 23 BNA TOXICS L. REP. 754 (2008).

238. Elizabeth Williams, Annotation, *What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9613(h)) on Judicial Review of Cases Arising Under CERCLA*, 116 A.L.R. Fed. 69 § 3(b) (originally published in 1993).

239. *Gates*, 538 F.3d at 1335 (citing Costner v. URS Consultants, Inc., 153 F.3d 667, 675 n.8 (8th Cir. 1998)).

240. *Id.* at 1336.

241. *Id.* at 1334.

C. What Cannon v. Gates *and* Frey II *Mean for CERCLA*

In enacting the timing of review provision, Congress did not prevent citizens from obtaining judicial review. Rather, judicial review must wait for the completion of remediation actions.[242] Courts recognize that section 113(h) "may in some cases delay judicial review . . . permanently,"[243] but believe that Congress has balanced this concern with the interest of quickly and efficiently remediating hazardous waste sites.[244]

The *Frey II* court did determine that in the interest of justice, a 100-year plan for remediation would "obviously" be unreasonable.[245] However, the *Cannon* court held that twenty years of evaluating a site with no concrete timeframe for selecting a final remediation action was reasonable.[246] While Congress provided for a citizen suit at the end of the remediation process, there is a danger that the Government may become too complacent in its cleanup actions.[247] According to scholars, a lengthy process for site remediation may soon create an opportunity for citizen suits.[248]

While precedent shows that the *Frey II* court broke with tradition, public policy shows that the court was correct.[249] The facts of the case establish that Frey's suit came at a time when a "selected" remedy was, in fact, "complete," thereby meeting a requirement of CERCLA's timing review provision.[250] However, because the EPA had ongoing studies investigating future actions, the Frey facts are vaguely similar to the Cannon facts.

In enacting the citizen suit provision, Congress clearly allowed citizens to seek judicial review of CERCLA cleanup actions. Because of the language of the statute, however, courts have interpreted this review to be available only upon completion of the action. If Congress is interested in making citizen suits available prior to completion, Congress will need to modify CERCLA. Courts, in the meantime, will likely continue to interpret CERCLA's timing of review provision based on the plain language of the statute.

CONCLUSION

The Cannons have had many opportunities to file suit against the Government in order to compel remediation actions on their Tooele

242. TOPOL, *supra* note 63, at 46.
243. McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995).
244. *Id.*
245. Jennings, *supra* note 43, at 692.
246. *Gates*, 538 F.3d at 1334.
247. James Stewart, *Agencies' Slow Remediation Process Frustrates Courts; If Site Cleanup Takes Too Long, Courts Will Permit Citizen Suits*, 181 N.J. L.J. 128 (2005).
248. *Id.*
249. Jennings, *supra* note 43, at 693.
250. Frey v. EPA (*Frey II*), 403 F.3d 828, 833-34 (7th Cir. 2005).

County, Utah property. Because they waited until the Government showed concrete signs of initiating cleanup, they missed their opportunity to demand action under CERCLA, and they missed their opportunity to recover damages under the FTCA. While the Tenth Circuit sympathized with the plight of the Cannons, it was not obligated to follow the *Frey II* court in holding that there must be a concrete indication of future remediation once studies have begun. The Tenth Circuit correctly followed the plain language of CERCLA when it denied the Cannon's challenge. Until Congress clarifies when citizens may bring suit, the Cannons—and many more—will likely be relegated to wait until remediation actions are complete.

Theresa Sauer[*]

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