

*Gadsden Industrial Park LLC, v. United States*, No. 17-15325, 2018 WL 6266473  
(11th Cir. Nov. 30, 2018)

**Eleventh Circuit Conforms EPA's Broad Discretionary Authority  
to Cleaning Environment Under CERCLA**

In *Gadsden Industrial Park LLC, v. United States*, Gadsden Industrial Park (“GIP”) brought claims against CMC, Inc., and Harsco Corporation (collectively “the defendants”), two contractors for the Environmental Protection Agency (“EPA”). GIP appealed the district court’s determinations that (1) the EPA has broad discretionary authority to engage in cleanings of the environment and (2) the sovereign immunity clause of the Federal Tort Claims Act bars the EPA from the alleged tort claims.

In 2002, the EPA initiated an environmental clean-up project aimed at redeveloping a former steel manufacturing facility in Alabama (the “Site”). GIP subsequently purchased 434 acres of the Site and assets such as kish\*, slag\*\* and a railroad track system, located on the unpurchased portion of the site. While the EPA began working on the Site, the defendants barred GIP from entering the Site and they were therefore unable to retrieve the kish and slag or utilize the railroad lines. The defendants proceeded to mine portions of the Site and sold metal-bearing materials from kish and slag to third party companies. Further, Harsco removed approximately 1,400 feet of the railroad track owned by GIP and rendered another 1,000 feet of the track unusable.

In response, GIP filed a series of unsuccessful lawsuits, each with essentially the same claims—the defendants violated the Fifth Amendment by taking GIP’s property without just compensation. The current action brought by GIP alleges that (1) defendants are liable for conversion of GIP’s kish and slag and (2) defendants acted negligently by removing, destroying, discarding and/or selling the kish and slag.

The Eleventh Circuit upheld the district court’s decision under a similar rationale. In GIP’s previous cases, they asserted claims under the same tort law theories, against the same defendants, and based on the same factual predicate. Thus, the court determined that since the two suits involve the same cause of action, the case at hand was barred by *res judicata*. As to sovereign immunity, the District Court finds that the defendants were immune from suits of this type because the removal of the kish and slag from the Site was related to the EPA’s remediation work and within the EPA’s discretionary authority under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Further, selling the metal-bearing material from the kish and slag was not outside the scope of discretion especially when no statute, regulation, or policy prohibits the EPA or government contractors from selling materials removed during a remediation project, especially since CERCLA directs the EPA to prioritize clean-up methods that are “cost effective.”

\*"Kish" is a by-product of the steelmaking process which contains recyclable metal particulates. "Slag" is the unrefined result of the first step of the steelmaking process.