

11 USC § 503(b)  
ORS 465.255

Gull Industries, Inc. v. Hanna BAP No. OR-92-2283-VMeJ  
cross appeal BAP No. OR-92-2285-VMeJ  
Adv No 90-3388-S

In re Hanna Case No 390-33990-S11

6/15/94 BAP aff'g DDS Published

The bankruptcy court allowed plaintiffs an unsecured claim for remediation costs incurred to clean the petroleum from the ground water. The petroleum migrated from the debtor's property. The bankruptcy court denied the request for administrative priority because the petroleum leaked from the tanks prepetition and the remediation efforts did not significantly reduce the contamination on the debtor's property.

Both parties appealed. The BAP affirmed both the allowance of the claim and the denial of administrative status. Two members of the panel focussed on the finding that the petroleum leaked from the debtor's tanks prepetition, and concluded that the damage was deemed to have occurred prepetition under bankruptcy law. They also affirmed the bankruptcy court's determination that the plaintiff's efforts constituted remedial action even though they may not have been cost effective or permanently cleaned the groundwater until the debtor's property was cleaned.

Judge Volinn filed a dissenting opinion. He concluded that plaintiffs were entitled to an administrative claim for the postpetition costs under Oregon law because they were injured by the ongoing release of petroleum from property of the estate, and

the estate was obligated to remove the petroleum.

P92-A31(33)

# ORDERED PUBLISHED

FILED

JUN 15 1994 *c.d.*

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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8 In re: ) BAP No. OR-92-2283-VMeJ  
9 DANIEL C. HANNA, ) OR-92-2285-VMeJ  
10 Debtor. ) (Cross Appeal)  
11 ) Bankruptcy No. 390-33990-S11  
12 ) Adversary No. 90-3388S  
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GULL INDUSTRIES, INC., an  
Oregon corporation, and  
BP OIL COMPANY, an Ohio  
corporation,  
Appellants / Cross-Appellees,  
v.  
JOHN MITCHELL, INC., Trustee  
of the Estate of Daniel C.  
Hanna and DANIEL C. HANNA,  
Appellees / Cross-Appellants.

O P I N I O N

Argued and Submitted on July 22, 1993  
at Portland, Oregon

Filed - JUN 15 1994

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: VOLINN, MEYERS, and JONES, Bankruptcy Judges.

1 JONES, Bankruptcy Judge:

2 BACKGROUND

3 The debtor, Daniel C. Hanna ("Hanna"), and appellant, Gull  
4 Industries, Inc. ("Gull"), owned adjacent filling stations in  
5 Gresham, Oregon. Both filling stations leaked petroleum  
6 products into the soil, causing contamination. However, only  
7 Hanna's leakage reached the groundwater. The contamination of  
8 the groundwater is apparently a slow, continuing process which  
9 occurs after the soil is saturated with petroleum.

10 Gull began cleaning up its site in August 1989, in  
11 conjunction with the sale of its property to BP Oil Company  
12 ("BP"). That sales agreement required Gull to clean up  
13 environmental damage to the site according to a specific  
14 timetable. Findings of Fact and Conclusions of Law (4-7-92) at  
15 7. Gull hired Applied Geotechnology, Inc. ("AGI") to perform a  
16 site assessment and cleanup which eventually cost about  
17 \$130,000. AGI determined that the groundwater beneath the Gull  
18 site was contaminated by one to three inches of free petroleum  
19 product. The bankruptcy court found that "Gull asserted and  
20 proved at trial that contaminated subsurface water continued to  
21 migrate to its land from the polluted Hanna land. . . ."  
22 Findings (4-7-92) at 3.

23 After beginning its remediation efforts by installing three  
24 twenty-four inch recovery wells on the Gull site in June 1990,  
25 Gull demanded that Hanna stop the flow of contamination from the  
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1 Hanna site to the Gull site.<sup>1</sup> About a week later on July 27,  
2 1990, Hanna filed for relief under Chapter 11. Three days later  
3 the bankruptcy court appointed John Mitchell, Inc. ("Mitchell"),  
4 as Chapter 11 trustee.

5 Gull continued its remediation efforts by installing an  
6 "air stripper" to clean the groundwater, and on August 24, 1990,  
7 brought an adversary complaint seeking injunctive relief and  
8 tort damages under Oregon Revised Statute § 465.255. Gull asked  
9 that these claims be treated as administrative expenses under 11  
10 U.S.C. § 503.<sup>2</sup>

11 In October 1990, Mitchell emptied the leaking underground  
12 storage tanks on Hanna's site, and in April 1991 removed them;  
13 however, he failed to remove the underlying contaminated soil or  
14 to perform a site study as directed by the bankruptcy court in  
15 its December 13, 1990 order.

16 On April 7, 1992, the bankruptcy court denied  
17 administrative status but concluded that Gull's expenses were  
18 "remedial action costs" recoverable as a general unsecured claim  
19 under O.R.S. § 465.255. Gull now appeals the denial of  
20 administrative status, and Mitchell cross-appeals the granting  
21 of the general unsecured claim. We affirm both.

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24 <sup>1</sup> Similar demands were made by the Oregon Department Of  
25 Environmental Quality ("ODEQ") before and after the filing of  
the bankruptcy petition.

26 <sup>2</sup> Unless otherwise indicated, all statutory citations refer  
to the Bankruptcy Code, 11 U.S.C. sections 101 to 1330.



1 and therefore do not address the other two.

2 1. Damages Caused Pre-Petition

3 Although the bankruptcy court's findings of fact and  
4 conclusions of law raise some questions, the court clearly found  
5 that the petroleum leaks on the Hanna property occurred pre-  
6 petition, and that neither Hanna nor Mitchell "added any  
7 significant new contamination to the Hanna land postpetition."  
8 Findings (4-7-92) at 2-7.

9 As noted above, the bankruptcy court also found:

10 Gull asserted and proved at trial that contaminated  
11 subsurface water continued to migrate to its land  
from the polluted Hanna land. . . .

12 Findings (4-7-92) at 3. The apparent inconsistency in these  
13 findings is resolved through the court's citation to In re Jensen,  
14 127 B.R. 27 (9th Cir. BAP 1991), aff'd, 995 F.2d 925 (9th Cir.  
15 1993).<sup>3</sup>

16 In Jensen, the BAP discussed when claims arise for purposes of  
17 dischargeability.<sup>4</sup> The BAP held that the estate's cost-recovery  
18 claim was dischargeable because it arose from the debtor's  
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20 <sup>3</sup> Mitchell argues that insufficient evidence was presented  
21 to determine that the Hanna release leached into the  
22 groundwater, and that the court made an impermissible  
23 presumption of causation. This is incorrect. The court heard  
24 testimony from AGI who believed that the groundwater  
contamination originated at the Hanna site. There was no  
contradictory evidence offered. The court is permitted to give  
weight to expert testimony. Fed.R.Evid. 702.

25 <sup>4</sup> The Jensen analysis is not limited to dischargeability  
26 cases, but rather is also useful for purposes of determining  
administrative status. Ohio v. Kovacs, 469 U.S. 274 (1985),  
relied on by the dissent, also deals with dischargeability  
issues.

1 prepetition actions even though the state's right to recover did not  
2 arise until postpetition when it cleaned up the site. 127 B.R. at  
3 33.

4 Jensen cites as authoritative In re Chateaugay Corp., 112 B.R.  
5 513 (S.D.N.Y. 1990), aff'd, 944 F.2d 997 (2d Cir. 1991), for the  
6 proposition that a claim arises upon the actual or threatened  
7 release of hazardous waste by the debtor. Consequently, if a tort  
8 occurs prepetition, with the injury occurring postpetition, such  
9 claim is deemed to have arisen prepetition. Jensen, 127 B.R. at 33  
10 (citing Chateaugay, 112 B.R. at 522). In other words, so long as a  
11 prepetition triggering event had occurred, the claim was  
12 dischargeable regardless of when the claim for relief was ripe for  
13 adjudication. Chateaugay, 112 B.R. at 522.

14 In the instant case the bankruptcy court identified the acts  
15 giving rise to the alleged liability as the petroleum spills from  
16 the underground storage tanks into the soil. The later leaching  
17 from the soil to the groundwater required no activity by Mitchell,  
18 but was rather "passive." See Findings (4-7-92) at 5.  
19 Consequently, the bankruptcy court found that all environmental  
20 damage was deemed to have occurred pre-petition. See id. We agree.

21 The Ninth Circuit has held that "damages caused during the pre-  
22 petition period are not entitled to administrative expense  
23 priority." Dant, 853 F.2d at 709. Dant also held that "consequent  
24 damage" occurring postpetition should be regarded as having occurred  
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1 prepetition. Id.<sup>5</sup>

2 For all practical purposes, the instant appeal is equivalent  
3 to Dant. In Dant, a pre-petition debtor operated a wood treatment  
4 plant on land partially owned by the debtor and partially leased  
5 from the Burlington Northern Railroad Company. The wood treatment  
6 facility operated for over a decade and caused massive toxic waste  
7 contamination on both properties, including significant  
8 concentrations of PCP in the groundwater. The pre-petition debtor  
9 clearly caused the pollution to both properties.

10 Burlington Northern spent approximately \$250,000 under a  
11 separate agreement with the EPA to clean up its property.  
12 Burlington requested that these cleanup costs be given  
13 administrative expense status, which request was denied for two  
14 reasons: (1) because the damages occurred pre-petition; and  
15 (2) because the remedial efforts occurred off-site on property not  
16 owned by the bankruptcy estate. Dant, 853 F.2d at 709. See also  
17 Ohio v. Kovacs, 469 U.S. 274 (1985)). The Dant court reasoned,  
18 pursuant to § 503(b)(1)(A), that the off-site remediation had not  
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21 <sup>5</sup> Jensen and Dant are Ninth Circuit and BAP opinions  
22 interpreting the Bankruptcy Code. These opinions are not affected  
23 by the idiosyncracies of state law, such as O.R.S. § 465.255,  
24 which, according to the dissent, contradicts Jensen and Dant. We  
25 find no contradiction--Dant having applied Oregon law--but in the  
26 event of a disagreement between the Bankruptcy Code and the Oregon  
Code, the former must prevail. See also discussion, infra at 8-9.  
We do not disagree with the dissent's insistence that a trustee  
must comply with state environmental laws. If such laws have been  
violated, appropriate remedies are available outside of the  
bankruptcy context. However, the narrow issue before this panel  
is whether Gull's cleanup costs should be given administrative  
priority under the Bankruptcy Code.

1 been shown to be for "the actual, necessary costs and expenses of  
2 preserving the estate. . . ." Dant, 853 F.2d at 709. Gull has  
3 cited no case wherein off-site cleanup costs were given  
4 administrative expense status.

5 In light of Dant, the bankruptcy court did not abuse its  
6 discretion in denying Gull administrative expense status for the  
7 continuing effects of pre-petition damages. See e.g., In re Bill's  
8 Coal Co., 124 B.R. 827, 829-830 (D. Kan. 1991).

## 9 2. Policy Considerations

10 Gull argues that its \$130,000 claim should be allowed as an  
11 administrative expense as a matter of environmental protection  
12 policy. Gull's argument fails to recognize the conflicting  
13 authority articulated by the Ninth Circuit that "[a]lthough [the  
14 creditor] asserts that public policy considerations entitled its  
15 claims for cleanup costs to administrative expense priority, we  
16 acknowledge that Congress alone fixes priorities . . . . Courts are  
17 not free to formulate their own rules of super or sub-priorities  
18 within a specifically enumerated class." Dant, 853 F.2d at 709  
19 (citations omitted); see also Jensen, 127 B.R. at 33.-

20 Dant, a case dealing with Oregon law, concluded with the  
21 following statement:

22 [A] State may protect its interests in the  
23 enforcement of its environmental laws by giving  
24 cleanup judgments the status of statutory liens or  
25 secured claims. But until the Oregon legislature  
26 enacts such protective provisions or until Congress  
amends sections 503 and 507 to give priority to  
claims for cleanup costs, we are without authority  
to create such a priority.

1 Dant, 853 F.2d at 709 (citations omitted). Consequently, we  
2 cannot grant the requested relief as a matter of policy.

3 3. Cross-Appeal

4 Mitchell argues that Gull's claim should not be allowed  
5 because it failed to follow the guidelines issued by the ODEQ in  
6 its cleanup efforts, and that its efforts were not reasonable as  
7 required by the statute. Mitchell also disputes the court's  
8 alternative theory of liability based on trespass. Because we  
9 affirm based on the former, we do not address the latter.

10 Mitchell asserts that Gull did not follow applicable rules  
11 governing remedial actions in containing the gasoline plume.  
12 Pursuant to O.R.S. § 465.200(15), Mitchell believes that, by  
13 definition, an allowable claim must be "consistent with a  
14 permanent remedial action." The court found that Gull's actions  
15 could be consistent, and the trustee asserts that therein lies  
16 the error.

17 However, the definition of remediation goes on to state  
18 that remediation includes actions "taken instead of or in  
19 addition to removal actions . . . to minimize the release . . .  
20 so that it does not migrate to cause substantial danger . . . ;"  
21 Because the court found that Gull's actions slowed the spread of  
22 the plume, it appears that its actions fit the statute.  
23 Although Gull's particular actions are not listed in the  
24 statute, the statute expressly states that the list is not  
25 exclusive. Nor does the statute require that an action be cost  
26 effective. Thus, even though the court was not convinced that

1 the action was cost effective, it did not err in concluding that  
2 the action was remedial under the statute.

3 **CONCLUSION**

4 The bankruptcy court found that the environmental damage  
5 caused to the Hanna site occurred prepetition, including the  
6 continuing effects of prepetition damages, and that cleanup  
7 costs relating to prepetition damages were not entitled to  
8 administrative expense priority. Gull has failed to show that  
9 these findings of fact and conclusions of law were erroneous.  
10 Gull has also failed to show that this panel should go beyond  
11 the facts and law relevant to this case based on policy  
12 considerations.

13 The bankruptcy court found that Gull's efforts were  
14 remedial and benefitted the public, and that Gull was therefore  
15 entitled to a general unsecured claim. Mitchell has failed to  
16 show that the bankruptcy court erred in these findings and  
17 conclusions.

18 Accordingly, we affirm the bankruptcy court's denial of  
19 administrative expense status and its grant of a general  
20 unsecured claim to Gull.

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1 VOLINN, Bankruptcy Judge, Dissenting:

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3 BACKGROUND FACTS

4 The debtor, Daniel C. Hanna, and appellant Gull Industries  
5 operated filling stations on adjacent parcels of land in  
6 Gresham, Oregon. Prior to the bankruptcy, Gull sold its filling  
7 station to appellant BP Oil Company. In the contract,  
8 appellants (collectively referred to as Gull) allocated the cost  
9 of any environmental remediation of the site between themselves.

10 In August of 1989, approximately one year prior to Hanna's  
11 bankruptcy filing, Gull hired AGI, an environmental consultant,  
12 to inspect the site. AGI discovered one to three inches of free  
13 petroleum product on the surface of the groundwater some 18 feet  
14 beneath the site. It concluded that the petroleum contaminating  
15 the groundwater had originated uphill on Hanna's property to the  
16 east of the Gull site, migrating downhill into the Gull  
17 property. AGI also discovered soil contamination at the Gull  
18 site. It determined, however, that the material in this  
19 contaminated soil had not leached down to a level where it would  
20 contaminate the groundwater.<sup>6</sup>

21 In April 1990, the Oregon Department of Environmental  
22 Quality (the ODEQ) directed Hanna to perform a site assessment,  
23 but Hanna took no action. In June 1990, Gull began remediation  
24 on its own site by commencing installation of three large

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26 <sup>6</sup>Gull removed this material, but the cost of doing so is not  
involved in its claim against the estate.

1 diameter recovery wells. On July 19, 1990, Gull demanded of  
2 Hanna that he clean up his site to stop the migration of  
3 contamination onto the Gull site. Hanna did not respond to the  
4 demand, and, on July 27, filed a petition under Chapter 11 of  
5 the Bankruptcy Code. A trustee was appointed on July 30, 1990.

#### 6 PROCEEDINGS AFTER BANKRUPTCY

7 After the bankruptcy petition was filed, Gull took  
8 substantial additional remedial actions. From August through  
9 October, it purchased, installed and operated a vapor extraction  
10 system to clean the contaminated groundwater and continued with  
11 operation of the previously installed recovery wells. On August  
12 24, 1990 Gull filed an adversary complaint in Hanna's bankruptcy  
13 for an injunction and an administrative priority damage claim.  
14 On December 13, 1990, the trial court signed a stipulated order  
15 in the adversary proceeding issuing an injunction prohibiting  
16 the trustee from storing any new petroleum at its site and  
17 directing the trustee to comply with Oregon's hazardous waste  
18 statute, O.R.S. § 465.200 et seq.<sup>7</sup> The trustee emptied the  
19 Hanna underground storage tanks in October 1990 and removed them  
20 in April of 1991.<sup>8</sup> He did not, however, remove any of the  
21 existing contaminated soil that had been determined by AGI to be  
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24 <sup>7</sup>Relevant portions of the statute are quoted infra.

25 <sup>8</sup>Both filling stations are presently closed. The Hanna  
26 property was transferred to another entity in accordance with the  
confirmed plan of reorganization in the debtor's Chapter 11.

1 the source of the contamination on the groundwater under Gull's  
2 premises.

3 THE COURT'S FINDINGS AND CONCLUSIONS

4 On April 7, 1991, the court signed an order denying Gull an  
5 administrative claim. The court found that Gull proved that  
6 contaminated subsurface water continued to migrate under Gull's  
7 site after the trustee's initial action. It found that Gull's  
8 cleanup efforts did not significantly contribute to reduction of  
9 contamination of the Hanna site, and therefore, that Gull did  
10 not prove that its efforts reduced the cost that the estate  
11 would incur to clean up its own property.

12 The court also found that the release from Hanna's  
13 underground storage tank occurred prepetition, and that the  
14 trustee acted reasonably in shutting down operations, even  
15 though he did not pursue cleanup of the resulting contamination.  
16 It found that the trustee as postpetition successor to the  
17 debtor was not reckless, negligent, nor strictly liable in his  
18 postpetition conduct and concluded that there was no  
19 postpetition trespass. Finally, it found that Gull was not  
20 specially damaged by the debtor's release of contaminant into  
21 the groundwater any more than the public at large, except for  
22 the effect of the contamination on the sale price of the  
23 property between Gull and BP.<sup>9</sup>

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26 <sup>9</sup>Although not stated by the court, this finding appears to  
relate to the viability of a nuisance claim--nuisance requires a  
showing of more than a lowering of the value of the property.

1 On October 29, 1992, the court entered supplemental  
2 findings of fact and conclusions of law. The court found that  
3 Gull's efforts cleaned the groundwater but did not eliminate the  
4 source. It found that Gull's costs were caused by Hanna, and  
5 Hanna was liable because Oregon's hazardous waste statute,  
6 O.R.S. § 465.200 et seq., imposes strict liability. It  
7 concluded that Gull's efforts, which it performed on the advice  
8 of experts, were reasonable. The court also concluded that  
9 while Gull's efforts did not follow the DEQ's administrative  
10 rules, the efforts were reimbursable under the statute, although  
11 the court was not convinced that the actions were cost effective  
12 or permanent.

13 The court also held the debtor liable in the alternative  
14 for trespass because the contamination had affected the sale  
15 price of the property, although it found that the groundwater  
16 did not specially harm Gull any more than the public at large,  
17 since it did not use the groundwater at the site. The court  
18 allowed Gull a general unsecured claim for \$129,420; of this,  
19 Gull's costs expended prepetition were some \$47,452 while its  
20 postpetition expenditures amounted to \$81,968. As indicated,  
21 Gull appealed the denial of first priority administrative status  
22 for its claim; the trustee cross-appealed imposition of  
23 liability for Gull's costs as an unsecured claim.

24 ISSUE PRESENTED

25 The central issue presented by this appeal is whether a  
26 bankruptcy estate is subject to an administrative claim for off-



1 site remediation costs resulting from failure to clean up  
2 polluting material on estate property which is a source of  
3 contamination of neighboring property. Gull argues that when  
4 the court denied administrative priority to Gull's claim, the  
5 court abused its discretion by failing to recognize that Gull's  
6 cleanup costs, although not expended in direct remediation on  
7 Hanna's site, benefitted the estate because postpetition, the  
8 estate was obligated to remediate off-site consequences of the  
9 release, including the effect on Gull's site.<sup>10</sup> On cross-  
10 appeal, the trustee claims that the trial court erred by  
11 awarding Gull an unsecured claim under the hazardous waste  
12 statute and the common law of trespass, and that the court's  
13 factual finding that the Hanna release contaminated the  
14 groundwater was clearly erroneous.

#### 15 DISCUSSION

#### 16 I

17 The facts in this case, with one significant distinction,  
18 are similar to facts considered by In re Dant & Russell, 853  
19 F.2d 700 (9th Cir. 1988).<sup>11</sup> In Dant & Russell, the debtor's

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21 <sup>10</sup>Gull also argues that its operation of the vapor extraction  
22 system is in fact remediating pollution at the Hanna site. Gull  
23 asserts that the system is extracting pollution from the  
groundwater under the Hanna site itself. The court made no  
finding in this respect.

24 <sup>11</sup>In re Jensen, 995 F.2d 925 (9th Cir. 1993) citing Dant &  
25 Russell, and cited by the majority, is inapposite. In Jensen, the  
26 issue was dischargeability, or postpetition liability of the  
debtor for its prepetition conduct: liability of the trustee or  
(continued...)

1 lessor, Burlington Northern (BN), applied for administrative  
2 expense status for past and future cleanup costs caused by the  
3 debtor's prepetition activities when the debtor occupied the  
4 property. The court determined that 11 U.S.C. § 503(b), which  
5 allows administrative priority for "actual, necessary costs and  
6 expenses of preserving the estate" must be construed narrowly in  
7 order to preserve the estate for the benefit of all unsecured  
8 creditors. After determining that the debtor postpetition had  
9 no interest in the lessor's property, the court denied  
10 administrative priority to the lessor's claim. Here, the  
11 debtor's interest in the estate continued in his capacity as  
12 debtor in possession to whose interests the trustee has  
13 succeeded.

14 In the present case, the bankruptcy judge found that  
15 contaminants continue to leach from the polluted soil on the  
16 Hanna site postpetition. In Dant & Russell, "most, if not all,"  
17 of the contamination on BN's land occurred prepetition. In re  
18 Dant & Russell, 67 B.R. 360, 364 (D. Or. 1986). Moreover, there  
19 is no indication in any of the three Dant & Russell opinions<sup>12</sup>  
20 that the pollution on BN's land was caused by leaching from the  
21 debtor's adjoining property, either before or after filing of  
22 the bankruptcy.

23  
24 <sup>11</sup>(...continued)  
25 the estate for breach of a distinct postpetition duty was not at  
26 issue, as is the case here.

<sup>12</sup>61 B.R. 668 (Bankr. D. Or. 1985); 67 B.R. 360 (D. Or. 1986);  
853 F.2d 700 (9th Cir. 1988).

1 In the instant case, the cause of the cleanup costs  
2 originated on property owned and controlled by the debtor in  
3 possession after the filing of the petition and until its  
4 ultimate turnover to another entity on plan confirmation. These  
5 circumstances differ significantly from those existing in Dant &  
6 Russell, where the debtor and the property were not involved  
7 with the bankruptcy estate.

## 8 II

9 The United States Supreme Court has considered the  
10 interface of environmental and bankruptcy law in circumstances  
11 which provide guidance here. In Ohio v. Kovacs, 469 U.S. 274  
12 (1985), the state had initiated action to collect from Kovacs  
13 the cost of pollution cleanup of debtor's property. The  
14 debtor's business was placed in state receivership. The Supreme  
15 Court determined that the state's attempt to collect from the  
16 individual debtor the cost of cleanup of the business was a  
17 claim dischargeable in bankruptcy. The claim was based on the  
18 debtor's failure to comply with a prepetition injunction to  
19 clean up hazardous waste. Because the receivership had already  
20 dispossessed the debtor from the property prior to his  
21 bankruptcy, the state's only remedy against him was for money  
22 damages, and the court therefore held that the remedy  
23 constituted a general unsecured claim for money against the  
24 debtor subject to discharge.

25 While the Kovacs court was presented with the liability of  
26 the individual debtor and not with the estate's postpetition

1 liability; it nevertheless alluded to the postpetition liability  
2 of the current operator of the property (as is the case here  
3 where the trustee controlled the property prior to its turnover  
4 to another entity on confirmation of the plan). The court  
5 stated:

6 Finally, we do not question that anyone in possession of  
7 the site--whether it is [the debtor] or another in the  
8 event the receivership is liquidated and the trustee  
9 abandons the property, or a vendee from the receiver or the  
10 bankruptcy trustee--must comply with the environmental laws  
11 of the State of Ohio. Plainly, that person or firm may not  
12 maintain a nuisance, pollute the waters of the State, or  
13 refuse to remove the source of such conditions.

14 Id. at 285.<sup>13</sup>

15 Although the court declined to address the legal  
16 consequences which would have ensued had the debtor taken  
17 bankruptcy before appointment of the receiver, it nevertheless  
18 hypothesized that:

19 If the property was worth more than the costs of bringing  
20 it into compliance with state law, the trustee would  
21 undoubtedly sell it for its net value, and the buyer would  
22 clean up the property, in which event whatever obligation  
23 [the debtor] might have had to clean up the property would  
24 have been satisfied. If the property were worth less than  
25 the cost of cleanup, the trustee would likely abandon it to  
26 its prior owner, who would have to comply with the state  
environmental law to the extent of his or its ability.

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23 <sup>13</sup>The foregoing language was adopted by Matter of CMC  
24 Heartland Partners, 966 F.2d 1143, 1147 (7th Cir. 1992), which  
25 held that although the EPA's claim against the debtor for  
26 prepetition contamination had been time-barred by the EPA's  
failure to file a proof of claim, this would not bar an  
independent postpetition claim against the reorganized debtor  
based on its status as owner of contaminated land. Accord, In re  
Torwico Electronics, Inc., 8 F.3d 146 (3rd Cir. 1993).

1 Id. at 284-285 n.12.<sup>14</sup>

2 In a subsequent case, the Supreme Court restricted the  
3 trustee's right to abandon contaminated property, underscoring a  
4 trustee's liability as a property owner. Midlantic Nat. Bank v.  
5 N.J. Dept. of E.P., 474 U.S. 494 (1986). In Midlantic, the  
6 court determined that a bankruptcy trustee cannot abandon  
7 property that has negative value, basing its decision in part on  
8 28 U.S.C. § 959(b), which imposes a duty on the trustee to  
9 manage and operate estate property in compliance with state law.  
10 While abandonment is not an issue presented here,<sup>15</sup> the basis  
11 for the Midlantic decision is pertinent. Since a trustee cannot  
12 abandon property to circumvent a statutory duty, a fortiori, a  
13 trustee occupying property which he does not wish to abandon  
14 should not disregard or abdicate his duty under state law.

15 The majority states that it relies on In re Jensen, supra  
16 herein, footnote 6, which "cited as authoritative," In re  
17 Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991). Chateaugay,  
18 which discussed in depth the nature of pre-petition claims in  
19 bankruptcy in the particular context we are concerned with here,  
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<sup>14</sup>This hypothesis may have relevance here since the confirmed plan has transferred the property. However, the record does not indicate the present status of the Hanna property.

<sup>15</sup>The trial court stated that "Mitchell [the trustee] believes that the land is worth more than the clean-up."

1 affirmed the trial court's ruling that post-petition remedial  
2 claims are to be accorded priority administrative status.<sup>16</sup>

3 Taken together, Kovacs and Midlantic impose legal  
4 obligations on a bankruptcy estate regardless of the  
5 dischargeability of the debtor's liability. To hold otherwise  
6 would not only allow a debtor to shift costs to the taxpaying  
7 public or innocent third parties, but would grant the debtor in  
8

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9 <sup>16</sup>Chateaugay, at page 1009, stated:

10 The Bankruptcy Code accords an administrative priority  
11 to "actual, necessary costs and expenses of preserving the  
12 estate." 11 U.S.C. § 503(b)(1)(A) (1988). The District  
13 Court ruled that all clean-up costs assessed post-petition  
14 with respect to sites currently owned by LTV where there has  
15 been a pre-petition release or threatened release of  
16 hazardous wastes will be entitled to administrative priority.  
17 LTV and the unsecured creditors challenge this ruling,  
18 viewing it as an unwarranted attempt to convert pre-petition  
19 contingent claims into priority claims by the simple  
20 expedient of liquidating them, i.e., incurring response costs  
21 and securing reimbursement. EPA contends that response costs  
22 paid during administration with respect to pre-petition  
23 releases or threatened releases are necessary to preserve the  
24 estate in the sense that they enable the estate to maintain  
25 itself in compliance with applicable environmental laws. The  
26 Equity Holders urge that decision as to whether reimbursement  
for any response costs is entitled to administrative priority  
cannot be made until there has been a careful assessment of  
the facts peculiar to each payment.

The District Court drew support for its ruling from  
the Supreme Court's decision in Midlantic, which ruled  
that a bankruptcy trustee could not abandon property in  
contravention of state or local laws designed to protect  
public health or safety. If property on which toxic  
substances pose a significant hazard to public health  
cannot be abandoned, it must the [sic] follow, the Court  
reasoned, that expenses to remove the threat posed by  
such substances are necessary to preserve the estate.  
We agree, as have other courts considering the same  
issue. See In re Wall Tube & Metal Products Co., 831  
F.2d 118, 123-24 (6th Cir. 1987); In re Peerless Plating  
Co., 70 B.R. 943, 948-49 (Bankr. W.D.Mich. 1987); In re  
Stevens, 68 B.R. 774, 783 (D.Me. 1987); see also In re  
Smith-Douglass, Inc., 856 F.2d 12, 17 (4th Cir. 1988).

1 possession or trustee immunity to laws enacted to protect the  
2 public safety.

3 III

4 Although the majority is correct that the postpetition  
5 leaching is a consequential damage caused by the prepetition  
6 rupture of Hanna's underground storage tanks, Oregon's hazardous  
7 waste statute creates a present liability on the landowner for  
8 failure to abate it. The court found the debtor liable to Gull  
9 under O.R.S. § 465.255. The relevant portion of that statute  
10 states:

11 (1) The following persons shall be strictly liable for  
12 those remedial action costs incurred by the state or any  
13 other person that are attributable to or associated with a  
14 facility and for damages for injury to or destruction of  
15 any natural resources caused by a release:

16 (a) Any owner or operator at or during the time of the  
17 acts or omissions that resulted in the release.

18 O.R.S. § 465.255(a) (1993).<sup>17</sup>

19 The present owner of the property, in this case the trustee  
20 of the debtor in possession, cannot escape remediation  
21 obligations imposed by the law of the state by arguing that the  
22 debtor has been discharged from past and future obligations  
23 arising out of his prepetition conduct. Matter of CMC Heartland

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24 <sup>17</sup>Subsection (b) of § 465.255 imposes strict liability on:  
25 "(b) Any owner or operator who became the owner or operator after  
26 the time of the acts or omissions that resulted in the release,  
and who knew or reasonably should have known of the release when  
the person first became the owner or operator." (emphasis added).  
This subsection may impose successor liability on a bankruptcy  
trustee for all remediation costs, whether incurred prepetition or  
postpetition.

1 Partners, -966 F.2d 1143. Gull has a private right of action  
2 against any owner or operator of the property, not solely  
3 against the owner or operator whose conduct initially created  
4 the problem. The trustee is an owner or operator and  
5 consequently is burdened with strict liability for all costs  
6 related to present releases. The trustee is equally as liable  
7 under the statute as any other owner or operator would be. The  
8 issue before us is whether, under the circumstances, Gull has  
9 demonstrated that its off-site efforts are compensable under the  
10 statute.

11 IV

12 In its April 7 Findings of Fact and Conclusions of Law, the  
13 trial court concluded, "The State of Oregon cannot create an  
14 administrative priority for bankruptcy purposes by enacting a  
15 statute that imposes strict liability for the claims of a  
16 neighbor arising from prepetition conduct of the debtor. Dant &  
17 Russell, 853 F.2d at 709." As noted above, reliance on Dant &  
18 Russell is misplaced because here the claim is based on  
19 liability arising from the trustee's knowing failure to observe  
20 a duty imposed on him by the Oregon statute with respect to  
21 property owned by the estate. Clearly, the State of Oregon can  
22 impose liabilities based on property ownership that extend to a  
23 bankruptcy trustee. See California State Board of Equalization  
24 v. Sierra Summit, Inc., 490 U.S. 844, 853-54 (1989):

25 "[b]y the transfer to the trustee no mysterious or peculiar  
26 ownership or qualities are given to the property," and that  
"there is nothing in that to withdraw it from the necessity



1 of protection by the State and municipality, or which  
2 should exempt it from its obligations to either." (quoting  
Swarts v. Hammer, 194 U.S. 441, 444 (1904)).

3 O.R.S. § 465.200(14) (1993) defines release as:

4 "[A]ny spilling, leaking, pumping, pouring, emitting,  
5 emptying, discharging, injecting, escaping, leaching,  
6 dumping or disposing into the environment . . . ."  
(emphasis added).

7 While the court found correctly that the trustee's passive  
8 failure to remove the soil was not culpable as trespass, it did  
9 not address the trustee's postbankruptcy conduct under  
10 § 465.255(1)(d) which imposes strict liability for omissions.  
11 An omission is "the neglect to perform what the law requires.  
12 The intentional or unintentional failure to act to act . . . ."  
13 Black's Law Dictionary (6th ed. 1990).

14 As quoted above, the definition of release in O.R.S. §  
15 465.200(14) which includes "escaping ~~and~~ leaching" imposes  
16 liability for non-action as well; a party does not act in regard  
17 to escaping or leaching, but rather fails to act to abate it,  
18 thereby permitting the escaping or leaching to occur. The  
19 statute therefore imposes a duty on the owner of a facility to  
20 remove the source of the leaching. The trustee's failure to  
21 clean up the soil permitted or resulted in a leaching type of  
22 release, which ultimately took the form of a migratory and  
23 invasive "plume" as the trial court described it.

24 As indicated, the trustee failed to act not only in  
25 derogation of a statutory duty to remove the soil, but in the  
26 face of a court order to do so. Until soil removal is

1 accomplished, the statute imposes strict liability on the  
2 trustee for the efforts of the state or any other person who  
3 engages in remedial action, such as Gull, whose actions are  
4 currently retarding the plume of gasoline in the groundwater.  
5 This duty must be promptly performed since migratory pollution,  
6 as indicated in the record here, would proceed inexorably  
7 without preventive action. The purpose of environmental  
8 statutes is to encourage expeditious treatment of the problem so  
9 as to forestall further damage.

10 Oregon's hazardous waste statute is drafted broadly to  
11 effect such prompt preventive action and imposes liability on a  
12 property owner for the cost of preventive off-site remediation.  
13 Consequently, Gull's appropriate off-site response gives rise to  
14 a cause of action thereunder. "Remedial action" is defined in  
15 O.R.S. § 465.200(15)(1993) to mean:

16 "[T]hose actions consistent with a permanent remedial  
17 action taken instead of or in addition to removal actions  
18 in the event of a release or threatened release of a  
19 hazardous substance into the environment, to prevent or  
20 minimize the release of a hazardous substance so that it  
21 does not migrate to cause substantial danger to present or  
22 future public health, safety, welfare or the environment."  
23 (emphasis supplied).

24 On the date of the filing of the petition, Hanna's estate  
25 received the contaminated property along with all concomitant  
26 obligations to manage it as the law required and liability for  
failure to do so. Liability of the trustee as the owner of the  
property therefore is predicated on the continuous release of  
contaminants in the remaining soil that the court found

1 continues to leach into the groundwater and downhill. It is  
2 clear from the court's findings of fact that, at the date of the  
3 filing of the petition, gasoline was leaching out of the  
4 contaminated soil on the Hanna site into the groundwater and  
5 that Gull was containing its spread. The court's statements,  
6 taken variously from its April 7 and October 29 findings state:

7       The ground under the [Hanna] tanks was seriously  
8       contaminated by gasoline.

9       Findings of Fact and Conclusions of Law at 3 (April 7, 1992).

10       Gull asserted and proved at trial that contaminated  
11       subsurface water continued to migrate to its land from the  
12       polluted Hanna land.

13       Id.

14       [The plaintiffs' efforts] are slowing the plume of  
15       contamination which is emanating from the Hanna site.

16       Findings of Fact and Conclusions of Law at 5 (October 29, 1992).

17       Although the action by plaintiffs did not eliminate the  
18       source of the petroleum, which is the soil on the Hanna  
19       site, they reduced the amount of pollutant in the  
20       groundwater. In this sense, their action benefitted the  
21       public.

22       Id. at 2.

23       Thus, it appears clear from the court's findings that there  
24       has been a release of gasoline from the property, originating  
25       prepetition, that has continued postpetition and will continue  
26       until the source of the release is removed.<sup>18</sup>

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24       <sup>18</sup>The court also found that there has been no significant  
25       postpetition contamination. In view of the statements quoted  
26       above, this finding reflects the court's understanding that  
      postpetition liability against the estate could be predicated only  
      on postpetition releases from the removed ruptured storage tanks.

CONCLUSION

The bankruptcy court's conclusion that Gull is not entitled to administrative status for its postpetition costs is an error of law. Even though the debtor initially created the harm, the trustee's succession to ownership of the property was attended by a responsibility to abate the ongoing downhill release of contaminant under Oregon law. This responsibility did not stop at his property line. Gull is entitled to first priority administrative expense status for its postpetition costs associated with remediation of the ongoing release from the contaminated soil. That part of the order denying administrative status for postpetition costs should be reversed. I therefore respectfully dissent.

ORS 465.255  
42 USC §9607(a)(4)  
trespass  
nuisance

Gull Industries, Inc. v. Hanna Adv No 90-3388-S

In re Hanna Case No 390-33990-S11

10/29/92 ; DDS Unpublished

The court allowed Gull/BP an unsecured non-priority claim for the expenses they had incurred to clean petroleum from the water under their property. The petroleum migrated from the debtor's property to Gull's neighboring property. The petroleum leaked from the tanks pre petition, but continued to migrate post petition.

The liability arose under ORS 465.255, which holds an owner of a facility strictly liable for the remediation costs incurred by the state or any other person. The debtor owned the property during the time the petroleum was released into the ground. Alternatively, the claim was allowable as a prepetition nuisance or trespass.

The claim was not entitled to administrative priority for the reasons stated in a memo dated 4/7/92 (P92-9). The trustee was ordered to clean up the estate property.

OCT 29 1992

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
          ) 390-33990-S11  
DANIEL C. HANNA, )  
                  ) Adversary Proceeding No.  
                  ) 90-3388-S  
                  ) Debtor, )  
                  ) )  
GULL INDUSTRIES, INC., a ) FINDINGS OF FACT AND  
Washington corporation and ) CONCLUSIONS OF LAW  
BP OIL COMPANY, an Ohio )  
corporation, )  
                  ) )  
                  ) Plaintiffs, )  
                  ) )  
                  ) v. )  
                  ) )  
JOHN MITCHELL, INC., )  
                  ) )  
                  ) Defendant. )

The debtor and Gull Industries operated gas stations on adjacent lots. Before the debtor filed chapter 11, gasoline from his station leaked into the groundwater and migrated under Gull's property. Gull sold its property to BP, but remained responsible for part of the environmental cleanup. The plaintiffs sought administrative expense treatment for the costs they had incurred in installing and

1 operating the recovery wells to remove the petroleum from the  
2 groundwater under their land.

3 I denied administrative status to their claim, and  
4 deferred a decision on the amount and allowability of the  
5 general claim for further briefing. After post-trial  
6 briefing, a hearing on August 18, 1992, and additional  
7 memoranda, a final judgment should be entered in this case  
8 allowing plaintiffs a general unsecured claim against the  
9 estate in the amount of \$129,420.00, denying administrative  
10 expense status to the claim, and ordering John Mitchell, Inc.  
11 to clean up the Hanna property at 80 East Burnside. My  
12 reasons follow, and supplement the memorandum issued on April  
13 7, 1992.

14 Based on my earlier findings after trial, I concluded  
15 that petroleum released on the Hanna site pre-petition  
16 migrated into the groundwater and under the property owned by  
17 plaintiffs. The soil on the Gull/BP property was also  
18 contaminated, but the gasoline in their soil had not reached  
19 the groundwater before it was removed. In conjunction with  
20 the cleanup of their property, plaintiffs installed recovery  
21 wells and an air stripper to clean the groundwater under  
22 their property. Although the action by plaintiffs did not  
23 eliminate the source of the petroleum, which is the soil on  
24 the Hanna site, they reduced the amount of pollutant in the  
25 groundwater. In this sense, their action benefitted the  
26 public.

1           The plaintiffs' claim is outlined on trial exhibit  
2 17, and in their claims numbered 501 and 1169. The costs  
3 were incurred as a response to the petroleum spills on the  
4 Hanna site, because the contamination on the plaintiffs'  
5 property did not reach the groundwater. The claim is the  
6 amount spent by plaintiffs through the date the Hanna  
7 property was transferred to Rub-A-Dub, Inc. in accordance  
8 with the confirmed plan of reorganization in the Hanna  
9 chapter 11.

10           Hanna's liability to plaintiffs arises under ORS  
11 465.255 and 466.825. The first statute holds an owner of a  
12 facility strictly liable for the remedial action costs  
13 incurred by the state or any other person when the costs are  
14 attributable to a facility owned by the person during the  
15 time of the acts or omissions that resulted in the release  
16 that injured the natural resources. Hanna owned the property  
17 during the release. The release of gasoline on the Hanna  
18 site leached through the soil and into the groundwater. The  
19 groundwater is a natural resource owned by the State of  
20 Oregon. ORS 465.200(10) and 537.110.

21           Gasoline is a hazardous substance under ORS  
22 465.200(9)(c) and (11), and contains known or suspected  
23 carcinogens. Based on the evidence, I find that the actions  
24 taken by plaintiffs were remedial as that term is defined in  
25 ORS 465.200(15). The recovery wells, air stripper and  
26 monitoring wells could be consistent with a permanent



1 remedial solution to the cleanup of the gasoline in the  
2 groundwater, although they will not be very effective until  
3 the soil on the Hanna property is cleaned or removed. The  
4 plaintiffs were advised by specialists to install the wells.  
5 Based on the regulations and the acknowledgements by the  
6 chapter 11 trustee of the Hanna case that the estate would  
7 clean up the Hanna site, plaintiffs proceeded as they were  
8 advised.

9           The language of ORS 465.255(1) creates a private  
10 cause of action for someone who helps to clean the  
11 environment when the damage was caused by another person.  
12 This is consistent with 42 U.S.C. § 9607(a)(4)(B), CERCLA,  
13 which creates a private cause of action. Wickland Oil  
14 Terminals v. ASARCO, Inc., 792 F.2d.827, 890 (9th Cir. 1986).

15           The defendant argued that ORS 465.255(1) requires  
16 compliance with state rules regarding cleanup as a  
17 prerequisite for recovery of remedial action costs. The  
18 Oregon Department of Environmental Quality (DEQ) submitted a  
19 brief as amicus curiae. The DEQ interprets ORS 465.255(1) to  
20 merely require that remedial action costs be reasonable to be  
21 recoverable. The DEQ stated that compliance with the DEQ  
22 rules and ORS 465.315 are indicative of reasonableness, but  
23 not a prerequisite to recovery. In this respect, the Oregon  
24 statute differs from 42 U.S.C. § 9607(a)(4)(B) which imposes  
25 liability on a responsible person only if the costs of  
26 response incurred by a person other than the government are

1 both necessary and consistent with the national contingency  
2 plan. I will adopt the DEQ's interpretation of the statute  
3 as more consistent with the legislature's intent to remove  
4 hazardous substances from the environment and protect the  
5 public.

6 While I am not convinced that the plaintiffs'  
7 remedial action expenses were cost effective or that they  
8 used permanent solutions, they did provide testimony to  
9 indicate that they are slowing the plume of contamination  
10 which is emanating from the Hanna site. Rather than  
11 speculate on the effectiveness of the plaintiffs' actions,  
12 defendant should have provided evidence to rebut the  
13 testimony of Mr. Laakso (trial transcript pp. 148-191) and  
14 Mr. Carlson. The most convincing evidence would have been a  
15 site characterization and investigation as required by OAR  
16 340-122-225 and 340-122-230, and the supplemental reports and  
17 corrective action plan required by the administrative rules.  
18 I denied the plaintiffs' claim administrative status partly  
19 because they did not pursue the investigation and cleanup of  
20 the Hanna property. However, I will not go so far as to deny  
21 their claim entirely as unreasonable because the trustee  
22 agreed to perform the initial abatement measures and site  
23 characterization almost two years ago. He consistently  
24 assured this court that he recognized the estate's liability  
25 to clean up the site and he was required by ¶ 11.11 of the  
26 confirmed plan of reorganization to spend \$30,000 to

1 remediate the site by December 31, 1991. The investigation  
2 should have been performed before the trial. Therefore, I  
3 will infer that the tests would be consistent with the  
4 conclusions of the plaintiffs' experts. They believe that  
5 the petroleum is migrating from the Hanna site to the Gull  
6 site, and that the plaintiffs' recovery wells are containing  
7 the spread of the contamination. Based on these conclusions,  
8 I will allow the plaintiffs' claim in full.

9 Part of the claim could also be supported by ORS  
10 466.825. That statute renders the owner of a leaking  
11 underground storage tank (UST) liable to any owner of a non-  
12 leaking UST in the vicinity for all costs reasonably incurred  
13 in determining which tank was the source of the release.

14 The claim is a general unsecured claim because the  
15 gasoline was released pre-petition, and is not an  
16 administrative tort and did not significantly assist the  
17 trustee in removing the source of the pollution on the Hanna  
18 site. My reasoning in denying administrative status is more  
19 thoroughly explained in the memorandum entered April 7, 1992.

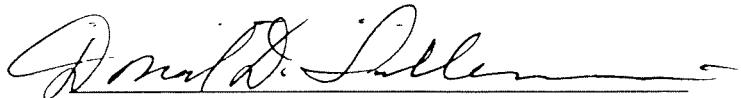
20  
21 Alternatively, I will allow the claim as a pre-  
22 petition trespass or public nuisance which caused special  
23 harm to Gull. See, Smejkal v. Empire Lite-Rock, Inc., 547  
24 P.2d 1363 (Or. 1976). The gasoline was mainly in the  
25 groundwater and only affected the plaintiffs' land about  
26 eighteen feet below the surface, where the level of the

1 groundwater rose to touch the dirt. While this would not  
2 necessarily prevent the plaintiffs from using the land as a  
3 filling station, the concern over the subsurface  
4 contamination affected the price that Gull was able to  
5 receive when it sold the land to BP. The damage occurred  
6 pre-petition, and is also only entitled to treatment as a  
7 general unsecured claim.

8 As the trustee of the Hanna chapter 11 estate, and  
9 the liquidating trustee, John Mitchell, Inc. should be  
10 ordered to immediately begin to clean up the Hanna property  
11 at 80 East Burnside in accordance with state rules.

12 A separate final judgment will be entered.

13 DATED this 29th day of October, 1992.

14  
15 

16 DONAL D. SULLIVAN  
17 Bankruptcy Judge

18 cc: Leon Simson  
19 John Mitchell  
20 Ronald T. Adams  
21 John C. Cahalan  
22 Andree Pollock  
23 Kurt Burkholder  
24 Wilson C. Muhlheim  
25  
26