

APPENDIX

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APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CONFEDERATED TRIBES OF
THE COLVILLE
RESERVATION,

Plaintiff - Appellant,

and

JOSEPH A. PAKOOTAS, an
individual and enrolled member of
the Confederated Tribes of the
Colville Reservation, DONALD
R. MICHEL, an individual and
enrolled member of the
Confederated Tribes of the
Colville Reservation,

Plaintiffs,

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

TECK COMINCO METALS
LTD, a Canadian corporation,

Defendant - Appellee.

No. 24-5565

D.C. No.
2:04-cv-00256-
SAB

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Stanley Allen Bastian, District Judge, Presiding

Argued and Submitted April 17, 2025
Seattle, Washington

Filed September 3, 2025

Before: Ronald M. Gould and Richard A. Paez, Circuit
Judges, and Michael J. McShane, Chief District Judge.*

Opinion by Judge Gould

SUMMARY**

Environmental Law

In an interlocutory appeal, the panel reversed the district court's summary judgment in favor of Teck Cominco Metals Ltd. and remanded for trial on the Confederated Tribes of the Colville Reservation's claims for natural resource damages under § 107(a)(4)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act against Teck.

The Tribes' claims were based on Teck's contamination of the Upper Columbia River with hazardous substances from its lead-zinc smelter in British Columbia, resulting in injuries to fish and benthic organisms in the river. The Tribes sought damages for their members' interim lost use of the injured natural resources. The district court granted summary judgment

* The Honorable Michael J. McShane, United States Chief District Judge for the District of Oregon, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

on the basis that the Tribes sought damages for injured “cultural resources,” not “natural resources,” and that claims involving damages with a cultural component are not cognizable under CERCLA.

The panel agreed with the district court that natural resource damages under CERCLA are only available to address injury to natural resources, defined under the statute as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.” But the panel held that this definition does not mean that natural resource trustees can only recover damages to restore or replace natural resources that are directly injured by the release of a hazardous substance. Rather, natural resource damages under CERCLA normally include restoration costs at a minimum, plus interim lost-use value in appropriate cases. Considering CERCLA’s text and its restorative purpose, and agreeing with the D.C. Circuit, the panel held that CERCLA authorizes damages for lost uses of injured natural resources in cases where the lost uses have a cultural dimension.

COUNSEL

Paul J. Dayton (argued), Daniel J. Vecchio, and Alexandria M. Smith, Ogden Murphy Wallace PLLC, Seattle, Washington, for Plaintiff-Appellant.

Andrew A. Fitz and Joshua A. Osborne-Klein, Assistant Attorneys General, Ecology Division, Office of the Washington Attorney General, Olympia, Washington, for Intervenor-Plaintiff.

Anne M. Voigts (argued), Pillsbury Winthrop Shaw Pittman LLP, Palo, Alto, California; Amanda G. Halter, Pillsbury Winthrop Shaw Pittman LLP, Houston, Texas; Deborah B. Baum, Pillsbury Winthrop Shaw Pittman

LLP, Washington, D.C.; Mark E. Elliott, Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, California; Bryce J. Wilcox and Kammi M. Smith, Witherspoon Brajcich Mcphee PLLC, Spokane, Washington; for Defendant-Appellee.

Brian J. Cleary and Dianne L. Herz, Cleary Law Group PC, Hayden, Idaho, for Amicus Curiae Spokane Tribe of Indians.

Rex S. Heinke and Jessica M. Weisel, Complex Appellate Litigation Group LLP, Los Angeles, California, for Amicus Curiae His Majesty the King in Right of the Province of British Columbia.

Joseph M. Manning, David S. Gualtieri, and Mary G. Sprague, Attorneys, Environment & Natural Resources Division; Todd Kim, Assistant Attorney General; United States Department of Justice, Washington, D.C.; for Amicus Curiae the United States.

Kendra A. Martinez, Tribal Attorney, Suquamish Indian Tribe, Suquamish, Washington; Michael M. Frandina, The Askman Law Firm, Denver, Colorado; for Amicus Curiae Suquamish Indian Tribe.

Julie A. Weis, Haglund Kelley LLP, Portland, Oregon, for Amicus Curiae Confederated Tribes of Siletz Indians.

Kelly L. Perigoe and Hannah T. Nguyen, King & Spalding LLP, Los Angeles, California, for Amici Curiae the Canadian Chamber of Commerce and the Mining Association of Canada.

Thomas L. Murphy and Ada M. Stepleton, Native American Rights Fund, Boulder, Colorado; Winter Hayes, Nez Perce Tribe, Lapwai, Idaho; Diana R. Bob, Native Law PPLC, Bellingham, Washington; Josh Newton, Best Best & Krieger LLP, Bend, Oregon; Tom

Zeilman, Law Offices of Thomas Zeilman, Yakima, Washington; for Amici Curiae Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation.

William M. Jay and Isabel M. Marin, Goodwin Procter LLP, Washington, D.C.; Tawny A. Bridgeford, National Mining Association, Washington, D.C.; Andrew R. Varcoe and Stephanie A. Maloney, U.S. Chamber Litigation Center; for Amici Curiae the National Mining Association, American Exploration & Mining Association, and Chamber of Commerce of the United States of America.

OPINION

GOULD, Circuit Judge:

This appeal concerns the Confederated Tribes of the Colville Reservation's (the "Colvilles" or "Tribes") claims for natural resource damages under section 107(a)(4)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4)(C), against Teck Cominco Metals, Ltd. ("Teck"), a Canadian corporation. The Tribes' claims are based on Teck's contamination of the Upper Columbia River with hazardous substances from its lead-zinc smelter in Trail, British Columbia, resulting in injuries to fish and benthic organisms in the river. The Tribes seek damages for their members' interim lost use of the injured natural resources between the time of the release of the hazardous substances and potential restoration. The district court granted Teck summary judgment on the Tribes' damages claims, holding that the Tribes sought damages for injured "cultural resources," not "natural resources," and that claims involving damages with a

cultural component are not cognizable under CERCLA. We have jurisdiction under 28 U.S.C. § 1292(b) and we reverse the district court's grant of summary judgment on the Tribes' claims for natural resource damages and remand for trial.

I. FACTS AND PROCEDURAL HISTORY

A

This case concerns the Upper Columbia River, roughly 150 miles of river and reservoir in Washington State, bounded to the north by the Canada-U.S. border and to the south by the Grand Coulee Dam. The Colvilles are a federally recognized tribe comprised of twelve individual tribes whose members claim they have lived on the banks of the Upper Columbia River since "time immemorial." The Upper Columbia River forms the eastern and southern boundary of the Colville Reservation and holds great cultural significance to the Tribes.

Teck, a Canadian mining company, owns a smelter on the banks of the Columbia River, ten miles north of the Canadian border, in Trail, British Columbia. The district court found that between 1930 and 1995, Teck discharged about 400 tons of slag daily—an estimated 9.97 million tons in total—directly into the Columbia River. The slag discarded into the river contained 7,300 tons of lead and 255,000 tons of zinc. In addition to slag, Teck also discharged untold gallons of contaminated effluent directly into the Columbia River. The effluent discharged into the river between 1923 and 2005 contained about 132,000 tons of hazardous substances, including 108,000 tons of zinc, 22,000 tons of lead, 200 tons of mercury, 1,700 tons of cadmium, and 270 tons of arsenic. What was once the lifeblood of the Tribes, now became a toxic dumping

ground, impacting the relationship the Tribe had with the river.

B

Litigation regarding the contamination of the Upper Columbia River commenced in 2004 when two members of the Tribes brought a CERCLA citizen suit against Teck. These plaintiffs were later joined by the State of Washington as a plaintiff-intervenor and by the Colville Tribes as a co-plaintiff. The district court trifurcated the case to sequentially determine: (1) whether Teck was liable as a potentially responsible party; (2) Teck's liability for response (i.e., cleanup) costs; and (3) Teck's liability for natural resource damages.

In Phase I of trial, the district court concluded that Teck was liable as an arranger under CERCLA section 107(a)(3), § 9607(a)(3), and that Teck was jointly and severally liable to the Tribes and the State in any subsequent action or actions to recover past or future response costs at the Upper Columbia River site under CERCLA section 107(a)(4)(A), § 9607(a)(4)(A).

In Phase II, the State settled its claim for past response costs while the Tribes proceeded to trial. The district court found in favor of the Tribes and awarded them \$3,394,194.43 in investigative expenses incurred through December 31, 2013, \$4,859,482.22 in attorney's fees up to that date, and \$344,300.00 in prejudgment interest. Teck appealed, and we affirmed the district court's judgment. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574, 596 (9th Cir. 2018).

The district court then proceeded with Phase III of the case to determine Teck's liability for damages to natural resources. The Tribes and the State brought joint claims for natural resource damages based on injury to benthic organisms in the river sediment and elevated

mercury levels in fish, including claims for damages for the public's lost use of those natural resources. Along with these joint damages claims, the Tribes also separately seek natural resource damages for their interim lost uses of the injured natural resources that are specific to their members because of their unique relationship with the Upper Columbia River. The Tribes' experts opined that the Tribes sustained natural resource damages as a result of: (1) reduced tribal fishing trips due to state-issued advisories concerning unsafe mercury levels in fish; (2) the interim lost use of an uncontaminated river; and (3) the interim lost use of the injured natural resources for cultural purposes.¹

Teck moved for partial summary judgment on the Tribes' separate natural resource damages claims, arguing in part that CERCLA does not authorize natural resource damages for cultural service losses.² The district court granted the motion, reasoning that the Tribes in effect sought damages for cultural resources that are not authorized under CERCLA. The Tribes moved for

¹ The Colvilles state that their second and third categories of damages are alternative approaches to damages.

² CERCLA refers to recovery of damages for the "use value" of injured natural resources, 42 U.S.C. § 9651(c)(2), but the implementing regulations and the governing caselaw have used a variety of other terms to describe the same concept, including "lost use," "interim lost use," and "service loss." *See* 43 C.F.R. § 11.83; *State of Ohio v. U.S. Dep't. of the Interior*, 880 F.2d 432, 448 (D.C. Cir. 1989). The Tribes originally referred to their claims as "tribal service loss" claims, but on appeal they refer to their claims as claims for their "interim lost use" of injured natural resources. In this opinion, we refer to the Tribes' claims as lost use or interim lost use claims.

reconsideration, contending that Teck and the court misconstrued their claims and emphasizing that they sought natural resource damages, not cultural resource damages. The district court denied the Tribes' motion for reconsideration. The Tribes then moved to certify the summary judgment order for interlocutory appeal under 28 U.S.C. § 1292(b). The district court reiterated its previous holding and granted the motion while acknowledging that "there is a conflict between the holding in *State of Ohio* which claims 'nonuse' services are actionable under CERCLA and this Court's Order determining that such claims are not cognizable under CERCLA if they involved damages with a cultural component." *See State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989). We granted interlocutory review of the district court's summary judgment order dismissing the Tribes natural resource damages claims.

II. STANDARD OF REVIEW

We review *de novo* a grant of summary judgment. *Lolli v. Cnty. of Orange*, 351 F.3d 410, 414 (9th Cir. 2003). When considering a grant of summary judgment, we view the evidence in the light most favorable to the nonmoving party, and we determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

III. DISCUSSION

The Tribes contend that the district court erred in granting summary judgment to Teck on their claims for natural resource damages by characterizing the claims as "cultural resources" injury and concluding that CERCLA does not authorize damages for injuries to such "cultural resources." The Tribes contend that they are not seeking damages for injured cultural resources, but rather for

their lost use of injured natural resources where their lost use has a cultural dimension in light of the Tribes' unique relationship with the Upper Columbia River. We use the traditional tools of statutory interpretation to determine whether the district court erred by dismissing the Tribes' natural resource damage claims as a matter of law, and whether § 9607(a)(4)(C) authorizes damages for the interim lost uses of injured natural resources in a case where the diminished uses have a cultural dimension.

CERCLA was enacted “[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.” *State of Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394 (9th Cir. 1989) (alteration in original) (citing Pub. L. No. 96–510, 94 Stat. 2767 (1980)). CERCLA makes potentially responsible parties jointly and severally liable not only for “all costs of removal or remedial action,” but also for “damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss resulting from such a release [of a hazardous substance].” § 9607(a)(4)(A), (C). “Indian” Tribes, in addition to the United States and the states, may sue as natural resource trustees to recover these natural resource damages. § 9607(f)(1).

Congress conferred on the President (who in turn delegated to the Department of the Interior (“Interior”)) the responsibility for promulgating regulations to address how these natural resource damages would be assessed. § 9651(c)(1); *State of Ohio*, 880 F.2d at 439. Congress stated that the regulations must:

identify the best available procedures to determine [natural resource] damages, including both direct and indirect injury, destruction, or loss and shall take into

consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover. § 9651(c)(2).

The statute also states that the measure of natural resources damages “shall not be limited by the sums which can be used to restore or replace [natural] resources.” § 9607(f)(1).

Interior promulgated its first round of regulations assessing natural resource damages in 1986. 51 Fed. Reg. 27,674 (Aug. 1, 1986) (codified at 43 C.F.R. pt. 11). This first round of regulations prescribed a hierarchy of methodologies by which the lost-use value of natural resources could be measured, focusing exclusively on market values for such resources when market values were available. *State of Ohio*, 880 F.2d at 462 (citing *id.*). Interior’s regulations were reviewed by the D.C. Circuit in *State of Ohio*, which held that “Congress intended the damage assessment regulations to capture fully all aspects of loss,” and that Interior had “erroneously construed the statute” to preclude certain methods for determining the lost-use value of natural resources. *Id.* at 463–64. The D.C. Circuit remanded the regulations to Interior with instructions to “consider a rule that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured,” including “‘passive’ use” or “non-consumptive” values such as “[o]ption and existence values” which “reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment.” *Id.* at 464. The D.C. Circuit defined option value as “the dollar amount an individual is willing to pay although he or she is not currently using a resource but wishes to reserve the option to use that resource in a certain state of being in the future.” *Id.* at 475 n.72. And

it defined existence value as the “dollar amount an individual is willing to pay although he or she does not plan to use the resource, either at present or in the future. The payment is for the knowledge that the resource will continue to exist in a given state of being.” *Id.* at 476 n.73.

Interior revised its regulations in response to *State of Ohio*. Adhering to the D.C. Circuit’s reading of the scope of CERCLA’s natural resource damages provisions, the current implementing regulations provide that recoverable damages for the interim lost use of natural resources are measured by “both public use and nonuse values such as existence and bequest values.” 43 C.F.R. § 11.83(c)(1). “Use value” is defined as “the economic value of the resources to the public attributable to the direct use of the services provided by the natural resources.” § 11.83(c)(1)(i); *see also* 43 C.F.R. § 11.14(nn) (defining “[s]ervices” as “the physical and biological functions performed by the resource including the human uses of those functions.”). “Nonuse value,” on the other hand, represents “the economic value the public derives from natural resources that is independent of any direct use of the services provided.” § 11.83(c)(1)(ii).

Here, the Tribes have identified natural resource injuries from Teck’s release of hazardous substances into the Upper Columbia River—injured benthic organisms and injured fish with elevated mercury levels—and seek damages for their members’ interim lost use of those natural resources. The Tribes provide three methods for quantifying their interim lost use of the injured natural resources: (1) reduced river trips by Tribal members due to the mercury-based fish consumption advisories; (2) the interim lost use of an uncontaminated river; and (3) the interim lost use of the injured natural resources for cultural purposes. The Tribes’ first lost use claim measures the Tribes’ reduced river use due to the

mercury-based fish advisories issued over the years and applies an enhanced value based on the role of fishing in the Colvilles' culture. The Tribes' second claim is derived from a contingent valuation study that was based on the nonuse or "existence value" of an uncontaminated Upper Columbia River. The Tribes' third claim reflects the Tribes' alternative measure of damages for use and nonuse service losses as a result of the injured natural resources. The Tribes acknowledge that their uses of the injured natural resources include a cultural component because of their unique relationship with the Upper Columbia River.

We agree with the district court that natural resource damages under CERCLA are only available to address injury to natural resources. Natural resources are defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources." 42 U.S.C. § 9601(16); 43 C.F.R. § 11.14(z). But, contrary to the district court's conclusion, this definition does not mean that natural resource trustees can only recover damages to restore or replace natural resources that are directly injured by the release of a hazardous substance. Congress made this explicit by instructing that natural resource damages "shall not be limited by the sums which can be used to restore or replace natural resources." § 9607(f)(1). Section 9651(c)(2) requires that the regulations for assessing natural resource damages consider, among other factors, "use value," and read together with § 9607(f)(1)'s "shall not be limited by" language, directs that "the measure of damages must not only be sufficient to cover the intended restoration or replacement uses in the usual case but may in some cases exceed restoration cost by incorporating interim lost use value as well." *State of Ohio*, 880 F.2d at 448. This means that natural resource damages under CERCLA "normally include restoration costs at a

minimum, plus interim lost-use value in appropriate cases.” *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 772 (9th Cir. 1994) (emphasis omitted) (quoting *State of Ohio*, 880 F.2d at 454 & n.34). The Tribes seek damages for their interim lost use of injured natural resources, and the district court erred by rejecting the Tribes’ claims as claims for cultural resource damages without assessing whether CERCLA authorizes damages for lost uses of injured natural resources in cases where the lost uses have a cultural dimension. We complete that analysis here.

We start with CERCLA’s text. When Congress ordered the President to promulgate regulations to guide the assessment of natural resource damages, it included a broad array of recoverable damages in its directive. The regulations had to:

identify the best available procedures to determine such damages, including *both direct and indirect injury*, destruction, or loss and shall take into consideration factors *including, but not limited to*, replacement value, *use value*, and ability of the ecosystem or resource to recover. § 9651(c)(2) (emphasis added).

Congress did not limit the types of recoverable natural resource damages, nor specify the types of approved “uses.” *See id.*; § 9607(f)(1). Instead, it provided that recoverable damages must include at least those specified in the statute, including “use value.” § 9651(c)(2).

CERCLA does not define “use value,” *id.*, so this term is given its ordinary meaning. *U.S. Commodity Futures Trading Comm’n v. Monex Credit Co.*, 931 F.3d 966, 973 (9th Cir. 2019). Webster’s Dictionary in 1979, the

year before CERCLA was enacted, defined “use” to include “a method or manner of employing or applying something” and “a particular service or end.” *Webster’s New Collegiate Dictionary* 1279 (1979). Nothing in this common meaning of the word suggests that lost uses that have a cultural component fall outside the scope of recoverable lost use damages authorized by the statute. *See* § 9651(c)(2).

Interpreting CERCLA to authorize damages for the lost use of injured natural resources where the lost use has a cultural component is consistent with CERCLA’s restorative purpose. A core pillar of the statute’s purpose is to “assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.” *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997). Although response actions are one method towards accomplishing this objective because they seek to remove or isolate hazardous substances from the environment to prevent or minimize future harm from the contamination, such response costs are not designed to repair the harm to natural resources that occurred while the contamination was not yet contained, including the disruption of any human uses of the natural resources. *See* § 9607(a). This is where a cultural component of natural resource damages must be considered. *See* § 9607(a)(4)(C). Reading in new limitations to CERCLA’s natural resource damages provisions, such as by holding that CERCLA does not authorize damages for the lost use of injured natural resources where the lost use has a cultural component, would fall short of “Congress’s intent to [permit] recover[y] for the full damages resulting from a release.” *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Interior*, 134 F.3d 1095, 1112 (D.C. Cir. 1998) (citing *State of Ohio*, 880 F.2d at 464). It is clear beyond doubt that Congress aimed at providing full recovery of any damages to those persons

harmed by the loss of natural resources. To do that, damages occasioned by lost human activities must be considered.

The D.C. Circuit's opinion in *State of Ohio*, which the district court acknowledged it did not consider when dismissing the Tribes' interim lost use claims, also supports our holding that CERCLA authorizes damages for the lost use of injured natural resources including where the lost use has a cultural component. In *State of Ohio*, the D.C. Circuit held that Congress intended the regulations assessing natural resource damages to "capture fully all aspects of loss[,] and to "permit trustees to derive use values for natural resources by summing up all reliably calculated use values," including "passive' use," or "nonuse" values, like "existence values" which "reflect utility derived by humans from a resource and thus, *prima facie*, ought to be included in a damage assessment." 880 F.2d at 463–64, 476 n.77. We agree with the D.C. Circuit that CERCLA authorizes lost use claims based on "reliably calculated" values that "reflect utility derived by humans from a resource," provided that "the trustee does not double count [the values.]" *Id.* at 464. Under the D.C. Circuit's interpretation of § 9651(c)(2), passive uses like "existence values" are an authorized measure of damages under the statute, and we see no reason why the Tribes' lost use claims, which include both active and passive uses of injured natural resources bearing cultural significance, would fall outside CERCLA's broad scope because their lost uses "reflect utility derived by humans from a resource." *See id.* at 463–64. Whether the Tribes can prevail on their damages claims will include questions about methodology and whether the Tribes' claims include any double counting, but these factual issues can only be properly determined after trial and full consideration of the evidence, including expert testimony. It was error for the district court to

dismiss the Tribes' claims as a matter of law by characterizing the claims as unauthorized under CERCLA. The fact issues not yet determined require a trial, not a summary judgment.

Next, we address the two cases the district court relied upon in its order, which we conclude are unpersuasive: *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003) and *In re Gold King Mine Release*, 669 F. Supp. 3d 1146 (D.N.M. 2023). Neither case addresses damages for the interim lost use of injured natural resources under CERCLA, and therefore, neither case affects our analysis or conclusion that the Tribes' damages claims are authorized under CERCLA.

First, in *Coeur d'Alene Tribe*, the district court made a factual finding that reads like a legal conclusion, stating that “[c]ultural uses of water and soil by the Tribe are not recoverable as natural resource damages.” 280 F. Supp. 2d at 1107. The court did not provide any statutory interpretation analysis or other reasoning why interference with cultural uses due to contamination of natural resources was not a cognizable claim for natural resource damages under CERCLA. *Id.* Without any analysis of lost use claims or discussion of the D.C. Circuit’s opinion in *State of Ohio*, this case is unpersuasive.

We also conclude that *In re Gold King Mine Release* is not persuasive. In that case, the district court examined the issue of whether certain “restorative damages claims” brought by the Navajo Nation under state tort law were preempted by CERCLA’s natural resource damages provisions. 669 F. Supp. 3d at 1159–60. The damages the Navajo Nation sought were for the stated purpose of restoring the confidence of the Navajo Nation’s members in the San Juan River as a natural resource. *Id.* at 1156. In holding that the claims were not preempted by

CERCLA, the district court rejected the defendant's characterization of the claim as one for natural resource damages and said that, while the claim was connected to the contamination from a gold mine spill, the restorative damage claims sought to remedy "injuries that are distinct from the injury to the River." *Id.* at 1160. Here, determining whether the Colvilles' damages claims seek to remedy injuries that are distinct from the injury to the Upper Columbia River is a factual question that the district court will need to determine on remand, but this factual question is separate and apart from the legal question we are tasked with answering on appeal: whether CERCLA authorizes damages for the interim lost use of natural resources when the lost use has a cultural component. Because *In re Gold King Mine Release* does not analyze the scope of natural resource damages under CERCLA, let alone the recoverability of damages for the interim lost use of injured natural resources, it too does not support dismissal of the Tribes' damages claims at the summary judgment stage. *See id.* at 1157–60.

We hold that the district court reversibly erred when it concluded that the Tribes sought damages for injuries to cultural resources and that cultural resource damages are not authorized under CERCLA. Nothing in the statute or in the caselaw suggests that interim lost uses of injured natural resources which have a cultural component, either because cultural perspectives inform the determination of the value of the interim lost use or because the injured natural resources have cultural uses, should be excluded as a matter of law from lost use damages authorized by CERCLA under § 9651(c)(2). We reverse the district court's dismissal and remand the case for trial to determine whether the Tribes have sustained any damages from lost uses of injured natural resources.

IV. CONCLUSION

For the reasons stated herein, we reverse the district court's grant of summary judgment rejecting the Tribes' separate claims for natural resource damages and remand the case for trial.

REVERSED AND REMANDED FOR TRIAL.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an
individual and enrolled
member of the Confederated
Tribes of the Colville
Reservation; and DONALD R.
MICHEL, an individual and
enrolled member of the
Confederated Tribes of the
Colville Reservation, and THE
CONFEDERATED TRIBES
OF THE COLVILLE
RESERVATION,

Plaintiffs,

and

THE STATE OF
WASHINGTON,

Plaintiff-
Intervenor,

v.

TECK COMINCO METALS,
LTD., a Canadian corporation,
Defendant.

No. 2:04-CV-00256-
SAB

**ORDER
GRANTING
RENEWED
MOTION FOR
INTERLOCUTORY
APPEAL**

Pending before the Court is Plaintiff CCT's Renewed
Motion for Immediate Interlocutory Review Pursuant to

28 U.S.C. § 1292, ECF No. 2905. Upon review, and being fully informed, Plaintiff CCT's motion is granted.

FACTS AND PROCEDURAL HISTORY

The facts of this case are well established. Similar to the other claims in this dispute, Plaintiff's cultural resource damage/service loss¹ claims arise from discharges of slag and effluents from Defendant's Trail, British Columbia smelter along the Upper Columbia River and Lake Roosevelt. Plaintiff CCT asserts that their altered relationship with the Columbia River is a specific cultural resource damage unto themselves. Therefore, Plaintiff CCT's claims are in addition to their CERCLA natural resource damage claims which are jointly sought with Plaintiff State of Washington. This matter involves the potential of over \$1 billion in damages. Plaintiff CCT's assessment of cultural resources damages are a significant portion of this matter's overall damages.

On February 6, 2024, this Court granted Defendant's motion granting partial summary judgment as to cultural resource damages, ECF No. 2831. This Court then denied Plaintiff CCT's motion to reconsider concerning this issue on April 10, 2024, ECF No. 2869. On June 20, 2024, the Ninth Circuit of Appeals denied appeal without prejudice and requested findings by this Court as required by *Couch*, ECF No. 2896.

LEGAL STANDARD

28 U.S.C. § 1292(b) provides a process for immediate interlocutory appeal of a court's order(s). The party pursuing the interlocutory appeal bears the burden of

¹ The parties disagree about the characterization of these claims. For clarity and efficiency, this Order will refer to them as cultural resource damages.

demonstrating appeal is appropriate. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met, as follows: (1) it involves a controlling question of law; (2) it has a substantial ground for a difference of opinion; and (3) immediate review will materially advance the ultimate termination of this litigation. *Id.*

“To determine if a “substantial ground for difference of opinion” exists under § 1292(b), courts must examine to what extent the controlling law is unclear. *Id.* “Courts traditionally [] find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.” *Id.* A party’s strong disagreement with the Court’s ruling or whether settled law might be applied differently does not establish a substantial ground for difference of opinion. *Id.* Substantial grounds for a difference of opinion on a controlling question of law are present where an order “involves an issue over which reasonable judges might differ and such ‘uncertainty provides a credible basis for a difference of opinion’ on the issue,” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

DISCUSSION

This case involves the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as Superfund, which provides courses of action for environmental remediation. CERCLA is controlling law in this matter as it forms the foundation of Plaintiff CCT’s claims.

There is a conflict between the holding in *State of Ohio* which claims ‘nonuse’ services are actionable under CERCLA and this Court’s Order determining that such claims are not cognizable under CERCLA if they involved damages with a cultural component. *See State of Ohio v. United States Dep’t of Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989). This Court’s order granting partial summary judgment did not address the D.C. Circuit’s ruling in *State of Ohio*. This Court instead relied on district court cases from within the Ninth Circuit finding that found there are no express or implied references to cultural resource damages in the language of CERCLA. *See Couer d’Alene Tribe v. Asarco*, 280 F. Supp 2d 1094 (D. Idaho 2003) and *In re Gold King Mine*, 669 F. Supp. 3d 1146 (D.N.M. 2023).

The scope of CERCLA’s applicability will materially affect the outcome of this litigation in district court. This matter involves the potential for over \$1 billion in environmental damage. Clarity will not only provide an understanding of CERCLA’s applicability related to cultural resource damages, but also allows the parties to properly assess their risk in this litigation. Furthermore, a potential Ninth Circuit order can have broader significance on the viability of similar claims.

Immediate review will hasten completion of this long-running litigation. This Court is concerned that this matter could fragment into multiple trials. A singular trial will best promote judicial efficiency and serves the interests of justice. Determining the parameters of that singular trial will benefit the parties and this Court.

Plaintiff CCT has demonstrated a need for interlocutory appeal pursuant to § 1292(b).

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff CCT's Renewed Motion for Immediate Interlocutory Review Pursuant to 28 U.S.C. § 1292, ECF No. 2905, is **GRANTED**.

2. The cultural resource damages dispute under CERCLA meets the three-factor test outlined in *Couch v. Telescope Inc.* Therefore, the issues related to this Court's Order Granting Defendant's Motion for Partial Summary Judgment on Cultural Resource Damages, ECF No. 2831, is **certified for immediate interlocutory appeal** pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The District Court Clerk is hereby directed to file this Order and provide copies to counsel.

DATED this 9th day of July 2024.

/s/ Stanley A. Bastian
Stanley A. Bastian
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS,
an individual and enrolled
member of the
Confederated Tribes of the
Colville Reservation; and
DONALD R. MICHEL, an
individual and enrolled
member of the
Confederated Tribes of the
Colville Reservation, and
THE CONFEDERATED
TRIBES OF THE
COLVILLE
RESERVATION,

Plaintiffs,

and

THE STATE OF
WASHINGTON,

Plaintiff-
Intervenor,

v.

TECK COMINCO
METALS, LTD., a
Canadian corporation,

Defendant.

No. 2:04-CV-00256-
SAB

**ORDER DENYING
MOTION FOR
RECONSIDERATION**

Before the Court is Plaintiff Confederated Tribes of the Colville Reservation's Motion for Reconsideration or in the Alternative for Immediate Review Pursuant to 28 U.S.C. § 1292, ECF No. 2838.

Plaintiff Confederated Tribes of the Colville Reservation (CCT) requests that the Court reconsider its Order Granting Defendant's Motion for Partial Summary Judgment on Cultural Resource Damages, ECF No. 2831, or certify the controlling issues of law for appeal to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

CCT argues that CCT had not previously asserted any claims for "cultural resource damages" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Teck's motion encouraged this error by conflating resource injury and resulting service loss by labelling them both "cultural." CCT states that this framing misconstrued CCT's natural resource damage claim and distracted this Court from the regulatory framework and supporting authority. Upon review, and being fully informed, this Court disagrees and denies the motion and certifies the controlling issues of law for appeal pursuant to 28 U.S.C. § 1292(b).

Reconsideration is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration may be reviewed under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or 60(b) (relief from judgment). *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). "A district court may properly reconsider its decision if it '(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was

manifestly unjust, or (3) if there is an intervening change in controlling law.” *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *Sch. Dist. No. 1J*, 5 F.3d at 1263). “There may also be other, highly unusual, circumstances warranting reconsideration.” *Sch. Dist. No. 1J*, 5 F.3d at 1263. Whether to grant a motion for reconsideration is within the sound discretion of the court. *Navajo Nation v. Confederate Tribes and Bands of the Yakima Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

Plaintiff did not meet the standard for reconsideration outlined in case law. No new evidence was discovered, nor did the Court commit clear error or make an initial determination that was manifestly unjust, and there was not an intervening change in controlling law. Whether termed cultural resource damages or lost services, this is not the type of loss contemplated by Congress when passing and amending CERCLA. Therefore, CCT’s motion for reconsideration is denied and the Court certifies this issue for appeal pursuant to 28 U.S.C. § 1292(b)

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff Confederated Tribes of the Colville Reservation’s Motion for Reconsideration or in the Alternative for Immediate Review Pursuant to 28 U.S.C. § 1292, ECF No. 2838, is **DENIED**.

2. The controlling issues of law related to service loss/cultural resource damages under CERCLA are certified for appeal pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The District Court Clerk is hereby directed to file this Order and provide copies to counsel.

28a

DATED this 10th day of April 2024.

/s/ Stanley A. Bastian
Stanley A. Bastian
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an
individual and enrolled member
of the Confederated Tribes of
the Colville Reservation; and
DONALD R. MICHEL, an
individual and enrolled member
of the Confederated Tribes of
the Colville Reservation, and
THE CONFEDERATED
TRIBES OF THE COLVILLE
RESERVATION,

Plaintiffs,

and

THE STATE OF
WASHINGTON,

Plaintiff-
Intervenor,

v.

TECK COMINCO METALS,
LTD., a Canadian corporation,

Defendant.

No. 2:04-CV-00256-
SAB

**ORDER
GRANTING
DEFENDANT'S
MOTION FOR
PARTIAL
SUMMARY
JUDGMENT ON
CULTURAL
RESOURCE
DAMAGES**

Before the Court is Defendant Teck Cominco Metals,
Ltd.'s Motion for Partial Summary Judgment on the
Colville Tribes' "Tribal Service Loss" Claim, ECF No.

2777. The Court held oral argument on the motion on December 14, 2023 in Spokane, Washington.

Plaintiff Confederated Tribes of the Colville Reservation (“Plaintiff”) proposes three “tribal service loss”¹ damage measurements under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Defendant argues Plaintiff’s claims for cultural resource damages fail as a matter of law and are thus not recoverable under CERCLA. The Court finds there are no disputes of material fact that preclude partial summary judgment as to cultural resource damages and, having considered the parties’ briefing, case record, applicable law, the Court concludes that the cultural resource damages are not recoverable as a matter of law. Therefore, Defendant’s motion for partial summary judgment is granted.

FACTS

The facts of this case are well established. Similar to the other claims in this dispute, Plaintiff’s cultural resource damage claims arise from discharges of slag and effluents from Defendant’s Trail, British Columbia smelter along the Upper Columbia River and Lake Roosevelt (“the Columbia River”). Plaintiff asserts that their altered relationship with the Columbia River is a specific cultural resource damage unto themselves. Therefore, Plaintiff’s claims are in addition to their CERCLA natural resource damage claims which are jointly sought with Plaintiff State of Washington.

Plaintiff utilized three separate approaches to develop monetary proof of cultural resource damages. Plaintiff’s first damage measure is a \$114.6 million

¹ The Court will refer to ‘tribal service loss’ as “Cultural Resource Damages” throughout this Order.

“Restoration Plan” which seeks to address erosion of Plaintiff’s culture. The Restoration Plan seeks to, among other initiatives, fund new cultural facilities, programs, and purchase land adjacent to the Columbia River. Second, Plaintiff’s experts conducted a survey of damages concerning “cultural disconnection from the [Columbia] River” which asked respondents to choose between two hypothetical options (a given amount of sediment removal or the purchase of a given amount of land. The survey concluded that the value of the “service losses” is between \$165 million and \$525 million. Finally, Plaintiff proposes damages of \$9 million to \$13.6 million for alleged cultural fishing losses.

LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

In addition to showing there are no questions of material fact, the moving party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of a claim on which the

non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

DISCUSSION

CERCLA creates a right to recover natural resource damages for “injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.” 42 U.S.C. § 9607(a)(4)(C). Natural resource damages, under CERCLA, are to compensate the public by providing for the recovery of the funds that are necessary – and by law must actually be used – to restore or replace injured natural resources. 42 U.S.C. § 9607(f)(1).

CERCLA defines natural resources as the following:

Natural resources or resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation,

any member of an Indian tribe. **These natural resources have been categorized into the following five groups: Surface water resources, ground water resources, air resources, geologic resources, and biological resources.**

43 C.F.R. § 11.14(z) (emphasis added).

The only courts to speak directly to the recovery of cultural resource damages, rejected the concept. *See Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1107 (D. Idaho 2003) (“cultural uses of water and soil by the tribe are not recoverable as natural resource damages”); *see also In re Gold King Mine Release in San Juan Cnty., Colorado*, on Aug. 5, 2015, No. 16-CV-931, --- F. Supp. 3d ---, 2023 WL 2914718 (D.N.M. Apr. 12, 2023) (finding that cultural resource damage claims, such as the lost confidence in a river, are not natural resource damages and therefore not recoverable by CERCLA).

There is no express or implied reference to cultural resources in the language of CERCLA. Whether reviewing CERCLA itself or relevant regulations or case law, there is no reference to ‘cultural’ or ‘tribal service’ damages. Neither the statute nor the regulations reference a cultural or tribal ‘connection’ or ‘relationship’ with a particular resource, let alone possible recovery from loss or damage to that connection or relationship. Though the impacts of Defendant’s smelter facility’s environmental contamination on the Columbia River are serious, cultural resource damages are simply not recoverable under CERCLA. Therefore, the Court grants Defendant’s motion for partial summary judgment as to cultural resource damages.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Teck Metal Ltd.'s Motion for Partial Summary Judgment on the Colville Tribes' "Tribal Service Loss" Claim, ECF No. 2777, is **GRANTED**.

IT IS SO ORDERED. The District Court Clerk is hereby directed to enter this Order and to provide copies to counsel.

DATED this 6th day of February 2024.

/s/ Stanley A. Bastian
Stanley A. Bastian
Chief United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES
OF THE COLVILLE
RESERVATION,

Plaintiff - Appellant,

and

JOSEPH A. PAKOOTAS, an
individual and enrolled member
of the Confederated Tribes of
the Colville Reservation and
DONALD R. MICHEL, an
individual and enrolled member
of the Confederated Tribes of
the Colville Reservation,

Plaintiffs,

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

TECK COMINCO METALS
LTD, a Canadian corporation,

Defendant - Appellee.

No. 24-5565

D.C. No.

2:04-cv-00256-SAB

Eastern District of
Washington,

Spokane

ORDER

Before: GOULD and PAEZ, Circuit Judges, and McSHANE, Chief District Judge.*

The full court has been advised of Defendant-Appellee's Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 40. The Petition for Rehearing En Banc is **DENIED**.

* The Honorable Michael J. McShane, United States Chief District Judge for the District of Oregon, sitting by designation.

APPENDIX F

§ 9601. Definitions

For purpose of this subchapter—

...

(6) The term “damages” means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title.

...

(14) The term “hazardous substance” means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas

liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

...

(16) The term “natural resources” means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]), any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by

another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term “comparable

maturity” shall be determined with reference to the date on which interest accruing under this subsection commences.

...

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United

States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of title 33 for those resources under their trusteeship

and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of title 33.

**SUBCHAPTER III—MISCELLANEOUS
PROVISIONS**

§ 9651. Reports and studies

...

(c) Regulations respecting assessment of damages to natural resources

(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 9605 of this title, shall study and, not later than two years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of title 33. Notwithstanding the failure of the President to promulgate the regulations required under this subsection on the required date, the President shall promulgate such regulations not later than 6 months after October 17, 1986.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

...

(e) Adequacy of existing common law and statutory remedies

(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by

the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of December 11, 1980.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address—

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed \$300,000.