Natural Resource Damages/CERCLA: Federal Appellate Court Addresses Scope



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The Ninth Circuit Court of Appeals ("Ninth Circuit") addressed in a September 3rd Opinion an issue associated with the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") term "natural resources." *See Confederated Tribes of the Colville Reservation v. Teck Cominco Metals Ltd,* No. 24-5565, 2025 WL 2525853 at *1 (9th Cir. Sept. 3, 2025).

The question considered was whether CERCLA authorizes recovery of damages for lost use of natural resource damages that have a cultural dimension.

The Confederated Tribes of the Colville Reservation ("Tribes") brought a CERCLA citizen suit against Teck Cominco Metals Ltd. ("Teck") concerning discharges from its lead-zinc smelter into the Upper Columbia River between 1930 and 1995. The State of Washington joined the Tribes as a plaintiff-intervenor.

The United States District Court ("Court") broke the litigation into three phases.

Teck was found liable to the Tribes and the State as an arranger under CERCLA and therefore jointly and severally liable to the tribes and Washington for past or future response costs.

Phase two of the trial resulted in a judgment of over $8 million in favor of the Tribes for past CERCLA response costs.

In phase three the Court sought to determine Teck's liability for damages to natural resources due to the releases of lead-zinc. The Tribes and the State of Washington jointly sought damages to natural resources. However, the Tribes also moved separately to recover for their interim lost use of the Upper Columbia River. They sought compensation for cultural uses of natural resources which they argued included fishing, gathering, and related activities.

CERCLA defines "natural resources" broadly to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources..." The statute limits "natural resources" to those resources held in trust for the public, termed Trust Resources. CERCLA states that a "natural resource" is a resource "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States, any State, an Indian Tribe, a local government, or a foreign government [CERCLA §101(16); OPA §1001(20)].

Natural Resource Damages are for injury to, destruction of, or loss of natural resources, including the reasonable costs of a damage assessment (see CERCLA §§101(6); 107(a)(4)(C); OPA §§1001(5); 1002(b)(2)). The measure of damages is the cost of restoring injured resources to their baseline condition,

compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage assessment.

The Tribes asserted three reasons to justify claims for damages from interim lost use:

1. Damage to the Columbia River resulted in reduced tribal fishing trips due to state advisories warning of high mercury levels in fish.
2. The interim lost use of an uncontaminated river.
3. The interim lost use of injured natural resources for cultural purposes.

Teck moved for partial summary judgment on the claims for interim lost use. It contended that "CERCLA does not authorize natural resource damages for cultural service losses." The Court granted the motion.

The Ninth Circuit granted interlocutory review of the district court's summary judgment award to Teck. It reversed the Court's decision and remanded for trial.

Looking to the language of 42 U.S.C. § 9607(f)(1), the Ninth Circuit made clear that liability under CERCLA, while constrained to address injury to natural resources, "shall not be limited by the sums which can be used to restore or replace such resources." Relying on a prior D.C. Circuit Court of Appeals decision, the Ninth Circuit interpreted this language to mean that under CERCLA, natural resources damages can include restoration costs at a minimum. Further, interim lost use value may be recovered in appropriate cases. See State of Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 454 (D.C. Circuit 1989).

In recognizing interim lost use, the Ninth Circuit looked to § 9651 (c)(2)'s inclusion of "use value" as a factor to be considered when determining damages. CERCLA's failure to define "use value" was held to mean that "use" should receive its ordinary meaning. The Ninth Circuit concluded that "use" should be defined as "a method or manner of employing or applying something." This definition was held to not bar cultural components from being considered in the determination of damages for lost use.

Therefore, the Court held that CERCLA places no bar on the consideration of cultural components when determining the value of interim lost use from injured natural resources. If the Tribes can prove at trial a "reliably calculated" value reflecting the "utility derived by humans from a resource," cultural components may be considered in the determination of damages stemming from lost use.

A copy of the Opinion can be downloaded here.