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RESPONDING TO DANGERS POSED BY HAZARDOUS SUBSTANCES: AN OVERVIEW OF CERCLA'S LIABILITY AND COST RECOVERY PROVISIONS AS THEY RELATE TO INDIAN TRIBES

Steven H. Berlant*

Introduction

Hazardous substance contamination is a nationwide problem that affects all living things. Over the last century land, air, surface water, and groundwater have been heavily contaminated by persons who spilled, dumped, or otherwise disposed of a multitude of chemicals and heavy metals. Today, well over thirty thousand sites contaminated with hazardous substances exist throughout the United States. Tribal lands have not been spared this problem. In 1985, a survey of twenty-five reservations identified more than sixty-five sites of contamination with many more near reservation boundaries.


Throughout this article, the Review will give United States Code citations to sections of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). However, legal scholars and practitioners often cite the originally-numbered sections of the Act as printed in Statutes at Large. The original act can be found at Pub. L. No 96-510, 94 Stat. 2767-811 (1980), and its amendments in portions of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613-782 — Ed.

1. "Hazardous substance" is used in its singular form throughout this article, but the term may also be used in its plural form without a change in analysis. For further explanation of what constitutes a hazardous substance, see infra notes 13, 17.


The sources of contamination are numerous, ranging from large industrial complexes to improper disposal of household solvents (cleaning agents). Automobile repair shops, mining operations, and wood treatment facilities comprise a few of the common sources of potential contamination. Also, improperly disposed-of containers of solvents, pesticides, and other chemicals pose a serious threat of hazardous substance contamination.

Fortunately, if hazardous substance contamination is found, measures can be taken to remediate the contaminated area. The most powerful legal tool for cleaning up sites located within Indian Country, and elsewhere in the nation, is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA was enacted in 1980 after Congress determined that the risks posed to human health, welfare, and the environment by hazardous substances were too great and could no longer be ignored. CERCLA provides for abatement and control over the vast problems associated with the improper disposal of hazardous substances. CERCLA's primary implementation strategy is based on the congressional determination that persons "who bore the fruits of hazardous waste disposal [must] also bear the costs of cleaning it up." Thus, CERCLA

4. "Indian Country" is defined as
(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

5. The Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (current version at 42 U.S.C. § 9601-9675 (1988)). There is more to CERCLA than just its liability and cost recovery provisions. For example, there are provisions concerning the use of the Hazardous Substance Response Trust Fund (the Superfund), federal response and abatement authorities, and various penalty provisions. Tribes may use such provisions to attain site remediation but the level of complication and governmental red tape can grow exponentially depending upon which section is implemented. There are ways to reduce the level of complication but such a discussion is well beyond the scope of this article because this article deals exclusively with CERCLA's liability and cost recovery provisions.

6. Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986). Moreover, Congress, in developing CERCLA's statutory scheme, intended that "society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise
places the financial burden of cleanup costs on the persons responsible for a site's contamination.\textsuperscript{7}

Congress, in enacting amendments to CERCLA in 1986,\textsuperscript{8} expressly provided Indian tribes\textsuperscript{9} with the authority to respond to hazardous substance contamination found within Indian Country. Section 9607(a)(1)-(4)(A),\textsuperscript{10} the Act's liability and cost

benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created." United States v. Shell, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,339, 22 Env't Rep. Cas. (BNA) 1473, 1478 (D. Colo. 1985) (citing S. REP. No. 96-848, 96th Cong., 2d Sess. at 98 (1980)).


8. See SARA, § 207(c). This section is the same as 42 U.S.C. § 9607(A) (1988).

9. "Indian tribe" is defined in CERCLA, as in other federal statutes, in a limiting way, to restrict a broad application. For purposes of CERCLA, in order for a tribal body to be an "Indian tribe," the tribal body must be an "Indian tribe, band or nation, or other organized group or community, including any Alaska Native Village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians." 42 U.S.C. § 9601(36) (1988) (emphasis added). A tribal body that does not fall within this definition is still able to proceed under CERCLA as a private citizen's group pursuant to \textit{id.} § 9607(a)(1)-(4)(B).

10. Section 9607(a)(1)-(4)(A) provides:

Notwithstanding any other provision or rule of law and subject only to the defenses set forth in section (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 the 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 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; . . .

recovery section, grants Indian tribes, the federal government, and states\footnote{Jurisdictional limitations prevent a state from responding to hazardous substance contamination found within Indian Country unless a tribe grants jurisdiction over the matter to the state through a cooperative agreement. However, the United States Government, represented by the U.S. Environmental Protection Agency, (EPA), has authority to implement the provisions of CERCLA both within Indian Country and throughout the States. See id. § 9607(a)(1)-(4)(A).} identical authority to enforce CERCLA's liability provisions and to recover hazardous substance cleanup costs from responsible parties.\footnote{Note that state and federal governments each have standing to implement CERCLA's liability and cost recovery provisions. Id. §§ 9601(27), 9607(a)(1)-(4)(A). See also id. §§ 9601(21), 9607(a)(1)-(4)(B) (standing extends to municipalities, businesses, and private citizens). Nevertheless, for purposes of this article, only a tribe's use of CERCLA's liability and cost recovery provisions is discussed.} The next section sets out the elements of liability which must be established by a tribe (as plaintiff) in order for CERCLA liability to attach to a potentially responsible party.

**Establishing CERCLA Liability**

The elements of liability to be established by a tribe, pursuant to a section 9607 action, include a showing that a release of a hazardous substance has or may occur at a location; that the release has or threatens to enter the environment; that the tribe has incurred reimbursable costs in responding to the hazardous substance; and that the tribe has identified the persons responsible for the hazardous substance contamination. The following discusses the elements of section 9607 liability in their component parts.

**Release or Threatened Release into the Environment**

A tribe must show that a release or threatened release of a hazardous substance\footnote{The term "hazardous substance" is defined in id. § 9601(14). See also infra note 17. Petroleum, natural gas, natural gas liquids, liquefied natural gas, and synthetic gas used for fuel are not "hazardous substances" for CERCLA purposes.} into the environment exists. A "release" of a hazardous substance includes actions such as spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment.\footnote{See 42 U.S.C. § 9601(22) (1988).} A release of any detectable amount of a hazardous substance is sufficient to meet the test of a "release."\footnote{United States v. Wade, 577 F. Supp. 1326, 1339-40 (E.D. Pa. 1983). Proof of most releases can be obtained through a 42 U.S.C. § 9603(a) notification, by site sampling, or through other litigation-oriented discovery techniques.} "Environment" encompasses surface water,
groundwater, land surface, or subsurface strata or ambient air within the United States.\textsuperscript{16}

In order to prevent potential releases of hazardous substances into the environment, CERCLA liability is not limited to past releases, but also extends to threatened releases. Congress by no means intended CERCLA's provisions to lay dormant until an actual release of a hazardous substance has occurred. For example, spilling a hazardous substance in an indoor workshop would not be a release into the environment. But if the spilled hazardous substance was likely to enter into the environment (through a floor drain, into a leach field, or through a wall, window, floor, etc.), a threat to the environment would exist.

\textit{Hazardous Substances}

The term "hazardous substance" is quite expansive and includes most chemical substances and naturally-occurring heavy metals, some of which are already regulated under various environmental statutes.\textsuperscript{17} One or more hazardous substances must be found at the contaminated site in order for CERCLA liability\textsuperscript{18} to attach.

\textit{Facility}

A release or threatened release of a hazardous substance must occur at a "facility."\textsuperscript{19} Essentially, a "facility" is any place where hazardous substances are located. If sampling and laboratory testing confirm the presence of hazardous substances at the contaminated site, then the site is a facility for purposes of CERCLA.

\textit{Response Costs Must Be Incurred}

Response costs must have been incurred\textsuperscript{20} by a tribe before

\footnotesize
\begin{itemize}
  \item[17.] See, e.g., id. § 9602. Title 40 C.F.R. § 302.4 provides a list of CERCLA hazardous substances.
  \item[18.] Courts have uniformly determined that strict liability applies to 42 U.S.C. § 9607. See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983); see also 42 U.S.C. § 9601(32) (1988). Strict liability imposes liability without the need to show that the defendant intended a result to occur. A defendant does not have to intend to pollute in order to be liable for the pollution. \textsc{Black's Law Dictionary} 741 (5th ed. 1983).
  \item[19.] "Facility" is defined in id. § 9601(9).
  \item[20.] "Incur" is not defined in the current version of CERCLA. The term has been interpreted to refer to funds that have actually been paid and for services contracted for but not yet performed. See, e.g., United States v. Wade, 577 F. Supp. 1326, 1335 (E.D. Pa. 1983).
\end{itemize}
commencing a CERCLA response cost recovery action.\textsuperscript{21} There is no statutory provision which specifies a minimum amount of response costs that must be incurred. In order to determine exactly what costs are recoverable, the term "response cost"\textsuperscript{22} needs to be scrutinized. "Response cost" appears in section 9607(a), though Congress failed to include the term in CERCLA's definition section. However, the term "response"\textsuperscript{23} is defined to include removal\textsuperscript{24} and remedial action.\textsuperscript{25} Thus, the actions which are incorporated

\textsuperscript{21} 42 U.S.C. § 9607(a)(1)-(4)(A) (1988). All costs incurred as of the closing date of an initial response cost recovery action are recoverable through the initial action. All future response costs, i.e., response costs incurred after the initial cost recovery action had concluded, incurred by the tribe may be recoverable through a declaratory judgment.

\textsuperscript{22} The term "response costs" appears in id. § 9607(a). "Although the term response costs is not defined in CERCLA, response is defined to mean remove, removal, remedy and remedial action." United States v. Conservation Chem. Co., 619 F. Supp. 162, 186 (W.D. Mo. 1985).


\textsuperscript{24} CERCLA has defined the terms "remove" or "removal" as follows:

\textsuperscript{25} The terms "remedy" or "remedial action" are defined as follows:

\url{https://digitalcommons.law.ou.edu/ailr/vol15/iss2/3}
in the definitions of “removal” and “remedial action” are response actions. Costs incurred for such response actions are, therefore, response costs.

**Inconsistency with the NCP**

All response costs\(^26\) incurred by the tribe related to a facility must have been incurred “not inconsistent with”\(^27\) the national contingency plan (NCP).\(^28\) The NCP consists of regulations, promulgated by EPA, which implement the provisions of CERCLA. Federal court interpretation of CERCLA and the NCP provides that all response costs incurred by a tribe, the United States, and states are presumed to be “not inconsistent” with the NCP.\(^29\) A potentially responsible party (PRP) has the burden of convincing the court that some or all of the response costs incurred by a tribe were incurred “inconsistent with” the NCP and, therefore, are unrecoverable.\(^30\) However, in order for re-

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storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.


The definitions of removal and remedial actions provide some specific examples but the listing is not exclusive; in other words, activities not specified in the definitions can still be recoverable as response costs.

26. CERCLA set some monetary limitations on a defendant's liability. However, these limitations pertain solely to the recovery of natural resource damages under certain circumstances. There is no liability limitation for response costs; the total cost of response is recoverable. See id. § 9607(c).

27. “Not inconsistent with” is *not* synonymous with “consistent with” when used in the context of CERCLA. The burden of proving NCP compliance shifts from defendant to plaintiff when the term “consistent with” is used pursuant to a private (nontribal, federal, or state) liability action. See id. § 9607(a)(1)-(4)(B).


30. If challenged, a tribe does not have to show that response costs incurred were not inconsistent with the NCP. Courts have concluded that when determining whether costs incurred by the EPA were inconsistent with the NCP, “defendants may only show that the EPA’s decision about the method of clean up is ‘inconsistent’ with the NCP in that EPA was arbitrary and capricious in the discharge of their duties under the NCP.” United States v. Ward, 618 F. Supp. 884, 900 (E.D.N.C. 1985). The same analysis would be available in a tribal response cost recovery context because § 9607(a)(1)-(4)(A)’s liability elements are to be established in exactly the same manner without distinguishing between a tribal, state or federal government plaintiff. While there may be exceptions to this statement, such exceptions must be specifically expressed in CERCLA, e.g., the different statute of limitation period applicable to tribes discussed infra notes 91-93 and accompanying text.
response cost recovery to be disallowed, serious procedural errors must have been made by the tribe with regard to following the NCP.31

**Responsible Parties**

The last step in proceeding with a CERCLA liability action32 is to determine financial responsibility for the remediation of the contaminated site. CERCLA established four classes of PRPs, one or more of whom can be held financially liable33 for a release or threatened release of a hazardous substance into the environment.

The first class of PRPs consists of present owners or operators of a facility where one or more hazardous substances are located. The term owner or operator encompasses anyone who presently owns or operates a "facility" and is distinguished according to the time of ownership or operation, be it present or past.34 Owners include individual and corporate titleholders of a facility.35 Operators include corporate officers who are responsible for the day-to-day operation of the facility.36

31. Section 9613(j)(4) states that "the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made." 42 U.S.C. § 9613(j)(4) (1988).

32. CERCLA actions may only be brought before the United States district courts. "Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." *Id.* § 9613(b) (1988). If a tribe wants tribal court jurisdiction over hazardous substance issues, a CERCLA-type tribal code would have to be enacted, thus giving a tribe authority to act pursuant to its own laws. CERCLA is silent as to whether tribes are preempted from enacting their own hazardous substance response laws. But see *id.* § 9614(a) (states are not preempted from enacting their own hazardous substance response laws).

33. CERCLA establishes joint and several liability among defendants. "Joint and several liability" means that a plaintiff, at his option, may sue one or more of the liable parties, separately or all together. BLACK'S LAW DICTIONARY 751 (5th ed. 1979). Hundreds of parties may be responsible for a contaminated site, but any one responsible party, whose contribution to the site's contamination was not de minimis, can be required to pay all response costs. Colorado v. Idarado Mining Co., 707 F. Supp. 1227, 1232 (D. Colo. 1989) (holding joint and several liability).

34. The term "owner or operator" is defined in 42 U.S.C. § 9601(20) (1988). Present owner or operator liability is set out in *id.* § 9607(a)(1). Land title documents, company employee records, etc., may be examined to establish owner or operator liability. Moreover, check corporate reports (if applicable) to ascertain the financial health of a potential defendant. A private investigator may also provide helpful financial (and other) information.


Past owners or operators, as the next class of PRPs, are similar to the first class in who may be considered an owner or operator. Simply put, past owners or operators must have owned or operated the facility at the time hazardous substances were disposed at the facility.

The third class of PRPs are the hazardous substance generators. A "generator" is one who arranges for disposal of hazardous substances. Arranging for disposal may be categorized as passive or active. For example, allowing a hazardous substance to leak into the environment constitutes passive disposal; deliberately dumping hazardous substances into the environment constitutes active disposal. Various techniques exist for identifying a generator. Some of the methods include: (1) looking for labels on barrels located at the facility, (2) checking waste shipping documents (i.e., manifests), (3) using witnesses to verify that a generator arranged for the disposal of hazardous substances at a facility, (4) sampling waste found at the facility to show that the waste is of the same type as a generator's wastes, and (5) utilizing other information gathering techniques. However, a party is not required "to match the waste found to each defendant as if it were matching fingerprints."

The final class of PRPs consists of hazardous substance transporters. Transporter liability exists if a transporter had selected the disposal site, instead of merely transporting a generator's hazardous substances to a site specified by the generator. Manifest documentation and party admissions may be helpful in determining whether a transporter had selected the disposal site himself.

Response Cost Classifications

After elements of liability have been established and if no defenses to liability are available, a tribe would be entitled to

38. Generator liability is set out in id. § 9607(a)(3).
recover all response costs incurred. Unfortunately, establishing a responsible party's liability does not automatically send money pouring into the tribe's coffers. There is, of course, no guarantee of either convincing a court that the elements of liability have been established by the tribe or in actually collecting monies due the tribe. A court could deny recovery of some or all response costs incurred by the tribe or the defendant may be unable to pay the judgment levied against him.

This section sets out, by specific category, a sampling of various monetary expenditures which have been designated as CERCLA response costs. These costs include monitoring expenses, litigation and administrative costs, investigation costs, site cleanup expenses and miscellaneous costs.

Monitoring Costs

Costs related to site monitoring and testing to identify the extent of danger to public health, welfare, or the environment, and costs incurred in order to identify the extent of a release or threatened release of a hazardous substance into the environment are response costs. Recoverable monitoring costs also include all aspects of field monitoring, such as air and groundwater sampling, as well as domestic septic system monitoring. Costs incurred in testing and monitoring workers and their families for contamination have also been included as response costs. Labor, materials, and expenses associated with the operation of either a mobile laboratory at the site or of an offsite laboratory can also be recovered.

Litigation and Administrative Costs

All costs incurred to enforce the provisions of CERCLA, including retaining legal representation and expert consultants

43. A PRP “shall be liable for all costs of removal and remedial action incurred by... an Indian tribe not inconsistent with the national contingency plan...” Id. § 9607(a)(1)-(4)(A) (emphasis added).
48. Id.
52. ASARCO, 616 F. Supp. at 829 (expenses for retaining expert consultants are response costs).
associated with the cleanup are examples of response costs. In addition, costs incurred to maintain an administrative support staff who are involved in the CERCLA cleanup or cost recovery action are recoverable as response costs.\textsuperscript{54}

Indirect litigation and administrative costs, \textit{i.e.}, overhead necessary to operate CERCLA response actions (rent, utilities (on-site and offsite), payroll and benefits for program managers, clerical support, and other administrative support staff) have been held to be recoverable costs.\textsuperscript{55}

\textbf{Investigation Costs}

Costs involved in identifying PRPs are response costs.\textsuperscript{56} Investigation costs associated with identifying the extent of danger to public health, welfare or the environment, as well as identifying the extent of the release or threat of release are recoverable as response costs.\textsuperscript{57} Photographs used to document site conditions are recoverable.\textsuperscript{58} Likewise, site assessment and evaluation costs are recoverable.\textsuperscript{59} Examples of site assessment or evaluation costs have been held to include hydrogeological studies,\textsuperscript{60} subsurface investigations such as seismic refraction data, ground penetration radar, a magnetometer scan, and development of a boundary survey and a base map of the site.\textsuperscript{61} Also, costs associated with planning and implementing a response action,\textsuperscript{62} including the development of a remedial investigation\textsuperscript{63} and feasibility study,\textsuperscript{64} are response costs.

\textsuperscript{56} \textit{ASARCO}, 616 F. Supp. at 829.
\textsuperscript{58} \textit{Ottati & Goss}, 694 F. Supp. at 992-93.
\textsuperscript{60} Vermont v. STACO, 684 F. Supp. 822, 834 (D. Vt. 1988).
\textsuperscript{61} \textit{Ottati & Goss}, 694 F. Supp. at 990.
\textsuperscript{62} \textit{Northeastern Pharmaceutical}, 579 F. Supp. at 850.
\textsuperscript{64} \textit{Ottati & Goss}, 694 F. Supp. at 996-97. A Feasibility Study evaluates potential solutions (remedial alternatives) to the contamination problems posed at the site.
Site Cleanup Costs

All costs associated with implementing a remedy, including the actual cleanup itself, are response costs. Costs incurred in removing hazardous substances and related contaminated items are recoverable, as are supervisory costs necessary to oversee the cleanup operation. Furthermore, Resource Conservation and Recovery Act (RCRA) waste treatment, storage, and disposal compliance costs are deemed response costs.

Miscellaneous Costs

As is evident so far, there are a multitude of costs that can be categorized as CERCLA response costs. Without trying to cover all possibilities, the following have been held to be recoverable in various federal courts as response costs:

- Habitat improvement and fish stocking costs;
- Costs incurred for emergency fire department and ambulance services;
- The cost of protective clothing;
- Costs incurred to undertake security measures at the site, such as erecting fences;
- Demolition costs at site;
- All costs related to travel expenses which were incurred in response to a release or threatened release of a hazardous substance;

69. Subtitle C of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6991i (1988), deals with hazardous waste disposal issues. "Hazardous wastes" are a subset contained within the definition of "hazardous substances." In other words, all hazardous wastes are hazardous substances but not all hazardous substances are regulated under RCRA as hazardous wastes.
73. Ottati & Goss, 694 F. Supp. at 987.
74. Id. at 988.
75. Id.
76. Id. at 987.
The cost of temporary relocation of residents who may be affected by the release or threatened release of a hazardous substance at the site or who may be harmed or threatened by cleanup operations at the site;78

Under certain circumstances, the cost of permanently relocating residents;79 and

Costs associated with preparing response cost recovery reports or other cost recovery documentation used to detail the type and amount of costs incurred in response to a release or threatened release of a hazardous substance.80

Limitations to Cost Recovery

Defenses to Liability

In addition to challenging whether response costs were incurred not inconsistent with the NCP,81 PRPs can attempt to limit response cost liability through narrowly defined defenses. CERCLA's liability section begins with these powerful words: "Not withstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . . ."82 These words emphatically state that only the three defenses set out in 42 U.S.C. § 9607(b) may be used to limit liability. These defenses are (1) an act of God; (2) an act of war; and (3) an act or omission of a third party, or a combination of the foregoing.83 A PRP must raise and establish a defense before it can be used as a shield against CERCLA liability.84 Generally, it is quite difficult for a defendant to

81. See supra note 27 and accompanying text.
83. Id. § 9607(b). See also United States v. Reilly Tar & Chem. Co., 546 F. Supp. 1100, 1118 (D. Minn. 1982); Idarado Mining, 707 F. Supp. at 1252. Case law is, however, unsettled as to whether equitable defenses apply as well. See 42 U.S.C. § 9607(i) (1988) (regarding federally-permitted releases); id. § 9607(i) (regarding the pesticide liability exemption). Further discussion of the available defenses is beyond the scope of this article.
84. As the plaintiff, a tribe must establish each of the elements of CERCLA liability. However, a defendant who raises a defense to liability has the burden of proof of showing that the defense is applicable to the case at hand. See Violet v. Picillo, 648 F. Supp. 1283, 1293 (D.R.I. 1986).
establish the factual background necessary to successfully use one of the statutory defenses. 85

Statute of Limitations

Furthermore, CERCLA’s statute of limitation requirements must be met in order for a response cost recovery suit to be considered in district court. Title 42 U.S.C. § 9613(g)(2) provides for a statute of limitations governing response cost recovery actions. 86 An initial response cost recovery suit involving removal actions must be brought within three years after the completion of the removal action. 87 An initial response cost recovery suit involving a remedial action must be brought within six years after initiation of physical onsite construction of the remedial action. 88 Subsequent response cost recoveries (i.e., a response cost recovery action which does not include response costs associated with the initial response cost recovery action) must be commenced not later than three years after the date of completion of all response actions. 89

However, a special extension of CERCLA’s statute of limitations has been granted to tribes. 90 In order for a tribe to be

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85. To avoid liability under § 107(b)’s [§ 9607(b)] defenses, a party must prove that the damages were caused solely by an act of God, an act of war[,] or an act or omission of a restricted category of third parties. Because causation is normally one of the most difficult elements to prove in a toxic waste site case, the burden of establishing any of those defenses can be overwhelming.


86. A statute of limitation is also provided for in 42 U.S.C. § 9658(a): “The discovery statute of limitations added to CERCLA in the SARA amendments is limited to personal injury or property damage causes of action under state law in situations where there is an underlying CERCLA action providing for clean up and remedial activities.” Knox v. A.C.G.S., Inc., 690 F. Supp. 752, 757 (S.D. Ind. 1988). Note that § 9658(a) does not apply to § 9607 actions.


88. Id. § 9613(g)(2)(B).

89. Id. § 9613(g)(2).

90. Section 9626(d) provides:

Notwithstanding any other provision of this chapter [CERCLA], no action under this chapter by any Indian tribe shall be barred until the later of the following:

(1) The applicable period of limitations has expired. [See id. § 9613(g)(2)].

(2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this chapter.

Id. § 9626(d) (emphasis added).
barred from recovery, one of two events must occur: 91 (1) the United States must send written notice to a tribe explaining that the United States will not attempt to present a claim concerning a specific site nor bring a CERCLA action on behalf of the tribe; or (2) the United States must fail to present a claim or file a lawsuit within three years after completion of a removal action or six years after initiation of physical onsite remedial measures. 92 If either of the two events occur, a tribe still has two additional years in which to bring a CERCLA action of its own before the statute of limitations expires.

Natural Resource Damages

Costs associated with injury to, destruction of, or loss of natural resources, including costs of assessing such injury, destruction, or loss resulting from a hazardous substance release are not recoverable as "response costs." However, these costs are recoverable as damages under 42 U.S.C. § 9607(C). 93 Natural resources include "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and such other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by ... any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." 94 An action for damages to natural resources can be maintained concurrently with an action for recovery of response costs.

Conclusion

A tribe's ability to pursue environmental cleanups can, as a practical matter, be severely hampered due to lack of funding. Private foundations may constitute a tribe's best chance of obtaining environmental remediation funding. Many charitable foundations exists to benefit positive environmental causes. Moreover, tribes should pursue grant-in-aid funding (not Superfund National Priority Listing) through EPA. However, this can be as difficult as getting water from a dry well. State funding,

91. Assume, for example, that the original three- or six-year statute of limitations, under § 9613(g)(2)(A), (B), has already expired.
92. The EPA, acting as trustee for a tribe, cannot allow the applicable statute of limitations expire by inaction without breaching the United States' trust responsibility to the tribe.
93. See also 42 U.S.C. §§ 9601(6), 9607(C) (1988). Other sections of CERCLA deal with the recovery of CERCLA damages. They will not be discussed further herein.
94. Id. § 9601(16).
although less likely than EPA funding, is worth pursuing if the political climate is favorable. Furthermore, attorney and technical expert fee agreements may be negotiated in such a way that a tribe would only have to initially pay a portion of the professional's hourly rate. The remainder of the professional's fee would be accrued and fully paid in the form of response cost reimbursement by the responsible party(s) upon successful resolution of the case at trial or by negotiated settlement. It is extraordinarily rare that a CERCLA case goes through a full trial. Typically, a negotiated settlement is reached long before trial or during the early stages of trial.

Congress continues to encourage tribes, as sovereign entities, to take a more active role in environmental protection issues. The provisions of CERCLA provide tribes with the necessary framework for responding to a release or threatened release of hazardous substances found on tribal lands. Through CERCLA, tribes can freely exercise their sovereignty with regard to hazardous substance environmental protection issues; they can take charge over cleanup and pursue cost recovery actions regarding hazardous substance contamination found on sites within their reservation.

Because EPA is overwhelmed by the thousands of CERCLA sites found across the nation, tribal governments must take the initiative to protect their people's health and welfare and to provide a safe and clean environment, free from hazardous substances. The problems associated with improper hazardous substance disposal will not be easily resolved. Fortunately, CERCLA provides the authority and the power which tribes can utilize to help find solutions.