

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	NO. CV 96-0122-N-EJL
)	NO. CV 91-0342-N-EJL
v.)	
)	
ASARCO INCORPORATED, et al.,)	
)	MEMORANDUM DECISION
Defendants,)	AND ORDER
_____)	
)	
COEUR D'ALENE TRIBE,)	
)	
Plaintiff,)	
)	
v.)	
)	
ASARCO INCORPORATED, et al.)	
)	
Defendants.)	
_____)	

Pending before the Court in the above-entitled matter are multiple motions filed by the parties. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

While the Court finds the challenge to the Court's subject matter jurisdiction meritless, the Court also finds it has inherent power to revise its rulings when justice so requires any time before final judgment has been entered in the case. Pursuant to Fed. R. Civ. P. 54(b):

[A]ny order or other form of decision however designated, which adjudicates fewer than all the claims or the rights and liabilities of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Regarding the particular issue of trusteeship, the Court finds after completing further research that it may have been in error with its prior ruling and now seeks to modify the prior ruling so that parties have adequate time to prepare for the issues to be resolved in the Phase 2 trial.

4. Trusteeship

In the Court's September 2003 Order, the Court determined there can be multiple trustees to a given natural resource, however "a given trustee cannot recover more than what its stewardship [percentage] is determined to be." Coeur d'Alene Tribe v. Asarco Inc., 280 F. Supp 2d 1094, 1116 (D. Idaho 2003). The Court indicated "during the second phase of this trial, the Court will allow the parties to submit evidence to aid the Court in determining the percentages of trusteeship over certain resources: fish, wildlife, biota, water and groundwater." Id. at 1117. The Court now modifies its earlier ruling regarding trusteeship in this case.

Most, if not all, of the appellate courts that have dealt with CERCLA recognize that it certainly is not a model of clarity, but the intent of Congress was to impose strict liability on the responsible parties. The remedial purpose of CERCLA was to give the statute a broad interpretation so as to restore and make whole the environment for the protection of the public and guard against destruction and damages to our natural resources.

Section 107(f) of CERCLA provides:

In the case of an injury to, destruction of, or loss of natural resources . . . 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. . . 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.

42 U.S.C. § 9607(f).

In order to prevent double recovery by the trustees, § 107(f)(1) of CERCLA provides in part:

There shall be no double recovery under this chapter for natural resource damages, including the cost of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource

42 U.S.C. § 9607(f)(1).

Upon further reflection and research, this Court finds that its reliance on traditional tort concepts in allocating trusteeship was misplaced and that this type of case is distinguishable from other tort actions. Under CERCLA the recovery, if any, is not for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals. At first blush, the complexity appeared to lie with the fact that more than one trustee could manage, control, or hold in trust a given natural resource and to avoid a double recovery the Court would have to determine the extent of each trustees' interest and apportion the damage accordingly. However, as pointed out by Plaintiffs' counsel, if the Court could truly do this there would be no need for the double recovery language in the statute because the situation would never arise.

The language of the statute dictates that a co-trustee acting individually or collectively with the other co-trustees may go after the responsible party or parties for the full amount of the damage,

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less any amount that has already been paid as a result of a settlement to another trustee by a responsible party. If there is a later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties.

If the Court were to find that the State of Idaho was the sole trustee as to a given natural resource the settlement would be final, but if the State of Idaho is only a co-trustee the settlement cannot bind the other co-trustee or trustees and they could recover whatever is necessary to accomplish the goals of Congress to restore the environment.

In this case, any potential disagreement between the trustees has been eliminated by the fact that the Tribe has agreed to let the United States government represent its interests, the State of Idaho is not a party to the litigation, and the State of Idaho has settled with Defendant Asarco.

While understandably the Defendants are arguing under this interpretation that they are not getting the benefit of their bargain, it is not the responsible parties that are to be benefitted under the concept of strict liability under CERCLA. There is some incentive to settle, however, because it still saves substantial fees and costs in litigation of this nature and the sums paid are deducted from the total amount allowed for damages.

It is unfortunate that the Court did not pick up on and distinguish the uniqueness of this statute from the traditional notions of tort law early on, but the Court is confident that this has to be the intent of Congress. Furthermore, if the Court fails to clarify the Court's ruling on this issue now, the only result is that all the parties incur additional expenses re-litigating the issue at a later date.

The Court revises its trusteeship ruling and the scope of the Phase 2 trial. The Court finds the Plaintiffs are "trustees" for purposes of CERCLA over the federal and tribal land as well as the

migratory natural resources of: fish, wildlife, birds, biota, water and groundwater based on their involvement in the management and control of such natural resources and applicable federal statutes give the United States trusteeship duties over fish, wildlife and birds. The United States' jurisdiction over navigable waters has previously been discussed and need not be restated in this Order. To the extent damages are awarded, any damages already paid to the State of Idaho and the Tribe will be deducted from the total damages to these natural resources. Phase 2 of the trial will focus on the actual amount of damages that have occurred to the named natural resources and not on the percentage of management or control of the Plaintiffs as trustees.

Order

Being fully advised in the premises, the Court hereby orders:

1) USA Motion to Strike Expert Reports on Remedy and Motion for Protective Order (Docket No. 1353) is **DENIED**.

2) USA's Second Motion to Strike Expert Reports on Remedy and Motion for Protective Order (Docket No. 1359) is **DENIED**.

3) Hecla's Motion for Protective Order (Docket No. 1363) is **GRANTED**.

4) Hecla's Motion to Strike Phase II Expert Report of Jared N. Day and for Extension of Discovery Deadline (Docket No. 1439) is **DENIED IN PART AND GRANTED IN PART** consistent with this Order.

5) Tribe's Motion Suggesting Lack of Subject Matter Jurisdiction to Allocate Trustees' Interests and Seeking Modification of Order Filed September 3, 2003 (Docket No. 1411) is **GRANTED IN PART** consistent with this Order.

6) To the extent the parties need more time to complete discovery based on this Order, the request is granted. The parties shall have until September 30, 2005 to complete any remaining discovery in this matter. However, the parties are on notice that the extension of the discovery deadline will not result in continuance of the trial date or motions deadlines.



DATED: August 9, 2005

A handwritten signature in black ink, appearing to read "Edward J. Lodge". The signature is written in a cursive style and is positioned above a horizontal line.

Honorable Edward J. Lodge
U. S. District Judge