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STATUTES OF LIMITATIONS IN UNITED STATES SUITS TO RECOVER OIL SPILL CLEANUP COSTS UNDER THE FEDERAL WATER POLLUTION CONTROL ACT

INTRODUCTION

Oil spills from vessels¹ and onshore and offshore facilities² cause extensive water pollution damage in the United States.³ As part of a scheme to remedy this problem, Congress passed section 311 of the Federal Water Pollution Control Act (FWPCA).⁴ Section 311 enables the United States to remove an oil spill from domestic waters if the President determines that the removal will not be done properly by the owner or

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¹ For the purposes of § 311 of the Federal Water Pollution Control Act, "'vessel' means every description of watercraft . . . used, as a means of transportation on water." 33 U.S.C. § 1321(a)(3) (1982).

² An onshore facility is "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States." Federal Water Pollution Control Act § 311(a)(10), 33 U.S.C. § 1321(a)(10) (1982). An offshore facility is "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters." Id. § 1321(a)(11).

³ Over 13,000 spills each year account for 20 million gallons of oil and hazardous substances entering United States waterways. Environmental Protection Agency, Oil Spills and Spills of Hazardous Substances 1 (1975). Environmental damage resulting from such spills includes mortality to seabirds and fish and damage to intertidal organisms, plant life, algae and salt marshes. Office of Technology Assessment, Congress of the United States, Oil Transportation by Tankers: An Analysis of Marine Pollution and Safety Measures 31 (1975). Spills may inflict severe economic damage on the fishing, shellfish and tourist industries. See Tanker Safety in Alaska: Hearings on S. 182, S. 568, S. 682, S. 715 and S. 898 Before the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 1st Sess. 1049-60 (1977) (statements of Phillip Daniel and Bob Blake, representatives of professional fishermen's organizations) (voicing apprehensions of fishing industry); Oil Pollution Liability: Hearings Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries of the House of Representatives, on H.R. 776, H.R. 1827, H.R. 1900, H.R. 3711 and H.R. 3926, 95th Cong., 1st Sess. 116-17 (1977) (written statement of Marc Guerin, State of Maine Dep't of Environmental Protection) (oil spills adversely affect the tourist industry); Organisation for Economic Co-operation and Development, The State of the Environment in OECD Member Countries 61 (1979) (economic damage from oil pollution includes impairment of fishing and shellfish farming and losses in hotel and tourist trades). Oil spills also threaten personal injury and damage to property, see Environmental Protection Agency, supra, at 15, 17, are expensive to remove, id. at 1, and degrade the quality of life of effected communities, see Oil Spillage—Santa Barbara, Calif., Hearing Before the Subcomm. on Flood Control and Subcomm. on Rivers and Harbors of the Comm. on Public Works of the House of Representatives, 91st Cong., 1st Sess. 4-5 (1969) (statement of Gerald S. Firestone, Mayor of Santa Barbara, Cal.). For an account of the impact of one of the worst oil spills in history, see R. Petrow, In the Wake of Torrey Canyon (1968).

operator of the polluting vessel or facility.\(^5\) The United States may recover, within limits,\(^6\) the costs incurred in removing the oil and in restoring or replacing natural resources damaged by the spill.\(^7\)

The FWPCA mandates no time within which the government must commence an action to recover cleanup costs, and no federal statute expressly sets forth a time limit for government suits based on federal statutory rights of action.\(^8\) Section 2415 of the Judicial Code, however, contains a general statute of limitations for actions brought by the United States.\(^9\) Section 2415(a) provides that actions for money damages "founded upon any contract express or implied in law or fact" must be commenced within six years after accrual of the right of action.\(^10\) Section 2415(b) provides that actions for damages "founded upon a tort" must be commenced within three years.\(^11\)

Some courts have held that section 311 actions are quasi-contractual in nature and are therefore governed by the six year limit.\(^12\) They reasoned that because polluters have unjustly benefited from government cleanups, actions for cleanup costs are restitutionary in nature.\(^13\) Other courts have concluded that actions for cleanup costs are not quasi-contractual for limitations purposes because there is no language of agreement in the statute, because the cleanups benefit the public, not polluters,\(^14\) or because the government has a duty to remove oil spills.\(^15\) Those courts held that these actions are founded on tort and are therefore subject to

\[\text{References} \text{\cite{5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15}}\]
the three year limit of section 2415(b). 16

Part I of this Note maintains that the courts have been correct in applying section 2415 to government actions based on statutes such as the FWPCA. Part II argues that courts should apply section 2415(a)'s six year limit to government actions for oil spill removal costs because the polluter's obligation to pay is quasi-contractual in nature.

I. SOVEREIGN IMMUNITY AND STATUTES OF LIMITATIONS

Before determining which provision of section 2415 applies to the government's cause of action under the FWPCA, it must be determined whether it is appropriate at all to apply section 2415 to government rights of action created by federal statutes. The doctrine of sovereign immunity dictates that the United States as plaintiff is never bound by any statute of limitations unless Congress has expressed its intent that the United States be so bound. 17 In 1966, Congress passed the general statute of limitations provision for actions by the United States. 18 By their terms, subdivisions (a) and (b) of section 2415 provide statutes of limitations for government suits based on actions "founded upon" tort, 19 contract or quasi-contract. 20 Courts have construed this language to limit the time within which the government may bring actions based on federal statutory rights that can be characterized as one of these common law causes of action. 21 Thus, whether section 2415 applies to section 311

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19. "Every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues . . . ." 28 U.S.C.A. § 2415(b) (West Supp. June 1984).

20. "Every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . ." 28 U.S.C.A. § 2415(a) (West Supp. June 1984).

of the FWPCA depends on whether the government action for cleanup costs can be so characterized.\(^{22}\)

The government has argued that because the FWPCA cause of action is founded on the commerce clause powers of Congress, characterization is inappropriate and therefore section 2415 should not apply at all.\(^{23}\) The statute's language, legislative history and policies show that the courts have correctly applied section 2415 to federal statutory rights of action of the United States, even though those rights are based on constitutional powers.

Section 2415 contains the words "founded upon any contract" and "founded upon a tort."\(^{24}\) Had Congress intended to waive immunity only for torts, contracts and quasi-contracts, it could have clearly said so. If section 2415 is read so narrowly as to apply only to those causes of action that fit squarely into common law categories, the words "founded upon" would be left without meaning. These words indicate that Congress used these common law categories to refer to the facts underlying the actions, rather than to the common law legal theories.\(^{25}\)

Other language from section 2415 supports the conclusion that it should be applied whenever possible to government causes of action based on statutes. Section 2415 expressly removes from its coverage all claims of the United States under the Internal Revenue Code.\(^{26}\) The spe-

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pecific exclusion of one type of statutory government action from section 2415's purview implies a congressional recognition that the statute would be applied to other government rights of action based on statutes.\textsuperscript{27} Therefore, all other federal statutory rights of action of the government should, if possible, be characterized as one of the kinds of action enumerated in section 2415.\textsuperscript{28}

Although the legislative history of section 2415 provides no clear meaning for the words "founded upon,"\textsuperscript{29} an examination of the policies underlying the statute shows that its time limitations should be applied to government suits based on federal statutory rights. By eliminating sovereign immunity with respect to limitations, Congress intended to put the government on an equal footing with other litigants,\textsuperscript{30} encourage prompt collection of government claims\textsuperscript{31} and reduce the cost of record keeping.\textsuperscript{32} Excluding federal statutory rights of action from the operation of section 2415 would frustrate the expressed will of Congress by reducing the number of suits included in the statute's scope.

The general rules for applying state statutes of limitations to federal rights of action provide further support for construing section 2415 to control government rights of action under federal statutes. Although Congress may create a right of action without limiting the time to exercise the right,\textsuperscript{32} the general rule when a federal statute specifies no statute of limitations is to apply the most applicable state statute of limitations to

\begin{footnotes}
\footnotetext[27]{27. When a statute expressly enumerates exceptions from its operation, it should be construed to apply to all other nonenumerated cases within the same class. 2A N. Singer, \textit{supra} note 25, § 47.11, at 145; \textit{see} Colorado Pub. Interest Research Group, Inc. \textit{v. Train}, 507 F.2d 743, 747 (10th Cir. 1974) ("where there be express exceptions to a statute, additional exceptions by implication are not favored"), \textit{rev'd on other grounds}, 426 U.S. 1 (1976).}
\footnotetext[28]{28. \textit{Cf.} United States \textit{v. Limbs}, 524 F.2d 799, 801 (9th Cir. 1975) (when the United States sues, the court must characterize claims as tort, contract or quasi-contract).}
\end{footnotes}
the federal claim. When a state has a limitations provision for liabilities created by statute, federal courts sitting in that state typically will apply that statute of limitations to federally created statutory rights of action. When appropriate, federal courts will apply either the tort or contract statute of limitations of that state. When the United States is a plain-


37. See, e.g., Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir.) (limitation for personal injuries applied to civil rights claims), cert. granted, 105 S. Ct. 79 (1984); Prince v. Wallace, 568 F.2d 1176, 1178 (5th Cir. 1978) (per curiam) (same); Page v. United States Indus., 556 F.2d 346, 351-52 (5th Cir. 1977) (limitation for torts applied to civil rights claim), cert. denied, 434 U.S. 1045 (1978); Shaw v. McCorkle, 537 F.2d 1289, 1294 (5th Cir. 1976) (limitation for contracts applied to civil rights claim); Douglass v. Glenn E. Hinton Invvs., Inc., 440 F.2d 912, 915-16 (9th Cir. 1971) (limitation for fraud applied to securities fraud claim); Wilson v. Robertshaw Controls Co., 600 F. Supp. 671, 675-76 (N.D. Ill. 1985) (limitation for products liability applied to action under Consumer Prod-
tiff, this analysis is precluded because sovereign immunity dictates that the government is not bound by state statutes of limitations. Thus, section 2415 takes the place of state statutes of limitations. The same analysis leading to application of state limitations to nongovernment federal claims should be used for section 2415. Only those government claims based on statutes which cannot be characterized as tort, contract or quasi-contract, and which are not limited by another provision of section 2415 or another statute, should be exempt from time limits.


The government's argument that the FWPCA's commerce clause basis precludes application of section 2415 to section 311 cleanup actions fails because it ignores the policy bases of section 2415. It also fails because it misapplies the commerce clause. The commerce clause empowers Congress to create certain rights of action for individuals. That constitutional provision does not, however, preclude application of state statutes of limitations to those rights of action. Similarly, government rights of action based on commerce clause powers should be subject to section 2415's time limits if they can be characterized as tort, contract or quasi-contract. Thus, the commerce clause empowers Congress to create the right, but does not determine the character of the claim.

II. ACTIONS FOR OIL SPILL REMOVAL COSTS: TORT OR QUASI-CONTRACT?

In characterizing the section 311(f) cause of action, it is immediately evident that there is no contract between the government and the polluter. Therefore, section 2415 should apply to FWPCA actions by the


42. See supra notes 30-41 and accompanying text.


46. See United States v. Dae Rim Fishery Co., No. A84-108 Civil, slip op. at 11-12 (D. Alaska Nov. 8, 1984). "Usually, an essential prerequisite to the formation of [a contract] is an agreement; a mutual manifestation of assent to the same terms." J. Calamari & J. Perillo, supra note 10, § 2-1, at 22; see also 1 A. Corbin, supra note 10, § 3, at 6 (a contract is often defined as an agreement that is enforceable at law); 1 S. Williston, A Treatise on the Law of Contracts § 1, at 2 (3d ed. 1957) ("courts have stressed the classic concept of the agreement resulting from mutuality of assent"). Section 311 does not require that the polluter assent before it is obligated to pay removal costs. The President is authorized to remove the spill at any time unless he determines that the removal will be done properly by the polluter. 33 U.S.C. § 1321(c)(1) (1982).
United States for cleanup costs only if the cause of action can be characterized as either tort or quasi-contract.47

A. The Nature of Tort Recovery

Some district courts have held that a government action for cleanup costs under section 311(f) is founded on tort.48 One court49 relied on a Seventh Circuit case50 that applied the three year statute of limitations to a government action under section 16 of the Rivers and Harbors Act of 1899, which allows the government to recover for damage to structures built by the United States for the preservation and improvement of its navigable waters.51 That reliance was misplaced. In the Seventh Circuit case, the government sued for damage to government-owned property.52 Section 311(f) provides no recovery for government property damage;53 it allows the government to recover money expended on behalf of the polluter.54

Confusion arises from section 311(f)'s use of language of tort in

47. Section 2415 also provides limitations for certain claims brought by the United States on behalf of Native Americans, 28 U.S.C.A. §2415(a), (b) (West Supp. June 1984), and for actions of the United States for the recovery of money erroneously paid to or on behalf of government employees and members of the uniformed services, id. §2415(d) (West 1978). Neither of these provisions is applicable to government actions for oil spill removal costs.


50. See United States v. Central Soya, Inc., 697 F.2d 165, 168-69 (7th Cir. 1982).


52. See United States v. Central Soya, Inc., 697 F.2d 165, 166 (7th Cir. 1982).

53. Federal Water Pollution Control Act § 311(f)(4), 33 U.S.C. § 1321(f)(4) (1982), allows the government to recover costs of restoration of natural resources damaged or destroyed as a result of oil spills. This Note does not address whether § 2415 applies to such recoveries or which limit of § 2415 applies.

54. The purpose of the varying time periods in § 2415 does not resolve this issue. Congress created different time limits for tort and contract because § 2415 was intended to resemble statutes of limitations in federal and state law for similar actions. See S. Rep. No. 1328, 89th Cong., 2d Sess. 6-7, reprinted in 1966 U.S. Code Cong. & Ad. News 2502, 2508; H.R. Rep. No. 1534, 89th Cong., 2d Sess. 8 (1966). One reason advanced for a shorter state statute of limitations in tort actions is that evidence in tort actions is less reliable and more transitory than the evidence in contract actions. See Williams, Limitations Periods on Personal Injury Claims, 48 Notre Dame Law. 881, 881 (1973); Developments in Law, supra note 34, at 1192 n.148, 1193; Comment, Tort in Contract: A New Statute of Limitations, 52 Or. L. Rev. 91, 92 (1972) [hereinafter cited as Tort in Contract]. In light of this purpose, the tort period would be appropriate because the evidence is likely to be similar to that in a tort case. It has also been suggested, however, that the general disfavor in which personal injury actions were once held also led to the shorter time period for many tort actions. See Developments in Law, supra note 34, at 1192 n.148; Tort in Contract, supra, at 93. Using this rationale, the tort statute of limitations would be inappropriate because, by enacting § 311(f) of the FWPCA, Congress created a favored remedy beyond existing tort remedies.
describing the liability scheme and from the tortious nature of the conduct leading to oil spills. A spill is not, however, tortious in relation to the federal government's right of recovery. Ordinarily, an act is tortious in relation to a party when that act causes injury to, or invades some interest of that party. If an oil spill is a tort, it is against those whose property and persons were damaged. In removing an oil spill, the government has not been directly injured; rather, it has performed a statutory function created to protect the public from injury when a polluter fails to remove its spill.

In addition, the cleanup action should not be characterized as tort because the FWPCA lacks a requirement that the government make a reasonable attempt to reduce the extent of its injury. A person injured by the tort of another is not entitled to recover damages for any harm that was avoidable by a reasonable effort or expenditure.


57. "[A]lthough the oil spill could be considered a tort . . . , the Government is not seeking compensatory damages suffered as a result thereof." United States v. Poughkeepsie Hous. Auth., No. 80 Civ. 959 slip op. at 8 (S.D.N.Y. Oct. 16, 1981); see United States v. P/B STCO 213, 756 F.2d 364, 375 (5th Cir. 1985); cf. United States v. State Farm Ins. Co., 599 F. Supp. 441, 444 (E.D. Mich. 1984) (in government action to recover Veterans Administration's (VA) medical care costs, triggering event was not accident which injured veteran but care and services provided by VA).


59. The primary purpose of a tort action is to compensate the injured party for damage suffered. Prosser and Keeton, supra note 58, § 2, at 7.

60. Restatement (Second) of Torts § 918(1) (1977); C. McCormick, Handbook on the Law of Damages § 33 (1935); see S.C. Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160, 168 (5th Cir. 1979) (plaintiff may not recover damages that could have been
FWPCA, the government may recover its actual cleanup costs even when they are unreasonable with respect to the harm threatened.61

Because the FWPCA cleanup is not the result of a tort against the government, and because the cleanup costs need not be reasonable, the section 311(f) cause of action is not founded on tort. Therefore, it is necessary to determine whether the section 311 action is quasi-contractual.

B. The Nature of Quasi-Contractual Recovery

section 311(f) cause of action should be characterized as quasi-contractual because the government cleanup activities unjustly enrich the polluter by performing the polluter's duty under federal and state law to remove the spill.

A person who performs another's duty to protect public safety, with the expectation of compensation, is entitled to restitution from the other.\textsuperscript{63} Section 311 empowers the United States to perform a polluter's duty to remove oil spilled by the polluter,\textsuperscript{64} and its creation of an action to recover costs gives rise to expectation of compensation.

This duty to remove the spill arises from both state and federal law. Under common law, a person who has performed an act that he later realizes or should realize has created an unreasonable risk of harm to another has a duty to exercise reasonable care to prevent the harm from occurring.\textsuperscript{65} The duty exists whether\textsuperscript{66} or not\textsuperscript{67} the conduct creating the

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\textsuperscript{63} See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967); United States v. Consolidated Edison Co., 452 F. Supp. 638, 655 (S.D.N.Y. 1977), modified on other grounds, 580 F.2d 1122 (2d Cir. 1978); W. Keener, supra note 62, at 341; G. Palmer, supra, § 1.8 (Supp. 1982); cf. J. Dawson, Unjust Enrichment 22 (1951) ("in the United States . . . there are no distinctions based on the form or nature of the gain received"). Unlike a contract, which is a consensual arrangement, see supra note 46, a quasi-contract can arise against even a clear expression of dissent, United States v. Neidorf, 522 F.2d 916, 918 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); see A. Corbin, supra note 10, § 19, at 46; cf. D. Dobbs, supra note 60, § 4.2, at 234-35 (in a quasi-contract, "there is nothing like a contract between the parties," express or implied).


\textsuperscript{65} Restatement (Second) of Torts § 321 (1964); see Hollinbeck v. Downey, 261 Minn. 481, 485-86, 113 N.W.2d 9, 12 (1962) (duty to warn of golf ball on golf range).


\textsuperscript{67} See Hardy v. Brooks, 103 Ga. App. 124, 127, 118 S.E.2d 492, 495 (1961); Zylka v. Leikvoll, 274 Minn. 435, 447, 144 N.W.2d 358, 367 (1966); Hollinbeck v. Downey, 261 Minn. 481, 485-86, 113 N.W.2d 9, 11-12 (1962); Chandler v. Forsyth Royal Crown Bot-
danger was negligent. A person breaching this duty is negligent.68 Oil spills create risk of harm to persons and property.69 This risk imposes a duty on the polluter to remove the oil in order to protect others from injury. The duty to remove oil spills also arises from state water pollution statutes which expressly require polluters to remove oil spilled into the waters of the state.70

The final source of the duty to clean up oil spills arises from the FWPCA itself. Section 311(b)(3) prohibits any discharge of oil or hazardous substances into the waters of the United States.71 Section 311(c)(1) empowers the United States to remove oil spills only if the polluter will not do it properly.72 These provisions indicate Congress' intention that polluters remove their own spills, if possible.73 The legislative history of section 311 clearly shows such an intent.74 In effect, the statute tells polluters that if they do not remove their own spills, the United States will do the job and send the bill to the polluters. Therefore, polluters have a duty to remove oil spills for which they are responsible.75

68. "Negligent conduct may be... a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Restatement (Second) of Torts § 284 (1964).
69. See supra note 3.
73. See id. § 1321(c)(1); United States v. P/B STCO 213, 756 F.2d 364, 370 (5th Cir. 1985).
75. See United States v. P/B STCO 213, 756 F.2d 364, 370 (5th Cir. 1985). It has been suggested that the government cleanup unjustly enriches the polluter by reducing its liability to private parties and to the states. See United States v. Poughkeepsie Hous. Auth., No. 80 Civ. 1998, slip op. at 14 n.10 (S.D.N.Y. Oct. 16, 1981). This argument may go beyond traditional common law theories of quasi-contractual recovery. Although oil spills can create potential liability to private persons under theories of com-
One court has held that an action for cleanup costs is not quasi-con-


One court has addressed this issue. See Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500 (2d Cir. 1972). In that case, the plaintiff, an insurance company, sought recovery of money spent to salvage a gasoline barge that had gone aground. Id. at 502. The court considered whether the defendant, another insurer of the barge, was unjustly benefited by plaintiff having removed the threat of an explosion for which
tractual because the primary duty to remove oil spills rests with the President and that it would therefore be legally impossible for the polluter's enrichment to be unjust. The President's duty, however, is a secondary one. Section 311 authorizes the President to remove the spill unless he determines that the spill will be removed properly by the polluter. If the President determines that the polluter will properly remove the spill, the FWPCA's authorization disappears. Therefore, the section 311 cleanup is a function exercised by the government when the polluter fails to perform its primary duty to remove the spill. The polluter's duty is not eliminated.

It has been suggested that because the FWPCA benefits the public and not the polluter, the government's claim for cleanup costs is not quasi-contractual in nature. This reasoning fails because a person whose duty to the public has been performed by another has been unjustly enriched. The FWPCA forces polluters to repay the United States for this enrichment. This enrichment provides the basis for characterizing the section 311 cleanup cause of action as quasi-contractual for the pur-

defendant might be liable. Id. at 504-05. The court, however, found that under the terms of the insurance policy, the defendant had contracted out of any such liability. Id. at 505. Thus, the court did not reach the issue of whether the defendant could have been unjustly enriched by virtue of prevention of potential liability. Id.


[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct. Restatement of Restitution § 76 (1936); see State v. Stewart's Ice Cream Co., 64 N.Y.2d 83, 87-88, 473 N.E.2d 1184, 1186-87, 484 N.Y.S.2d 810, 812 (1984) (citing Restatement of Restitution § 76 (1936)) (applying New York's statute of limitations for contracts implied in law to state action for oil spill removal costs under state statute).


80. See supra notes 63-75 and accompanying text.
poses of the section 2415 statute of limitations.\textsuperscript{81}

\textbf{CONCLUSION}

Oil pollution caused by spills is a pressing problem. The United States can best abate this problem by promptly enforcing anti-pollution laws, including section 311(f) of the FWPCA. Applying section 2415 to government suits to recover cleanup costs best implements the expressed congressional purposes for creating the statute of limitations: fairness and economy. The three year statute of limitations of section 2415(b) is inappropriate because oil spills, although arguably tortious acts, are not tortious with respect to the government's cause of action under section 311(f) of the FWPCA. Because government cleanups unjustly enrich polluters by performing the polluter's duty to remove oil spills, section 311(f) actions are quasi-contractual in nature and should therefore be governed by the six year limitations period of section 2415(a).

\textit{Robert E. Maher, Jr.}

\textsuperscript{81} It has been suggested that the cleanup cause of action is not quasi-contractual for limitations purposes because there is no agreement between the users of public waters and the United States. \textit{See United States v. Dae Rim Fishery Co., No. A84-108 Civil, slip op. at 9 (D. Alaska Nov. 8, 1984).} This is incorrect because quasi-contractual liability can exist in the absence of an agreement. \textit{See supra} note 62. That same court also suggested that there is no quasi-contract because § 311 allows the United States to recover the costs of removal, not the value of the services to the polluter. \textit{See Dae Rim Fishery, slip op. at 9.} This reasoning fails because a party is entitled to recover the costs incurred in performing another's duty to protect public health and safety. \textit{See supra} notes 63-64 and accompanying text.