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Damaged Before Repair

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Natural resource damages have, since their statutory formalization in the Comprehensive Environmental Response Compensation and Liability Act in 1980, and similar sections in the Clean Water Act and Oil Pollution Act, been a bit of an oddity. It has long been the law that sovereigns, whether the United States, states or Indian tribes, hold natural resources like plants, wildlife and groundwater in trust for the public. Under this common law public trust doctrine, it has followed legally that those sovereigns can in certain circumstances recover the costs necessary to repair or restore those natural resources from those responsible for damaging them.

Natural resource damages are different from these traditional restoration costs. They are "damages" in the compensatory tort sense of the word: Natural resources from trees to invertebrates are theorized to have money value, and potentially responsible parties injuring them through a release of hazardous substances can be liable to a sovereign for the totals.

This is not to say that the act's natural resource damages provision turned the state from sovereign to tortfeasor, or replaced the concept of restoration under the law with a type of environmental pain and suffering damages. Two restrictions in the act still keep natural resource damages yoked to the traditional notion of restorative damages.

The first is timing. The act "is best known as setting forth a comprehensive mechanism to cleanup hazardous waste sites under a restoration-based approach." A key component of the act process is the remedial investigation and feasibility study, which ultimately sets forth remedial alternatives for selection by Environmental Protection Agency. The timing limitation is that "[i]n no event" may an action for natural resource damages be initiated before the final remedy is selected. The limitation keeps damage assessment and remediation activity complementary rather than making them competitors for often scarce monetary resources.

It is fairer to the responsible remediation defendant who should not be made to suffer inconsistent natural resource damages and remediation demands. And finally it should make for a more accurate natural resource damages, and thus fairer, assessment because the study at a minimum describes and analyzes the contamination at issue in both the remediation and natural resource damages assessment.

The second is a restriction on the use of damages recovered: "[s]ums 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." If enforced, the restriction is highly significant since a sovereign cannot enrich itself through natural resource damages. The extent to which trustees in practice follow this admonition is debatable. Trustees have in the past used natural resource damages settlements to fund projects that were not even in the same part of the state as the subject property. Laura Rowley, writing in the Boston College Environmental Affairs Law Review, observed that "it is apparent that not all of the [famed $900 million Exxon Valdez award] was used for restoring damaged natural resources."

New Jersey, which arguably has the most militant and controversial natural resource damages policy in the nation utilizing its Spill Act, has gone a step further. In 2003 it announced a new natural resource damages policy to ferret out $950 million in natural resource damages for the Passaic River, most of which would go to "enhance public access to the waterway."

Considering these limitations, it is not surprising that sovereigns with enterprising natural resource damages policies have opted for state law claims over the act's natural resource damages provisions. Consequently, the overriding issue in non-traditional natural resource damages suits is pre-emption: Can the trustee use state law to recover what it could not under the act?

In the first and probably the most audacious case to so attempt, the 10th Circuit in *New Mexico v. GE*, 467 F.3d 1223 (10th Cir. 2006), answered in the negative. There, the state of New Mexico filed suit seeking to recover more that $4 billion in natural resource damages from a long-running groundwater remediation based on state causes of action, including trespassing, nuisance and negligence. The case was brought by contingency fee counsel, but in an unusual twist, the recalcitrant natural resource trustee had to be joined by the plaintiff as an indispensable party.

Because New Mexico admitted that it intended to pocket however much of its $4 billion demand it netted "for the State's general treasury fund," there was no question that the claim would violate the act's use restriction. The question was pre-emption.

The 10th Circuit provided an extensive examination of the act's scope and purpose. The court found that the act allows recovery of natural resource damages only to effectuate its twin goals - the restoration or replacement of the damaged natural resource — and damages for interim loss of use.

Puerto Rico had tried something similar in *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), prior to the act: It claimed $5.5 million from the alleged oil-induced death of 92 million invertebrates but "repeatedly disavowed any connection between this theory and an actual restoration plan."

Since the "[t]he ultimate purpose of any such [natural resource damages] remedy should be to protect the public interest in a healthy functioning environment, and not to provide a windfall to the pub-

lic treasury," the 1st Circuit vacated. The 10th Circuit followed, holding that the act's "comprehensive natural resource damages scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource."

The court reasoned that to allow such state natural resource damages causes of action to proceed could lead to particularly troubling results, such as double recovery "where a state's successful state law claim for money damages precedes an EPA-ordered cleanup" and the expenditure of recovered funds for non-restorative purposes, "for example, attorney fees[.]"

Considering this, it is surprising that plaintiffs have had success in bypassing the timing requirement with state court brought by contingency fee counsel. Yet recently in Quapaw Tribe of *Oklahoma v. Blue Tee Corp.*, 2009 U.S. Dist LEXIS 16339 (Feb. 23, 2009) the Northern District of Oklahoma allowed state claims seeking natural resource damages to proceed before the completion of the remedial investigation, let alone a remedy selected. The tribe had previously sought the same natural resource damages under the act.

The court predictably dismissed the claim based on the timing limitation just eight months prior to its Feb. 23 decision.

But that same court, which had just held that "natural resource damages claims are treated as residual claims ... ordinarily filed after the EPA has completed its work at a superfund Site," allowed the tribe to seek the same damages when re-pleading under state law. Significantly, the court relied on New Mexico, reading that case as "allow[ing] a state law claim for loss-of-use natural resource damages if such a claim is supported by the evidence and the requested remedy would not infer with the act's goals of replacement and restoration of a contaminated natural resource." Because the tribe drafted its fifth amended complaint to seek natural resource damages "only to restore, replace, or acquire the equivalent of such natural resources," the court found that "the Tribe's claims ... comply with New Mexico and ... do not conflict with the accomplishment of [the act's] remedial scheme." Notably, the court declined to address the propriety of the tribe's demand for attorney fees.

The decision stands in marked contrast with the court's prior ruling and the decision in New Mexico, and allows recovery of essentially natural resource damages irrespective of compliance with the act's natural resource damages provisions.

Natural resource damages do not become more factually independent of remedial activities when sought under state theories. Nor is there a rational reason why federal "even interim and lost use damages, can not be fully measured until the EPA's remedial work is completed," but the problem disappears when the exact same natural resource damages are requested under state law. Further, Quapaw raised quite saliently the prospect of double recovery and conflict. The tribe had previously alleged that the "EPA was not diligently proceeding with remedial work," so one would expect the trustee will take positions and make demands inconsistent with the EPA and visa versa.

While it is true that the defendant cannot be subject to double recovery in the sense of paying for the same plant or fish twice, it can be subject to double recovery by having ostensibly two natural resource damages taskmasters making conflicting demands on it. Most fundamentally, the opinion has the effect of reading one of two limitations that keep natural resource damages in check out of the act.

But it is early in the case, and the court indicated openness to evidence of a conflict between state and federal law. Chances are it will not have to wait long.

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