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NATURAL RESOURCE DAMAGES

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 has options for pursuing and defending against natural resource damages (NRD)—compensation for service losses arising from injuries to natural resources—but certain defenses and exclusions to such claims remain novel and untested. In this article, Sarah Peterman Bell discusses the act of war and act of God defenses to NRD claims in particular, focusing on how they have fared in court. She also discusses apparent strong support in the courts for the argument that injuries to cultural resources are not recoverable as natural resource damages.

CERCLA's Novel and Untested Defenses: Acts of God, Acts of War, Acts of Third Parties and Cultural Resource Damages

By Sarah Peterman Bell

Introduction

It has been repeated *ad nauseam*, *ad infinitum*: ''CERCLA is not a model of legislative clarity.''[1] And yet there continues to be ample room for debate about what claims are (and are not) recoverable, and what defenses are (and are not) likely to be successful in natural resource damages (NRD) litigation under CERCLA, more formally known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Thus, this is the first in a series of articles addressing defenses and means of overcoming CERCLA NRD litigation.[2]

Here, the (relatively) novel acts of God and acts of war defenses will be examined,[3] along with the (relatively) untested defense to claims seeking recovery for cultural resource damages as an element of CERCLA

[1] *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp.2d 1094, 1108 (D. Idaho 2003).

[2] This article series will address novel and untested defenses and exclusions to NRD claims, recent developments in important and well-settled defenses and exclusions to NRD claims and overlooked defenses and exclusions to NRD claims alleged under CERCLA.

[3] The acts of third parties defense is not particularly novel or untested. It is litigated far more than the act of God or act of war defenses, so it will be addressed below but not examined in depth.

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NRD. A recent holding appears to have revived the acts of God and acts of war defenses, while there is strong support for the argument that injuries to cultural resources are not recoverable as NRD.

Background on Natural Resource Damages

CERCLA's two primary purposes are ''to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.''[4] CERCLA thus imposes liability for cleanup and response costs on owners and operators of facilities where hazardous materials were disposed. In addition, CERCLA imposes liability for NRD—damages based on service losses from injuries to natural resources.[5]

Natural resources within the meaning of CERCLA invoke geological and biological entities—''land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources'' that belong to, are managed by, are held in trust by, that appertain to or that are otherwise controlled by the United States, state or local governments, or Indian tribes.[6] NRD liability flows to these trustees of the natural resources—the United States, the individual states, and Indian tribes.[7]

NRD claims arise from injuries to such resources from releases of hazardous substances. Under CERCLA's NRD scheme, owners, operators, arrangers and transporters can be liable for ''damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from [a release of hazardous substances].''[8]

Acts of God, Acts of War, Acts of Third Parties

CERCLA's enumerated defenses apply to persons ''otherwise liable'' who establish that the release and damages resulting from the release were caused ''solely by'': (1) an ''act of God''; (2) an ''act of war''; (3) an ''act or omission of a third party''; or (4) any combination of these acts.[9] Notwithstanding CERCLA's mandate that these defenses apply to persons who would otherwise be liable, until very recently, courts have been almost universally unwilling to hold that the acts of God and acts of war defenses applied. However, the recent holding by the U.S. Court of Appeals for the Second Circuit in *In re September 11 Litigation*, 751 F.3d 86 (2d Cir. 2014) may signal a shift in courts' willingness to entertain the acts of war and acts of God defenses.

Acts of War

CERCLA does not define an ''act of war,'' and the two court decisions addressing the defense prior to *In re September 11* did little to elucidate either its meaning or the elements necessary to establish the defense. Indeed, prior to *In re September 11*, this author was not able to locate a single published decision favorably applying the act of war defense.

In 2001, the U.S. District Court for the District of Idaho dismissed the potentially responsible parties' (PRPs) act of war defense in one paragraph.[10] There, defendants asserted the act of war defense in connection with World War II-era mining operations. The court summarily dismissed the defense, stating that it was ''not relevant,'' and that even if the U.S. had required higher mining production during WWII, there was no showing that such was the ''sole cause'' of releases during WWII. The court made one brief attempt to describe what might constitute an act of war—''i.e. bomb dropped during war on mining site and hazardous substances are released.''

The Ninth Circuit also addressed and dismissed the act of war defense in the context of WWII production requirements in *United States v. Shell Oil Co.*, 294 F.3d 1045, 55 ERC 1052 (2002), which addressed a Superfund site where oil company defendants dumped waste associated with the production of aviation fuel known as ''avgas'' during WWII. There, aviation fuel production was accepted as having been so ''critical to the war effort'' that the U.S. ''exercised significant control over the means of its production during World War II,'' even going so far as to establish several federal agencies to oversee wartime production.[11] These government agencies had the authority to require aviation fuel production from the oil company defendants, and could seize their refineries ''if necessary.''[12] The government maximized the production of avgas through various programs and long-term contracts with the oil companies for production and purchase, while the oil company defendants built, owned and managed their refineries throughout WWII.[13]

Notwithstanding the government's attempts to maximize production of aviation fuel during WWII, the Ninth Circuit rejected the act of war defense. The court acknowledged the lack of authority to guide its decision, and relied on the fact that CERCLA imposes liability expansively and uses ''narrow language to confer defenses.''[14] The court also looked to ''act of war'' definitions from international law and cases outside the CERCLA context, which featured narrow definitions requiring forceful actions by one state against another, ''massive violence,'' or ''catastrophes'' beyond any PRP's control.[15]

Finally, the Ninth Circuit also relied on the undisputed showing that the oil company defendants had other disposal options for aviation fuel waste, that they disposed of avgas waste at the site before and after WWII, and that the government did not compel them to dispose of the waste in a particular manner, all of which precluded defendants from showing that the generation and disposal of aviation fuel waste was caused ''solely''

[4] *Coeur D'Alene Tribe*, 280 F. Supp.2d at 1108.
[5] 42 U.S.C. § 9607(a). In fact, several federal statutes provide for the recovery of natural resource damages: the Clean Water Act (CWA), the Oil Pollution Act of 1990 (OPA), the National Marine Sanctuaries Act (NMSA), the Park System Resources Protection Act (PSRPA), and CERCLA, which is the focus of this article.
[6] 42 U.S.C. § 9601(16).
[7] 42 U.S.C. §§ 9607(f)(1), 9607(f)(2)(B).
[8] 42 U.S.C. § 9607(a).
[9] 42 U.S.C. § 9607(b).
[10] *Coeur D'Alene Tribe v. Asarco Inc.,* (D. Idaho No. 91-0342, 96-0122, March 30, 2001) *10.
[11] *Id.* at 1049.
[12] *Id.* at 1050.
[13] *Id.*
[14] *Id.* at 1061.
[15] *Id.*

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by an act of war.[16] While this last point probably sounded the death knell for the oil company defendants' act of war defense, the Ninth Circuit's reasoning leaves much to be desired in terms of explaining what is or might be an act of war under CERCLA.

This trend of rejecting the defense with little explanation of what might constitute an act of war continued in *R.E. Goodson Construction Co. v. International Paper Co.*, 2005 BL 42226, D.S.C., No. C/A 4:02-4184, Oct. 13, 2005. There, the U.S. District Court for the District of South Carolina, in a case regarding land leased by the U.S. for use as an aerial and gunnery target range during WWII, relied heavily on the *Shell Oil* opinion: ''They both involve the same war and they both involve [a lease arrangement]. Additionally, they both involve stateside activities in support of the war effort. Most importantly, neither set of facts involves 'massive violence,' 'use of force,' or 'military action' on the Site property.''[17] The court rejected defendants' urging that the act of war definition in *Shell Oil* was overly restrictive, saying the defense should be read narrowly because of ''the very few cases addressing the defense and no case finding the defense to apply.''[18]

In contrast, the Second Circuit's very recent opinion in *In re September 11 Litigation* provides extensive discussion regarding what constitutes an act of war under CERCLA. There, a real estate developer sued the owners and lessees of the World Trade Center, among others, under CERCLA for costs incurred in remediating a building contaminated by dust, debris, and other material (''WTC Dust'') following the Sept. 11, 2001, attacks.[19] The defendants raised the act of war defense. The Second Circuit acknowledged that both CERCLA and its legislative history are silent as to the meaning of act of war and repeated that CERCLA imposes liability broadly and that its defenses must be interpreted narrowly.[20] But the Second Circuit's analysis did not stop there.

The court noted that CERCLA's remedial goals were ''not advanced here by imposing CERCLA liability on the airlines and the owners (and lessors) of the real estate.''[21] On the other hand, the purpose of the defense was well served by recognizing the September 11 attacks as acts of war.[22] The Second Circuit was not bound by definitions from outside CERCLA that were referenced in *Shell Oil* or *Goodson*: ''War, in the CERCLA context, is not limited to opposing states fielding combatants in uniform under formal declarations.''[23] The court explained that defendants had no control over ''the planes or the buildings,'' there were no precautions defendants might have taken to prevent the contamination, and ''sole responsibility'' for the event and its environmental consequences rested with the terrorists ''whose acts the defendants were not bound by CERCLA to anticipate or prevent.'' [24] Here, then, is an analysis of the act of war defense that provides NRD practitioners with useful guidance regarding elements that may be relevant to establish the defense.

Finally, in analyzing whether the attacks were the sole cause of the release, the Second Circuit took a logical approach: ''The decisive point is that the attacks directly and immediately caused the release, and were the 'sole cause' of the release because the attacks overwhelmed and swamped the contributions of the defendants.''[25] In fact, the attacks ''overwhelmed all other causes'' and the release was ''immediately caused by the impacts.''[26] Based on prior opinions, it would not have been surprising if the Second Circuit had held that the attacks were not the sole cause of the release because defendants used asbestos, silicon, benzene, lead and other hazardous materials in the World Trade Center buildings. However, here the Second Circuit provided courts and NRD practitioners with a commonsense approach and tools to analyze the sole-cause requirement.

While the facts of *In re September 11* differ significantly from the facts at issue in *Shell Oil* and *Goodson*, the Second Circuit's recent opinion provides NRD practitioners with an act of war definition derived from CERCLA and its purposes, and elements and inquiries relevant to the act of war analysis. Indeed, *In re September 11* perhaps renders the act of war defense a little less novel. And as will be shown below, the opinion should carry weight in the act of God analysis as well.

Acts of God

Unlike acts of war, CERCLA does define an act of God:

> [A]n unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.[27]

So in order to establish the defense, a PRP must show that (1) the event was grave or exceptional, (2) the event was unanticipated, (3) the PRP could not have avoided the release by exercising due care and (4) that the event was the sole cause of the release.[28]

CERCLA's legislative history counsels that the defense is ''similar to, but more limited in scope than'' the traditional act of God defense such that many traditional acts of God ''would not qualify'' as CERCLA-required ''exceptional natural phenomenon.''[29] Such guidance invites the question of what could ever be an act of God under these limitations. Indeed, courts appear to have struggled with these questions as well, given that this author was unable to locate a single published decision holding that the alleged phenomenon was an act of God under CERCLA. For example, courts have routinely rejected natural phenomena and disas-

[16] *Id.*
[17] *Id.* at *19.
[18] *Id.*
[19] 751 F.3d at 89.
[20] *Id.* at 91.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 92.
[24] *Id.*
[25] *Id.* at 89.
[26] *Id.* at 93.
[27] 42 U.S.C. § 9601(1).
[28] *Id.*; (recall the ''sole cause'' prong is derived from 42 U.S.C. § 9607(b)).
[29] H.R. Rep. 99-253(IV), 99th Cong., 1st Sess. 1985, 1986, U.S.C.C.A.N. 3068, 3100 (noting that if a major hurricane occurred in a place and time ''where a hurricane should not be unexpected, it would not qualify as a 'phenomenon of exceptional character' '').

ters as insufficiently grave or exceptional to meet the requirements of the act of God defense.[30]

Courts have likewise required seemingly impossible standards in requiring that the event be unanticipated. In rejecting the act of God defense in *M/V Santa Clara I*, the court noted that the National Weather Service had predicted ''inclement weather offshore.''[31] The court went even further, citing a case under the Clean Water Act in which a poorly forecasted storm was sufficiently predicted so as to preclude application of the defense.[32] NRD practitioners might wonder what type of natural disaster could ever qualify as an act of God where the existence of storm forecasting technology renders even a natural disaster so anticipated as to preclude application of the defense.

In analyzing whether the release could have been avoided by exercising due care, the court in *Stringfellow* summarily dismissed the defendants' act of God defense in stating that ''any harm caused by the rain could have been prevented through design of proper drainage channels.''[33]

Finally, while review of the ''sole cause'' prong of the act of God analysis reveals courts' continued unwillingness to entertain the defense, it is this prong and its relevance in the *In re September 11* opinion that signals a potential shift in courts' treatment of this defense. To be clear, courts have historically been both strict and dismissive in applying the ''sole cause'' test.[34] These decisions beg the question of what natural disaster could ever be considered the sole cause of a release—indeed, no release of hazardous substances would ever occur if some PRP did not take the first step of generating or transporting such substances or owning or operating a site where they were used. And yet, Congress included the act of God defense in CERCLA, designing it as a defense for an otherwise liable PRP such that the defense should have relevance and meaning.

Indeed, the Second Circuit's recent *In re September 11* opinion articulates a newer perspective that gives effect not only to the act of war defense, but also to the act of God defense. First, on the ''sole cause'' analysis (the ''sole cause'' requirement applies equally to the God, war and third party defenses) the Second Circuit held that the event at issue there was the sole cause of the release because it ''overwhelmed and swamped the contributions of the defendant.''[35] The attacks were the sole cause because they ''overwhelmed all other causes'' and because the release was ''immediately caused'' by the event.[36] With this language, the Second Circuit provided NRD practitioners with a common sense analysis of the ''sole cause'' requirement that applies to the war, God and third party defenses, and that that also makes sense in the context of Congress enumerating the defense.

Furthermore, recall that in its analysis of whether the September 11 terrorist attacks constituted an act of war, the Second Circuit noted that the attacks ''obviated any precautions'' that defendants might have taken to prevent the release and that the defendants could not be held responsible for anticipating or preventing the attacks.[37] These elements of foreseeability and due care are decidedly not part of CERCLA's act of war definition. Instead, they bear striking similarity to elements set forth in CERCLA's act of God definition, suggesting that the Second Circuit looked to and was influenced by CERCLA's act of God defense in *In re September 11*. In return, it makes sense that NRD practitioners look to *In re September 11* for guidance in analyzing these elements of the act of God defense.

Indeed, the portion of the court's opinion analyzing the act of war defense concludes with reference to acts of God:

> [Plaintiff] argues that the composition of the dust and flying debris would have been less harmful but for actions previously taken by the [defendants]. This argument does not succeed. . . . The refutation is found in the text of the statute. The phrase 'act of war' is listed in parallel with 'act of God,' 42 U.S.C. § 9607(b); it is useful and sensible to treat the two kinds of events alike when it comes to showing causation. It would be absurd to impose CERCLA liability on the owners of property that is demolished and dispersed by a tornado. A tornado, which scatters dust and all else, is the 'sole cause' of the environmental damage left in its wake notwithstanding that the owners of flying buildings did not abate asbestos, or that farmers may have added chemicals to the soil that was picked up and scattered.[38]

Taking the Second Circuit's hypothetical, one could easily imagine the courts in *Stringfellow*, *M/V Santa Clara I* or *Alcan Aluminum* determining that a tornado was not exceptional or unanticipated in certain parts of the U.S. at certain times of the year, and that such tornado was not the sole cause of the release given that the PRP used hazardous substances in its operations. So this latest statement on the act of God defense from the Second Circuit appears to open the previously tightly sealed door to the act of God defense. Again, then, *In re September 11* perhaps renders the act of God defense a little less novel.

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[30] *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (''the rains were not the kind of 'exceptional' natural phenomena to which the narrow act of God defense [under CERCLA] applies''); *United States v. Barrier Ind.*, 991 F. Supp. 678, 679 (S.D. NY 1998) (''nothing remotely suggests that this 'cold spell' falls within the CERCLA definition of an act of God''); *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 658 (M.D. Penn. 1995) (heavy rainfall alleged to be ''torrential'' in the wake of Hurricane Gloria not sufficiently exceptional); *United States v. M/V Santa Clara I*, 887 F. Supp. 825 (D.S.C. 1995) (storm causing 50-knot wind gusts and 18-foot seas not a ''grave natural disaster''); *Coeur D'Alene Tribe v. Asarco Inc.*, D. Idaho, No. 91-0342, 96-0122, March 30, 2001 *9 (''forest fires, floods and high winds are normal for northern Idaho'').

[31] 887 F. Supp. at 843.

[32] *Id.*; *see also Alcan Aluminum*, 892 F. Supp. at 658 (rejecting defense in connection with hurricane effects as far north and inland as Pennsylvania); *Coeur D'Alene* (No. 91-0342, 96-0122) *9 (''fires, floods and winds'' not sufficiently ''extreme in severity to be unforeseeable'').

[33] 661 F. Supp. at 1061; *see also Alcan Aluminum*, 892 F. Supp. at 658 (in a case featuring an unlawful disposal: ''Clearly, the exercise of due care or foresight would have militated against dumping hazardous wastes into mine workings that inevitably lead to such a significant natural resource'').

[34] *See Stringfellow*, 661 F. Supp. at 1061 (saying only ''the rains were not the *sole* cause of the release''); *Coeur D'Alene* (D. Idaho, No. 91-0342, 96-0122) *9 (''Certainly the fires, flood sand wind caused the releases to be moved in the Basin, but these events cannot be held to be the sole cause of the release''); *State of New York v. Green*, 2004 WL 1375555, *9 (rejecting the defense where there were releases prior to the fire).

[35] 751 F.3d at 89.

[36] *Id.* at 93.

[37] *Id.* at 91.

[38] *Id.* at 93-94.

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Acts of Third Parties

In order to establish the third party defense to CERCLA liability, the defendant must show: (1) that a third party was the sole cause of the release; (2) the third party was not the defendant's agent or employee and the third party's act or omission was not done pursuant to a contractual relationship with the defendant; (3) the defendant exercised due care regarding the hazardous material; and (4) the defendant took precautions against the third party's foreseeable conduct and consequences that could foreseeably result therefrom.[39]

Once again, the ''sole cause'' element in the third party defense presents issues even in the context of the more-frequently litigated third party defense: ''[t]he interpretation of the sole cause requirements presents an important question as to which there is little guidance in the statute, case law or legislative history.''[40] While the provision might be read so strictly ''that virtually any evidence of a release from a defendant's facility would preclude assertion of the third party defense,'' such construction ''would eliminate the third party defense.''[41] Ultimately, the U.S. District Court for the Eastern District of California held that the sole-cause requirement should be interpreted according to whether the release was unforeseeable and whether the defendant's conduct was ''indirect and insubstantial in the chain of events leading to the release.'' [42] If so, the third party defense may be available.[43] Note that this standard is similar to the sole-cause analysis that the Second Circuit set forth in *In re September 11*.

On the second element of the defense, the ''mere existence'' of a contractual relationship between the defendant and the third party whose conduct caused the release ''does not foreclose the owner'' from maintaining the defense.[44] On the contrary, the defense is barred only if the contract between the defendant and the third party relates to the handling of the hazardous substances at issue.[45]

The last two elements of the defense require the defendant to have exercised due care regarding the release and taken precautions against the third party's foreseeable conduct and the consequences that could foreseeably result therefrom. Due care requires taking the necessary steps to protect the public from health and environmental threats.[46] On the issue of taking precautions, CERCLA ''does not sanction willful or negligent blindness'' by absentee property owners.[47]

Cultural Resource Damages

Another relatively ''untested'' NRD defense has to do with cultural resources: namely, that injuries to cultural resources (''cultural resource damages'') may not be recoverable as NRD under CERCLA (or the OPA and the CWA, for that matter).

The defense arises from the definitions of natural resources under the five federal NRD statutes: CERCLA, the Oil Pollution Act of 1990 (OPA), the Clean Water Act (CWA), the National Marine Sanctuaries Act (NMSA) and the Park System Resources Protection Act (PSRPA). On the one hand, CERCLA, OPA and the Clean Water Act define natural resources only in terms of biota and geologic entities: land, fish, wildlife, biota, air, water, groundwater, etc.[48] On the other hand, NMSA's natural resources definition includes reference to ''nonliving'' resources that contribute ''to the . . . cultural, archeological . . . or aesthetic value of the [national marine] sanctuary.''[49] Given the broad definitions in NMSA and the PSRPA, and that CERCLA, OPA and the CWA specifically exclude references to cultural resources or values, or nonliving resources in their natural resource definitions suggests that those statutes do not authorize recovery for cultural resource damages.

Indeed, the Department of Interior (DOI) has agreed that archaeological and cultural resources ''do not constitute natural resources under CERCLA.''[50] However, in confirming that cultural resources are not natural resources under CERCLA, DOI sought to create a distinction between cultural resource damages and damages for lost cultural services provided by an injured natural resource. In a preamble to DOI's 1994 NRD assessment regulations, DOI asserted that trustees may include the loss of ''cultural services provided by a natural resource in a natural resource damage assessment.''[51] Courts appear to reject this distinction.

In *Kennecott Utah Copper Corp. v. U.S. Department of the Interior*, 88 F.3d 1191, 1222 (D.C. Cir. 1996), industry petitioners challenged DOI's preamble to the 1994 assessment regulations, pointing out that archaeo-

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[39] 42 U.S.C. § 9607(b)(3).

[40] *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1540 , 36 ERC 1217 (E.D. Cal. 1992).

[41] *Id.*

[42] *Id.* at 1542.

[43] *Id.* (holding that defendant had established all elements necessary for the defense).

[44] *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2d Cir. 1992).

[45] *Id.*; *see also United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) (site owner defendants could not establish absence of contractual relationship where they leased property to chemical manufacturer).

[46] *State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 361, 43 ERC 1001 (2d Cir. 1996) (due care established where defendant property owner maintained water filter, sampled for VOC contamination, instructed tenants to avoid discharges, and conducted periodic inspections); *see also Redwing Carriers Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996) (due care shown where, within one year of defendants acquiring ownership interest in property, a program was in place to remediate waste).

[47] *Monsanto*, 858 F.2d at 169 (defense not available to site owners who leased to chemical company and claimed ignorance as to waste disposal activities and neglected to conduct inspections); *Westfarm Associates LP v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) (due care and precautions not established where defendant used and disposed of PCE into the sewer system and neglected to mend pipes or forbid use of VOCs).

[48] 42 U.S.C. § 9601(16); 33 U.S.C. § 2701(20); 43 C.F.R. § 11.14(z).

[49] 16 U.S.C. § 1432(8). Similarly, the PSRPA definition includes reference to ''non-living'' resources. 16 U.S.C. § 19jj(d).

[50] Natural Resource Damage Assessments (preamble), 59 Fed. Reg. 14,262, 14,269 (Mar. 25, 1994); *see also* Damage Assessment and Restoration Handbook, p. 1, p. 6-7 (National Park Service, U.S. Department of Interior, December 2003) (http://www.nps.gov/policy/DOrders/DO-14Handbook.pdf) (CERCLA and OPA protect natural resources while the PSRPA ''extends to cultural resources'').

[51] 59 Fed. Reg. 14262, 14269 (Mar. 25, 1994); *see also* 73 Fed. Reg. 57259, 57264 (Oct. 2, 2008) (''[c]ultural, religious and ceremonial losses that rise from the destruction of or injury to natural resources continue to be cognizable'').

logical and cultural resources are excluded from CERCLA's definition of natural resources. The court held that the issue was not ripe for review but otherwise appeared unpersuaded by DOI's attempt to distinguish between cultural resource damages and damages for injuries to cultural services provided by an injured natural resource, characterizing DOI's distinction as permitting ''recovery for injury to non-natural resources.''[52] DOI itself denied ''that the preamble is anything more than an explanatory preface with no independent legal effect.''[53]

The U.S. District Court for the District of Idaho has rejected the idea that damages for lost cultural services provided by an injured natural resource are recoverable under CERCLA. In *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp.2d 1094 (D. Idaho 2003), the court's factual findings advised that ''[c]ultural uses of water and soil by [the] Tribe are not recoverable as natural resource damages.''[54] The court here did not merely repeat that cultural resource damages are not recoverable. Instead, the court found that lost cultural services (cultural uses of water and soil) provided by the injured resources (water and soil) were not recoverable as NRD. This rejects the DOI's distinction in the preamble to the NRD assessment regulations.

In sum, DOI may continue to argue a distinction under CERCLA between unrecoverable cultural resource damages and allegedly recoverable damages for lost cultural services provided by a natural resource, not to mention that trustees continue to seek NRD for impacts to lost cultural services, and NRD settlements appear to contain awards for cultural restoration projects or to compensate for lost cultural services. However, CERCLA's NRD provisions contain no text indicating that damages to cultural resources or cultural services are recoverable as NRD, and the author has located no published cases holding that cultural resource damages or injuries to cultural services are recoverable as NRD under CERCLA. So NRD practitioners should be aware that while trustees will probably continue to seek NRD to compensate for alleged impacts to cultural services, there is certainly support for the argument that these damages may not be recoverable under CERCLA.

[52] *Id.*

[53] *Id.* at 1223.

[54] *Id.* at 1107; *see also id.* at 1117 (holding that a tribal trustee's use of ''certain natural resources in the exercise of their cultural activities . . . does not rise to the level of making a natural resource belong or be connected [to the trustee] as a rightful part or attribute for purposes of trusteeship analysis'').

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