



Natural Resources Damages: Key Legal Issues and Defenses

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John D.S. Gilmour
Connelly • Baker • Maston • Wotring • Jackson, LLP

The Legal Battlefield

- Limitations
- Trustee Interaction
- Liability & Causation
- Pre-Enactment Contamination
- State NRD Programs

LIMITATIONS

Four (4) applicable statutes of limitations:

- Non-NPL Sites
- NPL “Superfund” Sites
- Native American Tribes
- States

Non-NPL Sites

CERCLA – 42 U.S.C. § 9613(g)(1)

- Action must be commenced within three (3) years of the later of:
 - The “date of the discovery of the loss and its connection with the release in question;” or
 - The date on which the NRD regulations were promulgated (firmly established as March 20, 1987)

The Discovery Rule

- Determination is a fact question

- Looks at the specific Trustee's knowledge
 - *U.S. v. Montrose Chem. Co.*, 883 F. Supp. 1396 (C.D. Cal. 1995), *rev'd on other grounds*, 104 F.3d 1507 (9th Cir. 1997)
 - NOAA Site Review
 - NOAA Paper
 - S. Cal. Coastal Water Research Project
 - Cal. Dept. of Parks & Recreation
 - Cal. Dept. of Fish & Game

NPL “Superfund” Sites

CERCLA – 42 U.S.C. § 9613(g)(1)

- Action must be commenced within three (3) years after the completion of the remedial action (excluding operation and maintenance)
- Rationale: NRD claims are intended to be residual to the remediation and available only to the extent not covered by the remedial action

The Window of Opportunity

- If US EPA is “diligently proceeding” with a Remedial Investigation/Feasibility Study (“RI/FS”), the federal Trustees cannot bring NRD claims until selection of the remedy

- Creates “window” of time within which federal Trustees can bring NRD claims:
 - Opening the window: Selection of the remedy (Record of Decision (“ROD”))
 - Closing the window: Three (3) years after completion of the remedy

- States not similarly constrained

Native American Tribes

CERCLA – 42 U.S.C. § 9626(d)

- Action must be commenced by the later of:
 - The expiration of the applicable period of limitations in 42 U.S.C. § 9613(g)(1); or
 - Two (2) years after the United States gives written notice to the Tribe that it will not present a claim on the Tribe's behalf *or* fails to present a claim within the applicable period of limitations on the Tribe's behalf
- Result: Tribes receive an additional two (2) years beyond period applicable to federal Trustees in most cases

State Limitations

- NRD claims brought under state law are controlled by the applicable state limitations period
- Some states are amending their applicable statutes of limitation to extend the time period within which a NRD claim can be brought
 - New Jersey – Has amended its Spill Act twice in the last 4 years to extend the statute of limitations applicable to NRD claims

TRUSTEE INTERACTION

- States are not constrained regarding when they can bring NRD claims
- State Trustee may proceed with NRD claim under State law where federal Trustee is precluded by CERCLA
- Result: May diminish or even preclude recovery of NRD by the federal Trustee

Coeur D'Alene Case

- NRD must be apportioned between the Trustees
- Such apportionment is to be determined by the court on a case-by-case basis
- Percentage of trusteeship depends “on who the resource belongs to, who is it managed by, who controls the same, and how the resource appertains to other resources.”

Coeur D'Alene Tribe v. ASARCO, Inc., 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003)

Coeur D'Alene Case

- Court held that certain resources are managed by co-Trustees
- For example, a river:
 - State Trustee may have recreational interest
 - Federal Trustee may have navigable interest
 - Tribe Trustee may have cultural interest
- Must “award damages in the ratio or percentage of actual management and control that is exercised by each of the various co-Trustees.” *Coeur D'Alene*, 280 F. Supp. 2d at 1116.

Coeur D'Alene Case

Result:

- Federal Trustees' percentage of ownership and control in a resource could be determined in a State action in which federal Trustees cannot participate
- State could settle for low dollar amount and later be found to have high ownership interest, thereby reducing potential recovery of other Trustees
- *Res Judicata?*

Coeur D'Alene Case

- “[O]nce a state, federal, or other public trustee recovers such damages, *res judicata* would prevent a second trustee from recovering the same public losses.”

Coeur D'Alene, 280 F. Supp. 2d at 1116.

Coeur D'Alene Case

Footnote:

- August 9, 2005 the Court reversed itself
- Held its “reliance on traditional tort concepts in allocating trusteeship was misplaced”
- A “co-trustee acting individually or collectively with the other trustees may go after the responsible party or parties for the full amount of damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party.” Memorandum & Order, at 8-9.

Coeur D'Alene Case

➤ “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.”
Id. at 9.

➤ Unpublished Opinion (Not on Westlaw)
Coeur D'Alene Tribe v. ASARCO, Inc.,
No. CV 96-0342-N-EJL, Docket Entry
1529 (D. Idaho August 9, 2005).

PRE-ENACTMENT RELEASES

- CERCLA precludes recovery of NRD “where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.” 42 U.S.C. § 9607(f).
- Diametrically opposed to remedial provisions of CERCLA which allow for the recovery of costs incurred as a result of wholly pre-enactment releases
- Courts have interpreted the statutory language to require analysis of the release and damages

Mixed Releases

- What about where the release and damage occurred over a period of time spanning the 1980 cutoff?

- Limited Authority suggesting both are recoverable where the harm is indivisible
 - *In re Acushnet River*, 716 F. Supp. 676 (D. Mass. 1989)
 - *U.S. v. Montrose Chem. Co.*, 883 F. Supp. 1396 (C.D. Cal. 1995), *rev'd on other grounds*, 104 F.3d 1507 (9th Cir. 1997)

Coeur D'Alene Case

- Direct releases of mine tailings into the river ceased by 1968
- NRD should be barred under CERCLA
- Court adopted “continuous release” theory: the continued leaching of contaminants into river sediments, soils, and groundwater = post-enactment releases

Coeur D'Alene Case

- Court further held that damages do not occur until they are quantified
- Quantification = when Trustee “incurs expenses due to the injury to natural resources.”
- If the “monetary quantification stemming from an injury” occurs post-enactment, trustee can recover for pre & post-enactment damages
- Agreed with *In re Acushnet*

LIABILITY & CAUSATION

- Liability under § 107 of CERCLA (cost recovery) is strict, joint & several
- NRD is not as clear
- Damage must have “resulted from” the responsible party’s release
- Liability several?

Coeur D'Alene Case

- Traditional joint & several liability due to the indivisible nature of the harm
- Defendants convinced the Court that there was a “reasonable relationship between the waste volume, the release of hazardous substances, and the harm at the site.” *Coeur D'Alene*, 280 F. Supp. 2d at 1120.
- Court therefore allocated liability based upon the volume of mine tailings attributed to each Defendant “even though the exact percentages of lead, cadmium and zinc in the tailings from each mill is unknown and differed....” *Id.*

Causation

- “Resulted from” language necessitates a finding of causation for the recovery of NRD
- What level of causal link is required?
- Varies by jurisdiction

Causation

➤ “Contributing Factor”

- “at least some of the injury would have occurred if only the defendant’s amount of release had occurred.
- Slightly more than de minimis
- Advocated by the Trustees

In re Acushnet River, 722 F. Supp. at 897
Coeur D’Alene, 280 F. Supp. 2d at 1124

➤ “Substantially Contributing Factor”

- Based on traditional tort principles
- Advocated by defendants
- Unpublished opinion with no analysis

U.S. v. Montrose Chem. Co., No. CV 90-3122
AAH (JRX), 1991 WL 183147 (C.D. Cal. March
29, 1991)

STATE NRD PROGRAMS

- 35 States have some form of an active NRD program (2005)
- Includes New Jersey, South Carolina, Massachusetts, Washington, California, New York, Minnesota, Missouri, and Colorado
- Wide variety in scope, focus and enforcement of programs

Massachusetts

- Oil and Hazardous Material Release Prevention and Response Act (M.G.L. 21E § 5)
- Small program focusing on small number of large cases
- 11 NRD settlements between 1992-2005 totaling in excess of \$45M
- Planning larger NRD program
- Discussion regarding promulgating NRDA regulations – methodology to calculate damages and settlement values

Washington

- Hazardous Waste Cleanup – Model Toxics Control Act (RCW 70.105D.040); Oil and Hazardous Substance Spill Prevention and Response (RCW 90.56.500); Oil Spill Compensation Schedule (WAC 173-183-300)
- Oil Spills Program
- Recovered estimated \$50M over past 10 years
- Resource Damages Assessment Committee created in 1989

New Jersey

- Spill Compensation & Control Act (N.J.S.A. 58:10-23.11 *et seq.*)
- Large number of sites from small groundwater contamination to CERCLA-type sites
- Recovered over \$50M in last 10 years

California

- Very aggressive program
- Over \$100M recovered in last 15 years
- Wide range of cases, big & small
- Primary focus is oil spills & large CERCLA-type sites

California

- Oil Spill Response and Contingency Planning (Cal. Gov. Code §§ 8670.56.5 & 8670.61.5)
- Attorney General – Environmental Actions (Cal. Gov. Code § 12607)
- Hazardous Waste Control (Cal. Health & Safety Code § 25189.1)
- Fines & Penalties (Cal. Fish & G. Code § 12016)

Minnesota

- Environmental Response and Liability Act (M.S.A. §§ 115B.17 & 115B.04)
- NRD Program is 5 years old
- 3 Settlements as of 2005
- Plan to expand the program

South Carolina

- Pollution Control Act (SC ST § 48-1-90)
- NRD Program is 2 years old
- To date, all cases handled administratively (no litigation)
- Current Focus: large sites involving historical industrial discharges
- Future Focus: expand to smaller sites with groundwater contamination

The Future

- Number of States with NRD programs will increase
- States with active NRD programs will expand those programs
- States with active NRD programs will develop a regulatory framework within which to work



THANK YOU

CONTACT: jgilmour@connellybaker.com

CONNELLY • BAKER • MASTON • WOTRING • JACKSON, LLP

