**Pace Environmental Law Review**

Volume 11
Issue 2 *Spring 1994*

Article 6

April 1994

# Judges' Bench Brief: Sixth Annual Pace National Environmental Moot Court Competition

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# JUDGES' BENCH BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

| | |
|---|---|
| STATE OF NEW UNION<br>Appellee<br><br>v.<br><br>TIPPECANOE LOGGING CO.<br>Appellant<br><br>and<br><br>TYLER-2 MINING, INC.<br>Appellant | Civ. No. 93-214 |

## QUESTIONS PRESENTED

1. If New Union Department of Natural Resources can exercise CERCLA natural resource damage trusteeship over private land under section 107(b)(1) of CERCLA, 42 U.S.C. § 9607(b)(1) (1988).

2. If Tippecanoe Logging Co. is excused from liability under the CERCLA section 107(b) act of God defense, third-party defense, or a combination of both. 42 U.S.C. 9607(b) (1988).

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## PROCEDURAL POSTURE OF THE CASE

This case comes to the United States Court of Appeals for the Twelfth Circuit on appeal from a decision of the District Court for the District of New Union upholding the New Union Department of Natural Resource's exercise of natural resource trusteeship over privately owned land which fell victim to a mining leachate spill and excusing the Tippecanoe Logging Co. from liability under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) section 107(b), 42 U.S.C. § 9607(b) (1988). All parties concede that venue in the United States Court of Appeals for the Twelfth Circuit is proper under 42 U.S.C. § 9613(b) (1988).

## BACKGROUND

On September 30, 1989, Tippecanoe Logging Co. (TLC) sold a parcel of its land, "Site 18," to Mine-Finders, Inc., a firm specializing in matching new mining sites with companies that can develop them. New Union v.Tippecanoe Logging Co., Civ. No. 93-2829, slip op. at 2 (D. New Union Apr. 23, 1993). On November 30, 1989, before it went out of business, Mine-Finders sold Site 18 to Tyler-2 Mining (T2M). Site 18 was transferred in both cases by deed in fee simple absolute for cash. In each sale the deed included a transferable right of entry and exit to site 18 on a private road owned and maintained by TLC. *Id.*

T2M mines Site 18 using a leaching process to wash waste rock away from the ore. The highly acidic leachate, including chemicals particularly toxic to plant life, ran through a drainage channel to a surface impoundment. Every forty-five days, the impoundment was drained and the waste leachate trucked off-site to a licensed incinerator. T2M holds

all required environmental permits under federally-authorized programs administered by the New Union Department of Environmental Protection (NUDEP). *Id.*

When Mine-Finders sold the mining site to T2M, T2M inserted a deed provision to win zoning approval from the local County Board of Supervisors in which T2M warranted that it would use an independent contractor approved by the NUDEP to operate and maintain the surface impoundment. The same deed provision also required T2M to arrange for an annual environmental audit by an independent auditing firm and promptly correct any deficiencies reported. *Id.* T2M met these obligations and audits conducted prior to the accident, in November of 1990 and 1991, found no deficiencies. *Id.* at 3.

TLC's property is home to the only known population of the Purple Daisy, a wild flower listed as endangered under the Endangered Species Act, 16 U.S.C. § 1531 (1988 & Supp. IV 1992). The Purple Daisy has a symbiotic relationship with the Green Swallow. The Green Swallow lays its eggs only in Purple Daisy leaves and the egg shells left after the Green Swallows hatch add a key nutrient to the soil in which the Purple Daisy grows. Though not listed as an endangered species, a citizen petition to list the Green Swallow is pending with the U.S. Department of the Interior. *Slip op.* at 1, 2.

TLC's property also contains the only known habitat for the Blue Robin, a bird already listed as endangered under the Endangered Species Act. *Id.* at 2. Little is known about its adaptability to other habitats. *Id.*

The T2M mining site was inspected by the NUDEP on April 23, 1992. The NUDEP found no violations and gave the site it's highest approval rating. *Id.* at 3. On April 26, 1992, the area encompassing the T2M site was deluged with the heaviest rainfall to have occurred during the prior ten years, just as the impoundment was reaching the end of its forty-five day filling cycle. A crack developed in the surface impoundment wall on the following day, April 27, 1992. In a matter of fifteen minutes, mining leachate covered the area of TLC property containing all of the Blue Robin and ninety percent of the Purple Daisy habitat. The parties have stipulated

that the crack was caused by the heavy volume of liquid held in the impoundment on April 27. *Id.*

Within days of the impoundment break, all of the Purple Daisies in the area affected by the spill had died. The trees and shrubs in which the Blue Robins nest absorbed leachate into their root systems and the parties have stipulated that the trees and shrubs will die within 5 to 8 years. *Id.*

NUDEP sent an on-site assessment team to the spill site in May 1992. The team concluded that no response action was needed beyond its own investigation and recovery for natural resource damages which are the subject of this lawsuit. NUDEP submitted its bill for $21,000 to TLC and T2M to recover the expenses of its assessment. T2M paid the bill in full. *Id.*

On September 30, 1992, the New Union Department of Natural Resources, designated as a natural resource trustee under section 107(f)(2)(B) of CERCLA, 42 U.S.C. § 9607(f)(2)(B) (1988), brought suit in the District Court seeking natural resource damages from TLC and T2M under sections 107(a) and (c) of CERCLA, 42 U.S.C. § 9607(a), (c) (1988). Pursuant to CERCLA section 104(d)(1), 42 U.S.C. § 9604(d)(1) (1988), NUDNR has a memorandum of agreement with the U.S. Department of the Interior authorizing NUDNR to serve as lead trustee for purposes of litigation and to represent the interests of both the federal and state trustees. *Slip op.* at 3. New Union seeks funds to re-propagate the Purple Daisy in an unaffected state wilderness area and to study possible alternative habitats for the Blue Robin. *Id.* at 4. New Union's public trust doctrine includes riverbeds and the shores of Lake New Union. In 1979, the Supreme Court of New Union found that the public trust did not extend to privately-held lands. *Id.* New Union's rule regarding ownership of wildlife follows the common law rule. *Id.*

The United States District Court for the District of New Union, in a decision entered April 23, 1993, upheld the authority of the New Union Department of Natural Resources (NUDNR) to exercise natural resource trusteeship over TLC's affected land. The court held "that the Endangered Species Act is evidence of a congressional decision to exert substan-

tial governmental control over endangered species no matter where they are located." *Id.* at 5. Consequently, the New Union Department of Natural Resources properly exercised natural resource trusteeship over the resources affected by the spill. *Id.*

The court based its decision on sections 107(a) and 101(16) of CERCLA, 42 U.S.C. §§ 9607(a), 9601(16) (1988), and the Department of the Interior (DOI) interpretation that these sections contemplate the scope of trusteeship authority to include a basis in common law. *Id.* (citing Natural Resource Damage Assessment, 56 Fed. Reg. 19,752 (1991) (to be codified at 43 C.F.R. pt. 11) (proposed Apr. 29, 1991)). The District Court also found that TLC was not liable for natural resource damage liability under the "combination defense" of CERCLA section 107(b)(4), 42 U.S.C. § 9607(b)(4) (1988).

On appeal, TLC and T2M assert that CERCLA's natural resource authority is limited to land owned or held by the government as part of the public trust. The State of New Union and T2M appeal the district court's decision regarding TLC's eligibility for act of God and third-party liability defenses under section 107(b) of CERCLA, 42 U.S.C. § 9607(b) (1988).

## SUMMARY OF THE ARGUMENTS

### I. CERCLA NATURAL RESOURCE DAMAGE TRUSTEESHIP

#### A. *Legislative History*

TLC and T2M may argue that CERCLA legislative history supports the exclusion of privately owned property from New Union's exercise of trusteeship. The State of New Union may counter that trusteeship of endangered species on private property is not specifically precluded by CERCLA. It may also assert that trusteeship may be exercised because the Endangered Species Act, which provides for the management and protection of endangered wildlife, places in the state an interest in its endangered species.

B. *Statutory Interpretation*

The case of *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989), in which the Department of Interior (DOI) was ordered to revisit its interpretation of sections 107(f) and 101(16) of CERCLA, 42 U.S.C. §§ 9607(f), 9601(16) (1988), does not provide clear guidance as to when and how the state can exercise trusteeship over privately owned land. New Union will argue that the state has been substantially involved with the private property at issue and it is justified in its exercise of trusteeship. TLC and T2M may argue that this interpretation of the statute and regulations would run afoul of the intent of CERCLA.

C. *The Use of Common Law*

The New Union Department of Natural Resources might argue that it can exercise trusteeship based on traditional doctrines of common law such as the public trust doctrine, public nuisance cause of action or the parens patriae doctrine. TLC and T2M may counter that the traditional use of these doctrines is limited and that the resources the common law reaches, such as wildlife, are narrowly defined.

## II. COMBINATION DEFENSE

A. *Act of God*

TLC may argue that the leachate spill was caused by ten-year record rainfall constituting an act of God under CERCLA and therefore they are not liable for any resulting damages. New Union and T2M may argue that this rainfall was foreseeable and therefore was not an act of God under CERCLA's definition.

B. *Third Party Defense*

TLC may argue that it has met all the statutory requirement s of the third-party defense under CERCLA. TLC may argue that any contractual relationship it has with T2M is not connected with the leachate. TLC may also argue that the breach was unforeseeable and that under the circum-

stances it exercised due care and took proper precautions with respect to the leachate.

New Union and T2M may argue that the easement owned by T2M is a contractual relationship connected with the waste since trucks drive on it every forty-five days to remove the leachate. New Union and T2M may also argue that there is no evidence in the record of any due care or precautions taken by TLC and therefore their pleading of the third party defense is statutorily insufficient.

### C. *Combination Defense*

New Union and T2M may argue that every element of each defense in combination must be proven to satisfy the statutory requirements of the combination defense. New Union and T2M may also argue that the legislative purpose of CERCLA requires this interpretation. TLC may argue that the lower court was correct in ruling that the combination defense allows a partial showing of two defenses. TLC may further argue that requiring a full showing of each individual defense under a combination defense would render the combination defense meaningless.

## DISCUSSION

This discussion addresses the two issues on appeal from the district court. The first issue is the propriety of the exercise of trusteeship over land owned by Tippecanoe Logging Co. by the New Union Department of Natural Resources ("NUDNR") under section 107(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992). The second issue is the liability or excuse from liability of Tippecanoe Logging Co. in light of the defenses listed or a combination of them under CERCLA section 107(b), 42 U.S.C. § 9607(b) (1988).

## I. STATE TRUSTEESHIP OF PRIVATELY-OWNED NATURAL RESOURCES UNDER CERCLA

New Union will argue that the express language of CERCLA, as clarified through legislative history and the judicial interpretation of that language, as well as the recently proposed interpretation of that language by the U.S. Department of Interior, supports a holding that the State is intended to be trustee of natural resources under its authority even if privately-held. It will further argue that the facts of this case are sufficient to establish a trusteeship for New Union to have standing pursuant to CERCLA. TLC and T2M will argue that CERCLA language, its legislative history, and any subsequent interpretations do not support a holding that the state may exercise trusteeship privately-held natural resources. These parties will further argue that the facts of this case do not establish that New Union should be consider a trustee of the natural resources on TLC's land.

### A. *CERCLA Language*

CERCLA expressly establishes the scope of liability for recovery of natural resource damage to be:

> 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 . . . . *Provided, however*, That no liability . . . shall be imposed . . . where the party sought to be charged has demonstrated that the damages to natural resource complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant the permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license . . . .

42 U.S.C. § 9607(f)(1) (1988).

CERCLA similarly defines natural resources to mean "land, fish, wildlife, biota, air, water, ground water, drinking

water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, [or] any Indian tribe . . . ." 42 U.S.C. § 9601(16) (1988).

New Union will argue that CERCLA language which follows "belonging to" in both sections indicates Congressional intent for CERCLA to establish authority for recovery for harm to natural resources not owned by the government. It may further argue that, as CERCLA is a remedial statute, its language must be interpreted broadly. New Union will support this broader interpretation with the decision in *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989). New Union may also argue that the express exception for privately-held resources which were determined as "irretrievable" in an approved environment impact statement implies that CERCLA liability was considered for other privately-held resources.

TLC and T2M will argue that the express language of CERCLA strictly defines the scope of authority under the statute and that the words do not extend CERCLA liability to harm caused to privately-held resources. These parties will argue that the language explicitly defines natural resources and the liability for their damage to government ownership or other limited government property interest, i.e. resources "appertaining to" government property or resources held by the government "in trust" for the public.

B. *Legislative History*

TLC and T2M will argue that CERCLA's legislative history indicates Congress' intent to exclude privately-held property from state trusteeship. New Union will argue that the legislative history does not manifest an intent to deny the state authority to recover for privately-held property.

CERCLA is based, with some important modifications, on three hazardous waste response bills proposed during the Carter administration. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensa-*

*tion, and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1-2 (1982). The Oil Pollution Liability and Compensation Act would have introduced liability and compensation for oil spill damages. H.R. 85, 96th Cong., 1st Sess. (1979). It was to provide for a trust fund to pay cleanup costs, as well as damages for injury to real and personal property, natural resources, loss of profits, and loss of tax revenue. *Id.* §§ 102, 103(a)(2)-(4), 104. Liability was to be joint, several, and strict. *Id.* § 104. Also introduced in the House was the Hazardous Waste Containment Act, H.R. 7020, 96th Cong., 2d Sess. (1980). This bill addressed the regulation of inactive sites bearing hazardous wastes, other than oil, on land and in non-navigable waters by a regime of reporting, cleanup and monitoring. *Id.* This bill also provided for recovery for injury to real and personal property, economic loss, and added personal injury as a category of recovery. *Id.* § 5. The third of these proposals was the Environmental Emergency Response Act. S. 1480, 96th Cong., 1st Sess. (1979). It too envisioned recovery for injury to real and personal property as well as liability for personal injury. *Id.* § 4(a)(2)(A). All three bills were roundly criticized, mainly on the issues of causation of harm where personal injury claims were permitted, the scope of liability, and the structure of the fee system to fund the laws. Grad, *supra*, at 13-14.

CERCLA finally emerged from amended S. 1480, incorporating many of the changes recommended by members of the Committee on Environment and Public Works. Grad, *supra*, at 19-22. The Senate's original purpose in passing CERCLA was "to I public trust in the Nation's natural resources." S. Rep. No. 96-848, 96th Cong., 2d Sess. 84 (1984). Congress was pushed to action on CERCLA by "strong public demand for action in light of Love Canal and other celebrated dump sites . . . to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with the abandoned and inactive hazardous waste disposal sites." *United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 745 (W.D. Mich. 1987) (quoting H.R. Rep. No. 1016, 96th Cong., 2d. Sess. (1980)), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6124). The lan-

guage of amended S. 1480 was substituted for that of the House bill, H.R. 7020, and signed into law. Grad, *supra*, at 35. The compromise bill did not contain joint and several liability but retained the preexisting common law and statutory framework. 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980). The compromise bill also lacked the previous proposals for liability for personal injury and private property loss.

TLC and T2M will argue that Congressional history of the passage of CERCLA indicate no Congressional intent to establish liability for injury to privately-held natural resources. These parties will argue that both the Senate and House rejected bills which would allow recovery for damage to private property and instead, passed CERCLA following the removal of language which would permit recovery for these damages.

New Union will argue the legislative history supports New Union's authority to exercise trusteeship. It will argue that although the legislative history does not explicitly authorize the exercise of trusteeship, neither does it explicitly preclude the exercise if trusteeship. New Union will contend that CERCLA was intended to be read expansively to effectuate its broad remedial purpose.

### C. *Judicial Interpretation:* Ohio v. United States Department of Interior

New Union will argue that the holding in *Ohio v. United States Department of Interior*, 880 F.2d 432 (D.C. Cir. 1989), permits the establishment of state trusteeship over privately-held property; the invalidation of the DOI interpretation of CERCLA natural resources as encompassing governmentally owned land implies that other state interests may warrant the establishment of CERCLA natural resource trusteeship. TLC and T2M will assert that the *Ohio* precedent did not enumerate governmental interests which would justify the establishment of natural resource trusteeship, and that the interest New Union has in the species here is insufficient to permit the exercise of such trusteeship.

In *Ohio v. United States Department of Interior*, 880 F.2d 432 (D.C. Cir. 1989), the court examined if CERCLA and the DOI regulation promulgated on it "invalidly limit the availability of natural resources damages to cases where the resources harmed . . . are owned by federal, state, local, or foreign governments, rather than by private parties." *Id.* at 459. The *Ohio* court came to no conclusion, reasoning that the DOI regulations were ambiguous and remanding the regulation to be clarified by the agency. *Id.* at 461.

In reviewing CERCLA, the court noted that "the words [of CERCLA] 'managed by, held in trust by, appertaining to, or otherwise controlled by' . . . must refer to certain types of governmental (federal, state or local) interests in privately owned property." *Id.* at 460 (citing Barry Breen, *CERCLA's Natural Resource Damage Provisions: What Do We Know So Far*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,304, 10,305-06 (1984)); 42 U.S.C. § 9601(16) (1988). However, the court further held that the legislative history of CERCLA showed that "Congress quite deliberately excluded purely private property from the ambit of the natural resource damage provisions." *Id.* at 460.

The court then reviewed the DOI regulation. The court looked to the preamble of the regulation which stated that "Congress has defined 'natural resources' with such specificity to leave no doubt that resources owned by parties other than Federal, State, local or foreign governments (i.e., privately-owned resources) are not included" and that "section 101(16) clearly indicates that damage to privately-owned natural resources are not to be included in natural resource damage assessments." *Id.* at 460-61. The court concluded that the language of the preamble "[t]aken at face value, . . . appear[s] to exclude any privately owned property from ambit of natural resource damage provisions, no matter how heavily involved a governmental entity may be in managing or otherwise controlling the property."

Counsel for DOI, however, asserted that the preamble to its regulation should not be read so strictly and that "a substantial degree of government regulation, management or other form of control over the property would be sufficient to

make the CERCLA natural resource damage provisions applicable." *Id.* at 461. As the Court could not ascertain whether DOI's official interpretation of this CERCLA language was that stated in the preamble or that stated by counsel, it remanded the record to DOI to clarify its interpretation of the scope of these regulations as applied to non-governmental owned lands. *Id.* New Union will argue that the *Ohio* court ruling implicitly grants it the authority to establish a natural resource trusteeship on TLC's land. New Union may assert that this decision allowed CERCLA natural resources to be defined to encompass interests other than title to the land that the resources are on. TLC and T2M may counter that, since the *Ohio* court did not find the DOI counsel's interpretation of 43 C.F.R. part 11 invalid, this court should adopt the "substantial degree" formulation set forth by counsel, and that New Union can not meet this threshold.

D. *Department of Interior Regulations*

New Union will argue DOI's recent proposal to modify its trusteeship regulation, in response to the *Ohio* decision, supports its authority to exercise trusteeship. TLC and T2M will contend that, as this proposal is not a final ruling, it has no persuasive authority.

In response to the *Ohio* decision, which remanded the relevant DOI regulation for clarification as official agency policy, DOI proposed a revision to its rule. 56 Fed. Reg. 19,752 (1991). DOI proposed revision would establish as the official agency policy the interpretation of "managed by, held in trust by, appertaining to, or otherwise controlled by, as these terms appear in CERCLA definition of natural resources, "to ensure a wide range of legitimate government interest in natural resources that may, in fact, be held in private ownership." *Id.* The revised policy would be consistent with the DOI argument in *Ohio* that the regulation intends "general sources of authority for recovery under the rule [to] include, but not necessarily be limited to, . . . constitution, statute, common law, regulation, order, deed, or other conveyance, permit, or ag The revised regulation "directs the

trustee . . . to state briefly the authority for asserting trusteeship . . . in the Assessment Plan, and also in the Notice of Intent to Perform an assessment." *Id.* On this regulation, the DOI has not reached a final ruling. Natural Resources Damage Assessment, Reopening of Comment Period, 58 Fed. Reg. 39,328 (1993); Natural Resources Damage Assessment, Extension of Comment Period, 58 Fed. Reg. 45,877 (1993).

New Union will argue that the proposed regulation should guide the court to uphold its authority to establish trusteeship over privately-held property. The party will argue that the proposed regulation reflects DOI's policy and that the court should defer to the agency, pursuant to *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984). New Union may buttress this contention by arguing that the revised regulation merely affirms prior DOI policy broadly interpreting CERCLA language.

TLC and T2M will argue that the proposed regulation has no persuasive authority as it is not final agency decision. These parties may further argue that they may not be held to the requirements of regulations not yet promulgated. TLC and T2M may also contend that, for the proposed revised regulation to govern, New Union must meet its requirements of notice under the proposed regulation.

### E. *State Interests*

#### 1. Endangered Species Act

New Union may assert a separate basis for natural resource trusteeship over the affected species exists from its power to manage endangered species under the Endangered Species Act (ESA). 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992). TLC and T2M may counter that regulation of a species does not connote management or control and therefore the species are not natural resources under CERCLA.

Under ESA, Congress authorized the DOI to protect species threatened or endangered with extinction through management utilizing law enforcement, habitat acquisition and maintenance, transplantation and other techniques associated with scientific resource management. 16 U.S.C.

§ 1532(3) (1988). Whenever a species is listed as threatened or endangered, the DOI protects the species by issuing regulations necessary to provide for their continued survival. 16 U.S.C. § 1533(d) (1988).

CERCLA also recognizes this power of DOI in statutorily appointing it trustee for natural resources. 42 U.S.C. § 9607(f) (1988). The natural resources entrusted to DOI under CERCLA include migratory birds and endangered species. 40 C.F.R. § 300.600 (1992). For this action, DOI has agreed that New Union can act on its behalf as a trustee under both CERCLA and ESA. *Slip op.* at 3. As an appointed trustee, New Union is limited to remedial actions enumerated in CERCLA section 107(f). 42 U.S.C. § 9607(f). These actions include restoration, replacement or acquisition of the equivalent of the lost natural resource. *Id.* CERCLA also authorizes fund expenditures for studies and investigations of injuries to natural resources, to the extent that such injury may pose a threat to the public health or welfare or the environment. 42 U.S.C. § 9604(b) (1988). These response actions should also comply with the standards established by other environmental laws. 56 Fed. Reg. 2408 (1991) (Army Corp of Engineers Regulatory Guidance Letters).

New Union will argue that, as a designated trustee, it is given extensive powers to manage the endangered species within its borders. Furthermore, this management authority is within the reach of the "managed by, held in trust by, appertaining to" language which defines a natural resource under CERCLA section 101(16). 42 U.S.C. § 9601(16) (1988). New Union may further assert that because it is the stated policy of the ESA to conserve endangered species through scientific resource management until they are no longer endangered, the CERCLA action may incorporate such management techniques. Although not raised in the lower court, the NUDNR is also authorized through its trustee title to commence a remediation action for the green swallow, a migratory bird. 40 C.F.R. § 300.600.

TLC and T2M may argue that any interest New Union has in endangered or threatened species, as defined under ESA, does not bring these species within the ambit of natural

resources under CERCLA. These parties may argue that regulation of a species does not connote ownership or management of these species and therefore they are not natural resources controlled by the state under CERCLA.

2. State Interest as Defined by Common Law

New Union may introduce state common law doctrines, such as ferae naturae and parens patriae, to establish control or management of the affected area or species in accordance with the *Ohio* decision and the proposed DOI regulations. New Union will argue that alone, or in combination, these common law doctrines establish that it has an interest sufficient to justify its exercise of a natural resource trusteeship under CERCLA. TLC and T2M will argue that these common law concepts do not establish, or do not establish sufficient, control or management by New Union to authorize its exercise of trusteeship.

As a threshold issue, TLC or T2M may argue that state common law concepts were preempted by CERCLA. However, New Union may argue that CERCLA contains a savings provision which states that "nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993) (quoting 42 U.S.C. § 9652(d) (1988)) (footnote omitted); *see also* 42 U.S.C. § 9614(a) (1988).

a. Public Trust Doctrine

TLC and T2M may argue that there is no basis under New Union's public trust doctrine to find that the effected species are within the public trust since New Union's public trust doctrine doesn't extend to privately held lands. New Union may counter that it may still hold in trust species on private lands and in arguendo that the public trust doctrine of the state should be extended to endangered or threatened species on private lands.

The public trust doctrine holds that a government controls some types of natural resources for the benefit of the public in general. William H. Rodgers, *Handbook on Environmental Law* 171 (1977 & Supp. 1984). It imposes upon the government an affirmative duty to manage resources in accordance with the stipulations of the trust. *Id.* For the doctrine to apply, the plaintiff must show the trust was violated, that is, that there was an "unreasonable interference with the use and enjoyment of trust rights." Rodgers, *supra*, at 171. Although traditionally limited to certain kinds of natural resources, the public trust doctrine has been expanded through state statutes and court decisions. *See National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1986).

States developed the public trust doctrine along different lines and to include different resources. In New Union, the public trust includes riverbeds and the shores of Lake New Union, but not privately held land but not privately held lands. *Slip op.* at 4.

TLC and T2M may argue that the public trust doctrine of New Union does not extend to privately held lands, and therefore any species on the land owned by TLC are not within the ambit of the public trust. New Union, however, may argue that even though the public trust doctrine does not extend to privately held lands, it may extend to endangered species. New Union may also argue that the public trust doctrine of the state should encompass endangered and threatened species.

b. State Ownership of Wildlife: Ferae Naturae

New Union may argue that since it has the power to protect animals within its borders, the species affected by the leachate spill are natural resources for the purpose of CERCLA trusteeship. TLC and T2M may counter that this interest does not imply that New Union owns or even manages animals within the state and therefore the species are not natural resources under CERCLA section 101(16). 42 U.S.C. § 9601(16) (1988).

New Union follows the common law with respect to ownership of wildlife. *Slip op.* at 4. The common law doctrine of ferae naturae describes wildlife as not owned by anyone until captured or taken. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). In 1896, the United States Supreme Court ruled that wild animals, or ferae naturae, belonged to the citizens of the state until taken. *Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979). This concept of state ownership was later rejected by the Court. *Missouri v. Holland*, 252 U.S. 416 (1920); *Hughes*, 441 U.S. 322. In *Missouri*, the Court did not reject the state's assertion of ownership over migratory birds, but implied that the extent of such ownership may be limited." To put claim of the State upon title is to lean upon a slender reed." *Id.* at 434. The Court later discounted the notion of state ownership of wild animals as legal fiction. *Hughes*, 441 U.S. at 334. Nevertheless, the Court found that a state has an interest in protecting and conserving wild animals just as has an interest in protecting the health and safety of its citizens. *Id.* at 337.

In *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980), decided shortly after *Hughes*, a district court found that both the state and federal government possessed an interest in migratory birds. Though the court agreed with the defendants assertion that the state did not own the birds, it did find that "the state certainly has a sovereign interest in preserving wildlife resources." *Id.* at 40. This interest, coupled with the public trust placed in the State of Virginia and the federal government, permitted both to recover for damages to migratory waterfowl caused by an oil spill. *Id.*

TLC may argue that since New Union does not own the species affected by the spill, they are not natural resources as defined under section 101(16) of CERCLA. 42 U.S.C. § 9601(16) (1988). Consequently, New Union can not exercise trusteeship over them. New Union, however, may argue that its interest in the endangered species affected by the spill is enough to qualify the species as a natural resource "belonging to" the state. *Id.*

c. Public Nuisance

New Union may argue that the reach of its authority under CERCLA can be defined by reference to the public nuisance doctrine, since it has authority to act when there is an "unreasonable interference with the rights common to the general public." Restatement (Second) of Torts § 821B (1979). One court addressing the issue of public nuisance is the Second Circuit in *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985), where Shore Realty challenged the State of New York's authority to seek injunctive relief under state public nuisance doctrine pendent to a CERCLA claim. The *Shore Realty* court found that "the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law." *Shore Realty*, 759 F.2d at 1051. Furthermore, the *Shore Realty* court found that "the State has standing to bring suit to abate such a nuisance 'in its role as guardian of the environment." *Id.* (citing *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 978 (Sup. Ct. 1983)). New Union will assert that states have traditionally had sovereignty over natural resources. *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972); *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973); *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980); *Puerto Rico v. SS Zoe Colocotroni*, 456 F. Supp. 1327 (D.P.R. 1978), 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). New Union will argue that findings that states are guardians of and have sovereignty over natural resources under the various state public nuisance doctrines represent that the state's ability to protect its natural resources is sufficient interest to qualify the Blue Robin and Purple Daisy as natural resources under the section 101(16) definition of CERCLA. 42 U.S.C. § 9601(16) (1988).

TLC and T2M may argue that although the state may have the standing to bring a public nuisance claim, such a claim does not necessarily indicate that New Union also has the authority to exercise natural resource trusteeship. T2M and TLC may also argue that the state interest under a pub-

lic nuisance action is too vague to connote the specific control interest required by CERCLA's definition of natural resources. *Id.*

d. The Parens Patriae Doctrine

Under the parens patriae doctrine, a state as "parent of the nation" or quasi-sovereign and representative of the public interest, has standing to protect the air, water, and land within its territory with or without the consent of affected landowners. *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York v. New Jersey*, 256 U.S. 296 (1921); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). In order to have standing as parens patriae, a state must articulate an interest separate from the interests of private parties and a substantial portion of its citizens must have been adversely affected by the challenged acts. *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Haw. 1969).

The State of New Union may represent the citizens of the state against TLC and T2M to protect their interests in the natural resources of the state, but it will have to show that a substantial portion of its citizens have been adversely affected by the challenged acts. The ability to bring a parens patriae action may provide indication of a state interest sufficient to justify the exercise of trusteeship over Harrison Forest, or at least that portion which includes the habitat of the affected species.

F. *The "Takings" Issue*

TLC and T2M may argue that CERCLA trusteeship exercised in this manner is unconstitutional taking of property under the Fifth Amendment of the U.S. Constitution. But as this issue was not raised at trial, it is not in the record and it is not relevant here. However, TLC and T2M may argue that Congress did not grant New Union the power to effectuate a "taking" by establishing a trusteeship over privately-held

property. New Union may argue that CERCLA is a environmental regulation within the federal and state police powers and not a "taking" of TLC property.

The Fifth Amendment provides that the federal government shall not take private property without compensation, which also applies to the States through incorporation in the Fourteenth Amendment. *See* U.S. Const. amends. V, XIV. The recent case of *Lucas v. South Carolina Coastal Council*, — U.S. —, 112 S. Ct. 2886 (1992), affirmed that a "taking" need not be physical but could be through a regulation or statute which deprived one of all economic benefit or use of one's property. *Id.* at 2895. A "taking" also need not be permanent; temporary government interference with the use of property must be compensated for. *United States v. Hardage*, 1993 WL 207830, at *1 (10th Cir. June 9, 1993) (holding district court's temporary condemnation of third-party plaintiff's property pursuant to CERCLA to require compensation) (unpublished opinion, attached as Appendix A); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

As the "taking" claim was not raised before trial, TLC or T2M may not assert a counterclaim against New Union for compensation for any alleged taking. However, TLC and T2M may argue that the lack of any provision for compensation by CERCLA indicates that Congress did not intend CERCLA to authorize the exercise of trusteeship over privately-held property. These parties may argue the lack of Congressional discussion of "taking" during passage of CERCLA further supports a finding that Congress did not contemplate the establishment of trusteeships over privately-held property. To completely support this argument, these parties must convince the court that the trusteeship would be a "taking" requiring compensation. As this was not substantively argued in the court below, it is within the discretion of the court to accept de novo review of the issue, remand to the trial court for review of the issue, or preclude the issue.

If the court chooses to entertain this argument, New Union may counter the "takings" argument by asserting that the establishment of a trusteeship is not a "taking" as it does

not deprive TLC or T2M of the full economic benefit or use of its property as required by *Lucas*. This party may further argue that, even if a taking has occurred, the establishment of a trusteeship remains valid; the Fifth Amendment requires only that such actions are compensated and TLC and T2M have never claimed that they are entitled to compensation. Finally, New Union may argue that the lack of Congressional discussion of "takings" or language in CERCLA to compensate for "takings" does not preclude that Congress intended to establish state trusteeships over private property; instead, CERCLA predates *Lucas* and CERCLA establishment of trusteeship was contemplated to have "takings" implications.

## II. LIABILITY UNDER CERCLA

TLC does not dispute through its appeal the lower court finding that it was a facility since it owned the land upon which the hazardous leachate came to be located. TLC will, however, argue that it is not liable under the combination of an act of God and an act or omission of third party defenses. T2M and New Union will argue that both defenses are insufficient; therefore, TLC is also liable for the costs of any cleanup and damages.

### A. *Establishing Liability*

CERCLA is addresses action unrecoverable under the Resource, Conservation and Recovery Act, namely the clean-up of hazardous wastes already released into the environment. House Comm. Interstate and Foreign Commerce, Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.R. Rep. No. 1016, 96th Cong., 2d Sess. 96-510, *reprinted in* 1980 U.S.C.C.A.N. 6119. In addition to establishing a Federal fund to ensure the eventual clean-up of hazardous waste sites, CERCLA establishes liability for the "release or threatened release of hazardous substances." 42 U.S.C. § 9607(b) (1988).

Under Section 107(a) of CERCLA, TLC is classified as the owner or operator of a facility where hazardous waste is

located. 42 U.S.C. § 9607(a)(1) (1988). Section 101(9) of CERCLA defines a facility as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area where a hazardous waste has been deposited, stored, disposed of, or placed, or otherwise come to be located; not does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1988). Since TLC neither disputed nor appealed this finding this issue is not preserved for appeal. Section 107(a) defines four distinct categories of potentially responsible parties (PRPs). 42 U.S.C. § 9607(a) (1988). The other three classes of PRP's, which most likely will not come up in discussion of the issues relevant to this problem are:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or for treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a)(2)-(4) (1988).

If found liable, TLC will be responsible for all costs of removal incurred by New Union, any necessary response costs incurred by new Union, any damages for injury to, destruction of, or loss of natural resources, including the costs of as-

sessing such damage, and the costs of any health assessment or health study conducted. 42 U.S.C. § 9607(a)(4) (1988).

### B. *CERCLA Defenses to Liability*

TLC raises a combination defense provided by CERCLA incorporation an act of God and the third party defense pursuant to 42 U.S.C. § 9607(b) (1988). TLC will argue that through this combination of defenses it is not liable for the release of leachate from T2M's land. T2M and New Union will argue that the defenses presented by TLC are statutorily insufficient and not satisfactory to overcome the burden imposed by the legislative intent of CERCLA.

CERCLA provides only four defenses to limit a PRP's liability. Section 107(b) of CERCLA provides that a party shall not be liable under section 107(a) when the release of a hazardous substance is "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 the foregoing." 42 U.S.C. § 9607(b) (1988). To further the statutory purposes of CERCLA to encompass all instances of hazardous waste release, courts have interpreted these defenses narrowly. *Kelly v. Thomas*, 757 F. Supp. 1532, 1540 (W.D. Mich 1989), *New York v. Shore Realty* 759 F.2d 1032, 1045 (2nd Cir. 1985).

#### 1. Act of God Defense

TLC will argue that the record ten year rainfall which caused an increased volume behind the impoundment wall resulting in the break was an act of God under CERCLA. T2M and New Union will argue that this rainfall was a foreseeable climatic event and therefore not an act of God. All parties may refer to act of God cases occurring under section 311 Clean Water Act, 33 U.S.C. § 1321 (1988), whose wording parallels that of CERCLA section 107(b), 42 U.S.C. § 9607(b) (1988).

a. Common Law Origins of the Act of God Defense

The Act of God defense originated at common law in cases involving dams and impoundments of water. This defense allowed an individual to avoid liability for property damage caused by a break in an impoundment. These "acts of God" have been limited to only unforeseeable natural disasters, floods and the like. Under common law, the elements of this defense are established by a "preponderance of the evidence that the rainfall, runoff, or flooding (1) were unprecedented and extraordinary; (2) could not have been reasonably anticipated; (3) could not have been reasonably provided against; and (4) were the sole proximate cause of the damage to plaintiff's property." *Woonenberq v. Boone Township*, 455 N.W.2d 832, 835 (N.D. 1990). Thus, floods of a phenomenal nature do not have to be guarded against but "extraordinary rainfalls occasionally occurring" should be anticipated against and may not be used as a defense. *Cortell v. Marshall Infirmary*, 24 N.Y.S. 381 (1893).

> The principle, clearly, is that, although rainfall may be more than ordinary, yet if it such as has occasionally occurred, and it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it.

*Eikland v. Casey*, 266 F. 821 (9th Cir. 1920) (quoting *Ohio & M. Ry. v. Ramey*, 28 N.E. 1087 (Ill. 1891)). Under this test, only unpredictable and unforeseeable heavy rainfall would constitute an act of God. However, courts have refused to go beyond the legislative intent of Congress to define an act of God under environmental statutes. *Sabine Towing v. United States*, 666 F.2d 561 (Ct. Cl. 1981). Consequently, this common law has not been used as authority by courts in interpreting the act of God defense in the Clean Water Act (CWA). Instead courts are limited to the congressional intent and legislative history of the statute. *Id.*

b. Clean Water Act

CERCLA was passed in 1980 to make compensable claims that could not be satisfied under provisions of section 311 of the Clean Water Act 33 U.S.C. § 1321 (1988), for releases of hazardous substances. 42 U.S.C. § 9611(b)(1) (1988). This section is therefore a useful reference in determining the scope of available defenses under CERCLA. *Lincoln Properties v.Higgins*, 823 F. Supp. 1528, 1541 (E.D. Cal. 1992). As in section 107(b) of CERCLA, section 311 of the Clean Water Act limits the defenses for a release to an act of God, an act of war, an act or omission of third party, or any combination of the three. This section defines an act of God as "an act occasioned by an unanticipated grave natural disaster." 33 U.S.C. § 1321(a)(4) (1988). The Conference Report of the Clean Water Act further clarifies this definition. The report states that:

> [t]he term 'act of God' is defined to mean an act occasioned by unanticipated grave natural disaster. This definition varies from the Senate definition, and under this definition, only those acts about which the owner could have had no foreknowledge, could have made no plans to avoid, or could not predict would be included. Thus, grave natural disasters which could not have been anticipated in the design, location, or operation of the facility or vessel by reason of historic, geographic, or climatic circumstances, or phenomena would be outside the scope of the owner's or operator's responsibility.

Conf. Rep. No. 91-940, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 2722. Courts have gone no further than this definition to define what constitutes an act of God. Consequently, earlier common law interpreting the act of God defense has not been looked to for clarification of what constitutes an act of God. *Sabine Towing v. United States*, 666 F.2d 561 (Ct. Cl. 1981). Given the narrowness of this defense in a strict liability scheme, judges have typically focused upon the foreseeability of the natural event. *United States v. West of England Ship Owner's Mut. Protection & Indem. Assoc.*, 872 F.2d 1192 (5th Cir. 1989). For instance, a

thunderstorm of which weather forecasters warned only one-half hour before the storm passed over a vessel was not an act of God under this section. *Liberian Polar Transps. v. United States*, 26 Cl. Ct. 223 (1992). In addition, spring runoff causing flooding does not constitute an act of God under the Clean Water Act. *Sabine Towing*, 666 F.2d at 564.

c. CERCLA definition

CERCLA defines an "act of God" similarly to the Clean Water Act as an "unanticipated grave natural disaster or other phenomena 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." 42 U.S.C. § 9601(1) (1988).

In *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal.), *related case* 783 F.2d 821 (9th Cir. 1986), the court found that heavy rains were not an act of God under CERCLA. In that case, heavy rains on several occasions caused acid pits at the site to overflow, causing a release of contaminated water into a nearby community. The Federal District Court of Central District of California ruled that

> the rains were not the kind of 'exceptional' natural phenomena to which the narrow act of God defense of section 107(b)(1) applies. The rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through the design of proper drainage channels.

*Stringfellow*, 661 F. Supp. at 1061. Thus, the record rainfall involved here will only be found to be an act of God if it is unanticipated, of exceptional character, and the effects of the rainfall could not have been avoided through due care and foresight.

TLC may argue that the record ten year rainfall could not have been foreseen, and furthermore that the effects of this rain in causing the breach in the impoundment wall could not have been avoided since this consequence was also unforeseeable. New Union and T2M will argue that the rain-

fall here, like *U.S. v. Stringfellow*, was predictable. Therefore, the act of God defense is not available to TLC.

2. Act of War

Although not at issue here, it is worth noting that at least one court has interpreted the act of war defense under CERCLA. An act of war is not defined in either CERCLA or the Clean Water Act but by implication it is "an act of a combative nature." *United States v. Shell Oil Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,791, 20,792 (C.D. Cal. 1992). Thus, a contract with the Department of Defense and a wartime scarcity of resources to build disposal facilities during World War II, did not constitute an 'act of war' under CERCLA. *Id.*

3. Third Party Defense

TLC will argue that since the release was from T2M' s land and not caused by TLC, it is not liable for this release. TLC may further argue that it satisfies the statutory elements of this defense since it has no contractual relationship with T2M and it could take no acts against an unforeseeable release of leachate. New Union and T2M will argue that TLC has not satisfied all the elements of this defense. T2M and New Union will further argue that since T2M and TLC have a contractual relationship, an easement, the third party defense is not available.

Section 107(b)(3) of CERCLA establishes that no liability will be found if the release was solely caused by:

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that
>
> (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in

light of all the relevant facts and circumstances, and

(b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3) (1988).

Applying the 107(b) third party defense to the present case, TLC must prove by a preponderance of the evidence that: a) an act or omission of T2M was the sole cause of the release; b) the act or omission did not occur in connection within a direct or indirect relationship with T2M; c) it exercised due care with respect to the leachate; and d) it took precautions against any foreseeable acts or omissions of T2M and the foreseeable consequences of those acts or omissions. *See United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich 1987); *Kelly v. Thomas*, 714 F. Supp. 1439, 1446 (W.D. Mich 1989); *United States v. A & N Cleaners*, 788 F. Supp. 1317, 1326 (S.D.N.Y. 1992). A defendant's mere assertion that he had "no control over the third party" without statement of the elements of the third party defense is statutorily insufficient and therefore barred. *United States v. Marisol*, 725 F. Supp. 833 (M.D. Pa. 1989).

a. In Connection with a Contractual Relationship

Any claim by New Union and T2M that T2M and TLC have a contractual relationship will be based upon T2M' s ownership of a "transferable right of entry and exit" across land owned by TLC. *New Union, slip op.* at 2. This "transferable right of entry or exit" included with the deed is apparently an easement.

CERCLA defines "contractual relationship" as including "but not limited to land contracts, deed or other instrument transferring title or possession." 42 U.S.C. § 9601(35) (a) (1988). This definition was added to CERCLA in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), and has been found to include leases. *New York v. Shore Realty Corp.*, 759 F. 2d

1032 (2nd Cir. 1985); *United States v. Monsanto*, 858 F. 2d 160 (4th Cir. 1987); *United States v. Argent*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,497 (D.N.M. 1984). The legislative history of CERCLA implies a broad reading of an indirect contractual relationship. 26 Cong. Rec. 26,783 (1980) (remarks of Sen. Gore). However, courts have narrowly construed the requirement that the contractual relationship occur "in connection with" the act or omission of the third party, thus limiting the scope of an indirect contractual relationship. This requirement does not encompass "all acts by a third party with any contractual relationship with the defendant. Such a construction would render the language 'in connection with' mere surplusage." *Shapiro v. Alexanderson*, 743 F. Supp. 268, 271 (S.D.N.Y. 1990).

In *Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp.*, 964 F.2d 85 (2nd Cir. 1992), the plaintiff sued the defendant for cleanup costs of a site it had acquired from the defendant's predecessor. The defendant conceded that the sale of the land was a contractual relationship but argued that the sale had no connection with the waste involved. In an appeal from a summary judgment motion by the plaintiff, the court refused to rule that National Fuel could not assert this defense. The court required that a party opposing the defense, show more than a "mere existence of a contractual relationship." *Id.* at 89. This contractual relationship "must either relate to the hazardous substance or allow the landowner to exert some control over the third party's activities." *Id.*

In the present case, T2M possesses a transferable right of entry and exit on access road #5 that is owned and maintained by TLC. This right of entry was purchased at the same time as Site 18 from a third party, Mine Finders, who purchased it from TLC. *New Union, slip op.* at 2. It is the only access to the site. *Id.* TLC may argue that this is not a direct or indirect contractual relationship. TLC may also argue that even if it is a contractual relationship, the transferable right of entry and exit has no relation to the leachate. The State of New Union and T2M may argue that the transferable right of entry is a "land contract" under the definition

of contractual relationship. Furthermore, since the road is necessary for T2M to operate its mine and the leachate is presumably removed via this road, the contract and the leachate are related.

b. Due Care/Precautions Requirement

Another requirement of the third party defense is that TLC had to exercise due care with respect to the leachate. TLC will argue that it did not have to take measures against a possible release of leachate from T2M's mining operation since such a release was unforeseeable. T2M and New Union will argue that TLC has presented no factual evidence to the court that it took any measures in anticipation of a possible release of the leachate from T2M's property. Therefore, TLC has not properly pled this defense and is liable under CERCLA section 107, 42 U.S.C. § 9607 (1988).

The U.S. District Court for the Southern District of New York interpreted this element to require that a PRP possess knowledge of the waste. *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992). In that case, A & N Launderers, subtenants of a property owned by another defendant, were found to have contaminated a local aquifer. The contamination had spread from chemicals dumped into a drain on the property that emptied into a dry well. The owner of the property raised the third party defense under CERCLA section 107(b)(3). The court first found that no contractual relationship, direct or indirect, existed between the lessor and a sublessee for the purpose of this defense. This ruling was based on a common law finding that no privity of contract existed between a lessor and a sublessee. In discussing the due care/precautions requirement, the court held that:

> [t]he due care/precautions requirement clearly contemplates some degree of awareness by the defendant of the potential for a release of a hazardous substance: it is hard to fathom how a defendant could take due care "taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances," or

> take precautions against "foreseeable acts or omissions of any third party" if it is unaware that any hazardous substance is being used or disposed of.

*Id.* at 1329. The court found that the property owners should have been aware of the activities because of investigative activities at the site. These activities included the town's request of permission to drill bore holes for testing purposes. The court however could not conclude, based on the record, what the landowner should have done to exercise due care.

In *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), a landowner leased land to a company which subsequently stored hazardous waste in barrels on the property. The barrels leaked and the waste seeped into the ground. The court rejected the landowner's third party defense because it could not establish the absence of an indirect or direct relationship and it presented no evidence that it took precautionary measures against foreseeable conduct of the defendant.

4. Combination of Act of God and Third Party Defense

TLC will argue that the court should uphold the lower court's finding that "partial or marginal showings of some individual defenses can culminate to a solid combination defense under 107(b)(4)." *New Union, slip op.* at 6. New Union and T2M will argue that CERCLA's legislative history and Congressional intent implies a broad reading of the defenses and therefore marginal defenses under a combination defense are not adequate.

CERCLA section 107(b)(4) allows for a defense based on a combination "of the foregoing paragraphs" which are the three other enumerated defenses: an act of God; an act of War; or the third-party defense. 42 U.S.C. § 9607(b)(4) (1988). Since no cases directly interpret this defense, the arguments of the parties for and against this defense will be based on statutory interpretation. TLC raised the combination defense of an act of God and an act or omission of a third party. Courts have avoided reference to the combination defense to the extent that some cases make no mention of it

when discussing CERCLA defenses. *United States v. Monsanto*, 858 F.2d at 160; *Lincoln Properties*, 828 F. Supp. at 1539 ("An otherwise liable party may avoid CERCLA liability only by establishing one of the three affirmative defenses set forth in 42 U.S.C. § 9607(b)").

The statutory language that most likely will be at interpreting the combination defense will be the phrase "caused solely by". Under CERCLA liability is imposed unless the release or threat of release was caused solely by an act of God, an act of War, an act or omission of a third party, or any combination of the foregoing. 42 U.S.C. § 9607(b) (1988). TLC may argue that the phrase "caused solely by" does not extend to each element of a combination defense and therefore a marginal showing of two or more defenses is statutorily sufficient. New Union and T2M, however, may argue that "solely caused by" does extend to each defense in the combination and therefore each must be able to stand alone.

Several rules of statutory construction apply in interpreting this defense. First, unless a statute's language is ambiguous, courts are restricted to its literal meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). However, any literal interpretation should be viewed in light of the legislative intent or purpose which is to "prevent the potentially devastating effects of introducing hazardous substances into the environment." *United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 747 (W.D. Mich. 1987); *Skelly Oil v. United States*, 255 F. Supp. 228 (N.D. Okla. 1966). Furthermore, courts must give effect to every word in a statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983).

New Union may argue that the combination defense still requires that all of the elements for any individual defense must be proven. Therefore, if a party cannot prove that it took due care in the handling of a hazardous waste or that there was an act of war, that party should not prevail when raising a combination defense of an act or omission of a third party and an act of war.

TLC and T2M may argue that the lower court was correct in holding that the combination defense can be satisfied by only a marginal or partial showing of other defenses. TLC

and T2M may also argue that a combination defense does not require that each part of the defense should be able to stand alone. TLC and T2M may further argue that such a requirement would be redundant.

## III. EQUITABLE DEFENSES

Since none of the parties raised the question of equitable defenses, it is not an issue before this court. It is worth mentioning, however, that a few U.S. District Courts have allowed equitable defenses in CERCLA contribution actions. These decisions are based on the U.S. Supreme Court case of *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). In that case, the court held that the CWA did not bar equitable discretion of the courts in considering injunctive relief. The Court ruled that "unless a statute in so many words, or by necessary and inescapable inference restricts the Court's jurisdiction in equity, the full scope of jurisdiction is to be recognized and applied." *Id.* at 313.

After its passage, several courts found that since CERCLA actions sought restitution, an equitable remedy, equitable defenses should be available. These defenses included laches and unclean hands. *Violet v. Picillo*, 648 F. Supp. 1283 (D.R.I. 1986), *overruled by United States v. Davis*, 794 F. Supp. 67 (D.R.I. 1992); *Mardan Corp. v. C.G.C. Music. Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985). However, these decisions are criticized as ignoring the express language of section 107 of CERCLA. This section, in relevant part, states that liability is imposed "notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section." 42 U.S.C. § 9607(a) (1988).

A majority of jurisdictions do not allow equitable defenses to be raised in section 107(b) actions. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d. 86 (3d. Cir.), *cert. denied*, 488 U.S. 1029 (1988); *Kelly v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich.1989); *United States v. Vineland Chem. Co.*, 692 F. Supp. 415 (D.N.J. 1988); *Chemi-*

*cal Waste Management Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987). "While it may be logical to permit equitable defenses in an inherently equitable proceeding and sections 106 and 113 both permit equitable considerations, the clear answer for section 107 is that Congress explicitly limited the defenses to only those three provided in section 107(b)." *United States v. Kramer*, 757 F. Supp. 397, 427 (D.N.J. 1991).

## IV. SUMMARY AND CONCLUSION

For a brief summary of the arguments refer to Summary of the Arguments *supra*.

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