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No. 93-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

TIPPECANOE LOGGING CO.,
and TYLER-2 MINING, INC.,

Appellants,

v.

STATE OF NEW UNION,

Appellee.

STATE OF NEW UNION,
and TYLER-2 MINING, INC.,

Appellants,

v.

TIPPECANOE LOGGING CO.,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION*

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* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED

I. WHETHER, AS PROVIDED UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, THE NEW UNION DEPARTMENT OF NATURAL RESOURCES MAY ESTABLISH A NATURAL RESOURCES TRUSTEESHIP OVER NONPUBLIC LAND OWNED BY TIPPECANOE LOGGING COMPANY DUE TO THE OCCURRENCE OF A CHEMICAL SPILL ON THAT LAND.

II. WHETHER TIPPECANOE LOGGING COMPANY IS CORRECTLY EXCUSED FROM LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT SECTION 107(b) ACT OF GOD DEFENSE, THIRD PARTY DEFENSE, OR A COMBINATION OF THE DEFENSES.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT:

UNITED STATES CIRCUIT COURTS:

UNITED STATES DISTRICT COURTS:

STATUTES AND RULES:

LEGISLATIVE HISTORY:

OTHER AUTHORITY:

OPINION BELOW

The unreported opinion of the United States District Court for the District of New Union is set out in the transcript of the record, located at Appendix A. (A. at 1-11.)

STATEMENT OF THE CASE

A. *Facts*

This action arises from the sale of land and operation of a mining facility in Harrison Forest, an area of vast natural resource in the state of New Union. Growing among the hardwood in Harrison Forest is the purple daisy, a wildflower listed as endangered under the Endangered Species Act ("ESA"). (A. at 1.) This daisy is centralized and flourishes in a small area of the forest; however, it has never been a resident of an area known as "Site 18." (A. at 10.) One of the unique characteristics of the purple daisy is its relationship with the green swallow, a bird which at the present time has not been listed as endangered or threatened by the U.S. Department of the Interior. (A. at 2.) Once every four years, this swallow passes through Harrison Forest where it lays its eggs on the leaves of the purple daisies, leaving the egg shell nutrients in the forest soil for the purple daisy after the hatchlings leave. (A. at 1.) Also, Harrison Forest is the only known habitat of the blue robin, which is currently listed as

endangered under the ESA. (A. at 2.) None of the 50 nesting pairs residing in the forest make their homes in the location known as Site 18. (A. 2, 10.)

In September of 1989, a rich vein of unionite ore was discovered in the earth beneath Harrison Forest. (A. at 2.) At the time of this discovery, most of the forest was owned by Tippecanoe Logging Company ("TLC"). (A. at 1.) However, shortly after this discovery, on September 30, TLC sold Site 18, the small portion of the forest which contained the richest vein of ore. (A. at 2.) This sale was made to Mine-Finders, a venture capital firm specializing in matching new mining sites with companies that can develop them. (A. at 2.) Mine-Finders paid $200,000 for Site 18 and received a deed in fee simple absolute. (A. 2 - 3.) Later that year Mine-Finder's located Tyler-2 Mining ("T2M") as a prospective purchaser for Site 18. (A. at 2.)

Site 18 was sold by Mine-Finders to T2M on November 30, 1989 for $275,000 cash. (A. 2 - 3.) In return, Mine-Finders conveyed Site 18 to T2M by deed in fee simple absolute. (A. at 3.) Included with the deed was a transferable right of entry and exit to Site 18 on Access Road #5, which is a private road owned and maintained by TLC. (A. at 3.) At the time of the sale of Site 18, T2M was attempting to win zoning approval from the Harrison County Board of Supervisors. For this reason, T2M inserted a provision in the deed warranting it would use an independent contractor[1] to operate and maintain the surface impoundment. (A. at 3.) This deed provision also required T2M to arrange for annual environmental audits of its operations. (A. at 3.) Further, T2M held all of the required environmental permits under federally authorized programs administered by the New Union Department of Environmental Protection ("NUDEP"). (A. at 3.) The parties have stipulated that all of the actions in operating and maintaining the impoundment structure were the responsibility of T2M through its contractor, a "third party" to TLC. (A. at 7.)

1. The contractor was to be approved by the New Union Department of Environmental Protection. (A. at 3)

Audits on the T2M sites have never revealed any deficiencies. (A. at 3 - 4.) Moreover, on April 23, 1992, NUDEP inspectors visiting the site found no violations or cause for concern and gave the site its highest approval. (A. at 4.) However, on the afternoon of April 26, 1993, Harrison Forest experienced its heaviest rainfall in over ten years. (A. at 4.) Unfortunately, on April 27, 1992, one day after this tremendous rainfall, a crack developed in the surface impoundment wall, and leachate[2] from the mining operation poured out through this crack, covering a small area of the forest in a fifteen minute time period. (A. at 4.) The parties have stipulated that the crack developed due to the heavy volume of liquid contained in the impoundment. (A. at 4.)

The environmental damage caused by this incident affects the areas inhabited by the purple daisy and the blue robin. (A. at 10.) Although all of the daisies in the spill area withered and died within days of the impoundment break, ten percent of the former population still flourishes in the forest. (A. at 4.) At this time the spill has yet to effect the blue robin, however, the trees and shrubs in which it nests have absorbed the leachate into their root system, and it has been stipulated that they will be dead in 5 to 8 years. (A. at 4.)

B. *Procedural History*

The New Union Department of Natural Resource, through a memorandum agreement with the U.S. Department of Interior, was authorized to serve as natural resources trustee under section 107(f)(2)(B) of Compressive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(f)(2)(B). (A. at 5.) As trustee the NUDNR brought suit in the United States District Court for the District of New Union seeking natural resources damages from TLC and T2M under CERCLA § 107(a)(1-4)(C), 42 U.S.C. § 9607(a)(2)(B). (A. at 5.) The NUDNR trustee specif-

2. T2M uses a leaching process to wash waste rock away from the unionite ore. This leachate, which is highly acidic and toxic to plant life, runs through a drainage channel to a surface impoundment. (A-3). This impoundment is drained for disposal every 45 days. (A-3). On the day of the incident, the impoundment was in Day 44 of this cycle. (A-4).

ically sought damages for the relocation of the purple daisy to an area unaffected by the spill in the New Union state wilderness area. (A. at 5.) Funds were also requested to study alternative habitats for the blue robin. (A. at 5.)

At trial, the Honorable Judge R. N. Remus of the Unites States District Court for the District of New Union addressed two issues. First, whether a natural resources trustee such as NUDNR can claim a trusteeship over privately held resources. (A. at 5.) Secondly, whether the "act of God/third party defense" alone or in combination, under CERCLA § 107(b), 42 U.S.C. § 9607(b) was available to TLC. (A. at 5.) On the first issue, Judge Remus found that the Endangered Species Act ("ESA") was evidence of a congressional decision to exercise substantial governmental control over endangered species regardless of their location, and held that it was within the province of the NUDEP to exercise the trusteeship over TLC's land in order to protect the purple daisy and blue robin. (A. at 7.) In addition, the court held that TLC was free from liability for natural resource damage liability under the "combination defense" of CERCLA § 107(b)(4), 42 U.S.C. § 9607(b)(4). (A. at 9.) The court concluded that a partial or marginal showing of an individual defense can "[ac]cumulate to a solid combination defense under 107(b)(4)." (A. at 8.) The parties subsequently filed a notice of appeal in the United States District Court for the Twelfth Circuit. (A. at 11.)

SUMMARY OF THE ARGUMENT

I.

A natural resources damage trusteeship cannot be established on privately owned land. The provisions of CERCLA mandate that such a trusteeship is appropriate upon land which is owned managed or controlled by state, federal or foreign government, or an Indian tribe. The land at issue does not fall within the provisions of the statute, so the establishment of a trusteeship on this property would be in direct conflict with the provisions of CERCLA.

The State contends that ESA is evidence of Congressional intent to control privately owned land, due to the pres-

ence of natural resources upon that land. However, the state has misconstrued Congress' intent in promulgating ESA. Congress enacted ESA to protect endangered and threatened species and preserve ecosystems. No where in the provisions of ESA does it provide for natural resources damages trusteeships in order to protect these species. Additionally, the blue robin and the purple daisy have suffered that type of injury that is actionable under ESA.

II.

Tippecanoe Logging Company should be excused from liability under the Comprehensive Environmental Response, Compensation, Liability Act's Act of God Defense, Third-Party Defense or a Combination of the defenses. Tippecanoe Logging Company is completely free of any fault in this unfortunate accident and explicitly fits into the defenses provided by CERCLA.

The magnitude of rain and its resultant effect on TLC's land were unforeseeable and conclusively an Act of God within CERCLA's provision. In addition, the release of the hazardous substance was completely caused by an act or omission of a third party other than one with even a remote affiliation to TLC, clearly making TLC a prime candidate the Third-Party defense. Finally, this court may even use a combination of the Act of God and Third-Party defense to relieve TLC of any liability.

Furthermore, if this court concludes that TLC cannot apply one of the defenses provided by CERCLA, then TLC should be allocated zero liability. TLC is complete free of any fault in this situation. If this court finds it necessary to hold an innocent party, such as TLC, liable, then the court would be effectuating an unjust result.

ARGUMENTS

I. AS PROVIDED UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, THE NEW UNION DEPARTMENT OF NATURAL RESOURCES CAN NOT ESTABLISH A NATURAL RESOURCES TRUSTEESHIP, OVER NONPUBLIC LAND OWNED BY TIPPECANOE LOGGING COMPANY DUE TO THE OCCURRENCE OF A CHEMICAL SPILL ON THAT LAND.

A. *A natural resources trusteeship cannot be established on private land.*

1. A de novo standard of review is appropriate to review the lower court's determination of this case.

A de novo standard is appropriate for this Honorable Court's review of the District Court's determination in this case. When reviewing a district court's interpretation of a federal statute the court of appeals applies a standard of de novo review. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

2. There is no statutory indication that a natural resources trusteeship can be established over privately owned property.

The NUDNR cannot establish a natural resources damage trusteeship over the privately owned property of T2M in order to protect the habitats of the purple daisies and blue robin, due to their endangered status under ESA. The NUDNR contends that a trusteeship is appropriate in this situation, because the spill resulted in damage to these species critical habitats. However, an examination of CERCLA indicates that this type of trusteeship would not be appropriate on privately owned land. Moreover, no court has conclusively stated that a natural resources trusteeship may be asserted over privately owned land.

The first step in determining whether a natural resources trusteeship can be established over specific property

involves an examination of the statutory provisions allowing such a trusteeship. Under the provisions of CERCLA, state or federal officials may establish a trusteeship "to assess damages for injury to, destruction of, or loss of natural resource." 42 U.S.C. § 9607(f)(2)(A) (1993). A natural resource is defined as:

> "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, any Indian tribe. . . ."

42 U.S.C.§ 9601(16) (1993). The purpose of such a trusteeship is to pursue recovery for natural resource damage from potentially responsible parties. To assist the trustees in their quest for damages, Congress required the promulgation of regulations to provide guidance to natural resources trustees on the determination of adverse effects of hazardous substances upon natural resources and attach damages. *See* Thomas A. Campbell, *Natural Resources Damage Assessments: A Glance Backward and a Look Forward*, 45 Baylor L. Rev. 221, 225 (1993); *see also* 43 C.F.R. § 11 (1990). However, the nature of the land upon which a trusteeship may be designated has basically been left unregulated, leaving the ultimate determination to the courts.

The difficulty of implementing a natural resource damage trusteeship to natural resources found on privately owned land was addressed by the circuit court in the District of Columbia in *Ohio v. United States Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1991). The *Ohio* court applied the analysis set forth by the Supreme Court of the United States in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether a natural resources trusteeship may be exerted over the privately owned property. Through their review, the circuit court found that the language of CERCLA, which specifically addresses the use of a natural resource damage trusteeship on privately owned land was ambiguous, and remanded the records of the case to the Department of the Interior for fur-

ther clarification. *Ohio*, 880 F.2d at 461. Although the court ultimately left the determination of this issue to the Department of the Interior, the analysis and reasoning of the court strongly indicates that such a trusteeship cannot be established on privately owned land. Therefore, the reasoning of this court must be examined in great detail.

The *Ohio* court began its analysis by pointing out that the critical language of the statute provides that responsible parties shall be held liable for the injury, destruction or loss of natural resources. *Id.* at 459 (*citing* 42 U.S.C. § 9607(a)[4](C)). Additionally, the court pointed out that the statute defines "natural resources" as those 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, any Indian tribe . . . ." *Id.* at 459 (citing 42 U.S.C. § 9601(16)). The court recognized that the difficulty in determining whether a natural resource trusteeship can be assessed over privately owned land arose from the statutory language and specifically centered around the series of phrases: "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" a state, federal or foreign government. *Id.* at 459. However, the court pointed out that the text of CERCLA itself contains an implied indication that Congress did not intend resources under purely private ownership to be included within the definition of natural resource. The court stated, that the inclusion of the Indian tribe clause to the definition of natural resources in 1986, was intended to include some natural resources under purely private ownership. *Id.* at 460. "No such provision would have been necessary if Congress either in 1980 or in 1986 had intended 'natural resources' to generally include resources under purely private ownership." *Id.* Therefore, the language of the court clearly indicates that if Congress intended privately owned resources to be included in this definition, they would have made an affirmative statement to that effect.

The *Ohio* court also examined CERCLA's legislative history in order to determine whether the damage to private property was covered by the natural resources damage provi-

sion of the act. Importantly, the court indicated that early drafts of CERCLA show that Congress considered whether this legislation should cover damages to private property.[3] However, the court pointed out that each of the drafts including damage provisions for privately owned property was rejected. *Id.* at 460. Therefore, as the court states, Congress deliberately excluded purely private property from the ambit of the natural resources damage provision. *Id.*

Lastly, the court addressed the ambiguity of the Department of Interior's regulations concerning the application of natural resource damage assessment to privately and publicly owned land. The court examined the preamble to the Department of Interior's regulations and found that this was the source of the ambiguity:

> The Department believes that Congress has defined "natural resources" with sufficient specificity to leave no doubt that resources owned by parties other that Federal, State, local or foreign governments (i.e. privately-owned resources) are not included. . . . The Department notes, as stated above, that section 101(16) of CERCLA clearly indicates that damage to privately-owned resources are not to be included in natural resource damage assessments.

Id. at 461 (*citing* 51 Fed. Reg. 27,696). The court stated that by taking these comments at face value the Department of the Interior would exclude any privately owned property from the ambit of the natural resource damage provisions. *Id.* at 461.

The court found that the Department of Interior did not advocate a literal reading of the regulations. The court

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3. The court specifically cites the language of a number of drafts to support this point. *See, e.g.* H.R. 7020, 96th Cong., 2d Sess. § 5 (1980), *reprinted in* 2 A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 at 40 (Comm. Print 1983) (damages to include "all damages for personal injury, injury to real or personal property, and economic loss, resulting from such release or threatened release"); H.R. 85, 96th Cong. 1st Sess. § 103(a)(2), *reprinted in* 2 A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 at 487 (damages to include "injury to, or destruction of, real or personal property"); *Ohio*, 880 F.2d at 460.

stated that according to the position advanced by the Department of Interior the only manner in which privately owned property could be brought within the natural resources damage provision was if a substantial degree of governmental regulation, management or control was exerted over the privately owned property. *Id.* Since the Department of Interior's arguments and the language of the statute resulted in abundant confusion, the court remanded the case ordering the Department to clarify its interpretation of the regulations.

Regardless of the ultimate determination in this case, the court has explicitly advanced the position that privately owned land cannot be the subject of a trusteeship under the natural resource damage provision of the statute. Although the court ordered the Department of the Interior to clarify its interpretation of the regulations, the tone of the opinion is clear: A natural resources trusteeship cannot be asserted over privately owned land.

If this Court were to allow the NUDNR to establish a natural resource damage trusteeship over TLC's privately owned land, it would be in direct conflict with Congress' provisions in CERCLA. The express language of the Act states that such a trusteeship may be exercised over resources belonging to, managed by or otherwise controlled by various forms of government or Indian tribes, it does not allow such a trusteeship to be exercised over resources located on otherwise privately owned or controlled land. *See* 42 U.S.C. § 9601(6) (1993). Moreover, by allowing such a trusteeship, the Court would be opening the litigation flood gates, by allowing the state and federal government to intervene on purely private matters. As the law now stands, private parties are held responsible for natural resources located on their property. It is undoubtedly shown in the legislative history of the Act that Congress chose this language in order to hold private parties accountable for natural resources located on their land. Therefore, this Court should not place such a burden and responsibility on the government.

The area over which the NUDNR wishes to exercise the trusteeship is clearly privately owned land. The effects of the

spill manifested on land which has been held by TLC for a number of years. The land neither belongs to nor is managed by any federal, state or local government or Indian tribe. Moreover, it is not appertaining to or held in trust by any of these parties. Rather, the land is the responsibility of TLC, its owner. Along with its ownership rights to the land, TLC also acquired the rights to those resources located on this land. If TLC did not have such a right, it would neither be able to use the land for logging or sell any portion of the land for mining. It would be contrary to the provisions of CERCLA to employ a natural resources damage trusteeship over this land, just as it would be contrary to TLC's ownership rights. The government should not be burdened with the responsibility of the employment of the trusteeship over TLC's land. The responsibility for these resources should be left where the statute intended, in the hands of the private owner.

3. No governmental control has been exerted over the TLC's privately owned property and, therefore, this property cannot be the subject of a natural resource damage trusteeship.

Under the provisions of CERCLA, a natural resources trusteeship may be asserted over privately owned land if that land is managed or controlled by the State or Federal government. 42 U.S.C. § 9607 (1993). However, the State of New Union cannot contend that they have exerted any such control over the land owned by TLC.

In accordance with the regulations that were advanced by the Department of the Interior subsequent to the decision of *Ohio v. United States Department of the Interior*, private property can only be subject to a natural resource damage trusteeship if there is some form of government regulation, management or other form of control exerted over such property. 56 Fed. Reg. 19752-01 (1991). However, the source of this type of governmental control must be found in treaties, constitutions, statutes, the common law, regulations, orders, deeds or other conveyances, permits, or agreements. *Id.*

In *Ohio v. United States Department of the Interior*, 880 F.2d 432 (1991), the United States Department of the Interior argued that the substantial degree of governmental control needed to assert a natural resource damage trusteeship over privately owned land can be evidenced by a state's common law. The law in question required private property owners to allow public access to their private property. The *Ohio* court cited the United States Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), to support this contention.

The *Phillips Petroleum* Court addressed whether state common law could require private property owners to permit public access to their tideland property. 484 U.S. 469. The *Phillips Petroleum* Court held that a state has ownership of lands beneath waters subject to the tide's influence, and therefore such access must be allowed on privately owned tideland property. *Id.* at 484. The Department of the Interior in the *Ohio* case cited *Phillips Petroleum* as an example of when a substantial degree of governmental control can be found based upon the scope of a state's public trust doctrine.[4]

The land owned by TLC cannot be found to constitute an area of public trust, such as the tidelands in the *Phillips Petroleum* case. At this time the only areas which New Union hold in such a trust are riverbeds and the shores of Lake New Union. (A. at 5.) Moreover, in 1979 the New Union Supreme Court held that privately owned land cannot be included in the public trust. (A. at 5.) The land in question is purely private in nature. It is not open to public access nor is the road leading to it a public highway. As stated above, the only land which the State of New Union holds in trust are riverbeds and the shores of Lake New Union. This land is neither a riverbed nor a lakeshore. Additionally, in 1979 the New Union Supreme Court held that privately owned land cannot be the subject of a public trust; therefore, TLC's property cannot be the subject of a natural resources trusteeship.

4. Mississippi's common law holds that the state owns its tidelands. *Phillips Petroleum*, 484 U.S. at 484.

Additionally, the NUDNR cannot assert that the presence of Access Road #5 constitutes a form of government regulation, management or control over the land owned by TLC. Access Road #5 is merely the available access road to T2M's Site 18. This road is privately owned and managed by TLC and is used purely for the mining and logging operations. It is not a public road, and the right to its use was one which was simply passed to T2M through Mine-Finders from TLC under the deed provisions as a license. There is no governmental control or management of this road by the State of New Union and therefore no trusteeship can be asserted over the privately owned land of TLC due to the roads presence.

There is no indication of any governmental management or control over the property of TLC, which is the subject of this litigation. The property is not tideland, riverbed or lakeshore, and the road that leads to this property is not open for public use. The NUDNR cannot exercise a natural resources trusteeship over this property without showing some type of management or control over it. Because there is no type of governmental management or control over this land, no trusteeship can be exercised over it.

4. A natural resource damage trusteeship cannot be exercised over the privately owned land of TLC, since TLC is not an Indian Tribe.

The only instance in which CERCLA allows a natural resources damage trusteeship to be exercise on privately owned land is when such land is owned by an Indian tribe. *See* 42 U.S.C. § 9607(f)(1993). Therefore, in order to assert that TLC's privately owned land can be subject to such a trusteeship, the NUDNR must prove that TLC is not what it actually is, a logging company, but rather is an Indian tribe.

The Code of Federal Regulations defines a Indian tribe as a group of Indians, within in the continental United States as one which the Secretary of the Interior acknowledges to be an Indian tribe. 25 C.F.R. § 83.1 (1992).[5] Pursuant to the

5. This definition is for the purpose of establishing an Indian group exists as an Indian tribe.

Code, the Secretary of the Interior is to annually publish a list of all recognized tribes in the Federal Register. 25 C.F.R. § 83.6(b) (1992). An examination of this list reveals that TLC is not a Indian tribe recognized by the Secretary of the Interior. *See* 58 Fed. Reg. 202 (1993).

Under the provisions of CERCLA's section 107(f), the only private property that can be subjected to a natural resources damage trusteeship is that which is owned, managed or controlled by an Indian tribe recognized by the Secretary of the Interior. 42 U.S.C. § 9607(f) (1993). Because TLC is not an Indian tribe, a natural resources damage trusteeship cannot be exercised over their privately owned land.

B. *The Endangered Species Act is not evidence of a congressional decision to exert substantial governmental control over endangered species located on privately owned land.*

1. The intent of the Endangered Species Act is the protection of endangered or threatened species.

In light of the judicial and legislative disarray as to interpretation of section 107(f)(2), the lower court in this case looked to the Endangered Species Act as the basis for its conclusion that a natural resource damage trusteeship can be exercised over TLC's privately owned land. The District Court held that the Endangered Species Act was evidence of Congress' decision to exert substantial governmental control over endangered species regardless of where they are located. (A. at 6.)

However, the District Court, by allowing ESA to constitute the basis of the natural resources damage trusteeship over TLC's privately owned land has applied ESA in a manner which was not intended by Congress. As it is widely known, the purpose of ESA is to protect endangered species and preserve ecosystems. *Sweet Home Chapter of Communities for a Great Oregon v Lujan*, 806 F. Supp. 279, 281 (D.D.C 1992).

Upon ESA's adoption in 1973, Congress stated that it intended the ESA to provide for "conservation, protection, and propagation of endangered species of fish and wildlife by federal action." S. Rep. No. 93-307, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. The legislative history of ESA reveals that Congress directed a number of agencies to take steps in order to achieve this goal. To implement the Act, Congress directed the Secretaries of the Interior and Commerce to compile a list of those species which were to be considered endangered or threatened under ESA. In order to fulfill this directive, the Department of the Interior was also granted the "authority to establish an Advisory Committee for consultation regarding the [endangered species] list." *Id.* Further, this department was given the authority to acquire land pursuant to the existing legislation. *Id.* In addition to the provisions granting power to the Department of the Interior, the ESA contains provisions granting authority to the states to develop plans for the management of endangered and threatened species within their boundaries. *Id.*

Under Congress' direction the ESA compels federal agencies to guarantee that their activities will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior] . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2) (1993). In order to avoid jeopardizing endangered or threatened species, ESA enables the Department of the Interior to acquire lands upon which they may establish conservation programs. 16 U.S.C. § 1534(a) (1993). According to ESA's legislative history, Congress intended land acquisition to be an option which would allow the government to protect the habitats of endangered or threatened species on privately owned land. To this effect Congress stated "[o]ften, protection of habitat is the only means of protecting endangered animals which occur on non-public lands." S. Rep. No. 93-307, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

In light of the legislative history of the ESA, the lower court misconstrued the reach and anticipated "control" of ESA to private property. ESA does not create property rights for the state or federal government. ESA simply allocates funds and grants authority to the Department of the Interior to acquire non-public lands to conserve endangered species and their habitats. The record in this case does not reveal if any funds had been allocated to purchase any of TLC's property. Indeed, according to the record, none of TLC's property has been designated as a critical habitat for the blue robin or purple daisy. Currently, the only action that has been taken pursuant to ESA is the designation of the blue robin and purple daisy as endangered.

When Congress enacted ESA in 1973, Congress' desire was to protect wildlife. When Congress enacted CERCLA in 1980, it intended to remedy hazardous waste disposal practices. The scope of CERCLA did not include the protection of wildlife.[6] CERCLA itself or its corresponding regulations and legislative history do not state or allude to ESA as evidence of substantial governmental control in order to exert a natural resource damage trusteeship over private land. To construe ESA as evidence of substantial governmental control over private property is an affront to the statute.

The District Court's ruling would expand the possible reach of a natural resource damage trusteeship to the 1600 endangered and threatened specie and their habitats, beyond that which was intended in ESA. *See* 50 C.F.R. §§ 17.11, 17.12 (1993). Moreover, private property rights would be eviscerated if the natural resource damage trusteeship provisions of CERCLA were applied to privately owned property upon which an endangered or threatened species happened to be found. Both the state and federal governments would suffer staggering monetary hardships if they were compelled to

6. Congress intended CERCLA to "provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment form the dangers posed by such sites." H.R. Rep. No. 96-1016, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. A Hazardous Waste Response Fund (Superfund) was also created. *Id.*

manage the proposed expansion of natural resource damage trusteeships over privately owned property.

The intent of the ESA was not to place a burden on the state and federal government by compelling them to take charge over privately owned land which harbors endangered species. Rather, the intent was to conserve and protect those species. If the NUDNR intended to protect those species present upon TLC's property, it should have complied with the provisions of ESA and purchased the land. Without purchasing the land, the NUDNR has no intended or implied right to exercise a natural resources damage trusteeship over TLC's private property.

2. Under the provision of the Endangered Species Act, the spill on to Tippecanoe Logging Company's land was not a taking.

A close examination of the facts in this case indicates that the spill over TLC's property does not constitute a taking for the purpose of the ESA. According to the provisions of ESA the term " 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a species listed as threatened or endangered under the Act. 16 U.S.C. § 1532(19) (1993). However, TLC has not acted in any of these ways toward the blue robin or the purple daisy. TLC was not the party who caused the harm to these species, rather this harm arose from T2M's negligent operation of their mining facility. Therefore, the NUDNR cannot assert a natural resources trusteeship over TLC's land due to the actions of another.

Moreover, there has been no direct harm to the blue robin that would constitute a taking under ESA. The record indicates that Harrison Forest is the only known habitat of this species of bird.[7] (A. at 2.) However, the record fails to indicate whether Harrison Forest has been designated as the

7. It should be noted that in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1973), the Court sought to protect the critical habitat of the snail darter. At the time the case was brought, it was thought that the Little Tennessee River was the only habitat of that species. However, subsequent to the disposition in that case the snail darter was discovered elsewhere.

critical habitat of this species, as mandated in ESA. 16 U.S.C. § 1533(b)(2). Without such a designation, this court cannot consider the stipulated effect that the spill will have on the trees and bushes in which the blue robin lives. (A. at 4.)

In *Palila v. Hawaii Dept. of Land and Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988), the United States District Court for the District of Hawaii pointed out that the only type of injury to the habitat of an endangered or threatened species that is actionable under ESA is that which causes irreversible habitat modification, which would prevent the population from recovering. *Id.* at 1077. Clearly, the injury to the property at issue has not caused a decrease in the population to the blue robin, and therefore the blue robin has not been taken under the statute. Although the purple daisy population has suffered due to the spill on to TLC's property, they have not been extinguished, and ten percent of their original population still flourishes in Harrison Forest. The record fails to establish that the modification to the daisy's habitat is irreversible. In light of the court's findings in *Palila* and the fact that ten percent of the daisy's population still flourishes, it also cannot be considered taken under ESA.

The NUDNR should not be allowed to exercise a natural resources damage trusteeship over the property owned by TLC, merely because of the existence of endangered species upon their land. In accordance with the findings of the court in *Palila*, neither of these species have suffered the necessary degree of harm to evoke the statutes protection. Moreover, since the NUDNR has failed to establish that Harrison Forest is in fact the critical habitat of these species, no action should be taken under ESA. Consequently, no trusteeship should be exercised over this land.

II. THE TIPPECANOE LOGGING COMPANY IS CORRECTLY EXCUSED FROM LIABILITY UNDER COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, LIABILITY ACT SECTION 107(B) ACT OF GOD DEFENSE, THIRD-PARTY DEFENSE, OR A COMBINATION OF THE DEFENSES.

A. *This Court should excuse Tippecanoe Logging Company from liability under CERCLA Section 107(b)(1), Act of God Defense.*

The Act of God defense is available to Tippecanoe Logging Company to relieve them from liability under the Comprehensive Environmental Response, Compensation, Liability Act. The Act of God defense is defined in CERCLA as "an 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." 42 U.S.C. § 9601(1) (1993). TLC is a potentially liable party pursuant to § 107(a) of CERCLA because TLC owned the property neighboring Site 18 onto which the leachate flowed. 42 U.S.C. § 9607(a) (1993). In order to be held liable under CERCLA, TLC must be considered an owner of a "facility." Facility is defined under CERCLA 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 hazard substance has been deposited, stored, disposed of , or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1993). TLC is not the owner of Site 18, where the hazardous substance had been stored. Additionally, there is no structure located on TLC's property; therefore, TLC could only be exposed to liability under CERCLA as an owner of a "site or area where a hazardous substance has . . . come to be located." TLC only became a "covered party"

under CERCLA because TLC's property is adjacent to Site 18, and the leachate which escaped from the crack poured from Site 18 onto TLC's land. The hazardous substance came to be located on TLC's property solely as a result of an Act of God. Federal case law has supported the proposition that liability should not attach if an Act of God is the only cause for the release of the hazardous substances onto another's property. The court in *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987), examined the nature of rainfall as the basis for an Act of God defense. Based on the facts presented to the *Stringfellow* court, the Act of God defense was rejected because the rainfall was foreseeable and its effects were avoidable. However, the court did not summarily dismiss rain as a foundation for the proper application of the Act of God defense. The court held 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 design of proper drainage channels. Furthermore, the rains were not the sole cause of the release.

Id. at 1061. The *Stringfellow* court's holding reveals that a reviewing court must undertake a case-by-case factual analysis to determine whether the Act of God defense should be invoked.

In the case at bar, the proper drainage channels were installed by Tyler-2 Mining, Incorporated. T2M employs all of the required environmental permits under federally authorized programs. Moreover, all of the audits conducted on Site 18 have never revealed any deficiencies. In fact, NUDEP inspectors gave Site 18 the highest approval grade when visiting the site just four days before the development of the leak. Therefore, in accordance with the statute, T2M has taken all precautions to avoid foreseeable natural events.

The *Stringfellow* court considered the rain to be "foreseeable based on normal climatic conditions." *Id.* However, the rain in Harrison Forest was the heaviest in ten years. While

rainfall itself may not automatically invoke the Act of God defense, this defense is nonetheless applicable in the case at bar because the rainfall was the most drastic that the area had experienced in over ten years. Therefore, the volatile and unexpected nature of the rainfall of this magnitude merits the application of the Act of God defense.

Therefore, the amount of rain and its resultant effects on TLC's property were unanticipated and an "Act of God" within the plain meaning of CERCLA. Congress provided the Act of God defense as a bar to the strict liability that CERCLA imposes. This court should apply the Act of God defense to the facts presented in the case at bar. The rainfall experienced by Harrison Forest was exceptional, inevitable, and irresistible in character; thus, TLC has satisfied the Act of God defense and should not be held liable under CERCLA.

B. *This Court must excuse Tippecanoe Logging Company from Liability under CERCLA Section 107(b)(3), Third-Party Defense.*

The third-party defense is explicitly applicable to absolve TLC of liability under CERCLA. The statutory language of the third-party defense pertains to the factual predicament which TLC encounters in the case at bar. CERCLA explains that the third-party defense applies to one who proves by a preponderance of the evidence that a release or threat of release of a hazardous substance was generated solely 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 . . . .

42 U.S.C. § 9607(b)(3) (1993).

T2M was the owner of the property on which the impoundment facility was located. All the parties have stipulated that the operation and maintenance of the impoundment structure were the responsibility of T2M through its contractor. T2M is neither an employee nor agent of TLC, and the only question raised is whether the deed pro-

visions regarding the impoundment constitute a "contractual relationship" under CERCLA. If a "contractual relationship" is found within the meaning of CERCLA, the defendant would be barred from utilizing the third-party defense.

1. Tippecanoe Logging Co. unquestionably did not have a contractual relationship with Tyler-2 Mining, Inc. within the meaning of Section 107(b)(3) of CERCLA.

CERCLA defines a "contractual relationship" as including but not limiting to "land contracts, deeds or other instruments transferring title or possession." The facts explicitly illustrate that TLC had a contractual relationship for the sale of Site 18 with Mine-Finders, not T2M. Mine-Finders, in return resold Site 18 to T2M. There is no contractual relationship, deed or otherwise, between TLC and T2M.

T2M and the New Union Department of Natural Resources have contended that the impoundment safeguards which were required by the Harrison County Board of Supervisors during the transfer from Mine-Finders to T2M, are a contractual relationship indirectly between T2M and TLC. Even if this Court finds an indirect contract between TLC and T2M through the deeding of Site 18, as previously mentioned, the deed that was transferred by TLC did not contain the provisions regarding the impoundment safeguards. The deed transferred by TLC was only a fee simple absolute in Site 18 and a transferrable right of entry and exit on Access Road #5. The "impoundment safeguards" required during the transfer from Mine-Finders to T2M were not present in the deed when TLC owned and transferred Site 18. TLC never had any association with these impoundment provisions, and the "indirect" contractual relationship would not include these provisions.

2. CERCLA and case law interpret the contractual relationship clause to only apply when the contract is "in connection with" the handling of a hazardous substance.

The statute and case law clearly establish that in order for there to be a contractual relationship under CERCLA, the contract has to be "in connection with" the acts or omissions of a third party who possesses some type of nexus with the management of a hazardous substance. If a contract lacks this requisite nexus, then the contract is not a bar to the third-party defense.

In *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85 (2d Cir. 1992), the court found that "a landowner is precluded from raising the third-party defense *only* if the contract between the landowner and the third party somehow is connected with the handling of hazardous substances." *Id.* at 89 (emphasis added). The court found that "other cases considering this or similar questions also have indicated that something more than a mere contractual relationship is required." *Id.*

The court in *Shapiro v. Alexanderson*, 743 F. Supp. 268 (S.D.N.Y. 1990), verified that the language in CERCLA's third-party defense does not encompass all acts by a third party who has a contractual relationship with a defendant. "Such a construction would render the language 'in connection with' mere surplusage." *Id.* at 271. The courts have concluded that "[w]ithout a clear congressional command otherwise, [they] will not construe a statute in any way that makes some of its provisions surplusage." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (*citing United States v. Mehrmanesh*, 689 F.2d 822, 829 (9th Cir. 1982); *National Insulation Transp. Comm. v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982)).

The only deed which could possibly constitute an indirect contractual relationship is the one between TLC and T2M. However, this deed did not contain any provisions "in connection with" the handling of a hazardous substance. Therefore, the deed falls outside of the parameters of the "contractual

relationship" prohibition. This Court must find NUDNR's and T2M's assertion regarding a contractual relationship between T2M and TLC as being without merit. TLC is not be barred from utilizing the third-party defense because the statutory provision requiring that the deed be "in connection with" a hazardous substances has not been satisfied.

3. The release or threat of release of the hazardous substance was caused solely by a third party other than Tippecanoe Logging Company.

The facility which created the release of the hazardous substance was solely owned and operated by a third party other than TLC. Therefore, CERCLA provides for relief of liability in instances in which hazardous substances were released by a third party.

Section 107(b)(3) of CERCLA provides no liability for a defendant which would otherwise be strictly liable if the "release or threat of release of a hazardous substance and the damages resulting were caused *solely* by . . . an act or omission of a third party . . . ." 42 U.S.C. § 9607(b)(3) (emphasis added). In addition, case law has continually stated that the release and harm must be exclusive to the unrelated third party. *Kelley v. Thomas Solvent Company*, 727 F. Supp. 1532, 1540 (W.D. Mich. 1989); *United States v. Marisol, Inc.*, 725 F. Supp. 833, 838 (M.D. Pa. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706, 712 (D.C.R.I. 1988); *Stringfellow*, 661 F. Supp. at 1061.

In the instant case, the environmental damage derived entirely from the crack which developed in the wall of the impoundment on Site 18. All of the parties have already stipulated that all of the actions in operating and maintaining the impoundment structure were the responsibility of T2M through its contractor. The contamination present in Harrison Forest, therefore, was caused solely by a unrelated third party. TLC is free from any connection from the cause of the release and harm.

4. Tippecanoe Logging Company utilized due care and precaution against foreseeable acts or omissions of the third party responsible for the release or threat of release.

Due care and precaution against foreseeable acts or omissions of the unrelated third party have been specifically established by TLC in this incident. Since T2M was neither an agent nor employee of TLC, and no contractual relationship existed between them, TLC must only establish by a preponderance of the evidence that they,

> exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and . . . 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) (1993).

In *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543-1544 (E.D. Cal. 1992), the court found that the "due care" requirement had been fulfilled by the defendant's inspection of their contaminated facility, as was required by a legislative bill. The court established that due care must be exercised in light of all relevant facts and circumstances.

In the instant case, T2M held all the required environmental permits administered by NUDEP. T2M also had environmental audits performed each year, and none of the audits revealed any deficiencies. Site 18 was even inspected by NUDEP four days before the accident and was given NUDEP's highest approval grade. TLC neither has nor ever had control over the facility of Site 18. As such, TLC did not need to take any more precautions since T2M had already fulfilled all of its own requirements.

In *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543-1544 (E.D. Cal. 1992), the court recognized the defendant as exercising due care and taking reasonable precautions against the "foreseeable acts or omissions" of third parties

when the defendant had tested and inspected their facility in compliance with the state's legislative bill. Similarly, T2M has also complied with necessary regulations and therefore exercised due care as well as taken precaution against foreseeable acts or omissions. TLC, on the other hand, was not required to test or inspect their "facility" because there was no hazardous substance on their property. Therefore, TLC has also exercised due care and precaution.

This Court should recognize that TLC has met all the elements necessary to establish a third-party defense under CERCLA. The record reflects that the release was solely caused by the acts or omissions of a third party. Also, no contractual relationship exists between TLC and a third party. In addition, TLC has practiced due care and taken all precautionary steps against foreseeable acts of the third party. It is apparent that the drafters of CERCLA's third-party defense provision had just the type of defendant such as TLC in mind when designing this defense.

C. *This Court must excuse Tippecanoe Logging Company from Liability under CERCLA Section 107(b)(4), Act of God and Third-Party Defense Combination.*

Even if this Court's examination concludes that TLC cannot be excused from liability under the Act of God or Third-Party defenses, independently, it must find that no liability attaches because of a combination of these defenses. Judge Remus correctly decided that the CERCLA provision which provides for a combination of defenses was appropriately applied to TLC. In fact, the lower court's decision concluded that the combination defense is an accumulation of partial or marginal showings of some of the individual defenses available under CERCLA. At a minimum, TLC has demonstrated partial or marginal showings of both the Act of God and Third-Party defenses.

Section 107(b)(4) of CERCLA specifically states:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a

> preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b)(4) (1993). If this Court were to eschew the unambiguous language of the statute, it would be allowing for an inequitable distribution of liability. CERCLA explicitly provides for the employment of a combination of defenses. Therefore, if the Court ignores this provision, it would be tantamount to disregarding a Congressional directive, and the judiciary would be improperly acting as a superlegislature.

D. *If this Court finds it appropriate to hold Tippecanoe Logging Company Liable under CERCLA Section 107, Tippecanoe Logging Company should be apportioned zero liability.*

Even if this Court determines that TLC should not enjoy any of CERCLA's affirmative defenses, no liability should be apportioned to TLC. CERCLA specifically allows courts to institute an equitable application of the statute since CERCLA is couched in terms of strict liability.

CERCLA underwent a textual alteration when Congress amended CERCLA by abandoning the necessity of a plaintiff to prove the causation for the harm. Congress offset this strict liability type standard by affording the judiciary the discretion to apply CERCLA according to equitable principles. *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1486-88 (D. Colo. 1985); 42 U.S.C. § 9606(a) (1993). Hence, the principles of common law tort liability have been integrated into CERCLA apportionment situations. *Stringfellow*, 661 F. Supp. at 1060.

In *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), Chief Judge Rubin correctly concluded that a reading of the legislative history of CERCLA reveals that the "term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations

which might produce inequitable results in some cases." *Id.* at 808. The courts have been given the discretion to effectuate a fitting apportionment of liability. The court, in *United States v. Hardage*, 116 F.R.D. 460, 465 (W.D. Okla. 1987), stated that "[the judiciary] may impose joint and several liability where the harm is single and indivisible. However, defendants must be given the opportunity to demonstrate the divisibility of the harm and the degrees to which each defendant is responsible." *Id.*

TLC is clearly free from any fault in the release of the hazardous substances or damages that resulted therefrom. TLC is unquestionably an innocent victim to an unfortunate accident. For this court to allocate anything other than zero liability would constitute an inequitable result.

CONCLUSION

For the foregoing reasons, Tippecanoe Logging Company respectfully requests this Honorable Court reverse the judgment of the United States District Court for the District of New Union therefore removing the natural resources damage trusteeship established by the NUDNR upon their land, and affirm the District Court's decision finding Tippecanoe Logging Company free from liability under CERCLA § 107(b)(4).