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Diane S. Calendine

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COMMENTS

Investigating the Exxon Valdez Restoration Effort: Is Resource Acquisition Really Restoration?

I. Introduction

The events that took place off the coasts of Prince William Sound on March 24, 1989 are etched into every American's memory. The Exxon Valdez struck Bligh Reef, spilling eleven million gallons of crude oil and tainting what was once a pristine area.¹ The spill was the worst in United States' history.² The disastrous effects on the environment led to an enormous amount of litigation.³ Eventually, Exxon signed a settlement agreement with the Alaskan state government and the federal government

1. See Jay Mathews, *Spill Probe Focuses on Crew Error*, THE WASH. POST, Mar. 26, 1989, at A1.

2. See Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg. 14,687 (1991). The weather was calm for the first three days after the spill, so the oil did not spread far from the vicinity of the tanker. See *id.* However, even under these circumstances, the amount of oil overwhelmed efforts to contain and recover the spill. See *id.* Then, a major windstorm erupted and spread the oil to the southwest. See *id.* In the end more than 1,200 miles of coastline were oiled from the Valdez spill. See *id.*

3. See Michele Straube, *Is Full Compensation Possible for the Damages Resulting from the Exxon Valdez Oil Spill?*, 19 ENVTL. L. REP. (ENVTL. L. INST.) 10,338 (1989).

regarding both the criminal and civil charges filed by each government.⁴

The settlement established a Natural Resource Damage Assessment and Restoration Fund (hereafter referred to as the "Restoration Fund").⁵ Under the settlement agreement, administration of the Restoration Fund became the responsibility of a Trustee Council, which is made up of three federal and three state trustees.⁶ The Restoration Fund is used for restoring, replacing, enhancing, or acquiring the equivalent of the natural resources injured by the oil spill.⁷

Restoration is generally defined as action undertaken to return an injured resource to its baseline condition.⁸ Under the law at the time of the Exxon Valdez spill, and continuing today even with the changes in the law regarding oil pollution, there is not a preference for restoration as opposed to acquisition of equivalent resources.⁹ The land acquisition process consists of buying land and setting it aside to try to compensate for the land that the oil company polluted. Although the law does not draw a distinction between restoration and acquisition, the question nevertheless arises: is acquisition of equivalent resources really an effective way of "restoring" the injured resource?

4. See Memorandum of Agreement Between the United States and the State of Alaska Concerning the Exxon Valdez Oil Spill Notice [hereinafter "Memorandum of Agreement"], 56 Fed. Reg. 11,642 (1991). On October 8, 1991, the agreement was approved by the United States District Court for the District of Alaska. See Establishment of Public Advisory Group - Exxon Valdez Oil Spill Notice, 57 Fed. Reg. 33,967, 33,967 (1992).

5. See 43 U.S.C. § 147(b) (1992).

6. The federal trustees are the Secretary of the Interior, the Secretary of Agriculture, and the Administrator of the National Oceanic and Atmospheric Administration, Department of Commerce, or their representatives. See S. REP. NO. 106-124, at 3 (1999). The state trustees are the Commissioner of the State Department of Fish and Game, the Commissioner of the State Department of Environmental Conservation, and the Attorney General of the State of Alaska or their representative. See *id.*

7. See Memorandum of Agreement, 56 Fed. Reg. at 11,645.

8. See Natural Resource Damage Assessments, 43 C.F.R. § 11.4 (1991); see also Donald A. Wickman, et al, *Restoration: The Goal of the Oil Pollution Act Natural Resource Damage Actions*, 45 BAYLOR L. REV. 405, 407 (1993). "Baseline" is defined as the condition that would have existed at the area had the oil discharge or hazardous substance release under investigation had not occurred. See 43 C.F.R. § 11.14. The baseline condition is measured in terms of the physical, chemical, or biological properties that the resource or the services provided previous to the accident. See *id.*

9. See Natural Resource Damage Assessments, 58 Fed. Reg. 39,328, 39,340 (1993) (codified at C.F.R. pt. 11). "Acquisition of equivalent resources" does not just consist of purchasing land; different resources, such as biological and geological resources, are included in such acquisitions. See *id.*

This comment will investigate the restoration efforts in Prince William Sound, a decade after the Valdez oil spill. First, this comment will explain how the government may recover natural resources damages from the responsible parties and discuss the specific Valdez settlement terms. Next, this comment will pursue Senate Bill 711's proposal to modify the spending of the Valdez Settlement Fund. The final background issue studied in this comment is the effect of Valdez restoration on Native Alaskans.

This comment will suggest that the law should be amended to include a mandated hierarchy among the restoration alternatives, making acquisition only allowable when there is no other feasible solution. Furthermore, in cases where acquisition is necessary, the purchase should be limited to conservation easements.

II. The Restoration of Prince William Sound

A. *Natural Resource Damages Claims*

The federal and state governments hold and protect natural resources for the public benefit under the common law public trust doctrine.¹⁰ Under the Clean Water Act (CWA)¹¹ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹² the government may recover the actual

10. *See* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

11. Clean Water Act [hereinafter "CWA"], 33 U.S.C. § 1251 et seq. (1999). The CWA declares that there should be no discharges of oil or hazardous substances into the navigable waters of the United States. *See* CWA, § 1321(b)(1) (1999). The owner or operator of a vessel from which oil or a hazardous substance is released is liable for the actual costs of removal. *See id.* § 1321(f). This liability includes any costs or expenses incurred by the federal government or any state government in the restoration or replacement of natural resources damaged or destroyed as a result of such a discharge. *See id.* § 1321(f)(4). The federal government or a state government, as a public trustee, must use the funds it receives from the responsible party to restore, rehabilitate, or acquire the equivalent of such natural resources. *See id.* § 1321(f)(5).

12. Comprehensive Environmental Response, Compensation, and Liability Act [hereinafter "CERCLA"], 42 U.S.C. § 9601 et seq. (1999). CERCLA requires a party that releases a hazardous substance to cleanup any contaminated sites by providing a damages claim for "injury to, destruction of, or loss of natural resources. . .resulting from such a release." 42 U.S.C. § 9607(a)(4)(C). The state or federal government, as "trustees" of natural resources, can recover for damages to natural resources. *See* CERCLA, 42 U.S.C. § 9607 (f)(1) (1999). These damages are recovered through a statutory cause of action, and are not necessarily constrained by common law precedents. *See* State of Ohio v. United States Dep't of the Interior, 880 F.2d 432, 455 (D.C. Cir. 1989) (the legislative history indicates that the motivation behind CERCLA's natural resource damage provisions was Congress' dissatisfaction with the common law).

costs of cleaning up the natural resource damages from the party that released the hazardous substance.¹³

There are ceiling limits to the liability of a private party under CERCLA.¹⁴ Exxon, worried about public relations, "volunteered" to put up more money than would have been required by law because of the liability limits.¹⁵ The company entered into a settlement agreement with the Alaskan and United States governments wherein Exxon provided the money and resources for the Valdez restoration efforts.¹⁶

B. *The Valdez Settlement*

In the criminal case, Exxon paid a \$25 million fine and entered into a \$100 million criminal settlement agreement with the federal government.¹⁷ The money from the criminal settlement has been exclusively devoted to research and field studies.¹⁸

In the civil settlement, Exxon agreed to pay Alaska and the United States \$900 million over a ten-year period.¹⁹ This money was allotted for restoration use and would be administered by the trustees.²⁰ Under the 1991 civil settlement agreement, Exxon was credited for the expenditures and resources that the company had

13. See also Oil Pollution Act of 1990 [hereinafter "OPA"], 33 U.S.C. § 2701 (1990). In response to the Valdez spill, Congress passed the OPA. The OPA provides increased liability for the removal of, and compensation for the discharge of oil into, navigable waters of the United States. See Michael J. Uda, *The Oil Pollution Act of 1990: Is there a Bright Future Beyond Valdez?*, 10 VA. ENVTL. L.J. 403, 404 (1991); see also Gerald F. George, et al, *Litigation of Claims for Natural Resources Damages*, SD88 ALI-ABA 631 (1999) (discussing the statutory and regulatory framework for natural resource damages claims under the federal law).

14. See CERCLA, 42 U.S.C. § 9607(c). The only exception to the limitation is when the responsible party willfully or negligently causes the release, the primary cause of the release was the result of the party knowingly violating a regulation, or the party fails to provide cooperation with a public official in connection with response activities. See *id.* § 9607(c)(2). In such cases, the party will be responsible for the full and total costs of the response and damages. See *id.*

15. See Uda, *supra* note 13, at 418.

16. See Settlement Agreement Concerning the Exxon Valdez Oil Spill Between the United States, the State of Alaska and the Exxon Corp., Exxon Shipping Co. and Exxon Pipeline Co. Notice [hereinafter "Settlement Agreement"], 56 Fed. Reg. 11,636 (1991).

17. See Bill Dietrich, *Five Years After the Exxon Valdez - Is Momentum for Safety Fading?*, THE SEATTLE TIMES, Mar. 20, 1994, at A1.

18. See Kim Murphy, *Valdez Spill's Sticky Legacy of Public Land; Cleanup: Award is Being Used to Buy and Preserve a Million Acres, but at What Price to Native Americans?*, LOS ANGELES TIMES, June 23, 1996, at A1.

19. See Settlement Agreement, 56 Fed. Reg. at 11,638.

20. See *id.*

already used to cleanup the spill.²¹ The first of Exxon's payments was used to reimburse the federal and state agencies for any money they had spent for spill related work.²² The remainder of the money was deposited into a joint federal/state trust fund and earmarked for carrying out restoration activities.²³

The rules for spending the Restoration Fund provide that the money must be used for the purposes of restoring, replacing, enhancing, or acquiring the equivalent of the natural resources injured as a result of the oil spill.²⁴ The funds must be spent on resources in Alaska, unless the trustees unanimously agree that spending the funds outside the state is necessary for effective restoration.²⁵

The trustees encourage public participation in their determinations of how to spend the Restoration Fund.²⁶ In addition to considering the input of the public, the trustees also use the following factors in making their expenditure decisions: the link between the resource to be restored and the spill; the project's cost efficiency, technical feasibility, and scientific basis; and the predicted effectiveness of the proposed restoration activity.²⁷

21. See S. REP. NO. 106-124, at 3 (1999). Exxon maintains that through the end of 1990 the corporation had expended more than two billion dollars for clean up activities and reimbursements to the federal, state, and local governments for their expenses of response to the oil spill. See Settlement Agreement, 56 Fed. Reg. at 11,637.

22. See S. REP. NO. 106-124, at 3.

23. See *id.*

24. See Memorandum of Agreement, 56 Fed. Reg. at 11,645. Replacement or acquisition of the equivalent is defined as providing compensation for an injured, lost or destroyed resource by substituting another resource that provides the same or substantially similar services as the injured resource. See Natural Resource Damage Assessment, 43 C.F.R. § 11.14 (1999). Replacement allows an equivalent resource that is injured, lost, or destroyed elsewhere in the same system to be restored instead of the resource that was directly injured, lost, or destroyed by the spill. See Prince William Sound and Gulf of Alaska Restoration, 56 Fed. Reg. 8,898, 8,899 (1991). Restoration is completed once the services of the acquired land are returned to their baseline. See Wickham, et al., *supra* note 8, at 411. Whereas acquisition of equivalent resources means to compensate by purchasing another resource, which is not itself harmed, that provides substantially similar services as the injured resource. See Prince William Sound and Gulf of Alaska Restoration, 56 Fed. Reg. 8,898, 8,899 (1991).

25. See Memorandum of Agreement, 56 Fed. Reg. at 11,645. All of the trustees' decisions must be unanimous. See *id.* at 11,644.

26. See S. REP. NO. 106-124, at 8 (statement of Lois J. Schiffer, Asst. Atty. Gen., Environment Division, Dept. of Justice); see also Establishment of Public Advisory Group – Exxon Valdez Oil Spill Notice, 57 Fed. Reg. 33,967 (1992) (public participation in trustee decisions includes receiving advice from a Public Advisory Group).

27. See S. REP. NO. 106-124, at 8 (statement of Lois J. Schiffer, Asst. Atty.

The Valdez Restoration Plan includes a program of general restoration,²⁸ monitoring and research,²⁹ establishment of a restoration reserve fund, and habitat protection and acquisition. When evaluating potential restoration projects, the trustees balance the feasibility and benefit factors of the projects to determine which should be adopted.³⁰

Interestingly, the majority of the money from the Restoration Fund has been spent on habitat acquisition.³¹ In fact, the Trustee Council estimates that by the time all of the settlement money has been paid by Exxon, approximately 60% of the funds will be spent on habitat acquisition while only approximately 40% will be spent on research and monitoring.³²

The purpose of habitat protection and acquisition is to identify and protect wildlife and fishery habitats and prevent further environmental damage to resources.³³ This is accomplished by purchasing private lands or development rights and placing them into public ownership.³⁴

The object of restoration is to return the natural resources to baseline, the condition they would have been in if the release had not occurred.³⁵ However, this is not always possible.³⁶ Supporters

Gen., Environment Division, Dept. of Justice).

28. See *Exxon Valdez Oil Spill Restoration Web Site* (visited Sept. 29, 1999) <<http://www.oilspill.state.ak.us/col2.html>>. General restoration involves a variety of activities including manipulating the environment, management of human use, and reduction of marine pollution. See *id.*

29. See *id.* The data from the monitoring and research program helps to answer questions such as whether resources and services are recovering, what restoration activities are working, and what factors may be constraining recovery. See *id.*

30. The factors considered when evaluating potential restoration alternatives are: "nature and extent of injury; adequacy of natural recovery; technical feasibility; net environmental benefit (including indirect impacts); cost effectiveness; reasonableness of cost the restoration project in light of the value or ecological significance of the resource; and results of actual or planned response actions." Prince William Sound and Gulf of Alaska Restoration, 56 Fed. Reg. 8,898, 8,899 (1991). Alternatives which provided benefit to multiple species or resources, rather than a single species or resources, are generally given priority because the goal of the Valdez restoration is for the recovery of the injured environment as a whole. See *id.*

31. See *Exxon Valdez Oil Spill Restoration Web Site* (visited Sept. 29, 1999) <<http://www.oilspill.state.ak.us/col2.html>>. The website supported by the Exxon Valdez Oil Spill Trustee Council claims that this action has received overwhelming support from both the scientific community and the public. See *id.*

32. See S. REP. NO. 106-124, at 3.

33. See *Exxon Valdez Oil Spill Restoration Web Site* (visited Sept. 29, 1999) <<http://www.oilspill.state.ak.us/col2.html>>.

34. See *id.*

35. See Craig O'Connor, *Natural Resource Damages Under the Comprehensive*

of resource acquisition are of the opinion that buying land in order for wildlife to recover after an oil spill is a more effective way to spend money than devoting millions to cleaning oiled animals.³⁷ Congress, recognizing that the exact same resources that were injured could not always be restored, allowed the acquisition of equivalent resources to serve as a surrogate for replacing the injured resources.³⁸

To determine what resources are “equivalent,” the trustees compare the resources of the injured land in question to the resources of land elsewhere in the area in terms of human use and benefit.³⁹ If both the resources provide similar services, the restoration is considered to be complete once the services of the acquired land are put into public ownership.⁴⁰

However, acreage is not the only measure of restoration equivalence.⁴¹ The acreage of a restoration project should be sufficient to re-establish the values of the affected habitat.⁴² Generally, it is necessary for the trustees to acquire acreage with ratios greater than 1:1 in order to achieve the baseline ecological value of the area.⁴³ One reason equivalency ratios greater than 1:1

Environmental Response, Compensation, and Liability Act, and the Oil Pollution Act, ALI-ABA 145, 165 (1999).

36. Some cases discuss situations where the cleanup actions have altered the ecology to such an extent that the site can no longer support the type of ecosystem that existed before the spill. See Wickham, et al., *supra* note 8, at 409. Also, there may be circumstances where direct restoration would be so disproportionately expensive that it would not be reasonable to undertake such a remedy. See *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni*, 628 F.2d 652, 675 (1st Cir. 1980).

37. See Paul Rogers, *Valdez Spill Has Surprise Payoff Wildlife Areas, Parks Funded by Exxon Accord*, THE DENVER POST, June 22, 1997, at A-02. The oiled animals will probably die even if they are cleaned, so using the money to buy land and set the land aside is considered to be a more adequate restoration measure. See *id.*

38. See Natural Resource Damage Assessments, 58 Fed. Reg. 39,328, 39,339 (1993); see also Prince William Sound and Gulf of Alaska Restoration, 58 Fed. Reg. 8,898, 8,899 (1991).

39. See Natural Resource Damage Assessments, 58 Fed. Reg. at 39,340.

40. See Prince William Sound and Gulf of Alaska Restoration, 58 Fed. Reg. 8,899.

41. See Wickham, et al., *supra* note 8, at 411.

42. See *id.*

43. See *id.* These equivalency ratios are similar to the ones utilized in wetlands mitigation. The importance of wetlands has resulted in the federal government policy of “no net loss” of wetlands. See Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404 (b)(1) Guidelines [hereinafter “MOA”], 55 Fed. Reg. 9,210, 9,211 (1990). Thus, in order to receive a permit for an activity that will affect a wetland, a landowner often

are necessary is that it normally takes a great deal of time for the damaged environment to attain the characteristics of a fully functioning ecosystem.⁴⁴ Also, there is a risk that the project may not be fully successful.⁴⁵ Further, even with a successful project, full recovery of the site is generally not expected because there are some changes associated with oil spills that are simply irreversible.⁴⁶

Despite the arguments for resource acquisition there are those who oppose spending over half of the Restoration Fund on acquisitions.⁴⁷ The main attack to acquisition spending has come from U.S. Senator Frank Murkowski's amendment to Senate Bill 711, which prohibits the trustees from making any more purchase offers.⁴⁸

C. *The Effort to Limit the Trustee Council's Spending on Acquisitions*

On March 24, 1999, U.S. Senator Frank Murkowski from Alaska introduced a bill to the United States Congress that allows for the investment of joint federal and state funds from the Exxon Valdez civil settlement.⁴⁹ The purpose of the bill is to provide a mechanism for obtaining a higher rate of interest earning on the Exxon Valdez settlement funds by allowing the funds to be invested in accounts rather than the Court Registry Investment System (CRIS).⁵⁰ These alternative accounts must be income-producing obligations and other instruments or securities that have been determined by the trustees to have a high-degree of reliability and security.⁵¹

Senator Murkowski proposed an amendment to his original bill on July 28, 1999.⁵² The amendment included language limiting the

must agree to offset the impact on a wetland. See Section 404 (b)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.10 (d) (1999). In theory, wetland mitigation replaces the filled wetlands, but often the mitigation fails. See Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527, 531 (1996). Since it is likely that the mitigation effort will not be completely successful, the Environmental Protection Agency and the Army Corps of Engineers often require a ratio that is greater than 1:1. See MOA, 55 Fed. Reg. 9,210, 9,212-13 (1990).

44. See Wickham, *supra* note 8, at 411.

45. See *id.*

46. See *id.*

47. See S. 711, 106th Cong. (1999).

48. See *id.*

49. See *id.*

50. See S. REP. NO. 106-124, at 2.

51. See S. 711 ES § 1(a).

52. See S. 711. On November 19, 1999, the bill passed the Senate with the

amount of the remaining settlement monies that can be spent on habitat protection programs.⁵³ The amendment to the bill provides that \$55 million of the remaining funds will be used for habitat protection programs including habitat acquisition.⁵⁴ This \$55 million allows the Trustee Council to continue making payments on previous purchases.⁵⁵ It also allows the trustees to continue making payments on those potential purchases that they have made offers on as of June 30, 1999.⁵⁶ However, the bill directs that the remaining funds, estimated to be at least \$115 million,⁵⁷ and any interest accrued thereon, cannot be used for habitat acquisition.⁵⁸ The money can be used for programs consisting of marine research, monitoring, and community and economic restoration projects.⁵⁹

The Department of Justice's Environment Division argues that Senate Bill 711's limit on expenditures of the accrued interest is inconsistent with the settlement agreement entered into by Exxon, the State of Alaska, and the United States.⁶⁰ For this reason, the Department of Justice opposes the legislation.⁶¹ However, Senator Murkowski has countered by asserting the legislation is necessary because there still remain unanswered questions regarding the recovery of the area's resources.⁶² While it is known that the bald eagle and the river otter have recovered from the Valdez spill, there are 26 other species that have not recovered.⁶³

Senator Murkowski asserted the legislation is necessary because the trustees' priorities have been misplaced.⁶⁴ The General Accounting Office (GAO) has discovered that some of the

amendment by unanimous consent and was passed onto the House of Representatives. See *Murkowski Wins Senate OK of Four Alaska Bills*, GOV'T PRESS RELEASES, Nov. 19, 1999, available in 1999 WL 28846520.

53. See S. 711.

54. See *id.*

55. See S. REP. NO. 106-124, at 5.

56. See *id.*

57. See *id.* at 6.

58. See S. 711.

59. See *id.*

60. See S. REP. NO. 106-124, at 9-10 (statement of Lois J. Schiffer, Asst. Atty. Gen., Environment Division, Dept. of Justice).

61. See *id.*

62. See *id.* at 11 (additional Views of Senator Frank H. Murkowski).

63. See Michael Sean Gillard, et al., *Valdez Disaster Was 10 Years Ago, But How Much Has Changed?*, THE GUARDIAN (LONDON), July 12, 1999, available in 1999 WL 21230812. In fact, eight of the injured species have made almost no progress at all. See *id.*; see also Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg. 14,687 (1991).

64. See S. REP. NO. 106-124, at 11 (additional Views of Senator Frank H. Murkowski).

monitoring and research programs currently in place have questionable links to the spill. The GAO has also found programs that appear to run counter to the trustee's policy of not funding projects that would normally be funded by a federal or state agency.⁶⁵ An example of a study that is conducted outside the Valdez spill area is the sockeye salmon project, which examines "the effects of oil exposure during embryonic development on the return rate of pink salmon."⁶⁶

Although the Valdez restoration plan does allow for research outside the spill area, the research information must be significant to restoration or for understanding injuries that have occurred within the spill area.⁶⁷ The link is difficult to establish since the pink salmon being studied are not genetically identical to the pink salmon in the spill area.⁶⁸

The sockeye salmon project has also met objection from the Trustee Council's peer reviewers.⁶⁹ The basis of the objection is that the restoration objectives have already been achieved; thus, the project should have already been taken over by the Alaska Fish and Game Department as part of its normal management responsibilities.⁷⁰ Senator Murkowski asserts that to let the trustees "go on a land buying spree" is unreasonable under such circumstances.⁷¹

Sixty-eight percent of the land in Alaska is federally owned, whereas individuals own less than one percent.⁷² In spite of how little land is privately owned, the trustees allotted \$416 million of the \$900 million settlement for land acquisitions.⁷³ In fact, the Restoration Fund was used to buy more Alaskan land than Congress spent buying new parks, refuges, and national forest in the other 49 states combined in 1996.⁷⁴ Furthermore, much of the

65. See Natural Resources Restoration: Status of Payments and Use of Exxon Valdez Oil Spill Settlement Funds [hereinafter "GAO Report"], GAO/RCED-98-236, § 4 (1998) (showing the distribution of settlement payments).

66. See *id.* at § 4.2.

67. See *id.*

68. See *id.*

69. See *id.*

70. See GAO Report, *supra* note 65, at § 4.2.

71. See S. REP. NO. 106-124, at 11 (additional views of Senator Frank H. Murkowski).

72. See *id.*

73. See *id.* Nearly 647,000 acres in and around Prince William Sound have been purchased with the Exxon Valdez Settlement Fund. See *id.*

74. See Rogers, *supra* note 37, at A-02. Approximately \$175 million of the Restoration Fund was expended in agreements and pending sales in 1996 alone. See *id.* This money is being spent to purchase an area of Alaskan land the size of Yosemite National Park. See *id.*

land purchased by the Valdez trustees is land belonging to Alaskan natives.⁷⁵ The natives fought a decades long battle culminating in the 1971 land settlement, which gave them control of 44 million acres of Alaskan land, only to lose it once again to the United States government.⁷⁶

D. Native American Issues

The Alaska Native Claims Settlement Act of 1971 (ANCSA) has taken away the individual Natives' claims to land and forced them to set up village and regional corporations to obtain title to land.⁷⁷ The Natives have been transformed from ancestral stewards of the land into corporate shareholders.⁷⁸ Supporters of ANCSA claim the Act provides the Natives with self-determination because the federal government does not direct or supervise the Native corporations on how to use the land.⁷⁹ They argue ANCSA brings the Natives land and money and also improves their living conditions.⁸⁰ Opponents argue that the Act was designed to further destruct the Natives' way of life and contend that ANCSA divides the people, bringing wealth only to the head of the corporations.⁸¹

Out of six Native corporations, only one refused to sell land to the trustees.⁸² The other five corporations sold fee simple title,

75. Alaskan natives are made up of Indians, Eskimos, and Aleuts. See Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?*, 12 J. ENVTL. L. & LITIG. 305, 323-24 (1997) (comparing how the Native American tribes in the lower forty-eight states and the natives in Alaska lost their land and discussing the impact of the Alaska Native Claims Settlement Act on Alaskan natives).

76. See S. REP. NO. 106-124, at 11 (additional Views of Senator Frank H. Murkowski). When the United States purchased Alaska from Russia in 1867, the issue of the Alaskan natives' rights to the land was not resolved; instead, Congress postponed the issue for future action. See Ford, *supra* note 75, at 320-1. The Alaska Statehood Act of 1958 acknowledged the natives' right to the lands used and occupied by them, see *id.* at 321, but the issue of the native claims was not defined until the Alaska Native Claims Settlement Act of 1971 (ANCSA), see *id.* at 323. ANCSA extinguished all native claims that were based on aboriginal rights, see *id.* at 323, in order to permit oil companies to exploit the newly discovered petroleum resources, see *id.* at 308. ANCSA did benefit the natives though by conveying approximately 40 million acres of federal public land to native corporations. See Ford, *supra* note 75, at 325.

77. See Ford, *supra* note 75, at 319.

78. See *id.*

79. See *id.* at 319 n.19.

80. See *id.* at 326-27.

81. See *id.* at 327.

82. See Natalie Phillips, *Spill Funds Aren't End of Trouble*, ANCHORAGE DAILY NEWS, May 13, 1999.

conservation easements, and/or timber rights on Native lands to the trustees.⁸³

The biggest obstacle in the land acquisitions has been establishing a selling price that both the government and the Native corporations can agree on as fair.⁸⁴ The trustees have been criticized for the relatively large amounts paid for the land acquired with the Restoration Fund,⁸⁵ negotiating prices that were about fifty-six percent above government appraised values.⁸⁶ Nearly all the amount paid above the government appraised values was for five large parcels.⁸⁷

Molly McCammon, executive director of the Trustee Council, views the government's appraised values for these parcels as the problem.⁸⁸ The appraisals were based on the highest and best use currently associated with the land parcels.⁸⁹ The appraisals for these five parcels were generally lower than the price that the parties were ultimately willing to accept as a purchase price.⁹⁰ The low appraisal values were due in large part to the fact that there were no commercial uses yet attached to those land parcels;⁹¹ the single and best use identified by the government appraisers was holding the land for speculation.⁹² However, the appraisers hired by the Native corporations valued the five land parcels much higher because they accounted for the multiple resources and development potential of the land.⁹³ The trustees, wishing to permanently protect the area's habitat, compromised with the Native corporations and paid a higher price than the government appraisal.⁹⁴

83. See Ford, *supra* note 75, at 306.

84. See Kim Murphy, *Valdez Spill's Sticky Legacy of Public Land; Cleanup: Award is Being Used to Buy and Preserve a Million Acres, but at What Price to Native Americans?*, LOS ANGELES TIMES, June 23, 1996, at A1.

85. See *id.*

86. See GAO: *Exxon Spill Funds Spent Properly*, THE WASH. POST, Sept. 13, 1998, at A10.

87. See Natural Resources Restoration: Status of Payments and Use of Exxon Valdez Oil Spill Settlement Funds (hereinafter "GAO Report"), GAO/RCED-98-236, § 1 (1998).

88. See Murphy, *supra* note 84, at A1.

89. See GAO Report, GAO/RCED-98-236, § 1 (1998).

90. See *id.*

91. See GAO: *Exxon Spill Funds Spent Properly*, *supra* note 86, at A10. The other 4 large parcels acquired by the trustees received higher appraisals because they contained timber resources. See *id.*

92. See GAO Report, GAO/RCED-98-236, § 5.2 (1998).

93. See *id.* The parcels' resources include rivers, lakes, and world-class salmon. See *id.*

94. See *id.*

Many feel that a price cannot be put on the land that the Natives fought so hard to gain. Gail Evanoff, a resident Native American who has vowed to fight the sale of land, was quoted in the Los Angeles Times as saying, "Our land is the center of who we are, it's what we are. You can't put a price on culture and heritage and tradition."⁹⁵

However, the majority of the comments received by the trustees from the public and special interest groups regarding the large parcel acquisitions have been in support of the land acquisition program and the individual acquisitions.⁹⁶ It has been suggested that it is patronizing to assume that the Natives cannot determine for themselves how to best use their own land.⁹⁷ After all, they are receiving greater profits from acquisition and conservation easements than they would have had they sold their land to the loggers.⁹⁸ The payments from acquisition and conservation easements have been mostly set up in permanent trust funds from which Native shareholders can draw dividends of up to \$1,500 or more each year.⁹⁹ In contrast, each shareholder has only received a total of \$2,000 from all logging proceeds since 1989.¹⁰⁰

III. Analysis of Resource Acquisitions

In order to ensure protection of ecologically sensitive land, federal land agencies can purchase the land from private landowners.¹⁰¹ When the landowners refuse to sell, the Fifth Amendment of the Constitution provides the federal government with the power to take the land for public use, so long as the owner is compensated.¹⁰² However, the government already owns more land than it can take care of properly.¹⁰³ In fact, estimations have

95. See Murphy, *supra* note 84, at A1.

96. See GAO Report, GAO/RCED-98-236, § 6.2 (1998).

97. See *In All Fairness: Environmental Injustice*, N.Y. TIMES, August 24, 1998, (advertisement); see *Chugach Alaska Corporation: Hearings on H.R. 2547 Before the House Committee on Resources*, 106th Cong. (1999) (statement of Sheri Buretta, Chairman of the Board of Chugach Alaska Corporation) [hereinafter "Buretta testimony"] available in 1999 WL 20010671.

98. See Murphy, *supra* note 84, at A1.

99. See *id.*

100. See *id.*

101. See Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 54-55 (1999).

102. See U.S. CONST. Amend. V ("nor shall private property be taken for public use without just compensation").

103. See *Conservation and Reinvestment: Hearings Before the Senate Comm. on Energy and Natural Resources*, [hereinafter "Conservation and Reinvestment

asserted that combined the local, state, and federal government owns 42% of the nation's landmass.¹⁰⁴ The Restoration Fund provides money for the government to acquire the land, but does nothing to provide for the additional funding that will be necessary to manage and protect these acquisitions.¹⁰⁵ With the current \$12 billion backlog in maintenance and operations facing the four federal land agencies, U.S. Representative Ralph Regula, chairman of the Subcommittee for Interior Appropriations, believes the federal government already owns more land than it can manage.¹⁰⁶

Land acquisition has been used as a tool by the federal land agencies to exert control over private property owners.¹⁰⁷ The agencies regularly try to force people to sell who do not wish to put their land on the market and refuse to buy from those who want to sell.¹⁰⁸ For instance, the Valdez trustees were not satisfied with only acquiring land from willing sellers; the Forest Service has decided to foreclose development on land remaining in Native hands.¹⁰⁹

The government does not have to take direct action in order to advance restoration though.¹¹⁰ In fact, there is a strong argument that private owners on average provide a higher level of environmental stewardship.¹¹¹ This is because private property owners have an incentive to protect their land.¹¹² This type of self-interest is lacking with public or common ownership.¹¹³

Hearings"] 106th Cong. (1999) (statement by Malcolm Wallop, Chairman of Frontiers of Freedom) available in 1999 WL 16947226

104. *See id.*

105. *See id.*

106. *See id.*; see also Mary McGrory, *The Environmentalists of August*, THE WASH. POST, Aug. 24, 1997, at C-01. The main federal land agencies are the Bureau of Land Management, U.S. Forest Service, National Park Service, and Fish and Wildlife Service. See Mark Obmascik, *Some Friendly Advice: Put Away the Ax, Work on Trimming*, THE DENVER POST, Jan. 12, 1995, at B-01.

107. *See Conservation and Reinvestment Hearings, supra* note 103.

108. *See id.*

109. *See Chugach Alaska Corporation: Hearings on H.R. 2547 Before the House Committee on Resources*, 106th Cong. (1999) (statement of Edgar Blatchford, Chairman of the Finance Committee of Chugach Alaska Corporation's Board of Directors) available in 1999 WL 20010672.

110. *See* Adler, *supra* note 101, at 55; see also *Here's How You Can Help Restore Resources*, STAR TRIBUNE, Jan. 4, 1993, at 5B (describing private groups that are helping to restore natural resources); see also *Center for Private Conservation* (visited Jan. 17, 2000) <<http://www.cei.org>> (describing examples of private stewardship).

111. *See Conservation and Reinvestment Hearings, supra* note 103.

112. *See id.*

113. *See id.* This concept of the land being overused when the commons can be equally used by all is known as the tragedy of the commons. See Garrett Hardin, *The Tragedy Of The Commons*, 162 SCIENCE 1243 (1968). The land needs to be

For example, small ranching communities in the West are worried that the area's environment is going to be destroyed by overpopulation.¹¹⁴ Currently large land tracts are held by single owners, which allow open spaces for animals and plants to thrive.¹¹⁵ However, a growing number of people are attracted to the area's beauty and wish to move to the West.¹¹⁶ Developers are buying up the land in order to subdivide the land tracts.¹¹⁷ The development will destroy the natural environment of the area.¹¹⁸

Local conservationists in Custer County, Colorado have formed a nonprofit land trust.¹¹⁹ The land trust, the San Isabel Foundation, buys large tracts of land for the preservation of private land through conservation easements.¹²⁰ As a result, the tracts are protected from the future development of subdivision that threatens the area.¹²¹

The San Isabel Foundation is just one of over a thousand land trust groups in the United States that have already preserved approximately 4.7 million acres of land.¹²² Other areas that have been preserved by such groups include New England woodlands, Californian redwoods, Appalachian mountainsides, and Northeastern farms.¹²³ Landowners are giving up their developmental rights in theory to protect the land.¹²⁴ However, there is also an economic incentive enticing the landowners to enter the conservation easements. If there is a public benefit to preserving the land, the landowners can receive an income tax deduction for donating their development rights to the land trust.¹²⁵

owned, so that people have to weigh the positive and negative feedback of their actions. *See id.*

114. *See* Malcolm Howard, *In US, Land Trusts Grow at Rapid Rate to Curb Development*, THE CHRISTIAN SCIENCE MONITOR, Jan. 4, 1996, at 10.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See* Howard, *supra* note 114, at 10; *see also* *Land Trust Alliance* (last visited Jan. 18, 2000) <<http://www.lta.org/whatlt.html>> (Land Trust Alliance is a national umbrella group that promotes voluntary land conservation).

120. *See id.*

121. *See id.*

122. *See* *Land Trust Alliance* (last visited Jan. 18, 2000) <<http://www.lta.org/whatlt.html>>.

123. *See* Howard, *supra* note 114, at 10.

124. *See id.*

125. *See* Charitable, etc., contributions and gifts, I.R.C. § 170(h) (2000). The conservation easement must be contributed to a qualified organization in order to receive a deduction. *See id.* This is why private owners must donate their developmental rights to a group such as a land trust in order to qualify for the deduction. *See* 143 CONG. REC. S6670 (daily ed. June 27, 1997) (statement of

Recently, many families have felt forced to sell their ranches when the original owner died because the estate taxes have become so expensive as a result of the development of the area increasing the value of land.¹²⁶ If the landowner enters a conservation easement though, the estate taxes are reduced.¹²⁷ This is because the Internal Revenue Service (hereinafter "IRS") appraises the property based on the value of the land's highest and best use, which the IRS assumes to be subdivision.¹²⁸ By placing the restriction on the property with the conservation easement, the estate tax is reduced enough that most landowners can afford to keep their land.¹²⁹ Although the true reason landowners are protecting the land from development may be for this tax benefit; the environment is still protected by these private actions.

Thus, in a country where the government already owns 42% of the nation's land¹³⁰ and where private owners can themselves provide environmental stewardship,¹³¹ placing more land into the public domain should not be the initial choice of restoration measures for damaged natural resources.¹³² At most, the government should provide incentives to private citizens in the form of conservation easements.¹³³

As discussed earlier, the goal of restoration is to make the environment and public whole for the injuries to natural resources resulting from an incident involving an oil discharge.¹³⁴ At times the devastation from an oil spill is so severe that it is infeasible to restore, rehabilitate, or replace the injured resources.¹³⁵ It is in this type of situation that Congress intended the acquisition of equivalent resources to be utilized.¹³⁶

Land acquisition should only be used in such extreme circumstances.¹³⁷ Acquisition of equivalent natural resources should be the last choice, with restoration, rehabilitation, and replacement

Senator Kempthorne).

126. See Howard, *supra* note 114, at 10.

127. See I.R.C. §170(h).

128. See Howard, *supra* note 114, at 10.

129. See 143 CONG. REC. S6670, *supra* note 125.

130. See *Conservation and Reinvestment Hearings*, *supra* note 103.

131. See Adler, *supra* note 101, at 55.

132. See *Conservation and Reinvestment Hearings*, *supra* note 103.

133. See Howard, *supra* note 114, at 10.

134. See Natural Resource Damage Assessments, 15 CFR 440 pt. 990 (1996), 440.

135. See Wickham, et al., *supra* note 8, at 409.

136. See H. R. REP. NO. 253, 99th Cong., 1st Sess., pt. 4, at 50 (1985).

137. See *id.*

being preferred.¹³⁸ The language of the statutes governing the restoration of natural resource damages does not make such a preference mandatory.¹³⁹

If the statutes were revised to include a hierarchy among the remedial alternatives, bills such as Senate Bill 711 might not be necessary. The money would go to restoration, rehabilitation, and replacement efforts before considering using funds for land acquisition. Such a revision would give the trustees more guidance, which currently is needed.¹⁴⁰

Some possible misuses of the Valdez settlement funds by the trustees were explored earlier.¹⁴¹ These misuses were foreseeable because the natural resources trustee system itself is flawed.¹⁴² The trustees are placed in a position where the potential for abuse is obvious due to a lack of oversight and the substantial deference that the courts give to the trustees.¹⁴³ Natural resource trustees are federal and/or state agencies.¹⁴⁴ As political entities, they are subject to governmental pressures.¹⁴⁵ Murray, et al., suggest that the potential to become involved in the politics behind decisions puts the trustees in a position where they cannot adequately protect the public resources.¹⁴⁶

138. See *id.*

139. See *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1230 (1996). The Court concludes that CERCLA does not require natural resource trustees to follow a hierarchy among restoration, replacement, and acquisition. *Id.*; see CERCLA, 42 U.S.C. § 9607 (f)(1); see CWA, 33 U.S.C. § 1321 (f)(5).

140. See generally Kevin R. Murray, et al., *Natural Resource Damage Trustees: Whose Side Are They Really On?*, 5 ENVTL. LAW, 407, 423 (1999) (a discussion of the flaws in the natural damage resource trustee system).

141. See GAO Report, GAO/RCED-98-236 (1998).

142. See Murray, et al., *supra* note 140, at 423.

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.* Potential conflicts of interest and unchecked control may lead trustees to the following problems:

- (1) using recovered damages inappropriately for restoration activities outside of the statutory requirements to restore, replace, and acquire equivalent natural resources;
- (2) abusing settlement authority to benefit potentially responsible parties for political reasons;
- (3) precluding private parties from compensation for a loss resulting from the damaged natural resource;
- (4) increasing assessment costs and fees to fund the trustee's own office;
- (5) avoiding liability when the trustee is a PRP; and finally
- (6) increasing costs due to overlapping jurisdiction with other federal, state, and tribunal trustees.

Murray, et al., supra note 140, at 423.

Valdez was the largest oil spill in America,¹⁴⁷ thus, even if a hierarchy of restoration alternatives was followed, land acquisition would have been necessary in the Valdez restoration. Some Alaskan government officials are wary of purchasing easements.¹⁴⁸ In 1992, John Manly, press secretary to Alaska Governor Walter Hickel, said that the state wanted to acquire all the rights to the land and not just temporary timber or mining rights.¹⁴⁹ However, as previously explained, such acquisition of fee simple title is not necessary to achieve the goals of restoration.¹⁵⁰

The Valdez trustees should have limited the land acquisitions to conservation easements.¹⁵¹ In this way, the land would have been protected from its almost certain future of being clear-cut by the timber industry.¹⁵² Plus, the land would have been reserved for the natural recovery of the injured resources.¹⁵³ However, the Native Americans would only have been putting restrictions on the land, instead of giving up title to their land to the federal government. By limiting the government acquisition to conservation easements, the government would also come closer to honoring its ANCSA commitments.¹⁵⁴

IV. Conclusion

Initially when studying the Exxon Valdez restoration, the idea of acquisition of equivalent resources seems improper, especially when one considers that the government is purchasing fee simple titles and easements from Native Americans. Scientists have determined that there are accidents, such as the Valdez oil spill, that have devastated the land to a point where it is infeasible to restore, rehabilitate, or replace the injured resources. In such instances, setting the land aside is the best thing that can be done to bring the resources back to health. Thus, the Valdez restoration

147. See Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg. 14,687 (1991).

148. See Shari Rudavsky, *Unsettled Business: Priorities for Exxon Spill Settlement*, THE WASH. POST, Sept. 1, 1992, at A15.

149. See *id.*

150. See *Chugach Alaska Corporation: Hearings on H.R. 2547 Before the House Committee on Resources*, 106th Cong. (1999) (statement of Dune Lankard, Executive Director and Spokesperson for the Eyak Preservation Council and Eyak Traditional Elders Council) available in 1999 WL 20010673.

151. See *id.*

152. See Murphy, *supra* note 84, at A1.

153. See Rogers, *supra* note 37, at A-02.

154. See Buretta testimony, *supra* note 97.

was destined to have acquisition of equivalent resources as a part of the plan.

The Natives did voluntarily sell their land and in fact received more of an economic return than if they had sold rights to timber companies. The land is environmentally better off because it is now being set aside and will not be used by timber, oil, and other resource companies. However, the government could have achieved the same effect even if the acquisition had not included fee simple titles and had instead been limited to conservation easements.

Acquisition should only be used in these desperate situations though. CERCLA, the CWA, and the OPA should be amended to mandate a hierarchy among restoration, rehabilitation, replacement, and acquisition of equivalent resources. In cases where acquisition is required, the purchase should be limited to conservation easements.

The government already owns much of the nation's land. Not to mention, when given an incentive to protect the land, private owners have been found to be superior environmental stewards to the government. Thus, it is not logical for restoration acquisitions to include fee simple titles; rather, the purchases should be limited to easements. This is not the most ideal outcome, but under the extreme circumstances of the Valdez oil spill this is an adequate manner of restoring the area.

Diane S. Calendine

