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NRD TRUSTEES: TO WHAT EXTENT ARE THEY TRULY TRUSTEES?

Laura Rowley*

Abstract: Several federal environmental statutes have empowered the federal government to appoint executive branch agencies to act as trustees on behalf of the public to oversee the process of collecting damages from responsible parties, and restoring natural resources that have been damaged on public lands. This Note will focus on the question of whether these natural resource damages (NRD) trustees created by federal statute have a common law fiduciary duty to the public, some lesser obligation, or no fiduciary duty at all. This Note concludes that courts have not held executive branch NRD trustees to a common law fiduciary duty, but instead have granted them typical agency deference. Finally, this Note suggests that courts should hold NRD trustees to an enforceable fiduciary duty, similar to the one applied to government trustees under the Indian trust doctrine.

INTRODUCTION

Before the environmental movement of the 1970s, states had limited common law authority to recover damages for injury to public natural resources, and the federal government had to rely on explicit legislative mandates before taking action.¹ In a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),² Congress established the first scheme whereby federal and state governments could appoint trustees who would have the power to bring suit to collect damages from parties whose toxic waste injured natural resources on public land.³ The idea of recovering for natural resource damages (NRDs) is conceptually similar to the tort law doctrine of providing a sum of money to "make the victim whole again," although here the victim is the environment rather than a pri-

* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2000-01.

¹ See Fredrick R. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405, 406 (1989).

² 42 U.S.C. §§ 9601-9675 (1994).

³ See 42 U.S.C. § 9607(f); Anderson, *supra* note 1, at 406.

vate party.⁴ Like tort, the concept involves the shifting of loss; since natural resource restoration is extremely expensive, the trustees must pursue damages so that taxpayers are not burdened with these expenses.⁵ Despite its similarity to prior existing doctrines of common law, the idea of recovering damages on behalf of the environment is also revolutionary because it incorporates the natural resources' intrinsic worth.⁶ The marketplace economy, which assigns value to natural resources based on the economic worth they hold for humans, does not typically recognize their intrinsic worth.⁷ CERCLA's requirement that NRD trustees use recovered funds to replace or restore the damaged natural resource to its "baseline condition as measured . . . [by] the injured resource's physical, chemical, or biological properties or the services previously provided"⁸ demonstrates the statute recognizes that acceptable cleanup and recovery standards for humans may not be standards high enough for an ecosystem.⁹ It further recognizes that the value of natural resources should not always be quantified in human economic terms.¹⁰

Today, two more major federal statutes—the Clean Water Act (CWA)¹¹ and the Oil Pollution Act (OPA)¹²—join CERCLA in allowing recovery of natural resource damages,¹³ and individual states are

⁴ See Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 853 (1989).

⁵ See Anthony R. Chase, *Remedying CERCLA's Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine Into Natural Resource Damage Actions*, 11 VA. ENVTL. L.J. 353, 357 (1992). The taxpayers would either literally pay the cost of restoration, or would figuratively "pay" by the result of no action taken to restore the damaged natural resources. See *id.*

⁶ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 60 (2d ed. 1998) [hereinafter PLATER, ENVIRONMENTAL LAW].

⁷ See *id.* at 57–58, 60.

⁸ Chase, *supra* note 5, at 356 (quoting Prince William Sound and Gulf of Alaska; Restoration Work Plan and Program, 55 Fed. Reg. 48,160, 48,161 (1990)).

⁹ See *id.* The author explains that additional injuries to natural resources can be caused by the problem of biomagnification. See *id.* at 356 n.22. For example, PCBs and DDT are chemicals that do not easily deteriorate, and their hazardous effects are magnified by transmittal up the food chain. See *id.* They become concentrated in higher organisms, such as birds and marine mammals, at levels as high as a million times greater than normal concentration in water or marine sediments. See *id.* Anthropocentric clean-up standards may not be good enough to relieve problems caused by this phenomenon. See *id.* at 356.

¹⁰ See Chase, *supra* note 5, at 356.

¹¹ Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251–1387 (1994).

¹² Oil Pollution, Liability and Compensation Act, 33 U.S.C. §§ 2701–2761 (1994).

¹³ Other statutes such as the Trans-Alaska Pipeline Authorization Act and the Marine Protection Research and Sanctuaries Act amendments of 1988 provide for governmental

allowed to create their own NRD statutory schemes.¹⁴ The statutes allow appointed government entities¹⁵ to act as trustees to oversee the process of repairing damaged natural resources, which includes initial damage assessments, bringing suit against and collecting awards from potentially responsible parties (PRPs), and applying the recovered funds to restoration of the damaged natural resources.¹⁶ This scheme is complex. An understanding of its full meaning is frustrated by the fact that there is little case law in the area, and most cases that have been brought ended short of full litigation when parties agreed to a settlement.¹⁷ Many questions remain unanswered about the legal status of NRD trustees.¹⁸ This Note will focus on whether the executive branch NRD trustees created by federal statute have a common law fiduciary duty to the public, some lesser obligation, or none at all. Part I of this Note provides background on the CERCLA, CWA, and OPA NRD provisions; Part II discusses the roots of the NRD provisions; Part III provides an example of the federal government acting as trustee in another area of law—the Indian trust doctrine; Part IV explores past and current litigation based on statutory NRD provisions; and Part V determines that courts have granted NRD trustees agency deference, but suggests that courts should instead hold NRD trustees to a fiduciary duty similar to the one applied to government trustees under the Indian trust doctrine.

I. A NEW CAUSE OF ACTION: NATURAL RESOURCE DAMAGES

A. *The Three Economies*

Most lawmakers are aware of and incorporate an understanding of the marketplace economy into the laws that they create.¹⁹ In the realm of environmental law and policy, however, laws based only on an understanding of the marketplace economy often will not be

recovery of natural resource damages in varying degrees. See Anderson, *supra* note 1, at 406 n.1; Breen, *supra* note 4, at 855–56.

¹⁴ See Kevin R. Murray et al., *Natural Resource Damage Trustees: Whose Side Are They Really On?*, 5 ENVTL. LAW. 407, 413 (Feb. 1999).

¹⁵ Often the trustees are Department of Interior (Interior) under CERCLA, and the Commerce Department's National Oceanic and Atmospheric Administration (NOAA) under OPA. See *id.* at 412, 417–18.

¹⁶ See *id.* at 407, 413.

¹⁷ See Gerald F. George, *Litigation of Claims for Natural Resource Damages*, SD88 A.L.I.-A.B.A. 631, 633 (1999).

¹⁸ See generally Murray et al., *supra* note 14.

¹⁹ See PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 58.

sufficient to achieve the goals of regulating behavior to maintain a healthy ecosystem.²⁰ The marketplace economy has been slow to acknowledge a need for recovery of NRDs because natural resources are not easily quantified in terms of monetary value, and thus the marketplace economy undervalues or ignores them.²¹ It is necessary, therefore, to look beyond familiar market forces and to consider two other “economies” in order to explain the need for NRD recovery.²²

The marketplace economy, while undoubtedly a sophisticated and intricate mechanism for dealing with the distribution of resources in our complex society, is limited because it takes for granted many natural resources that cannot be reduced to a monetary value.²³ Scholars have recognized a “natural economy” that exists and operates alongside the marketplace economy, sometimes overlapping with it.²⁴ The natural economy accounts for what happens in the physical world and values the biological and “geophysical systems that sustain dynamic planetary processes.”²⁵ It overlaps with the marketplace economy when it supplies vital resources and services to humans.²⁶ Much of what comprises the natural economy, however, lies outside the marketplace economy, which may account for why legal protection of natural resources has been slow to develop.²⁷

A third economy, the “civic-societal economy,” incorporates the entire market economy but extends beyond traditional notions of goods and services that can be exchanged for money.²⁸ While sometimes overlapping with the natural economy,²⁹ it can best be described as “encompass[ing]the public, societal values, ethics, benefits and losses that cumulatively shape the full and long-term interests of society.”³⁰ The health of the marketplace and civic-societal economies are often directly and substantially linked to the health of the natural

²⁰ See Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 366 (1999) [hereinafter Plater, *Three Economies*].

²¹ See PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 58; Plater, *Three Economies*, *supra* note 20, at 367.

²² See Plater, *Three Economies*, *supra* note 20, at 367–69.

²³ See *id.* at 373.

²⁴ See *id.* at 367–74.

²⁵ PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 58; see also Plater, *Three Economies*, *supra* note 20, at 370.

²⁶ See Plater, *Three Economies*, *supra* note 20, at 370.

²⁷ See *id.* at 370, 373.

²⁸ See *id.* at 368.

²⁹ See *id.* at 369.

³⁰ *Id.* at 370.

economy, with its life-sustaining systems of “soil, water, air and living communities . . . [w]hen a resource system is derogated or destroyed, some enterprises may prosper greatly, but the society is likely to be far less well off.”³¹ Congress implicitly incorporated this idea into its creation of government trustees to protect and restore natural resources that have been damaged.³²

B. CERCLA, OPA, and CWA

While several federal statutes provide some legal authority to recover NRDs, CERCLA is the primary vehicle because it provides the most extensive legal framework for NRD recoveries.³³ CERCLA § 107 addresses liability for violators of the Act’s provisions.³⁴ Specifically, § 107(f) covers liability for damage to natural resources, and allows the United States government, any state government, and any Indian tribe to act on behalf of the public as trustee of the natural resources to recover for the damages.³⁵ Under § 107(f)(2), the President must designate federal officials to act as trustees, and the Governor of each state must designate state officials to act as trustees on behalf of the public.³⁶

The natural resources covered by CERCLA include:

land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.³⁷

This definition excludes “purely private” property, yet makes clear that land does not have to be owned by the government to be covered

³¹ PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 59. Of course, harm to a resource system will cause prosperity to some enterprise, but the idea of protecting natural resources stems from concern for society as a whole. *See id.*

³² *See* 42 U.S.C. § 9607(f) (1994); 33 U.S.C. § 1321 (1994); 33 U.S.C. § 2702 (1994); *see also* PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 57–59.

³³ *See* Chase, *supra* note 5, at 358.

³⁴ *See* 42 U.S.C. § 9607.

³⁵ *See id.* § 9607(f).

³⁶ *See id.* The language is mandatory: the President and Governor “shall designate” officials to act as trustees, and those officials “shall assess damages” to natural resources. *See id.* (emphasis added).

³⁷ 42 U.S.C. § 9601(16).

by the statute.³⁸ Instead, there must be a degree of government regulation, management or control over the land for it to be considered a natural resource within the meaning of the statute.³⁹ Cases thus far have been brought to protect an aquifer,⁴⁰ a state's wildlife and sport fish,⁴¹ a stream and groundwater,⁴² and all drinking water sources within a state.⁴³

The Oil Pollution Act and Clean Water Act both have a provision similar to CERCLA's NRD provision.⁴⁴ The CWA allows federal and state officials, as trustees, to sue on behalf of the public to recover "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 oil or a hazardous substance" having been spilled into navigable waters.⁴⁵ The CWA NRD provision is implemented by the Department of Interior (Interior) in the same manner as the CERCLA NRD provision, employing the same regulations.⁴⁶

Enacted by Congress in 1990 in response to the Exxon Valdez oil spill, OPA is the most recent federal statute that allows for recovery of natural resource damages.⁴⁷ Like CERCLA, the natural resource damages provision of OPA states that "the President, or the authorized representative of any state, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources."⁴⁸ Despite the similarity, OPA's natural resource damages provision improves upon CERCLA's scheme in some

³⁸ See Craig R. O'Connor, *Natural Resource Damages Under the Comprehensive Environmental Response, Compensation, and Liability Act, and the Oil Pollution Act*, SD67 ALI-ABA 145, 150-51 (Feb. 1999) (citing *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 460 (D.C. Cir. 1989)).

³⁹ See *id.*

⁴⁰ See *id.* at 151 (citing *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 650 (3d Cir. 1988)).

⁴¹ See *id.* (citing *State of Idaho v. S. Refrigerated Transp.*, No. 88-1279, slip op. at 11-12 (D. Idaho Jan. 25, 1991)).

⁴² See *id.* (citing *State of Ohio v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983)).

⁴³ See O'Connor, *supra* note 38, at 151 (citing *Lutz v. Chromatex*, 718 F. Supp. 413, 419 (M.D. Pa. 1989)).

⁴⁴ See 33 U.S.C. § 2702(b)(2)(A) (1994); 33 U.S.C. § 1321(f)(4) (1994); 42 U.S.C. § 9607(f) (1994).

⁴⁵ See 33 U.S.C. § 1321(f)(4).

⁴⁶ *E.g.*, 43 C.F.R. § 11.10 (1997); see Murray et al., *supra* note 14, at 415-16.

⁴⁷ See 33 U.S.C. § 2702(b)(2)(A); Murray et al., *supra* note 14, at 416.

⁴⁸ 33 U.S.C. § 2706(b)(1); see 42 U.S.C. § 9607(f)(1).

significant ways.⁴⁹ First, OPA allows trustees to use funds from the Oil Spill Liability Trust Fund to perform initial site assessments and file claims against PRPs.⁵⁰ In contrast, CERCLA prohibits trustees from using Superfund money to fund initial assessments of sites for natural resource damages.⁵¹ This oversight has had the effect of placing trustees in the unfortunate position of being forced to settle with one or more PRPs in order to obtain sufficient funds to perform a site assessment.⁵² The dangers of this predicament are obvious—settling forecloses the possibility of filing suit against that PRP once the true extent of the damage it caused has been discovered.⁵³ In fact, this lack of funding has often proved to be an insurmountable obstacle because agency budgets have historically authorized little or no funding for natural resource damage actions.⁵⁴

The OPA NRD provision also differs from that of CERCLA in that the National Oceanic and Atmospheric Administration (NOAA), not Interior, promulgated its regulations and usually acts as the government trustee.⁵⁵ NOAA filed lawsuits under CERCLA and OPA in Massachusetts, California, Washington, and Alaska, and its efforts have so far appeared to be more successful than those of Interior.⁵⁶

Finally, there are other federal statutes that allow more limited claims for natural resource damages,⁵⁷ and, in addition to the federal

⁴⁹ See Murray et al., *supra* note 14, at 416–17.

⁵⁰ See 33 U.S.C. § 2712(a)(2), (5) (1994); Murray et al., *supra* note 14 at 416. “The Oil Spill Liability Trust Fund is funded by an environmental tax on petroleum under the Internal Revenue Code as well as by provisions under various other statutes, including OPA, CWA, the Deepwater Port Act, the Outer Continental Shelf Lands Act Amendments, and the Trans-Alaska Pipeline Authorization Act.” Murray et al., *supra* note 14, at 417 n.30; see 26 U.S.C. § 9509(b) (1994); 33 U.S.C. § 1517(f) (1994); 33 U.S.C. §§ 1319(c), 1321 (1994); 33 U.S.C. §§ 2706(f), 2715 (1994); 43 U.S.C. § 1517(f) (1994); 43 U.S.C. §§ 1653, 1656 (1994 & Supp. II 1996); 43 U.S.C. § 1812 (1994).

⁵¹ See 26 U.S.C. § 9507(c)(1) (1994); 42 U.S.C. § 9611(b)(2) (1994); Murray et al., *supra* note 14, at 417 n.31.

⁵² See *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1031–32 (D. Mass. 1989); Murray et al., *supra* note 14, at 428 n.89.

⁵³ See generally *In re Acushnet*, 712 F. Supp. 1019.

⁵⁴ See Chase, *supra* note 5, at 372.

⁵⁵ See Murray et al., *supra* note 14, at 417.

⁵⁶ See Chase, *supra* note 5, at 355, 365–71.

⁵⁷ See Anderson, *supra* note 1, at 406 n.1 (citing Outer Continental Shelf Lands Act Amendment of 1978, 43 U.S.C. § 1813(a)(2)(C)–(D), (b)(3) (1982); Deepwater Port Act, 33 U.S.C. § 1517(i)(3) (1982); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(a)(1), (c)(1) (1982)).

statutes, each state is free to develop its own statutory scheme for NRDs.⁵⁸

C. *The Trustees' Responsibilities*

To establish the liability of a potentially responsible party (PRP) under CERCLA, a trustee must not only establish the same elements of a claim as for recovery of response costs,⁵⁹ but also establish injury and causation.⁶⁰ Establishing injury can be difficult where it is necessary to demonstrate a change in the resource's baseline condition.⁶¹ Often, information on the baseline condition (before the release of the hazardous substance took place) is unavailable.⁶² The causation element is also problematic because the necessary standard is unsettled. For example, a Massachusetts federal district court held that a trustee need only demonstrate that the contaminant is a "contributing factor" to the injury,⁶³ while a California federal district court held that the contaminant must be the "sole or substantially contributing factor" to the injury.⁶⁴

It is clear, however, that despite any difficulties in the process of pursuing natural resource damages, Congress did intend for these cases to be brought.⁶⁵ Moreover, there are fiduciary duties that restrict trustees' discretion.⁶⁶

D. *Trustees Have Conflicting Interests*

With the exception of the federally recognized Indian tribes, NRD trustees are governmental entities, subject to the obligations

⁵⁸ See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (stating that states' interest in conservation and protection of wild animals are legitimate local purposes similar to states' interest in protecting the health and safety of their citizens).

⁵⁹ These elements are: "(1) the release; (2) of a hazardous substance; (3) from a vessel or at a facility; (4) by a responsible party as defined in the statute." George, *supra* note 17, at 641.

⁶⁰ See *id.* at 641-42.

⁶¹ See *id.* at 641.

⁶² See *id.*

⁶³ See *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 722 F. Supp. 893, 897 (D. Mass. 1989).

⁶⁴ *United States v. Montrose Chem. Corp.* of Cal., 788 F. Supp. 1485, 1490 (C.D. Cal. 1991); see also George, *supra* note 17, at 642.

⁶⁵ See 42 U.S.C. § 9607(f) (1994) (stating the President and Governor "shall designate" officials to act as trustees, and those officials "shall assess damages" to natural resources).

⁶⁶ See *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1031-32 (D. Mass. 1989).

that status confers.⁶⁷ As a large administrative body, Interior cannot escape its involvement in other projects or its knowledge of other priorities that may affect its ability to put the needs of the NRD trust beneficiaries ahead of itself.⁶⁸ While these other interests do not necessarily preclude Interior from fulfilling its fiduciary duty, if it indeed has one, these conflicts of interest may lead 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 PRPs 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 tribal trustees.⁶⁹

In fact, many of these potential problems have actually come to pass, demonstrating the need for more clearly defined duties on the part of these government agencies when they act as trustees.⁷⁰

II. ROOTS OF NRD PROVISIONS: COMMON LAW TRUST AND THE PUBLIC TRUST DOCTRINE

Neither a private entity nor a local government may bring CERCLA natural resource damage claims unless it has been appointed trustee by a state governor.⁷¹ Instead, the individual or local government must rely on a state or federal government entity to bring the claim.⁷² The public is in a position of vulnerability, relying on and placing its trust in the government to accomplish restoration of the damaged natural resources in which each member of the public has a stake. In short, CERCLA and the other federal statutes that allow for

⁶⁷ See Murray et al., *supra* note 14, at 423.

⁶⁸ See *id.* at 423–24.

⁶⁹ *Id.* at 424.

⁷⁰ See *id.* at 424–45.

⁷¹ See O'Connor, *supra* note 38, at 149–50 (citing *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 649 (3d Cir. 1988); *Lutz v. Chromatex*, 718 F. Supp. 413, 419 (M.D. Pa. 1989)); see also James Peck, *Measuring Justice for Nature: Issues in Evaluating and Litigating Natural Resource Damages*, 14 J. LAND USE & ENVTL. L. 275, 297–98 (1999).

⁷² See O'Connor, *supra* note 38, at 149–50.

NRD trustees have created a trust relationship between the government and the public.⁷³ This section will explore first the common law of private trusts, then provide a brief summary of the public trust doctrine, which some commentators have asserted is the root of the federal statutory NRD provisions.

A. Common Law Trust

Generally, a trust is a device that allows a trustee to manage property for one or more beneficiaries.⁷⁴ The theory of a trust relationship involves varying degrees of ownership on the part of trustees and beneficiaries.⁷⁵ Neither owns the trust property to the exclusion of the other: "the trustee owns the legal interest and the beneficiary owns the equitable interest."⁷⁶ To create a trust at common law, a property owner transfers assets to a trustee, usually by means of a written document setting forth the terms of the trust.⁷⁷ In order to create a trust, there must exist a settlor (property owner who created the trust), a trustee, and a beneficiary.⁷⁸ A trustee may also be a beneficiary, but a valid trust must have at least one beneficiary who is not a trustee, under the theory that such a beneficiary would be willing to go to court to enforce the terms of the trust against any misconduct on the part of the trustee.⁷⁹ There must also be a corpus (trust property),⁸⁰ and intent on the part of the settlor to create a trust.⁸¹

A trust relationship between a trustee and beneficiary carries with it the highest fiduciary duty known at law.⁸² Trustees must be proactive in gathering and preserving assets,⁸³ and making them productive.⁸⁴ The "duty of loyalty" mandates that trustees put the interests of beneficiaries above their own—to a standard that is illustrated as

⁷³ See RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 435 (4th ed. 1990).

⁷⁷ See RESTATEMENT (SECOND) OF TRUSTS §§ 4, 17 (1959). "The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings." *Id.* § 4.

⁷⁸ See *id.* § 2(h).

⁷⁹ See *id.* § 99(e).

⁸⁰ See *id.* § 74.

⁸¹ See *id.* § 23.

⁸² See *id.* § 2(b).

⁸³ See RESTATEMENT (SECOND) OF TRUSTS § 175 (1959).

⁸⁴ See *id.* § 176.

being above reasonableness, but somewhat less than self-sacrifice.⁸⁵ When investigating whether a trustee has abided by this duty of loyalty, a court looks both to the trustee's actions and her state of mind.⁸⁶

The duty of loyalty doctrine includes the "no further inquiry rule": if a trustee has benefited in any way from a transaction made on behalf of the trust beneficiary, a court will conclude that there has been a breach of the duty of loyalty, regardless of whether the beneficiary has benefited, or will ultimately benefit, from the transaction.⁸⁷ The only exceptions to this rule against self-dealing on the part of a trustee arise when the settlor of a trust has agreed to the particular action that would constitute self-dealing, or when all the beneficiaries of the trust agree to it after being fully informed of the action and its potential consequences.⁸⁸

Other common law duties of trustees include the duty to earmark trust property⁸⁹ and the duty not to co-mingle trust property with the trustee's own property.⁹⁰ Under the duty to earmark trust property, the trustee must keep copious notes and a paper trail of all investments of the corpus.⁹¹ The duty not to co-mingle is self-explanatory: the trustee must keep the trust corpus separate from his or her own property.⁹²

Finally, trustees have a duty not to delegate.⁹³ Historically, under the common law, a trustee had to handle personally all investments and other transactions made with the trust property.⁹⁴ More recently, however, courts have approved delegation of tasks, so long as the delegation is done prudently.⁹⁵ To prove that a task was delegated prudently, a trustee must show that he or she researched the selected agent; if the trustee makes a negligent delegation, he or she is liable for the resulting losses.⁹⁶

⁸⁵ See *id.* § 170.

⁸⁶ See *DUKEMINIER & JOHANSON, supra* note 76, at 851.

⁸⁷ See *RESTATEMENT (SECOND) OF TRUSTS* § 170 cmt. h (1959); *DUKEMINIER & JOHANSON, supra* note 76, at 852.

⁸⁸ See *RESTATEMENT (SECOND) OF TRUSTS* § 216 (1959).

⁸⁹ See *id.* § 172.

⁹⁰ See *id.* § 179.

⁹¹ See *id.* § 172.

⁹² See *id.* § 179. This can be difficult for trustees to adhere to since they have legal title to the property.

⁹³ See *id.* §§ 2 cmt. b, 171.

⁹⁴ See *RESTATEMENT (SECOND) OF TRUSTS* § 171 (1959).

⁹⁵ See *id.* § 171; *DUKEMINIER & JOHANSON, supra* note 76, at 178.

⁹⁶ See *RESTATEMENT (THIRD) OF TRUSTS* § 171 (1992); *DUKEMINIER & JOHANSON, supra* note 76, at 178-79.

If the basic common law trust principles were to apply to the NRD trustee provisions of the federal statutes, the Congress that passed the statute would be the settlor, or creator of the trust.⁹⁷ The appointed federal or state government agency, or Indian tribe would be the trustee.⁹⁸ The beneficiaries of the trust can be identified as members of the public, likely any United States citizen since natural resources are ignorant of state boundaries.⁹⁹ The trust corpus would be the money recovered from responsible parties through litigation.¹⁰⁰ The question remains, however, whether Congress intended these basic common law principles of trust to apply in the NRD provisions of CERCLA, CWA, and OPA.

B. Public Trust Doctrine

Although it is unclear to what extent Congress intended common law trust principles to apply to NRD provisions, it is clear that the trustee provisions of CERCLA, CWA, and OPA find roots in the public trust doctrine.¹⁰¹ In the context of the public trust doctrine, trustees, which are generally states, are not impressed with fiduciary duties identical to those imposed by common law; states as trustees of natural resources are not held to the highest fiduciary duty known at law, since the public trust doctrine does not require absolute protection of all trust resources.¹⁰² Variations of the public trust are permissible, although a careful fiduciary balancing process is required of the government trustees.¹⁰³ A legislature cannot simply override the public trust protection.¹⁰⁴ Instead, courts require a substantive, rather than procedural, trust balance under traditional equity standards.¹⁰⁵ In *Paepke v. Building Commission*,¹⁰⁶ for example, the Illinois Supreme Court implied that a government wishing to alter public trust re-

⁹⁷ See 42 U.S.C. § 107(f) (1994); RESTATEMENT (SECOND) OF TRUSTS § 3(1) (1959).

⁹⁸ See 42 U.S.C. § 107(f); RESTATEMENT (SECOND) OF TRUSTS § 3(3) (1959).

⁹⁹ See RESTATEMENT (SECOND) OF TRUSTS § 3(4) (1959). Did Congress intend to limit beneficiaries to citizens of the United States? To members of a local community that is affected by the damage to natural resources? Questions such as this are not answered by CERCLA. See 42 U.S.C. § 107(f).

¹⁰⁰ See 42 U.S.C. § 107(f); RESTATEMENT (SECOND) OF TRUSTS § 3(2) (1959).

¹⁰¹ See Chase, *supra* note 5, at 354, 379; Miriam Montesinos, Comment, *It May Be Silly, But It's an Answer: The Need to Accept Contingent Valuation Methodology in Natural Resource Damage Assessments*, 26 *ECOLOGY L.Q.* 48, 54 (1999).

¹⁰² See PLATER, *ENVIRONMENTAL LAW*, *supra* note 6, at 995.

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 995, 998.

¹⁰⁵ See *id.* at 995.

¹⁰⁶ 263 N.E.2d 11 (1970).

sources bears the burden of showing that it has struck a balance between its trust obligations and other economic or legislative motives.¹⁰⁷ The government, in its role as trustee, comes before the court as a fiduciary subject to special scrutiny, and less deserving of the deference given the government in its other capacities.¹⁰⁸ The court then affords the public trust's long-term legacy great weight, and any departure from such legacy would bear the burden of persuasion.¹⁰⁹

The plain language and legislative history of CERCLA, CWA, and OPA NRD provisions imply that the meaning of the words "trust" and "trustee" derive from the concepts of state and federal public trust.¹¹⁰ Unfortunately, the statutes are silent regarding the definition of the trustees' fiduciary duty, and it is not readily apparent whether Congress intended NRD trustees to be subject to the same standards as trustees under the public trust doctrine.¹¹¹

III. THE INDIAN TRUST DOCTRINE: AN EXAMPLE OF GOVERNMENT AS TRUSTEE

The idea of the federal government serving as trustee for natural resource damages has not been fully explored in litigation,¹¹² but there have been analogous situations in which the United States government has acted as trustee that could help shed light on the concept. One such situation is the federal government's role as trustee on behalf of federally recognized Indian tribes, an enlightening scenario because Indian trust law is the closest cousin to the public trust doctrine, in which the NRD provisions are rooted.¹¹³ Furthermore, Indian trust law is a particularly good analogy to shed light on the role of NRD trustees because currently, environmental threats to tribal land bases are the most pressing issues under the doctrine.¹¹⁴ Indian litigants have successfully invoked the Indian trust doctrine to force the executive branch of the federal government to live up to its trust responsibility in matters such as considering Indian interests when allo-

¹⁰⁷ See PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 998.

¹⁰⁸ *See id.* at 998-99.

¹⁰⁹ *See id.* at 998.

¹¹⁰ *See Murray et al.*, *supra* note 14, at 422.

¹¹¹ *See id.*

¹¹² *See George*, *supra* note 17, at 633.

¹¹³ *See Mary Christina Wood*, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1565 (1994).

¹¹⁴ *See id.* at 1474.

cating water rights;¹¹⁵ cleaning up pollution on Indian reservations;¹¹⁶ protecting Indian lands against trespassers and infringing development;¹¹⁷ preventing improper conveyance of Indian lands;¹¹⁸ and compensating for natural resource mismanagement.¹¹⁹

The current status of the government's Indian trust responsibility is certainly not one of a clear common law fiduciary duty.¹²⁰ It does, however, find certain reference points in the common law.¹²¹ For example, defining the trust duty depends upon the branch of government against which the responsibility is being enforced; courts have been reluctant to hold that the trust duty constrains congressional action, and have even held that Congress has the power to terminate the Indian trust.¹²² This is because at common law, the settlor, or creator of the trust, has the power to alter and even end the trust, regardless of the impact on the beneficiary.¹²³ So, "while courts recognize that Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement."¹²⁴ Even though the Supreme Court established a standard that limits Congress's power,¹²⁵ the standard, similar to a rational basis review in constitutional law, is so loose that it effectively did little to change previous court opinions that set standards of great deference to Congress.¹²⁶

The executive branch, on the other hand, would be the trustee in a common law trust paradigm, and consequently has been held to

¹¹⁵ *Id.* at 1513–14 (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256–57 (D.D.C. 1972)).

¹¹⁶ *Id.* (citing *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1096 (8th Cir. 1989)).

¹¹⁷ *Id.* (citing *North Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065, 3067–71 (D. Mont. 1985)).

¹¹⁸ Wood, *supra* note 113, at 1513–14 (citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)).

¹¹⁹ *Id.* (citing *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 681 (1987)).

¹²⁰ See Kathleen M. O'Sullivan, Comment, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123, 134 (1995).

¹²¹ See Wood, *supra* note 113, at 1512–13.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." O'Sullivan, *supra* note 120, at 134 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

¹²⁶ See *id.*

more than a mere moral obligation.¹²⁷ In *United States v. Mitchell*,¹²⁸ [hereinafter *Mitchell II*] the Supreme Court found that Indians could legally enforce a trust responsibility¹²⁹ against the federal executive branch.¹³⁰ This interpretation, though, was not the Supreme Court's original conclusion.¹³¹ In an earlier version of *Mitchell v. United States*,¹³² [hereinafter *Mitchell I*] the Court had rejected a tribe's claim for money damages under the General Allotment Act, reasoning that the Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."¹³³ On remand, the Court of Claims examined several timber management statutes apart from the General Allotment Act, and ruled that they imposed a fiduciary duty on the executive branch of the federal government.¹³⁴

In *Mitchell II*, the Supreme Court agreed with the Court of Claim's conclusion, and held that the federal government did have a fiduciary duty toward the Indians under the timber management statutes.¹³⁵ It noted that the Quinault reservation had been allotted in trust to individual tribe members.¹³⁶ The Tribe and its individual members had sued the federal government for mismanagement of forest resources on the reservation.¹³⁷ The executive branch was implicated through Interior, which had been responsible for managing the forest resources.¹³⁸

In its analysis, the Court applied a three-part test that addressed the issue of legislative intent to create a right and a remedy in regard to the Tribe's collection of monetary damages for the government's

¹²⁷ See *id.* at 134–35.

¹²⁸ 463 U.S. 206 (1983) [hereinafter *Mitchell II*].

¹²⁹ Tribes can enforce the federal fiduciary duty and obtain equitable, declaratory, or mandamus relief in a federal district court pursuant to the Administrative Procedure Act (APA). Wood, *supra* note 113, at 1514–15. Before the enactment of the APA, "questions of sovereign immunity posed initial barriers to litigation and likely hampered tribes from fully employing the trust doctrine as a claim for relief against federal agency transgressions." *Id.*

¹³⁰ See *Mitchell II*, 463 U.S. at 224–27; see also O'Sullivan, *supra* note 120, at 135.

¹³¹ See O'Sullivan, *supra* note 120, at 134 n.84 (citing *Mitchell v. United States*, 445 U.S. 535 (1980)).

¹³² 445 U.S. 535 (1980) [hereinafter *Mitchell I*].

¹³³ *Id.* at 542.

¹³⁴ See O'Sullivan, *supra* note 120, at 134 n.84.

¹³⁵ See *Mitchell II*, 463 U.S. 206, 224 (1983).

¹³⁶ See *id.* at 208–10; O'Sullivan, *supra* note 120, at 135.

¹³⁷ See *Mitchell II*, 463 U.S. at 210; O'Sullivan, *supra* note 120, at 135.

¹³⁸ See *Mitchell II*, 463 U.S. at 219–20; O'Sullivan, *supra* note 120, at 135 n.87.

breach of its fiduciary duty.¹³⁹ The three factors were: (1) a tribe must base its claim on a substantive right found in the Constitution or a federal statute, or created by the assumption of federal control over Indian property; (2) the claim must be for money damages; and (3) the claimant must demonstrate that the law creating the substantive right “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”¹⁴⁰

The Court, applying the test to the Quinalts’ claim in *Mitchell II*, found that the Tribe had a substantive right based on both the timber statutes and the assumption of elaborate federal control.¹⁴¹ The Court found two sources of fiduciary duty: it first held that the executive branch must exercise fiduciary care when a trust relationship is clear from congressional enactments, and relied on the standards for federal management of Indian timber set out in the multiple timber management statutes and administrative regulations.¹⁴² Second, the Court found that a fiduciary relationship had necessarily arisen when the government assumed “such elaborate control over forests and property belonging to Indians.”¹⁴³ The Court further held that Interior’s regulations, which were comprehensive and had been revised several times, imposed fiduciary duties upon the agency, as did the

¹³⁹ See O’Sullivan, *supra* note 120, at 135, 138.

¹⁴⁰ *Id.* at 135 (citing *Mitchell II*, 463 U.S. at 217). Critics of *Mitchell II* point out that the decision conflicts with the Court’s opinion in the 1975 case of *Cort v. Ash*, 422 U.S. 66 (1975). In *Cort*, the Court created a stringent, four-part test for implying a private cause of action from federal statutes that do not explicitly grant one. The factors of the test are: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.* at 78; O’Sullivan, *supra* note 120, at 138 n.109. Even though the *Mitchell II* Court did not apply the *Cort v. Ash* four-part test, the test created addresses the same fundamental issue—legislative intent to create a private right and remedy. O’Sullivan, *supra* note 120, at 138.

¹⁴¹ See *Mitchell II*, 463 U.S. at 224–25; O’Sullivan, *supra* note 120, at 135.

¹⁴² See *Mitchell II*, 463 U.S. 206, 222–24 (1983); O’Sullivan, *supra* note 120, at 135–36; Wood, *supra* note 113, at 1519–20.

¹⁴³ See *Mitchell II*, 463 U.S. at 225. Indeed, the federal government did exercise elaborate control; until 1910, the federal government did not allow Indians the right to sell timber from reservation land, and the 1910 Act gave the Secretary of the Interior “the right to sell timber from the reservation land, the right to use the money from timber sales for the benefit of Indians, and the right to consent to sales by Indian allottees.” O’Sullivan, *supra* note 120, at 136 (citing Act of June 25, 1910, §§ 7–8, 36 Stat. 857 (codified as amended at 25 U.S.C. §§ 406, 407 (1994))).

requirement that the Secretary of the Interior consider "the needs and best interests of the Indian owner and his heirs."¹⁴⁴

The Court in *Mitchell II* never explicitly stated on what substantive right the Tribe's claim was based, but rather "implicitly stated a substantive right of Indians to be protected from an executive branch agency's breach of its fiduciary duty."¹⁴⁵ The source of this fiduciary duty arose from the pervasive federal involvement in tribal forestry management; it did not seem to be inherent in the federal-tribal relationship.¹⁴⁶ As for the Tribe's entitlement to compensation for the government's breach, the Court found that the statutes and regulations at issue could be fairly interpreted as mandating compensation because they clearly established fiduciary obligations on the part of the government in the management and operation of Indian lands and resources.¹⁴⁷ Unlike the *Mitchell I* Court, which would have allowed compensation only where the law creating the substantive right expressly mandated it,¹⁴⁸ the *Mitchell II* Court found an implied right of damages under the regulatory scheme based on precedents from the Court of Claims that allowed implied rights of action for Indians,¹⁴⁹ and on an analogy to the common law of trusts.¹⁵⁰

The *Mitchell II* decision does have some problematic features, including a lack of clarity in the scope of its holding.¹⁵¹ The Court seemingly created a rule of liability without manageable standards because it failed to set parameters on how extensive a statute must be in detailing governmental duties in order for a court to find a claim for money damages.¹⁵² Critics also find the holding problematic because of its reference to the Quinault's lack of education, and because it

¹⁴⁴ O'Sullivan, *supra* note 120, at 135-36 (citing 25 U.S.C. § 406(a) (1994)).

¹⁴⁵ *Id.* at 136.

¹⁴⁶ *Id.*

¹⁴⁷ See *Mitchell II*, 463 U.S. at 226; O'Sullivan, *supra* note 120, at 136. The Court contrasted these statutes and regulations with the "bare trust" created by the General Allotment Act. See *Mitchell II*, 463 U.S. at 224; O'Sullivan, *supra* note 120, at 136..

¹⁴⁸ See *Mitchell I*, 445 U.S. 535, 538 (1980).

¹⁴⁹ See *Mitchell II*, 463 U.S. 206, 217 n.16 (1983); O'Sullivan, *supra* note 120, at 137.

¹⁵⁰ See *Mitchell II*, 463 U.S. at 226 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205-212 (1959) for proposition that, at common law, trustee's breach of fiduciary duty naturally leads to liability); O'Sullivan, *supra* note 120, at 137. The Court also seems to take into account the fact that many Quinaults lacked education, and were absentee owners, unaware of the exact physical location of their allotments. See *Mitchell II*, 463 U.S. at 227; O'Sullivan, *supra* note 120, at 137.

¹⁵¹ See O'Sullivan, *supra* note 120, at 137.

¹⁵² See *id.*

relies on common law trust principles even though the Court has consistently found the federal-tribal trust relationship to be unique.¹⁵³

Despite the confusion surrounding *Mitchell II*, the case demonstrates that common law principles of trust can apply when the federal government acts as trustee.¹⁵⁴ Perhaps the most obvious indication that the federal government has a fiduciary duty in the realm of Indian trust law, and that the Indians have a right to enforce it, is the current "Indian Trust Suit," *Cobell v. Norton*.¹⁵⁵ As a result of Interior's alleged mismanagement of Indian trust funds for years, 300,000 American Indians have sued the federal government for breach of its fiduciary duty.¹⁵⁶ Were there no fiduciary duty on the part of the federal government, the plaintiffs in this case would not have a cause of action.¹⁵⁷

IV. PAST AND CURRENT NRD LITIGATION

Very few cases have been litigated under the CERCLA, CWA, and OPA NRD provisions. Most of the controversy that has found its way into a courtroom has focused on the methodology the trustee used to perform damage assessment.¹⁵⁸ This section looks at the history of courts' decisions that have granted NRD trustees typical agency deference instead of holding them to a stricter fiduciary standard. It then examines one case where a court allowed an environmental group to intervene in NRD proceedings to prevent a settlement between the trustee and a PRP that was not in the public's best interest.

A. Courts Afford Great Deference to NRD Trustees

According to the language of CERCLA's NRD provision, the government does have a duty to commence at least a damages assessment when there has been injury to natural resources: the President and Governor "shall designate" officials to act as trustees, and those officials "shall assess damages" to natural resources.¹⁵⁹ The provision does not clarify whether the trustees have an obligation, in their fiduciary capacity, to pursue damages to restore natural resources,

¹⁵³ See *id.*

¹⁵⁴ See 463 U.S. at 206.

¹⁵⁵ 2001 WL 173299 (D.C. Cir. 2001).

¹⁵⁶ See John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40–44.

¹⁵⁷ See generally *Norton*, 2001 WL 173299.

¹⁵⁸ See Murray et al., *supra* note 14, at 419 n.45.

¹⁵⁹ See 42 U.S.C. § 9607(f) (1994) (emphasis added).

and whether the trustees have the option of settling with PRPs.¹⁶⁰ Furthermore, the provision leaves unclear whether or not it is a violation of the trustees' fiduciary duty not to take action beyond the point of assessing damages.¹⁶¹ CERCLA also fails to provide guidance for situations where reality conflicts with the statutory purpose—for example, when trustees simply do not have access to adequate funds to pay for an initial site assessment.¹⁶²

1. Cases Establish Deference to Trustees

If a government trustee plans to pursue damages after an initial site assessment, the question must be explored whether the trustee, such as Interior, has a duty to seek damages for restoration purposes, or whether it may pursue a cheaper alternative.¹⁶³ When Interior originally promulgated rules governing NRD trustee action, it created a rule stating that trustees under the CERCLA NRD provision were allowed to seek recovery for the lesser of the cost of restoring the injured resource or the lost use value of the resource.¹⁶⁴ However, the D.C. Circuit Court of Appeals held the rule invalid in *Ohio v. United States Department of Interior*.¹⁶⁵ That court stated that the relevant CERCLA provisions demonstrated that "Congress established a distinct preference for restoration costs as the measure of recovery in [NRD] cases."¹⁶⁶ Before environmentalists could declare victory, though, the court went on to explain that Interior could sometimes take into account other factors.¹⁶⁷ For example, when restoration is physically impossible or the cost is grossly disproportionate to the lost use value, Interior may seek damages for lost use value¹⁶⁸ of the resources instead of restoration cost.¹⁶⁹

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019 (D. Mass. 1989); Murray et al., *supra* note 14, at 428 n.89.

¹⁶³ See generally *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996); *State of Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989).

¹⁶⁴ See *Ohio*, 880 F.2d at 441, 459.

¹⁶⁵ See *id.* at 481.

¹⁶⁶ *Id.* at 459.

¹⁶⁷ See *id.*

¹⁶⁸ Lost use value encompasses the human economic harm stemming from loss of natural resources, such as loss of timber or harvestable species of fish. See Plater, *supra* note 6, at 222–23; Anderson, *supra* note 1, at 407.

¹⁶⁹ See *State of Ohio v. United States Dep't of Interior*, 880 F.2d 432, 441, 459 (D.C. Cir. 1989).

Even though the *Ohio* court invalidated the “lesser of” rule, trustees are still left with plenty of choices in seeking damages for harm to natural resources, and in how to use the recovered funds.¹⁷⁰ CERCLA allows for recovery of damages that shall be used “to restore, replace or acquire the equivalent of” the affected natural resources.¹⁷¹ In *Kennecott Utah Copper Corporation v. United States Department of Interior*,¹⁷² the D.C. Circuit Court of Appeals heard several challenges to Interior’s regulations concerning assessment of NRDs.¹⁷³ Petitioner Montana argued that CERCLA requires trustees to prefer “restoration” and “rehabilitation” of natural resources over the “acquisition of equivalent resources” because the former result in a net benefit to the nation’s natural resources whereas acquiring equivalent resources simply transfers into public ownership uninjured resources that are comparable to the injured resources.¹⁷⁴ Under Interior regulations, trustees are required to consider cost in implementing the most appropriate remedial strategy.¹⁷⁵ The court concluded that Montana’s argument may have merit as policy, but that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹⁷⁶ Interior’s interpretation is permissible.¹⁷⁷ The court found that Congress had not clearly expressed a preference for restoration/rehabilitation over replacement/acquisition.¹⁷⁸ The court did not analyze Congress’s choice of the word “trustee,” and so did not consider whether to apply a fiduciary standard instead of the typical deference standard to agencies.¹⁷⁹

¹⁷⁰ See *Kennecott Utah Copper Corp. v. United States Dep’t of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); *Ohio* 880 F.2d at 459.

¹⁷¹ 42 U.S.C. § 9607(f)(1) (1994) (emphasis added).

¹⁷² 88 F.3d 1191 (D.C. Cir. 1996).

¹⁷³ See *id.* at 1199.

¹⁷⁴ See *id.* at 1229.

¹⁷⁵ See 43 C.F.R. § 11.81; *Kennecott*, 88 F.3d at 1229.

¹⁷⁶ 467 U.S. 837 (1984). *Chevron* set a precedent of great deference to administrative agency decision making. See *id.*

¹⁷⁷ See *Kennecott Utah Copper Corp. v. United States Dep’t of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996).

¹⁷⁸ See *id.* Interior uses “restoration” and “rehabilitation” as synonyms, defining them as “actions undertaken to return injured resources to their baseline condition.” 43 C.F.R. § 11.82(b)(1)(i). It defines “replacement” and “acquisition of the equivalent” as synonymous, meaning “the substitution for injured resources with resources that provide the same or substantially similar services.” 43 C.F.R. § 11.82(b)(1)(ii); see *Kennecott*, 88 F.3d at 1229.

¹⁷⁹ See *Kennecott*, 88 F.3d at 1191.

In *Puerto Rico v. SS Zoe Colocotroni*,¹⁸⁰ the First Circuit discussed the difference between restoration and replacement/acquisition.¹⁸¹ In *Puerto Rico*, an oil tanker ran aground on a reef three and a half miles off the south coast of Puerto Rico.¹⁸² In order to refloat the vessel, the captain ordered the crew to dump more than 5,000 tons of crude oil into the water.¹⁸³ The court allowed the government to seek NRDs under a state statute analogous to the NRD provisions of the CWA.¹⁸⁴ The First Circuit judges decided, in light of the NRD provisions of the CWA, that Congress had intended for NRD recovery instead of merely recovery for the loss of market value of the affected real estate.¹⁸⁵ However, after examining the legislative history of the CWA's NRD provisions, it went on to infer a reasonableness standard¹⁸⁶ that should dictate a trustee's determination of what type of restoration damages to seek.¹⁸⁷ It explained that acquiring resources to offset the loss could include acquisition of comparable lands for public parks, or reforestation of a similar proximate site where the presence of oil would not pose the same hazard to ultimate success.¹⁸⁸ It continued by stating that as with restoration damages, damages awarded for alternative measures should be reasonable and not grossly disproportionate to the harm caused.¹⁸⁹ The *Puerto Rico* court's interpretation might have moved beyond Congress's intent by holding that funds could be

¹⁸⁰ 628 F.2d 652 (1st Cir. 1980).

¹⁸¹ See *id.* at 676-77.

¹⁸² See *id.* at 656.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 670-74.

¹⁸⁵ See *id.* at 674.

¹⁸⁶ The court articulated factors that a reasonable and prudent trustee of the environment would consider in its steps to mitigate harm caused by pollution: technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is to be naturally expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive. See *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 657, 675 (1st Cir. 1980).

¹⁸⁷ See *id.* at 675.

¹⁸⁸ See *id.* at 676.

¹⁸⁹ See *id.* The court applied the standard to reject a \$7 million proposal to remove damaged trees and oil-impregnated sediments from a large area and replace them with clean sediment and container-grown trees, stating that no reasonable trustee of the environment would have pursued such a plan. See *id.* It next rejected a \$5 million plan related to the replacement value of the living creatures destroyed or damaged by the oil spill as also being unreasonable. See *id.* at 676-77. Finally, it remanded the case to the District Court for further consideration, urging the parties to consider the option of alternative site restoration. See *id.* at 678.

spent on projects that have no direct relationship to the damaged resources, such as building public parks elsewhere.¹⁹⁰

In sum, courts have decided that trustees should seek damages for restoration instead of lost use value, unless restoration would be impossible or the cost of restoration is grossly disproportionate to the lost use value of the resources.¹⁹¹ However, when a trustee pursues restoration damages, the trustee can decide, based on cost, whether to seek damages in an amount that can be used to attempt to restore the natural resources to their pre-damaged state, or to acquire the equivalent of the damaged natural resources by buying up land or by other means.¹⁹² As there are still relatively few cases concerning NRD trustees, it remains to be seen how broadly the term "acquiring the equivalent of" will be defined.¹⁹³ It also remains to be seen how "grossly disproportionate" recovery costs have to be before trustees can recover for lost use value instead of restoration.¹⁹⁴

A final factor in the equation, which may cause trustees to delay assessment and ultimately not to seek damages, is that under CERCLA, NRDs are residual to cleanup.¹⁹⁵ Cleanup work by EPA or responsible parties could significantly restore injured natural resources to their pre-damaged condition, thus eliminating the need for trustees to step in at all.¹⁹⁶ Even if the damage to natural resources is not completely or significantly restored by cleanup, common sense dictates that the trustees should not do a damage assessment until the remedial work has been completed, or the effects of the remedial work become apparent.¹⁹⁷

Courts have interpreted the statutes to allow trustees a significant amount of discretion.¹⁹⁸ It seems, at times, that they can consider the

¹⁹⁰ See *Puerto Rico*, 628 F.2d at 678; Murray et al., *supra* note 14, at 433.

¹⁹¹ See *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989).

¹⁹² See *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); *Puerto Rico*, 628 F.2d at 675-76.

¹⁹³ See 42 U.S.C. § 9607(f) (1994).

¹⁹⁴ See *id.* Trustees, as part of the government, may often be under political pressure to maintain good favor with industry by seeking lost use damages instead of the more expensive restoration damages. See *id.*

¹⁹⁵ See O'Connor, *supra* note 38, at 152-53.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See, e.g., *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1230-31 (D.C. Cir. 1996); *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 657, 673-74 (1st Cir. 1980).

interests of those other than the public, the named beneficiary of the trust.¹⁹⁹

2. NRD Trustees in Practice

Ohio and *Kennecott* establish that money collected in NRD cases does not necessarily have to be applied directly to resource restoration, making the guidelines of expected behavior for a trustee fuzzy.²⁰⁰ For example, in 1991, a train derailed near Dunsmuir, California, spilling approximately nineteen thousand gallons of the herbicide metam sodium into the upper Sacramento River.²⁰¹ A thirty-eight million dollar settlement, fourteen million of which had been obtained under CERCLA's NRD provision, was deposited in the Canterra Trustee Council's account.²⁰² In 1995, the Canterra Trustee Council announced that it would use the money to develop natural resource restoration projects in other areas of the state, although projects affecting the upper Sacramento River would be given a higher priority.²⁰³ Apparently, no member of the public or any environmental organization assumed the role of a trust beneficiary, and therefore, no attempt was made to enjoin the Canterra Trustee Council from using the trust corpus in this manner.²⁰⁴

An example on a larger scale can be found in the case of the 1989 *Exxon Valdez* oil spill, where an oil tanker sliced into a submerged reef and spilled nearly eleven million gallons of crude oil into Prince William Sound off the coast of Alaska.²⁰⁵ Six NRD trustees represented the United States and the State of Alaska to bring suit under the CERCLA and CWA NRD provisions, garnering a nine hundred million dollar settlement from Exxon.²⁰⁶ Ten years later, it is apparent that not all the money was used for restoring damaged natural resources.²⁰⁷

¹⁹⁹ See generally *Kennecott*, 88 F.3d 1191; *Puerto Rico*, 628 F.2d 652.

²⁰⁰ See *Kennecott*, 88 F.3d at 1229; *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989); Murray et al., *supra* note 14, at 424.

²⁰¹ See Murray et al., *supra* note 14, at 427 n.83.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 220.

²⁰⁶ See Murray et al., *supra* note 14, at 447.

²⁰⁷ See *id.*

The Exxon Valdez Oil Spill Trustee Council (Spill Trustee Council) has divided the funds into several categories.²⁰⁸ First, money must be used to reimburse federal and state governments for costs incurred prior to the settlement, and to reimburse Exxon for cleanup work that took place after the settlement.²⁰⁹ Next, the Spill Trustee Council has devoted 25.3% of its budget to research, monitoring and restoration.²¹⁰ The largest portion of the budget, 60%, goes toward habitat protection, which the Spill Trustee Council accomplishes by providing funds to government agencies to acquire title or conservation easements on land important for its restoration value.²¹¹ The Spill Trustee Council has set aside 15.2% of its budget for a reserve fund that will support long-term restoration activities after Exxon supplies the final payment of the settlement in September 2001.²¹² Finally, 4.3% of the budget is devoted to science management, public information and administration.²¹³

As in the case of the Canterra Trustee Council, no member of the public has attempted to challenge the Spill Trustee Council's distribution of funds recovered under CERCLA and CWA NRD provisions. Even if trustees such as the Canterra Trustee Council and the Spill Trustee Council theoretically have a fiduciary duty to the public, their unchallenged decisions amount to their having virtually complete discretion.²¹⁴ In the long run, this unchecked power could lead to abuse, which will be to the detriment of the already damaged natural resources.²¹⁵ The following case, however, demonstrates that there is potential for the public, as beneficiary, to intervene in NRD litigation and enforce trustees' fiduciary duty.

²⁰⁸ See *Exxon Valdez Oil Spill Trustee Council* (visited Nov. 20, 1999) <<http://www.oil-spill.state.ak.us>> [hereinafter *Exxon Valdez*].

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *id.* These costs include management of the annual work plan and habitat programs, scientific oversight of research, monitoring and restoration projects, agency coordination, and overall administrative costs including costs of keeping the public informed. See *id.*

²¹⁴ See Murray et al., *supra* note 14, at 440 n.143.

²¹⁵ See *id.*

B. In re *Acushnet River & New Bedford Harbor*

In *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*,²¹⁶ the United States and the Commonwealth of Massachusetts (the sovereigns) brought a claim, inter alia, under CERCLA § 107 for damages to natural resources allegedly caused by the release of polychlorinated biphenyls (PCBs) into New Bedford Harbor.²¹⁷ The proceeding involved an attempt to resolve the liability of one defendant, AVX Corporation, which allegedly caused the release of PCBs during its ownership and operation of a capacitor manufacturing plant adjacent to New Bedford Harbor.²¹⁸ On March 4, 1987, the parties filed a settlement agreement of two million dollars and a proposed judgment approving the settlement.²¹⁹ At that point, the National Wildlife Federation (the Federation), representing the interests of its members who lived in the New Bedford Harbor area, sought to intervene to contest the proposed settlement.²²⁰ Among other rights, the Federation wanted to brief and argue the appropriate measure of natural resource damages under CERCLA.²²¹ The Federation believed that the sovereigns had adequately represented its interests until the announcement of the proposed settlement, at which point it believed the sovereigns had betrayed its interests by accepting such a low settlement figure.²²² Although the sovereigns argued that their ultimate goal of cleaning up the harbor was consistent with that of the Federation, the court granted the Federation's motion to intervene in order to promote the just and equitable adjudication of the legal questions before it.²²³

Undoubtedly, AVX was anxious to settle because under CERCLA, a judicially approved settlement entitled them to protection from contribution liability to non-settlers.²²⁴ The sovereigns had little incentive to make sure that the settlement was favorable because the

²¹⁶ 712 F. Supp. 1019 (D. Mass. 1989).

²¹⁷ *See id.* at 1022.

²¹⁸ *See id.*

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ *See id.* at 1024. The Federation sought only the right to brief and argue several issues. It did not seek to participate in discovery, the examination of witnesses, or the taking or contesting of evidence. *Id.* at 1023.

²²² *See In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1024 (D. Mass. 1989).

²²³ *See id.* at 1024–25. The court also noted that the expertise of the Federation would help guide the court through the extremely complex matter before it. *See id.* at 1025.

²²⁴ *See id.* at 1026; *see also* 42 U.S.C. § 9613(f) (2) (1994).

settlement would only reduce the potential liability of others by the amount of the settlement.²²⁵ The court, therefore, had the important task of ensuring that the settlement was “fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress” before granting its approval.²²⁶ The Federation argued that the proposed settlement violated the mandate of Congress because it violated the NRD settlement provision of CERCLA.²²⁷ The court held that, contrary to the Federation’s position, the Congressional mandate was satisfied because the CERCLA settlement provision does not require recovery of the full restoration and replacement of the injured natural resources.²²⁸ The court stated that it was not required to ensure that the sovereigns had negotiated the best deal possible, and that the settlement was “fair, reasonable, and in the public interest.”²²⁹ When the natural resource damages were later revealed to be close to seventy million dollars, therefore, nothing could be done.²³⁰ The court addressed the possibility that damages would later be revealed to be much higher than the settlement agreed upon, and stated that it was not disturbed by the fact that AVX may have caused the most pollution.²³¹ Instead, the court took the position that AVX deserved a

²²⁵ See *In re Acushnet*, 712 F. Supp. at 1026.

²²⁶ *Id.* at 1027. Factors for the court to consider in deciding whether to approve a settlement include: a comparison of the strengths of plaintiffs’ case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and, the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement. See *id.* (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)).

²²⁷ See *id.* at 1032–33. In 42 U.S.C. § 9622 (1994), section 9622(j) (2) provides:

An agreement under this section may contain a covenant not to sue under section 9607(a) (4) (C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

42 U.S.C. § 9622(j) (2); see *In re Acushnet*, 712 F. Supp. at 1032–33.

²²⁸ See *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1033 (D. Mass. 1989).

²²⁹ *Id.* at 1031.

²³⁰ See *id.* at 1031, 1032; Murray et al., *supra* note 14, at 428 n.89.

²³¹ See *In re Acushnet*, 712 F. Supp. at 1032.

break for being the first to enter into settlement negotiations well in advance of the trial.²³²

Even though the Federation was not ultimately successful, the case is significant because the court implicitly recognized that members of the public, as beneficiaries, have a right to intervene in NRD proceedings in an attempt to force the NRD trustee to consider the public's best interest.²³³

V. COURTS SHOULD FIND THAT NRD TRUSTEES HAVE A FIDUCIARY DUTY

The NRD provisions of CERCLA, CWA, and OPA are statutory causes of action, which means that their interpretation need not mirror common law precedents.²³⁴ A motivating force behind the CERCLA NRD provisions was Congress's dissatisfaction with the common law's inability to measure loss other than market value.²³⁵ Yet, when Congress created this revolutionary cause of action, it gave the power to bring NRD claims exclusively to state and federal trustees of natural resources who would act on behalf of the public, or to designated trustees of Indian tribes.²³⁶ In other words, Congress created a trust.²³⁷ Because the subject matter concerns natural resources that belong to all, this trust finds its roots in the public trust doctrine.²³⁸ Therefore, it would be logical to turn to public trust doctrine jurisprudence to interpret the CERCLA, CWA, and OPA NRD provisions. However, while the public trust doctrine is "a cornerstone of environmental and public lands law, [it] labors under an overriding ambiguity and obscurity that hinders its effective application."²³⁹ It makes sense, then, to look also to Indian trust law, the public trust doctrine's closest cousin, for guidance in how federal statutory NRD trustees should act.²⁴⁰

This section will first examine the problems with trying to hold NRD trustees to a fiduciary standard in light of the incomplete drafting of the statutory provisions and the current precedent granting

²³² See *id.*

²³³ See *id.* at 1022–26.

²³⁴ O'Connor, *supra* note 38, at 149.

²³⁵ See *id.* (citing *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 455 (D.C. Cir. 1989)); *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 657, 673–74 (1st Cir. 1980).

²³⁶ See 42 U.S.C. § 9607(f) (1994).

²³⁷ See O'Connor, *supra* note 38, at 149–50.

²³⁸ See Chase, *supra* note 5, at 354.

²³⁹ Wood, *supra* note 113, at 1565.

²⁴⁰ See *id.*

deference to trustees. It then looks at the similarities between federal statutory NRD provisions and Indian trust law, and argues that courts should hold NRD trustees to a similar fiduciary duty to which the *Mitchell II* Court held federal executive branch Indian trustees.

A. *Difficulty in Identifying What Would Constitute a Breach of Fiduciary Duty: Inherent Ambiguities in the NRD Trustee System*

Instead of holding federal statutory NRD trustees to a strict fiduciary duty, courts have granted them agency deference.²⁴¹ One argument for imposing a fiduciary duty on NRD trustees, thereby eliminating this standard of deference, is to increase public accountability.²⁴² Today, public accountability is severely lacking because the deference standard makes it nearly impossible to identify cases where trustees' activities violate the bounds of the statutory authority under which they act. *Ohio* and *Kennecott* have blurred the lines in NRD cases concerning the meaning of natural resource restoration, leaving the door wide open for trustees to make decisions about restoration that may not live up to the public's expectations.²⁴³ Of course, if a trustee used recovered funds to increase general government funds, without contributing a cent toward restoration, this would be a clear violation of its fiduciary duty and Congress's intent.²⁴⁴ As soon as the trustee makes even the most minimal effort to restore, though, any further attempt to delineate the statutes invokes uncertainty.²⁴⁵

For example, the 1991 train wreck near Dunsmuir, California, that resulted in a chemical spill into the upper Sacramento River, put fourteen million dollars into the pockets of the Canterra Trustee Council to use for restoration.²⁴⁶ In 1995, the Canterra Trustee Council announced that it would use the money to develop natural resource restoration projects in other areas of the state, although projects affecting the upper Sacramento River would be given a higher priority.²⁴⁷ Here it can be argued that the Canterra Trustee Council's actions fall under the permissible conduct of replacement/acquisition

²⁴¹ See, e.g., *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1224, 1230-31 (D.C. Cir. 1996).

²⁴² See Murray et al., *supra* note 14, at 466.

²⁴³ See *Kennecott*, 88 F.3d at 1229; *Ohio*, 880 F.2d at 459.

²⁴⁴ See Murray et al., *supra* note 14, at 433.

²⁴⁵ *Id.* at 433-34.

²⁴⁶ See *id.* at 427 n.83.

²⁴⁷ See *id.*

discussed in *Puerto Rico*.²⁴⁸ The Council could argue that restoration of the upper Sacramento River was not feasible, that restoration would result in harmful side effects, or that their efforts would be redundant or disproportionately expensive.²⁴⁹ If any of these arguments were valid, spending the trust money to restore losses in other areas would be a legally acceptable action.²⁵⁰

The best example of the futility in trying to identify where an NRD trustee has violated the bounds of the statutory authority, and thus violated its fiduciary duty, is found in the case of the 1989 *Exxon Valdez* oil spill.²⁵¹ The Spill Trustee Council recovered nine hundred million dollars from the settlement of a suit under the CERCLA and CWA NRD provisions.²⁵² Due to the magnitude of the disaster, the Spill Trustee Council used the money for a variety of purposes, but it is unclear whether all the uses were for the end result of natural resource restoration.²⁵³

There are several ways in which the Spill Trustee Council might have spent funds in violation of the statutes that allowed recovery.²⁵⁴ The Spill Trustee Council has funded several monitoring and research projects, including some that would normally be funded by agencies such as Alaska Department of Fish and Game.²⁵⁵ The Spill Trustee Council has also purchased 456,000 acres of land at a price higher than market value, believing that the acquisition would provide a degree of protection and public access otherwise not available.²⁵⁶ In addition, the Spill Trustee Council established a four and one half million dollar fund to restore and protect waterways across the United States, and spent over \$26 million in support of the Alaska SeaLife Center.²⁵⁷

²⁴⁸ See *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 675–76 (1st Cir. 1980); Murray et al., *supra* note 14, at 427 n.83..

²⁴⁹ See *Puerto Rico*, 628 F.2d at 675.

²⁵⁰ See *id.*

²⁵¹ See PLATER, ENVIRONMENTAL LAW, *supra* note 6, at 220.

²⁵² See Murray et al., *supra* note 14, at 447.

²⁵³ See *Exxon Valdez*, *supra* note 208.

²⁵⁴ See Murray et al., *supra* note 14, at 447–49.

²⁵⁵ See *id.* at 447–48. Projects included sockeye salmon and killer whale projects that were routinely required by Alaska harvest management programs and thus should have been funded by Alaska Department of Fish and Game. The Spill Trustee Council also funded a study examining the effects of oil exposure on embryonic development of pink salmon (not genetically identical to the pink salmon in Prince William Sound) in south-east Alaska, which is outside the spill area. *Id.* at 448.

²⁵⁶ See *id.*

²⁵⁷ See *id.* at 449. Former EPA Administrator Carol Browner announced in March 1997 that Exxon funds would be used to restore forested buffers in the Anacostia River water-

A closer look, however, reveals that these uses of funds arguably all fall within statutorily permissible uses.²⁵⁸ First, the land acquisitions were arguably a misuse of the settlement funds because the Spill Trustee Council paid too much for the land.²⁵⁹ While this may be so, it is important to distinguish the question of whether the Spill Trustee Council breached its fiduciary duty, if it has one, from whether it overstepped the bounds of the NRD statutory provisions. In the case of the latter, the Spill Trustee Council was comfortably within the letter of the law, based on the *Puerto Rico* court's holding that acquisition of comparable lands is permissible, and possibly preferable to restoration in areas where ultimate success is uncertain.²⁶⁰ This, then, is an excellent example of where the public would be better served by the judiciary holding NRD trustees to a standard of fiduciary care instead of the traditional agency deference granted by the *Puerto Rico* and *Kennecott* courts.²⁶¹ The trustees would have violated a fiduciary duty by paying too much for the land, and perhaps by acquiring the land at all.

Another gray area is the use of funds to restore and protect waterways across the United States. Technically, this use does not violate a statute because the money was a reimbursement to EPA for costs incurred during cleanup of the spill prior to settlement.²⁶²

Arguably, the Spill Trustee Council's use of over twenty-six million dollars in support of the Alaska SeaLife Center²⁶³ is the one glaring example of money spent on purposes outside the confines of the CERCLA and CWA NRD provisions. However, before concluding that the Spill Trustee Council has violated its fiduciary duty as trustee, another explanation should be considered. The last sentence of CERCLA § 107(f), "The measure of damages in any action . . . shall not be limited by the sums which can be used to restore or replace such resources,"²⁶⁴ means that trustees may recover more money than is actu-

shed in Maryland, and in September 1997 that funds would be used to prevent pollution of the waters in and around New York City. *See id.*

²⁵⁸ *See Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 675-76 (1st Cir. 1980).

²⁵⁹ *See Murray et al.*, *supra* note 14, at 448-49.

²⁶⁰ *See Puerto Rico*, 628 F.2d at 675-76.

²⁶¹ *See Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); *Puerto Rico*, 628 F.2d at 675-76.

²⁶² *See Murray et al.*, *supra* note 14, at 449.

²⁶³ *See Exxon Valdez*, *supra* note 208. The Center is a fifty-five million dollar facility combining three main missions: providing public education about the marine environment, maintaining the best marine research facilities in the north Pacific, and offering animal rehabilitation for injured marine mammals and seabirds. *See id.*

²⁶⁴ 42 U.S.C. § 9607(f) (1994).

ally needed to restore damaged natural resources.²⁶⁵ This portion of the statute allows NRD trustees to recover damages in an amount that exceeds the cost of restoring or replacing resources, thus recognizing that a trustee may “recover damages not only to restore an injured resource physically, but also to compensate the public for the lost use of resources during the interim period between the discharge of hazardous substances and the final implementation of a remedial plan.”²⁶⁶ Recovered damages under this portion of the statute are surplus to the cost of actual restoration and trustees can spend the extra money they collect without further Congressional authorization or appropriation.²⁶⁷ Thus, the Spill Trustee Council’s contribution toward the creation of the Alaska SeaLife Center might be justified as a use of excess funds recovered to compensate the public.²⁶⁸

The legal ambiguity that prevents a clear understanding of whether a trustee such as the Spill Trustee Council is exceeding the bounds of statutory authority and/or is violating its fiduciary duty to the public, also prevents observers from being able to discern whether the trustee itself seems to be acting under the belief that it has a fiduciary duty to the public. In sum, the CERCLA, CWA, and OPA NRD trustee provisions may have originally been drafted with intent for the trustees to have a fiduciary duty to the public. Along the way, though, courts seem to have lost sight of that goal, and granted federal executive branch NRD trustees deference instead of holding them to a stricter fiduciary duty.²⁶⁹

B. *Indian Trust Law Sheds Light*

Despite the fact that courts have made it difficult to identify when an NRD trustee may have breached its fiduciary duty,²⁷⁰ it is not hard

²⁶⁵ See *id.*

²⁶⁶ *Kennecott*, 88 F.3d at 1229.

²⁶⁷ See Murray et al., *supra* note 14, at 426 (citing *Superfund Reauthorization and Reform Legislation: Hearings on H.R. 2727 Before the Subcomm. on Water Resources and Env’t of the House Comm. on Transp. and Infrastructure*, 104th Cong. 239, 239 (1998) (statement of Richard Stewart, Professor, New York University School of Law)).

²⁶⁸ See *id.* The Center serves as a tourist attraction that helps to boost the local economy, and as a center for research related to the oil spill. See *Exxon Valdez*, *supra* note 208. Both purposes seem to be a reasonable way to compensate the people of Alaska for their lost use of natural resources. See *id.*

²⁶⁹ See, e.g., *Kennecott Utah Copper Corp. v. United States Dep’t of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); *Ohio v. United States Dep’t of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989); *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 675–76 (1st Cir. 1980).

²⁷⁰ See generally *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019 (D. Mass. 1989); *Puerto Rico*, 628 F.2d at 652.

to imagine a situation in which such a case might arise. For example, a trustee could settle with a PRP for an amount obviously too low, or could refuse to spend any of the recovered funds on restoring damaged natural resources, instead using the money for other purposes.²⁷¹ Two questions arise when considering such hypothetical situations. The first is whether a citizen could bring a lawsuit, or intervene in a lawsuit or settlement negotiations between the government trustee and PRPs, to force the government either to pursue a suit for NRDs or to prevent an inadequate settlement. The answer to this question seems to be affirmative, since the National Wildlife Federation did just that in the New Bedford Harbor case.²⁷² The second question is whether a citizen can sue for damages under the theory that he has been harmed by the trustee's breach of fiduciary duty. It may be that when Congress created NRD trustees, it did not intend the word trustee to carry the common law meaning,²⁷³ but instead meant it to mean something more symbolic. The case law where courts granted deference to agencies that act as trustees supports this notion.²⁷⁴ However, drawing a comparison to the area of Indian trust law²⁷⁵ reveals several factors that support finding some level of an enforceable fiduciary duty in regard to NRDs, a breach of which would support a private cause of action for damages.²⁷⁶

Mitchell II established that the United States was accountable in money damages for alleged breaches of trust in connection with its management of forest resources²⁷⁷ on allotted lands of the Quinault

²⁷¹ These hypothetical situations are only a step removed from actual cases. In the New Bedford Harbor case, Interior settled with defendant AVX for an amount later proven to be too low, and in the case of Canterra Trustee Council, the Trustee Council used recovered funds to help pay for other projects. See *In re Acushnet*, 712 F. Supp. at 1019; Murray et al., *supra* note 14, at 427 n.83.

²⁷² See *In re Acushnet*, 712 F. Supp. at 1019.

²⁷³ See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959). Common law trustees are subject to the highest fiduciary duty known at law. See *id.*

²⁷⁴ See, e.g., *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1229 (D.C. Cir. 1996); *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989); *Puerto Rico*, 628 F.2d at 675-76.

²⁷⁵ See Wood, *supra* note 113, at 1505. The analogy makes even more sense today than it might have fifty years ago, because the modern role of federal protection is to shield Indian lands from environmental threats. See *id.* Thus, not only do the Indian and NRD trustees share a similar relationship of trust between agency and public, but they are now engaging in substantively similar work. See *id.*

²⁷⁶ See *Mitchell II*, 463 U.S. 206, 224 (1983).

²⁷⁷ *Id.* at 210. The respondents claimed that the government: (1) failed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a

Indian Reservation.²⁷⁸ The timber statutes and regulations upon which the Indians relied clearly gave the government full responsibility to manage Indian resources and land for the Indians' benefit.²⁷⁹ Therefore, the Court found that these timber statutes, despite the fact that they lack the words trust and trustee, constructively imposed a fiduciary duty on the executive branch trustee, and defined the contours of the United States' fiduciary responsibilities.²⁸⁰ The Court also concluded that a fiduciary relationship necessarily arose because the government had assumed such elaborate control over forests and property belonging to the Indians.²⁸¹ It noted that all of the necessary elements of a common law trust relationship were present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).²⁸² The Court went on to say,

Because the statutes and regulations at issue clearly establish a fiduciary obligation of the government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the government for damages sustained. Given the existence of a trust relationship, it follows that the government should be liable in damages for a breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust.²⁸³

The Court disagreed with the government trustee's argument that violations of its statutory duties could be remedied by prospective relief such as declaratory, injunctive, or mandamus relief.²⁸⁴ It held

proper system of roads and easements for timber operations and exacted improper charges from allottees for maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the funds; and (6) exacted excessive administrative fees from allottees. *Id.*

²⁷⁸ *See id.* at 226.

²⁷⁹ *Id.* at 224.

²⁸⁰ *See id.*; Wood, *supra* note 113, at 1518-19.

²⁸¹ *See Mitchell II*, 463 U.S. at 225.

²⁸² *Mitchell II*, 463 U.S. 206, 225 (1983).

²⁸³ *Id.* at 226.

²⁸⁴ *See id.* at 227.

that such prospective remedies would be inadequate in this context for several reasons.²⁸⁵ The Indian allottees were not in a position to monitor federal management of their lands because many were uneducated, and most were absentee owners, with some not even knowing the exact location of their land.²⁸⁶ In addition, the Court factored in the reality that often, once the land has been mismanaged, the damage to the resources will have been so severe that prospective relief would be worthless.²⁸⁷

Much of the reasoning that led to the Court's conclusion in *Mitchell II* is directly applicable to cases litigated under the NRD trustee provisions of CERCLA, CWA, and OPA.²⁸⁸ First, the idea that Congress gave full control over the resources on Indian lands to the executive branch is directly analogous to the NRD provisions of CERCLA, CWA and OPA.²⁸⁹ Just as individual Indians or Indian tribes were not able to assert control over the resources on their allotted land, members of the public are not permitted to bring suit for damages to natural resources.²⁹⁰ The Bureau of Indian Affairs (BIA) is the executive branch agency that exercises day-to-day supervision over land and resource development on tribal and allotted Indian lands.²⁹¹ Federal statutes allow BIA involvement in nearly all phases of timber, mineral, agricultural, and range resource development.²⁹² Sometimes, the BIA fails to perform its duties adequately, and the tribes have used the trust doctrine to hold the government to strict fiduciary responsibilities.²⁹³ By analogy, members of the public ought to be able to use the public trust doctrine or theories of common law trust to hold Interior and other executive branch NRD trustees to strict fiduciary responsibilities, and to collect damages when those duties go unfulfilled.

A second similarity between the timber statutes at issue in *Mitchell II* and the CERCLA, CWA and OPA NRD provisions is the elaborate control over natural resources that all the statutes give the govern-

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *id.* at 227–28. The Court recognized that once the natural resources such as timber on an allotment have been destroyed, it could take years for nature to restore them. See *id.*

²⁸⁸ See generally *Mitchell II*, 463 U.S. 206, 225 (1983).

²⁸⁹ See *id.* at 224–25.

²⁹⁰ See O'Connor, *supra* note 38, at 149–50.

²⁹¹ See Wood, *supra* note 113, at 1478.

²⁹² See *id.* at 1478–79.

²⁹³ See *id.*

ment.²⁹⁴ The Court in *Mitchell II* found that the elaborate control over forests and property belonging to the Indians *necessitated* finding a fiduciary relationship.²⁹⁵ The same could be said of the government's role in restoring natural resources—the decisions of how to restore and replace damaged resources, particularly in the wake of damage as devastating as that caused by the Exxon Valdez oil spill, are certainly exercises of elaborate control.²⁹⁶

Third, the Court's explanation of the government's control of Indian resources is something to consider in the realm of NRD trustees as well.²⁹⁷ Just as many Indians are absentee owners of their allotted land, many members of the public are not able to keep close tabs on damaged natural resources.²⁹⁸ The *Mitchell II* Court reasoned that a trusteeship would mean little if the Indian beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.²⁹⁹ Like absentee owners of Indian land allottees, members of the public rely on government trustees to oversee restoration and rehabilitation of resources that they value, but can not fix themselves.³⁰⁰ It is this vulnerability and reliance that should give rise to an enforceable fiduciary duty.

Of course, the reasoning that led to the conclusion in *Mitchell II* does not apply perfectly to the context of NRD trustees. For example, the Court also found an enforceable trust duty because many allottee land owners were uneducated.³⁰¹ This argument does not apply to the case of NRD trustees because the class of beneficiaries (the public as a whole) could not be characterized as vulnerable in the sense that being "uneducated" implies.³⁰² It is difficult to know how much emphasis the Court placed on this factor as opposed to others, and whether the Court would have reached the same conclusion if the government

²⁹⁴ See *Mitchell II*, 463 U.S. at 225.

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *id.* at 227.

²⁹⁸ See *id.* For example, many Americans feel that they have a stake in the wilderness and natural resources of Alaska. There is a general feeling that the treasures of Alaska belong to us collectively. Yet, many citizens simply cannot monitor the progress of the Spill Trustee Council in restoring the damaged natural resources after the Exxon Valdez spill. We must rely therefore on the Spill Trustee Council to fulfill its fiduciary duties.

²⁹⁹ See *id.*

³⁰⁰ See *Mitchell II*, 463 U.S. 206, 227 (1983).

³⁰¹ See *id.*

³⁰² See *id.*

had mismanaged the resources of a tribe whose members could have been characterized as highly educated.³⁰³

Another problem is that the scope of the Court's holding is unclear because the Court failed to state how extensive a statute must be in delineating governmental duties before it will state an enforceable claim for monetary damages.³⁰⁴ This makes it difficult to apply the reasoning of *Mitchell II* to other statutes. In addition, the Court's integration of common law trust with Indian trust seems to conflict with its previously consistent position that the federal-tribal trust relationship is unique.³⁰⁵ Explicit statements concerning the one-of-a-kind trust relationship between the government and Indian tribes would discourage an attempt to draw an analogy between it and another area of government trust.

Finally, the *Mitchell II* Court's finding of an implied right of action for damages under a federal statute is an inexplicable break from its previous jurisprudence on this topic, namely the *Cort v. Ash*³⁰⁶ test. The Court's failure to distinguish *Cort v. Ash* in *Mitchell II* makes it impossible to predict which standard the Court would use to determine whether an implied right of action for damages exists in the NRD trustee provisions of CERCLA, CWA, and OPA.³⁰⁷

CONCLUSION

This Note does not conclude that Congress intended the principles of common law trust to apply to the NRD trustee provisions of CERCLA, CWA, and OPA. The *Mitchell II* Court correctly identified the presence of many elements of a common law trust in the relationship between the BIA and Indian tribes and individuals, including a trustee, a beneficiary, and trust corpus.³⁰⁸ However, another necessary element of a common law trust, overlooked by the *Mitchell II* majority but identified by the dissenters, is the manifestation of intent to create a trust.³⁰⁹ The question of whether Congress intended to create an enforceable trust is the key to understanding the proper approach to NRD litigation, but thus far remains unanswered. The statutes are silent with regard to any definition of the trustee's fiduciary duties, and

³⁰³ See O'Sullivan, *supra* note 120, at 137.

³⁰⁴ See *id.*

³⁰⁵ See *id.*

³⁰⁶ 422 U.S. 66 (1975). For factors of the *Cort v. Ash* test, see *supra* note 140.

³⁰⁷ See O'Sullivan, *supra* note 120, at 137-38.

³⁰⁸ See *Mitchell II*, 463 U.S. 206, 234 n.8 (1983).

³⁰⁹ See *id.*

a court has yet to discuss the issue.³¹⁰ The scant legislative history is not enough to infer the requisite intent on the part of Congress.

However, this Note does recognize that it would be beneficial for courts to find that federal executive branch NRD trustees operate within the confines of a legally enforceable trust duty. This fiduciary duty would force trustees, such as Interior, to perform their job better and more efficiently by allowing members of the public to bring suit to enforce that duty.

³¹⁰ See Murray et al., *supra* note 14, at 422. The authors state that Congress's use of the common law terms "trust" and "trustee" appears to imply its intention to impose on NRD trustees the responsibilities of a trustee as established by common law. This idea is further emphasized by the legislative history in which a committee noted that the legislation's purpose was to "preserve the public trust in the Nation's natural resources." *Id.*

