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Matthew Duchesne

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MATTHEW DUCHESNE\*

# Tribal Trustees and the Use of Recovered Natural Resource Damages Under CERCLA

## ABSTRACT

*The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act) authorizes certain federal, state, and tribal officials to act as trustees on behalf of the public and recover damages for injuries to publicly owned, managed, or regulated natural resources. The Act explicitly limits the uses to which federal and state trustees may put recovered damages, but fails to provide any similarly explicit limitations on the uses to which tribal trustees may put recovered damages. This article demonstrates that Congress intended to subject tribal trustees to the same limitations on the use of recovered damages as state and federal trustees, but failed to make the limitation explicit because of an overlooked drafting error in the Superfund Amendments and Reauthorization Act of 1986 (SARA). The article also examines SARA's legislative history, a series of similar environmental protection laws, and a canon of statutory construction, showing why each supports the conclusion that Congress intended CERCLA to limit the uses to which tribal trustees may put recovered natural resource damages.*

## INTRODUCTION

Passed in haste amid a flurry of last-minute compromises and substitutions,<sup>1</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>2</sup> has long been derided as a model of poor draftsmanship. Judges attempting to divine congressional intent from CERCLA's disjointed and often conflicting provisions regularly complain that the statute is "vague, contradictory, and lacking a useful legislative

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\* B.A. (1991), Miami University; M.P.A. (1999), J.D. (1999), University of North Carolina at Chapel Hill. The author is a member of the North Carolina Bar and the District of Columbia Bar. This article reflects the present views and considerations of the author and does not necessarily reflect the views of the author's past or present employers.

1. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1, 19-21, 29-30 (1982).

2. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2002)).

history."<sup>3</sup> The Superfund Amendments and Reauthorization Act of 1986 (SARA)<sup>4</sup> not only failed to correct many of the original statute's defects and ambiguities, it also introduced a few more of its own. One particularly surprising anomaly is found in SARA's amendment to CERCLA's natural-resource-damages provisions,<sup>5</sup> which added Indian tribes to CERCLA's list of government entities entitled to recover damages from responsible parties whose releases of hazardous substances cause injury to publicly or tribally owned, managed, or regulated natural resources. Until SARA, CERCLA authorized only federal and state officials to act as natural resource trustees and to recover damages for injuries to such resources.

The anomaly is not that Congress elected to add Indian tribes to CERCLA's list of natural resource trustees; rather, the anomaly is that while CERCLA, (like every similar law that has preceded and followed it), places strict and explicit limitations on the uses to which federal and state trustees may put recovered natural resource damages, it fails to place the same limitations on tribal trustees. Thus, taken at face value, CERCLA appears to allow tribal trustees to use recovered natural resource damages in any way they please, while federal and state trustees are prohibited from using recovered damages for any purpose other than to cover the cost of assessing the damages and to restore, rehabilitate, or acquire the equivalent of the injured natural resources. The anomaly is even more striking because the Oil Pollution Act of 1990 (OPA),<sup>6</sup> the only other federal law to authorize Indian tribes to act as natural resource trustees, does prohibit tribal trustees from using recovered damages for any purpose other than assessment, restoration, rehabilitation, and the acquisition of equivalent resources.<sup>7</sup>

There are several problems with allowing tribal trustees to use recovered natural resource damages for any purpose they choose, such as investing in economic development projects, paying a one-time dividend to tribal members, or building a new school. First, while none of those policy choices is inherently bad, they simply are not consistent with clear congressional intent because "the primary purpose of the resource damage

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3. *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 246 (5th Cir. 1998); *see also Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174 (D.S.C. 1992) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.") (quoting *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1277 (D. Del. 1987), *aff'd*, 851 F.2d 643, 648 (3rd Cir. 1988)); *In re Acushnet River and New Bedford Harbor*, 716 F. Supp. 676, 681 n.6 (D. Mass 1989) ("Like many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA.").

4. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

5. 42 U.S.C. § 9607(a), (f) (2008).

6. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

7. *See infra* notes 48-57 and accompanying text.

provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances."<sup>8</sup> Second, there is often substantial overlap in trusteeship over specific resources. For instance, one or more tribes may be a trustee of migrating salmon in a river by virtue of treaty-reserved fishing rights. But the federal government is also a trustee of the same salmon, and one or more states may be as well. If tribal trustees are permitted to use damages recovered for injuries to the salmon for a purpose other than restoration of the salmon stock, non-tribal citizens will be deprived of the benefits to which they are lawfully entitled because CERCLA does not allow double recovery of natural resource damages.<sup>9</sup> Third, if tribes were allowed to use recovered natural resource damages for a purpose other than restoration of the injured resources, the fact that CERCLA does not allow double recovery of natural resource damages would encourage a race to the courthouse by and among tribal trustees on the one hand and state and federal trustees on the other, as each trustee seeks to ensure that the recovered damages are available to be used for their preferred purpose. This race to perfect a claim promises to undermine the spirit of cooperation, both among trustees and between the trustees and responsible parties, that experience has shown leads to more efficient, more effective, and less expensive damage assessments and resource restoration.

The purpose of this article is to explain how this anomaly developed as a result of an overlooked drafting error in SARA rather than congressional intent and to demonstrate why both the legislative history of SARA and the text and history of similar laws support the conclusion that Congress intended to place the same restrictions on tribal trustees' use of natural resource damages recovered under CERCLA as were imposed on federal and state trustees. Section I provides a brief overview of the language of CERCLA as originally enacted and as it reads today. Section II explores the text of the relevant provisions in SARA, showing how Congress attempted to subject tribal trustees to the same limitations on the use of recovered natural resource damages as state and federal trustees but failed to do so because of an overlooked conflict in the amendments affected by two separate SARA provisions. Section III reviews SARA's legislative history and why that history supports the conclusion that Congress intended tribal trustees to be subject to the same limitations on the use of recovered natural resource damages as federal and state trustees. Section IV reviews the long line of federal laws designating trustees authorized to recover damages for injuries to publicly owned, managed, or regulated natural resources, in which Congress has consistently placed the same

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8. *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 458 (D.C. Cir. 1989) (quoting H.R. REP. NO. 99-253 pt. IV, at 50 (1985)).

9. 42 U.S.C. § 9607(f)(1) (2008).

limitations on trustees' use of recovered natural resource damages that are found in CERCLA. Section V explores the applicability of the so-called "plain meaning rule," demonstrating that the rule does not bar reading into CERCLA the restriction on tribal use of recovered natural resource damages that Congress itself intended to put there.

## I. CERCLA'S TEXT

CERCLA is a broad remedial statute with two primary purposes: (1) to ensure that hazardous wastes that have been released or that threaten to be released into the environment are cleaned up promptly and effectively, and (2) to ensure that the parties responsible for the waste and/or its release, or threatened release, pay for cleaning it up.<sup>10</sup> Subject to certain limited defenses,<sup>11</sup> four broad categories of responsible parties are subject to liability under CERCLA:

- (1) current owners and operators of—
  - a. any "facility," which is defined to include virtually any site, area, or building, as well as a variety of other manmade objects, including motor vehicles and aircraft; and
  - b. any "vessel," which is defined to include "every description of watercraft," as well as any other "artificial contrivance" that can be used for transportation on water

where a hazardous substance has come to be located;<sup>12</sup>

- (2) any person who owned or operated a facility at the time hazardous substances were disposed of at the facility;<sup>13</sup>
- (3) any person who—
  - a. arranged for disposal or treatment of hazardous waste; or
  - b. arranged for transportation for disposal or treatment of hazardous substancesowned or possessed by that person at any facility or incineration vessel where such hazardous substances are located;<sup>14</sup> and

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10. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007).

11. 42 U.S.C. § 9607(b) (2008).

12. *Id.* §§ 9607(a)(1), 9601(9), (28).

13. *Id.* § 9607(a)(2).

14. *Id.* § 9607(a)(3).

- (4) any person who accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release, or a threatened release of those hazardous substances.<sup>15</sup>

Liability, which can be joint and several, is for all costs of responding to, removing and cleaning up the hazardous substance(s); damages for injury to, destruction of, or loss of natural resources; and the costs of certain health assessment or health effects studies authorized by CERCLA.<sup>16</sup>

As originally enacted, CERCLA recognized only the federal and state governments as trustees authorized to recover natural resource damages.<sup>17</sup> Then, as now, CERCLA section 107(f) also limited the uses to which federal and state trustees could put any natural-resource-related damages they recovered, so that any “[s]ums recovered” were only “available for use to restore, rehabilitate, or acquire the equivalent of such natural resources.”<sup>18</sup> Congress added Indian tribes to CERCLA’s list of natural resource trustees authorized to recover damages for injuries to natural resources with the passage of SARA in 1986. Surprisingly, however, as amended by SARA, CERCLA places no explicit limitations on the uses to which tribal trustees may put recovered natural resource damages. Thus, CERCLA section 107(f)(1) provides, in relevant part, as follows:

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: . . . *Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this*

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15. *Id.* § 9607(a)(4).

16. *Id.* §§ 9607(a), 9604(i).

17. Pub. L. No. 96-510, § 107(f), 94 Stat. 2767, 2783 (1980).

18. *Id.*

*subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.*<sup>19</sup>

## II. SARA'S AMENDMENT OF CERCLA'S NATURAL RESOURCE DAMAGES PROVISIONS

The limitations placed on federal and state trustees are so explicit and unequivocal that the complete omission of any similar limitations on tribal trustees in section 107(f)(1) or any other provision in CERCLA appears at first glance to be almost certainly intentional. But a close reading of SARA itself, as opposed to its codification into the United States Code, demonstrates that Congress not only fully intended to place the same restrictions on tribal trustees' use of recovered damages as it placed on federal and state trustees, it took explicit action to do so but failed to effectuate the restriction because of a simple but apparently overlooked drafting error.

With SARA, Congress added Indian tribes to CERCLA's list of recognized natural-resource trustees through a series of technical amendments that simply added a reference to Indian tribes wherever federal and state trustees were mentioned.<sup>20</sup> The key amendment for present purposes was made by SARA section 207(c)(2)(D), which directed that the phrase "or Indian tribe" be inserted after the phrase "State government" where it appeared in the third sentence of CERCLA section 107(f). If that amendment had been effected as intended, the pertinent part of CERCLA section 107(f)(1) would read as follows:

Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, *or Indian tribe*, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.

The problem is that Congress, in an entirely separate amendment to CERCLA section 107(f), deleted the very sentence SARA section 207(c)(2)(D) was meant to amend. Specifically, SARA section 107(d)(2) split in two the command that federal and state trustees use recovered damages only to restore, rehabilitate, or acquire the equivalent of the natural resources at issue. Thus, SARA section 107(d)(2) amended CERCLA section 107(f)(1) to read as it still does today:

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19. 42 U.S.C. § 9607(f)(1) (2008) (emphasis added).

20. Pub. L. No. 99-499, § 207, 100 Stat. 1613, 1705 (1986).

Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.

The purpose of the amendment was to make clear that federal trustees could retain, "*without further appropriation*," any natural-resource damages they recovered,<sup>21</sup> a clarification that did not apply to the states. But in the process of splitting the injunction on the use of recovered damages in two, Congress also deleted the word "government" after "State," which now appeared in the fourth rather than the third sentence of CERCLA section 107(f)(1), leaving no place for the change required by SARA section 207(c)(2)(D) to be inserted. Again, then, the text of SARA unequivocally demonstrates that Congress fully intended to place the same restrictions on tribal trustees' use of recovered damages as it placed on federal and state trustees, and took explicit action to do so, but failed to effectuate the restriction because of a drafting error.

### III. LEGISLATIVE HISTORY

As judges and others have frequently observed, mining CERCLA's legislative history for insight into the statute's meaning and intent is often a fruitless exercise.<sup>22</sup> For a statute as complex and far reaching as CERCLA, the written record of the debates and compromises that forged it is, in many critical respects, remarkably sparse. The legislative history behind SARA's

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21. See, e.g., H.R. REP. NO. 99-962, at 205 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3297 (explaining that CERCLA 107(f)(1) was being amended "to authorize [federal trustees] to retain, without further appropriation, sums recovered by the United States as trustee, and use such sums to restore, replace, or acquire the equivalent of injured natural resources"); H.R. REP. NO. 99-253, pt. IV, at 49 (1985), *reprinted in* 1986 U.S.C.A.N. 3068, 3079 ("This amendment clarifies the language of Section 107(f)(1) of CERCLA to provide specifically that sums recovered by a federal natural resource trustee shall be retained by that federal trustee, and shall be used, without further appropriation, to restore, replace, or acquire the equivalent of the damaged resource").

22. See, e.g., *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993) ("[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.") (citations omitted); *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (describing CERCLA's legislative history as "unusually riddled by self-serving and contradictory statements").



addition of Indian tribes to CERCLA's list of recognized natural resource trustees hardly marks a departure from the general trend. For instance, the conference report on SARA makes no mention of the fact that Indian tribes are being added to CERCLA's list of recognized natural resource trustees, much less why.<sup>23</sup>

Nevertheless, what history there is demonstrates that both the Senate and House of Representatives intended to subject tribal trustees to the same limitations on the use of recovered natural resource damages as state and federal trustees. The fact that they went about it differently helps explain the drafting error that resulted in omission of explicit restrictions in the final law. It was the Senate bill that sought to add Indian tribes to the list of natural resource trustees in CERCLA section 107(f), and it did so in precisely the same way SARA ultimately did, by adding the words "Indian tribe" after the word "State" throughout section 107(f).<sup>24</sup> Thus, the Senate's amendment of section 107(f) resulted in the following language:

Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government *or Indian tribe*, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.<sup>25</sup>

The House bill sought to achieve the same result by adding an entirely new section to CERCLA, a proposed section 127, which would have placed all of the Indian tribe-related amendments into a single section of CERCLA instead of dispersing them as the Senate bill, and ultimately SARA, did.<sup>26</sup> As proposed by the House, new section 127 included the following language:

Sums recovered shall be available for use *to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Indian tribe*, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.<sup>27</sup>

Thus, both the House and Senate bills explicitly limited tribal trustees to using recovered natural resource damages *only* to restore, rehabilitate, or acquire the equivalent of the resources that have been injured, varying

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23. H.R. Rep. No. 99-962, at 205 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3297-99.

24. S. 51, 99th Cong. § 101(d) (1985).

25. S. REP. NO. 99-11, at 102 (1985).

26. H.R. 2817, 99th Cong. § 207(a). *See also* H.R. 2780, 99th Cong. § 208(d) (setting forth essentially the same provisions as in H.R. 2817 § 207(a)).

27. *Id.* (emphasis added).

solely in how they attempted to do it. The proposal to split in two section 107(f)'s command that federal and state trustees use recovered damages only to restore, rehabilitate, or acquire the equivalent of the natural resources at issue was inserted into the House bill by the Committee on Energy and Commerce in August 1985:

Section 107(f)(1) of CERCLA...is amended by striking out the third sentence and inserting in lieu thereof the following: "Sums recovered by the United States Government as trustee under this subsection shall be retained by the Administrator, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources."<sup>28</sup>

As noted above, the purpose of this amendment was to make it clear that federal trustees did not need to deposit recovered natural resource damages into the Treasury's general fund, and then seek a special appropriation from Congress to spend those funds on the restoration, rehabilitation, or acquisition of the equivalent of the natural resources that had been injured.<sup>29</sup>

Other portions of SARA's legislative history provide further evidence that Congress intended to place the same limitations on the uses to which tribal trustees may put recovered natural resource damages as are placed on federal and state trustees. For instance, that history makes it clear that "the primary purpose of the resource damage provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances."<sup>30</sup> Allowing tribal trustees to put damage recoveries to any use other than restoring, rehabilitating, or acquiring the equivalent of the injured natural resources at issue would defeat that purpose.

More importantly, in adding Indian tribes to the list of recognized natural resource trustees, Congress made it explicitly clear that it intended the tribes to be treated the same as the states. Thus, as stated in a committee

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28. H.R. REP. No. 99-253, at 30-31 (1985); *see also* H.R. 3852, 99th Cong. § 107(d)(2) (amending CERCLA; introduced in the House in December 1985 by Congressman Wright and others and containing identical language).

29. 42 U.S.C. §§ 9607(a)(1), 9601(9), 9601(28).

30. H.R. REP. No. 99-253, pt. IV, at 50 (1985); *see also* *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 458 (D.C. Cir. 1989) (quoting same).

report accompanying the Senate bill that eventually became SARA, the tribes were added to the list of recognized natural resource trustees to "give an Indian tribe the *same* rights under sections 107 and 111 of CERCLA...as a State has under those sections."<sup>31</sup> As CERCLA section 107 makes explicitly clear, the states have no right to use natural resource damages for any purpose other than to rehabilitate, restore, or acquire the equivalent of injured natural resources. For tribal trustees to have the "same" rights as state trustees, they must be subject to the same restrictions on the use of natural resource damages.

#### IV. STATUTORY AND HISTORICAL CONTEXT

If SARA's text and legislative history left any doubt that Congress intended CERCLA to subject tribal trustees to the same restrictions on the use of recovered natural resource damages as federal and state trustees, further evidence is readily found in the broader context of similar laws. CERCLA is just one in a decades-old line of federal laws allowing trustees to recover damages on behalf of the public for injuries to natural resources. It is no accident that each and every one of those laws expressly limits the uses to which natural resource trustees may put recovered damages. Other than CERCLA, only one of those laws, the Oil Pollution Act of 1990 (OPA),<sup>32</sup> gives Indian tribes the authority to act as natural resource trustees. And, just as Congress intended to do with SARA, OPA explicitly places the same restrictions on tribal trustees' use of recovered natural resource damages as federal and state trustees.<sup>33</sup>

Long before OPA, however, the first federal law to incorporate the concept of natural resource trustees authorized to recover damages on behalf of the public was the Deepwater Port Act of 1974.<sup>34</sup> Section 18(i)(3)

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31. S. REP. 9911, at 5 (emphasis added); *see also* H.R. REP. No. 99-962, at 274-75 (Conf. Rep.) (1986) (noting that both the Senate and the House amendments afford Indian tribes "substantially the same treatment as a State under CERCLA section 107); H.R. REP. No. 99-253, pt. 1, at 109 (1985) (stating that Indian tribes were being added to CERCLA's list of natural resource trustees authorized to act on behalf of the public "to afford Indian Tribes substantially the same treatment as states").

32. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 33 U.S.C., 26 U.S.C., 46 U.S.C., 14 U.S.C.).

33. *See infra* notes 52-57 and accompanying text.

34. Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126, 2144 (codified at 33 U.S.C. § 1517 (1988)), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 2003(a)(2), 104 Stat. 484, 507. The first federal law to include a natural resource damages provision appears to be the Trans-Alaska Pipeline Authorization Act of 1973. *See* Pub. L. No. 93-153, § 204, 87 Stat. 576, 586-87 (1973), 43 U.S.C. § 1653(a)(1); *see also* John M. Heyde, Book Note, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331, 334-35 (1995) (tracing the chain of environmental statutes with natural resource damages provisions). The Trans-Alaska

of the Act, which was repealed by OPA, authorized the Secretary of Transportation to "act on behalf of the public as trustee of the natural resources of the marine environment to recover damages to such resources."<sup>35</sup> And, as in every similar law since, Congress mandated that recovered natural resource damages "be applied to the restoration and rehabilitation of such resources."<sup>36</sup>

Three years later, Congress amended the Clean Water Act<sup>37</sup> to, among other things, authorize the president or "the authorized representative of any State" to "act on behalf of the public as trustee of" natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance, and to recover from the responsible party "the costs of replacing or restoring such resources."<sup>38</sup> As in the Deepwater Port Act of 1974, the Clean Water Act of 1977 provided, as the Clean Water Act still provides today, that natural resource damages recovered by natural resource trustees may only "be used to restore, rehabilitate, or acquire the equivalent of [the injured] natural resources."<sup>39</sup>

One year later, and nearest in time to CERCLA, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978,<sup>40</sup> upon which CERCLA's natural-resource-damages provisions appear to be modeled.<sup>41</sup> Section 303 of that Act created a cause of action for damages resulting from, among other things, "injury to, or destruction of, natural resources."<sup>42</sup> Such damages could be recovered "by the President, as trustees [sic] for natural resources over which the Federal Government has sovereign rights or exercises exclusive management authority, or by any State for natural resources within the boundary of the State belonging to, managed by,

Pipeline Authorization Act did not incorporate the trustee concept. Instead the Act made the holder of the pipeline right of way "strictly liable," subject to certain defenses, "to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes." 43 U.S.C. § 1653(a)(1).

35. Deepwater Port Act of 1974, Pub. L. No. 93-627, § 18(i)(3), 88 Stat., at 2144.

36. *Id.*

37. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

38. *Id.* § 1321(f)(5).

39. *Id.*

40. Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 303, 92 Stat. 629, 674-75 (codified at 43 U.S.C. § 1813 (1988)), *repealed by* Oil Pollution Control Act of 1990, Pub. L. No. 101-380, § 2004, 104 Stat. 484, 507.

41. *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 452 (D.C. Cir. 1989) (stating that "[t]he draft of S. 1480 is even more instructive when viewed alongside the 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA), from which the language of S. 1480 appears to have been borrowed").

42. Pub. L. No. 95-372, § 303(a)(2)(C), 92 Stat. 629, 674 (1978).

controlled by, or appertaining to the State.”<sup>43</sup> And, as under CERCLA, recovered damages were only “available for use to restore, rehabilitate, or acquire the equivalent of” the injured resources.<sup>44</sup>

In 1988, Congress amended the Marine Protection, Research, and Sanctuaries Act of 1972<sup>45</sup> to add a specific cause of action for injury to natural and other national marine sanctuary resources.<sup>46</sup> The addition was a response to two separate events, involving the grounding of an ocean freighter and an oil tanker, respectively, that resulted in significant injuries to two national marine sanctuaries.<sup>47</sup> Although the National Oceanic and Atmospheric Administration (NOAA) recovered monetary damages in both cases, the Secretary of Commerce<sup>48</sup> was without explicit authority to retain such damages, and so deposited the settlement monies in the general fund of the Treasury.<sup>49</sup> As a result, Congress responded by giving the Secretary of Commerce explicit authority to retain damages recovered for injuries to sanctuary resources in the future, but allowed the Secretary to put such damages to only three uses: (1) to reimburse the Secretary, or any other federal or state agency, for injury response and assessment costs;<sup>50</sup> (2) to restore, replace, or acquire the equivalent of the injured resources;<sup>51</sup> and (3) to restore degraded resources in the same or other marine sanctuaries.<sup>52</sup>

Two more freighter groundings convinced Congress in 1990 to give nearly identical authority to the Secretary of the Interior when federally owned natural and other resources located within the boundaries of a National Park are injured.<sup>53</sup> The law gives the Secretary the authority to retain recovered damages, which the Secretary may use for just two

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43. *Id.* § 303(b)(3), 92 Stat. 674–675.

44. *Id.*; see also H.R. REP. NO. 95-1474, at 131 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.A.N. 1674, 1730 (stating that natural resource damages recovered by a federal or state trustee under the Act are “to be used only for the restoration of the damaged natural resources or for acquisition of equivalent resources”).

45. Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended at 16 U.S.C. §§ 1431 to 1445(c)-1 (2000)).

46. *Id.* § 1443. The term “sanctuary resource” is defined as “any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary.” *Id.* § 1432(8).

47. S. REP. NO. 100-595, at 2 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.A.N. 4387, 4388.

48. NOAA is an agency within the U.S. Department of Commerce.

49. S. REP. NO. 100-595, at 2 (1988).

50. 16 U.S.C. § 1443(d)(1)(A) (2000).

51. *Id.* § 1443(d)(1)(B). The costs of curation and conservation of archeological, historical, and cultural sanctuary resources are also allowed. *Id.* § 1443(d)(2)(A).

52. *Id.* § 1443(d)(2)(C).

53. Pub. L. No. 101-337, 104 Stat. 379–381 (codified at 16 U.S.C. §§ 191j to 191j-4 (2000)); see also S. REP. NO. 101-328, at 3, 9–10 (1990) (describing the shipping accidents that convinced Congress to act).

purposes: (1) to reimburse the Secretary or any other federal or state officials for costs incurred responding to or assessing the underlying injury; and (2) to restore, replace, or acquire the equivalent of the injured resources.<sup>54</sup> As passed in the House, the legislation would have permitted the Secretary to use any money in excess of what was needed for restoration, replacement, and acquisition for management and improvement of the affected park.<sup>55</sup> But both the Senate and the Administration rejected this provision as an improper use of recovered natural resource damages, concluding that regular park operations should only be funded through the normal appropriations process.<sup>56</sup> Thus, funds in excess of what can be spent on the restoration, replacement, or acquisition of equivalent resources must be turned over to the general fund of the U.S. Treasury.<sup>57</sup>

That same year, and 10 years after CERCLA, Congress passed OPA.<sup>58</sup> Moved to action by the Exxon *Valdez* disaster in 1989, enactment of OPA was, in many ways, a reaction to the limitations and inadequacies of the laws that preceded it. At the time of the Exxon *Valdez* spill, the Trans-Alaska Pipeline Authorization Act, the Outer Continental Shelf Lands Act Amendments, the Deepwater Ports Act, and the Clean Water Act "all play[ed] a role in oil spill liability and compensation."<sup>59</sup> But, Congress found, they "provide[d] varying and uneven liability standards and scope or coverage for cleanup costs and damages associated with activities covered by each individual law."<sup>60</sup> OPA was intended to fix those deficiencies.

Like CERCLA, OPA makes responsible parties liable for "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage...."<sup>61</sup> Such damages are "recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee."<sup>62</sup> The bill originally passed by the Senate did not include Indian tribes on its list of recognized natural resource trustees under OPA, instead recognizing only federal, state, and

54. 16 U.S.C. § 19jj-3(a) & (b). However, the Secretary may not acquire an interest in any land or water outside the National Park in question, unless authorized in an appropriations act and permitted by the organic legislation for that park. *Id.* § 19jj-3(c).

55. S. REP. NO. 101-328, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 603, 606.

56. *Id.* at 6, 10.

57. 16 U.S.C. § 19jj-3(c).

58. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

59. S. REP. NO. 101-94, at 3, *reprinted in* 1990 U.S.C.C.A.N. 722, 725.

60. *Id.* at 3, 4.

61. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1002, 104 Stat. 484, 490 (codified at 33 U.S.C. § 2702).

62. *Id.*

foreign trustees.<sup>63</sup> But the House version did include Indian tribes on its list of natural resource trustees and it was the House provision that was ultimately adopted.<sup>64</sup> Thus, other than CERCLA, OPA is the only other federal pollution statute to give Indian tribes the status of trustees authorized to recover damages on behalf of the public for injuries to natural resources.

As the Act makes explicitly clear, natural resource damages recovered by *any* trustee, including tribal trustees, may only be used to pay for or reimburse those costs that the trustee incurs in carrying out its authorized functions.<sup>65</sup> And under OPA, tribal trustees have only two functions:

The tribal officials designated under subsection (b)(4) of this section—

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.<sup>66</sup>

For tribal trustees, this means that recovered natural resource damages may only be used to pay for two things: (1) assessing damages and (2) developing and implementing a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship. All recovered damages in excess of what is required to pay or reimburse for these activities must be turned over to the Oil Spill Liability Trust Fund.<sup>67</sup>

In sum, from 1974 to 1990, Congress passed six separate laws vesting in various government authorities the status of natural resource trustee and authorizing such trustees to recover, on behalf of the public, damages for injuries to covered natural resources. From the first to the last, every one of those laws has prohibited natural resource trustees from using recovered damages for any purpose other than as reimbursement for response and assessment costs and to restore, replace, or acquire the equivalent of the resources that were injured. The only anomaly in that 16-year history is CERCLA's failure to expressly apply the same limitations to

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63. H.R. REP. NO. 101-653, at 107-108 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.A.N. 779, 785-86.

64. *Id.*

65. *Id.* § 2706(f).

66. 33 U.S.C. § 2706(c)(3) (2000).

67. *Id.*; *see also id.* § 2701(11) (defining the term "Fund").

tribal trustees. And, as demonstrated in Section II,<sup>68</sup> that omission is the product not of intent, but of a simple, overlooked drafting error.

## V. INAPPLICABILITY OF THE "PLAIN MEANING RULE"

One might invoke a version of the "plain meaning rule"<sup>69</sup> to argue that the courts should not look beyond the text of CERCLA to find its meaning and intent. In other words, one might argue that CERCLA's explicit restrictions on federal and state trustees' use of recovered natural resource damages, coupled with the glaring omission of any similar restrictions on tribal trustees, plainly indicate that Congress did not intend to place such restrictions on tribal trustees, and the courts should not look outside the statute for evidence of a contrary intent. But there are multiple reasons why such a plain-meaning rule does not apply.

First, there is no need for courts to look outside the language of the law itself to find evidence of contrary intent. Congress's intent to subject tribal trustees to the same restrictions as federal and state trustees is evident in the language of SARA itself, even if that intent was lost in the process of incorporating SARA's many provisions into CERCLA's already complicated text.

Second, the "the plain meaning rule" is neither certain nor absolute:

Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."<sup>70</sup>

Moreover,

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68. See *supra* notes 11-12 and accompanying text.

69. See, e.g., *United States v. Williams*, 425 F.3d 987, 988-89 (11th Cir. 2005) ("Under the rules of statutory construction, one applies the 'plain meaning' rule by first looking to actual language used in a statute to determine its meaning. Only when the statutory language is shown to be ambiguous may a court look to legislative history") (citing *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001)).

70. *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928); see also *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (citations omitted); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (quoting *Boston Sand & Gravel*, 278 U.S. at 48)).



Words are seldom so plain that their context cannot shape them. Once the "tyranny of literalness" is rejected, *United States v. Witkovich*, 353 U.S. 194, 199, the real meaning of seemingly plain words must be supplied by a consideration of the statute as a whole as well as by an inquiry into relevant legislative history.<sup>71</sup>

Therefore, "[t]he starting point for determining legislative purpose is plainly an appreciation of the 'mischief' that Congress was seeking to alleviate."<sup>72</sup> There can be no disagreement that the "the primary purpose of the resource damage provisions of CERCLA is the restoration or replacement of natural resources damaged by unlawful releases of hazardous substances."<sup>73</sup> Allowing tribal trustees to use recovered natural resource damages for any other purpose is plainly "inconsistent with Congress' intention." In addition, the statute's legislative history demonstrates that Congress intended to give tribal trustees the same rights as state trustees — no more and no less — and state trustees have no right to use recovered damages any way they please.<sup>74</sup>

Finally, CERCLA and SARA must be viewed in the context of the many similar laws that both preceded and followed them. All of those laws, without exception, restrict natural resource trustees from using recovered natural resource damages for any purpose other than the restoration, replacement, or acquisition of natural resources.<sup>75</sup> Indeed, even OPA, the only federal law other than CERCLA to authorize Indian tribes to act on behalf of the public as natural resource trustees, explicitly prohibits tribal trustees from using recovered damages for any purpose other than assessing the damages themselves and restoring, replacing, or acquiring the equivalent of the injured resources.<sup>76</sup> Against this backdrop, any argument that Congress intended to allow tribal trustees to use natural resource damages recovered under CERCLA falls flat. Thus, a court called upon to determine whether CERCLA's limitations on trustees' use of recovered natural resource damages apply to tribal as well as federal and state trustees should not let an unintentional omission in the statutory text stand in the way of Congress's clear intent.

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71. *I.C.C. v. J-T Transp. Co.*, 368 U.S. 81, 107 (1961) (mem).

72. *Id.*

73. *Supra* note 30 and accompanying text.

74. *See supra* note 22 and accompanying text.

75. *See supra* notes 23-57 and accompanying text.

76. *See supra* notes 51-57 and accompanying text.

## VI. CONCLUSIONS

As demonstrated above, Congress not only intended, but took explicit action to subject tribal trustees to the same limitations on the use of natural resource damages recovered under CERCLA as the law imposes on federal and state trustees but failed to give effect to that intent because of a drafting error.<sup>77</sup> That conclusion is further supported by the legislative history of SARA,<sup>78</sup> which added Indian tribes to CERCLA's list of authorized natural resource trustees, and by the long line of federal laws that both preceded and followed CERCLA's and SARA's passage.<sup>79</sup>

In a perfect world, one might expect Congress to amend CERCLA to correct the error in SARA's conflicting amendments and make explicit what was clearly Congress's original intent. But CERCLA has always been a controversial law and no one should hold his or her breath waiting for Congress to find the political will to revise it.<sup>80</sup> Thus, it is likely that the job of deciding whether CERCLA imposes any restrictions on tribal trustees' use of recovered natural resource damages will, in the first instance, eventually be decided by the courts.<sup>81</sup>

77. See *supra* notes 11-12 and accompanying text.

78. See *supra* notes 13-22 and accompanying text.

79. See *supra* notes 23-57 and accompanying text.

80. See, e.g., MARK REISCH, SUPERFUND AND NATURAL RESOURCE DAMAGES, CONGRESSIONAL RESEARCH SERVICE REPORT RS20772 (Jan. 8, 2001) (describing Congress' inability to find an acceptable compromise on natural resource damage provisions in Superfund reauthorization bills proposed in the 106th Congress), available at <http://www.ncseonline.org/nle/crsreports/waste/waste-35.cfm>; Michael A. Walker, CERCLA's Natural Resource Damage Provisions: A Loophole for Private Landowners, 9 ADMIN. L.J. AM. U. 425, 429 (1995) (discussing Congress's repeated failure to clarify CERCLA's natural-resource-damages provisions from 1986 through 1994).

81. It is not particularly surprising that no court has yet decided the issue even though more than two decades have passed since SARA added Indian tribes to CERCLA's list of authorized natural resource trustees. Most natural resource damages cases ultimately settle, leaving scarce case law on a wide range of questions unanswered by this imperfect law. Moreover, there has been a marked change in natural-resource-damages practice toward responsible parties either agreeing to implement restoration projects themselves or to pay for restoration projects implemented by the trustees, thus obviating any need to argue over how recovered damages may be spent. See, e.g., Reisch, *supra* note 58 ("Most NRD actions are implemented concurrently with or shortly after the remedial action, and the majority of NRD claims are settled in the context of the remedial action as part of the cleanup agreement negotiated with the Environmental Protection Agency (EPA)"); Rebecca Renner, *Calculating the Cost of Natural Resource Damage*, ENVTL. SCI. & TECH., Feb. 1, 1998, at 86A-90A (noting same), available at <http://pubs.acs.org/hotartcl/est/98/feb/renner.html>.