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Articles

Spiritual and Cultural Resources as a Component of Tribal Natural Resource Damages Claims*

Connie Sue Manos Martin**

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I. INTRODUCTION

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] and the Oil Pollution Act of 1990 (OPA),[2] Natural Resource Trustees can recover for damages caused to natural

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1. 42 U.S.C. §§ 9601-9675 (1994).
2. 33 U.S.C. §§ 2701-2761 (1994).

resources as a result of the release of hazardous substances.[3] Natural Resource Trustees include federal, state or local governments, and Indian tribes.[4] Because of the unique relationship between Native Americans and the environment, damage to a natural resource may harm more than simply the environment. The damage may also affect spiritual and cultural resources inextricably associated with the environments that have been harmed. Hence, in assessing the extent of damage to tribal resources as part of a Natural Resource Damages (NRD) claim, one should not overlook the potential claims arising from loss or damage to cultural and spiritual resources resulting from the release of a hazardous substance.

II. NATURAL RESOURCE DAMAGES

Section 107 of CERCLA[5] provides in pertinent part that those persons responsible for the release of hazardous substances that caused the incurrence of response costs shall be liable for "all costs of removal or remedial action . . . [and] damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction or loss resulting from such a release."[6]

CERCLA broadly defines natural resources as including virtually any identifiable aspect of the natural environment. "Natural resources" are defined as:

> [L]and, fish, wildlife biota, air, water, ground water, drinking water supplies, *and other such resources* belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . ., any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.[7]

The damages available under CERCLA's NRD provision are intended to be compensatory, not punitive. The public is to be made whole and the responsible party is required to pay only for the damages it caused. CERCLA provides that a tribe may recover damages for harm to natural resources belonging to, managed by, appertaining to, or held in trust for the benefit of a tribe.[8] Indian tribes may recover for harm to natural resources both on- and off-reservation.[9]

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3. 42 U.S.C. § 9607(f)(1) (1994).
4. *Id.*
5. § 9607.
6. *Id.*; Section 1006 of the Oil Pollution Act is nearly identical. 33 U.S.C. § 2706 (1994).
7. § 9601(16) (emphasis added).
8. § 9607(f)(1).
9. Indian tribes have the additional authority to recover for natural source damages on an individual tribal member's land where such land is subject to a trust restriction on alienation. *Id.*

An NRD claim usually seeks to recover for residual harm to natural resources, assessed after any remedial action which the EPA, or another authorized agency with cleanup authority, has selected and completed, or after the likely effects of the remedial action on natural resources has been taken into account.

> [C]ustomarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, [damages] are thus not generally settled prior to the cleanup.[10]

The measure of damages is the cost of restoration, rehabilitation, replacement and/or acquisition of the equivalent of the injured natural resources and the services those resources provide. Damages may also include, at the discretion of the trustee, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement and/or acquisition of the equivalent of the resources and the return of those services to baseline levels (pre-spill or pre-release).[11] Thus, the measure of damages is the cost of restoration plus the value of lost services provided by the damaged resource.

The goal of restoration is to return the resource to its pre-release or baseline level. The trustee is required to develop a reasonable number of possible alternatives for the restoration, rehabilitation, replacement, and/or acquisition of the equivalent of the injured resource and the services it provided. The trustee then chooses the alternative he or she determines is the most appropriate from among the possible alternatives.[12] The alternatives are limited to those actions that restore, rehabilitate, replace, and/or acquire the equivalent of the injured resource and service to no more than their baseline (i.e., the way the resource would have been had the discharge or release never occurred).[13]

III. THE IMPORTANCE OF TRIBAL SPIRITUAL AND CULTURAL RESOURCES

> The Earth and myself are of one mind. The measure of the land and the measure of our bodies are the same.[14]

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10. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1035 (D. Mass. 1989) ("Acushnet IV").
11. 43 C.F.R. § 11.80(b) (1998).
12. 43 C.F.R. § 11.82(a) (1998).
13. § 11.82(b)(1)(iii).
14. Hinmaton Yalatkit (Joseph), Nez Perce Chief. NATIVE AMERICAN WISDOM 97 (Running

Native American religious beliefs are inextricably linked to both the natural environment and the everyday lives of Native Americans:

> Unlike the predominant religions of modern America, Native American religion cannot be separated from day-to-day activities. It is a way of life in which geography, language, and nature often play important roles. The fact that humans cannot survive without the natural environment is recognized by most Indian religions, and tribes usually are responsible for protecting the ancestral territories provided them by their creator. Indian religions focus upon nature's continuous renewal of life, not upon a particular individual or event.[15]

This link between the environment and the everyday lives of Native Americans, and the inability to survive without the environment, is a difficult concept to translate and apply to American jurisprudence. However, the idea that cultural resources have intrinsic value is neither a new concept nor one that is limited to Indian tribes. This recognition of the value of cultural and spiritual resources is codified in several federal statutes.

A. *National Environmental Policy Act*

The National Environmental Policy Act (NEPA)[16] requires that environmental and cultural values be considered along with economic and technological values when proposed federal projects are assessed. The Act requires that the federal government use all practicable means to improve and coordinate federal plans, functions, programs and resources to the end that the nation may "preserve important historic, cultural, and natural aspects of the national heritage."[17] This duty is ongoing; that is, the duty to "use all practicable means to improve and coordinate federal plans, functions and resources to . . . preserve . . . cultural . . . aspects of the national heritage" does not end once the proposed federal project has been approved and funded.[18] Moreover, courts are directed to avoid decisions which would constitute participation in frustration of NEPA policy.[19]

NEPA's requirement that the federal government use all practicable means to improve federal plans and resources to preserve cultural aspects

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Press 1993).

15. INDIAN TRIBES AS SOVEREIGN GOVERNMENTS: A SOURCEBOOK ON FEDERAL-TRIBAL HISTORY, LAW, AND POLICY 50 (1988).

16. 42 U.S.C. §§ 4321-32 (1994).

17. § 4331(b)(4).

18. *See* Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army, 348 F. Supp. 916 (N.D. Miss. 1972), *aff'd* 492 F.2d 1123 (5th Cir. 1974) (Congress declared the Nation's policy in broad and general terms and provided that it was the continuing responsibility of the federal government to improve and coordinate all federal undertakings to achieve six stated environmental goals).

19. Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).

of the national heritage provides an overriding policy statement that resources should be made available under CERCLA's NRD provisions for the restoration or replacement of natural resources to the extent those resources are a necessary part of tribal culture. In addition, when resotration or replacement is infeasible, NEPA requires recovering the value of lost services provided had the natural resource not been injured. Denying such recovery, it may be argued, would "constitute participation in frustration of NEPA policy."

B. *Historic Sites, Buildings, and Antiquities Act*

The Historic Sites, Buildings, and Antiquities Act[20] declares a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[21] The Secretary of the Interior is authorized to contract and enter into cooperative agreements with states, municipal subdivisions, private organizations, and individuals, to protect, preserve, maintain, or operate any historic or archeological building, site, object, or property connected with a public use.[22]

C. *National Historic Preservation Act*

The National Historic Preservation Act[23] provides for the maintenance and expansion of a National Historic Register of districts, sites, buildings and structures, and objects significant in American history, architecture, archeology, and culture, and to provide matching grants-in-aid to the National Historic Trust for the purpose of preserving historical properties for the public benefit. Under the Act, the head of any federal agency having direct or indirect jurisdiction over a proposed federal, or federally assisted, undertaking in any state must consider the effect of the undertaking on any district, site, building, structure or object included or eligible to be included in the National Register.[24] This review must take place prior to the federal agency's approval of any federal funds for the undertaking, or prior to issuance of any federal license.[25] At least one circuit court of appeals has held that eligible property is not limited to property that has been officially determined to be eligible for inclusion in the National Register.[26] The National Historic Preservation Act also com-

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20. 16 U.S.C. §§ 461-67 (1994).
21. § 461.
22. § 462(e).
23. 16 U.S.C. §§ 470a to 470w-6 (1994).
24. § 470f.
25. § 470f.
26. Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986).

pels the Secretary of the Interior to direct and coordinate U.S. participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage.[27]

In determining the areas that have been harmed by the release of hazardous substances for purposes of establishing a natural resource damages claim, it might be useful to identify any part of the area that might have significance in Tribal or American history, architecture, archeology, and culture. Such an area may well be eligible for inclusion in the National Register. The head of the federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking, such as the clean-up of a contaminated site, must consider the effect of the undertaking on any district, site, building, structure or object included or eligible to be included in the National Register, before approving any federal funds on the undertaking, or issuing any licenses.

D. *Archeological Resources Protection Act*

The Archeological Resources Protection Act,[28] passed in 1979, enlarges upon the Antiquities Act of 1906[29] and protects archeological resources and sites located on public and Indian lands. An archeological resource is any material remains of past human life or activities that are of archeological interest and which are at least 100 years old.[30]

E. *American Indian Religious Freedom Act*

The American Indian Religious Freedom Act[31] provides that the federal government will protect and preserve for Native American their inherent right of freedom to believe in and exercise their traditional religions. The Act applies only to federal agencies, and has been construed by the courts as simply a statement of the federal government's policy that it will recognize the religious beliefs of Native American and others.[32]

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27. § 470a-1(a).

28. 16 U.S.C. §§ 470aa-70mm (1994).

29. 16 U.S.C. §§ 431-33 (1994). The Antiquities Act of 1906 provides penalties for the appropriation, excavation, injury or destruction of any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controled by the federal government. § 433.

30. § 470bb(1).

31. 42 U.S.C. § 1996 (1994).

32. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 88 (1993); *See, also,* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1993); United States v. Top Sky, 547 F.2d 483 (9th Cir. 1976); *Crow v. Gullett*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

F. *First Amendment Establishment & Free Exercise Clauses*

The First Amendment of the U.S. Constitution forbids Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[33] Judicial construction has expanded the express protection afforded to include the protection of sincere religious beliefs from the infringement of otherwise neutral regulations.[34]

In order to be protected from an otherwise neutral regulation, two elements must be satisfied. First, the belief being infringed upon must be "central" or "indispensable" to the individual's religious practices.[35] Second, the individual seeking protection must establish that the regulatory infringement is not justified by a sufficiently compelling governmental interest.[36] "The tests have been inconsistently applied, however, and courts seem to have difficulty in determining how much weight to give a sacred site or ceremonial object when balanced against the benefits that the challenged regulation would provide American society as a whole. For example, in *Northwest Indian Cemetery Protective Association v. Peterson*, the Ninth Circuit held that a proposed U.S. Forest Service road and logging operation lacked a compelling justification because of its impact on a nearby religious site.[37]

The recognition of the value of religious, spiritual, cultural, and historic resources in federal statutes lends support for the inclusion of harm to such resources as a component of a natural resource damages claim, to the extent that such damages can be assessed and monetarily valued.

IV. SPIRITUAL AND CULTURAL RESOURCES AS A COMPONENT OF A TRIBAL NATURAL RESOURCE DAMAGES CLAIM

The broad statutory definitions of both "natural resources" and "damages" permit creativity in determining both the nature of the resource that has been harmed, and the mechanism by which damages for that harm may be calculated. With respect to Tribal natural resource damage claims, this broad statutory language permits, and arguably requires, that harm to spiritual and cultural resources be assessed and included in a claim for natural resource damages.

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33. U.S. CONST. amend. I.
34. Wisconsin v. Yoder, 406 U.S. 205 (1972).
35. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (sacred site to be flooded by reservoir not central or indispensable).
36. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 586-87 (9th Cir. 1985), *cert. granted sub. nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
37. *Northwest Indian Cemetery Protective Ass'n*, 764 F.2d at 586-87; INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 15, at 30.

There is little in the way of published caselaw that is on point. The most in-depth judicial analysis of cultural resource damages occurred in *In re the Exxon Valdez*.[38] There, the Ninth Circuit squarely addressed the issue of whether harm to cultural resources may cause a compensable injury under CERCLA. The court wrote:

> The determinative issue is whether cultural damage--damage to the Class members' "subsistence way of life"--may cause compensable injury. The Class asserts that its claims "comport with established principles of tort recovery" but cites no authority and does not dispute Exxon's assertion that no reported decision supports such a claim. Instead, the Class attempts to infuse an economic character into its claims by arguing that Class members suffered "economically measurable damages" beyond the commercial injury. The Class asserts that its cultural injury has a "pervasive economic foundation" and is based on "economic injuries from disruption of Native subsistence activities." The spill allegedly harmed "an integrated system of communal subsistence . . . inextricably bound up not only with the harvesting of natural resources damaged by the spill but also with the exchange, sharing and processing of those resources as the foundation of an established economic, social and religious structure."
>
> ***
>
> Admittedly, the oil spill affected the communal life of Alaska Natives, but whatever injury they suffered (other than the harvest loss), though potentially different in degree than that suffered by other Alaskans, was not different in kind. We agree with the district court that the right to lead subsistence lifestyles is not limited to Alaska Natives. [citation ommited.] While the oil spill may have affected Alaska Natives more severely than other members of the public, "the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings" is shared by all Alaskans. [citation ommitted.] The Class therefore has failed to prove any "special injury" to support a public nuisance action. [citation ommitted.][39]

Further discussion occurs in *In re the Exxon Valdez*.[40] The unreported federal district court decision stated that:

> The Alaska Natives' non-economic subsistence claims are not "of a kind different from [those] suffered by other members of the public exercising

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38. In re the Exxon Valdez: Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997).
39. *In re the Exxon Valdez*, 104 F.3d at 1198.
40. In re the Exxon Valdez, No. A89-0095-CV, 1994 WL 182856 (D. Alaska Mar. 23, 1994).

the right common to the general public that was the subject of Interference." [citation ommitted.] Although Alaska Natives may have suffered to a greater degree than members of the general public, "differences in the intensity with which a public harm is felt does not justify a private claim for a public nuisance." [citation ommitted.] All Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives. All Alaskans, and not just Alaska Natives, have the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings. Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique. These attributes of the Alaska Native lifestyle only make it different in degree from the same subsistence lifestyle available to all Alaskans.

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The court does not reject the notion that there are cultural differences between Alaska Natives and many non-native Alaskans. The existence of two cultures is not inconsistent with a conclusion that both have suffered injury of the same kind as a consequence of the Exxon Valdez oil spill, and that it is for the public to demand satisfaction on behalf of all those injured.

The court is concerned that rural Alaska residents might view this decision as evidencing a lack of understanding of the commitment to a subsistence lifestyle as permitted by Title VIII of the ANILCA[41] or holding that cultural considerations are without value and/or not valued by the court. The court does neither.

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Suffice it to say, the court accepts without qualification the cultural importance of the subsistence lifestyle to residents of rural Alaska in general, and Alaska Natives in particular, in rendering this decision.

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However, one's culture--a person's way of life--is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life. If (and we think this is not the case) the Native culture was in such distress that the Exxon Valdez oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1989. Development of the Prudhoe Bay oil fields, the construction of processing facilities, and the trans-Alaska pipeline on the North Slope of the Brooks Range were,

41. ANILCA is the Alaska National Interest Lands Conservation Act which provides that "the continuation of the opportunity for subsistence uses by both rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence . . . ." 16 U.S.C. § 3111(1) (1994).

> in all probability, a much greater and certainly longer-lasting incursion into Native culture than the Exxon Valdez oil spill, yet the Inupiat have thrived. The court doubts that they are less committed nor less successful in preserving their Native culture than are the Native people of Prince William Sound, Kodiak, or the Cook Inlet area. The Exxon Valdez oil spill was a disaster of major proportions, but it did not deprive Alaska Natives of their culture.
>
> The affront to Native culture occasioned by the escape of crude oil into Prince William Sound is not actionable on an individual basis. To those who say it ought to be, the court must answer: Congress and the appellate courts make law, not this court.[42]

The *Exxon Valdez* cases are helpful for several reasons. First, it is a judicial recognition of the value of "the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings."[43] The court also "accept[ed] without qualification the cultural importance of the subsistence lifestyle to residents of rural Alaska in general, and Alaska Natives in particular . . . ."[44]

The *Exxon Valdez* case does not preclude a claim for spiritual or cultural resource damages as a component of an NRD claim. The *Exxon Valdez* court denied the award of damages for harm to the subsistence way of life under the Oil Pollution Act.[45] One reason for the denial was that the subsistence way of life practiced by the Eskimo plaintiffs was not different in kind from that to which any other Alaska resident is entitled under the Alaska constitution. Hence, said the court, the harm suffered by the Eskimos, although possibly different in degree, was no different in kind than that suffered by any other Alaskan practicing a subsistence lifestyle. In addition, the court opined that the catastrophic damage wrought by the oil spill could not possibly have caused irrevocable changes to the Eskimo way of life that were not already set in motion by development of the surrounding environment.

In most states, however, there is no right to a subsistence lifestyle guaranteed to all residents by the state Constitution, as there is under the Alaska Constitution. Additionally, in most cases, Indian reservations are largely unaffected by non-Indian development, and therefore it is unlikely that the incursion of outside development had already affected the Indian

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42. *In re the Exxon Valdez*, 1994 WL 182856, at *2, *4-*5.

43. *In re the Exxon Valdez*, 104 F.3d at 1198.

44. *In re the Exxon Valdez*, 1994 WL 182856, at *4.

45. The Oil Pollution Act of 1990 was enacted after the Exxon Valdez spill to create a cause of action for damage or loss of subsistence use resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines. Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. § 2702(b)(2)(C) (1994)).

culture before the environmental harm occurred.

Armed with the judicial and statutory recognition of the value of spiritual and cultural resources, it is not difficult to assert that injuries to such resources should be compensable under an NRD claim. What *is* difficult, although not impossible, is assessing the *amount of damages* to a spiritual or cultural resource, because it requires the translation of traditional Tribal belief systems into the American jurisprudence system.

Some translations are easier than others. For example, the Tribe may have been deprived of a basic resource of the Tribe's diet; for example, fish. A fish consumption advisory, issued by a state or Tribal department of health, typically limits the amount of fish that may be consumed in a given amount of time. The cost of that loss may be quantified by the difference in value of the fishery pre- and post-contamination. The loss of the fish may also impact the Tribe's exchange, sharing or processing of those resources as the foundation of an established economic, social and religious structure. That figure may not be as easily calculated.

Another potential loss might be that of tourist-generated income. On some reservations, non-Indian tourists are permitted to take water tours and fishing trips through the reservation, for a fee. The tourists may also spend money on the reservation in gas, food, supplies, and other souvenirs. In some cases, Tribal members may act as guides and fish during each trip, with fish that are not needed to feed the guides' families being bartered or shared among the Tribe. As a result of the contamination, the tourist-driven fishing and tour activities on the rivers may be detrimentally affected, with the Tribe no longer receiving the income the tours generated. This loss should be included in an NRD claim as a loss of services provided by the damaged natural resource.

In determining the amount of damages caused to spiritual and cultural resources that cannot be repaired or replaced, the First Circuit Court of Appeals has suggested that the acquisition of the equivalent might include the acquisition of comparable lands for public parks or restoration of a similar proximate site.[46] Applied to Tribal resources, the acquisition of the equivalent might mean the acquisition of comparable lands, where spiritual or cultural significance is transferrable. Where the spiritual or cultural significance of a resource has been irrevocably destroyed by the contamination, the acquisition of the equivalent might mean the creation of a program to preserve and teach the oral history of the site that has been lost.

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46. Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 676 (1st Cir. 1980).

V. CONCLUSION

The value of cultural resources is recognized by statute and decisional law. When calculating Tribal Natural Resource Damages claims under CERCLA, special consideration should be given to damages for harm to spiritual and cultural resources resulting from the release of hazardous materials. Where such damage is quantifiable, it should be included as a component of an NRD claim.