CERCLA’s Unrecoverable Natural Resource Damages: Injuries to Cultural Resources and Services

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INTRODUCTION

Confusion over what damages are recoverable as natural resource damages (NRD) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and other federal statutes abounds, giving credence to the oft-repeated phrase that “CERCLA is not a model of legislative clarity.”1 Among other things, confusion appears in discussions among the Department of the Interior, legislators, and courts regarding the recoverability of cultural resource damages as NRD under CERCLA. But the statute and caselaw are clear. As demonstrated here, CERCLA establishes that injuries to cultural resources,2 no matter how they are described, are not recoverable as NRD.

BACKGROUND ON NRD

CERCLA imposes liability for cleanup and response costs on owners and operators of facilities where hazardous substances were released or disposed of. The two primary purposes of CERCLA are “to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.”3 In addition to these cleanup and response

2. The analysis and arguments presented herein likely also establish that injuries to archaeological resources and services are not recoverable under CERCLA; however, that is the topic for another article, as this Article focuses on whether injuries to cultural resources and services are recoverable as NRD under CERCLA.
costs, CERCLA may also impose liability for NRD—damages based on injuries to natural resources. In fact, several federal statutes provide for the recovery of NRD, including the Clean Water Act (CWA), the Oil Pollution Act of 1990 (OPA), the National Marine Sanctuaries Act (NMSA), the Park System Resources Protection Act (PSRPA), and CERCLA, which is the focus of this Article.

Natural resources within the meaning of CERCLA invoke geological and biological entities—"land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources" that belong to, are managed by, are held in trust by, or pertain to or are controlled by the United States, state or local governments, or Indian tribes. NRD claims arise from injuries to such resources from releases and threatened releases of hazardous substances. Under CERCLA’s NRD scheme, owners, operators, arrangers, and transporters can be liable for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from [a release of hazardous substances].” That is, NRD are calculated by adding the cost of restoring the injured resource, compensation for the interim loss of use of the resource from injury to restoration, and the cost of assessing the damages.

Private parties may not bring suit for NRD recovery. CERCLA does not allow private parties to recover damages for injuries to natural resources held in trust by federal, state, or tribal governments, nor does it allow federal, state, or tribal trustees to recover damages for injuries to private property or private interests. “[D]amage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of [CERCLA].”

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10. 43 C.F.R. § 11.83(c)(1) (2010) (“The compensable value can include the economic value of lost services provided by the injured resource, including both public use and nonuse values.”); Notification and Coordination with Natural Resource Trustees, U.S. ENVTL. PROT. AGENCY (Oct. 1, 2010), http://www.epa.gov/superfund/programs/nrd/faqs.htm.
Instead, NRD liability flows to the trustees of the natural resources: the United States, and the individual states, “for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State,” and Indian tribes “for natural resources belonging to, managed by, controlled by, or appertaining to such tribe.”

A government or tribe’s ownership, management, control, or trusteeship over the resource is a question of fact and law.

ARE INJURIES TO CULTURAL RESOURCES RECOVERABLE?

One question that arises is whether injuries to cultural resources are compensable as NRD under CERCLA. At the very least, it is clear that unlike some of the federal statutes that include NRD recovery schemes, CERCLA’s definition of “natural resources” does not specifically reference cultural resources. That is, of the five federal statutes that provide for the recovery of NRD—the CWA, OPA, NMSA, the PSRPA, and CERCLA—both the NMSA and the PSRPA provide for recovery for injuries to natural resources that specifically include “non-living,” or “cultural” resources. CERCLA, OPA, and the CWA do not.

In light of the broad resource definitions in the NMSA and the PSRPA, the exclusion of reference to “non-living” or “cultural” resources in CERCLA’s resource definition suggests that injuries to cultural resources, however characterized, are not recoverable under CERCLA. The OPA and CWA define “natural resources” as does CERCLA only in the context of water, air, geological, and biological resources, and without any reference to “cultural resources.”

By comparison, the NMSA defines protected marine resources as including any “nonliving” resource that “contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of a sanctuary.” Similarly, the PSRPA broadly defines protected resources in the National Park system as any “living or non-living resource,” the latter of which has been interpreted to include cultural resources. Given that only five federal statutes provide for NRD recovery, that the NMSA’s resource definition includes reference to “nonliving” resources and “cultural” values, and that the PSRPA’s resource definition likewise includes reference to “non-living” resources, which have been interpreted to include cultural resources, the

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16. The author is not taking a position on whether injuries to cultural resources are compensable under NMSA and PSRPA.
fact that CERCLA’s resource definition excludes reference to “non-living” or “cultural” resources suggests that CERCLA does not establish recovery for injuries to cultural resources, regardless of how such injuries are characterized.

The Department of the Interior (Department or DOI) appears to have confirmed this fact. But in so doing, the Department has generated confusion by attempting to distinguish between cultural resources and cultural services, which seems to be a distinction without a practical difference. In 1994, the Department promulgated regulations for assessing NRD under the CWA and CERCLA. In the “comment” and “response to comment” section of the preamble to its final regulations, the DOI sowed confusion regarding whether injuries to cultural resources are recoverable as injuries to natural resources under CERCLA.

First, the Department stated that “archaeological” and “cultural” resources are not “land, fish, wildlife, biota, air, ground water, drinking water supplies, or other such resources” such that archaeological and cultural resources “do not constitute ‘natural’ resources under CERCLA.” Unfortunately, the Department did not stop there. The DOI went on to instruct that although archaeological and cultural resources are not “natural resources” under CERCLA, federal, state, and tribal trustees may “include the loss of archaeological and other cultural services provided by a natural resource in a natural resource damage assessment.” The DOI then tried to provide an example of a scenario in which the loss of an archaeological or cultural service provided by a natural resource might be recoverable as NRD:

For example, if land constituting a CERCLA-defined natural resource contains archaeological artifacts, then that land might provide the service of supporting archaeological research. If an injury to the land causes a reduction in the level of service (archaeological research) that could be performed, trustee officials could recover damages for the lost service.

This example has done little to clarify or explain how recovery for “the loss of archaeological and other cultural services” (which DOI suggests is provided for under CERCLA’s NRD scheme) is different than recovery for injuries to archaeological and cultural resources (which DOI acknowledges that CERCLA does not allow).

Since the 1994 regulations, the Department has continued to publish conflicting information about the recoverability of cultural resource damages as NRD under CERCLA. For example, in 2003 the National Park Service, one of DOI’s eight bureaus, published its Damage

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21. Id.
22. Id.
23. Id.
Assessment and Restoration Handbook (Handbook) to provide guidance for damages assessment within the National Park Service. The Handbook largely addresses NRD assessments under the PSRPA, and the National Park Service confirms therein that resources protected by the PSRPA include both natural resources and, specifically, “cultural resources.”

The Handbook contains a comparison of recoverable NRD under the PSRPA, CERCLA, and OPA. According to the National Park Service, while CERCLA and OPA only protect natural resources and associated services, the PSRPA “extends to cultural resources (e.g., historic sites, structures, objects, and landscapes) and physical facilities (e.g., signage, buildings, docks, and roads), and their associated services.” Thus, as stated the Handbook, the NPS and DOI frankly acknowledge that the PSRPA “covers a broader range of resources” than CERCLA and OPA, which “do not necessarily address injuries to cultural resources and park facilities.”

On the other hand, DOI also persists in maintaining that cultural resource damages are recoverable under CERCLA by articulating a distinction between recovery for cultural resource damages and recovery for the loss of cultural services provided by damaged natural resources. In 2008, the Department amended certain parts of the NRD assessment regulations set forth in the Code of Federal Regulations. In the comment and response to comment section of the preamble, the Department said, “[c]ultural, religious, and ceremonial losses that rise from the destruction of or injury to natural resources continue to be cognizable.” Again, however, there is no explanation offered to aid in understanding the practical difference between recovery for injury to cultural resources and recovery for injury to cultural services provided by a damaged natural resource. One wonders how the loss of a cultural service provided by a natural resource could ever differ economically or practically from the loss of a cultural resource.

The DOI’s confusing distinction appears to have had little success in convincing lawmakers and practitioners that there is a meaningful difference between the two theories of recovery. In 1996, various “Industry Petitioners” challenged the 1994 DOI regulations for NRD assessments before the D.C. Circuit in Kennecott Utah Copper Corp. v. U.S. Department of the Interior. There, the industry petitioners

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25. Id. at 1.
26. Id. at 6 (emphasis added).
27. Id. at 7.
challenged DOI’s instructions in the preamble that an NRD assessment may include the archaeological and cultural services provided by a natural resource, pointing out that archaeological and cultural resources are conspicuously absent from CERCLA’s definition of “natural resources.”\(^{30}\) Unfortunately, the court held that the issue was not ripe for review. However, in so holding, the court characterized DOI’s instructions as allowing for “recovery for injury to non-natural resources” and not, as DOI would have it, as allowing for recovery for injury to archaeological or cultural services provided by a natural resource.\(^{31}\)

Furthermore, in *Coeur D’Alene Tribe v. Asarco, Inc.*, the District Court for the District of Idaho determined that “cultural uses of water and soil by [the plaintiff Indian tribe] are not recoverable as NRD.”\(^{32}\) That is, the court held that cultural services supported by the water and soil resources at issue were not recoverable as NRD. Also, in its analysis of whether various plaintiffs were “trustees” of the resources sufficient to have standing to pursue NRD claims, the court was likewise not persuaded by the tribe’s argument that the natural resources “appertain[ed] to” it.\(^{33}\) The court noted that,

> While the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource “belong or be connected as a rightful part or attribute” for purposes of trusteeship analysis.\(^{34}\)

Legislative history also suggests that Congress did not intend for CERCLA to provide for recovery for injury to cultural resources. In 1995, U.S. Representative Elizabeth Furse (D-Ore.), during a hearing of the Commerce, Trade, and Hazardous Materials Subcommittee, introduced an amendment to add to CERCLA a provision that would allow for the “recovery of NRD for so-called non-use values.”\(^{35}\) In language similar to DOI’s sometimes-used guidance that NRD assessments may include losses of archeological or cultural services provided by a resource, the amendment was described as providing for compensation under CERCLA’s NRD provisions for the “intangible... aesthetic, cultural and religious values attached to natural resources that have been destroyed or damaged by toxic contamination.”\(^{36}\) Representative Furse further explained that without the amendment she proposed, CERCLA would not allow for recovery of damages accounting

\(^{30}\) Id. at 1222.

\(^{31}\) Id.


\(^{33}\) Id. at 1117.

\(^{34}\) Id. (citing WEBSTER’S NEW COLLEGIATE DICTIONARY 54 (1979)).


\(^{36}\) Id.
for the cultural importance of an injured natural resource. By way of example, she described Indian tribes that rely on salmon from the Columbia River for important tribal ceremonies. As explained by Representative Furse, the amendment was necessary to allow for compensation to Indian tribes for loss of that cultural ceremony stemming from injury to the salmon or the salmon’s habitat.

However, this cultural resource amendment to CERCLA was defeated. Representative (now Senator) Michael Crapo (R-Idaho) opposed the amendment, suggesting that it was tantamount to including a punitive damages provision in CERCLA, since recovery for injuries to such non-use values went “beyond” recovery for actual damages, remediation, clean-up, and restoration. Representative Michael Oxley (R-Ohio) agreed that the proposed amendment added an opportunity for “punitive” recovery to CERCLA and was not directed toward achieving cleanup or restoration of a natural resource. Representative Furse’s amendment was not approved, and did not proceed out of committee. Thus, evidence suggests that Congress did not intend for CERCLA to provide recovery for injury to cultural services as NRD.

Notwithstanding that CERCLA’s resource definition excludes reference to “non-living” or “cultural” resources, the challenge to the 1994 regulations in Kennecott, the cultural resource damages amendment’s defeat in 1995, and the 2003 Couer D’Alene decision holding that injuries to cultural services are not recoverable as NRD under CERCLA, with the 1994 assessment regulations and the 2008 amendments to the same, DOI continues to “read into” CERCLA a mechanism for NRD recovery for cultural injuries. But DOI’s attempt to create an exception allowing for recovery of cultural resource damages when couched as lost cultural services provided by an injured natural resource splits too fine a hair. It is unpersuasive and confusing. And practically, it is a distinction without a difference.

As demonstrated by the courts and lawmakers discussed herein, there is no meaningful, practicable difference between the loss of a cultural resource and the loss of a cultural service provided by a natural resource; these losses are the same, and are not divisible or different. While the Department may continue to maintain that losses of “cultural services” can be recovered, as discussed herein there is ample evidence to suggest otherwise. Moreover, CERCLA’s NRD provisions contain no definitions or passages indicating that damages to “cultural resources” or “cultural services” are compensable as NRD, and this author has likewise

37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
located no federal or state cases holding that injuries to “cultural resources” or “cultural services” are recoverable as NRD under CERCLA.42

As has often been repeated, CERCLA’s primary purposes are to ensure timely and effective cleanup of waste disposal sites, and to ensure that the parties responsible for such waste bear the costs of restoration and remediation.43 In fact, the Department’s 2008 amendments to the NRD assessment regulations were designed to emphasize restoration of resources over monetary damages.44 CERCLA notably excludes “cultural resources” from its definition of natural resources. Therefore, cultural resource damages cannot be recovered as NRD, regardless of whether couched as losses of cultural services provided by a natural resource. These losses are the same, and until and unless Congress amends CERCLA, cultural resource damages are not recoverable.

42. The author additionally located no federal or state cases awarding NRD under CERCLA for cultural uses, cultural losses, or cultural values.
43. Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).