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Brief for the Appellant, Tyler-2 Mining, Inc.: Sixth Annual Pace National Environmental Moot Court Competition

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Civ. No. 93-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF NEW UNION

and

TIPPECANOE LOGGING CO.,

Appellees

v.

TYLER-2 MINING, INC.,

Appellant,

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for the Appellant*
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* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED

I. May the New Union Department of Natural Resources exercise CERCLA natural resource damage trusteeship over the area affected by the chemical spill on April 27, 1992, onto land owned by Tippecanoe Logging Co.?

II. Is the Tippecanoe Logging Co. excused from liability under CERCLA sec. 107(b) under any of the defenses listed or a combination of them?

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STATEMENT OF THE CASE

A. *PROCEEDINGS BELOW*

Appellant, Tyler-2 Mining Inc., has appealed the decision of the district court on the issues of trusteeship and liability resulting from a hazardous waste incident.

In September 1992, the New Union Department of Natural Resources filed suit in the United States District Court for the District of New Union. The suit sought natural resource damages from Tyler-2 Mining Inc. and Tippecanoe Logging Co.

B. *STATEMENT OF FACTS*

Tyler-2 Mining Inc., (T2M) owns and operates a unionite ore mine on land located within Harrison Forest. The property is commonly referred to as Site 18. T2M's property is surrounded by land owned by Tippecanoe Logging Company (TLC), one of the nation's largest producers of forest products. (R. 1). After discovering a rich vein of unionite ore on Site 18, TLC sold the property to Mine-Finders Inc. Mine-Finders resold the property to T2M.

A small local company, T2M purchased Site 18 from Mine-Finders to mine the ore and, also, to provide alternative employment for the local community. At the time, the Harrison Forest community was dependant upon agriculture and forest products as the predominate basis of its economy. (R. 2). It was hoped that the mine would diversify the community's economic base.

In both transactions the property was sold for cash in fee simple absolute. The only method of ground access to Site 18 is along Access Road #5, a private road. TLC owns and maintains Access Road #5. (R. 2). When T2M purchased Site 18, its deed included a "transferable right of entry and exit to Site 18 on Access Road #5." (R. 2). The deed from TLC to Mine-Finders included the same right of entry provision.

Since purchasing the site in 1989, T2M has operated its mine in complete compliance with all federal and state regulations. All required permits have been obtained from the New Union Department of Environmental Protection (NUDEP). (R. 2). As part of the transfer from Mine-Finders to T2M, a deed provision was incorporated that required T2M to have the operational and maintenance status of a surface impoundment inspected annually, by a NUDEP approved independent contractor. An annual environmental audit, conducted by an independent firm, is also required by the provision. (R. 2-3). The independent contractor clause was inserted in the deed to obtain zoning approval from the Harrison County Board of Supervisors. (R. 2).

The process that T2M uses to "wash waste rock away from the unionite ore" produces a highly acidic leachate. (R.

2). Chemicals in the leachate are especially toxic to plant life. (R. 2). A surface impoundment collects the leachate. The leachate is transported off site by truck to a licensed incinerator at 45 day intervals. (R. 2).

On April 27, 1992 a crack developed in the wall of the surface impoundment. Within fifteen minutes the leachate had spread onto land owned by TLC. (R. 3). The land where the leachate came to be located is the habitat of two endangered species (the purple daisy and the blue robin) and one species which a petition to list as endangered has been filed (the green swallow). The only known habitat of the species of wild flower known as the purple daisy is on TLC's property in Harrison Forest. The purple daisy is listed as endangered under 16 U.S.C. sec. 1531 of the Endangered Species Act. (R. 1). Every fourth year the green swallow lays its eggs on the leaves of the purple daisy; this is the only place green swallows lay their eggs. Purple daisies receive an essential nutrient from the egg shells of the green swallow. The blue robin's only known habitat is on TLC's property within Harrison Forest.

As a result of the leachate deposition on TLC's property: 10% of the former population of purple daisies remain alive, and the trees and shrubs where the blue robins nest will be dead within five to eight years. (R. 3). NUDNR filed suit in the United States District Court for the District of New Union to compel T2M and TLC to provide funding for a repropagation and habitat study for the affected species. (R. 3). NUDNR has been designated as the government entity representing federal and state interests. (R. 3-4). NUDNR asserts that under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a)(1)-(4)(c) both T2M and TLC are responsible parties for the natural resource damages. In addition, NUDNR contends it has authority to act in the capacity of a natural resource trustee over the privately owned land of TLC. (R. 3).

SUMMARY OF ARGUMENT

The district court ruled that a trusteeship could be asserted over private property even though the regulations providing for the establishment of a trusteeship do not clearly indicate that such a trusteeship can be maintained. In interpreting the statute in such a manner, the court has determined congressional intent in an area where Congress had the power to regulate, had they so desired. The absence of such wording in the regulation gives clear indication Congress had no desire to regulate the use of private property and to leave this regulation to the states.

The district court excused TLC from liability based on the framework of the statutory defenses allowed under CERCLA § 107(b). TLC is a covered person under CERCLA § 107(a)(1). This liability is, by definition, strict, joint and severable. TLC can not receive relief from the limited statutory provisions provided for in CERCLA § 107(b) as Congress did not provide an exception from CERCLA liability for landowners like TLC.

ARGUMENT I

I. THE NEW UNION DEPARTMENT OF NATURAL RESOURCES CAN NOT EXERCISE NATURAL RESOURCE DAMAGE TRUSTEESHIP OVER TIPPECANOE LOGGING COMPANY'S PRIVATELY OWNED LAND.

A. *The trial court inappropriately asserted a natural resources trusteeship over TLC's property.*

The District Court's decision concerning natural resources liability under CERCLA was based on the interpretation of both CERCLA and the Endangered Species Act. (R. 5). Its holding was based on a question of law and appellate review, therefore, is de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated [as] questions of law (reviewable de novo) . . .").

B. *The plain language of CERCLA does not support imposing a natural resources trusteeship over privately owned land.*

"In attempting to discern the intent of Congress in enacting a particular statutory section, [the court] must examine the language of the statute and, if there is ambiguity, the policy behind it. The starting point is always the plain meaning of the words used." *Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1488 (1989). Whether the intent of Congress is "clear and unambiguous does not depend on whether a particular phrase of the statutory text standing all alone . . . [r]ather, the court must look beyond "the particular statutory language at issue" and examine "the language and design of the statute as a whole." *Ohio v. United States Dept. of Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989)(quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 language concerning when a state or federal authority may properly impose a trusteeship over natural resources is plain and unambiguous. Trusteeship may only be imposed over those resources that are either owned, controlled, or managed by a governmental authority. 42 U.S.C. § 9607(f)(1) (1980). Specifically, CERCLA § 107(f)(1) states that "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 . . ." 42 U.S.C. § 9607(f)(1). [*emphasis added*]. Further, the statute provides that when seeking natural resource damages, "the President, or the authorized representative of any State, shall act on behalf of the public *as trustee* of such natural resources to recover for such damages." 42 U.S.C. § 9607(f)(2)(A). [*emphasis added*].

The words "belonging to, managed by, controlled by, or appertaining to" restrict the ability of the government to assert a trusteeship to those natural resources over which the government can assert one of the statutorily indicated interests. *Ohio v. United States Dept. of Interior*, 880 F.2d at 459 (rejecting the argument that CERCLA "covers injuries to any

land, water, air, fish and wildlife that exist 'within [a] State' —a reading which, if true, would establish natural resource damage liability for harm to all private as well as public property."). Even allowing for the statute's broad remedial purpose, these words cannot be read out of the statute where they can otherwise be given meaning. *Stepan Chem. Co.*, 713 F. Supp. 1484 (D. Pa. 1989) (wherein the court looked to the clear and unambiguous language of CERCLA and the policies behind the act and strictly construed the statutory definition of "state" as applied to the NCP to exclude municipalities).

To give meaning to these words and, therefore, to bring itself within the statute, the alleged trustee must demonstrate that it has one of the listed interests in the natural resources located on the land. However:

> It should be noted, however, that while the statute excludes purely private resources, it clearly does not limit the definition of 'natural resources' to resources owned by a government. If that were the meaning of sec. 101(16), then all the phrases other than 'belonging to' would be surplusage. If the words 'managed by, held in trust by, appertaining to, or otherwise controlled by' mean anything at all, they must refer to certain types of governmental (federal, state or local) interests in privately-owned property.

Ohio v. United States Dept. of Interior, 880 F.2d at 460.

These interests are not present on privately owned property, such as TLC's, which is owned in fee simple by the private landowner and where the owner has complied with all statutory and deed restrictions that may have been imposed on the property by the state authority.

C. *The legislative history corroborates the interpretation inferred by the statute's plain language.*

"The legislative history of CERCLA further illustrates that damage to private property — absent any government involvement, management or control — is not covered by the natural resource damage provisions of the statute. *Ohio v. United States Dept. of Interior*, 880 F.2d at 460. Had Con-

gress intended natural resource damages to be recoverable for damage done to land, fish, wildlife, or other biota on privately owned land it could have done so simply by leaving out the restrictive language. *Id.* This suggestion was not only considered by the Congress, but rejected when the final version of CERCLA was adopted. *Id.* ("Congress quite deliberately excluded purely private property from the gambit of the natural resource damage provisions.").[1]

D. *NUDNR did not satisfy its burden of proving an interest in the natural resources on TLC's property.*

The NUDNR was designated to represent both the federal and the state trustee interests. In order for the NUDNR trustee to collect under CERCLA § 107(f)(1) it must first prove that it has either a state or a federal interest to assert. 42 U.S.C. § 9607. As discussed above, that interest must be either by the way of ownership, management, control, or trust over the natural resource.

1. New Union does not own, manage, or control natural resources on TLC's property.

The state of New Union did not have ownership interests in either the land or over the wildlife on the land. (R. 1). ("TLC owns large tracts of forests in six states. One of TLC's tracts, most of Harrison Forest in the State of New Union . . ."). Nor does New Union manage or control the land or its resources. *Id.* In fact, it has allowed the forest, which includes the waste site, to be logged by TLC. *Id.* ("One of TLC's

1. The full extent of the section's applicability to privately owned *natural resources* was called into question by Department of Interior regulations and subsequent argument in this case. The Court of Appeals remanded the regulations back to the department for clarification on this point. *See Ohio v. United States Dept. of Interior*, 880 F.2d at 461. Consistent with the Ohio court's interpretation of section 101(16), the department subsequently proposed rules indicating that "The Department never intended to suggest that the applicability of the rule hinges solely on ownership of a resource by the government entity." Natural Resource Damage Assessments, 43 C.F.R. Part 11 (proposed July 22, 1993).

tracts, . . . is 18 square miles of some of the finest old growth hardwood forests left in the United States.").

2. The common law public trust doctrine does not support NUDNR's claim to the wildlife on TLC's property.

The common law public trust doctrine provides the remaining possibility for New Union to assert a claim to either TLC's land or to the resources on the land. The NUDNR has not demonstrated that the doctrine applies to this situation. The "New Union Supreme Court held in 1979 that the public trust does not include privately held land." (R. 4). Therefore, the state must be able to exert an interest over the natural resources on the land, i.e., its wildlife, in order to bring itself within CERCLA § 107(f)(1).

"New Union's law regarding wildlife follows the common law rule." (R. 4). The common law rule has been subject to flux in recent years. It is unlikely, however, that New Union's Supreme Court would find that the public trust doctrine applied to the natural resources located on TLC's land.

The public trust doctrine is a common law rule that allows states the "authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Philips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474 (1988); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). *Philips Petroleum* reaffirmed the U.S. Supreme Court's "longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide." *Philips Petroleum*, 484 U.S. at 475, 476. The state interest in the lands held in the public trust includes "bathing, swimming, recreation, fishing, and mineral development." *Philips Petroleum*, 484 U.S. at 482. Given this background, the Court has construed the public trust doctrine to apply to natural resources either within the state's navigable waters or within waters subject to the ebb and flow of the tide. *Id.* at 478-79.

While the Supreme Court did not retreat from its view that it is within the state's authority to define the limits of

the lands within their boundaries that are held in the public trust, the Court may have limited that rule in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The *Hughes* Court rejected the long held notion that "wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people." *Hughes*, 441 U.S. at 325, (quoting *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924)). In so doing:

> The Court overruled *Geer v. Connecticut*, 161 U.S. 519 (1896) invalidating on Commerce Clause grounds a state ban on interstate transportation of wildlife lawfully caught in the state and completing the long erosion of *Geer's* theory of state ownership of wildlife. The court recognized, however, that states retain an important interest in the regulation and conservation of wildlife and natural resources.

Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 671 (1st Cir. 1980).

The *Hughes* court affirmed, however, the *Geer* dissent's theory that ownership and commerce in wild game was "artificial and formalistic." *Hughes*, 441 U.S. at 328. The *Geer* dissent's view was that "[when] any animal . . . is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Hughes*, 441 U.S. at 328-29 (quoting *Geer*, 161 U.S., at 541 (Field, J., dissenting)).

The *Hughes* decision was grounded on the Commerce Clause, and not the public trust doctrine, so its effect on the various state definitions of wildlife held in the public trust is not absolute. *Id.* at 323. However, given that wild birds and windblown seeds do not recognize state boundaries, states should be reluctant to assert control over natural resources in the name of the public trust. The court cited Idaho Code sec. 36-103(a) to support its finding that "Idaho is the trustee on behalf of the citizens of Idaho of all Idaho's wildlife . . . Idaho is the proper party to bring a suit for damages to its natural

resources under CERCLA." *Idaho v. Southern Refrigerated Transp., Inc.*, 1991 WL 22479, at *5 (D. Idaho Jan. 24, 1991). The NUDNR has not cited a similar statute applicable in this action, relying, instead, on the common law public trust doctrine.

The species at issue in this case are particularly inappropriate for being part of the state public trust interest. The green swallow is migratory. (R. 1). ("Every fourth year, when the green swallows swoop through their flyway . . ."). This indicates that the swallow crosses state lines, making it directly subject to interstate commerce and the Commerce Clause. *Hughes*, 441 U.S. at 328. ("[E]ven state regulations of wild game have been held subject to the strictures of the Commerce Clause under the pretext of distinctions from *Geer*."). It lays its eggs on the purple daisy. Considering the impact that the purple daisy and the green swallow have on the tourism industry and the thousands of individuals from "around the world who fill motels and campgrounds throughout central New Union to watch the swallows' unique flying formations," anything that the legislature proposed concerning this wildlife would impact that national industry. (R. 1). "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970).

Additionally, the purple daisy falls under the federal protection of the Endangered Species Act, as does the blue robin. (R. 1-2). The ESA permits state statutes to be more restrictive than federal law concerning the endangered species. 16 U.S.C. § 1535(f). Even granting that provision, because of the nature of the species involved here, the strong federal interest, current U.S. Supreme Court holdings concerning state ownership of wildlife, and the interstate commerce issue it would be unlikely for the New Union Supreme Court to find that its public trust doctrine was appropriate to apply in this action. *Hughes*, 441 U.S. at 334 n. 15 (" 'In more recent years . . . the Court has recognized that the States' interest in regu-

lating and controlling those things they claim to 'own,' including wildlife, is by no means absolute.'" (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928)).

Since the state of New Union has not demonstrated a possessory, management, control, or trust interest in the natural resources found on TLC's land, it does not qualify as a CERCLA natural resources trustee for those resources.

E. *The NUDNR did not establish that the Endangered Species Act provided the federal government an interest within the meaning of CERCLA sufficient to bring the federal government within CERCLA § 107(f)(1).*

The lower court held that the ESA reflected "a congressional decision to exert substantial governmental control over endangered species no matter where they are located, and that the NUDNR can exercise trusteeship over the affected area." (R. 5). The plain language of the ESA does not support this holding.

1. The Endangered Species Act does not impose a trustee relationship on the federal government for the benefit of endangered species.

Although the court did not explain the basis for this conclusion, the language of the opinion indicates the court's belief that the ESA puts the federal government in the position of a trustee for endangered species. The plain language of the statute does not support this conclusion as there is no provision in the act that designates the federal government, or anyone, to be an endangered species trustee. 16 U.S.C. §§ 1531-44. In the absence of such a provision, one should not be inferred. The court cannot construe CERCLA § 107(a)(4)(A) to allow a municipality to proceed as a state when there is no support in either the statutory language or the legislative history of CERCLA for such a result. *Stepan Chem. Co.*, 713 F. Supp. at 1488

Initially, it is noted that Congress is well capable of writing a provision appointing a trustee for natural resources. When Congress has intended for a trustee to be designated, it has said so. For example: "The President shall designate . . . Federal officials who shall act on behalf of the public as trustees for natural resources." 42 U.S.C. § 9607(f)(2)(a); "The Governor of each State shall designate . . . trustees for natural resources." 42 U.S.C. § 9607 (f)(2)(b). *See also* Oil Pollution Act of 1990 33 U.S.C. §§ 1006(b)(3), 2706(b)(2), which mirror the above-cited CERCLA provisions. The ESA does not contain a trustee designation provision.

It is true that the ESA reflects Congress' intent to take what steps are necessary to protect endangered species. 16 U.S.C. § 1531(a)-(b). Nonetheless, the ESA controls only what steps the Secretary of the Interior is to take when a species is listed or is proposed for listing. 16 U.S.C. §§ 1533-36. The statute's extensive and explicit directions to the Secretary do not place him in the position of a trustee for these resources. A trustee is required to use his trust for the sole benefit of the beneficiary. The ESA requires the Secretary to weigh the costs and benefits associated with designating a particular habitat as "critical," and it permits the secretary to allow certain "takings" and exceptions. 16 U.S.C. §§ 1533(6)(2), 1539. These actions are not consistent with the ordinary responsibilities of a trustee.

2. The Endangered Species Act does not impose a managerial role on the federal government for the benefit of endangered species.

If the lower court did not conclude that the ESA put the federal government in the position of a trustee for endangered species, the language of CERCLA requires that the court must at least have concluded that the ESA gave the government a managerial or controlling role over the natural resources. Such a conclusion would be contrary to the statutory language. The ESA has not placed the federal government in the position of managing or controlling TLC's property or the resources on it.

The ESA requires that the Secretary of the Interior designate critical habitat for the effected species, and that he promulgate regulations prohibiting actions that would endanger the species' survival. 16 U.S.C. §§ 1533(b)(2), 1533(4)(d). In addition, "the Secretary shall develop and implement plans . . . for the conservation and survival of endangered species." 16 U.S.C. § 1533(4)(F)(1). In the case of the blue robin and the purple daisy, these regulations apparently allowed TLC to continue logging operations in the forest. (R. 1). Nothing in the opinion indicates otherwise, so the logging company could log as long as its operations did not impact the species.

Further, just because the secretary requires precautions to be taken or prohibits certain acts does not mean that the secretary is "managing" or "controlling" a particular resource even though ESA requires that the Secretary, to the maximum extent practicable incorporate in each plan "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species." 16 U.S.C. § 1533(f)(1)(b)(i). To hold otherwise would mean that every time an authority promulgated a regulation concerning wildlife or land, or every time that a county zoning board passed a zoning regulation, that the government was "managing or controlling" the resource within the meaning of CERCLA § 107(f)(1). This reading would be inconsistent with Congress' expressed desire to limit the application of this section. The difference in CERCLA's provisions concerning the treatment of the private versus United States and states suggests that Congress "could have intended to limit the right of recovery for natural resource damages to the United States and the states." *Mayor and Council of the Borough of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1049 (1993). "While CERCLA in its broadest terms may be viewed as legislation to ensure the cleanup of toxic waste sites, the legislative history of the Act, . . . suggests a concern on the part of Congress that unwise and excessive clean-up activity be restrained." *Stepan Chem. Co.*, 713 F. Supp. at 1488 n.12.

F. *The federal government does not have any other interest in the property or its natural resources to bring it within CERCLA § 107(f)(1).*

Without the ability to use the ESA as an indication of statutorily mandated trusteeship, management, or control in the TLC property, the federal government must be able to demonstrate an alternative basis for asserting a CERCLA § 107(f)(1) trusteeship. This it cannot do. It does not own the property or the resources on it. Nor is the property part of any federal management program. Therefore, the lower court's holding that a CERCLA sec. 107(f)(1) natural resources trusteeship was proper must be reversed. Where the statutory language is plain, the court's duty is clear; apply the statute to the facts. CERCLA § 107(f)(1) states that the state authority shall designate a natural resources trustee when those natural resources belong to, are managed by, are controlled by, or are appertaining to the state. Although the scope of CERCLA is intended to be broad, the language of the statute and the legislative intent make clear that CERCLA is not without limits. It does not apply to natural resources on privately owned land.

The natural resources at issue in this case are located on private land. Unless the state or federal government can prove that they are managing or controlling these resources, the NUDNR has no basis for asserting a CERCLA § 107(f)(1) trusteeship over TLC's property. The NUDNR has not established this basis. The state of New Union does not manage or control the wildlife on the timber company's property. Despite the federal government's strong interest in protecting the endangered species in the forest, the Endangered Species Act does not create a managerial or controlling role for the federal government.

Without ownership, management, or control the state cannot assert a natural resources trusteeship over TLC's land. Therefore, the District Court's decision must be reversed.

ARGUMENT II

II. TLC IS NOT EXCUSED FROM LIABILITY BY CERCLA § 107(b) DEFENSES.

A. *Legislative framework details liability standards and applicable defenses allowed by the CERCLA statute.*

The statutory framework of CERCLA imposes liability on TLC. TLC has not established by a preponderance of the evidence that it falls within the limited statutory exceptions for parties who are otherwise liable. The intent of Congress in enacting CERCLA was to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment." Pub. L. No. 96-510, 94 Stat. 2767 at 3038 (1980). As a result, CERCLA § 107(a) provides wide sweeping and expansive coverage of parties liable under CERCLA. In contrast CERCLA § 107(b) provides a limited number of defenses which have been narrowly interpreted.

B. *TLC is Liable for Response Costs and Natural Resources Damages as Defined in § 107(a)(1) of CERCLA.*

To impose liability on TLC, NUDNR and T2M must establish that: (1) the area affected by the chemical spill is a facility; (2) there has been a release or a threatened release of a hazardous substance from the facility; (3) response costs were incurred as a result of the release or threatened release; (4) TLC meets the criteria for inclusion in one of CERCLA's classes of persons subject to liability. *Lincoln Properties, Ltd. v. Higgins*, No. CIV.S-91-760DFL/GGH, 1993 WL 217429, at *17 (E.D. Cal. Jan. 21,1993). The affected area, where the hazardous leachate came to be located is a facility as defined in CERCLA "any site or area where a hazardous substance has been deposited . . . or otherwise come to be located." 42 U.S.C § 9601(9). Courts have given this definition a broad interpretation. *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1360 (9th Cir. 1990) ("Structure built with asbestos insulation and fire retardants is a "facility" within the

meaning of CERCLA"); *Lincoln Properties*, 1993 WL 217429 at *18. (dry cleaning shops where hazardous substance had "come to be located" held to be facilities).

A hazardous substance, the highly acidic leachate, escaped from the facility into the environment. CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(20). "The presence of hazardous substances in the soil, surface water, or groundwater of a site demonstrates a 'release'." *Lincoln Properties* 1993 WL 217429 at *19 (citing to *United States v. Hardage*, 761 F. Supp. 1501, 1510 (W.D. OKL. 1990)). Leachate from the facility was released into the soil and the root systems of both the purple daisies and the trees and shrubs, where the blue robins nest. (R. 3).

NUDEP responded to the "release." NUDEP conducted an on-site assessment of the spill area; NUDEP submitted a bill for $21,000 to TLC and T2M for expenses NUDEP incurred while conducting the on-site assessment. T2M paid the entire bill. In addition, NUDNR has instituted this lawsuit seeking natural resource damages, from TLC and T2M.

CERCLA § 107(a)(1) states that liability will be imposed on "the owner or operator of a facility." 42 U.S.C. § 9607 (a)(1). It is undisputed TLC is the owner of the property affected by the chemical spill. (R. 1). Since TLC is the owner of the facility, TLC is jointly and severally liable for cleanup costs and natural resource damages assessed by this court, unless TLC proves it is entitled to one or a combination of the statutorily defined defenses. *United States v. Monsanto*, 858 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 1356 (1989) (joint and several liability appropriate where traditional principles of common law would require it); *United States v. Marisol, Inc.*, 725 F. Supp. 833, 842 (M.D. Pa. 1989) (courts have consistently held liability under CERCLA is joint and several, except where harm is divisible).

C. *TLC Does Not Qualify for Third Party Defense, Act of God Defense, or a Combination of Defenses.*

TLC asserts that it is excused from liability by CERCLA § 107(b)'s third-party defense and act of God defense, either alone or in combination. Exempt from CERCLA liability under CERCLA § 107 defenses are those:

> who can, establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance and the damages resulting therefrom were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . ., if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against any foreseeable acts or omissions of any such third party and the consequences that could forseeably result from such acts or omissions; (4) any combination of the foregoing paragraphs. 42 U.S.C § 9607(b).

The district court found TLC not liable for natural resource damages based on a combination of CERCLA § 107(b) defenses. Judge Remus based his opinion on the following factors: (1) "the T2M site was clean when TLC sold it to T2M"; (2) "TLC had no direct deed relationship with T2M"; (3) "TLC had nothing to do with T2M's operations"; (4) "heavy rains contributed to the impoundment break." (R. 6).

First, the T2M site is not the property for which NUDNR is seeking natural resource damages. Liability is being assessed against TLC as the current owner of a "facility," not as the former owner of Site 18.

Next, contrary to the finding of the district court, TLC does have a direct deed relationship with T2M. The deed T2M received for the purchase of Site 18 includes a transferable right of entry and exit along Access Road #5. TLC owns and

maintains Access Road #5. The same transferable right of entry and exit was in the deed executed between TLC and MineFinders. (R. 5). TLC is fully aware that the only access to into and out of the T2M property is by way of TLC's access road. TLC also understands that this access road, while not a possessory interest for T2M, acts as a basis for a continuing contractual relationship between the two parties. By severing this relationship, TLC would be held accountable. *See Hinman v. Barnes*, 66 N.E.2d 911, 915 (1946); Restatement (First) of Property § 450 (1936).

Since TLC has a contractual relationship with T2M, to escape liability under CERCLA's third-party defense TLC must prove that it "exercised due care with respect to the hazardous substance concerned" and "took precautions against foreseeable acts or omissions" of T2M and its contractors. 42 U.S.C § 9607(b)(3)(a)-(b); (R. 5). TLC was aware that Access Road #5 provides the only method by land to enter or exit Site 18. (R. 2). TLC was aware that T2M would use Site 18 to mine unionite ore. In fact it was the discovery of the "richest vein of ore" that precipitated TLC's decision to sell Site 18. (R. 2). The waste leachate from T2M's mining operation is hauled off Site 18 by trucks entering and exiting along Access Road #5. *Id.*

TLC was aware of T2M's mining operations, yet TLC failed to exercise precautionary measures to protect its property. Installation of a swale or berm to direct drainage away from the portion of TLC's property where the endangered species are located would have prevented or lessened the severity of damage to the endangered species habitat. TLC did not notify T2M that the mining operations were located within the proximity of endangered species' habitat. TLC did not request T2M construct a diversion to prevent run off from the mining operation from entering the endangered species' habitat.

TLC also asserts that a "contractual relationship" as defined in CERCLA sec. 101(35) only takes into account a deed which is executed after the release of a hazardous substance on the property. (R. 6). TLC's assertion is contrary to the plain language of statute, CERCLA § 101(35) states:

> "contractual relationship" for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession, UNLESS the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i),(ii),(iii) is also established by the defendant. [emphasis added].

The "contractual relationship" definition was added as part of the Superfund Amendments and Reauthorization Act of 1986. The purpose of the definition is to "clarify and confirm" the defense to liability landowners may have "under limited circumstances." H.R. Rep. No. 99-962, 99th Cong., 2d Sess. at 3279 (1986). The definition is framed in the negative. A land contract or deed subjects the defendant to liability UNLESS acquisition of the property where the facility is located occurred after disposal of a hazardous substance on the property. J.B. Ruhl, *Third-Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S.Tex. L.J. 291, 307 (1988). All "land contracts, deeds or other instruments transferring title or possession" are included as contractual relationships creating liability unless the party is able to prove a third-party defense under CERCLA § 107(b)(3). A "contractual relationship" under CERCLA § 101(35) is not limited to deeds executed after disposal of a hazardous substance.

Third, T2M agrees that the operation and maintenance of the surface impoundment was conducted solely by T2M and T2M's contractors, all of which are "third parties" in relation to TLC. (R. 5). However, the legislative history of CERCLA shows Congress "specifically rejected including a causation requirement in CERCLA § 106(a)." *New York v. Shore Realty Co.*, 759 F.2d 1032, 1044 (2d Cir. 1985). As a result, in CERCLA claims the causation element is eliminated from the plaintiff's case. Persons who are otherwise liable cannot escape liability based on their lack of contribution to the release or threat of release. *Marisol*, 725 F. Supp. at 840. Liability has been adjudged to be strict, joint and sev-

eral. As a result a party's liability for costs and damages arises "without any evidence of fault on their part but merely by their status." H.R. Rep. No. 99-253(V), 99th Cong., 2d Sess. at 3125 (1986).

Fourth, the district court correctly held that the heaviest rainfall in ten years is not the type of unanticipated natural disaster or exceptional natural phenomenon that Congress had in mind as an act of God. (R. 6). 42 U.S.C. § 9601(1). The court in *United States v. Stringfellow*, 661 F. Supp. 1053, (C.D. Cal. 1987) dismissed the defendant's claim that heavy rainfall was a "natural disaster which constituted an act of God." The court found heavy rainfall to be a foreseeable event. Therefore, the damage caused by the rainfall was preventable, through properly designed storm water channels. *Id.* at 1061. In addition, while T2M has stipulated that the "heavy volume of liquid being held" caused the crack in the impoundment, T2M asserts that the crack could have developed even without a rain event. The impoundment was only "nearly as full as it becomes when it is emptied on the 45th day." (R. 3). The crack in the structure could have as easily developed by end of the 45th day without the heavy rains. The volume of liquid at the time of crack on April 27, 1992 was no greater than it would normally have been at the end of the 45th day of operation. (R. 3).

As a result, TLC cannot escape liability under an act of God defense. Since TLC has not established either a third-party defense or an act of God defense, the combination of defenses described in CERCLA § 107 is not available to TLC.

Clearly, under the plain language of CERCLA TLC is a "covered person" that is not excused from liability by the statutorily defined defenses set forth in section 107(b). Yet, TLC contends the court should not let the form of the statute override an equitable interpretation of the statute's substance. According to TLC, while the scope of CERCLA lability is broad and expansive, Congress' intention was to pull in as many responsible parties as possible, not to impose liability on the innocent victims of a hazardous substance release or threatened release.

In response, T2M asserts that it has long been established that when the language of the statute is "clear it is conclusive" there is nothing for the courts to interpret. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1983); *Webster v. Luther*, 163 U.S. 331, 342 (1896).

D. *TLC can not be construed as some type of innocent bystander who should not be liable for the damage caused to the critical habitat. Selling the property through a third party broker does not absolve TLC from its responsibility to the environment.*

In addition to the clear language of the statute, T2M contends that it would be against public policy to have a property owner such as T2M be held liable for the entire cost of the accident, to include the re-establishment of a habitat for the purple daisy. In this case, TLC was fully aware of what type of operation would be conducted on the property after it was sold. It was TLC who initiated the contact with Mine-Finders after discovery of the vein of unionite ore. If TLC is not held liable for the natural resource damages, it will receive a windfall profit. Prior to the chemical spill, TLC could not harvest timber in or around the area of the endangered species habitat without federal approval.[2] If the endangered species are relocated to a state owned wilderness area, their former habitat, on TLC's property, will be available for commercial timber harvest. TLC was also fully aware of the location of the impoundment and the contents of the impoundment. However, even though TLC is known as an environmentally conscious company, no steps were taken to protect the critical habitat located adjacent to the impoundment. The cost to TLC to protect the habitat would have been

2. Under the Endangered Species Act 16 U.S.C. § 1539 (section 10) TLC would need to submit a conservation plan. The plan would need to demonstrate that any taking of endangered species would be incidental to lawful activity and any incidental taking would be minimized. A "taking" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

minimal compared with the resulting damage costs associated with accident. Certainly, a company as large and profitable as TLC could afford to protect the small location of the habitat without incurring large costs. As a point of reference, TLC made $200,000 from the sale of the property, which equates to less than 1/15th of one percent of the profit generated by TLC in 1992.

T2M has conducted its mining operation in full accordance with all federal and state regulations. T2M has done everything the government requested and has been a responsible business operator. Conversely, by selling the property to the mining company and taking no precautions for the protection of the critical habitat, TLC has effectively reduced the economic potential in New Union. The loss of tourism dollars as a result of the accident will harm the local community but TLC will continue to log the area and profit from its operations. It is difficult to conjecture that this was the intent of Congress when CERCLA defenses were established.

CONCLUSION

For the foregoing reasons, Tyler-2 Mining Inc., respectfully requests this court reverse the findings of the district court.

Respectfully submitted

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