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Brief for Appellee: 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 12TH CIRCUIT

TIPPECANOE LOGGING COMPANY,

and

TYLER-2 MINING, INC.,

Appellants,

—against—

STATE OF NEW UNION,

Appellee.

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

BRIEF FOR APPELLEE*

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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. Whether the New Union Department of Natural Resources may exercise CERCLA natural resource trusteeship over the area affected by the hazardous substance on land owned by Tippecanoe Logging Company.

II. Whether Tippecanoe Logging Company may escape liability pursuant to 42 U.S.C. § 9607(b) under any of the defenses listed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEAL CASES

UNITED STATES DISTRICT COURT CASES

STATE COURT CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND LEGISLATION

MISCELLANEOUS

OPINIONS AND JUDGMENTS BELOW

The opinion of the District Court of New Union is unpublished and appears in the record on appeal, reproduced in Appendix A.

JURISDICTION

Jurisdiction is waived pursuant to Rule 4(c) of the official rules for the 1994 Sixth Annual National Environmental Law Moot Court Competition.

STATUTES AND REGULATIONS INVOLVED

The constitutional provisions and statutes relevant to the determination of the present case are listed in the Table of Authorities, contained at Appendix B.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the District of New Union, rendered April 23, 1993. Tippecanoe Logging Company ("TLC") and Tyler-2 Mining ("T2M") appeal from the District Court decision allowing the New Union Department of Natural Resources ("DNR") to exercise natural resource trusteeship over TLC's land pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(f). T2M and the State of New Union ("New Union") appeal from the District Court decision allowing TLC to raise defenses under 42 U.S.C. § 9607(b). Further, New Union has standing before this Court because the damage caused by the toxic spill violated its interest in preserving its natural resources. As substantive issues of law have been raised, this Court should review this appeal *de novo*.

STATEMENT OF FACTS

The fifty pairs of blue robins ("robin") which remain in the world and the purple daisy ("daisy") have been declared endangered under the Endangered Species Act ("ESA"), 16

U.S.C. § 1533. (R.2).[1] On April 27, 1992, a toxic spill in New Union's Harrison Forest destroyed ninety percent of the daisies and severely damaged the robin's critical habitat. (R.3). Within five to eight years, the trees and shrubs in the robin's habitat will be destroyed. (R.3). The robin has no known alternate habitats. (R.3). TLC, a large forest products company, owns eighteen square miles of Harrison Forest which is the only known habitat of both the robin and the daisy. (R.1-2). TLC and T2M, as owners of the parcels of land, are strictly liable under CERCLA for these damages because hazardous waste is located on their property. (R.4-5).

The green swallow ("swallow") also was injured by the spill. (R.2). The swallow, which is currently under United States Department of the Interior ("DOI") consideration for classification as an endangered species, has a symbiotic relationship with the daisy. (R.1). The swallow lays its eggs in the daisies' leaves and the egg shells add a critical nutrient to the daisies' soil. (R.1). The swallow's only known reproductive habitat is the daisy. (R.1).

The swallow is also economically significant to New Union. The swallows migrate to Harrison Forest on a quadrennial cycle to reproduce. (R.1). The movie "The Swallows of Cappuccino" has made the species famous outside of New Union. (R.1). Approximately thirty thousand tourists from around the world come to New Union to witness the swallows' unique flying formations. (R.1). These tourists provide significant revenue for New Union's economy. (R.1). The swallows are scheduled to return in 1995. (R.1).

Operating under the slogan "Give nature some TLC," TLC portrays itself as environmentally ethical. (R.1). However, when TLC discovered unionite ore in Harrison Forest, it parcelled off Site 18, the area with the richest vein of ore, for mining. (R.2). Site 18 was sold to Mine-Finders, Inc., a venture capital firm specializing in matching mining companies with new mining sites. (R.2). Two months later, Mine-Finders sold Site 18 to T2M. (R.2). Title to Site 18 was transferred

1. Cites to (R.—) refer to pages of the decision of the United States District Court for the District of New Union.

by deed in fee simple absolute, and included an easement, the right of entry and exit on Access Road #5. (R.2). Access Road #5 is the only means of ground access to Site 18, and is owned, operated and maintained by TLC. (R.2).

Before it would grant T2M zoning approval to develop the site, the Harrison County Board of Supervisors required T2M to insert additional provisions in its deed of sale. (R.2). T2M warranted that it would use an independent contractor who was approved by the New Union Department of Environmental Protection ("NUDEP") to operate and maintain the site. (R.2). Additionally, T2M was required to arrange an annual environmental audit and to correct promptly any deficiencies noted in that audit. (R.3). T2M holds all requisite permits under federally authorized programs administered by NUDEP. (R.2).

The mining activity on Site 18 caused the toxic spill in Harrison Forest on April 27, 1989. (R.2). The mining operations produced highly acidic leachate waste known to be especially toxic to plants. (R.2). This waste was stored in a surface impoundment adjacent to both the robin and daisy habitats. The impoundment was drained every forty-five days. (R.2). An inspection conducted four days before the spill revealed no deficiencies, yet on the day before the impoundment was to be drained a crack developed. (R.3). Though on the previous day it rained more heavily than it had in ten years, when the crack developed the impoundment was filled with forty-four days of waste. (R.3). From that crack, leachate waste poured from the impoundment, blanketing an area nearly one and a half times the size of the site. (Map, A-7).

NUDEP concluded that natural resource damages compensation was necessary to replace and restore the endangered species and their habitats the spill destroyed. (R.3). New Union seeks damages to study alternate habitats for the robin and to re-propagate the daisy in the New Union State Wilderness Area in preparation for the swallows' anticipated return in 1995. (R.4). New Union has designated the DNR as the trustee in order to protect these natural resources pursuant to 42 U.S.C. § 9607(f). (R.3).

SUMMARY OF THE ARGUMENT

New Union may assert trusteeship in order to protect the endangered species on privately owned land because they have substantial control over those resources. The DOI regulations permit government trusteeship over natural resources on privately-owned land when there is control or trust over those resources.

The daisies, robins, and swallows are natural resources which are controlled and held in trust by New Union. Natural resources include land, wildlife, and biota which are managed, held in trust, or otherwise controlled by the United States or any state government. These species are controlled and held in trust by the federal and state governments pursuant to the ESA, New Union's common law regarding wildlife, the public trust doctrine, and the doctrine of *parens patriae*.

Natural resource trusteeship over TLC's land affected by the hazardous waste is not a "taking" in violation of the Fifth Amendment. New Union's plan to exert trusteeship does not amount to a physical invasion of TLC's land. Acting as trustee, New Union would not interfere with any property interest or any reasonable development expectations that TLC might have in its land. Furthermore, a partial takings analysis does not apply because the area affected by the spill constitutes only a small portion of TLC's property.

TLC may not avail itself of any of CERCLA's enumerated defenses. The heaviest rainfall in ten years is not the kind of unpredictable event that qualifies as an act of God. Furthermore, TLC cannot successfully raise the third-party defense because it failed to prove by a preponderance of the evidence any of the elements of that defense. TLC has not shown that a third party was the sole cause of the release and subsequent harm. TLC owned and maintained Access Road #5, and Site 18's deed of sale and its provisions created indirect contractual relationships between TLC and T2M that were related to the handling of the leachate. Furthermore, TLC sold the land aware that it would eventually be mined, and cognizant of the site's proximity to the endangered species.

In light of this knowledge, TLC did not exercise due care or take any precautions against the foreseeable spill.

TLC also may not avail itself of the innocent landowner exception, because it did not acquire its land prior to the hazardous release. The exception requires that at the time the facility was "acquired," the defendant did not know and had no reason to know that a hazardous substance had been disposed there. This language contemplates *only* subsequent ownership and not the continual ownership that TLC exercised over the spill site.

Moreover, TLC should not be allowed to use the combination defense to escape liability because it has failed to establish all of the requisite elements of each affirmative defense. An interpretation which allows the elements of one defense to compensate for deficiencies in another would create absurd results. Such an interpretation would also be inconsistent with Congress' intent to make CERCLA's liability strict and to force polluters to clean up their toxic spills.

Since the plain meaning of CERCLA precludes the use of defenses other than those enumerated in the statute, equitable defenses are not recognized. In addition, the state is immune from equitable doctrines when it asserts public rights. Therefore, TLC may not assert any equitable defenses.

ARGUMENT

I. NEW UNION CORRECTLY ASSERTS NATURAL RESOURCE TRUSTEESHIP BECAUSE IT CONTROLS THE ENDANGERED SPECIES AND HOLDS THEM IN TRUST FOR THE PUBLIC.

New Union's substantial interest in preserving its natural resources enables it to exercise trusteeship over the contaminated area in order to protect the daisy, robin and swallow. These resources are appropriate subjects of natural resource trusteeship because New Union exercises control over them and holds them in trust for the public pursuant to both the ESA and its state police powers. Natural Resource Damage Assessments, 56 Fed. Reg. 19,752 (1991) (to be codified at 43 C.F.R. pt. 11 (proposed Apr. 29, 1991); *see State of*

Ohio v. United States Dep't of Interior, 880 F.2d 432, 459, 461 (D.C. Cir. 1989). Nor does New Union's assertion of trusteeship constitute a taking of private property as it is not denying TLC all economic value in its land. Accordingly, New Union has offered an adequate basis for trusteeship, and the decision of the District Court of New Union should be affirmed.

A. *New Union may assert trusteeship over TLC's land because it has substantial control over the resources located there.*

CERCLA's natural resource damage provisions apply to resources on privately-owned property when sufficient government control exists over the resources. *Ohio*, 880 F.2d at 459. Because New Union controls the daisy, robin and swallow pursuant to a grant of authority under the ESA, natural resource trusteeship over TLC's land is proper.

The daisy and the robin are endangered species and should be afforded the highest priority as their value is "incalculable." *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 187 (1978). Congress has determined that "any endangered species *anywhere* is of the utmost importance to mankind," *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (emphasis added), and thus, encourages control of endangered species and their critical habitats, even when found on private land. S. REP. NO. 307, 93rd Cong., 1st Sess. 7 (1973). When Congress enacted the ESA in 1973, it set up a comprehensive regulatory scheme designed to preserve endangered species and conserve their ecosystems. *See Tennessee Valley Auth.*, 437 U.S. at 153.

Pursuant to the regulatory powers under the ESA, the Secretary of the Interior is authorized to exercise substantial control over the regulation of the conservation of endangered species. *Id.* The Secretary of the Interior, however, "shall cooperate to the maximum extent practicable with the States . . . for the purpose of conserving any endangered species. . . ." 16 U.S.C. § 1535(a). Under the ESA, New Union is authorized to administer an endangered species conservation pro-

gram, and in fact authorizes them to administer a program that is more stringent than a federal conservation program. 16 U.S.C. § 1535(f). Through this grant of power, New Union controls the daisy, robin and swallow and has thus established an adequate basis for asserting natural resource trusteeship for their protection.

The daisies are subject to the ESA because they were destroyed in violation of New Union's criminal trespass law. The ESA explicitly prohibits the destruction of endangered plants on any land when the destruction violates a state law or regulation. 16 U.S.C. § 1538(a)(2)(B). The destruction of natural resources on private property constitutes a trespass. *See, e.g., Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 318 (W.D. Tenn. 1986), *rev'd on other grounds*, 855 F.2d 1188 (6th Cir. 1988) (trespass resulted when chemicals were moved from waste disposal site, through underground aquifer, into plaintiff's water wells). The ESA's prohibition specifically includes violations of state criminal trespass laws. 16 U.S.C. § 1538(a)(2)(B); S. REP. NO. 240, 100th Cong., 1st Sess. (1987). Similarly, damage to resources held in trust by the government has been deemed a trespass. *See, e.g., Satsky v. Paramount Communications, Inc.*, 778 F. Supp. 505, 511 (D. Colo. 1991) (State could bring trespass claim in its *parens patriae* capacity); *see also In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 994, 1000 (D. Mass. 1989) (State may sue in trespass for injury to property it holds in trust). The daisy is a proper subject for ESA protection, and thus, for natural resource trusteeship, because the destruction of ninety percent of all existing daisies constituted a violation of New Union's criminal trespass law.

The robin is also protected under the ESA because its critical habitat was "taken" as a result of the toxic spill. The ESA defines "take" as including, but not limited to, harming, harassing or killing any member of an endangered species. 16 U.S.C. § 1532(19). "Harm" and "harass" have been broadly interpreted to include significant habitat degradation which is likely to injure a species by impairing the normal breeding, feeding or sheltering patterns of that species. *Palila v. Hawaii Dep't of Land and Natural Resources*, 852

F.2d 1106, 1108 (9th Cir. 1988) (*Palila II*). In *Palila*, an endangered bird received both its food and shelter from the mature Mamane tree. The court held that animals grazing on Mamane seedlings constituted a "harm" because the seedlings could not mature and thus resulted in a future loss of the endangered bird's food and shelter. *Id.* at 1108-9. The harming of an endangered species does not require death or even direct physical injury, but includes injury to habitat which threatens the future extinction of a species. *Id.*; *see also Sierra Club v. Lyng*, 694 F. Supp. 1260, 1272 (E.D. Tex. 1988), *aff'd*, 926 F.2d 429 (5th Cir. 1991) (the reduction of a species' gene pool resulting in future genetic abnormalities was held to constitute a taking).

Further, the ESA's legislative history supports the view that the harm need not be imminent or certain. By including "harassment" as a means of taking, Congress has indicated that any activities which disturb the breeding, feeding or sheltering patterns of a species, even in the future, will constitute a taking. H.R. REP. NO. 412, 93rd Cong., 1st Sess. (1973).

As a result of the spill, both the robin and its critical habitat have been presently and prospectively harmed. The trees and shrubs which absorbed the leachate provide the only known shelter for the robin, and are therefore critical to its existence. It is likely that the robin will be injured through its contact with the contaminated trees and shrubs. Further, the critical habitat was degraded as soon as the trees and shrubs which shelter the robin absorbed the leachate into their roots. (R.3). Not only have the breeding, feeding and sheltering patterns of the robin been disturbed, but it is undisputed that in five to eight years the trees and shrubs in the robin's habitat will be dead. (R.3). The impact of the spill on the robin is analogous to that sustained by the bird in *Palila*. When the trees and shrubs die, the robin may become extinct. Thus, the leachate has had a definite impact on both the robin and its critical habitat. Any determination that harm five to eight years in the future is not imminent is "shortsighted" and plays "Russian roulette" with the robin's

existence. *See Palila II*, 649 F. Supp. 1070, 1075, 1082 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

Moreover, the definition of "critical habitat" gives the ESA the authority to protect the swallow because of its symbiotic relationship to the daisy. Realizing that the degradation of natural habitats posed the gravest threat to endangered species, the ESA drafters broadly defined critical habitat to include those areas which contain the physical or biological features that are (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. 16 U.S.C. § 1532(5)(A); *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993). Critical habitat has been further defined to include the area in which a species lives and all elements of that environment, including flora, fauna, and the quality and chemical content of the soil, water and air. *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 368, n.9 (5th Cir.), *reh'g denied*, 532 F.2d 1375 (5th Cir.), *cert. denied*, *Boteler v. National Wildlife Fed'n*, 429 U.S. 976 (1976).

The continued existence of the swallow is essential to re-propagate the daisy. Every four years, the swallows lay their eggs only in the daisies in Harrison Forest. (R.1). These eggs provide essential nutrients to the soil where the daisy grows. (R.1). The swallows will return to Harrison Forest in 1995, but if the daisies are not re-propagated by then, the swallows will be unable to lay their eggs. Further, the swallow, which is already on a citizen petition for ESA protection, may be on the precipice of extinction if it is unable to reproduce. If the continued existence of the swallow is threatened, the continued existence of the endangered daisy is threatened in violation of the ESA. Just as in *Palila*, where eating the seedlings prevented the trees from growing into the food of the endangered bird, not re-propagating the daisy will decrease the number of swallows, thereby reducing the supply of nutrients which are essential to the daisy.

Once a species has been harmed or harassed, other provisions of the ESA are triggered allowing the government to exert substantial control over the species. For example, the ESA's forfeiture provision states that any fish, wildlife or

plant taken contrary to the Act shall be subject to forfeiture to the United States. 16 U.S.C § 1540(e)(4)(A). Another provision commands land acquisition in order to protect endangered species' natural habitats which are found on private land. 16 U.S.C. § 1534. This provision gives the Secretary of Interior broad authority and funding to acquire any real property ("land, waters, or interests therein") which he finds "necessary for the purpose of conserving, protecting, restoring, or propagating any endangered or threatened species." 16 U.S.C. § 1534(a, b); S. REP. NO. 307, 93rd Cong., 1st Sess. (1973).

The current and prospective harm to the daisy, robin and swallow in violation of the ESA allows New Union to exert control over these resources. As soon as the spill killed the daisy and modified the robin and swallow habitats, it constituted an ESA taking. Thus, the species were subject to forfeiture. Though neither New Union nor the Secretary of the Interior have exercised the land acquisition provision, the fact that they could provides additional proof of government control over the daisy, robin and swallow. Therefore, the ESA's authorization for substantial control provides the government with a sufficient basis for asserting trusteeship.

B. *New Union is acting pursuant to its state police power to protect natural resources which it holds in trust.*

The State of New Union seeks to protect the public's interest in restoring and replacing the daisy, robin and swallow pursuant to common law duties which CERCLA recognizes. CERCLA provides that natural resource trustees may recover damages for injury, destruction or loss of natural resources which are held in trust by any state. 42 U.S.C. § 9607(a)(4)(B). A state's police power provides authority to limit property rights as trustee for the public. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). Under the police powers of the common law, states act as trustees of wildlife within their borders and have the power to preserve and regulate these important resources. *See Toomer v. Witsell*, 334 U.S. 385 (1948). Furthermore, states

have the common law power to protect plants and wildlife under the *parens patriae* and public trust doctrines. *See Matter of Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980). In exerting trusteeship over the daisy, robin and swallow, New Union acts pursuant to these common law police powers.

1. New Union may exert trusteeship over the robin and swallow because it holds these species in trust for the public pursuant to the common law rule regarding wildlife.

New Union may exert trusteeship over the robin and swallow on TLC's land because it has a legitimate interest in conserving and protecting wild animals. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979). New Union follows the common law rule regarding wildlife (R.4), and has the power to protect wildlife living within, or migrating through, its borders pursuant to the common law rule. *See State of Missouri v. Holland*, 252 U.S. 416, 434 (1920) (wild birds). This power is manifested in the state's role as trustee over wildlife. *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). As a trustee over natural resources, New Union has a duty to protect the birds and has a sufficient interest to support an action for damages to those resources. *See Com. of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d. 652, 671 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (recovery permitted for oil spill damage to animals and the mangrove trees on which they depend); *State of Maryland Dep't. of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp 1060, 1066 (1972).

The common law trust over New Union's wildlife is the type contemplated by CERCLA's natural resource damages provision. This common law trust gives New Union a greater interest in the birds and more power to control them than TLC. It is widely recognized that private parties do not own wild birds. *Missouri v. Holland*, 252 U.S. at 434; *see also Douglas v. Seacoast Products Inc.*, 431 U.S. 265, 284 (1977). However, common law duties provide states with authority to regulate these birds. While TLC has no interest in the robin and swallow, New Union has an interest based on its common

law duty to protect wildlife. Acting as New Union's designee, the DNR would fulfill this duty by exerting trusteeship in order to protect the robin and swallow.

2. New Union may assert trusteeship over the daisy, robin and swallow because they are encompassed by the common law *parens patriae* doctrine.

The daisy, robin, and swallow are properly protected by New Union as a trustee pursuant to its quasi-sovereign, *parens patriae* capacity. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972) (*parens patriae* capacity enables a state to prevent or repair harm to its quasi-sovereign interests). The common law *parens patriae* doctrine provides an additional authoritative basis for asserting trusteeship if a state has an interest apart from those of particular private parties. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). To assert such capacity, the state must allege that there has been an injury to a substantial segment of its population. *Id.* at 607. This is determined by evaluating all direct and indirect effects on the residents. *Id.* While the Supreme Court has not enumerated which quasi-sovereign interests effect a substantial segment of the population, they have been interpreted to involve the set of interests a state has in the health and well-being of its populace. *Id.* at 601, 607. This set of interests includes abating public nuisances, conserving natural resources, and protecting its economy. *See State of Idaho v. Southern Refrigerated Transp., Inc.*, 1991 WL 22479, at *5 (D. Idaho 1991); *see also Matter of Steuart Transp. Co.*, 495 F. Supp. at 39 (sovereign right to protect the public's interest in preserving wildlife resources). New Union's interest in abating public nuisances as well as the economic interest in preserving the endangered species provide it with a *parens patriae* justification to assert trusteeship.

The power to abate public nuisances is premised on a state's interest, independent of and behind the titles of its citizens, in all the earth and air within its domain. *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)

(enjoining corporation from discharging noxious gases over land, which caused wholesale destruction of forests, orchards and crops). New Union has an interest in abating the public nuisance resulting from the leachate spill. The leachate will be absorbed by the soil and eventually may reach the groundwater table. This could effect the drinking water of many New Union residents. In addition, the spill has spread dangerously close to the New Union State Wilderness Area. When it rains there is a possibility that leachate runoff will interfere with the public's enjoyment of the State Wilderness Area.

Further, New Union has an interest in conserving and protecting its natural resources. *See Maine v. M/V Tamano*, 357 F. Supp. 1097, 1110 (D. Me. 1973). Appreciating the importance to a state's residents that their government have the power to preserve and regulate important natural resources, courts have allowed states to serve as trustees of natural resources in a *parens patriae* capacity. *See Satsky*, 778 F. Supp. at 510; *see also M/V Tamano*, 357 F. Supp. at 1097.

New Union may base its authority for asserting trusteeship in the *parens patriae* doctrine because the interest in conserving the endangered species is common to all of its citizens. The current and future generations of New Union residents should be able to enjoy the aesthetic and educational benefits of the daisy, robin and swallow. New Union's residents will be deprived of the opportunity to watch the swallows' flying formations as depicted in the movie, "The Swallows of Cappuccino." In addition, if New Union is prevented from exerting trusteeship, there will be limited ability to conduct scientific studies of the species. Re-propagation of the daisies and relocation of the robin will facilitate such studies.

Finally, the *parens patriae* doctrine has been extended to include the protection of a wide variety of economic interests. *See, e.g., State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945) (*parens patriae* capacity was correctly asserted because trade barriers effect the economic prosperity and welfare of a state); *Com. of Pennsylvania v. West Virginia*, 262 U.S. 553, 592, *reh'g granted*, 263 U.S. 671, *aff'd*,

263 U.S. 350 (1923) (state was proper party to represent the economic interest of its residents in maintaining access to natural gas). New Union's interests include the economic potential that could be realized in its tourism industry. If New Union is not allowed to serve as natural resource trustee for the endangered species, the daisy will not be re-propagated in time for the 1994 growing season, and the swallows will be unable to return to Harrison Forest. Accordingly, the future revenue derived from the quadrennial visits of thousands of tourists from around the world would be lost unless the daisy and swallow are protected.

By asserting trusteeship over the endangered species, the State of New Union is acting as the *parens patriae*, trustee, guardian, and representative of all her citizens. The State is entitled to seek relief because the matter complained of effects her citizens at large. Thus, New Union's *parens patriae* capacity is satisfied, and provides further authorization for New Union's trusteeship for the protection of the daisy, robin and swallow.

3. The public trust doctrine should be extended to protect the daisy, robin and swallow because they are critical in maintaining a healthy environment.

New Union holds important natural resources in trust for the benefit of its citizens under the public trust doctrine. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Traditionally, the public trust doctrine has allowed the state to protect citizens' rights to fish, to engage in commerce and to navigate upon waterways. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892), *aff'd*, 154 U.S. 225 (1894). Each state retains the right to define the public trust doctrine so that the interests of that state are best served. *See Shively v. Bowlby*, 152 U.S. 1, 14, 24 (1894). Therefore, states have flexibility in setting the boundaries of the doctrine so that it can meet changing conditions and the needs of the public. *See Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972). Thus, several states have extended the doctrine to protect wildlife and its habitats because of the importance to

the public. *See, e.g., Mountain States Legal Foundation*, 799 F.2d at 1426; *Kootenai Environmental Alliance, Inc., v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983). New Union has developed its own version of the public trust doctrine to meet its residents' needs. The New Union Supreme Court held in 1979 that the public trust doctrine applied to Lake New Union's riverbeds and shores. (R.4). While the court stated that privately owned land is not within the public trust, it did not decide whether other natural resources are subject to the public trust doctrine. (R.4).

This Court should further extend the public trust doctrine to protect the endangered species on TLC's land in order to promote a healthy environment. Courts have applied the public trust doctrine to private land in order to protect natural resources which are critical to a healthy environment. *See Just v. Marinette County*, 201 N.W.2d 761, 768-770 (Wis. 1972) (doctrine applied to privately owned wetlands because of their role in contributing to a healthy environment). The daisy, robin and swallow, although found on private land, play essential roles in maintaining a healthy environment. Not only do these species interact with each other, but they provide important links in surrounding ecosystems on both public and private land. Because a healthy environment is a public concern, the public trust doctrine should apply to natural resources that effect the environment even when they are found on private land. *Id.*

Extending the public trust doctrine to endangered species, irrespective of private or public ownership of the land, would be consistent with CERCLA's rationale. First, CERCLA's natural resource damage provision establishes a public trust remedy, which provides compensation to the *public* for injury to natural resources. Natural Resource Damage Assessments, 51 Fed. Reg. 27,674 (1986) (to be codified at 43 C.F.R. pt. 11). Second, the public trust doctrine has been deemed to be the legal basis for CERCLA's natural resource damage provisions. *See* Kerry Russell, *A Research Guide to Natural Resource Damage Under the Comprehensive Environmental Response, Compensation and Liability Act*, 26 Land & Water L. Rev. 403 (1991). Third, CERCLA states

that natural resources include those which are held in trust by any state. 42 U.S.C. § 9601(16). Expanding the public trust doctrine to include important natural resources, regardless of where they are found, comports with the values behind the doctrine and complements the steps other states have taken to include wildlife in the doctrine's protection. Therefore, because endangered species are important to the promotion of a healthy environment, this Court should extend New Union's public trust doctrine to include the daisy, robin and swallow.

C. *Trusteeship over TLC's land affected by the spill is not a taking of private property in violation of the Fifth Amendment.*

Natural resource trusteeship over TLC's land affected by the spill is not a taking of TLC's property for public use in violation of the Fifth Amendment. The Fifth Amendment states in relevant part: "nor shall private property be taken . . . without just compensation." U.S. Const. amend. V. It is well established that a state may regulate private property pursuant to its police power for the purpose of protecting the health, safety and welfare of its citizens. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Subsequently, a taking occurs when there has been a physical invasion of private land or when a regulation deprives an owner of all economic value in its land. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). In order to determine whether a taking has occurred, the court must address the parcel of land as a whole. *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-131 (1978). A partial takings analysis is appropriate only when a substantial portion of the land is subject to the regulation. *Lucas*, 112 S. Ct. at 2894 n.7.

New Union's plan to exert trusteeship does not effect a physical invasion of TLC's land. Governmental monitoring on private property is not a taking. *Formanek v. United States*, 26 Cl. Ct. 332, 334 (1992). In *Formanek*, when government representatives walked on private property and took plant samples, the court held that it was only a minor nuisance. *Id.* at 334. The court found that this was not a taking,

despite the fact that a state botanist brought tours onto the land and visited the property eleven times, two of which were unauthorized visits. *Id.* at 333; *but see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Similarly, New Union's entry onto TLC's land for the purpose of studying the robin's habitat and re-propagating the daisy does not constitute a taking. New Union will enter TLC's land to study the robin's habitat requirements and to remove samples or seeds of the remaining daisies. Under *Formanek*, this would be considered only a minor nuisance, not a taking.

Moreover, trusteeship does not effect a taking of all the value of TLC's property. In *Lucas*, the Court stated that a law which denies all economic benefit of the land constitutes a taking. *Lucas*, 112 S. Ct. at 2893. According to the Court, the relevant consideration focuses on the economic impact of the regulation and whether the regulation interferes with reasonable investment-backed expectations. *Id.* In applying this analysis, courts do not require that the property be available for its most beneficial use after the regulation is in place. *DeFeo v. Sill*, 810 F. Supp. 648, 657 (E.D. Pa. 1993). Where there are many remaining economically viable uses for a landowner's property, no taking has occurred. *Deltona Corp. v. United States*, 657 F.2d 1184, 1194 (Cl. Ct. 1981).

TLC has other economically viable options besides cutting down the trees in the robin's habitat. For example, trusteeship over the affected area does not interfere with TLC's ability to harvest trees from approximately seventy-percent of its land. Not only can it gain economic benefits from the unaffected area, but TLC may also harvest the trees from the contaminated area other than those in the robin's habitat. Therefore, the impact on TLC does not deprive it of all economic benefit. Moreover, the land is available for mining, and TLC can sell its property and mining rights. Trusteeship will not interfere with these mining expectations because the regulations prohibiting harm to habitats do not impact mining operations which take place beneath the habitat. TLC's reasonable investment-backed expectations for its land, as exhibited by the sale of Site 18, extend beyond forestry to mining.

Finally, a partial takings analysis does not apply in this case because the area affected by the spill constitutes only a small portion of TLC's property. Partial takings analysis is generally employed only where a substantial segment of the property is being regulated. *Lucas*, 112 S. Ct. at 2894 n.7. In *Lucas*, the court found that a regulation effecting ninety-percent of the land qualified as a partial taking. *Id.* Similarly, the lost use of 20 acres of an 80 acre parcel did not constitute a taking. *Jentgen v. United States*, 657 F.2d 1210, 1213 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982); *see also Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) (regulation of fourteen acres of a forty acre parcel of land not a taking). Here, the affected area appears to constitute less than thirty-percent of TLC's land in Harrison Forest. (Map, A-7). Thirty-percent is not a substantial portion of TLC's property under the *Lucas* rationale. *See Lucas*, 112 S. Ct. at 2894 n.7. Similarly, because the *Jentgen* and *Ciampitti* courts held that lost use of one quarter of the land did not constitute a taking, then thirty-percent should be inadequate as well.

This Court should reject the reasoning of the one court which has applied a partial takings analysis when only a small portion of the land was affected because the cases are distinguishable. *See Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990). *Loveladies* involved a 250 acre parcel of property. The landowners were denied the right to develop 51 acres of wetlands on the property. Subsequently, they were denied the right to develop a 12 acre plot within those wetlands. The court looked only to the 12 acre plot when analyzing the takings issue. *Id.* The *Loveladies* court held that there was a taking because (1) there was a lack of a substantial legitimate state interest; (2) the property surrounding the parcel was either developed or had been denied a permit; and (3) there was substantial valuation of the 12 acre parcel. *Id.* Here, New Union is exerting natural resource trusteeship over the critical habitats of the daisy and robin. Accordingly, the substantial state interest in protecting endangered species makes this case factually distinguishable from *Loveladies*. Furthermore, the property surrounding the contaminated area has always been available for economic

development by TLC. In fact, even the area within the spill site that is not part of the critical habitat of the robin may be developed. Finally, the record is silent as to valuation of either the critical habitat or the spill site. Therefore, on the facts of this case the *Loveladies* partial takings analysis is inapplicable, and there has been no taking.

II. TLC CANNOT AVAIL ITSELF OF ANY CERCLA DEFENSES BECAUSE IT HAS FAILED TO PROVE THAT THE TOXIC SPILL WAS SOLELY CAUSED BY AN ACT OF GOD, A THIRD PARTY OR A COMBINATION OF THE TWO.

TLC cannot successfully assert any CERCLA defenses without misinterpreting the language or purpose of the statute. A party may be relieved of liability only if it proves by a preponderance of the evidence that it satisfies one of the three affirmative defenses provided by the statute. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). The relevant statutory defenses require that the release of the hazardous substance be caused solely by (1) an act of God; (2) an act or omission of a third party; or (3) any combination of the foregoing paragraphs. 42 U.S.C. § 9607(b)(1),(3),(4). These defenses were drafted narrowly in order to increase the scope of CERCLA's liability provisions. *See United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). In light of this goal, heavy rainfall does not qualify as an act of God within the meaning of the statute. In addition, TLC is not relieved of liability under the third-party defense because it did not satisfy the requisite elements of the defense. Finally, TLC cannot assert a combination defense because it did not fully satisfy any other affirmative defense.

A. *TLC may not avail itself of the act of God defense because the rainfall was not an exceptional natural phenomenon and the effects of the spill were foreseeable and preventable.*

TLC may not avail itself of the act of God defense by mischaracterizing the rainfall that occurred the day before the spill. Under CERCLA, an act of God is defined as an unanticipated grave natural disaster or other natural phenomenon of an exceptional, or inevitable character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. 42 U.S.C. § 9601(1). Heavy rain fall is not the type of natural disaster or exceptional natural phenomenon contemplated by CERCLA. *See United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987). In contrast, lightning has been identified as a natural phenomenon that may qualify as an act of God under CERCLA. *Wagner Seed Co., Inc. v. Bush*, 709 F. Supp. 249, 250 (D.D.C. 1989), *aff'd*, 946 F.2d 918 (1991), *cert. denied*, 112 S. Ct. 1584 (1992). While pinpointing the location where lightning will strike is virtually impossible, normal climatic conditions make it possible to predict heavy rainfall, and therefore make it foreseeable. *See Stringfellow*, 661 F. Supp. at 1061 (heavy rains not an act of God because they were predictable).

Moreover, the effects of rainfall are foreseeable, and thus preventable. Accordingly, TLC could have requested that T2M empty the nearly full impoundment or stop mining in anticipation of the heavy rainstorm. Furthermore, because the crack did not develop until the day after the rainfall, TLC could have suggested that T2M empty the impoundment the day of the storm, rather than wait until the end of the disposal cycle two days later. Because actions could have been taken to prevent the effects of the storm, the rainfall is not an act of God.

Further, even if the rainfall was unpredictable, the resulting harm to the endangered species could have been prevented. TLC could have designed its own rain contingency plan, including emergency run-off drainage channels adjacent to the mining site. *See Stringfellow*, 661 F. Supp. at

1061 (act of God defense denied where drainage channels could have prevented harm caused by rain). TLC could also have requested that the impoundment be built further from the endangered species. Therefore, because TLC took no precautionary measures, it cannot escape liability under CERCLA's act of God defense.

B. *TLC cannot avail itself of the third-party defense because it has failed to prove the requisite elements of the defense.*

TLC cannot successfully assert the third-party defense because it failed to prove both requisite statutory elements. The third-party defense requires a party to prove that (1) there is no contractual relationship (direct or indirect) with a third party; and (2) defendant exercised due care and took precautions against a third party's foreseeable acts or omissions and the results therefrom. 42 U.S.C. § 9607(b)(3); *see also Monsanto Co.*, 858 F.2d at 168-169. Because TLC failed to prove these requirements it cannot assert the third-party defense.

1. TLC and T2M maintain contractual relationships through the deed of sale, transferable right of entry and exit and the impoundment safety provisions.

The deed of sale, the transferable right of entry and exit ("easement") on Access Road #5 and the deed's safety provisions establish contractual relationships between TLC and T2M. In order for a party to successfully assert the third-party defense, CERCLA requires proof that the release of hazardous substances and the resulting damages were caused solely by a third party who has no contractual relationship with the defendant. 42 U.S.C § 9607(b)(3); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1047 (2d Cir. 1985). A contractual relationship includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession of property. 42 U.S.C. § 9601(35)(A); *see United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546, 557 (W.D.N.Y. 1988). Because TLC did not prove

the absence of a contractual relationship, it cannot assert the third-party defense.

The deed for Site 18 establishes an indirect contractual relationship between TLC and T2M. In *Hooker*, where a corporation deeded the contaminated Love Canal property to the local Board of Education, and the Board subsequently deeded the property to the City, the court held that the corporation had a direct and an indirect contractual relationship with the Board and the City respectively, and thus barred the use of the third-party defense. *Id.* at 558. The *Hooker* court's contractual relationship analysis is directly analogous to this case. Here, TLC deeded the property to Mine-Finders and Mine-Finders deeded it to T2M. Pursuant to the *Hooker* court's holding, TLC has a direct contractual relationship with Mine-Finders, and an indirect contractual relationship with T2M, and may not escape liability under the third-party defense.

Moreover, the deed of sale relates to the handling of hazardous waste. In order to defeat the third-party defense, some courts impose the further condition that the contractual relationship be connected to the disposal related activity. *See, e.g., Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distribution Corp.*, 964 F.2d 85, 88 (2d Cir. 1992). The easement evidences a contractual relationship which relates to the handling of the hazardous waste. Access Road #5 is connected to the handling of the leachate because it provides the only means for removal of the waste. TLC maintains the road so that T2M can safely remove the leachate from the site. Therefore, the easement renders the contractual relationship between TLC and T2M connected to the handling of the leachate.

Additionally, the deed is connected to the handling of hazardous waste because of its two safety provisions. One provision guarantees the use of a NUDEP approved independent contractor to operate and maintain the surface impoundment, including removing the leachate waste from Site 18. (R.3). The second safety provision required annual environmental audits. (R.3). These audits were conducted to guarantee that the site was in compliance with all federal

and state regulations relating to hazardous waste. Therefore, both safety provisions demonstrate a contractual relationship that was related to the handling of the leachate.

TLC cannot escape liability by claiming that, because it was unaware of the activities on Site 18, the contract does not relate to the handling of hazardous waste. A lease relates to the handling of hazardous substances when the lessor knows that the lessee is involved in a business that uses hazardous substances. *See United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1320 (S.D.N.Y. 1992). In *A & N Cleaners*, knowledge of hazardous substance use created a contractual relationship that was related to the handling of the substance. *Id.* at 1335.

Similarly, TLC's knowledge of the activities on Site 18 renders its contractual relationship connected to the handling of the leachate. T2M mined the site for three and one half years while TLC maintained the only entrance and exit. Thus, TLC had knowledge that hazardous waste was being generated on Site 18. TLC, one of the largest forest products producers in the country, managed to discover ore on its land as well as pinpoint the richest vein. (R.2). TLC then sold Site 18 to a company that specialized in matching mining companies with new sites. (R.2). Therefore, TLC should be held to have the constructive knowledge advanced in *A & N Cleaners*.

Furthermore, TLC cannot assert the innocent landowner exception to the third party defense because it did not acquire the contaminated property after the hazardous waste was released. The exception only applies when the property ". . . was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility." 42 U.S.C. § 9601(35). The innocent landowner exception contemplates situations where a party purchased land that was already a hazardous waste site, indicating that this exception applies only to subsequent owners. *See, e.g., In re Hemingway Transport, Inc. v. Kahn*, 993 F.2d 915, 932 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993); *United States v. Serafini*, 791 F. Supp. 107 (M.D. Pa. 1990). TLC may not avail itself of the innocent landowner exception because it is not a subsequent

owner. If Congress intended the innocent landowner exception to work in TLC's continuous ownership context, it would not have used such explicit language in the statute.

Assuming, *arguendo*, that the "acquired by" element of the exception were waived, TLC fails to meet the remaining criteria of the innocent landowner exception. TLC must also prove that it did not know and had no reason to know that any hazardous substance was disposed of on its property, and that it undertook all appropriate inquiry into the previous ownership and uses of that property. 42 U.S.C. § 9601(35)(A)(i),(B). TLC's specialized knowledge or experience, plus any commonly known or reasonably ascertainable information about the property is relevant in determining appropriate inquiry. 42 U.S.C. § 9601(35)(B); *see In re Hemingway Transport*, 993 F.2d at 932. Further, this exception is construed strictly and absentee landowners are liable even when they did not participate in the action resulting in the release of hazardous substances. *See United States v. Monsanto Co.*, 858 F.2d at 168.

TLC cannot claim it had no knowledge of the mining activity or the resulting hazardous waste. TLC maintained the access road to the site and knew or should have known that Site 18 was being used for mining and that hazardous waste was being produced. In addition, it had special knowledge and experience relating to mining. TLC not only discovered the ore, but determined where the richest vein was located. (R.2). Therefore, TLC knew that hazardous substances were being produced on the site adjacent to the endangered species' habitats and cannot assert the innocent landowner exception to avoid CERCLA liability.

2. TLC has failed to prove it exercised due care or took precautions against T2M's foreseeable acts or omissions.

TLC has failed to demonstrate that it exercised due care and took precautions against T2M's foreseeable acts or omissions which resulted in injury to the endangered species. In order to avail itself of the third-party defense, a party must exercise due care with respect to the hazardous waste and

take precautions against foreseeable acts or omissions of the third party. 42 U.S.C. § 9607(b)(3); *Shore Realty Corp.*, 759 F.2d at 1047.

TLC did not exercise due care or take precautions to prevent injury to the endangered species, even though it had actual and constructive knowledge that these species lived adjacent to Site 18. The ESA directs the Secretary of the Interior to publish a list of endangered species and a description of their critical habitats in the Code of Federal Regulations ("CFR"). 16 U.S.C. § 1533(b)(3)(B). TLC had actual notice that endangered species were living on its land because the daisy and robin are listed in the CFR. In addition, TLC had constructive knowledge that endangered species lived on its land. Thousands of tourists made quadrennial visits to New Union to observe the swallows en route to the daisies in Harrison Forest. (R.1). Because the swallows' flight is so well known, TLC had constructive knowledge that the species lived on its land.

TLC also had constructive knowledge that the mining activities on Site 18 might adversely effect the endangered species on TLC's land. TLC knew that Site 18 was eventually going to be used for mining ore, and that endangered species were living adjacent to Site 18. Therefore, TLC should have been aware that a toxic spill could threaten the species' existence. Injury to the endangered species was a foreseeable result of such a spill. Thus, TLC had a duty to take precautions against T2M's acts or omissions and the foreseeable consequences.

TLC could have taken a variety of precautions that would have protected the endangered species on its land. For instance, TLC could have placed an additional provision in the deed alerting any subsequent owner of Site 18 that two endangered species inhabited the land adjacent to the site. TLC could have contacted T2M directly to inform them about the daisy and robin. Perhaps T2M would then have removed the endangered species from the zone of danger, by building a wall to prevent runoff from Site 18. Furthermore, TLC could have alerted the DOI or the Environmental Protection Agency about the mining and its proximity to the species.

This could have led to (a) a relocation of the species before the toxic spill; (b) the Secretary placing more stringent requirements on T2M; or (c) the government purchasing the land pursuant to the ESA's land acquisition provision. 16 U.S.C. § 1534. However, because TLC failed to take any precautions, it did not exercise due care, and thus, cannot assert the third-party defense.

C. *TLC cannot avail itself of the combination defense because it has not satisfied any of the affirmative defenses.*

The combination defense is not available to TLC because it has not satisfied any of the affirmative defenses. The district court incorrectly applied the combination defense and thus, its decision must be reversed. The combination defense is available to a defendant who can show that the release was caused "solely by . . . any combination" of an act of God, act of war or an act or omission of a third party. 42 U.S.C. § 9607(b)(4). When determining how to apply a statutory provision, courts must look first to the plain meaning of the statute. *See Caminetti v. United States*, 242 U.S. 470 (1917). When a statute is ambiguous, however, evidence other than the plain meaning may be used to determine congressional intent. *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). Regardless of the evidence relied on by the court, the statute must be sensibly construed to avoid absurd results. *Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892). The combination defense is ambiguous because it has numerous meanings. Therefore, the court must look to the legislative history behind CERCLA and relevant case law in order to understand the combination defense.

The combination defense provided by CERCLA is inherently ambiguous. Because the statute requires defendants to establish a combination of the foregoing paragraphs, it can mean that they must meet all of the elements of more than one defense. It may also mean that factors other than those included in the three defenses must not have added to the release. In addition, the combination defense could mean

that parties may plead in the alternative, so that a defendant is not restricted to asserting one defense. Or it might mean that the defendant must meet 99% of one defense and 99% of another, or perhaps only 10% of one and 70% of another, or any other percentage of more than one defense. Chief Justice Marshall observed that "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived. . . ." *United States v. Fischer*, 6 U.S. 358, 356 (1805). Accordingly, because the provision is unclear, congressional intent and case law demonstrate the proper interpretation of the combination defense.

The congressional debate behind the enactment of CERCLA helps to clarify the combination defense. In interpreting statutes, a court may consider a clearly expressed legislative intent or policy that is contrary to the language of the statute. *Escobar Ruiz v. Immigration and Naturalization Serv.*, 838 F.2d 1020, 1023 (9th Cir. 1988). One of Congress's primary goals in passing CERCLA was holding parties who are in some way responsible for toxic spills liable, rather than the taxpayers. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Congress recognized that if polluters were allowed to escape liability in such an easy fashion, they would have little incentive to prevent pollution and toxic spills. H.R. REP. NO. 253(I), 99th Cong., 1st Sess. (1985). Therefore, Congress made CERCLA's liability strict, and explicitly limited the defenses to those found in § 9607(b). *Monsanto*, 858 F.2d at 160.

Finally, case law does not support a finding that § 9607(b)(4) can be met by proving only partial defenses to CERCLA. There are a number of cases where defendants have raised the combination defense, but none have allowed the defendant to avoid CERCLA liability by proving only a part of several defenses. *See, e.g., Stringfellow*, 661 F. Supp. at 1061; *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488 (S.D. Ohio. 1991). An application of the combination defense begins with a determination of whether any of the other defenses have been met. *See Stringfellow*, 661 F. Supp. at 1061. Once it is determined that no single defense has been fully satisfied, courts have not gone on to decide whether the

addition of two partial defenses create a successful combination defense. Because TLC cannot establish that the release was caused by either an act of God or by a third party, it should not be allowed to establish a combination defense.

TLC should not be allowed to establish a combination defense because such a ruling would lead to absurd results. In *Rector*, the Court held that a literal reading of the immigration law which barred English clergyman from working in the United States was not the intended meaning of the law. *Rector*, 143 U.S. at 460. The Court found that upholding such a prohibition would lead to absurd results. *Id.* Similarly, it is absurd to allow TLC to avoid liability when it cannot establish either the act of God defense or the third party defense. It is illogical that Congress would require a CERCLA defendant to prove explicit and rigorous statutory defenses, but allow them to escape liability under a combination defense that allows diluted partial defenses. Therefore, the district court's holding produces absurd results and undermines the purposes of CERCLA because it permits responsible parties to avoid liability.

Furthermore, if combination defenses made up of partial statutory defenses were adopted by other courts, it would result in inconsistent CERCLA decisions. An interpretation allowing courts to design their own combination defense to a strict liability statute is not what Congress intended. If courts created their own combination defense, one court could decide that twenty-percent of one defense and thirty-percent of another is adequate, while another court decides that ninety-percent of both are required. If the combination defense was intended to incorporate "parts" of two defenses, Congress would have included language guiding courts on what percent of defenses are needed to add up to a whole defense. Therefore, because TLC has failed to establish the requisite elements of any of the affirmative defenses, it may not now use a combination of partial defenses to escape liability.

D. *Equitable defenses are not enumerated under CERCLA and therefore unavailable to TLC.*

The only defenses permitted under CERCLA are those enumerated within the statute. A majority of courts have rejected equitable defenses as inconsistent with the congressional intent and explicit language of the statute. *See United States v. Kramer*, 757 F. Supp. 397, 424 (D.N.J. 1991). These courts acknowledge that equitable jurisdiction may be limited by a clear and valid legislative command. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The plain language of 42 U.S.C. § 9607(a) provides the clear legislative command by limiting the defenses to those set forth in subsection (b). *See Smith Land and Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). Accordingly, only the affirmative defenses of an act of God, act of war, or act of a third party may be asserted in a CERCLA action. *See United States v. Amtreco, Inc.*, 809 F. Supp. 959, 968 (M.D. Ga. 1992).

This court should follow the substantial weight of authority denying the use of equitable defenses for the following reasons. First, the state is immune from equitable doctrines when it asserts public rights. *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1451 (W.D. Mich. 1989). "Equitable principles will not be applied to thwart public policy or the purpose of federal laws." *Id.* Second, allowing equitable defenses would undermine the broad, remedial purpose of CERCLA. Last, claims under § 9607(a)(4)(C) have been held to be legal in nature, rather than equitable, rendering equitable defenses inapplicable. *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. at 999.

TLC should not be allowed to raise equitable defenses because they are not contemplated by CERCLA. Serving as trustee, New Union is asserting its police power to protect its natural resources and the public health, thus immunizing the state from equitable doctrines. In addition, allowing equitable defenses would undermine the purposes of CERCLA by relieving potentially responsible parties of liability. This would have catastrophic impact on health and the human en-

vironment because many companies would not clean-up their hazardous waste spills. Moreover, it would remove the deterrent effect of clean-up costs, which encourage potential polluters to properly treat, store and dispose of hazardous waste. Finally, New Union is asserting legal claims, seeking damages to study alternate habitats for the robin and to re-propagate the daisy. As in *Acushnet*, New Union is seeking the legal remedy of natural resource damages, and equitable defenses do not apply. Therefore, TLC may not substitute equitable defenses for CERCLA's enumerated defenses in order to escape liability.

CONCLUSION

For the foregoing reasons, Appellee State of New Union respectfully requests this Court to uphold the District Court's decision allowing the State of New Union to assert natural resource trusteeship and to reverse the District Court's decision allowing TLC to escape liability under the combination defense.

Respectfully submitted,

Counsel for Appellee,
State of New Union

APPENDIX B

U.S. CONSTITUTION, 5TH AMENDMENT

[N]or shall private property be taken for public use, without just compensation.

16 U.S.C. § 1532

Definitions

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(19) The term "take" means 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. § 1533

(b) Basis for determinations

(3)(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

— in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

16 U.S.C. § 1534

Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C.A. s 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C.A. s 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C.A. s 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 U.S.C.A. s 460l-4 et seq.], may be used for the purpose of acquiring

lands, waters, or interests therein under subsection (a) of this section.

16 U.S.C. § 1535

Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(f) Conflicts between Federal and State laws

. . . Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

16 U.S.C. § 1538

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law. . . .

16 U.S.C. § 1540

(e) Enforcement

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

42 U.S.C. § 9601

Definitions

For purpose of this subchapter—

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(16) The term "natural resources" means land, 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 (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. s 1801 et seq.]) 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.

(35)(A) The term "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), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly

known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

42 U.S.C. § 9607

Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed.

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or 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 which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), 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 foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(f) Actions involving natural resources; maintenance, scope, etc.

(1) Natural resources liability

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. . . .

50 C.F.R. § 17.3

Definitions.

"Harass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

"Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.