THE AUTHORITY OF CO-TRUSTEES UNDER CERCLA'S NATURAL RESOURCE DAMAGES REGIME (ANOTHER LOOK AT *COEUR D'ALENE* AND *TYSON FOODS*)

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I. Introduction

CERCLA, OPA and various other federal laws establish a regime under which enumerated federal, state and tribal governmental bodies are designated as trustees for the nation's natural resources.[1] Building upon the public trust doctrine and similar historical underpinnings,[2] Congress authorized these enumerated "trustees" to pursue and recover natural resource damages ("NRD") on behalf of the public so that restoration of the nation's injured natural resources can be achieved. However, how trustees (and which ones can) recover NRD from responsible parties through settlement or litigation in order to effectuate Congress' goals has been the subject of debate and inconsistent court decisions.

Those inconsistent court decisions – *Coeur d'Alene I*,[3] *Coeur d'Alene II*,[4] and *Tyson Foods*[5] – have fueled the debate over the scope of a co-trustee's authority to bring NRD claims on behalf of the public. *Coeur d'Alene I* and *Tyson Foods* stand for the proposition that, as part of its NRD claim, a co-trustee plaintiff must allocate its trusteeship based upon the ratio or percentage *of actual management and control* that it exercises over a particular injured natural resource vis-à-vis its other co-trustee(s). 280 F. Supp.2d at 1116; 258 F.R.D. at 480. *Tyson Foods* went one step further, however, by dismissing the state co-trustee's NRD claims for its failure to join the tribal sovereign serving as a co-trustee, in part because courts can make "no determination of the ratio or percentage of actual management or control" of a co-trustee in that trustee's absence. 280 F.R.D. at 480. In *Coeur d'Alene II*, the U.S. District Court in Idaho reversed itself and modified its opinion in *Coeur d'Alene I,* holding that a co-trustee could recover 100% of NRD with respect to injured natural resources within its trusteeship, less any amount already recovered by another co-trustee. 471 F. Supp.2d at 1067-69.

These decisions leave potentially responsible parties across the country in a quandary when it comes to settlement: Can one co-trustee over natural resources resolve the NRD liabilities of a party desiring to settle in the absence of unanimity among all co-trustees? This issue is particularly important in NRD litigation, because early settlement and restoration opportunities often have the ability to produce magnified benefits and large credits for settling

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[1] *See*, *e.g.*, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*; the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.*; the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* The natural resource damages provisions of these statutes are found in 42 U.S.C. § 9607(f); 33 U.S.C. §§ 2702(b), 2706; and 33 U.S.C. § 1321(f)(4), respectively.

[2] *See*, *e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) ("At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation . . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the constitution to the United States.").

[3] *Coeur d'Alene Tribe v. ASARCO Inc.*, 280 F. Supp.2d 1094 (D. Id. 2003) (hereinafter, "*Coeur d'Alene I*").

[4] *United States v. ASARCO Inc.*, 471 F. Supp.2d 1063 (D. Id. 2005) (hereinafter, "*Coeur d'Alene II*").

[5] *Oklahoma v. Tyson Foods*, 258 F.R.D. 472 (N.D. Okla. 2009) (hereinafter, "*Tyson Foods*").

parties. This is true because early restoration opportunities can often produce ecological vitality and provoke economic growth that, over time, can far outstrip the original investment of any particular party. Thus, in order to resolve NRD liability early, a responsible party must be able to estimate its potential exposure for a particular natural resource damage and develop restoration opportunities or early actions that extinguish such a claim.

In that light, it appears that *Coeur d'Alene II* correctly focuses on the recovery of NRD for the benefit of the public to restore natural resources – instead of focusing on a particular co-trustee's recovery – thus giving responsible parties a viable settlement mechanism and method to calculate damages. In other words, the *Coeur d'Alene II* approach authorizes and encourages one co-trustee to engage in early NRD settlements. This approach also gives effect to CERCLA's preclusion of a double recovery of NRD and furthers Congress' goals to expedite the restoration of the nation's injured natural resources. *See*, *infra*, Part IV.B. Conversely, it appears that the *Coeur d'Alene I* and *Tyson Foods* approach potentially pits one co-trustee against the other(s), creating a situation in which, arguably, one co-trustee could veto or hold hostage NRD settlements and claims in perpetuity, thus precluding their resolution and the restoration of injured natural resources. Moreover, this approach can substantially increase the costs for responsible parties wanting to engage in early settlement and restoration projects that could otherwise produce huge values and restorative benefits.

This paper explores these issues in greater detail. After framing CERCLA's NRD regime and the *Coeur d'Alene* and *Tyson Foods* opinions, this paper explains why the *Coeur d'Alene II* approach not only further Congress' goals under CERCLA, but also provides responsible parties greater benefits in the long term.[6]

II. CERCLA's Statutory Scheme for Natural Resource Damages Claims.

Responsible parties are liable for NRD resulting from releases of hazardous substances. Specifically, under CERCLA § 107(a)(C), a responsible party "shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from [] a release" of a hazardous substance. *See* 42 U.S.C. § 9607(a)(C).

A. CERCLA provides a "make-whole" remedy for natural resources damaged or destroyed by releases of hazardous substances.

With CERCLA, Congress sought to fully restore injured natural resources but did not intend to supplement general treasuries. In *Ohio v. DOI*, for instance, the court recognized "Congress' intent to effect a 'make-whole' remedy of complete restoration" of an injured natural resource. *Ohio v. U.S. Dep't of Int.*, 880 F.2d 432, 445 and n.9 (D.C. Cir. 1989) (citing 132 Cong. Rec. at H9613 (daily ed. Oct. 8, 1986)).

Congress underscored its intent to make whole injured natural resources by mandating that recovered NRD are "for use only to restore, replace, or acquire the equivalent of such natural

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[6] This paper focuses on CERCLA's NRD provisions, but the analysis herein does not materially change under the NRD framework of OPA or other federal statutes.

resources." 42 U.S.C. § 9607(f)(1); *Ohio*, 880 F.2d at 444. Thus, under this provision, recovered NRD cannot be diverted for other specific or general purposes, which would dilute any effort to restore the injured natural resources at issue:

> [S]ection 107(f) clarifies that sums recovered by trustees are to be used only to restore *the natural resources* without further appropriation. The amendment reflects the restitutionary nature of the natural resource regime of CERLCA. The natural resource regime is not intended to compensate public treasuries. Nor are recovered damages to be diverted for general purposes. The purpose of the regime, rather, is to make whole the natural resources that suffer injury from releases of hazardous substances.

132 Cong. Rec. H9561-03 at 309, 1986 WL 787183, at 87 (emphasis added); *see also* 42 U.S.C. § 9607(f)(1); *Coeur d'Alene II*, 471 F. Supp. at 1068. Accordingly, the determination of injuries to a natural resource, and the amount of damages necessary to fully restore that injured natural resource, are of primary importance and should take center stage in any NRD case.

B. Congress sought to effectuate CERCLA's make-whole remedy through a trusteeship system where multiple trustees could recover for the same injured resource – but not twice – on behalf of the public.

Under CERCLA § 107(f)(1), NRD may only be recovered by federal, state, and/or tribal trustees for those natural resources under their trusteeship.[7] 42 U.S.C. § 9607(f)(1)-(2). "A 'trustee' is a federal, state or Indian tribal official who, in accordance with 42 U.S.C. § 9607(f)(2), is designated to 'act on behalf of the public as [a] trustee[] for natural resources.'" *Nat'l Assoc. of Manufacturers v. U.S. Dept. of Int.*, 134 F.3d 1095, 1098 n.1 (D.C. Cir. 1998).[8] Thus, NRD recovered by a trustee are recovered on behalf of the public – not the sovereign designating the trustee – for the benefit of the injured natural resource. *See Coeur d'Alene II*, 471 F. Supp. at 1068 ("Under CERCLA the recovery, if any, is not for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals."). As such, a trustee is a means to an end under CERCLA, which again highlights CERCLA's focus on the restoration

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[7] "CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control. These relationships are created by other Federal, State, local and tribal laws." *Coeur d'Alene I*, 280 F. Supp.2d at 1115 (quoting Final Rule, 59 Fed. Reg. 14262, 14268 (Mar. 25, 1994)). The issue of a particular trustee's trusteeship interest over particular natural resources often arises in NRD cases. *See, e.g., Coeur d'Alene I*, 280 F. Supp.2d at 1107, 1114-17. However, whether or not a trustee has a trusteeship interest over particular natural resources, in the first place, is beyond the scope of this paper, as is the issue of litigation costs and fees associated with pursuing such a claim. Instead, this paper takes the position that co-trustees are possible and are in fact the norm under CERCLA, and it discusses the proper way courts and responsible parties should treat co-trustees of injured natural resources.

[8] *See also* 42 U.S.C. § 9607(f)(1) ("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") (emphasis added).

of injured natural resources and not on the particular trustee who recovers NRD. 42 U.S.C. § 9607(f)(1); *Ohio*, 880 F.2d at 444.

One way CERCLA attempts to accomplish its goal of full restoration is to authorize multiple trustees to act over injured natural resources. In relevant part, CERCLA § 107(f)(1) provides that,

> [i]n the case of an injury to, destruction of, or loss of natural resources . . . 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 . . . .

42 U.S.C. § 9607(f)(1) (emphasis added). Liability to each trustee is not necessarily an either/or proposition. Rather, liability "shall be to the United States . . . and to any State . . . and to any Indian Tribe" for injured natural resources as the case may be. *Id.* In sum, CERCLA's statutory framework envisions the possibility of co-trustees over natural resources.[9] Courts interpreting CERCLA reach the same conclusion. *See, e.g., Coeur D'Alene I*, 280 F. Supp.2d at 1115 (stating that "trusteeship is not an all or nothing concept"); *Coeur d'Alene II*, 471 F. Supp. 2d at 1068 (stating that "more than one trustee could manage, control, or hold in trust a given natural resource"); *U.S. v. Shell Oil Co.*, 605 F. Supp. 1064, 1080 (D. Colo. 1985) (recognizing that the United States and Colorado were co-trustees of the natural resources at issue). Indeed, the court in *Coeur d'Alene I* even explained that "co-trustees are the norm and not the exception." 280 F. Supp.2d at 1115.

On its website, the United States Environmental Protection Agency ("USEPA") also explains that "Federal and State agencies and Indian Tribes may be co-Trustees for the same natural resource." USEPA, Natural Resource Damages: Frequently Asked Questions, http://www.epa.gov/superfund/programs/nrd/faqs.htm (last visited May 12, 2010) ("There may be multiple Natural Resource Trustees because of coexisting or contiguous natural resources or concurrent jurisdictions."). Co-trustees make sense, particularly those who share common interests in natural resources that are migratory such as water, fish and birds. *See id.*; *see also Coeur d'Alene I*, 280 F. Supp.2d at 1116-17. Accordingly, CERCLA creates a system through which one or more trustees may seek NRD to restore or replace injured natural resources.

But, even though multiple trustees may recover NRD for a particular injured natural resource, CERCLA protects the potentially responsible party by precluding any double recovery of NRD. Specifically, CERCLA § 107(f)(1) provides that "[t]here shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource[.]" 42 U.S.C. § 9607(f)(1). CERCLA's preclusion of a double recovery also underscores CERCLA's goal of full restoration and its grant of authority to multiple trustees to recover NRD for a particular

[9] CERCLA does not provide for the perfect division of trustee interests among the trustees for a state, agencies of the federal government, and an Indian tribe, precisely because the uses and resources at issue will ultimately dictate if there are concurrent federal, state and tribal interests in any particular resource.

injured resource. Because NRD may only be used to restore or replace an injured natural resource, as opposed to supplementing general treasuries, full restoration of a natural resource extinguishes another claim for NRD by a co-trustee over the same resource. *See id.* Similarly, if only one co-trustee could recover NRD for an injured natural resource, then a double recovery situation would never arise. *See Coeur d'Alene II*, 471 F. Supp.2d at 1068.

C. Co-trustees do not and cannot always act in unanimity when it comes to NRD recoveries on behalf of the public for the benefit of injured natural resources.

Co-trustees over a particular natural resource are encouraged to cooperate with one another to effectuate CERCLA's make-whole remedy for injured natural resources. *See* 40 C.F.R. 300.615(a) ("Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities"). Coordination among co-trustees reflects the mutuality of interest trustees share over restoring or replacing injured natural resources on behalf of the public. In addition, coordination is often the most efficient and cost-effective way to pursue NRD.

But coordination and cooperation is not necessarily required under CERCLA. In fact, in practice, individual trustees are often unwilling or unable to pursue NRD for various reasons. For instance, trustees are often without resources to fund NRD cases that are typically complicated and expensive.[10] In other situations, trustees may be reluctant to bring an NRD case in the face of political pressure or economic impacts that can accompany pursuit of particular responsible parties. These situations can lead to disputes among co-trustees or, at the very least, a lack of coordination in bringing claims for NRD.

So what happens when co-trustees do not coordinate or cooperate with each other? Can a co-trustee enter into an early NRD settlement or even pursue NRD in a lawsuit with a responsible party in the absence of another co-trustee? CERCLA case law provides inconsistent answers to these questions.

[10] In fact, in both the *Coeur d'Alene* and *Tyson Foods* cases, discussed *infra*, a co-trustee was unable to participate in the case because of insufficient means to fund litigation against the responsible parties. *See* U.S. Memorandum Regarding the Tribe's Mtn. Suggesting Lack of Subject Matter Jurisdiction (Document 1437) at 9, *United States v. ASARCO Inc.*, Case 3:96-cv-00122-EJL (D. Id. Feb. 14, 2005) (explaining that the State of Idaho settled its NRD claims against one responsible party for "substantially less than full restoration" because "the State legislature decided against funding the litigation"); Brief of Plaintiff/Appellee State of Oklahoma, *Oklahoma v. Tyson Foods*, No. 09-5134 (10th Cir. Dec. 28, 2009), 2009 WL 5242220 at 8 (citing Attorney General of the Cherokee Nation's testimony explaining that the Nation "do[es] not have the resources to bring this sort of lawsuit . . . on its own"). It is beyond the scope of this paper to address in what circumstances portions of unitary NRD recoveries under CERCLA may be applied to the litigation costs, attorney's fees, and expert/NRD assessment costs incurred by trustees pursuing CERCLA claims.

III. CERCLA Case Law Provides Inconsistent Decisions With Respect to Situations of Co-Trusteeship Over Natural Resources.

A. *Coeur d'Alene I*: Co-trustees must allocate their trusteeship interests based upon proof of day-to-day stewardship over particular natural resources.

In *Coeur d'Alene I*, the United States, the State of Idaho, and the Coeur d'Alene Indian Tribe (the "Tribe"), through their trustees, sought NRD under CERLCA against certain mining companies for contamination of the Coeur d'Alene Basin (the "Basin") resulting from the defendants' mining practices. 280 F. Supp.2d at 1101-02, 1115. Idaho settled its NRD claims. *Id.* at 1115. After a lengthy bench trial over Phase I of the lawsuit, the district court issued its findings of fact and conclusions of law, and it directed the parties in Phase II to present evidence so that the court could allocate trusteeship over the natural resources at issue "in order to adequately compensate multiple trustees for damage to natural resources." *Id.* at 1101, 1117.

One issue in *Coeur d'Alene I* was the scope of trusteeship over particular natural resources within the Basin. 280 F. Supp.2d at 1107, 1114-17. The defendants argued that the trustee plaintiffs were not trustees over many of the natural resources at issue. *Id.* at 1114. The court noted that, as part of an NRD claim, a natural resource trustee must show that the injured natural resource is within the scope of its trusteeship. *Id.* at 1102, 1115 (citing Final Rule, 59 Fed. Reg. 14262, 14268 (Mar. 25, 1994) ("CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control."). According to the court, trusteeship over a particular natural resource is a question of both law and fact. *Id.* at 1115.

As part of its factual findings, the court identified natural resources within the Basin under the trusteeship of one or more of the trustee plaintiffs. *Id.* at 1107, 1117. Specifically, the court found that the federal government had jurisdiction over navigable waters, it had control and management over water quality, and it was trustee for federal lands within the Basin. *Id.* Idaho shared control and management over water quality within the Basin with the federal government, and it also had trusteeship over fish and birds, their food sources, the submerged lands at issue, and state-owned lands. *Id.* Finally, the court found that the Tribe shared trusteeship over submerged lands with Idaho, and it had trusteeship over lands within the reservation. *Id.*

In addition to these findings of overlapping trusteeship, the district court concluded that co-trusteeship existed under CERLCA. *Id.* at 1115. In fact, according to the court, "<u>co-trustees are the norm and not the exception</u>." *Id.* (emphasis added). Stating further, "the law clearly anticipates the same because in practice that is the only feasible way it could work. The migration of birds and fish from one area to another and the use of habitat as they move demonstrate that our natural resources are not static to one area." *Id.* at 1116. "Water, wildlife, fish, birds, and biota do not stay in one place." *Id.* at 1117.

Yet, after making these findings, the court held that only one trustee could recover NRD for any given natural resource, even when co-trustees could bring suit under CERCLA. *Id.* at 1115-16. According to the court, a co-trustee can only recover NRD if it exercises actual management and control over the injured natural resource: "[T]he only feasible way to compensate the co-trustees and avoid a double recovery or unjust enrichment to one trustee at the

expense of another is to award damages in the ratio or percentage of actual management and control that is exercised by each of the various co-trustees." *Id.* at 1116. The court explained that its ruling would preclude "the undesirable situation of a race to the courthouse between co-trustees" of any given resource. *Id.* As such, the court directed the parties "during the second phase of this trial . . . to submit evidence to aid the Court in determining the percentages of trusteeship over certain resources[.]" *Id.* at 1117.

In sum, despite the language in CERCLA § 107(f) that NRD can be recovered for injured natural resources "belonging to, managed by, controlled by, or appertaining to" to co-trustees, *Coeur d'Alene I* stands for the proposition that co-trustees may only recover NRD according to their percentage of actual management or control of an injured natural resource. *See* 42 U.S.C. § 9607(f)(1); *Coeur d'Alene I*, 280 F. Supp.2d at 1116.

B. *Coeur d'Alene II*: Relying on legislative intent, co-trustees can recover the full amount of NRD, without any allocation, less any amount already recovered by a co-trustee for an injured natural resource.

Almost two years later, in *Coeur d'Alene II*, the Tribe asked the court to reconsider its decision in *Coeur d'Alene I.* The Tribe's motion, however, was couched as a "Motion Suggesting Lack of Subject Matter Jurisdiction to Allocate Trustees' Interests," presumably because the deadline for filing a motion to reconsider had passed. 471 F. Supp.2d at 1066. Ultimately, the court denied the Tribe's motion, concluding that it had subject matter jurisdiction under CERCLA. *Id.* at 1066-67. However, despite that ruling, the court *sua sponte* modified its own order in *Coeur d'Alene I*, holding that co-trustees could recover the full amount of NRD for an injured natural resource, less any amount already recovered by another co-trustee, and were not required to allocate their trusteeship interest vis-à-vis other co-trustees. *Id.* at 1067-69.

After reviewing the parties' briefing, the court found that its reliance in *Coeur d'Alene I* "on traditional tort concepts in allocating trusteeship was misplaced" given Congress' intent behind CERCLA. 471 F. Supp.2d at 1067-68. Specifically, the court noted that CERCLA imposed strict liability on responsible parties in furtherance of the statute's make-whole remedial scheme: "The remedial purpose of CERCLA was to give the statute a broad interpretation so as to restore and make whole the environment for the protection of the public and guard against destruction and damages to our natural resources." *Id.* at 1067. Furthermore, the court noted that "[u]nder CERCLA the recovery, if any, is not for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals." *Id.* at 1068. Thus, CERCLA's remedial scheme is focused on the natural resource and not on the party to whom NRD is awarded.

Consistent with CERCLA's make-whole remedy, the court held that a co-trustee, acting individually or collectively with other co-trustees, may pursue responsible parties for the full amount of NRD, less any amount already recovered by a co-trustee through settlement or otherwise. *Id.* at 1068. The court's ruling ensured that if only one co-trustee was able or willing to pursue NRD, the full extent of NRD could be recovered by the co-trustee to effectuate full restoration of the injured natural resource (and, conversely, that one trustee cannot prevent another trustee from settling its NRD claims). In addition, the court noted that its ruling was consistent with CERLCA's preclusion of a double recovery for NRD, because if co-trustees were only allowed to recover NRD according to an allocation based upon actual control or

management, a double recovery situation would never arise. *Id.* Thus, the court recognized that its earlier reasoning – that an allocation was required to prevent unjust enrichment and preclude a double recovery – was wrong. *See Coeur d'Alene I*, 280 F. Supp.2d at 1116.[11]

C. *Tyson Foods*: The State of Oklahoma's NRD claims could not proceed without the Cherokee Nation in part because an award of NRD to Oklahoma would impair or impede the Nation's interests in the same natural resources.

Four years later, the United States District Court for the Northern District of Oklahoma appeared to backtrack from *Coeur d'Alene II* by relying instead on *Coeur d'Alene I*. In that case, *Tyson Foods*, the court dismissed the State of Oklahoma's NRD claim under CERCLA for its failure to join the Cherokee Nation (the "Nation"). 258 F.R.D. at 473, 484. Oklahoma brought its CERCLA NRD claim, among others, for injury to the Illinois River Watershed ("IRW") against the "Poultry Defendants" as a result of their "practice of storing and disposing of hundreds of thousands of tons of poultry waste on lands within the IRW." *Id.* at 473. The Poultry Defendants moved to dismiss Oklahoma's claims under Federal Rule of Civil Procedure (FRCP) 19 for failure to join the Nation, who it argued was an indispensable party. *Id.* at 474.[12]

Along with its response to the Poultry Defendants' motion, Oklahoma filed "an agreement" between it and the Nation, which recognized the Nation's interests in the litigation and purported to retroactively assign any of the Nation's claims relating to the lawsuit to Oklahoma, effective as of the date of Oklahoma's complaint. *Id.* at 475. The agreement between Oklahoma and the Nation evidenced a mutuality of interest between the two with respect to Oklahoma's NRD claim in the lawsuit. However, the court found the agreement to be invalid because its formation did not comply with Oklahoma law regarding cooperative agreements between the state and an Indian tribe. *Id.* at 475-76.

Ultimately, the court agreed with the Poultry Defendants that the Nation was an indispensable party and dismissed Oklahoma's NRD claim. *Id.* at 476-82. To determine whether the Nation was a "required" party – one step in the court's indispensable party analysis under FRCP 19 – the court considered whether the Nation "claimed an interest" relating to the subject of Oklahoma's action and whether proceeding without the Nation – as a practical matter – would impair or impede its ability to protect that claimed interest. *Id.* at 474, 476-81; *see also* FRCP 19(a)(1). The court found ample evidence that the Nation *claimed* an interest in Oklahoma's action, including interests in "protecting the Illinois River[,]" "vindicating its claimed rights for any pollution of the watershed[,]" "recovering for itself civil remedies . . . for

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[11] The court also addressed situations in which co-trustees were in disagreement: "If there is later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties." *Id.* at 1068.

[12] Alternatively, the Poultry Defendants argued that Oklahoma lacked standing to assert its NRD claim for injury over properties it does not own or hold in trust. *Id.* The court also dismissed Oklahoma's NRD claims on standing grounds, even though Oklahoma argued that, under CERCLA, it had standing to pursue NRD for the natural resources at issue. *Id.* at 483-84. The question of whether a trusteeship interest exists, in the first place, is beyond the scope of this paper.

the injuries to the IRW[,]" claimed "water rights in the Illinois River[,]" "claims for pollution to natural resources belonging to or held in trust for the benefit of the [Nation]" under CERCLA, among others. 258 F.R.D. at 477-79.

The court also concluded that adjudication of Oklahoma's action in the Nation's absence would impair or impede the Nation's claimed interests. *Id.* at 479. According to the court, Oklahoma sought NRD for pollution to the IRW as a whole, and it did not "attempt to differentiate, segregate and/or exclude damages to tribal lands and water rights." *Id.* The court recognized the possibility that Oklahoma and the Nation may be co-trustees over the natural resources at issue. *Id.* at 480 (noting Oklahoma's argument that "the [Nation] is a 'potential co-trustee under CERCLA'"). However, relying upon *Coeur d'Alene I*, the court explained that Oklahoma "made no attempt to determine the relative ratios or percentages attributable to itself and the Nation" of actual management or control over the natural resources at issue. *Id.* (citing *Coeur d'Alene I*, 280 F. Supp.2d at 1094). Without such an allocation, the court concluded that "[o]ne trustee – the State – is therefore likely to be unjustly enriched at the expense of the Nation, thereby impairing the [] Nation's ability to protect its interests." *Id.*

As such, contrary to *Coeur d'Alene II* and without even a mention of it, the court in *Tyson Foods* concluded that a co-trustee could not recover the full amount of NRD for an injured natural resource without proving that it actually managed or controlled 100% of that natural resource through an allocation process. *See id.* Moreover, the court explained that it could not even make a "determination of the ratio or percentage of actual management or control" of Oklahoma vis-à-vis the Nation "in the Nation's absence." *Id.* So, it dismissed Oklahoma's NRD case. *Id.* at 484.

IV. The Fate of Co-Trustees After *Tyson Foods*: Will Courts Adhere to Congress' Intent Behind CERCLA?

Coeur d'Alene I and *Tyson Foods* have broad implications for parties wishing to settle with a less than unanimous group of trustees, as well as for co-trustees who wish to bring or resolve NRD claims without the concurrence of all trustees. For instance, following the *Coeur d'Alene I* and *Tyson Foods* approach, co-trustees will be bear the additional burden and expense of allocating their respective trusteeship interests, overburdening already complex and expensive litigation for governmental entities and responsible parties, alike. Likewise, unless overturned, the *Tyson Foods* decision will require a settling party to make such an allocation among trustees just to determine how much of any particular resource a settling trustee is authorized to compromise.[13] Following *Coeur d'Alene II* will bypass these problems, bring clarity to the parties involved, and provide the framework for co-trustees to achieve the goals of Congress under CERCLA's NRD regime.

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[13] An appeal in *Tyson Foods* is pending. After the court's July 22, 2009 decision, the Cherokee Nation sought leave to join Oklahoma's case. The Poultry Defendants (after they argued that the Nation was an indispensable party to the litigation) opposed leave and argued that the Nation's joinder was too late and would result in substantial prejudice to them. The court agreed with the Poultry Defendants, and that decision has been appealed. Oral argument before the Tenth Circuit Court of Appeals was held on May 5, 2010.

A. *Coeur d'Alene I* and *Tyson Foods* are inconsistent with CERCLA's "make-whole" remedial scheme and co-trustee system for NRD.

The outcome in *Tyson Foods* made clear that an allocation of trusteeship among co-trustees is inconsistent with CERCLA's "make-whole" remedial scheme and the goal of full restoration of injured natural resources. Because the Nation was unwilling or unable (as was the case) to join Oklahoma's action,[14] Oklahoma's natural resource trustee was precluded from pursuing NRD on behalf of the public and restore injured natural resources. Accordingly, under the *Tyson Foods* approach, one co-trustee could veto or hold hostage NRD claims, forever precluding their adjudication or settlement and the restoration of injured natural resources.

Congress did not intend such a result under CERCLA. Indeed, the express language of CERCLA does not even lend support for the *Coeur d'Alene I* and *Tyson Foods* allocation approach. Nowhere does CERCLA require or even imply that a co-trustee must prove the extent of its trusteeship interests vis-à-vis another co-trustee. To the contrary, CERCLA § 107(f) provides that a responsible party's liability "shall be to the United States Government **and** to any State . . . **and** to any Indian Tribe" for natural resources "belonging to, managed by, controlled by, or appertaining to" one or more of those parties. 42 U.S.C. § 9607(f)(1) (emphasis added). Instead of looking to CERCLA's express language, the *Tyson Foods* court relied exclusively on the *Coeur d'Alene I* decision for its conclusions on allocation. *See Tyson Foods*, 258 F.R.D. at 480. However, the same court in *Coeur d'Alene II* recognized that its reliance "on traditional tort concepts" concerning allocation of *a defendant's* respective share of liability to suggest that a *plaintiff* trustee must allocate its trusteeship interest "was misplaced." 471 F. Supp.2d at 1068.

In addition, the *Coeur d'Alene I* and *Tyson Foods* allocation approach conflicts with other CERCLA NRD provisions. As *Coeur d'Alene II* explains, the CERCLA provision precluding a double recovery of NRD would be superfluous if courts allocated trusteeship interests among co-trustees. 471 F. Supp.2d at 1068 (if courts had "to determine the extent of each trustee's interest and apportion the damage accordingly" . . . "there would be no need for the double recovery language in the statute because the situation would never arise"). On the other hand, allowing co-trustees to recover or resolve 100% of NRD, subject to the double recovery preclusion, gives force and effect to the statute. *See Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981) (recognizing a "well-settled rule that all parts of a statute, if possible, are to be given effect").

Finally, the *Coeur d'Alene I* and *Tyson Foods* approach appears to be based in part on the mistaken belief that allowing a co-trustee to recover 100% of NRD would unjustly enrich that trustee to the detriment of the absent co-trustee. *Coeur d'Alene I*, 280 F. Supp.2d at 1116; *Tyson Foods*, 258 F.R.D. at 480. But that approach flatly ignores CERCLA's focus on the restoration of natural resources on behalf of the public, as opposed to using NRD for general purposes. 42 U.S.C. § 9607(f)(1). CERCLA precludes the possibility of "unjust enrichment" by expressly prohibiting double recoveries of NRD and applying NRD recoveries to the injured natural resources at issue. *See id.* Thus, the interests of an absent co-trustee are generally protected because the recovery of NRD, if any, for a particular injured natural resource must be used to restore that resource.

[14] *See, supra*, note 10.

B. *Coeur d'Alene II* provides a proper path and gives clear direction to parties and practitioners seeking to achieve finality with respect to NRD liability.

Coeur d'Alene II provides the proper framework for achieving CERCLA's broad remedial purposes and promoting early settlements. Under *Coeur d'Alene II*, a co-trustee can pursue, recover and release a party for 100% of NRD for injured natural resources, less any amount already recovered by a co-trustee given CERCLA's preclusion of a double recovery.[15] 471 F. Supp.2d at 1068. This approach is consistent with many CERCLA concepts. For starters, the *Coeur d'Alene II* approach promotes early settlements and allows potentially responsible parties to evaluate and resolve risk early. Moreover, it makes it unlikely that one co-trustee could veto or, by its absence, preclude another co-trustee from resolving an NRD claim in the first place.

In addition, the *Coeur d'Alene II* approach returns CERCLA's proper focus to the inured natural resources, as opposed to the co-trustee bringing the claim. The co-trustee's recovery does not benefit the trustee or governmental entity. Rather, any recovery of NRD must be directed to the injured natural resources on behalf of the public. Thus, unjust enrichment of a particular trustee is avoided, and co-trustees that do not recover NRD are unlikely to be prejudiced. If, however, a co-trustee disagrees with the natural resource damages assessment ("NRDA") of its co-trustee, the regulations promulgated under CERCLA[16] and *Coeur d'Alene II* provide an avenue of redress: "If there is a later disagreement between co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties." 471 F. Supp.2d at 1068.

The *Coeur d'Alene II* approach will also bring clarity and can expedite finality to responsible parties seeking to resolve their NRD liability. On the other hand, by requiring an allocation process and adjudicating which trustee exercises the greater amount of *actual management and control* over the injured natural resource, NRD claims will become even more lengthy, complicated, and expensive to litigate. Additional claims – such as actual ownership between sovereigns over the injured natural resources – will be interjected into CERCLA litigation and NRD claims. For these reasons, a dissenting co-trustee will be much more likely to contest settlements between another co-trustee and a responsible party, fearing that the settling trustee will recover more than its share of NRD. Consequently, the benefits accruing to responsible parties and the public from early NRD settlements and restoration efforts will likely end.

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[15] The authors do not suggest that a natural resource trustee can recover NRD for natural resources not within its trusteeship. Consistent with the case law discussed herein, a trustee must show that it does have trusteeship over the natural resources at issue as part of its NRD claim. *See, supra*, note 7.

[16] *See* 42 U.S.C. § 9607(f)(2)(C). CERCLA provides that an NRDA performed in accordance with its regulations is entitled to a rebuttable presumption. A dissenting co-trustee may be able to show that the NRDA was not performed under the appropriate regulations, or it may be able to overcome the rebuttable presumption by demonstrating that the injured natural resource has not been fully restored given a particular use not assessed by the other co-trustee.

In sum, the *Coeur d'Alene I* and *Tyson Foods* approach could result in a significant shift from the practice of early settlement and restoration. Co-trustees could block and disrupt early NRD settlements, arguing that the restoration efforts to be undertaken under the supervision of one trustee exceed its percentage of trusteeship over the injured natural resource, are insufficient, or should be expanded beyond the NRD claims at issue. With early settlement and restoration off the table while co-trustees allocate their respective interests, responsible parties will have to wait years to have their NRD liability finally adjudicated, which could serve to only increase the damages accruing and ultimately paid. That process could result in the responsible party's expenditure of greater sums to resolve its NRD liability.

V. Conclusion

Courts have repeated that CERCLA should be interpreted liberally to effectuate its broad remedial purposes.[17] *Tyson Foods* undercuts this CERCLA adage significantly. If *Tyson Foods* is the law under CERLCA, injured natural resources under the trusteeship of co-trustees may never be resolved or restored. But, under *Coeur d'Alene II*, a party wishing to resolve its NRD liabilities can do so even if the trustees are not acting in unanimity. In addition, the *Coeur d'Alene II* approach will further Congress' intent to expeditiously and effectively restore the nation's natural resources.

[17] *See, e.g., U.S. v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998); *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1481 (9th Cir. 1995).