

ROSCOE HOGAN ENVIRONMENTAL LAW ESSAY CONTEST
Sponsored by The Roscoe Pound Foundation
First Place Winner 1998

Muddy Waters: Clarifying The Line Between Public And Private Recovery Of Natural Resource Damages

By Danielle Droitsch, University of Tennessee College of Law

I. INTRODUCTION

On March 24, 1989, 11 millions gallons of crude oil spilled into the Alaskan Prince William Sound making it the largest oil spill in American history. As a result of the Exxon Valdez spill, over 1,200 miles of coastal land and between 2,500 and 6,000 miles of square ocean were contaminated with oil. Wildlife also suffered. Approximately 3,500 - 5,300 sea otters and between 260,000 - 580,000 birds perished as a result injuries from the oil spill.

In 1991, the U.S. Justice Department and the State of Alaska entered into a settlement with the Exxon Corporation for at least \$900 million in damages "for restoration of the environment and compensation for lost public uses of the natural resources." After the settlement, however, there still remained a claim against Exxon by the Alaska Sport Fishing Association (ASPA) made up of over 130,000 recreational sportfishers who used the Prince William Sound. The ASPA claimed damages for the lost of use and enjoyment of natural resources which resulted from the oil spill. Specifically, the ASPA alleged that the release of oil into the Prince William Sound resulted in lost resources for sport fishing, boating, kayaking, wildlife viewing, camping, beachcombing, hiking along the shoreline, hunting, trapping, crabbing, education or children, and other uses of the area. Exxon moved for a dismissal of the recreational sportfisher claims arguing that its government settlement precluded the recovery of any additional damages based on lost public uses of natural resources. The court agreed with Exxon and granted the dismissal holding that the sportfishers did not have standing to bring the action as they did not allege any "uniquely private claims."

To what degree private parties can assert "standing" to recover damages which result from injury to natural resources is unclear. This paper attempts to provide an overview of public or government "standing" and private "standing" to recover damages resulting from injury to natural resources. It then seeks to identify those factors which appear to persuade courts to grant standing to one party or another. Finally, this paper offers some ideas as to how to better distinguish natural resource damage claims so as to provide the fullest possible recovery of claims for natural resource damages as between public and private parties.

A. Natural Resource Injury: An Overview

Pollution released into the natural environment can significantly impact the ecological health of rivers, streams, lakes, fish and other aquatic life, and wildlands. Costs to clean up and restore natural resources to their pre-damaged condition are often exorbitant. The impacts of injury to natural resources often has a widespread impact on the economies of communities who depend on these resources including commercial fishers, hotels, dry docks, restaurants, and other tourism-related businesses. The impact of pollution, however, also extends to non-pecuniary users of natural resources such as recreational fishers and swimmers.

Despite the breadth of environmental protection afforded by federal and state laws, the production of goods and services continues to leave its negative mark on the environment. Environmental laws affect everything from the discharge of air and water pollutants to environmental decision-making at the federal agency level. While the advent of environmental regulation in the 1970's did produce an overall decrease of pollution impact on natural resources, the release of pollution continues to take its toll on the environment. Environmental regulation does not have the effect of preventing or hindering all

pollution; rather, it only partially offsets actual environmental impacts to natural resources. In its pure and unregulated form, capitalism does not account for environmental costs or impacts. The pollution which reaches the natural environment translates into environmental costs which are not included in the price of goods or services. Consequently, the costs of injury to public natural resources are externalized as they are not incorporated into the overall costs of economic decision-making.

The problem of accounting for these environmental costs is captured in the axiom known as the "Tragedy of the Commons." Under this axiom, a rational herdsman will decide to graze additional steer on land in an attempt to maximize revenues. The resulting environmental impact to the overgrazed land and the public commons, however, is not calculated in the overall cost of that decision. The herdsman will not pay for the external impacts to those resources which are public in nature and cannot be privately owned. The "tragedy" occurs when these external damages remain unaccounted for and ignored in the long term. The public is therefore burdened with the rehabilitation of the commons and the loss of the use of the natural resource. An even further tragedy lies in the disorganized and dispersed nature of the public which is too big to defend its own interests. In other words, the ability of the collective public to recover these lost or damaged resources is both impractical and infeasible.

Under modern day jurisprudence, injured natural resources including trees, water, and the wildlife have no "standing" to bring an action for a redress of injuries. The conferral of "standing" on animals and inanimate objects has been a subject of debate for over twenty years. Justice Douglas in *Sierra Club v. Morton* argued unsuccessfully for such standing.

Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation ... [s]o it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes - fish, aquatic insects, water ouzel, otters, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.

The burden of making the victim of pollution B the natural environment - whole again therefore lies with the public. The dilemma therein is two-fold: 1) how the public can assert standing to effectively recover damages resulting from injuries made to these natural resources while 2) also successfully asserting a right in something which is theoretically owned by no one.

The legal theorem which best attempts to address this dilemma of how to practically account for public damages to natural resources is addressed under ancient jurisprudence with roots in Roman Law - the public trust doctrine. The following discussion addresses the reinvigoration and application of the public trust doctrine over the past thirty years and then specifically addresses current parameters of the private right of action for such damages.

B. The Public Trust Doctrine

The public trust doctrine embodies the notion that certain natural resources are held and protected within the public trust. Dating back to the Roman Empire, the public trust doctrine identifies the government or king as the trustee of the natural resources, and the public as beneficiaries of that trust. The public trust doctrine, recognized by American courts as far back as 1810, matured under American state common law. Roots of state common law form the foundation of the public trust doctrine which has expanded from covering only submerged lands and other navigable waters to non-navigable waters, state parks, and other natural resources. The public trust doctrine is now recognized in one form or another in the majority of states in the country. The application of the public trust doctrine under federal common law, however, is unclear.

The elevation of environmental concerns combined with the publication of a seminal article by Professor Joseph Sax over 25 years ago marked the reemergence of the doctrine as a leading procedural tool to address injury to natural resources. Since the publication of Sax's article, there is now a renewed body of common law as well as several significant environmental statutes which draw from the public trust doctrine's framework.

The public trust doctrine is invoked with the interference or impairment of natural resources. A claim under the public trust doctrine requires the allegation of four elements: 1) tortious interference, destruction, invasion, or encroachment upon natural resources; 2) that the natural resources form a part of the corpus of the public trust; 3) causation; and 4) quantifiable damages commensurate with the diminution in value of the trust. Under this doctrine, the legal representative or "trustee" of the public-at-large is entitled to recover damages from the wrongdoer.

In most cases, the public trust doctrine is invoked under three conditions: 1) when the government transfers a piece of public trust property to a private party; 2) when the government permits an impermissible private use of a public trust area; or 3) when a public trust asset has been injured, destroyed, or is threatened by pollution. Setting the public trust doctrine apart from common law torts of negligence, nuisance, and trespass is the public trust doctrine's emphasis on "restoration costs" rather than diminution as a measure of damages. In contrast, under common law claims of tort, the measure of damages is the difference between the commercial value of the property before and after the injurious event. The public trust doctrine also allows for equitable relief which is the most often sought after remedy.

Today, the public trust doctrine acts as the intersection of several different legal pathways including common and statutory law. This intersection was clearly identified by Professor Sax as primarily a "recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that make their adaptation to private use inappropriate."

As a result, there is now many sources of public trust doctrine law. Though originally conceived under a collection of state common law, the public trust doctrine can now be thought of as an umbrella of legal thought incorporating state common law and federal and state statutory law to encompass all potential natural resource damage claims. Together, these legal sources define who may bring a public trust action and for what natural resource injuries they may recover.

The context under which the public trust doctrine is invoked has broadened significantly since its inception. The celebrated Supreme Court case, *Illinois Central Railroad Co. v. Illinois*, which first affirmed the public trust doctrine held that the state of Illinois was prohibited from conveying a portion of Lake Michigan to a private entity. In *Illinois Central*, the court held that the state held in trust the submerged land on behalf of the state's citizens "so that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." This celebrated public trust doctrine case confirmed that states are entrusted with certain natural resources and that they have an obligation not to exceed that trust.

Illinois was followed up by a Wisconsin Supreme Court case, *Milwaukee v. State* which similarly prohibited the attempted transfer of a portion of Lake Michigan by the state to a private company. In addition to using the public trust doctrine to prevent a natural resource conveyance, it can also be used to prevent a condemnation action, or oppose a regulation.

The only exception to the public trust doctrine holds that a government grant or conveyance of natural resources can be overridden when it 1) aids navigation, commerce, or another public trust purpose and; 2) does not impair the public interest in the remaining trust or natural resources. For example, in *George Bunch v. Hodel*, a public trust doctrine action brought by landowners, business owners, guides challenging the controversial drawdown of 5.8 feet of a Tennessee lake was dismissed based on the public interest exception. The exception was founded upon the state's public interest to combat problems of depleted oxygen levels and reduction of the fishing habitat.

II. APPLICATION OF PRINCIPLES OF THE PUBLIC TRUST DOCTRINE

A. The Public Trust Doctrine: Statutory Law

The reemergence of the public trust doctrine as a result of Professor Sax's article in the early 1970s was followed by the incorporation of the doctrine's framework into federal law. Of those statutes which

provide for recovery of damages resulting from injury to natural resource damages, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA) of 1990 are the most notable.

CERCLA's statutory framework is considered to most closely mirror the principles of the public trust doctrine. CERCLA's main purpose is two fold: 1) to clean up contaminated sites; and 2) to allocate the costs of cleanup, remediation, and natural resource injury costs to those polluters who benefited from the pollution. CERCLA is triggered with the release or threatened release of a hazardous substance into the environment. A cleanup action of a hazardous site involves either the removal, remediation, or combination thereof of hazardous pollutants from a site. The cleanup or remediation of polluted sites under CERCLA begins with an initial preliminary assessment (PA), a site investigation (SI), and eventually a Record of Decision (ROD) which acts as the administrative threshold determining whether a site will be remediated.

CERCLA natural resource damage provisions, permitting the recovery of damages by "public trustees" from those responsible for the injury to natural resources, are designed to compensate the public for its loss or injury that will not be recovered during the remediation. A CERCLA natural resource damage action is brought after the completion of a remediation action "to restore, replace, or acquire the equivalent of [the damaged] resources." Damages which may be recovered in a CERCLA claim may include residual injury to natural resources after the remediation is completed and compensatory damages for the lost value during the remediation and recovery process. Injunctive relief is not available under CERCLA's natural resource damage provisions.

CERCLA imposes liability against responsible parties 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." Significantly, CERCLA as well as the other federal environmental laws based on the public trust doctrine expands on the common law and provides for the recovery of restoration value rather than just diminution in value.

The natural resource damages provisions under the CWA generally mirror those of CERCLA except to the extent it covers oil spills. Political maneuvering prior to CERCLA's passage resulted in an extensive "petroleum exclusion." Under the CWA, owners and operators' of vessels which have discharged harmful quantities of oil or hazardous substances into navigable waters of the United States are held strictly liable for costs associated with the spill. The CWA provides for the recovery of "costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damages or destroyed as a result of a discharge of oil or a hazardous substance ..."

The passage of the Oil Pollution Act (OPA) in 1990 following the Exxon Valdez spill, however, has appeared to replace the CWA provisions. The OPA provides for expanded liability covering not only oil spills but, more broadly, any discharge of oil. In addition to this expanded application to oil releases, the OPA also provides for recovery of specific economic damages by private parties.

B. The Public Trust Doctrine: Common Law

Basic principles of the public trust doctrine also are evident in the common law claim for public nuisance. A public nuisance is "a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience" Public nuisance has been described as "the inland version of the public trust doctrine" since it is commonly used to recover damages resulting from injury to natural resources. A public nuisance exists when there is an unreasonable interference in the exercise of a right common to the general public or to an indefinite number of people. Public nuisance is related to the public trust doctrine in that it arises with an invasion of rights which are common to all members of the public. A private nuisance, however, is not related to public trust doctrine concepts as it involves the invasion of a private interest or right.

III. GOVERNMENT TRUSTEESHIP UNDER THE PUBLIC TRUST DOCTRINE

A. Common Law Trusteeship

The touchstone of the public trust doctrine lies in its conferral of "standing" to the public through a designated governmental trustee to recover natural resource damages. Imparting trusteeship to a governmental entity acknowledges the extreme difficulties in coordinating the general public to obtain "standing" to bring a legal action for natural resource damages. Theoretically, the designated trustee is considered to be the guardian of the public's natural resources and the best representative of the public's interest to recover those damages resulting from their injury. A state's power to assert authority over natural resources was upheld by the Supreme Court in *Hughes v. Oklahoma*. The corresponding assertion of natural resource damages by state governments is brought under the *parens patriae* doctrine allowing states to assert trusteeship.

Common law, statutes, and regulations form the legal authority supporting a trustee's ability to bring certain natural resource damage claims. Whether a certain party may successfully bring a natural resource damage action often depends on how trusteeship is defined under either common or statutory law. The broader the scope of trusteeship over certain natural resources, the more likely the government trustee can recover and simultaneously the more likely a private party action for natural resource damage will be foreclosed with respect to the recovered damages.

Trusteeship is defined primarily by the types of natural resources which fall under the corpus of the public trust. Trusteeship also extends to the protection of the public use of a natural resource from destruction or interference. Historically, government trusteeship has extended to navigable lakes and streams, submerged lands, and the foreshore as a result of the public's use of these resources for navigation and commerce. Over the past 20 years, courts and statutes have expanded trusteeship to include other uses of natural resources. Trustee authority now extends to non-navigable waters, state parks, and migratory waterfowl. Further expansion in the public trust doctrine eroded the distinction between commercial uses such as navigation and commerce to include recreational uses such as swimming, hunting and fishing.

The rationale for expanding the public trust doctrine is founded on the assumption that government protection should extend to public uses in addition to commerce and navigation. The expansion of trusteeship covering a wider range of natural resource uses also recognizes that the public doctrine is flexible changing with "public perception of the values and uses of waterways."

The outer boundary of government trusteeship over natural resources was permitted in *Marks v. Whitney*. In *Marks*, a property owner brought a quiet title action to have the adjoining property declared burdened with a "public trust easement" as part of a settlement of a boundary dispute. The recognition of the public trust easement, however, was not based on the public use of the tidal lands; instead, the court based its decision on the need to preserve tidelands in their natural state "so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks* signified the most expanded application of what constituted a public trust use concluding that it was unnecessary to define precisely what public use encumbered the tidelands.

B. Statutory Trusteeship

The assertion of trusteeship by the federal and state governments occurs most commonly through statutory law. Trusteeship under the public trust doctrine has been incorporated into statutory law particularly CERCLA, the CWA, and the OPA. Trusteeship under these federal environmental laws is best outlined in CERCLA's natural resource damages provisions which also governs the natural resource provisions of the CWA.

CERCLA Section 107(a)(4)(C) provides that "in 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 ..." The related definition of natural resources is broadly defined under CERCLA as "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States or a state government. Trusteeship is therefore determined by the definition of natural resources under CERCLA.

CERCLA trusteeship is defined to include the federal government and state governments or their designated authorities. Prior to the adoption of the Superfund Reauthorization Amendments (SARA) in 1986, there was disagreement among the courts as to whether local governments could assert trusteeship under CERCLA without having been designated by the state. Three pre-SARA decisions were handed down granting trusteeship to local governments partially based on a lack of certain language in CERCLA. In 1986, Congress authorized SARA and Section 107(f)(2)(B) which provides a mechanism for the designation of state trustees. This added section has been interpreted by courts as not extending trusteeship to local governments unless officially designated by the State.

The scope of trusteeship, or federal and state government standing, to bring a natural resource damage action under CERCLA has long been a subject of debate. Natural resources which potentially fall under government trustee domain include (1) resources actually owned by the government or which the government has "exclusive possession"; (2) resources which are encompassed under the Public Trust Doctrine; (3) resources directly regulated by a government to protect the environment and; (4) resources not directly regulated for environmental protection but could be regulated within constitutional limitations. As the degree of government control decreases with each successive category, so does the "publicness" of the natural resource. The first and second categories likely fall under the purview of CERCLA trusteeship, however, the remaining categories are areas where there is a greater need for judicial or legislative interpretation to establish the government domain.

The debate over the scope of CERCLA trusteeship has mainly been fought over the development of the natural resource damage regulations designed to assist trustees in making natural resource damage determinations. Section 301(c) of CERCLA provides for the development of standard procedures in determining the amount of a natural resource damage claim; specifically, the regulations assist trustees in making damage assessments and alternative protocols for individualized assessments. The regulations must "determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recovery." Once a trustee brings an action for recovery of natural resources, they are further empowered with a rebuttable presumption that the damage assessment developed is correct.

A challenge to the originally proposed regulations issued in 1987 and 1988 forced more definition as to breadth of CERCLA trusteeship. In *Ohio v. Department of Interior*, natural resources were classified as falling under CERCLA trusteeship including those directly owned by the government, those held under the public trust and those which are substantially regulated or maintained by a government entity. Ohio confirmed that the assertion of trusteeship in a natural resource damage claim is not limited to those natural resources owned outright by the federal government. Indeed, compensation under CERCLA for an injured resource has been broadly defined to include the value of the lost "use" of the natural resource as well as lost "non-use" values of the resources. Examples of "use" values include fishing, hunting, bird-watching, and tourism while non-use values are less tangible and more theoretical encompassing the "existence" value which is equal to the dollar amount an individual will give to ensure the resource exist in the future.

In addition, Ohio also confirmed that CERCLA trusteeship might extend to privately owned land to the extent that a CERCLA trustee could demonstrate a "substantial degree of government regulation, management or other form of control over the property." Determining whether a natural resource met the "substantial degree of government regulation" test, however, would be determined on a case-by-case basis with reference to "the relevant treaty or other provision of international law, constitution, statute, common law, regulation, order, deed or other conveyance, permit, or agreement providing the basis for the trusteeship." This definition of natural resources represents "a middle ground where trustees have authority over some privately-owned resources based on government involvement with the resource." The natural resource damages regulations were finalized in 1996 and apply to both CERCLA and the CWA's natural resource damage provisions.

In contrast with CERCLA, the CWA and the OPA cover oil spills. Under the CWA, owners and operators of vessels of onshore and offshore facilities are subject to liability for the discharge of oil or any hazardous substance into navigable waters or coastal shoreline. Similar to CERCLA, Section 132(f) of

the CWA provides that the President, or an authorized representative, may act as a public trustee. Under the Clean Water Act, federal and state governments may recover damages incurred "in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil." The authorized representative under the CWA allows the President or an authorized representative of a state to "act on behalf of the public as trustee of the natural resources."

A trustee under the CWA may recover "any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance..." Because the Clean Water Act does not limit the amount a government trustee can recover for "costs and expenses incurred ... in the restoration or replacement of natural resource damaged or destroyed as a result of a discharge of oil or a hazardous substance" recovery for "lost use" claims are permitted under the Act. The passage of the OPA in 1991 created a similar regime for recovery of natural resource damages resulting from the discharge of oil into navigable waters of the United States. The OPA was modeled after CERCLA creating trusteeship in favor of state, tribal, foreign, and federal governments. Because of the breadth of OPA's provisions, it is considered to have superceded the Clean Water Act in its coverage of oil spills.

IV. Private Rights of Action for Natural Resource Damages

As government trusteeship over natural resources under the public trust doctrine and statutory law has expanded, so has the range of private party claims for natural resource damages. Natural resource damages include not only those damages designed to restore or recover a natural resource to its pre-damaged condition but also damages which result from injury to natural resources including the "value" of a natural resource. The value of the natural resource is defined both by the "use value" measuring actual behavior of people toward the resource as well as the "existence" value which represents the amount of money people will pay for the mere existence of the resource.

Government trustees may seek recovery not only for restoration and replacement damages but also for "lost use" claims which should be distinguished from restoration or replacement costs. Private parties are not generally favored to recover restoration and replacement costs since government trustees are required to apply recovered damages toward restoration and replacement costs. Similarly, the "existence" value of a natural resource is similarly not recoverable by private parties as it is considered a "pure" public resource and therefore recoverable only by the public as a whole through its trustee.

The potential conflict between public and private claims for natural resource damages emerge with respect to "lost use" damages. DOI regulations define lost use as "the value to the public of recreational or other public uses of the resource." Generally, lost use claims could encompass the closure of an area of fishing, the prohibition of commercial or recreational fishing, or even swimming uses. The following section discusses the historical sources of private party recovery for natural resource damages and then evaluates how courts attempt to distinguish private and public/trustee claims for damages resulting from "lost use" of natural resources.

Private parties cannot claim "trustee" status over natural resources under CERCLA and the CWA as they are precluded from bringing claims for natural resource damages held in trust under the government. But to the extent that a private party can assert "special" damages resulting from injury to natural resources, a common law action in tort for public nuisance is permissible. As will be discussed further below, private parties may also now seek private recovery under the OPA which provides a narrow claim for natural resource damages resulting from oil injury to natural resources.

In contrast with the public trust doctrine which focuses on the public or private nature of the natural resource before it was damaged, nuisance claims are defined by the nature of injury. And though public nuisance claims are generally considered an offense against the state, courts have also recognized such claims brought by private citizens. A private party alleging a public nuisance must demonstrate "an unreasonable interference with a right common to the general public." Private party claims for "lost use" damages based on injury to natural resource damages under a public nuisance claims depend on whether the claimant can show a special injury to a private property interest. Thus, a public nuisance to abate an "unreasonable interference with a right common to the general public" must also prove special and

individualized damages resulting from the harm. To succeed in alleging this special injury, a private claimant must demonstrate an injury "different in kind, rather than simply in degree, from that sustained by the public generally." In other words:

It is not enough that [the plaintiff] has suffered the same kind of harm or interference but to a greater extent or degree. Thus when a public highway is obstructed and all who make use of it are compelled to detour a mile, no distinction is to be made between those who travel the highway only once in the course of a month and the man who travels it twice a day over that entire period ... The explanation of the refusal of the court to take into account these differences in extent undoubtedly lies in the difficulty or impossibility of drawing any satisfactory line ...

Essentially, proving "special injury" as distinct from public injury requires some injury to a private property interest. The special injury alleged need not be proprietary. In *Ouellette v. International Paper Co.*, a class of private plaintiffs successfully alleged a public nuisance based on defendant's pollution into Lake Champlain. The plaintiffs demonstrated the special injury showing decreased land values as a result of the pollution. In *National Sea Clammers Association v. City of New York*, an association of private claimants were permitted to bring a public nuisance for injury resulting from nutrient-rich sewage and toxic wastes into the Atlantic ocean. In *Rockaway v. Klockner & Klockner*, a private claimant was permitted to make a public nuisance claim based on the contamination of an aquifer. The "public" aspect of the claim lay in the public right to an uncontaminated water from the aquifer. To satisfy the "special injury" requirement of the claim, the plaintiff alleged an interest different from the public in the water from the aquifer; the plaintiff was deprived of the use and enjoyment of a portion of the aquifer located directly below the plaintiff's property: "Because [the plaintiff] alleged interference specifically with that portion of the aquifer located beneath its property, it has alleged an injury different from that suffered by the public in general."

Private claims are often precluded on the ground they are not distinct in kind and degree from those suffered by the public. Proving the type of special injury necessary to permit a private plaintiff to recover for a public nuisance is difficult. In *Anderson v. W.R. Grace & Co.*, a group of residents alleged that the nearby presence of hazardous substances in the water and soils of East Woburn, Massachusetts constituted a public nuisance threat to the public groundwater. The court properly categorized the claim as a public nuisance rejecting the defendant's argument that only public officials or trustees could bring the claim. It rejected, however, the claim of public nuisance itself holding the plaintiffs had not demonstrated any special injuries. Additionally, standing by a private plaintiff for a public nuisance is not met by incurring the costs to clean up the injury.

With respect to the claim for economic damages, proving "special injury" is different. Historically, claims for economic damages without actual injury were prohibited because damages are too remote and unforeseeable, not based on a duty owed to the plaintiffs seeing compensation, or failing to demonstrate proximate cause. This general prohibition, as it applies to commercial fishing interests, known as the "Robins Dry Dock Rule," precludes liability where only economic injury is shown.

An exception under federal maritime law, however, disposes with the requirement that actual or physical injury predicate the recovery of damages. Under this exception, commercial fishers, oysterman, crabbers and shrimpers can recover purely economic losses resulting from damage to the fish populations. The "commercial fishing" exception is significant in that it provides commercial fishers with economic losses resulting from injury to natural resources without a showing of physical harm. In *Louisiana v. M/V Testbank*, the court adopted this commercial fishing exception based on the "character of the interest harmed." For commercial fishermen, this interest was recognized as a greater interest than that of the general public grounded in the economic protection of their trade. The "commercial fishing" exception is recognized because of the "special relationship" between tortfeasor and the plaintiff. This special relationship developed under maritime law is based on a historic observation that "seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection." The "special relationship" exception has been broadened over time to include a number of employment relationships including pension consultants, accountants, architects, attorneys, title abstractors, termite inspectors, soil engineers, surveyors, and test hole drillers. Once this "special relationship" is demonstrated, recovery for economic damages without a showing of actual injury is permissible. The

"commercial fishing" exception was also adopted in *Union Oil Co. v. Oppen* allowing for the recovery of natural resource damages. In *Oppen*, the court permitted a private claim for economic damages by commercial fishing interests due to an oil spill near Santa Barbara, California in 1969 resulting in natural resource damages in the coastal waters of Southern California. The private commercial fishing plaintiffs were permitted to recover the profits they would have realized in the absence of the spill.

While the "special relationship" exception has extended to commercial fishers, there is uncertainty as to whether it extends to others whose livelihood depends on waters free of pollution. In *M/V Testbank*, economic claims were rejected when made by other plaintiffs including shipping interests, marina and boat rental operators, wholesale and retail seafood enterprises, seafood restaurants, tackle and bait shops, and recreational fisherman, oystermen, shrimpers, and crabbers and other businesses dependant on a healthy population of aquatic life.

The special exception which is made to commercial fishing interests for recovery of economic damages may also apply "where an established business made commercial use of the public right with which the defendant interfered." Thus, special injury can be demonstrated by a business who has made commercial use of the public waters. The extent to which non-commercial fishing interests are successful in recovering economic damages under this principle are unclear. In *Burgess v. M/V Tamano*, a number of plaintiffs representing various business interests brought economic claims resulting from the accidental discharge of one hundred thousand gallons of oil into the port of Portland. Among those plaintiffs who claimed economic damages as a result of the oil spills were commercial fishermen, owners of motels, trailer parks, camp grounds, restaurants, grocery stores, and similar establishments dependant on tourism. All but the commercial fishing claims were dismissed based on the "special interest" historically claimed by commercial fisherman and clam diggers. According to the court:

unlike the commercial fishermen and clam diggers, the [other plaintiffs] do not assert any interference with their direct exercise of a public right. They complain only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches in which they do not have a property interest. Although in some instances their damage may be greater in degree, the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents ...

A. Claims for Natural Resource Damages Under State Law

A number of state statutes provide for recovery of damages related to natural resource injury. Through their police power, states have the power to regulate for the purpose of protecting and conserving natural resources. CERCLA, the CWA, and the OPA specifically do not preempt states from imposing additional liabilities regarding the release of hazardous pollutants or oil.

In *Puerto Rico v. SS Zoe Colocotroni*, the inherent ability of a state to enact such natural resource damage statutes more stringent than common law was upheld. In *Colocotroni*, the court rejected defense arguments that the plaintiff was limited to common law "diminution in value" in calculating damages. Instead, the court held that the state is empowered to recover damages equal to restoration costs. Specifically, the court held, "implicit in this choice of language, we think is a determination not to restrict the state to ordinary market damages." The court interpreted the state statute as having the ability to go beyond recovery of only market or commercial value as having power to recover "the total value of the damage caused to the environment and/or natural resource" as provided by the state statute.

In contrast with federal laws which prohibit municipal recovery of natural resource damages, a local government may have the ability to recover natural resource damages under state law. For example, in Pennsylvania, the Hazardous Sites Clean Act (HSCA) provides "the [Pennsylvania Department of Environmental Resources], a Commonwealth agency, or a municipality" may proceed to recover natural resource damages. But in North Carolina, only the state Environmental Management Commission is charged with trusteeship over natural resources.

The Alaska Environmental Conservation Act ("Alaska Act") imposes for strict liability for the release of hazardous substances for natural resource damages including response, containment, removal, and

remedial costs. Under the Alaska Act, damages are broadly defined as including "but not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." The corresponding definition of economic benefit is similarly broad including any benefit "measurable in economic terms" for gathering, catching, or killing of food or other items utilized in a subsistence economy and their replacement costs. Significantly, the Alaska Act does not limit those parties who may bring a claim and does not require a physical harm for economic loss to be awarded.

In Glacier Bay, fish buyers, fish spotters, fish processors and other shoreside business successfully claimed economic damages under the Alaska Act. The court not only permitted the claims by all the plaintiffs but also rejected defendant claims that the Alaska Act did not permit economic damages for strict liability and that state law was preempted by maritime law or federal law which prohibited these claims.

Private plaintiffs, including local governments, are given standing under the New Jersey Spill Act. The Mayor and Council of the Borough of Rockaway in New Jersey was successful in recovering natural resource damages resulting from the discharge of trichloroethylene ("TCE") and tetrachloroethylene ("PCE") into the municipal well field. The New Jersey act goes one step further, however, providing standing to "any injured person" for the recovery of natural resource damages.

Courts have generally rejected arguments that state statute claims made by private plaintiffs are preempted by either federal common or statutory law. At least one exception lies with respect to Section 311 of the Clean Water Act. In the Matter of Oswego Barge Corporation addressed claims by the United States for natural resource damages as a result of a pollution spill in the St. Lawrence Seaway. Defendants successfully argued that claims under Clean Water Act preempted other claims brought under federal maritime law and public nuisance.

B. Private Recovery Now Available Under the Oil Pollution Act

A private right of recovery for natural resource damages is not available under CERCLA or the CWA. The Oil Pollution Act (OPA) of 1990, however, expanded the ability of private citizens to bring a claim for oil pollution damages. The OPA now permits recovery for lost profits or impaired earning capacity by private parties without a showing of a private proprietary loss resulting from the injury, destruction, or loss of natural resources. Those losses now covered by the OPA could include for example the cost of cleaning a boat impacted by oil during sailing or lost revenues due to cancellations of fishing charters. Section 2702(b)(2) now gives private parties the ability to recovery purely economic losses. At few courts have not even required physical damage act as a prerequisite to recover these losses.

V. THE EMERGING CONFLICT BETWEEN PUBLIC AND PRIVATE CLAIMS

As public trusteeship and private claims for natural resource damages have significantly expanded under both common law and statutory law, so has the confusion in determining who can proceed in an action for natural resource damages: a private claimant or a public trustee. Consequently, the line which distinguishes public and private standing is significantly blurred. For example, the conflict between a government trustee and a private party could emerge when a CERCLA trustee attempts to recover damages which may also be asserted by a private party. On the one hand, CERCLA trusteeship is fairly broad. Damages recovered under CERCLA's natural resource damage provisions are "not ... limited by the sums which can be used to restore or replace" the damaged resource. But at the same time, CERCLA prohibits "double recovery" for damages based on the same injured resource. Double-recovery includes both the cost of the clean to the damage natural resource and damages eventually mitigated afterward. Examples of the conflict for recovery of natural resource damages between a public trustee and private party are particularly evident in Alaska Sporting Fishing Association and Satsky v. Paramount Communications.

A. Alaska Sport Fishing Association v. Exxon Corporation

How and when damages were alleged by competing public and private claimants was a central issue in Alaska Sport Fishing Association, ("ASPA") which denied 130,000 sport fishers claims for lost use of public resources. The sportfisher claims were dismissed on the basis they were in privity with the United

States and Alaska for the purposes of res judicata. The doctrine of res judicata, or claim preclusion, holds that parties or their privies are barred from relitigating issues that were or could have been raised in the prior action. In other words, because the United States and Alaska had the authority to recover for "lost public uses" as trustees on behalf of the public under the CWA and CERCLA, double recovery was prohibited.

The ASPA argued that the losses they alleged were distinct from those already recovered by the United States and Alaska in the settlement. Specifically, ASPA argued their losses were "active, in situ use, distinct in kind from loss of 'passive use' suffered by the public at large." The ASPA conceded the federal government and state had the ability to recover costs to remove the oil and in the "restoration or placement of natural resource damage or destroyed." They also agreed the trustees could recover with respect to lost uses that could not be mitigated by cleanup. Nevertheless, ASPA argued it sought to recover what the trustee could not: those lost uses, particularly recreational, which resulted from resource injury during the contamination.

The sportfisher claims in Alaska Sport Fishing Association were dismissed specifically for failing to allege a distinct private injury such as harm to boats, fishing tackle, or the incurring of expenses based on the cancellation of a specific fishing or camping trip. Translated, this meant the federal government and the state had the authority to recover for virtually all lost-use damages caused by the Exxon Valdez oil spill. The central issue in Alaska Sport Fishing was whether the state and federal government had overstepped its assertion of trusteeship as an adequate representative of the public. The quasi-sovereign interest asserted by the state under the parent patriae doctrine must be "an articulable interest in the well-being of its populace, something more than allegations that it is a nominal party."

The Alaska Sport Fishing decision highlights how an expanded view of government trusteeship impacts a private right of action. Expanded government trusteeship is powerful, allowing the government to represent not only the interests of the public but those divergent groups who make different uses of our natural resources. Such an expansive reading bars private claims which are protected both under statutory and common law. The ever-broadening assertion of trusteeship by states under the *parens patriae* doctrine and resulting foreclosure of certain private party claims has been criticized as in "need of a fundamental rethinking of its future application in similar cases."

B. Satsky v. Paramount Communications

Satsky v. Paramount Communications, similar to Alaska Sport Fishing Association, involved legal claims by a group of private plaintiffs for recovery of natural resource damages resulting from mining waste. The litigation resulted from activities over a period of 64 years at the Eagle Mine Facility in Colorado. Hazardous waste disposed in nearby dumps resulted in extensive natural resource damages around the area of Eagle County and subsequently a claim by the State of Colorado in 1983 under CERCLA for removal and clean up costs. The plaintiffs in *Satsky* were composed of residents and businesses including a white water company, a fishing guide service, and two flyfishermen organizations. The type of claims varied including property damage, diminution in property value, loss of water quality, and loss of enjoyment of real property among other things. Following the original filing in federal court, Paramount moved to dismiss all of plaintiff's natural resource damage claims on the basis they were precluded by res judicata from the consent decree with the state. The district court agreed with Paramount and dismissed the plaintiff's claim.

On appeal, the 10th Circuit reversed the District Court holding that the state did not articulate an interest under the *parens patriae* doctrine apart from those interests of the private parties. The *parens patriae* doctrine is "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, [and] interstate water rights ..." Under the *parens patriae* doctrine, the state must show an separate interest from those of private party and that a substantial portion of its citizenry has been affected by the action. To assert the doctrine, a State must assert harm to its "quasi-sovereign" interest. A "quasi-sovereign" interest is "not merely advancing the right of individual injured citizens, but [as] an additional sovereign or quasi-sovereign interest." The "quasi-sovereign" interest may not include the right of private individuals.

Satsky held that the claims of the private plaintiffs were not precluded under res judicata because the state in the first suit could not have asserted the recovery of private claims. *Satsky* was significant in recognizing the blatant competition between public and private rights of action which emerge from damages to natural resources. *Satsky* correctly evaluated the competing claims between the federal

trustee and the private claimants distinguishing "nature of the right" asserted. In other words, the central question posed was: Are the claimed damages related to the public or private aspect of the damaged resource? Satsky established a test to determine whether public trustee is barred from recovering a private claim depends on whether the state could have recovered the damages under statute law or the *parens patriae* doctrine.

C. Possible Statutory Conflict: The Oil Pollution Act

A potential conflict between public and private rights is also evident in the Oil Pollution Act of 1990. Private rights of recovery was recently expanded in the OPA's adoption. As a result of the OPA's expanded coverage to include economic claims by private parties, there is a greater potential for conflict between government trustees and private parties. Section 2702(b)(2) now provides that liability may also be had to private persons for:

(B) Real or Personal Property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence Use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resource which have been injured, destroyed, or lost, without regard to ownership or management of the resources

(E) Profits and Earning Capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources which shall be recoverable by any claimant.

As a result of adopting these provisions, private parties may now assert standing for recovery of purely economic losses.

The potential for overlap, however, could emerge between those private and public interests which seek economic recovery. The conflict with a public trustee could emerge if a resident claims to suffer lost enjoyment of the "environmental amenities associated with their real property, when their property fronts on a public beach or waterway that is oiled" or "incur[s] loss in real property value ... due to long-term physical contamination of their property."

VI. SYNTHESIS: COMPETING PUBLIC AND PRIVATE CLAIMS

Alaska Sport Fishing and Satsky highlight two factors which appeared to help determine whether the public or private claimants recovered for natural resource damages. These two factors are 1) whether the natural resource damage claimed is public or private in nature; and 2) whether the public trustee is trying to recover the claim.

Satsky highlights the principle that public trustee claims should not be asserted to the extent that they would preclude private claims. Support for this principle comes from the statutory "saving clause" in CERCLA, the CWA, and the OPA providing that common and state law causes of action for natural resource damages are preserved. This result is further supported by the legislative history of public trust statutory law.

Thus, at least with respect to an action brought under statutory law, private claims brought under common law are protected including negligence, strict liability, nuisance, trespass, misrepresentation, diminution in value of property. The preclusion of private claims for "lost use" brought by the recreational fishers in Alaska Sport Fishing Association, however, were precluded. The primary characteristic which distinguished Alaska Sport Fishing Association from Satsky lay in whether the character of the damages were public or private. The claims of the recreational fishers in Alaska Sport Fishing Association failed at least in part because they could not demonstrate a private injury such as harm to their fishing equipment. This private injury was demonstrated in Satsky where the plaintiffs could assert property damage, diminution in value to real estate, actual losses of income, and loss of enjoyment to real property.

Determining whether a public trustee might have recovered natural resource damages is dependant on the nature of the damage. This distinction is similarly made in the natural resource regulations implementing CERCLA and the Clean Water Act providing trustee claims must be made based on a claim for public use and non-use value but not personal injuries or "private economic damages" To determine whether a natural resource damage claim is public or private in nature, courts have resorted to legal doctrines such as *res judicata* and *parens patriae* to evaluate whether there is an identity between public and private issues. Courts have also evaluated the scope of a trustee's authority, and therefore the limitations on a private right of action, through statutory interpretation of the phrase "controlled by" under CERCLA, the Clean Water Act and to an even larger extent state natural resource protection law. A state's interest in natural resource damage recovery turns on whether it has asserted an interest separate from those of private parties. As articulated under *Satsky*, the assertion of a "quasi-sovereign interest in a damaged resource" is necessary to trigger the *parens patriae* doctrine.

Recovery of public natural resource damages under statutory law including CERCLA, CWA, and the OPA depends on the degree of control asserted by a trustee. While the final natural resource regulations and accompanying litigation holds a trustee must demonstrate "substantial" control over a natural resource, trusteeship under statutory law particularly CERCLA, has been interpreted broadly. In *Idaho v. Southern Refrigerated Transport*, the state trustee sought a variety of natural resource damages resulting from the spill of 200 containers of chemicals in and next to the Little Salmon River. The State of Idaho, claiming a loss of 90 - 100 percent of the fish in the river, recovered not only the commercial value of the fish but also the recreational value, or the value a consumer places on the "use" of the natural resource. In *National Association of Manufacturers*, DOI was challenged for including "economic rent" as recoverable losses in its natural resource damage regulations governing CERCLA and the Clean Water Act. "Economic rent" was defined as those fees "that commercial harvester could pay to the government and still find the harvesting economically feasible." In essence, these fees would be ones which were not charged but might have been charged by the federal government. The argument of the National Association of Manufacturers was that CERCLA trustees should be precluded from recovering "economic rent" because it was a private claim. The court instead held that government trustees are not prevented from recovering these "economic losses."

But in contrast with the breadth of damages successfully recovered by CERCLA trustees above, "lost use" damages were also recovered by a private unincorporated association of long-distance swimmers in *In re Oriental Republic Uru*. The association, "I Did the Delaware," brought the claim as a result of an oil spill in the Delaware River. Recognizing that the association of swimmers lost the use of the Delaware River for a six weeks as a result of the spill, the court distinguished federal maritime law which does not permit for loss of use for private purposes. Significantly, the court also rejected a claim that CERCLA's prohibition on double recovery precluded the swimmer's claims. Instead, the court reasoned that because the swimmer association never sought recovery under CERCLA and that "there is nothing in the record indicating that the State of Delaware or any other government entity seeks to recovery damages for lost use of natural resources arising from the inability of person to swim in the Delaware River."

How to square the private recovery of the swimmers in *In Re Oriental, Inc.* with other cases supporting broad CERCLA liability leads to the second factor that courts consider in determining private or public standing for natural resource damages. *Alaska Sportfishing Association* was particularly significant in that the United States had already recovered for the "lost use" claims by the time the sportfisher claims were officially heard by the district court. The court appeared to be persuaded by the fact the United States and Alaska had already recovered for the lost uses asserted by the ASPA. Ultimately, if the government had not tried to assert the "lost use" claims in their \$900 million settlement with Exxon, it is more likely the sport fishing interests could have recovered. Arguably, the fact the United States was able to settle before the Alaska Sport Fishing Association was able to argue the merits of its case led to the preclusion of the ASPA's claims.

Support for argument is found in both *Satsky* and the recent decision in *National Association of Manufacturers (NAM) v. Department of the Interior*. In *Satsky*, the court held that while the plaintiffs could recover for purely private interests, it simultaneously held that those claims [] for injuries to interests which all citizens hold in common, and for which the State has already recovered, the [former] judgement ... acts as a bar." In *National Association of Manufacturers (NAM)*, the court held that "once a

state or other public trustee recovers such damages, a private party will be barred by res judicata from later seeking recovery for the same public losses."

VII. RECOMMENDATIONS

A sweeping interpretation of government trusteeship over natural resources has been rejected in *Ohio v. U.S. Department of the Interior* which specifically noted that Congress excluded private property from CERLCA trusteeship "no matter how heavily involved a government entity may be in managing or otherwise controlling the property." Instead, Ohio held that courts should evaluate whether natural resource damage recovery may be had by a public or private parties on a case-by-case basis. Equitable considerations necessitate that government recovery of natural resource damages not entirely foreclose private claims. On the one hand is the argument that natural resources will prosper better under a broader net cast by government trustees who are required to secure damages toward the restoration, replacement, or acquisition of natural resources. The other and not necessarily incompatible argument posits that private parties should not be precluded from bringing claims. And finally, the intersection between the two suggests that private parties be given the "stick" to ensure that government trustees are affirmatively protecting the trust.

Two issues arise with respect to the goal of providing for equitable recovery as between public and private claims for natural resource damages. First, there are the direct conflicts which arise between the public and private parties. The recent conflicts highlighted in *Alaska Sport Fishing Association and Satsky* reveal the need to fairly distinguish between the public and private aspects of natural resources so as to apportion damages equitably. The test articulated in *Satsky* provides that public claims will be precluded to the extent private claims would have succeeded. Determining whether the private claim would have succeeded, however, requires that courts fully evaluate the scope of possible private claims including those under the Oil Pollution Act and tort claims for public nuisance and negligence. Unlike the approach of both *Satsky* and *Alaska Sport Fishing*, however, the viability of a private claim should not depend on whether a federal trustee has already asserted or plans to assert a natural resource damage claim.

Commentator Carter H. Strickland goes one step further in defining a test: "Trustees should be able to bring a natural resource damage claim where they could bring a public nuisance claim. However, they should abstain from bringing natural resource damage claims where private claims for public nuisance can redress the problem and preclusion would have inequitable results." Strickland suggests that because public and private interests have already been segregated with respect to public nuisance law, that the same approach could be used in separating trustee and private party interests.

The second and perhaps more important issue arises with respect to those natural resource damage claims which are never brought in the first place. Several commentators claim that the controversy over the natural resource regulations has resulted in very few claims for damages. Other commentators have criticized the regulations for being too narrow and that only a fraction of the oversight originally contemplated by Congress and that private recovery of natural resource damage is already limited not encompassing the full extent of the injuries sustained. This problem was evident following the loss of 694,000 gallons of partially refined crude oil in Galveston Bay resulting from a collision between two vessels. As a result of the spill, Galveston Bay was closed to commercial fin fish, shrimp, crab, and oyster harvests for up to 30 days. Significantly, the court only permitted the claims by licensed fishermen based during the period the bay was closed. The resulting recovery may therefore be less than actually realized private losses:

Notwithstanding the unlicensed fisherman's lack of standing to assert a private claim for losses during the closure, the entire public loss is not captured through private suits in this context: the fish the unlicensed fishermen would have caught have still been injured or killed. Similarly, restricting claims to the closure period precludes recovery for economic losses due to injuries to the fishery populations, which affect fishing incomes beyond the closure dates.

As revealed in *Satsky* and *Alaska Sport Fishing Association* among other cases, the scope of government trusteeship under either statutory or common law is not only fuzzy but overlapping. The significant

disagreement and confusion over the scope of government trusteeship and related limitations on private standing to bring natural resource claims provides fertile ground for gaps in recovering for natural resource damages.

The gaps in recovery of natural resource damages emerge in evaluating differences and overlap between the public trust doctrine, CERCLA, and public nuisance. On the one hand, government trusteeship over certain types of natural resource damages and natural resource uses under CERCLA is significantly broader than claims brought solely under the public trust doctrine. But at the same time, actionable injury under CERCLA is limited compared to the broadened recovery contemplated under the public trust doctrine which only requires a showing of "impairment of or interference with public resources and uses protected by [public] trust." CERCLA allows a trustee to institute recovery only upon "actual injury to, destruction, or loss of public natural resources." Consequently, CERCLA's broad trusteeship combined with its more limited scope of actionable injury precludes private parties from bringing claims for damages which are by definition under government trusteeship.

A. Giving Citizens the Ability to Enforce the Public Trust Doctrine

To the extent governments are given the tools to assert trusteeship over natural resources, they must exercise their trusteeship. While government trustees appear to be the best representatives of the entire public, only three natural resource claims under CERCLA have been asserted by the federal government. The realistic need to protect private party actions, however, is particularly necessary given the lack of asserted government trusteeship under CERCLA.

The Supreme Court in its ruling in *Illinois Central* spoke to the issue of a state's affirmative responsibility to protect those natural resources which fall under the public trust: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace." Professor Sax has also argued that one of the primary objectives of the public trust doctrine that is should "be enforceable against the government."

What can be described as an "affirmative burden" by federal and state governments to enforce the public trust doctrine has been recognized. This duty on behalf of the federal and state governments to affirmatively protect natural resources has been noted by several courts. In *Lake Michigan Federation v. United States Army Corps of Engineers*, the court acknowledges its role to ensure this affirmative duty is enforced:

First, courts should be critical of attempts by the state to surrender valuable public resources to a private entity. Second, the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest. Finally, any attempt by the state to relinquish its power over a public resource should be invalidated under the doctrine.

In *Lake Michigan*, the court viewed its role as one of affirmative oversight to prevent the damage to a natural resource.

At least one court has actually permitted private citizens to invoke the public trust doctrine to force a federal agency to exercise these affirmative obligations. In *Sierra Club v. Department of the Interior*, an environmental organization sued the Department of the Interior to exercise powers to protect the lands from logging with threatened to destroy the park's redwoods. The Sierra Club brought suit to compel DOI to exercise non-discretionary duties under the National Park System Act. The court relied on its general authority to review agency actions under the Administrative Procedure Act, and specifically on the basis that the Redwood National park Act, imposed a legal duty requiring the Secretary to use powers to protect the park.

The non-discretionary duty owed by trustees to recover natural resource damages is also found in statutory law. Under CERCLA, there is an express and affirmative duty on federal and state to protect and therefore recover natural resource damages. Specifically, CERCLA provides "the President, or

authorized representative of any State, shall act on behalf of the public as trustee of such natural resources, to recover for such damages." SARA similarly acknowledges a "fiduciary duty" owed to the public by trustees. In passing CERCLA, Congress intended for a broad scope of trusteeship based on the failure of the common law to adequately redress natural resource injuries.

Unfortunately, there are several barriers in making an argument that the federal government has the affirmative duty to invoke the common law or statutory version of the public trust doctrine. Among them are procedural barriers including the Administrative Procedure Act which precludes agency review where agency action is committed to agency discretion. In addition, the Supreme Court has upheld that an agency decision not to enforce is presumptively unreviewable. Whether CERCLA's requirement that trustees "shall act to behalf of the public as trustee of [injured] natural resource to recover for" natural resource damages is subject to this presumption is unclear.

B. The Creation of Citizen Suit Provisions Under Statutory Law

Private parties who are precluded from bringing a certain action for natural resource damages should be given the tools to force the trustee to assert claims for natural resource damages. Several commentators have argued for the creation of a right for private citizen suits against the federal government requiring the federal government or trustee to carry out a mandatory duty under law. According to one, "[i]f Congress sincerely intends CERCLA to effectively alleviate the environmental woes of our society, then Congress should provide a citizen suit provision for natural resource damages actions." The citizen suit provision would satisfy concerns that private claimants bring natural resource damage action for personal gain. The adoption of a citizen suit provision for natural resource damages would be beneficial in spurring government enforcement which is often constrained by political motivations and limited funding.

In fact, existing CERCLA's "citizen suit" provisions may already provide the needed link to help citizens enforce a trustee's affirmative duty to recover natural resource damages. CERCLA Section 310(a) provide for two types of citizen suits: 1) allowing citizens to challenge "any violation of any standard, regulation, condition, requirement, or order" under CERCLA, and 2) providing that "any person may commence a civil action on his own behalf ... (2) against the President or any other official of the United States ... where there is an alleged failure ... to perform any act or duty" under CERCLA. The latter provision may provide citizen groups with the needed language to compel a federal or state trustee to recover natural resource damages.

Whether any citizen group has ever attempted to invoke Section 310(a)(2) providing for the enforcement of a trustee's nondiscretionary duty to recover natural resource damages on behalf of the public is unclear. At least one commentator has suggested that using these citizen-suit provisions for such a purpose would not work because a court's jurisdiction over such a matter will not be established until a cost recovery action begins.

VIII. CONCLUSION

Whatever the remedy, there appears to be significant confusion surrounding public trustee and private standing to recover natural resource damages whether under common law or statutory law. The confusion among courts has led to a gap in the full amount of natural resource damages potentially recoverable. The resulting gap leaves polluters unaccountable for the Atragedy of the commons@ they have created. More importantly, victims of natural resource injury B the natural resources themselves as well as those who depend on unpolluted natural resources B are left in the dark. The need for a clearer line determining which parties may correctly assert standing will also lead to a more efficient judicial system and greater accountability for those who benefit from natural resource injury.

VIII. ENDNOTES

1. See Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg. 14,687 (1991) (National Oceanic and Atmospheric Administration (NOAA)).
2. Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994)

3. Note. Alaska Sport Fishing Association v. Exxon Corporation Highlights the Need to Take a Hard Look at the Doctrine of Parens Patriae When Applied in Natural Resource Damage Litigation. 25 *Envtl. L.* 897 (Summer 1995) (citing Brief for Plaintiff-Appellant at 7, n. 7 (No. 93-35852)).
4. Alaska Sport Fishing, 34 F.3d at 769-770. See *supra* text accompanying notes 181-191.
5. *Id.* at 771 (citing Dist. Ct. Order No. 146, at 6, 15 (July 8, 1993)).
6. See Garrett Hardin, The Tragedy of the Commons, *Science*, Dec. 13, 1968 at 1243, 1244; see also H. Scott Gordon, The Economic Theory of a Common-Property Resource: The Fishery, 62 *J. Pol. Econ.* 124 (1954).
7. 405 U.S. 727 (1972) (Douglas J. dissenting).
8. *Id.* at 741-43.
9. See Patrick H. Zaepfel, The Reauthorization of CERCLA NRDs: A Proposal for a Reformulated and Rational Federal Program, 8 *Vill. Envtl. L.J.* 359, 390, n. 177 (1997) ("[I]n the past thirty or so years, the Public Trust Doctrine has expanded rapidly due to state statutes, state constitutions and activist judicial interpretations.")
10. See generally Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 *Mich. L. Rev.* 471, 475 (1970).
11. *Carson v. Glazer*, 2 *Binn.* 475 (Pa. 1810) (dismissing action against defendants who crossed plaintiff's property along river to fish because plaintiff did not have exclusive fishing right and owners of bank did not have right to navigable waters). Carson is highlighted as the earliest American case incorporating concepts of the public trust doctrine.
12. See Sax, 68 *Mich. L. Rev.* at 475.
13. For a review of state common law cases which have endorsed the principles of the public trust doctrine, see Terry Fox. 33 *S. Tex. L. Rev.* at 527, n. 33 (1993) (citations omitted).
14. See *United States v. Burlington Northern R.R.*, 710 F. Supp. 1286, 1287 (D. Neb. 1989); but cf. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082-84 (D.C. Cir. 1984).
15. See text accompanying notes *supra* notes 23-31.
16. Gregg L. Spyridon and Sam A LeBlanc III, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 *Tul. Envtl. L. J.* at 530 (1993) (excluding citation).
17. See Sax, 68 *Mich. L. Rev.* 471; Williams H. Rodgers, Jr., *Environmental Law*, § 2.16, p. 173-174, (1977?).
18. See Terry Fox, 34 *S. Tex. L. Rev.* 521, 530 (1993) (excluding citations).
19. *Id.* at 532 (excluding citations).
20. See Restatement (Second) of Torts § 929(1)(a) (1979).
21. See Terry Fox, 33 *S. Tex. L. Rev.* 531 (1993) (citing *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal.)).
22. See Sax, 68 *Mich. L. Rev.* at 485.
23. Rodgers, *Environmental Law*, § 2.16, p. 176.

24. 146 U.S. 387 (1892).
25. *Id.* at 452.
26. 214 N.W. 820 (Wis. 1927).
27. *Texas E. Transmission Corp. v. Wildlife Preserve, Inc.*, 225 A.2d 130 (1966) (holding that an evaluation was required as to whether an alternative route existed to that of a proposed condemnation action.)
28. *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47 (1972) (invalidating a fee against nonresident beachers users).
29. *Illinois Central*, 146 U.S. at 452, 454.
30. 793 F.2d 129 (6th Cir. 1986).
31. *Id.* at 793-94.
32. Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 3767 (1980) (codified as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). Claims for natural resource damages are available under 42 U.S.C. § 9607(a)(4)(C).
33. 33 U.S.C. §§ 1251-1387. Claims for natural resources damages under the CWA are available under 33 U.S.C. § 1321(f)(5).
34. 33 U.S.C. §§ 2701-2720. Claims for natural resources damages under the CWA are available under 33 U.S.C. 2706(a)(1)-(3).
35. Other statutes which authorize natural resource damages claims include the Outer Continental Shelf Land Act, 43 U.S.C. §1813(a)(2)(C)-(D), (b)(3) (1986); Deepwater Port Act, 33 U.S.C. §1517(i) (1975); Trans-Alaska Pipeline Authorization Act, 42 U.S.C. §1653(a)(1), (c)(1) (1978); Marine Protection, Research, and Sanctuaries Act of 1988, 16 U.S.C. 1443 (1988); National Park System Authorities, 16 U.S.C. 19ii (Supp. V 1993).
36. S. Rep. No. 96-848, at 13 (1980).
37. 42 U.S.C. § 9604(a)(1) (1994).
38. 42 U.S.C. § 9601(23) providing that "the terms 'remove' or 'removal means the cleanup or removal of released hazardous substances from the environment, such as actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release of hazardous substances, the disposal of removed material..."
39. 42 U.S.C. § 9601(24) providing that "the terms 'remedy' or 'remedial action' means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substances into the environment..."
40. 42 U.S.C. § 9621(a).
41. 42 U.S.C. § 9607(f) (1988 and Supp. V 1993).
42. Patrick H. Zaepfel, *The Reauthorization of CERCLA NRDs: A Proposal for a Reformulated and Rational Federal Program*. 8 *Vill. Envtl. L.J.* 359, 371-2 (1997).

43. 42 U.S.C. § 9607(f)(1)
44. Zaepfel, 8 Vill. Envtl. L. J. at 371.
45. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)
46. 42 U.S.C. § 9607(a)(4)(C)
47. 132 Cong. Rec. H9,613 (daily ed. Oct. 8, 1986)
48. 33 U.S.C. § 1321.
49. 42 U.S.C. § 9601(14) (defining "hazardous substance").
50. 33 U.S.C. § 1321(b)(3).
51. 33 U.S.C. § 1321(f)(4) and (5). In contrast with other CWA provisions which limit the amount of liability of removal costs, 33 U.S.C. § 1321(f)(1), these limits are not made for the costs associated with replacing or repairing damaged natural resources. 33 U.S.C. § 1321(f)(4) and (5).
52. 33 U.S.C. §§ 2701-2719.
53. See 33 U.S.C. § 2702(a) which provides "[n]otwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel ... from which oil is discharged ... into or upon the navigable water or adjoining shorelines or exclusive economic zone is liable for the removal costs and damages." This section appears to supercede those provisions of the CWA which covers oil spills. See Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 Vill. Envtl. L.J. 283, 298 (1992) (discussing that the CWA section addressing oil spills have been replaced by the OPA) .
54. See 33 U.S.C. § 2701(29) (Supp. II 1990) (defining "discharge" as "any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.")
55. See *infra* text accompanying notes 172-174.
56. Restatement (Second) of Torts § 821B.
57. See Rodgers, *Handbook on Environmental Law* 171 (1977 & Supp. 1984).
58. *Philadelphia Elec. Co., v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985); see also Restatement (Second) of Torts § 821B(1).
59. See Prosser, Restatement (Second) of Torts § 821A - 840E, Introductory Note (1959).
60. 441 U.S. 322, 331-337 (1979) (concluding that under the police power, states have authority to conserve and protect wild animals); see also *Puerto Rico v. S.S. Zoe Colocotrini*, 628 F.2d 652 (1st Cir. 1980).
61. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).
62. See Carter H. Strickland, *The Scope of Authority of Natural Resource Trustees*. 20 Colum. J. Envtl. L. 301 (1995).
63. *Id.* at 302.
64. See *Illinois Central*, 146 U.S. at 462-453 (1892); See also Rodgers, § 2.16, p. 173-74.

65. Sax, 68 Mich. L. Rev. at 471 (1970) (noting that this area included "below the low water mark on the margin of the sea and the great lakes, the waters over those lands, and the water within rivers and streams of any consequence.")
66. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (expanded the public trust doctrine to include lands despite their nonnavigable character); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983).
67. Gould v. Greylock Reservation Commission, 215 N.E.2d 114 (1966)
68. In re Stuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980) (allowing Virginia and the federal government to sue for the loss of migratory waterfowl).
69. See e.g. Neptune City, 294 A.2d at 47.
70. State ex rel. Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) (recognizing a public right in hunting and fishing in navigable waters); see Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (recognizing that the activities of hunting and fishing are recreational in nature); see also Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J.).
71. Illinois Central, 146 U.S.C. at 287.
72. See National Audubon, 658 P.2d at 719.
73. 491 P.2d 374 (Cal. 1971).
74. Id. at 380.
75. 42 U.S.C. § 9611(c); 33 U.S.C. § 1321(f)(4)-(5)
76. 42 U.S.C. § 9607(a)(4)(C)
77. 42 U.S.C. § 9601(16).
78. 42 U.S.C. § 9607(f)(2)(A); 33 U.S.C. § 1321. CERCLA Section 107(f)(2)(A) directs the President to designate federal trustees who are authorized to pursue natural resource damage claims. See Exec. Order 12,580, 52 Fed. Reg. 2923 providing that "the following shall be among those designed in the NCP (National Contingency Plan) as Federal trustees for natural resources: (1) Secretary of Defense; (2) Secretary of the Interior; (3) Secretary of Agriculture; (4) Secretary of Commerce; (5) Secretary of Energy."
79. 42 U.S.C. § 9607(f)(2)(B); 33 U.S.C. § 1331.
80. See City of New York v. Exxon Corp., 697 F. Supp. 677 (S.D.N.Y. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609, 617 (S.D.N.Y. 1986); Town of Booton v. Drew Chem. Corp., 621 F. Supp. 663, 667 (D.N.J. 1985).
81. 42 U.S.C. § 9607(f)(2)(B) providing that the "Governor of each state shall designate State officials who may act on behalf of the public" as trustees under CERCLA and the Clean Water Act, 33 U.S.C. § 1321(b)(1)-(2).
82. City of Philadelphia v. Stepan Chem. Co., 713 F. Supp. 1484 (E.D. Pa. 1989) (holding that the term "state" does not include "municipality"); Werlein v. United States, 746 F. Supp. 887 (D. Minn. 1990); see also Rockaway v. Klockner & Klockner, 811 F. Supp. 1039 (N.J. 1993) which held that Congress' adoption of SARA Section 107(f)(2)(B) demonstrates that Congress intended to benefit states and not their political subdivisions. For a different perspective arguing in favor of municipality standing under CERCLA, see Michael J. Wittke, Comment, Municipal Recovery of Natural Resource Damages Under CERCLA, 23 B.C. Env'tl. Aff. L. Rev. 921 (1996).

83. Barry Breen, CERCLA's Natural Resource Damage Provisions: What Do We Know So Far?, 14 *Envtl. L. Rep.* 10304-10307 (Aug. 1984).
84. *Id.* at 10305-06.
85. See Fed. Reg. 27674 (1986) directing the President to promulgate two types of rules, Type A and Type B, to assist trustee in making damage determinations for natural resource damages. See 42 U.S.C. § 9651(c) (1994).
86. CERCLA Section 301(c) specifically provides for the development of "such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss. 42 U.S.C. § 9651(c).
87. 42 U.S.C. § 9651(c).
88. 42 U.S.C. § 9607(f)(2)(C) (1988).
89. The primary focus of debate has been over the Type B assessments which require the development of "alternative protocols for conducting assessment in individual cases." 42 U.S.C. § 9651(c)(2) (1988). See Natural Resource Damage Assessments, 51 Fed. Reg. 27,674 (1986) (first final rule of Type B assessments); Natural Resource Damage Assessments, 53 Fed. Reg. 5166 (1988) (revised final rule as a result of adoption of SARA amendments) (codified at 43 C.F.R. pt. 11, reh'g denied, en banc, 897 F.2d 1157 (D.C. Cir. 1989); and subsequent court review in *Ohio v. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989); 56 Fed. Reg. 14,262 (1994) (final rule issued in response to Ohio decision); *Kennecott Utah Copper Corp. v. United States Department of Interior*, 88 F.3d 1489 (11th Cir. 1996) (upholding the 1994 Type B regulations).
90. See *Ohio*, 880 F.2d at 434.
91. For a detailed discussion of this subject, see Strickland, 20 *Colum. J. Env'tl. L.* at 301.
92. 42 U.S.C. § 9651(c)
93. See *Ohio*, 880 F.2d 432, 476, n. 73 (citing 51 Fed. Reg. 27692, 27721).
94. *Ohio*, 880 F.2d at 461.
95. 43 C.F.R. pt. 11.
96. See Strickland, 20 *Colum. J. Env'tl. L.* 301 (1995) at 313.
97. See *supra* note 89.
98. 33 U.S.C. § 1321(b)(3) and (f)(1).
99. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).
100. 33 U.S.C. § 1321(f)(4).
101. 33 U.S.C. § 1321(f)(5).
102. 33 U.S.C. § 1321(f)(4) and (5).
103. 33 U.S.C. § 1321(f)(4).

104. See *In re Montauk Oil Transportation Corp.*, 90 CIV. 5702 (KMW) (1996 U.S. Dist. LEXIS 8500) (permitting the recovery of "lost use" damages as compensable under the Clean Water Act).

105. Pub. L. No. 101-380, 104 stat. 484 (codified at 33 U.S.C. §§ 2701-2719 (Supp. 1991)).

106. 33 U.S.C. § 2701(20) (Supp. II 1990); see also 33 U.S.C. § 2702(b)(2)(A) (Supp. II 1990).

107. James P. Power, *Reinvigorating Natural Resource Damage Actions Through the Public Trust Doctrine*, N.Y.U. Envtl. L.J. 418, 422-425 (1995).

108. CERCLA 42 U.S.C. § 9607(f)(1); CWA 33 U.S.C. § 1321(f)(5); OPA 33 U.S.C. § 2707(f).

109. *Id.* (noting that the "[e]xistence value represents a purer public good than use value.")

110. 43 C.F.R. § 11.83 (1988).

111. See *Artesian Water v. New Castle Country*, 851 F.2d 643 (3rd Cir. 1988); see *United States v. Southeastern Pennsylvania Trans. Auth.*, 17 ELR 20001 (E.D. Pa. 1986).

112. See OPA 33 U.S.C. § 2718(a); CERCLA 42 U.S.C. § 9615; CWA 33 U.S.C. § 2621. Both statutes provide that recovery under these statutes will not preclude common law action or recovery under state statutes. But see *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that claims of nuisance are preempted under the Clean Water Act.)

113. 33 U.S.C. §§ 2701-2719.

114. *Illinois v. Milwaukee*, 406 U.S. 91, 92 (1972) (recognizing a federal cause of action to abate pollution of interstate pollution); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993); *Copart Indus., Inc. v. Consolidated Edison Co.*, 394 N.Y.S. 2d 169 (N.Y. 1977); *Urie v. Franconia Paper Corp.*, 218 A.2d 360 (N.H. 1966). To the extent that a private plaintiff alleges a particular harm, a private nuisance may also be asserted so long as it consists interference with the use and enjoyment of land. A public nuisance, in contrast with a private nuisance, does not involve interference with use and enjoyment of land. Because private nuisance involves a wrong to a private property interest and because private parties are generally unable to assert ownership over most aquatic resources including most navigable and a large number of unnavigable waters, public parks, and aquatic life, it will not be the focus of discussion in this paper. If a private claimant can demonstrate ownership over the injured natural resource, a successful for damages resulting from that injury is more likely.

115. See Restatement (Second) of Torts, § 821(B) (1979) which provides that those "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."

116. See *W. Page Keeton Et Al.*, *Prosser and Keeton on the Law of Torts*, § 129, at 997-1002 (5th ed. 1984).

117. Restatement (Second) of Torts § 821B(1) (1979).

118. *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973).

119. Restatement (Second) of Torts, § 821(C), Comment b (1979).

120. See *In re Oriental Republic Uru.*, 821 F. Supp. 950, 953 (D. Del. 1993) (holding that private claim for loss of purchased and released ducks lacked private property interest); *Alaska Sport Fishing*, 34 F.3d

at 774, n. 6 (holding that failure to allege harm to fishing boats or equipment or lost expenses from cancellation of trips resulted in inability to allege private claims).

121. 602 F.Supp. 264 (affirmed in part, reversed in part 479 U.S. 481 (1987)); but cf. *Adams v. Star Enterprise*, 51 F.3d 417, 421 (Ca.4 1995) (precluding public nuisance claim brought as a result of oil spill by private claimants who suffered diminution in value of land because of a lack of physical damage to property.)

122. *Id.*

123. 616 F.2d 1222, 1233-1234 (3rd. Cir. 1980).

124. 811 F. Supp. 1039 (N.J. 1993).

125. 811 F. Supp. at 1057 (citing *Hercules*, 762 F.2d at 315).

126. See e.g. *Alaska Sport Fishing*, 34 F.3d at 769.

127. 628 F.Supp. 1219 (D.Mass. 1986)

128. *Id.* at 1233.

129. *Id.*

130. *Hercules*, 762 F.2d at 316.

131. *Union Oil v. Oppen*, 501 F.2d 558, 563 (9th Cir. 1974).

132. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927) (holding that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other")

133. See *Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D.Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977).

134. See *Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953); *Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (allowing a negligence action by commercial fishers with losses caused by an oil spill); *In re Glacier Bay*, 746 F. Supp. 1379 (D. Alaska 1990) (providing commercial fishers with economic and business losses resulting from oil spill).

135. *Louisiana v. M/V Testbank*, 524 F. Supp. 1170, 1172 (E.D. La. 1981)

136. *Id.* at 1173 (citing *Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D. Me. 1973)).

137. *Oppen*, 501 F.2d at 567.

138. *Id.* 566 (citations omitted).

139. Prosser, *Law of Torts*, p. 952 (4th ed. 1971)

140. 501 F.2d 558 (9th Cir. 1974)

141. *M/V Testbank*, 524 F. Supp. at 1174.

142. Prosser, *Private Action for Public Nuisance*, 52 *Va. L. Rev.* 997, 1013-14 (1966).

143. See *Hercules*, 762 F.2d at 303.

144. M/V Tamano, 370 F. Supp. at 248.

145. Id. at 250-51 (citing Prosser, Law of Torts, 88 at 591 noting that private actions cannot be recovered where losses are "common to the community ... regarded as no different in kind from the common misfortune.")

146. See e.g. Tex. Nat. Res. Code Ann. sec. 40.107 (West Supp. 1995); Mich. Comp. Laws Ann ch. 324, § 11151 (West Supp. 1995). For a complete listing of all state statutes pertaining to natural resource injuries, see Lloyd W. Landreth et al., Natural Resource Damages: Recovery Under State Law Compared With Federal Laws, 20 ELR 10134.

147. Geer v. Connecticut, 161 U.S. 519, 527-28 (1895).

148. See CERCLA 42 U.S.C. § 9614(a); CWA 33 U.S.C. § 1365 (1988); OPA 33 U.S.C. § 2718.

149. 628 F.2d 652 (1st. Cir. 1982)

150. Id. at 672-673.

151. Id. at 673.

152. See Colocotroni, 628 F.2d at 671 (referring to L.P.R.A. 1131(29))

153. See supra text accompanying notes 78-82.

154. P.L. 756, 33 Pa. Const. Stat. Ann. 6020.101-6020.1305 (West 1996)

155. 35 Pa. Cons. Stat. Ann. 6020.507(a).

156. N.C. Gen. Stat. Ann., ch. 143, sec. 143-215.77(2), - 215.3 (1989).

157. Alaska Environmental Conservation Act, AS 46.03.822

158. AS 46.03.826(5)(B)

159. AS 46.03.822 - 46.03.828

160. See Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990).

161. Id.

162. Id.

163. N.J.S.A. 58:10-23.11, et seq.

164. N.J.S.A. 58:10-23.11g.c(1) providing that "[s]uch person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit"

165. N.J.S.A. 58:10-23.11s.

166. See Glacier Bay, 746 F. Supp. at 1340 (holding that plaintiff claims under state law were not preempted either by federal maritime law or the Trans Alaska Pipeline Authorization Act, 42 U.S.C. §§ 1651-1655).

167. See City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that federal common law particularly public nuisance was preempted by the Clean Water Act).

168. 664 F.2d 327 (2nd Cir. 1981)

169. *Id.*

170. 42 U.S.C. § 9607(a), § 9613(f) (1988 & Supp. V 1993) (providing only for recovery of private clean-up costs and for contribution from other liable parties but not natural resource damages); see also *International Paper Co., v. Ouellette*, 479 U.S. 481, 494, 497 (1987) (holding that the Clean Water Act, 33 U.S.C. § 1365(e), preserves only private claims under nuisance law under the common law of the source state.)

171. 33 U.S.C. §§ 2701-2761 (Supp. V 1993).

172. The OPA, 33 U.S.C. § 2702(b)(2) (Supp. V 1993).

173. *Sekco Energy, Inc. v. M/V Margaret Choest*, 820 F. Supp. 1008, 1015 (E.D. La. 1993); but c.f. *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669, 678-79 (E.D. Mich. 1992) (rejecting a claim under 2702(b)(2)(E) based on failure of claimants to allege injury, destruction, or loss to their property).

174. See *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (S.D. Me 1973) ("Concededly, the line between damages different in kind and those different only in degree from those suffered by the public at large has been difficult to draw.")

175. 42 U.S.C. § 9607(f)(1) (emphasis supplied)

176. *Id.*, 33 U.S.C. § 2706(d)(3) (Supp. II 1990).

177. 43 C.F.R. § 118.4 provides: (c) Double Counting. (1) Double counting of damages should be avoided. Double counting means that a benefit or cost has been counted more than once in the damage assessment. (2) Natural resource damages are the residual to be determined by incorporating the effects, or anticipated effects, or any response actions. To avoid one aspect of double counting, the effect of response actions shall be factored into the analysis of damages. If response actions will not be completed until after the assessment has been initiated, the anticipated effects of such action should be included in the assessment."

178. *Alaska Sport Fishing Association*, 34 F.3d at 769.

179. 7 F.3d at 1464.

180. *Alaska Sport Fishing Association*, 34 F.3d at 769.

181. *Id.*

182. The barring of a claim based on *res judicata* requires that 1) there is a final judgment on the permits in a prior case; 2) the prior and present suits have identical claims, and 3) the prior suit involved the same parties or their privities.

183. *Alaska Sport Fishing Association*, 34 F.3d at 770.

184. 33 U.S.C. The barring of a claim based on *res judicata* requires that 1) there is a final judgment on the permits in a prior case; 2) the prior and present suits have identical claims, and 3) the prior suit involved the same parties or their privities. 1321(f)(4) (1988)

185. Note. 25 *Envtl. L.* at 913-916.

186. *Id.* at 913.

187. *Id.*

188. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592 (1982).
189. See 33 U.S.C. § 1321(o), § 1365(e) (1988); CERCLA, 42 U.S.C. § 9611(a) (1988) providing that recovery under other statutes or common law are preserved. Interestingly, the consent decree which barred the Asia's claim provided that it was not the intent of the settlement to bar those not directly represented by the government including those suffering direct private claims.
190. Note. 25 *Envtl. L.* at 920.
191. 7 F.3d at 1464.
192. *Id.*
193. Satsky, 7 F.3d 1464 (the plaintiff's amended complaint fully provided to claims based on "property damage, diminution of value to real estate, loss of income and other economic losses including loss of asset value, increased operating expenses, increased costs of personal protection from contaminated domestic water or the threat of contaminated domestic water, loss of water quality or quantity, loss or enjoyment of real property, loss of water quality or quantity, loss or enjoyment of real property, mental anguish, and emotional distress and an increased risk of harm and an increased risk of contracting fatal or otherwise serious illnesses.")
194. *Id.* at 1470.
195. *Id.* at 1469.
196. Black's Law Dictionary 1114 (6th ed. 1991).
197. See Puerto Rico v. S.S. Zoe Colocotroni, 456 F. Supp. 1327 (D.P.R. 1978), *aff'd* on other grounds, 628 F.2d 652 (1st Cir. 1980).
198. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 258 (1972).
199. 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d 4047 at 223 (1988).
200. Alfred L. Snapp, 458 U.S. 600; Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976).
201. *Id.* at 1470.
202. *Id.*
203. *Id.*
204. 33 U.S.C. § 2702(b)(2)
205. C. Jones et. al. Public and Private Claims in Natural Resource Damage Assessments. 20 *Harv. Env'tl. L. Rev.* 111, 120-121 (1996).
206. *Id.* at 123.
207. 42 U.S.C. § 9652(d) (1988)
208. 33 U.S.C. § 1365 (1988)
209. 33 U.S.C. § 2718(a) (providing that "nothing in this chapter ... shall (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements ...")

210. 132 Cong. Rec. S14895 (daily ed. Oct. 3, 1986) (statement of Senator Baucus that "losses are not intended to be subject to trustee recovery if they are subject to private recovery [and] trustees should be barred from recovery of private losses only if it can be demonstrated that recovery under established applicable tort doctrine is available to a private individual who has suffered a loss.")

211. *Norwet Fin. Leasing, Inc. v. Morgan Whitney, Inc.*, 787 F. Supp. 895, 902 (D. Minn. 1992).

212. *Satsky*, 7 F.3d at 1470.

213. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992).

214. 43 C.F.R. pt. 11.

215. *M/V Tamano*, 357 F. Supp. at 1097; *Zoe Colocotroni*, 456 F. Supp. at 1327; *Idaho v. Southern Refrigerated Transp. Inc.*, No. 88-1279, 1991 U.S. Dist. LEXIS 1869 (D. Idaho 1991) (holding that because the state of Idaho could bring a claim under the *parens patriae* doctrine, it was therefore permitted to bring a claim for natural resource damages under CERCLA).

216. *Ohio*, 880 F.2d at 461.

217. 1991 U.S. Dist. LEXIS 1869

218. *Id.* at LEXIS *59.

219. No. 96-1268, 1998 U.S. App. LEXIS 584 (1998)

220. *Id.* at *55 (citing *Natural Resource Damage Assessments*, 51 Fed. Reg. 27,674, 27,691 (1986)).

221. *Id.* at *59.

222. *In re Oriental Republic Uru.*, No. 90-404, 1993 U.S. Dist. LEXIS 6291 (d. Del. Apr. 7, 1993).

223. *Id.* at 1993 U.S. Dist LEXIS 6291 at *3 ("It must be recognized that to swim and to navigate are completely different activities.") (referring to *Oppen*, 485 F.2d at 257).

224. 42 U.S.C. § 9607(f)(1)

225. *In re Oriental Republic Uru.* at *3.

226. *Alaska Sport Fishing*, 34 F.3d at 769 (citing D.C. No. CV-89-00095-HRH).

227. No. 96-1268, 1998, U.S. App. LEXIS 584 (1998)

228. *Satsky*, 7 F.3d at 1464. Recovery by the private claimants in *Satsky* was at least partly if not wholly determined by the fact the state had not already recovered for those damages in the original settlement.

229. No. 96-1268, 1998 U.S. App. LEXIS 584 (1998)

230. *Id.* (referring to *Alaska Sport Fishing*, 34 F.3d at 774).

231. See *Ohio*, 880 F.2d at 461.

232. See also *Breen*, 14 *Env'tl. L. Rep.* at 10304.

233. See 42 U.S.C. § 9607(f)(1) (1988 & Supp. V 1993); 132 Cong. Rec. H9,561-03 (daily ed. 8, 1986) (noting that "the purpose of the [natural resource damages] regime ... is to make whole the natural resources that suffer injury for release of hazardous substances.")

234. Satsky, 7 F.3d at 1470.
235. Strickland, 20 Colum. J. Envtl. L. at 236
236. Id.
237. See Cynthia Carlson, Making CERCLA Natural Resource Damage Regulations work: The Use of the Public Trust Doctrine and Other State Remedies, 18 ELR 10299 (1988).
238. Golnoy Barge Co. v. M/T Shinoussa, No. CIV.A. H-90-2414, 1993 WL 735038, at *3 (S.D. Tex. Aug. 17, 1993).
239. Jones, 20 Harv. Envtl. L. Rev. at 146-57.
240. See generally Carlson, 18 ELR 10299 (1988).
241. Id. at 10305. Carlson notes that the scope of natural resources falling under the protection of the public trust doctrine is narrow general limited to "traditional trust areas" while all but purely private resource seem to fall under CERCLA's purview. 18 ELR at 10305.
242. Id.
243. 42 U.S.C. § 9607(a)
244. Similarly, the breadth of potential recovery under the public trust doctrine and public nuisance claims requiring only impairment or interference with public rights still must demonstrate that the interference was with was defined a "public right." Id.
245. In re Acushnet River, 675 F. Supp. 22 (D. Mass. 1987); United States v. Montrose Chem. Corp. of Cal., No. CV-90-3122-AAH (C.D. Cal. filed June 18, 1990); United States v. City of Seattle, No. C90-395 (W.D. Wash. Jan. 23, 1991); United States v. Exxon Corp., Nos. A-91-082-CV, A-91-083-CV, A-90-015-2 (D. Alaska Sept. 30, 1991).
246. Illinois Central, 146 U.S. at 454.
247. See Sax, 68 Mich. L. Rev. at 474.
248. See generally Susan D. Baer, Comment: The Public Trust Doctrine -- A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources, 15 B.C. Envtl. Aff. L. Rev. 385, 400-414 (1988).
249. In re Stueuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980) (noting that the duty to protect and preserve natural resources derive from a duty owed to the people) (citing Tommer v. Witell, 334 U.S. 385, 408 (1948); Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985); City of Alameda v. Todd Shipyards Corp., (recognizing the federal government's non-statutory affirmative duty precluding it from selling land to a private corporation).
250. 742 F. Supp. 441 (N.D. Ill. 1990).
251. Id. at 445. See also Power, N.Y.U. Envtl. L.J. at 427.
252. 16 U.S.C. §§ 79a-79j (1982 & Supp. IV 1986).
253. 376 F. Supp. 90 (N.D. Cal. 1974).
254. 16 U.S.C. § 1 (providing that the National Park Service shall promote and regulate the use of Federal areas known as national parks, monument, and reservations ...").

255. 5 U.S.C. § 706(2)(A)
256. 16 U.S.C. §§ 79a-79j
257. 42 U.S.C. § 9607(f) (emphasis supplied).
258. 132 Cong. Rec. S14,930 (daily ed. Oct. 3, 1986); 132 Cong. Rec. H9,612 (daily ed. Oct. 8, 1986)
259. See H.R. Rep. No. 172, part 1, 96th Cong., 1st Sess. 17 (1979); S. Rep. No. 848, 96th Cong., 2d Sess. 84 and 233 (1980). See also Howard Kenison et al., States Actions for Natural Resources Damages: Enforcement of the Public Trust, 17 ELR 10434, 10436 (1987).
260. 5 U.S.C. §§ 701-706 (1982 & Supp. IV 1986)
261. Heckler v. Chaney, 470 U.S. 821 (1985).
262. See e.g. Barry Breen, Citizen suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law, 24 Wake Forest L. Rev. 851 (1989).
263. Patrick Thomas Michael III, Natural Resource Damages Under CERCLA, 20 Pepperdine L. Rev. 185, 211 (1992).
264. Id. at 878-879.
265. 42 U.S.C. § 9659(a)(1)
266. 42 U.S.C. § 9659(a)(2)
267. 42 U.S.C. § 9613(h)(4) provides "an action [relating to citizen suits] alleging that the removal or remedial actions taken under this section 9604 of this title or secured under 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be under taken at the site." see supra note 36, suggests that CERCLA's citizen suit provisions were only intended to allow citizen group to seek review of a site's remediation. Until a court specifically addresses whether CERCLA Section 310(a)(2) precludes review of a government's decision not to bring natural resource damage actions it will be unclear.