

THE OVERRIDING PUBLIC INTEREST IN PRIVATELY OWNED NATURAL RESOURCES: FASHIONING A CAUSE OF ACTION

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The president in Washington sends word that he wishes to buy our land. But how can you buy or sell the sky? The land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

This we know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.

One thing we know: our God is also your God. The earth is precious to him and to harm the earth is to heap contempt on its creator.¹

I. INTRODUCTION

The prophetic wisdom of Chief Seattle, expressed in 1852 when the supply of fresh air, land, and water appeared unlimited and perpetually sustainable, has come home to roost in the twilight of the 20th Century. We have finally begun to take stock of our natural resources and have come to the stark realization that the supply of those resources is not endless and needs to be protected and, if possible, restored. The historical development of natural resources law, particularly in the last two decades or so, clearly demonstrates an increasing emphasis on the protection of natural

1. Letter from Chief Seattle, Patriarch of the Duwamish & Squamish Indians of Puget Sound, to U.S. President Franklin Pierce (1855) (original letter has never been located, but remains extensively cited). See generally Paul S. Wilson, *What Chief Seattle Said*, 22 *Envtl. L.* 1451 (1992) (providing an engaging account of the history of this significant letter).

resources.² That emphasis is sometimes premised on the assumption that privately owned land imbued with certain natural resources is not totally owned by the private individual despite fee simple title.³ In a significant way the traditional American concept of private ownership of land has been challenged. This challenge is having a profound impact on the law.

Just as the law is dynamic, the legal concept of property ownership is also dynamic. This evolving concept of land ownership can be better understood when viewed in the context of past thinking. Consider the following: "[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and 'antisocial' activities are given the protection of law; the owner may do what all or most of his neighbors decry."⁴

The foregoing quotation (albeit taken out of context) is antithetical to the emerging notion of property ownership in both legislation, as well as jurisprudence, but probably reflected and

2. Since 1916, Congress has enacted (among others) the following environmental protection statutes containing explicit trust language: The Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (1988 & Supp. III 1991); The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988 & Supp. II 1990); The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1990); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, and The National Park Service Act, 16 U.S.C. §§ 1-460 (1988 & Supp. III 1991). See also, 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, 393 n.56 (1988).

3. See Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 751-54 (1992); see also, Timothy Patrick Brady, *But Most of it Belongs to Those Yet to be Born: The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 626-29 (1990) (describing the American roots of the public trust doctrine).

4. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

may still reflect the mindset of many regarding land ownership.⁵ Moreover, it is submitted that current legislation and judicial decisions have created many zones within which the owner has to yield to the majority. Thus, although an antisocial private landowner may still act whimsically and irrationally with regard to his own property, today it is more likely that he will be held accountable to the general public for those actions when they result in damages to property in which the public has an overriding interest.

Over the years, the role of the government as a corporate representative of the populace has changed from being merely an adjudicator of disputes between private litigants over the destruction of land and natural resources to an advocate for the protection, preservation and restoration of natural resources. Through the actions of its legislative bodies, government has recognized the public's interest in the national and state natural resources in constitutions, statutes, rules and regulations. It has also been appointed custodian of those natural resources and empowered to protect, preserve and restore natural resources. While some environmental statutes provide a cause of action for damages to *privately* held natural resources, they are self-limiting by their terms. They encompass only those situations specifically indicated, such as environmental harms caused by oil spills (*e.g.*, Oil Pollution Act (OPA))⁶ or release of hazardous substances at inactive waste sites (*e.g.*, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)).⁷ The question on which this paper focuses is whether, in the absence of a specific statute, the state or federal government acting as a public trustee has a cause of action under general common law for damages to natural resources (*e.g.*, wetlands, wildlife) on privately owned lands.

5. See generally James I. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that the public trust doctrine is best characterized as property law).

6. 33 U.S.C. §§ 2701-2761 (1988 & Supp. II 1990).

7. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1990).

II. PUBLIC TRUST DOCTRINE

In fashioning a public remedy for damages to privately held natural resources, the logical place to begin is with the Public Trust Doctrine, which has historically been utilized to protect certain natural resources on publicly owned property.⁸ If we can demonstrate that privately owned natural resources fall within the corpus of the public trust, then the Public Trust Doctrine, which is universally recognized and well-entrenched in jurisprudence throughout the United States, should be an appropriate vehicle for the recovery or restoration of damages to those privately held resources. While the key condition to recognizing or creating a cause of action will ultimately be whether the public has a proprietary interest in privately held natural resources, some discussion of the Public Trust Doctrine will be helpful.

The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person.⁹ Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including, but not limited to, public lands directly owned by a sovereign, as well as tidal, seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.¹⁰ When the public's rights to these resources are alienated by destruction, damage, or interference, the Public Trust

8. See Robert E. Tarcza, Comment, *The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana*, 27 LOY. L. REV. 469, 474-76 (1981); Joseph L. Sax, *The Public Trust Doctrine in National Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970); Bernard S. Cohen, *The Constitution, the Public Trust Doctrine and the Environment*, 1970 UTAH L. REV. 388, 389-90.

9. Tarcza, *supra* note 8, at 469.

10. See LA. CIV. CODE ANN. art. 450 (West 1980 & Supp. 1993); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm.*, 247 N.W.2d 457, 460-61 (N.D. 1976); *Payne v. Kassab*, 312 A.2d 86, 93 (Pa. Commw. Ct. 1973) (citing PA. CONST. art. 1, § 27), *aff'd*, 323 A.2d 407 (Pa. Commw. Ct. 1974), *aff'd*, 361 A.2d 263 (Pa. 1976).

Doctrine and the courts construing it have recognized a cause of action by the public trustee to seek injunctive relief or compensatory damages against the tortfeasor.¹¹

The seminal case on the scope of the Public Trust Doctrine is *Illinois Central Railroad v. Illinois*.¹² In *Illinois Central*, the Supreme Court upheld the Illinois Legislature's repeal of an earlier legislative grant of public trust land beneath Lake Michigan to the Illinois Central Railroad company. In explaining the character of a state's title to lands underneath navigable waters, the Court found that it was different in character from the title that the state holds in other lands intended for sale to private parties. The Court stated that a state's title to lands under navigable waters is "a title held in trust for the people of the State 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."¹³

In affirming the revocation of the grant of public trust lands to the railroad, the Supreme Court stated further:

The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject

11. *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972); *State v. Jersey Cen. Power & Light Co.*, 308 A.2d 671, 673-74 (N.J. Super. Ct. Law Div. 1973) *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976). See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-64 (1892); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576 (La. 1975), *modified*, 317 So.2d 580 (La. 1975).

12. 146 U.S. 387 (1892).

13. *Id.* at 452; see also *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842) (describing water course sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery").

to revocation.¹⁴

Almost 100 years later in *Phillips Petroleum Co. v. Mississippi*,¹⁵ the Supreme Court reaffirmed the inalienable character of public trust lands. While *Illinois Central* dealt with lands beneath navigable waters, in *Phillips*, the Supreme Court expanded the public trust lands to include all lands beneath the ebb and flow of the tide regardless of their navigable character. While the case dealt with merely forty-two acres of tidelands in Mississippi, it called into question the ownership of millions of acres of wetlands elsewhere which are subject to tidal changes but which have been in the hands of private landowners for nearly 200 years. The pivotal issue in both *Illinois Central* and *Phillips* was the question of ownership of the subject lands. If they were found to be public lands, they were protected and inalienable. Once the corpus of the public trust has been defined, it is well settled that the state or federal government has the inherent power and fiduciary duty to assert a common law cause of action for the destruction, encroachment, or interference of any natural resources that are part of the public trust.¹⁶

While the cause of action may vary in each state, caselaw has essentially delineated four elements to the public trust lawsuit:

- (1) Tortious interference, destruction,

14. *Illinois Cent.*, 146 U.S. at 453; see also *Shively v. Bowlby*, 152 U.S. 1, (1894); *Knight v. United States Land Ass'n*, 142 U.S. 161, (1891).

15. 484 U.S. 469 (1988).

16. See, e.g., *Amerada Hess*, 350 F. Supp. at 1067; *Jersey Cent. Power & Light*, 308 A.2d at 674; *Toomer v. Witsell*, 334 U.S. 385 (1948); *Gulf Oil*, 317 So.2d 576; *United States v. Domerust*, 658 F. Supp. 752 (D. Idaho 1987) *aff'd*, 888 F.2d 630 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981); *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910); *Teller v. United States*, 113 F. 273 (8th Cir. 1901); *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980); *County of Los Angeles v. Berk*, 605 P. 2d 381 (Cal. 1980) *cert. denied*, 449 U.S. 836 (1980); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923 (Tex. Civ. App. 1964); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex. Ct. App. 1986).

- invasion, or encroachment upon natural resources;
- (2) Natural resources must form part of the corpus of the public trust;
- (3) Causation; and
- (4) Quantifiable damages commensurate with the diminution in value of the trust.¹⁷

As noted at the outset, if privately held natural resources fall within the corpus of the public trust, then the Public Trust Doctrine should provide a remedy for the destruction, interference or encroachment of any resources that are part of the public trust.¹⁸ However, difficulty lies in sufficiently defining the scope of the public's proprietary interest in privately held natural resources in order to give the public a cause of action under the Public Trust Doctrine, as well as an appropriate measure of damages for injury to those resources.

III. PRIVATE CAUSES OF ACTION FOR LOSS OF PUBLICLY OWNED NATURAL RESOURCES: AN ANALOGY

In general, there is no private right of action to recover for damages to natural resources.¹⁹ This is primarily because private citizens do not own natural resources—they are public resources. Most states have laws which address this subject. For example, the Louisiana Civil Code vests the state with ownership of public resources such as "running waters, [and] the waters and bottoms of natural navigable water bodies."²⁰ Nonetheless, it is not an entirely novel concept that private individuals can indeed have an overriding interest in public resources to such an extent that certain individuals can sue and recover for damages connected with publicly owned natural resources.

17. See *supra* note 16.

18. See *supra* text accompanying note 11.

19. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1288 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

20. LA. CIV. CODE ANN., art. 450 (West 1980 & Supp. I 1993).

One such class of individuals is comprised of fishermen, hunters and others who commercially harvest natural resources. They have no proprietary interest with respect to the marine or nonmarine life until after it is harvested.²¹ It is generally recognized that before harvest, ownership of these resources is vested with the state or federal government. Nonetheless, courts have extended protection to commercial fishermen, oystermen, crabbers, and shrimpers by granting them a cause of action under general law for damages to natural resources in which their interests are greater than the public's interest, even in the absence of any proprietary rights.²² Generally they may recover only consequential (*i.e.*, economic loss) damages arising out of the injury to those natural resources.²³

Admiralty law provides a good example of such private causes of action. In *Carbone v. Ursich (The Del Rio)*²⁴ members of a crew libelled another vessel for negligently fouling their net. They claimed their share of the lost catch and the prospective catches of fish lost during the period in which the net was being repaired.²⁵ In a lengthy decision the court considered, among other issues, whether or not the crew could bring the action itself or whether it had to be brought by the owner of the fishing vessel.²⁶ Although the owners of the vessel had intervened, the court found the fishermen to be the real parties in interest despite the lack of any property rights in the fish, the boat or the net.²⁷ The court focused on the special status of seamen:

It is quite evident that the [lower] court,
although dealing with a well established rule of law

21. *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F. Supp. 1370, 1378 (E.D. La. 1978).

22. *Louisiana v. M/V TESTBANK*, 524 F. Supp. 1170, 1173 (E.D. La. 1981), *aff'd*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Burgess v. M/V TAMANO*, 370 F. Supp. 247, 250-51 (S.D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977).

23. *M/V TESTBANK*, 524 F. Supp. at 1173.

24. 209 F.2d 178 (9th Cir. 1953).

25. *Id.* at 179.

26. *Id.* at 179-82.

27. *Id.* at 182.

of torts, was not thinking of the special situation of the fishermen who, as we have here indicated, had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.²⁸

In 1973, the issue was again raised in *Burgess v. M/V TAMANO*.²⁹ This time, in addition to fishermen and clam diggers, businessmen also made a claim for damages indirectly resulting from pollution of waters caused by a discharge of bunker oil into Maine's Casco Bay.³⁰ Admiralty jurisdiction of the federal court was invoked, and liability was asserted under the Rivers and Harbors Act³¹ and the Water Quality Improvement Act of 1970³² and on theories of negligence, unseaworthiness, trespass, and nuisance.³³ Defendants filed motions to dismiss the claims of the fishermen, the clam diggers, and the businessmen. The court squarely faced the issue of who had a cause of action:

[D]efendants contend that the economic interests (loss of profits and impairment of earning capacity) which these classes of plaintiffs assert to have been damaged by the oil spill are *not legally cognizable because none of the classes had any property interest* in the coastal waters and marine life or shores claimed to have been injured by the spill.³⁴

28. *Id.*

29. 370 F. Supp. 247.

30. *Id.* at 248-49.

31. 33 U.S.C. § 407 (1988 & Supp. II 1990).

32. 33 U.S.C. § 1161(b)(2) (1988 & Supp. II 1990).

33. *Burgess v. M/V TAMANO*, 370 F.Supp. 247, 249 (S.D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977).

34. *Id.* (emphasis added).

The parties agreed that the spill had occurred in Maine's coastal waters, which constituted a maritime tort.³⁵ Plaintiffs petitioned the court to fashion a new uniform federal rule applicable to their situation, but the court found it unnecessary to determine whether the general maritime law or the law of Maine was controlling.³⁶ The court focused on what rights certain individuals had in public resources:

Since the fishermen and clam diggers have no individual property rights with respect to the waters and marine life allegedly harmed by the oil spill, their right to recover in the present action depends upon whether they may maintain private actions for damages based upon the alleged tortious invasion of public rights which are held by the State of Maine in trust for the common benefit of all the people.³⁷

The court opined that it was a long-standing rule of law "that a private individual can recover in tort for invasion of a public right only if he has suffered damage particular to him—that is, damage different in kind, rather than simply in degree, from that sustained by the public generally."³⁸ The court went on to say that "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. But the Court is persuaded that the commercial fisherman and clam diggers have sufficiently alleged 'particular' damage to support their private actions."³⁹

Recognition of the overriding rights of certain classes of private individuals in public natural resources has not been limited to cases emanating from United States coastal waters or involving

35. *Id.*

36. *Id.* at 250.

37. *Id.*

38. *Id.*

39. *Id.* (citation omitted) (dismissing the claims of the businessmen).

only the "favorites of the admiralty."⁴⁰ In *Masonite Corp. v. Steede*, a 1945 Mississippi Supreme Court case, plaintiff-appellee claimed damages for destruction of her fishing business and for loss of profits as a result of the discharge of effluents into a river which ran through her property upon which her business was located.⁴¹ One of the specific issues considered by the state supreme court was the appellant's argument "that although the effluent discharged into the river from the appellant's plant may have contributed to the killing of the fish in the river the appellee *has no cause of action* therefor against the appellant for the reason that she did not own the fish."⁴² The court recognized that appellee did not own the fish but that she and all other persons on the Pascagoula River could obtain access to the fish and that she had the right to permit or exclude others from obtaining access to the river through her property.⁴³ In affirming the lower court's decision, the court ruled that these were valuable rights "the destruction of which by the pollution of the river she would be entitled to recover damages."⁴⁴

In *Union Oil Co. v. Oppen*,⁴⁵ the United States Court of Appeals for the Ninth Circuit again considered the question of whether commercial fishermen had a cause of action for damages caused by the Santa Barbara oil spill.⁴⁶ Defendant's Motion to Dismiss was denied by a special master who recognized that the "injuries resulting from 'an interference by defendants with

40. See, e.g., *Geer v. Connecticut*, 161 U.S. 519 (1896) (wildlife); *Robbins v. Department of Public Works*, 244 N.E.2d 577 (Mass. 1969) (meadow); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966) (parklands); *Zumbrota v. Strafford W. Emigration Co.*, 290 N.W.2d 621 (Minn. 1980) (public square).

41. 23 So.2d 756 (Miss. 1945).

42. *Id.* at 757 (emphasis added).

43. *Id.* at 757-58.

44. *Id.* at 759. In his dissent, Justice Griffith seemed to focus more on the secondary type damages (loss of profits because of the lack of people coming to fish) as opposed to questioning the cause of action itself. *Id.*

45. 501 F.2d 558 (9th Cir. 1974).

46. In 1969, vast quantities of oil escaped from under and near a Union Oil Company platform located on the Outer Continental Shelf of the United States in the Santa Barbara Channel. *Id.* at 559.

[plaintiffs'] economic right to fish in public waters' were legally compensable."⁴⁷ As a result of the special master's action, the district judge considered the following question, "[d]oes the alleged diminution of the aquatic life of the Santa Barbara Channel claimed to have resulted from the occurrence constitute a legally compensable injury to the Commercial Fishermen claimants?"⁴⁸ Answering this question affirmatively, the court pointed out that its resolution was not dependent on whether plaintiffs had a proprietary interest in the sea life of the Santa Barbara Channel.⁴⁹ The court saw this as a "loss of a prospective economic advantage occasioned by the alleged diminishment of the quantities of available sea life [which] formed a sufficient basis for . . . recovery under the law of negligence."⁵⁰

The material presented above clearly illustrates that the general common law has allowed certain classes of private individuals to recover for the loss of publicly owned natural resources even though those individuals had no proprietary interest. The causes of action were not created or given life by any environmental statutes, most of which did not even exist at the time of the cited decisions. If there was any limitation on plaintiffs in these cases, it was in matters of proof of losses and the inherent limitation in the types of damages (*i.e.*, economic losses) which could be recovered.⁵¹ As the cases make clear, the bases of the causes of action were tortious invasions of an overriding private interest in publicly held natural resources in which a person suffered damages greater in degree than the general public.⁵²

These cases bring to the forefront the issue of whether there

47. *Id.* at 560 (quoting special master's order).

48. *Id.*

49. *Id.*

50. *Id.* The Court of Appeals affirmed. 501 F.2d at 570.

51. *Louisiana v. M/V TESTBANK*, 524 F. Supp. 1170, 1173 (E.D. La. 1981), *aff'd*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Burgess v. M/V TAMANO*, 370 F. Supp. 247, 250-51 (S.D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977).

52. *M/V TESTBANK*, 524 F. Supp. at 1173; *M/V TAMANO*, 370 F. Supp. at 250.

exists a means by which the state or federal government, as public trustee, has a cause of action to recover for damages to natural resources in which it has an overriding interest. More specifically, does the government have a cause of action to recover damages to natural resources which are on or connected to the property of a private landowner? If it does, what is the overriding public interest, how can it be protected and how does it differ from the private actions just discussed?

IV. THE PUBLIC'S OVERRIDING PROPRIETARY INTEREST IN PRIVATELY HELD NATURAL RESOURCES

As noted earlier, natural resources are now considered "too important by society to be owned by one person" and, as such, have gradually evolved into the corpus of the public trust.⁵³ The movement from insatiable consumption to protection and restoration of natural resources began in 1969 with the enactment of the National Environmental Policy Act (NEPA)⁵⁴ and has been gaining momentum ever since with the subsequent enactment of numerous environmental statutes such as the Clean Water Act (CWA),⁵⁵ the Clean Air Act (CAA),⁵⁶ and their respective amendments, the Coastal Zone Management Act (CZMA),⁵⁷

53. Tarcza, *supra* note 8, at 469. Commentators have also noted that the Public Trust Doctrine reflects the fundamental "precept that some resources are so central to the well-being of the community that they must be protected." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980); see also Bader, *supra* note 3, at 754 (citing the same quote). This principle was recognized by an American court as early as 1821. In *Arnold v. Mundy*, the court found that "'by the law of nature, which is the only true foundation of all the social rights,' the rivers that ebb and flow, the bays, and the coasts are common to all citizens and are sources from which they can find their sustenance." Bader, *supra* note 3, at 751 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 76-78 (1821)).

54. 42 U.S.C. §§ 4321-4370 (1988 & Supp. II 1990).

55. 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990).

56. 42 U.S.C. §§ 7401-7671 (1988 & Supp. II 1990).

57. 16 U.S.C. §§ 1451-1464 (1988 & Supp. II 1990).

OPA,⁵⁸ CERCLA,⁵⁹ and the Resource Conservation and Recovery Act (RCRA),⁶⁰ as well as their state counterparts. Protection was not limited solely to land, air and water but also extended to flora and fauna with the enactment of the Marine Mammals Protection Act,⁶¹ the Migratory Bird Act,⁶² and the Endangered Species Act.⁶³

In NEPA, Congress declared the following environmental policy for the nation:

The Congress, recognizing the profound impact of man's activity on . . . the natural environment . . . and recognizing further the *critical importance of restoring and maintaining environmental quality* to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.⁶⁴

This policy was echoed in each of the subsequent federal enactments mentioned above. For example, the CWA stated that its objective was "*to restore and maintain the chemical, physical and biological integrity of the Nation's waters*,"⁶⁵ while the purpose of the CAA was "*to protect and enhance the quality of the Nation's air resources*."⁶⁶ In adopting the CZMA, Congress found that increasing and competing demands upon the lands and

58. 33 U.S.C. §§ 2701-2761 (1988 & Supp. II 1990).

59. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1990).

60. 42 U.S.C. §§ 6901-6992k (1988 & Supp. II 1990).

61. 16 U.S.C. §§ 1361-1407 (1988 & Supp. II 1990).

62. 16 U.S.C. §§ 701-718j (1988 & Supp. II 1990).

63. 16 U.S.C. §§ 1531-1544 (1988 & Supp. II 1990).

64. 42 U.S.C. § 4331 (a) (emphasis added).

65. 33 U.S.C. § 1251(a) (emphasis added).

66. 42 U.S.C. § 7401(b)(1) (emphasis added).

waters of our coastal zones resulted in permanent and adverse changes necessitating a national policy "*to preserve, protect, develop and where possible, to restore or enhance*, the resources of the Nation's coastal zone for this and succeeding generations."⁶⁷

The federal government has not acted alone in its adoption of a new policy but has been joined by its state counterparts. For example, the Louisiana State Constitution of 1974 clearly states:

The natural resources of the state, including air and water, and the healthful, scenic, historic and aesthetic quality of the environment *shall be protected, conserved and replenished* insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy.⁶⁸

Following the mandate of its constitution, Louisiana has enacted numerous statutes designed to protect and restore its natural resources. The Louisiana Water Control Law provides that "the waters of the State of Louisiana are among the state's most important natural resources and their continued protection and safeguard is of vital concern to the citizens of this state."⁶⁹

In protecting the natural resources of the state, the Louisiana legislature recognized the need to establish dominance over those resources in which there was a strong public interest. This policy was incorporated into Louisiana's Environmental Quality Act which provides:

- A. The maintenance of a healthful and safe environment in *Louisiana requires regulation and control* over the areas of water quality, air quality, solid and hazardous waste, scenic rivers and streams

67. 16 U.S.C. § 1452(1) (emphasis added).

68. LA. CONST. Art. IX, § 1 (1977) (emphasis added).

69. LA. REV. STAT. ANN. § 30:2072 (West 1989).

and radiation.

- B. In order to accomplish these goals most efficiently, it is necessary to provide for comprehensive policies on a statewide basis to unify, coordinate, and implement programs to provide for the most advantageous use of the resources of the state and to preserve, protect and enhance the quality of the environment of Louisiana.⁷⁰

In addition to reflecting public interest through the declaration of a state and national policy of protection and restoration of natural resources, the environmental statutes cited above establish a framework of *regulation and control over natural resources regardless of their fee simple ownership*. For example, in Louisiana the Water Control Law defines the waters of the state so broadly that they include regulation of water solely contained within the confines of private lands.⁷¹ In fact, Louisiana's Department of Environmental Quality (DEQ) regulations go even further by defining surface water as follows:

Surface Water—means all lakes, bays, rivers, streams, springs, ponds, impounding reservoirs, wetlands, swamps, marshes, water sources, drainage systems and other surface water, natural or artificial, *public or private* within the state or under its jurisdiction that are not a part of a treatment system allowed by state law, regulation or permit.⁷²

While the state specifically includes wetlands as waters of the state, the federal government has also asserted an overriding public interest in wetlands such that a private owner of wetlands cannot develop his land without first obtaining a Section 404 permit under

70. *Id.* § 30:2003 (emphasis added).

71. *Id.* § 30:2073(5).

72. LA. ADMIN. CODE tit. 33, pt. IX § 107 (1988) (second emphasis added).

the Clean Water Act.⁷³

The extensive regulation and control over natural resources that has been developed over the past twenty years suggests that perhaps Chief Seattle was right—one cannot own natural resources, at least not in the traditional sense. However, even if this is a concept that many may not be willing to accept, what is becoming clear is that even if one claims ownership of natural resources, that ownership may nevertheless be subject to an overriding public interest as reflected by the extensive network of state and federal environmental statutes and regulations created to protect those resources. This appears to be the rationale behind the definition of natural resources codified in CERCLA,⁷⁴ and more recently in OPA:

"[N]atural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources *belonging to, managed by, held in trust by, appertaining to, or otherwise controlled* by the United States (including the resources of the exclusive economic zone), any State or local government or any Indian tribe, or any foreign government.⁷⁵

In *Ohio v. Department of Interior*,⁷⁶ the U.S. Court of Appeals for the D.C. Circuit noted that the preamble to the Department of Interior (DOI) regulations on natural resources suggested that privately owned natural resources were not to be included in natural resource damage assessments under CERCLA.⁷⁷ However, the court determined that DOI's

73. 33 U.S.C. § 1344; see James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 25 (1986) (outlining the evolution of Section 404 and Congress' struggle to define "navigable waters").

74. 42 U.S.C. § 9601(16).

75. 33 U.S.C. § 2701(20).

76. 880 F.2d 432 (D.C. Cir. 1989).

77. *Id.*

interpretation may have been impermissible in light of CERCLA's natural resource definition which did not hinge solely on ownership or any type of title instrument which transferred property to a government entity to be held in trust.⁷⁸ On the contrary, the court found that a substantial degree of government regulation, management, or other form of control of natural resources on private property may be sufficient to make CERCLA natural resources damage provisions applicable to private lands.⁷⁹

If management and control of natural resources is sufficient to allow the provisions of CERCLA and OPA to reach privately held natural resources, the same rationale might well afford a public trustee a basis upon which to assert a cause of action for the recovery of damages to natural resources on private property. It is submitted that the degree of regulation, management, or control over natural resources is a clear expression of the public's overriding, if not proprietary, interest in those resources regardless of its fee simple ownership.

It simply cannot be denied that public policy favors the public's overriding interest in natural resources even on privately owned land. Numerous recent federal and state legislative expressions have articulated this policy clearly and in the strongest possible terms.⁸⁰ Not only is there an overriding interest in natural resources, but one could say that there is a proprietary interest in the traditional sense of the common law. Indeed, this interest has already been demonstrated in selective areas where private landowners have been prohibited by statute from using their property in certain ways. Yet these prohibitory actions have occurred almost exclusively because of regulatory statutes which prohibit future actions, such as *protecting* the land from pollution. Little, if anything, has been done to correct past destructive actions except in particular situations such as CERCLA cleanups.⁸¹ In other words, the parts of the various statutes referenced above which mandate government action "to protect and preserve" have

78. *Id.* at 461.

79. *Id.*

80. *See supra* notes 2, 64-70 and accompanying text for examples of some statutes.

81. *See supra* note 7.

been utilized.⁸² On the other hand, the simultaneous commands "to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations"⁸³ or "of restoring . . . environmental quality"⁸⁴ have been largely ignored. They certainly have been ignored as they relate to the destruction of natural resources on private property.

If the state is the public trustee of our natural resources—giving it unquestionable standing to sue "to protect and to restore" those resources—and the public policy declarations give it an overriding or proprietary interest in those resources even on privately owned land, why then has the state failed to take action? Perhaps courts have not considered (or have not been presented the opportunity to consider) a public cause of action because of misguided notions of ownership of natural resources, as well as reliance on traditional conceptions of property damage awards (*i.e.*, economic loss) which are clearly incompatible with the redress of environmental harm. Nonetheless, as a result of emerging concepts of overriding or proprietary interest in natural resources, the courts may be on the verge of recognizing a statutory cause of action for damage to privately held natural resources. Furthermore, as discussed below, a strong legislative preference for restoration may also provide the courts with the necessary guidance to fashion an appropriate remedy for natural resource damages.

V. TORTIOUS INVASION OF THE PUBLIC'S OVERRIDING INTEREST IN PRIVATELY HELD NATURAL RESOURCES

As previously noted, the government, as a public trustee, has the right and duty "to protect, preserve and restore" damaged natural resources that are publicly owned.⁸⁵ When there has been a tortious invasion or interference with that right, the courts have recognized that the public trustee has a legally protected interest

82. See, *e.g.*, Wilderness Act, 16 U.S.C. §§ 1131-1136 (1988 & Supp. III 1991).

83. CZMA, 16 U.S.C. § 1452(1).

84. NEPA, 42 U.S.C. § 4331(a).

85. See *supra* Sec. IV.

which may be enforced in a court of law or equity.⁸⁶ However, when damaged natural resources are located on private lands, in the absence of a specific statutory cause of action, does the public trustee still have a legally protected interest which is enforceable under the common law against this tortious invasion of the public's rights? A fair interpretation of the jurisprudence, particularly in the context of the environmental statutes discussed above, strongly suggests that the courts would so find.

The case of *Puerto Rico v. S.S. Zoe Colocotroni*⁸⁷ came remarkably close to resolving this issue. There, the crew of a grounded barge discharged crude oil in order to lighten the vessel and free her from the reef upon which she had grounded. The oil slick found its way to a bay off the Puerto Rican coast and damaged a public mangrove forest located in a wetland area.⁸⁸ The Commonwealth of Puerto Rico and the Environmental Quality Board (EQB) filed an action in admiralty claiming as damages, among other things, monies to restore the mangrove forest.⁸⁹ The appellate court affirmed the liability portions of the judgment and specifically considered whether the plaintiffs stated a cognizable cause of action.⁹⁰ The defendants conceded that Puerto Rico as the landowner, like any private owner, would have a private cause of action to recover any damages it could prove for economic loss.⁹¹ Puerto Rico made no attempt to allege this. Instead, Puerto Rico asserted its rights "to recover as a governmental entity on behalf of its people for the loss of natural resources on the land such as trees and animals."⁹²

86. See *supra* Sec. IV.

87. 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

88. *Id.* at 657-58.

89. *Id.* at 656, 659.

90. *Id.* at 670-72.

91. *Id.* at 670-71.

92. *Id.* Directly pertinent, a significant footnote appears at the end of this quotation which reads, in part:

We note at this point several questions which are not presented in this case, and on which we express no opinion. First, since the lands in question were all owned by Puerto Rico, we need not decide whether or in what circumstances a state might have a cause of action for

The Court rejected the defendants' contention that Puerto Rico's assertion of a recoverable interest in wildlife and other living resources was prohibited by prior jurisprudence concerning state ownership of wildlife.⁹³ More importantly, the plaintiffs claimed that "a state regulatory interest in wildlife and other living resources, expressed metaphorically in the state's status as 'public trustee' of its natural resources, is sufficient in itself to support an action for damages to those resources."⁹⁴ Defendants replied that "absent a proprietary interest in the resource actually damaged, a state's unexercised regulatory authority over wildlife will not support a proper cause of action."⁹⁵ The court did not decide this issue, believing it to be unnecessary since a specific statute authorized the EQB to bring an action "to recover the total value of the damages caused to the environment and/or natural resources" if a defendant had violated any part of the statute.⁹⁶ The court saw this as the creation of a new cause of action but, significantly, left open the possibility that the statutorily created cause of action was unnecessary.

Whatever might be the case in the absence of such a local statute, we think that where the Commonwealth of Puerto Rico has thus legislatively authorized the bringing of suits for environmental damages, and has earmarked funds so recovered to a special fund, such an action must be construed as taking the place of any implied common law action the Commonwealth as trustee, might have brought. . . . It is unnecessary, therefore, for us to consider whether, had the legislature of Puerto Rico not

environmental harm to privately owned land."

Id. at 671 (emphasis added).

93. *Id.*

94. *Id.*; see e.g., *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972).

95. *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 671 (1st Cir. 1980); see, e.g., *Commonwealth v. Agway*, 232 A.2d 69 (Pa. Super. 1967).

96. *S.S. Zoe Colocotroni*, 628 F.2d at 672 (quoting P.R. LAWS ANN. tit. 12, § 1131(29) (1977)).

delegated to the EQB the right to maintain such suits, the Commonwealth would have an inherent right to bring them itself.⁹⁷

Although there was specific statutory authority for the court to rely upon in *S.S. Zoe Colocotroni*, there are many instances in which no such statutory authority exists. Where there is a legally protected interest, the courts have been willing to fill the gap by implying a cause of action under the common law. For example, there was no specific statutory cause of action to allow fishermen to recover economic damages arising out of tortious interference to publicly owned natural resources in which they had an overriding interest.⁹⁸ To deny the public's right to recover damages to privately held natural resources in which the public has an overriding or proprietary interest would elevate the rights of commercial fishermen above that of the obviously broader, deeper and more meaningful rights of the public. It is highly doubtful that a court would do this now.

In *Union Oil Co. v. Oppen*,⁹⁹ fishermen sought to recover economic damages arising out of the destruction of aquatic life caused by an oil spill from drilling operations off the coast of Santa Barbara. While noting the lack of any proprietary interest in the sea life, the district court recognized that the "loss of a prospective economic advantage occasioned by the alleged diminishment of the quantities of available sea life formed a sufficient basis for the recovery under the law of negligence."¹⁰⁰ Applying California tort law, the court of appeals outlined the cause of action as follows:

As we see it, the issue is whether the defendants owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a

97. *Id.* at 672.

98. *See supra* notes 26-28 and accompanying text.

99. 501 F.2d 558 (9th Cir. 1974).

100. *Id.* at 560 (quoting the district judge).

diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business.¹⁰¹

Concluding that Union Oil owed a duty to the commercial fishermen which would give rise to a cause of action for a breach of that duty, the Court held that "the fact that the injury flows directly from the action of escaping oil on the life in the sea, the public's deep disapproval of injuries to the environment, and the strong policy of preventing such injuries all point to existence of a required duty."¹⁰² The court was no doubt motivated in part by an emotional response to a tragic event, the Santa Barbara oil spill of 1969. More than twenty years later public sentiment against environmental harm has risen to such heights that it is unlikely that any court would take a more restrictive approach and exclude the public trustee from protection where there is an overriding, if not proprietary, interest in natural resources on privately owned lands.

VI. MEASURES OF DAMAGES—RESTORATION

Although the recognition of a public cause of action would advance more recently declared national objectives of protection and restoration of natural resources, those policies would be frustrated if the public remedy was no greater than the private remedy. Under traditional property damage concepts, a landowner is entitled to recover restoration costs of his property unless the costs exceed the value of the property. For example, the proper measure of property damage in Louisiana is as follows:

[W]here land has been rendered useless, the proper measure of damages is the lesser of either the market value of the property and severance damages minus any residual value or the cost of restoration of the property to its condition prior to the

101. *Id.* at 568.

102. *Id.* at 569 (citations omitted).

damage. When land has been rendered useless, the cost of restoration exceeds the value of the land and no residual value has been proven, the owner of the damaged land is entitled to recover the market value of the land in damages.¹⁰³

In *Ryan v. Southern Natural Gas Co.*,¹⁰⁴ plaintiff (private landowner) sought restoration damages arising out of the loss of wetlands allegedly caused by a pipeline canal constructed by Southern Natural Gas (SNG).¹⁰⁵ The District Court found that SNG's negligent maintenance of its pipeline had caused the loss of 330 acres of wetlands.¹⁰⁶ However, in awarding damages, the Court found that restoration costs (which were approximately \$3 million) were disproportionate to the market value of the wetlands and limited the award to \$400 per acre and \$271,000 for stabilizing costs representing expenses necessary to prevent any further deterioration of the marsh.¹⁰⁷ Although the United States Court of Appeals for the Fifth Circuit ultimately reversed the finding of liability,¹⁰⁸ the case nevertheless demonstrates the reluctance of courts to award restoration costs to private owners when those costs exceed the market value of the property. The courts' reluctance may be justified in light of the speculative nature of restoration damages, the potential for inflated values, and the fact that a private landowner is under no obligation to restore the property. This problem would be eliminated if the public trustee recovered the restoration costs because of a clear duty to use the funds to restore the property.

When property damage claims include injury to natural resources, traditional property damage concepts become grossly

103. *Day v. Warren*, 524 So.2d 1383, 1387 (La. App. 1st Cir. 1988) (citations omitted) (emphasis omitted); *Matherne v. Terrebonne Parish Police Jury*, 462 So.2d 274, 280-81 (La. App. 1st Cir. 1984), writ denied 463 So.2d 1321 (La. 1985).

104. 879 F.2d 162 (5th Cir. 1989).

105. *Id.* at 163.

106. *Id.*

107. *Id.* at 164-65.

108. *Id.*

inadequate to carry out the state and national policies of protecting and restoring natural resources. It is this deficiency that the framers of CERCLA and OPA had in mind when enacting their respective natural resource damage provisions, both expressing a strong preference for restoration of damages over compensatory types damages. For example, CERCLA provides that parties responsible for hazardous substance releases "shall be liable for . . . damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."¹⁰⁹ Moreover, "[t]he measure of damages . . . shall not be limited by the sums which can be used to restore or replace such resources."¹¹⁰

CERCLA also requires the President, acting through federal officials, to promulgate regulations that identify the best available procedures to determine natural resource damages while taking into consideration factors such as replacement value, use value and the ability of the ecosystem to recover.¹¹¹ The President delegated the responsibility for promulgating regulations governing the assessment of natural resource damages to the Department of Interior.

After much delay and many missed statutory deadlines, DOI published a final rule on August 1, 1986, which was then challenged by several groups in *Ohio v. Department of Interior*.¹¹² The most significant challenge to DOI's regulation was its use of a "lesser of rule" for deciding whether the measure of damages for natural resources would be based on either restoration or lost use values of the resource.¹¹³ The DOI regulations mirrored the traditional property damage principle in requiring the public trustee to conduct an assessment with the measure of damages for natural resources being calculated using either restoration (or replacement) cost or lost use value (market value) of the resources, whichever was estimated to be the lesser

109. 42 U.S.C. § 9607(a)(4)(C).

110. 42 U.S.C. § 9607(f)(1).

111. 42 U.S.C. § 9651(c)(2).

112. 880 F.2d 432 (D.C. Cir. 1989).

113. *Id.* at 441-59.

amount.¹¹⁴ The D.C. Circuit Court invalidated the regulations holding that Congress had indicated a distinct preference for using restoration costs as a measure of damages.¹¹⁵ However, the court indicated that there may be times when restoration costs would not be the appropriate measure of damages because restoration was not technically feasible or restoration costs would be grossly disproportionate to the use value of the injured resource.¹¹⁶ The court did not define the term "grossly disproportionate" and left it to the DOI to determine under what conditions restoration cost as a basic measure of damages to natural resources might not be feasible or appropriate.¹¹⁷

While the preference for restoration has been expressed in other environmental legislation such as OPA,¹¹⁸ the CWA,¹¹⁹ and the Outer Continental Shelf Lands Acts (OCSLA),¹²⁰ the question arises whether this preference can be incorporated into traditional common law and civil law theories of property damage assessments when they involve natural resources. At least one court has borrowed from analogous environmental statutes such as the CWA¹²¹ and the OCSLA¹²² in awarding costs for the restoration of natural resources damages resulting from an oil spill even though the restoration cost exceeded the fair market value of the land. In *Puerto Rico v. S.S. Zoe Colocotroni*,¹²³ the Commonwealth of Puerto Rico sought to recover approximately \$13 million in damages for the restoration of approximately forty acres of a mangrove forest which had been contaminated by an oil spill. The forty-two acres of contaminated mangrove forest had a commercial market value of approximately \$200,000 but, like many wetlands, was found to serve many noncommercial

114. *Id.* at 441-42.

115. *Id.* at 459.

116. *Id.*

117. *Id.*

118. 33 U.S.C. §§ 2702-2706 (1988 & Supp. II 1990).

119. 33 U.S.C. § 1321(a)(8), (f)(4)-(5) (1988 & Supp. II 1990).

120. 43 U.S.C. § 1813(a)(2)(C)-(D), *repealed by* Pub. L. No. 101-380, § 2004, 104 Stat. 507 (1990).

121. 33 U.S.C. § 1321(f)(5).

122. 43 U.S.C. § 1813(b)(3) (*repealed* 1990).

123. 628 F.2d 652 (1st Cir. 1980).

ecological functions such as: "1) protecting the shoreline from erosion, storms, tides and high winds; 2) providing a habitat for wildlife; 3) providing a protected breeding ground for fish and shellfish; and 4) acting as a food source for aquatic creatures of all kinds."¹²⁴ Puerto Rico sought full restoration pursuant to a local statute that authorized the recovery of "the total value of the damages caused to the environment and/or natural resources."¹²⁵ In response to argument that Puerto Rico's statutory scheme for protecting natural resources was not cognizable in admiralty, the court held:

Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction.¹²⁶

With respect to Puerto Rico's damage statutes, the court was faced with the task of determining whether federal laws supported the recovery of restoration costs which far exceeded the market value of the lands that were damaged. While noting that traditional property damage theories did not support such a recovery when the damages involved injury to natural resources, recent federal oil pollution statutes and their legislative history did, in fact, support such a recovery.¹²⁷ Borrowing from the language and legislative history¹²⁸ of the OCSLA¹²⁹ and the CWA¹³⁰ which both expressed preferences for restoration or rehabilitation of damaged or destroyed natural resources, the court

124. *Id.* at 658.

125. P.R. LAWS ANN. tit. 12, § 1131.

126. *S.S. Zoe Colocotroni*, 628 F.2d at 672 (quoting *Just v. Chambers*, 312 U.S. 383, 391 (1941)).

127. *Id.* at 673-74.

128. See 1977 U.S.C.C.A.N. 4424, 4467.

129. 43 U.S.C. § 1813(a)(2)(C) (repealed 1990).

130. 33 U.S.C. § 1321(f)(5).

held that a strict application of the traditional property damage (diminution in value) rule would effectively deny Puerto Rico *any* right to recover meaningful damages.¹³¹ In fashioning a new measure of damage for injury to natural resources, the court held that "the appropriate primary standard for determining damages . . . is the cost reasonably to be incurred . . . to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures."¹³²

Thus, following the rationale of the First Circuit and the much stronger preferences expressed by Congress in subsequent legislation such as CERCLA and OPA, the public trustee should not be precluded from recovering restoration costs for damages to privately held natural resources even if they exceed the fair market value of the property, provided that they do not entail any grossly disproportionate expenditures. While the courts have been reluctant to award restoration costs to private litigants who are under no affirmative obligation to restore natural resources, recovery by the public trustee would eliminate most, if not all, of the courts' concern in awarding highly speculative damages since the public trustee has a duty to use the funds to restore the property.

VII. CONCLUSION

Fortunately for the environment, the law is a dynamic process. Just several decades ago, the destruction of the earth was accepted as part of progress and the law accepted that thesis. Over the years, as our conception of the environment's value has changed, so have the laws. Because of those changes and new attitudes regarding both landowners and governments, there now appears to be more opportunity to protect, preserve, enhance and restore our natural resources. It is not too late. In many instances, it is time to begin attempting the use of new strategies of restoration. One such strategy is the enforcement of the

131. 628 F.2d at 675.

132. *Id.*

public's legally protected interest in damaged natural resources regardless of whether they are publicly or privately held. While the latter may present untested theories of recovery, the foundation for those theories has ample support in state and federal case law and legislation, sufficient to find a cause of action for the tortious invasion of privately held natural resources.