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The Cultural Value of Natural Resources

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An appellate decision earlier this month addressing the cultural value of a fishery resource for purposes of a natural resources damages claim raises issues worth thinking about, not only with respect to NRD claims but also with respect to our own Environmental Rights Amendment. *Confederated Tribes of the Colville Reservation v. Teck Cominco Metals*, No. 24-5565 (9th Cir. Sept. 3, 2025), decided an interlocutory appeal in one portion of the long-running litigation brought by various individuals, certain tribes, and the state of Washington against the owners of a Canadian lead-zinc smelter. The smelter had air emissions and water discharges that resulted in injury to, among other resources, fish in the Upper Columbia River. The plaintiffs sought NRDs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) for interim lost use of the fishery and sought to value that lost use specially because of the cultural importance of those fish in that river to the tribal members.

The defendant took the position that viewed in this way, the fish were a cultural resource and not a natural resource. While the cost of restoring the fishery might be compensable, the defendant reasoned that the lost interim cultural value of the damage to the fish was not recoverable under CERCLA. According to the plaintiffs, the cultural value was not specifically a reduction in the number of fish in the river, but more significantly a loss in the value of those fish to tribal members because they were contaminated. The defendants argued that that loss was not a loss of *natural resource* services on account of the contamination of the fish.

The district court granted summary judgment on that reasoning. The court of appeals reversed. The court of appeals properly observed that the federal natural resource damage assessment regulations, 43 C.F.R. pt. 11, call for compensation for all of the lost values of natural resources, including existence value. The rules permit determination of the loss caused by an injury to natural resources using contingent valuation in some circumstances. Contingent valuation is a controversial technique that ascribes a value to a loss by surveying those affected by that loss about their willingness to pay to avoid the loss without requiring any observation of actual behavior; economists conventionally look to behavior, not statements, as a way of understanding preferences.

Therefore, it must be true that natural resource injuries can be valued because people suffer a loss in their happiness or well-being. That could be because they are poorer, or because they lose the ability to experience a natural resource, or because they lose the satisfaction they experience by knowing that a natural resource exists.

If there is a connection to human beings in determining whether an injury causes a natural resource damage, then, so reasoned the court, the cultural value of a resource would affect the value ascribed to a natural resource injury. In *Confederated Tribes* the injury may seem out of the mainstream because it is particular to one group of individuals, but "culture" plays a significant part in determining which injuries cause damage and which do not. For example, if a release eradicates an invasive species, it surely injures a natural resource—the population of the invasive species. But we often do not treat that as a compensable injury because we sometimes prefer native species to invasive ones. But our environment is full of invasive species that we like—the grass on our lawns and sometimes the zebra mussels in a contaminated waterway. Injury from a release that adversely affected those favored invasive species might be valued differently from injury from an adverse effect to a disfavored invasive species. That is a cultural difference.

Whether we value a species or any other natural resource has a cultural component. The corona virus is every bit as much the successful result of billions of years of evolution as I am and has no more or less claim to intrinsic value, but along with most I would like to send that species the way of the smallpox virus.

But lest we dismiss it out of hand, the defendant's position in *Confederated Tribes* has some visceral appeal. Should NRDs be compensable just because some set of people care about a resource? That is not really how natural resource trustees and others like to think about NRDs; they would like them to be objective, or at least as objective as the decision as to what a cleanup ought to entail.

Now one might say that the NRD issue in *Confederated Tribes* is special because the people claiming cultural loss are Native Americans and the cultural loss is to their ancestral connection to a natural resource. Pennsylvania has no federally recognized tribes. See 89 Fed. Reg. 99,899 (Dec. 11, 2024). But Pennsylvania projects can affect resources valued by tribes that migrated or were removed as described in the Pennsylvania Department of Transportation's Cultural Resources Handbook, Pub. No. 689 (2023). So even under current practice, PennDOT consults with remote tribes about impacts to cultural resources.

Further, neither the regulations, any of the cases, nor the court's reasoning in *Confederated Tribes* is limited to tribal cultural resources. That the claimed cultural value is ancient helps to prove that it is genuine and significant, but it is not necessary to the existence of the value. If tens of millions of Americans suddenly and sincerely decided that the spotted lanternfly provided them with great joy, injury to the spotted lanternfly from a release might constitute a natural resource damage. The principle is not limited to cultural values of tribes. If NRDs are to be objective, they cannot admit of these sorts of claims. And yet they must if any natural resource can be said to have value at all.

Notice that the issue extends beyond statutory natural resource damages. The Environmental Rights Amendment to the Pennsylvania Constitution sets out a right of "the people" "to the preservation of the natural, scenic, historic and esthetic values of the environment." See Pa. Const. art. I, Section 27. Scenic, historic and esthetic values are cultural. Many of the cases are about just that.

But again, the words of the Environmental Rights Amendment, like the natural resource damages statutes and regulations, do not limit cultural salience to tribes. If a discernible group of people thinks that some natural or environmental resource is valuable, then perhaps they have a right to it under the Pennsylvania Constitution and perhaps a natural resource trustee can sue for damage to it.

This is a slippery area with policy implications. Should the concept of value be adjusted somehow in the NRD statutes and regulations? Should some caution be taken with application of the Environmental Rights Amendment? Stay tuned.

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