

# ASSESSING, VALUING AND RESTORING TRIBAL/CULTURAL LOSSES UNDER NRDA

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# THE STATUTORY FRAMEWORK-CERCLA AND OPA NRD CAUSES OF ACTION

- “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.”
  - CERCLA §107 (a) (c)
- “...or loss of use of.”
  - OPA § 1002(b)(2)(A)
- Why is this important?

# WHAT ARE COVERED RELEASES

- CERCLA
  - Hazardous substances, as defined in CERCLA and referenced statutes
- OPA- Oil
  - Petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes

# WHAT ARE NATURAL RESOURCES

- Definition-natural resources “lands, fish, wildlife,...belonging to, managed by, held in trust by, appertaining to or otherwise controlled by" the United States, State, Indian Tribe or Foreign Government. CERCLA Sect. 101(16), OPA Sect. 1001(20).

# WHAT AREN'T NATURAL RESOURCES

- Man made items
- Historical structures
- Artifacts
- Archaeological resources

# WHAT IS INJURY

- “An adverse change to the chemical or...???” 43 CFR 11.????
- Not simple presence of a hazardous substance.

# ELEMENTS OF CLAIM FOR NRD

- Release (CERCLA)/Discharge (OPA) of
- Hazardous Substance/Oil
- Which (Pathway)
- Causes Injury to
- Natural Resources
- Under trusteeship of Plaintiff Govts
- Resulting in damages (quantify service losses/restoration costs and convert to dollars)

# CLAIMABLE DAMAGES

- Restoration of the natural resource to baseline
  - And of the services it provides
- Compensation for interim loss of services provided by the natural resource
  - Can include broadly the loss of ability to use or enjoy natural resources, if loss caused by the hazardous substance.

- WHAT DO YOU DO TO DEVELOP A CLAIM FOR TRIBAL/CULTURAL LOSSES?
- WHAT CAN OR SHOULD ONE BE SEEKING?

# ESTABLISHING A BASIS FOR TRIBAL/ CULTURAL CLAIMS

- What were and are practices, uses, activities, What are anticipated future uses
  - Existing literature
  - Interviews
  - Using experts- anthropologists, historians, etc
  - Issues raised by sensitive or confidential tribal information or knowledge
- Establishing causation- why changes (or to what degree changes) were the actual result of the hazardous substance release and the injury to a natural resource
  - Comparisons with cultural changes in other tribes
  - First person representations
  - Use of experts

# RESTORATION (BACK) TO BASELINE, PAST DAMAGES- ISSUES AND OPTIONS

- ‘What can be done now about this mess’?
- Restoration (back) to baseline
  - Goals can be supplementing, developing, enhancing, supporting cultural practices, etc.
  - Support cultural institutions
  - Education,
  - Alternative access to uncontaminated resources, etc.
- Goal is to ameliorate as fully as is possible ongoing impacts resulting from the hazardous substance
- Issues of scaling!

# PAST LOSSES- ISSUES AND OPTIONS

- Goal is to compensate for what has been lost in the past
- This is a separate from what can be done
- Involves valuing the loss people have experienced
- Realm of economics
  - ‘Fully valuing’ involves asking people what their cultural/ spiritual activities are worth!
  - Willingness to pay, willingness to accept
  - Controversiality within econ community, litigation costs and risks
- Issues of “Taboo Trade Off”
- Limited or indirect valuation alternatives
  - Value of protein forgone, etc.

# THE PSYCHOLOGY OF THE TABOO TRADEOFF

- Adam Weytz, Sci.Am., March 9 2010
- “Not only are people unwilling to compromise sacred values for money- contrary to classical economic theory’s assumption that financial incentives motivate behavior- but the inclusion of money in an offer produces a backfire effect such that people become even less likely to give up their sacred values compared to when an offer does not include money. People consider trading sacred values so morally reprehensible that they recoil at such proposals.”

# Conclusion

- Tribal/cultural losses are real and potentially significant
- Restoration based claims are generally more amenable to development and easily supported internally
- Past damages are real, but challenging to quantify both technically, and to 'sell' internally

# CONTACT INFORMATION

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