Economic Valuation of Ecosystem Services on American Indian Tribal Land:

Legal Issues in Valuing Tribal Natural Resource Damage Claims

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(Personal Views, Not Those of the U.S.)
Background

- Congress established a two-step approach to address releases of hazardous substances and discharges of oil:
  - Response actions to reduce risks posed to human health and the environment; and
  - **Natural Resource Damage Assessment and Restoration (NRDAR)** to redress injuries to public natural resources.

- **NRDAR:** Designated federal, state, and tribal entities act as trustees on behalf of the public to --
  - Assess **injuries** to natural resources;
  - Determine the monetary **damages** needed to restore the injured resources to their baseline conditions and for interim loss of services pending restoration; and
  - Use the damages recovered from potentially responsible parties (PRPs) to **restore, rehabilitate, replace, or acquire** the equivalent natural resources.
Tribal NRDAR

- ~ 36 NRDAR matters involving
- ~ 55 tribes
- Out of 565 federally recognized tribes
NRDAR Laws and Regulations

- **Laws**
  - CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act
  - OPA – Oil Pollution Act
  - CWA – Clean Water Act
  - Other federal and state laws

- **Regulations**
  - CERCLA Rules (DOI): 43 CFR Part 11
  - OPA Rules (NOAA): 15 CFR Part 990
  - Assessments done in accordance with the regulations are entitled to a rebuttable presumption in court
Definition of Natural Resources

- **“Natural Resources”**: “[L]and, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources...”

- **Under Tribal Trusteeship**: “...belonging to, managed by, held in trust by, appertaining to, or controlled by”
  - the United States;
  - any State or local government; or
  - “any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.”
Bases of Tribal Trusteeship

- Aboriginal Rights
- Treaties, including --
  - Reserved Water Rights
  - Off-reservation Hunting, Fishing, Gathering Rights
- Executive Orders
- Statutes
**Definition of Injury**

- **“Injury”:** “[A] measurable adverse change, either long- or short-term, in the chemical or physical quality or viability of a natural resource resulting either directly or indirectly from exposure to…” a hazardous substance or oil.

- **Per se injuries:** measurable adverse change if --
  - Contaminant levels exceed regulatory standards
  - Fishing closures or consumption advisories
  - 18 specific, but non-exclusive, biological responses

- **Injury quantification:** “…by determining the extent to which natural resource services have been reduced as a result of the injuries…”
Natural Resource Services

- **Services:** “...the physical and biological functions performed by the resource including the human uses of those functions. These services are the result of the physical, chemical, or biological quality of the resource.”

- Habitat for wildlife
- Harvesting of plants or animals
- Flood control
- Scenic views
- Recreation

- **Service loss:** measured from the baseline conditions
Cultural Services

- Many Native American traditional, spiritual and cultural practices utilize natural resources.

- Diminished tribal use of natural resources may be compensable under NRDAR.
Navajo Nation v. United States, 535 F.3d 1058 (9th Cir.), cert. denied (2008)

- Six Tribes filed claim under Religious Freedom Restoration Act (RFRA) against plan to allow application of “A+ recycled wastewater” on sacred San Francisco Peaks.

- Court found sincere Tribes’ belief that entire mountain would be spiritually contaminated.

- Court found no physical effects on natural resources, religious shrines, or religious ceremonies, or restrictions on access thereto.

- Held: Sole effect is on Tribes’ “subjective spiritual experience” and is not a “substantial burden” on the exercise of religion under RFRA.
“The Earth and myself are of one mind. The measure of the land and the measure of our bodies are the same.”
- Nez Perce Chief Hinmaton Yalatkit (Joseph)

Measurable adverse change in the chemical or physical quality or viability of a natural resource?
Measure of Damages

Damages include:

1. the cost of restoring or rehabilitating the injured natural resources to a condition where they can provide the level of services available at baseline, or the cost of replacing or acquiring the equivalent natural resources capable of providing such services;

2. the “compensable value” of the services lost pending full restoration (a/k/a interim loss); and

3. the reasonable costs of the assessment.
Restoration-Based Approach to Calculating Interim Loss Damages

- DOI rule originally provided that “compensable value” should be measured by the economic value of the public losses arising from the resource until restoration can be achieved.

- CERCLA provides for review and revision of the NRDAR regulations every two years. A Federal Advisory Committee convened in 2005 and the final rule was published in 2008.

- Committee recommended targeted revisions of the regulations to emphasize the restoration goal of NRDAR over obtaining money damages.

- Amended rule expressly gives trustees the option of determining compensable value using the cost of restoration actions that address the public loss.
Replacement or Acquisition of the Equivalent

- Where natural resources cannot be restored, acquisition of the equivalent might mean the acquisition of comparable lands, if spiritual or cultural significance is transferable.

- In general, however, tribal trusteeship for natural resources extends to the tribal reservation borders and to off-reservation treaty-reserved rights.

- In order for off-reservation resources to provide a substitute, the lands may need to be placed into federal trust status and/or made part of the tribe’s reservation.
Direct Restoration of Human (Cultural) Services

- Where it is not possible to restore injured natural resources to baseline, or it will take a long time to do so, the impact on tribes can be large and cannot necessarily be remedied by providing substitute resources.

- The selection of restoration alternatives is limited by factors the regulations require to be considered, including cost effectiveness and the relationship between a project’s cost and its expected benefits.

- Direct restoration of human services is permissible so long as it is consistent with the statutory requirement that damages be used only to restore, rehabilitate, replace, or acquire the equivalent of the injured resources.

- FACA Subcommittee Recommendation: Projects providing cultural services may be appropriate where cultural uses are lost, even where not enhancing natural resources, provided they relate to a reasonable degree to the lost resources and services.