

TRIBAL INVOLVEMENT AT DEPARTMENT OF ENERGY SITES THROUGH THE AUTHORITY OF CERCLA NATURAL RESOURCES TRUSTEESHIPS

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ABSTRACT

Superfund (CERCLA) empowers Native American Tribes with legal recovery rights for natural resource damages resulting from hazardous waste releases. This right is based on a Tribe having the responsibilities of a trustee for its natural resources. At Hanford, DOE is both a co-trustee and a potentially responsible party - an inherent conflict of interest. DOE faces a multi-billion dollar liability to trustees for damages to resources at Hanford. The Yakima Nation is a trustee for those natural resources at Hanford to which it has reserved rights. If the Yakima Nation does not pursue its trustee duties, it may incur litigation for not carrying out this requirement of CERCLA.

INTRODUCTION

Superfund, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1), has a statutory provision which delineates a process for the recovery of damages for injuries which occur to natural resources as a result of a hazardous waste release. This provision of the law has been referred to as a "sleeping giant" because government agencies, the public and other entities have yet to fully appreciate its potential. It empowers Native American Tribes with the right to recover damages for injuries from hazardous waste releases which affect their natural resources. Natural resources are defined in CERCLA as including land, fish, wildlife, air, water, and others belonging to, held in trust by, managed by, relating to or otherwise controlled by a tribe.

The right of recovery is based on a Tribe having the responsibilities of a trustee for natural resources protected by treaty rights, even if outside reservation boundaries (2). When acting under color of that authority, a tribe has the right to quantify damages resulting from the release of a hazardous substance and seek recovery for injuries from the responsible party. Since this law specifically waives sovereign immunity, the federal government can be considered a legally responsible party.

The Yakima Nation is a potential trustee of certain natural resources to which it has reserved rights. Under the terms of the Treaty of 1855, the Yakima people "ceded", approximately 11 million acres to the United States -- roughly 28 per cent of what is now the State of Washington. Within this area, the Tribe expressly reserved Treaty rights to, among other things, hunt, fish, and gather foods and medicines. Also, under the doctrine of "trust responsibility" established in case after case over the past 200 years by the U.S. Supreme Court, the federal government has an obligation to honor the general trust relationship it has to the indigenous people of this land. Since the Department of Energy's (DOE) Hanford Site is within the sphere of lands under Yakima Nation influence and protected by Treaty rights, the Yakima Nation can assert a damage claim against the DOE for injury to those natural resources belonging to the Tribe.

DOE AND TRUSTEESHIPS

In many natural resource damage situations, there are multiple trustees involved. At Hanford, DOE and the Yakima Nation are statutorily defined trustees due to the location of the releases. The Department of Interior has an interest be-

cause of injuries to Fish and Wildlife under its responsibility; the State of Washington is likewise involved, as potentially are several other Tribes, plus other federal government agencies that have a duty of care over public natural resources. In such situations, a lead authorized official should be designated to coordinate the damage assessments, investigations, planning, and participation in negotiations (3). The lead official is picked by consensus of all the trustees, and that person acts as coordinator, contact point, and arbitrator. If consensus on the lead official cannot be reached, the designated official of the agency upon whose land the injury occurred becomes the lead official. In theory, response actions are made more efficient and duplication of effort is avoided by this kind of coordination (4). However, at Hanford, DOE is also a potentially responsible party; thus, it has a deep conflict of interest. Ethically, DOE should not be the lead authorized official despite the fact the injury occurred on DOE lands. If DOE were to assume lead authority, it could not be considered as acting like a trustee since no true trustee would allow a potentially responsible party to be coordinator and arbitrator and still be considered as acting in the best interests of its public.

DOE has accepted a responsibility to notify and coordinate with natural resource trustees when DOE discovers a hazardous waste release or a threat of a release. On April 15, 1993, DOE hosted a meeting at the Hanford Site and invited potential natural resource trustees to attend. The purpose of the meeting was to introduce these entities to the natural resources of Hanford and to initiate discussions about future trustee activities. A second meeting was sponsored by DOE on August 4 and 5, 1993. Its purpose was to acquaint trustees with their legal responsibilities under CERCLA. On November 19, 1993, a third trustees' meeting was held wherein formation of a trustee council was debated. The Yakima Nation voiced concerns that formation of a council could water down the strength of the CERCLA trustee provisions by making a legally empowered entity into simply a member of another advisory group. However, a trustee council has the potential to influence the cleanup process or even obtain funding prior to a damage assessment. For example, if DOE were to acknowledge that certain injuries had occurred to the Yakima Nation's treaty protected natural resources at a release site, it could work out mutually satisfactory compensation terms without resorting to litigation. Land transfers or other compensatory actions could then be used to settle claims. DOE

has recognized that where it cannot accomplish full restoration, excess property can be traded to a trustee in full or partial compensation for damages to natural resources (5). This scenario could be utilized at Hanford. DOE has stated that it intends to "excess" or transfer the 120 square mile Arid Lands Ecology Reserve on the southwest side of the Site. This location is of great significance to the Yakama Nation as it is a traditional ceremonial site and many scarce traditional foods and medicines grow there. The Yakama Nation is currently seeking to have this uninhabited land returned to it. Since DOE has a tremendous amount of potential liability owing to the Yakama Nation for damages to Treaty protected resources, DOE should be negotiating a settlement that involves transfer of these lands to the Yakama Nation. Instead, DOE favors trading this land to the Bureau of Land Management, further alienating the Yakama Nation and destroying an opportunity to settle with a trustee. Actions like this conflict with DOE statements that negotiation can relieve it of expensive and time consuming damage assessments and litigation (6).

One of the problems apparent at the November 1993 meeting was DOE's conflict of interest. DOE was not able to admit that there have even been any damages to natural resources at Hanford. DOE chose to forego admissions concerning obvious liability making it readily apparent that DOE cannot be a conscientious and ethical trustee; DOE continues to exhibit the mentality of a potentially responsible party trying to minimize the injuries it has caused. By working with trustees to restore resources without resorting to litigation, DOE may be able to act as both a trustee and a liable party, but it is going to have to do something it does not do very well ... bend.

The Yakama Nation, in its capacity as a trustee, is legally charged with determining the extent of the injuries to its resources caused by the release of hazardous waste at Hanford and with making a claim for damages. DOE has recognized that the natural resource damage claims of tribal trustees may be enforceable against DOE in court (7). It also recognizes the legal provision for trustees and responsible parties to try to work together and coordinate actions to rectify natural resource injuries. What DOE must still realize is that the Yakama Nation's position is distinct from other trustees due to the uniqueness of its culture. Under CERCLA, the Yakama Nation is entrusted with making assessments of residual injuries and filing claims for damages with regard for the culture of the Tribe utmost in mind.

THE PROCESS

Executive Order 12580 gave the responsibility of promulgating regulations based on the trusteeship provisions in CERCLA to the Department of Interior (DOI). These are set forth in 43 CFR 11. The use of these procedures is optional, but if used, they create a "rebuttable presumption" that the injury quantification is correct. If introduced in court, the opposing party is required to overcome this proof of injury. DOE has stated that this can be used to "establish a very high standard of administrative or judicial review" which States and Indian tribes may find difficult to rebut or challenge (8). These kinds of statements and generalities that identify tribes as the enemy make it hard for the Yakama Nation to work with DOE as a co-trustee.

The DOI regulations divide the damage assessment process into steps which identify the release, evaluate it, determine injuries and damage, and then document the results. An actual damage assessment is a long term activity which be-

comes necessary only when environmental restoration actions do not satisfy the concerns of trustees.

Damage assessments are a process by which a trustee determines the amount of damage that may be sought in a CERCLA damage claim. The formal process is performed in order to assess residual damages - those not addressed by remedial or corrective actions. Residual injuries form the basis of the natural resource damage claim. Damage assessments identify what was injured, the extent of the injury, and the appropriate compensation.

INJURIES AND DAMAGES.

A damage claim is made by a trustee on behalf of the people or public that trustee represents. Damages are statutorily defined as the monetary amount sought by a trustee as compensation for injury to natural resources (9). It includes the reasonable costs incurred by carrying out the process of assessing the losses to natural resources. Injury is defined as a measurable adverse change in chemical quality, physical quality, or viability of a natural resource resulting either directly or indirectly from exposure to the release of a hazardous substance (10). To prove that an injury has occurred from a hazardous release, the pathway linking the release to a measurable change in a natural resource must be identified.

The DOI regulations limit injuries to biological, surface water, groundwater, geologic and air natural resource categories. Under these guidelines, occurrences such as habitat loss are not injuries to a resource. For example, in a situation where habitat loss has occurred, the vegetation, animals, soil and water are the damaged resources. Habitat, foods, recreation, and aesthetic values are all examples of services provided by resources. To begin a damage assessment, a service is identified, its baseline levels determined, and the reduction in services quantified. The reduction in services is the quantity of the injury to the resource. Services are further categorized into use services and nonuse services. Nonuse services arise from natural resources that provide some positive value just by their existence.

Under this scheme, such services as natural foods and medicines of the Yakama Nation, hunting and fishing, fish and wildlife habitat, ceremonial sites, and aesthetics of a site are some examples of services which are quantifiable. The corresponding resources are the plants and animals, surface and ground water, dirt and rocks, and the air.

Damages are not just limited to the cost of restoring a resource. A trustee must obtain compensation for loss of use and diminished value, existence value and other less tangible losses may be asserted. The measure of damages is the restoration cost plus compensable values. Restoration cost is the sum of direct costs and indirect costs. Compensable value is the sum of use values and nonuse values. Nonuse values are existence values inherent in the service. This value can be determined by using a *contingent value to measure it*. Contingent values can be obtained by such means as public surveys which ask how much a person would be willing to pay to avoid a similar damage situation. This value is then multiplied by the entire population to come up with a dollar value for the contingent value. Thus,

Total recoverable residual damages = direct costs of restoration + indirect costs of restoration + use values + existence values.

For example, in a situation where DOE does not remove all the contamination from a groundwater aquifer, the

Yakima Nation's damages could be quantified as the Nation's cost of removing the contaminant; plus all associated administrative, personnel and similar costs; plus the effects of loss of use of that water for fishing, watering stock, growing food and medicinal plants, etc.; plus what people would pay to prevent the contamination of that aquifer and its related services in the future.

CONCLUSIONS

At Hanford, DOE is faced with a monumental task - the cleaning up of 50 years' worth of nuclear waste. Current estimates are that the cleanup will now take 40 years; a year ago the estimate was 30 years. DOE must realize that, under this law, they face a multi-billion dollar liability to trustees. DOE must begin to work openly and honestly with trustees. It must realize that the trustees are in a position where they can say, "Pay me now ... or pay me later."

The natural resources trustees' hands are legally tied. Under CERCLA §310(a), any person may bring suit against a trustee for not fulfilling its legal obligations. Thus, a trustee must pursue damage compensation for natural resources. If the Yakima Nation does not follow through with a claim against DOE, anyone can sue the Nation for not fulfilling this duty.

The trusteeship provisions of CERCLA provide for compensation of residual losses - those losses that occur regardless, or beyond, the completion of restoration. This provides the answer to the question DOE is constantly wrestling with - "How clean is clean?" The answer from the trustee perspective is clear - "As clean as it was prior to the hazardous waste release, or the responsible party pays for the difference."

CERCLA compels the Yakima Nation to file a damage claim against DOE if residual damages occur to natural resources.

REFERENCES

1. 42 U.S.C. §§9601 *et seq.*
2. 42 U.S.C. §9607(f)(1).
3. 40 C.F.R. 300.615.
4. *Id.*
5. Regulatory Overview for Land and Surplus Planning, p.19, footnote 21, Office of Environmental Restoration and Waste Management, U.S. Department of Energy (September 1992).
6. Natural Resource Trusteeship and Ecological Evaluation for Environmental Restoration at Department of Energy Facilities, Office of Environmental Guidance, RCRA/CERCLA Division, U.S. Department of Energy (June 1991).
7. Natural Resources Trusteeship and Ecological Evaluation for Environmental Restoration at Department of Energy Facilities, Office of Environmental Guidance, RCRA/CERCLA Division, U.S. Department of Energy (June 1991).
8. Draft Memorandum entitled "Natural Resource Trusteeship Responsibilities and Ecological Evaluation Requirements," p.8. EH-231, U.S. Department of Energy (Undated).
9. 42 U.S.C. §9607(a).
10. *Id.*