

## **IIIRM Risk Workshop**

**3/14/2000**

**3:30 p.m.**

### **Risk and Risk Assessment in Indian Country: Law and Policy**

**Mervyn Tano:** We've moved onto, let's see this is item number 5 on the agenda; Risk and Risk Assessment in Indian Country: Law and Policy. I'm one of the these guys who's a true believer in risk assessment, okay, but I will tell you that I like getting down to background and I like zero. I know it drives people like hell up the wall and I've had this debate with one of his colleagues, Dr. Margaret McDemella at Argon. And I should explain why I think zero is important. Because zero is important if you take it in Maori perspective, you cannot go above zero because it, it is so wrong that you can't do it. But in your mind you can say we're going to get there, we're going to work with these people and we're going to get there. It may not happen tomorrow, it may not happen next year, but we've got to get our kids to these colleges, we've got to build our colleges, we've got to get science, an Indian science policy in place and Indian technology development policy in place so that we are sure that when Marilyn's people come back five years from now and say can we do something to get from whatever that number is closer to zero that we'll have the horses to do it and it'll be our horses that will have the institutions to do it. We'll have the science and we'll have the technology to do it. See for me the zero represents a whole bundle of, if you want to call them risk management initiatives, you know that's fine by me, uh, but it's important I think for native peoples to always, and I think it's also important for non native peoples those technical rationalists to understand that zero doesn't necessarily mean you're going to have to do it tomorrow and you're going to have to do it the day after, but that is something that certain human beings have to have as their goal. They cannot have a goal that is less than that. They can be realistic enough to understand that it's not going

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to happen right away. But if you don't have that goal, you don't have that target, then how do you shape your policies? How do you shape your educational program? You know, Sheila, you know how do you develop the kind of curriculum for at the toddler level and the sixth grade level and the high school level? How do you push AI into the kinds of internships that are important for, for the guys over at Southern Ute? Okay, it seems to me, you know, it's something that we've got to have and understand why it is that we have to have it. And in a very real sense I don't think it's incompatible at all with the technical rationalists.

Okay, having said all of that, the basis for all of those risk management initiatives and the basis for in my mind uh, federal support of these kinds of tribal initiatives or joint federal tribal initiatives, is that as AI said, Indian people, Indian tribes are not like any other community here in the United States. Yes, they have treaties, but not all tribes have treaties. But what all tribes do have is a relationship that has been characterized, with the United States that has been characterized as trust obligation, trust responsibility, that these words, these principles derive from cases in 1832. In the 1830s decisions brought down by Chief Justice Marshall called the Cherokee Cases where he articulated the notion of that guardian trustee beneficiary type of relationship.

A very, very I think important point that very often gets lost in discussions about cleanup standards, about environmental protection standards as it relates to Indian tribes. Let me start with a quick explanation of what these trust obligations mean. Congress has broad authority over Indian Affairs. It's been called the Preliminary Powers over Indian

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Affairs. But that doesn't necessarily mean they have complete authority over Indian Affairs, that they can act without any regard to the Constitution, that they cannot act without regard to the trust obligation. So you find that the Congress in the promulgation of its laws, the enactment of its laws, never has a law that says we are out to screw the Indians. The net result may be that. So when you have the General Allotment Acts and the Specific Allotment Acts, no one was saying in that legislation that what we're going to do is wipe you guys out in terms of your land base. That was a net result but it was for your own good because the Congress has to act in the best interest of the tribe. And they were acting in according to that particular view of Indian Affairs that that time in the best interest of Indian tribes. Indian Tribe Welfare Act, Indian Health programs, all of these programs and the legislation are all geared up based on doing the right thing for Indian tribes. Sometimes they succeed, sometimes they don't.

The trust obligation, trust responsibility imposes fiduciary, I say fiduciary and you say fiduciary, standards on the conduct of the executive branch. Not just the Department of the Interior, not just Maggie Sun, but all federal agencies, executive agencies. The duty of care and loyalty, the government has a duty to make trust property productive and to take affirmative action, to protect and preserve trust property. But what's trust property? Obviously the land, that includes the fish too, it includes the water. Now these standards, these fiduciary standards operate to limit not only the discretion of the Secretary of the Interior but as I said, other executive branch officials as well.

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So what is the relationship then between trust obligation and let's say risk, whether it's risk assessment or risk management. What's instructive is a case that came out of Montana with the Northern Cheyenne tribe. This was a Northern Cheyenne tribe vs. Odell. This was a 1985 case. I'll read a little bit from that case. It says:

“The special relationship, historically existing between the United States and the Northern Cheyenne tribe obligated the Secretary to consider carefully the potential impact to the tribe (and this was from co-leasing off reservation, but close to the reservation) ignoring, (I want to emphasize this) ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in this decisional process (and it was *(inaudible)* process) violated this trust obligation.”

Now, I tend to view this as a very, very powerful piece of legal decision. The reading of the trust obligation in Northern Cheyenne versus Odell means that federal agencies cannot treat treaty and trust resources and treaty rights like any other resources or rights. And so what does it mean then when the court in this case talks about the special needs of the tribe. That seems to me that what we're talking about is in a case by case basis as it relates to the particular tribe, as it relates to the particular resource, as it relates to a particular action as being contemplated by the federal agency, that the federal agency needs to consult with the tribe to start a dialog to identify what those special needs are. And it seems also to mean that there is an obligation then placed

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upon the tribe and I would think one that the tribe would want to bear anyway in helping to determine what those special needs are.

So as an example can we use a hypothetically, or hypothetical maximally exposed individual in our studies, EPA studies for let's say Pueblo Zuni or Chemowevee or Crow or does it mean that EPA has to go in and do some more very population specific kinds of studies to determine what those particular special needs are?

Marilyn talked about the synergistic effects when you have two or more contaminants. What about the synergist effects between a particular contaminant and a particular genetic makeup? Is that something that needs to be considered? But we don't have those data. And the question for tribes is in my mind, is how serious you know, do you want to get about those special, those unique needs. Because there's a, Al talked about tradeoff. There's a tradeoff there. You can be fully protected let's say because you do have let's say mercury contamination, you've got chromium contamination or you've got PCV contamination. You might feel that you're perfectly protected if you use the kinds of studies that have occurred in the past. Perhaps you don't need to have a Zuni specific study on the effects of the PCV, on the Zuni population. Or you may feel otherwise. But if you feel otherwise, understand that there are a whole hosts of legal, of ethical, and moral questions at stake as well. Is that who controls the data, who gives consent, what is informed consent as far as those data are concerned. Questions as to how those data are going to be used in the future. There's a raft of those kinds of questions that are imbedded in that risk process that complicate things. It's a lot easier

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when you can talk about coal and special economic interests of the tribe as it relates to coal. You lease these lands and it depresses the price of coal for the Northern Cheyenne tribe. Or if you lease those lands the Northern Cheyenne have, the opportunity for leasing their coal is lost. That's easy. But when you start talking about the special, the unique needs of Indian populations as it relates to epidemiological studies, boy I said that okay, I guess, oh that opens up a whole can of different kinds of worms. And we ought to be aware of that.

Now, I want to talk about the trust obligation as it relates to cleanup in Indian Country. I know the folks down in New Mexico, Richard Pacheco and the AIPC are working on incorporating tribal and cultural and other concerns into the hazard ranking system. In my mind, my reading of the law, my reading of the trust obligation is this; if I can connect, if there is any nexus between that contamination that's affecting the tribe, the population of the tribe and the federal trustee, whether the trustee is the Air Force, whether it's the Department of Energy or whether it's the Department of Transportation, or whomever, if that contamination is a result of a breach of the federal trust obligation there is in my mind no need to go to a hazard ranking system process. There is an obligation, complete obligation to take care of that problem.

Now, so why do we need risk? If there is that kind of, if it's to patently obvious, because in order to get to zero which is where ideally we should be going, you've got to use risk to stage the process of cleanup. Because it may be that you're going to have to fence like the folks in Marilinga had to do, fence off parts of the reservation for awhile. It may

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be that we don't have the technology to detect unequated ordinance deeper than 10, 15, or 30 meters. And it doesn't make any sense then to go out and start digging up entire you know, the south 40 to a depth of 10 feet, or 20 feet or 30 feet just to go sifting through to find out if there's unequated ordinance. One, as AI said, you make a horrible environmental mess and two, you put a lot of workers at risk as well.

Now, it seems to me that the trust obligation as it relates to cleaning up federal contamination in Indian lands or federal contaminations that effect trust property and treaty rights of Indian people is that you've got a go, no go situation. If there's a connection, a nexus between the federal government, the trustee and the contamination it's a go decision. The question then is how far do we go. And it seems to me there are a couple of areas that need further examination and possible further research. I'll cite as an example a tool, we'll use the leaking underground storage tank example. Now, in the mines of the EPA regulators dealing with underground storage tanks, we are talking about underground storage tanks leaking benzene taluine, ethylene and xylem and some other stuff, but generally that's what we're talking about. BTEX. Now you're talking about as a risk assessment you do the risk assessment based on what Marilyn was talking about, just following with her process and saying, okay, benzene and taluine, ethylene and xylem. And then you come up with those numbers. And probably for most of Indian Country the numbers are going to come up pretty good. I think for lots of areas you're not going to have enough receptors out there. Not enough human beings out there so you're not going to have a risk. But the thing to do is to understand I think the role that we have to play here in talking about risk and in how it operates in

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Indian Country is that we need to step back a couple of paces and take a more holistic or polistic view of the issue. I say what does a service station, a gas station in Indian Country represent? It gets back to my point of identifying that whole bundle of risk, identifying the total risk burden. Yeah there's one of these service stations is a purveyor of petroleum, oil and lubricants, but in Indian Country, I mean if anybody's been to these places like Pine Ridge, you know that that gas station there, what's the name of it, right, (*inaudible*), represents a heck of a lot more than just a purveyor of POL. Okay, it is a social center, it's a purveyor of all kinds of fried foods which represents a totally different kind of risk. It's a recreational center. You've got kids going over there playing video machines. You've got kids hanging out over there at all hours of the day, just hanging out being teenagers. A lot of these gas stations serve as the, kind of the informal tribal first responder. You've got the guy with the hook who also has first aid kit with him and they're listening to the CB and they're able to get to folks probably quicker than the county ambulance might be able to get to them. The cops hang out over there because these places usually sell doughnuts. And also these are places where when times are a little hard during the end of the month that you might be able to go in and get a little advance on next month's salary in the form of you know, a couple of days worth of meals. And if things get really tough you can go in and take your 30-30 over there or some family heirloom and pawn it because they act as informal pawn shops and sort of banking role.

So when you shut down a gas station in Indian Country, let's say Pine Ridge, what you've done is you've said, okay you kids can no longer hang out here in dry Pine

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Ridge, but maybe you want to go someplace else to hang out across the line that's not dry with horrible roads, poorly maintained roads, so you know you're going to increase road miles. People are going to have increased road miles just traveling to another place to get food, or to pawn, or to get a couple of meals. Or they will forego those meals. So the question for risk and the trust obligation is the question of how far do we go? And I think we need to examine regulators, folks who are in the business of risk assessment and travel folks to start identifying those bundles of risk so that people who are advising tribal councils or board of trustees on leaking underground storage tanks issues are giving them a full picture. Because if all they're talking about is BTEX, in my mind that's just a very, very, very small part of the risk picture.

Okay, and then we get to the question of what it is that we're going to do in terms of integrating the tribal perspective because we have these limitations in the ability to reflect tribal and other social values.

You know Al talked about the salmon and how it figured so prominently in the Pacific Northwest. Now there was a lady from Idaho who talked about salmon and she said, there couldn't possibly be any shortage of salmon because I can get it at Albertson's anytime. Okay, so I think the folks on Nez Perce know who I'm talking about.

Now if you take a look at the salmon from an economist point of view, you can have a value for it. You can talk about it in terms of dollar. From a recreational perspective, we can go through some sophisticated or evaluation systems, say okay it costs me ten bucks worth of gas to get up there to fish and I spend 14 dollars on film and I bought

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200 dollar waders and a 500 dollar rod and 250 dollars worth of flies. So you can go through all of those contingent evaluations and say, okay, for this salmon we got a price for it. And we do that. The problem is we don't have a cost, a metric for totemic if you will value of that salmon.

Now, can we use dollars? I'm not sure. People that I've talked with don't want to put a dollar value. So how are we going to satisfy Dan? Well I don't know but I think that's the charge we got. How do we get the Totemic value? How do we get the existence value of these kinds of resources, cultural resources? I think the web, those dependency webs I think a great way of identifying what the interests are. The trick is going to be identifying how we, you know, what kind of metric we're going to use to get those resources plugged into a system where we can say, okay, this thing works.

Because otherwise we will be at this point where the totemic value of salmon always trumps the economic value or the cultural value of a site always trumps any other value. That may be right, but it seems to me that what we ought to be doing is coming up with a more rational system of determining whose interests will prevail and why those interests will prevail.

I would suggest that as you talk with each other today, tomorrow um, in the breaks and during lunches, that you discuss these kinds of questions. There are no wrong answers, there are no silly answers, there are no silly questions. Ask the questions, present your suggestions. We need your best thinking.