

Risk Assessments and Hazardous Waste Cleanup in Indian Country: The Role of the Federal-Indian Trust Relationship

Mervyn L. Tano

International Institute for Indigenous Resource Management

444 South Emerson Street

Denver, CO 80209-2216

(303) 733-0481; FAX: (303) 744-9808

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Introduction

That the United States stands in a fiduciary relationship to American Indian tribes is established beyond question. The specific scope and content of the trust responsibility is less clear.

Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy.

These standards may be summarized as follows:

- There is a legally enforceable trust obligation owed by the United States government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indian tribes.
- While the Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be tied rationally to the government's trust obligations. Congress must, in its exercise of its powers, act in the best interest of Indian tribes, however, Congressional judgment of exactly what constitutes the best interests of Indian tribes

may eventually prove faulty, as occurred in the case of the Allotment Acts and its termination policy.

- The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive branch, including the U.S. Department of Energy. The government has fiduciary duties of care and loyalty, to make trust property productive, to enforce reasonable claims on behalf of Indian tribes, and to take affirmative action to preserve trust property.
- Executive branch officials have discretion to determine the best means to carry out their responsibilities to Indian tribes, but only Congress has the power to set policy objectives contrary to the best interest of Indian tribes.
- These standards operate to limit the discretion not only of the Secretary of the Interior, but also of other executive branch officials.

The Interplay Between Statutes and the Federal Indian Trust Relationship in Assessing Risks to Tribal Cultural Resources

Although most statutes governing non-tribal agency action are not likely to contain express fiduciary language, Congress, nevertheless, made its intent to impose fiduciary obligations clear in at least one important environmental statute. CERCLA provides for recovery of natural resource damages associated with the release of hazardous waste substances on both public and Indian lands. CERCLA also provides an exemption from liability for releases that are authorized under federal permits or licenses; however, in the case of damage to Indian lands, CERCLA provides an exemption only “if the issuance of that permit or license is not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe.” This language reflects an explicit Congressional recognition of a fiduciary duty that implicates the full range of federal permit decisions affecting Indian lands.

Additionally, the U.S. Environmental Protection Agency has for several years expressly recognized a fiduciary duty toward Indian tribes. The EPA Statement on Indian Policy states:

“EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.”

Further, in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), the Eighth Circuit found a trust obligation for the Bureau of Indian Affairs and Indian Health Service to clean up illegal solid waste dumps arising from the Resource Conservation and Recovery Act even though RCRA contained no specific trust language. The court reasoned that Congress intended the specific obligations to apply to the agency through RCRA. In discussing the fiduciary role of the agencies, the court stated, “BIA and IHS have not merely violated RCRA, but, in so doing, they have violated their fiduciary obligation toward the plaintiffs and the tribe.

Courts have also extended the duty of protection to other forms of tribal trust property, such as Indian water rights, forest resources, and wildlife resources. Moreover, the duty to protect trust property has firm grounding in private trust law. In finding a fiduciary duty to protect tribal water rights, the United States Court of Claims stated: “Here, the title to [the tribe's] water rights constitutes the trust property, or the res, which the government, as trustee, has a duty to preserve....[W]here a trust exists with respect to a defined res, the trustee is charged with taking appropriate steps to preserve that res. Therefore, the United States was required under the trust arrangement to defend [the tribe's] water rights....*Fort Mojave Indian Tribe*, 23 Cl.Ct. at 426. See also Mary Christina Wood, **Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources**, 1995 Utah L. Rev. 109.

CERCLA, the Environmental Protection Agency's, Department of Defense's, and Department of Energy's Indian policy, the federal-Indian trust responsibility and federal Indian law provide sufficient authority for federal agencies to incorporate tribal cultural concerns in any risk analysis or environmental monitoring program conducted at Hanford. *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) is instructive in this regard. In that case the court stated that:

“[T]he special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully the potential impacts to the tribe [from coal leasing near the reservation]. **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 the decisional process . . . violated this trust responsibility.**” (Emphasis added.)

A fair reading of *Northern Cheyenne v. Hodel* is that the application of a risk assessment protocol or environmental monitoring strategy that does not consider the special needs of Indian tribes and treating the tribal populations like any other citizen and reservation land like any other real estate is a violation of the federal trust responsibility. The *Northern Cheyenne v. Hodel* reading of the trust obligation means that federal agencies cannot treat treaty and trust resources and rights like any other resources or rights when they conduct risk assessments. Certainly, at a minimum, federal agencies should consider risks to tribal, treaty, trust and statutorily protected interests. The attitude of the Department of Defense in this regard is that “tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. . . . In some instances where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.” (Department of Defense, American Indian and Alaska Native Policy (Annotated)).

CERCLA requires federal agencies to take “into account a variety of factors including [inter alia], the population at risk, . . . [and] the potential for destruction of sensitive ecosystems” The population at risk is generally considered to be the number of persons, not the class or category of persons. In the Hazard Ranking System Guidance Manual, EPA 540-R-92-026, November 1992, EPA defines resident individual as “[a] person who lives or attends school or day care on a property with an area of observed contamination and whose residence, school, or day care center, respectively, is on or within 200 feet of the area of observed contamination.” The Guidance Manual goes on to define resident population as, the “[t]otal number of people meeting the criteria for resident individual.” Although the HRS is not a full blown risk assessment, *Northern Cheyenne v. Hodel* indicates that EPA should, at the very least, survey the literature regarding the unique genetic, metabolic and dietary characteristics of the affected tribal populations, and assess the impact such characteristics might have on the tribal population’s vulnerability to the contaminants present at the hazardous waste site. (See, for example, Stuart G. Harris and Barbara L. Harper, **A Native American Exposure Scenario**, in *Risk Analysis*, Vol. 17, No. 6, December 1997, p. 789).

Similarly, using estimates of risk based on a hypothetical maximally exposed individual in Indian country is likewise, a violation of EPA’s trust responsibility. Any assessment of exposure in Indian country should be tribal-specific and consider how the unique diets, cultural practices, and life-styles of tribal members affect their exposure levels.

EPA does not define the term, “sensitive ecosystems,” but defines a comparable term, “sensitive environments,” as a terrestrial or aquatic resource, fragile natural setting, or other area with unique or highly valued environmental or **cultural** features. *Guidance for Performing Preliminary Assessments under CERCLA*, 1991. (Emphasis added).

Principles which follow from a reading of the Indian trust cases are that the trustee must take affirmative action to preserve trust and treaty property and to make such property productive.

These principles mirror and justify federal agencies' roles in both the protection and restoration of Indian lands.

Implications of the Trust Obligation on the “Go-No Go” Decision

The Hazard Ranking System (“HRS”) is the risk based approach to prioritization of hazardous waste sites mandated by CERCLA. Tribal environmental staff are frustrated at the inability of the HRS to adequately address tribal cultural concerns. This frustration with the HRS is summed up in a recent report of the All Indian Pueblo Council’s Office of Environmental Protection which states that “. . . the Superfund HRS model does not account for Indian religious and ceremonial impacts from sites. Due to their importance in Pueblo life, culturally significant plants, animals, ceremonial surface water use, and sacred areas should be considered as critical impacts when evaluating the various pathways of exposure of the HRS.” (The Pueblo Superfund Program—A Native American Perspective on Cultural Impacts and Environmental Equity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), p. 1.) In response to this and similar criticism from tribes and other tribal organizations, EPA is currently working with several tribes and tribal organizations to see how the HRS can be modified to incorporate tribal cultural concerns and interests. Even a modified HRS that incorporates tribal cultural concerns and interests might be inadequate to address other tribal treaty and trust interests. Note that a modified HRS does not do much to identify or address what the court in *Northern Cheyenne v. Hodel* describes as “the special needs of the tribe.”

My sense is that the HRS, as a tool used for “go-no go” decisions, need not be modified. The Department of Defense’s reading of the trust obligation is substantially correct, *i.e.*, where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation and where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible. My reading of the case law goes further. I

would state the fiduciary duties of the federal trustee require, where a tribal trust or treaty asset has been harmed by any direct or indirect action (for example, lease, permit, right-of-way, etc.) of the trustee, an absolute obligation to correct the harm. Thus, all that is required for the “go” decision is a finding that a trust or treaty asset has been harmed.

Implications of the Trust Obligation on the “How Far to Go” Decision—An Agenda for Further Research

Note that the “go” decision does not necessarily mean a full-scale environmental restoration program has to be implemented. Risk assessments are helpful in determining how and when the harm to the trust or treaty asset should be corrected. Tribal specific exposure scenarios also help identify and address the “special needs of the tribe” and accordingly, can influence the scope and timing of environmental restoration programs. Examination of specific treaty and statutory requirements such as those in the National Historic Preservation Act, Native American Graves Protection and Repatriation Act are also instructive.

However, there are two areas which need further examination. The first is the problem of deciding how far risk assessments should extend. Let me illustrate this problem area by using the example of leaking underground storage tanks on Indian reservations. The leaking underground storage tank program is generally seen as a fate and transport of BTEX issue. But is the risk to human health by BTEX contamination of soil and surface and ground waters the only risk over which tribal decision-makers should be concerned. I would argue that there are more risks and more substantial risks that arise when gas stations on Indian reservations shut down because their owners cannot afford to comply with the LUST requirements. For example, these gas stations also sell foodstuffs. They extend credit and make loans. They serve as social centers for tribal youth. They provide an outlet for art work and crafts of local artists and craftsmen. Shutting down these gas stations means increased highway miles traveled for gas and food and recreation. Nutrition of tribal members may suffer because the mini-mart operations attached to these gas stations often extend credit for food purchases made during the

end of the month when commodities and food stamps are exhausted. Emergency responses to highway accidents may be delayed because these operations act as unofficial first responders. The point here is that these gas stations are much more than purveyors of gasoline and an informed risk assessment would incorporate more than the risk of BTEX contamination.

From a tribal perspective, risk assessment are plagued by a number of inherent limitations in its ability to reflect tribal cultural or other social values. The concerns of American Indian communities who practice traditional lifestyles, readily highlight a number of the deficiencies and limitations of conventional risk assessment methodologies. The Confederated Tribes of the Umatilla Indian Reservation have identified the following tribal concerns that are not addressed by current risk assessment practice:

- unique and multiple use of treaty-reserved rights and resources for subsistence, ceremonial, cultural, or religious practices;
- multiple exposure pathways that result from cultural resource use that are neither considered nor commonly included in typical “suburban” exposure scenarios;
- that tribal communities often constitute critical segments of populations whose lifestyles result in disproportionately greater than average exposure potential, either sociologically or geographically;
- the failure to address the role of time and to adequately assess risks to future generations;
- issues of environmental justice and the right to a safe and healthful environment (the need for formally incorporating affected community input); and
- well-being, equity, peace of mind, and sustainability.

(Confederated Tribes of the Umatilla Indian Reservation, *Scoping Report: Nuclear Risks in Tribal Communities*, Pendleton, Oregon, (1995), pp. 2-3).

The Umatilla list raises a number of points that can be subdivided into two major categories. The first category is basically economic and responds to the question: “How and in what ways do human societies use nature?” The second is fundamentally cognitive and responds to the question: “How and in what ways do human societies view nature?”

My sense is that we do an adequate job at assessing the risks attendant to the issues included in the economic category. We have means of determining the economic value of a salmon. We also have means by which we can assess the human health risks posed by consumption of mercury-contaminated salmon. Obviously more work needs to be done to identify tribal specific exposure pathways and to identify specific genetic, metabolic and other vulnerabilities, but the work here is generally accepted as part of good risk assessment.

But I believe we do not, at present, have adequate metrics to evaluate the totemic, ceremonial aspects of the salmon to a society and the impact of the loss of the totem to the spiritual, emotional, mental and physical health and cohesiveness of a society and other issues that emanate from the way Indian tribes view nature and natural resources. More importantly, I do not believe that these notions are generally accepted as part of risk assessments.

We at the International Institute for Indigenous Resource Management are working with colleagues at the Yakama Indian Nation and the Confederated Tribes of the Umatilla Indian Reservation and with the Department of Energy’s Center for Risk Excellence and the Environmental Protection Agency’s Office of Emergency and Remedial Response to, among other things, develop a tribal framework for risk assessment and the metrics required for assessing those second category issues. We invite your inquiries and assistance.