

# PROTECTING THE

BY JACQUELINE P. HAND

# Seventh

American-Indian tribes have traditionally asserted a governing ethic of acting in such a way as to preserve resources for seven generations in the future. This goal of sustainable, non-consumptive use has been reinforced in recent years by provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),<sup>1</sup> which name American-Indian Tribes to serve as natural resources trustees, along with their state and federal counterparts. Under the statute, a governmental entity responsible for a natural resource that has been injured is designated as a trustee to protect the public's interest in restoring the environment. An excellent example of the role tribes can play in preserving natural resources is the recent out-of-court settlement of a lawsuit brought by the Saginaw Chippewa Tribe, along with the state of Michigan and the United States, against General Motors Corporation and the Cities of Bay City and Saginaw, for restoration of the Saginaw River and Bay watershed.

The river and bay were seriously contaminated by polychlorinated biphenyls (PCBs), allegedly initially released by the automaker's facilities, then passed through the two cities' wastewater treatment plants. Under the settlement, the defendants agreed to pay approximately \$28 million for dredging to remove sediment and restore the area. In addition, various tracts of land were set aside for wildlife preservation, including a 110-acre tract in Allegan County, which was conveyed to the tribe and immediately put into trust by the Bureau of Indian Affairs. Archeological surveys of this land, which was Chippewa territory before contact, have yielded various artifacts, including pottery shards, a bead, and projectile points.<sup>2</sup> The land transfer was explicitly made to make the tribe whole in

compensation for the damage done to the tribe's hunting and fishing rights.

This relatively simple transaction warrants attention because it illustrates two important developments in law and public policy. The first is the institutionalization of a policy of restoring environmental damage whenever possible. The second is a renewed recognition of the sovereignty of American-Indian tribes, both over reservation land held in trust and over usufructuary hunting and fishing rights.

When CERCLA was passed by Congress in 1980, in addition to providing for the remediation of land contaminated by hazardous substances, it provided that natural resources trustees can recover for natural resource damages (NRD) caused by the release of these substances. Natural resources trustees include federal, state, and local governments and Indian tribes.<sup>3</sup> This is consistent with federal policy, as embodied in the various statutes, including the Clean Water and Air Acts, providing that Indian tribes should be treated as states when they have infrastructure in place to assume that responsibility. Natural resources are defined as "land, fish, wildlife, air, water, ground water, drinking water supplies, and other such resources managed by, held in trust by, appertaining to, or otherwise controlled by the United States." A Natural Resources Trustee is "any state or local government, . . . any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe."<sup>4</sup>

The relevant damages that the NRD trustees can claim include:

- funds to restore the environment to the condition that existed prior to the injury; this is fairly clear cut and often requires actions similar to the remediation required by CERCLA's parallel requirements<sup>5</sup>



**Saginaw  
Chippewa Tribe  
serves as  
natural  
resources  
trustee**

# Generation



- the cost of the trustees' initial assessment of the nature and extent of the environmental injury, and delineating the quantity of monetary damages needed
- compensation for the loss or reduction of the use of the resource from the time of the initial injury until restoration is completed

This final type of damages has historically been the most controversial factor in the final determination of damages, both because restoration or replacement damages are often substantially higher than damages figured by the classic tort formula of subtracting the value of the property after the injury from its value before the injury occurred, as well as because the benefits and services provided by the resource are not necessarily reflected in any obvious market value. These can be active uses, such as swimming or hiking, or passive uses where people value the existence of a resource without actually using it. For example, a citizen of Michigan may be concerned with preservation of grizzly bears in Yellowstone National Park.<sup>6</sup> The affirmation that damages are owed for this sort of injury reflects a notable change from traditional concerns about awarding damages that are too speculative, hence the controversy. Resolution of the issue in favor of restoration reflects an effort to require that enterprises fully internalize the costs of their activities.

With the exception of early cases challenging the methodology for computation of compensatory and passive damages, most cases brought for NRD are resolved by settlement and are therefore not memorialized in reported cases, although some consent decrees are available online. Since NRD are generally characterized as the difference between the condition of the resources before the injury and its state after the cleanup, combined with the lost use value and the costs of making the assessment itself, they are not generally settled before the initial cleanup.

As might be expected, in the majority of NRD actions the trustee is a state or federal agency, often both working together. However, in a significant number of actions, a tribal trustee participates as well. This is appropriate, as well as statutorily authorized, because tribes, as "domestic dependent sovereigns,"<sup>7</sup> are responsible for the land and re-



## FAST FACTS:

**The goal of sustainable, non-consumptive use has been reinforced by CERCLA, which names American-Indian Tribes to serve as natural resources trustees.**

**CERCLA provides that natural resources trustees can recover for natural resource damages.**

sources they were able to hold on to after two centuries of destructive federal policies. Generally, tribal NRD claims are made jointly with the federal government and seek restoration of on-reservation resources. The General Motors Consent Decree discussed above is interesting because it approves the claim of the Saginaw Chippewa Tribe for NRD for the tribe's off-reservation reserved hunting and fishing rights.

These usufructuary rights to hunt and fish derive from the tribes' aboriginal title to all land in what is currently Michigan. When in the early-to-mid 19th century, the Chippewa ceded to the United States a substantial portion of their land in this state, they did not explicitly transfer these rights as well. Therefore, these rights remained with the tribe under basic principles of property law and treaty interpretation.<sup>8</sup> While the rights of the Bay Mills Indian Community and Sault Ste. Marie Tribe of Chippewa Indians were explicitly adjudicated in a series of cases revolving around the state of Michigan's assertion of a right to prohibit American-Indian gill netting,<sup>9</sup> these rights for the Saginaw Chippewa have not been explicitly reaffirmed by the federal courts. Since the same principles apply, this affirmation is arguably pro forma, but the affirmation implicit in the Consent Decree is a welcome one to tribal members. This is particularly so because it occurs in a cooperative, noncontroversial context, rather than through the sort of acrimonious dispute the earlier adjudications entailed.

The specifics of the GM Consent Decree provide a model of how this relatively novel remedy works and of how tribes can play an important role in the preservation and restoration of our shared environment. This case was a consolidation of three actions brought against the defendants. During the course of the nearly five years of negotiations between the parties, which ultimately resulted in the

consent decree, the trustees examined the entire assessment area,<sup>10</sup> from the head of the Saginaw River to the outer edge of Saginaw Bay, including resources that "inhabit or feed" in the area or are "ecologically dependent" on it. In this instance, the injuries were determined to be the PCB-contaminated sediments, which affected the aquatic habitat and migratory birds, and interference with fishing, including subsistence fishing and hunting.

At that point, keeping in mind that the goal is to return the area to its precontamination state, the trustees must look at a reasonable number of possible alternatives that are possible in the restoration, rehabilitation, replacement, and/or acquisition of the injured resources and the services they provided.<sup>11</sup> In evaluating those services to tribes, a good argument can be made that the resource's role in tribal cultural and spiritual practices must be taken into account,<sup>12</sup> particularly because most tribe's spiritual beliefs are an intrinsic part of the culture and of everyday life. A good example of this is the injury inflicted on the communal life of the Isleta Pueblo when high cyanide levels in the Rio Grande River endangered ceremonial drinking from that river.<sup>13</sup> While the GM Consent Decree does not explicitly recognize cultural injuries, in fact the Allegan County property does contain archaeological resources.

In addition to the Allegan County wilderness property, the GM consent Decree NRD included the dredging and disposal of contaminated sediments; the funding of recreational and educational facilities, including boat launches, and the green Point Environmental Learning Center; restoration of the Tobico Marsh (spawning habitat for pike and perch); and the acquisition of various islands, coastal wetlands, and lake plain prairie properties.

Once the amount of the damages and how they were to be allocated were agreed to,

the final step was implementation of the plan by the trustees. In this instance, many of the decisions are required to be made collectively by a Trustee Council based upon a Memorandum of Understanding (MOU).<sup>14</sup> Under this MOU, each trustee appoints representatives to serve on the council, which requires a consensus by a quorum for all decisions. If a consensus cannot be reached, the MOU sets up a dispute resolution system that provides for the tribe and the U.S. Fish and Wildlife Service to confer and reach preliminary decisions. This is the basis for consultation with the state to reach a final decision. This mechanism, in addition to providing a road map for carrying out the parties' trust responsibilities, also seems well suited to developing the sort of institutional cooperation between the tribe and state, which is likely to benefit all concerned.

This pattern of cooperation, in support of the goal of making the environment whole for future generations, is a positive one that can hopefully be followed in the future when public resources have been injured. ♦

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## Footnotes

1. 42 USC 9607.
2. Csernyk, Scott, *Field Survey Conducted on Land from Settlement*, Tribal Observer, p. 2, May 1, 1999.
3. 42 USC 9607(f)(1) (1994).
4. 42 USC 9601(16).
5. 42 USC 9064.
6. See Hupp, R. Craig and Denton, Charles M., *Natural Resources Damage Assessments and Claims in the Great Lakes Basin, Part I: The Law of Natural Resources Damages Assessments*, 19 Mich Env J 3 (2001) and Hupp, R. Craig and Denton, Charles M., *Natural Resource Damages Assessments and Claims in the Great Lakes Basin, Part II: Analysis of NRD Settlements*, 20 Mich Env J 3 (2002).
7. *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823).
8. *US v Michigan*, 471 F Supp 192, 213 (WD Mich 1979). Later court rulings examined the state's power to regulate Indian gill netting.
9. *Id.*
10. Consent decree, paragraph 5.5.
11. 43 CFR 11.82 (1998).
12. Martin, Connie Sue, *Spiritual and Cultural Resources as a Component of Tribal Natural Resource Damages Claims*, 20 Pub. Land & Resources L. Rev. 1 (1999).
13. *City of Albuquerque v Browner*, 97 F3d 415 (CA 10, 1996).
14. Consent decree, Appendix K.