



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN 26 2001

Memorandum

To: Deputy Commissioner, Bureau of Indian Affairs
Director, Bureau of Land Management
Director, Fish and Wildlife Service
Director, National Park Service
Commissioner, Bureau of Reclamation
Director, Office of Environmental Policy and Compliance
Deputy Solicitor

From: Frank DeLuise, Program Manager *Frank DeLuise*
Natural Resource Damage Assessment and Restoration Program
Shelly Hall, Assistant Solicitor *Shelly Hall*
Branch of Environmental Restoration, Division of Parks and Wildlife

Subject: Deposits into DOI Restoration Fund from Joint Settlements

In several recent Natural Resource Damage Assessment and Restoration ("Restoration") settlements the issue has arisen whether a recovery of past assessment costs incurred by trustees other than the Department of the Interior (DOI) may be included in a joint settlement that is deposited into the DOI's Restoration Fund, to be sorted out later and with the Fund then distributing those past assessment costs to the appropriate non-DOI trustees. The answer is that only DOI recoveries may be deposited into the Restoration Fund. Any recovered amounts to which non-DOI trustees may assert a distinct, divisible interest, including past assessment costs, may not go into the Fund. They should instead be separately identified in the consent decree or settlement document, and paid directly to those non-DOI trustees.

The authority for the Restoration Fund to accept payments from natural resource damage claim recoveries is found at 43 U.S.C. § 1474b:

Notwithstanding any other provision of law, in fiscal year 1991 and thereafter, sums provided by any party, including sums provided in advance or as a reimbursement for natural resource damage assessments, may be credited to this appropriation and shall remain available until expended.

While the permanent appropriation language codified in section 1474b does not explicitly restrict the Fund to accepting "DOI" recoveries, the appropriation itself is a DOI appropriation, and the originating language provides only for conducting damage assessment and restoration activities "by the Department of the Interior." P.L. 102-154, 105 Stat. 994 (Nov. 13, 1991). There is no language specifically authorizing the Fund to accept payments for past assessment costs incurred by non-DOI trustees or to hold such monies on behalf of those non-DOI trustees. In addition, DOI has described its authority to accept funds in which non-DOI trustees may have an interest only in terms of "jointly-recovered funds from negotiated settlements to implement restoration actions pursuant to a joint restoration plan," and not in terms of accepting divisible recoveries of other trustees. *DOI FY1998 Interior Appropriation Bill Effect Statement to the Conference Managers*. Without specific authority allowing the Restoration Fund to accept distinct non-DOI recoveries, including monies that include payment for distinct non-DOI claims, we conclude that the deposit of such monies into the Restoration Fund is inappropriate. In contrast, monies that are jointly recovered by DOI and other trustees, which are indivisible in nature and not susceptible to division by entitlement, still constitute a DOI recovery which can be placed into the Fund. They are simply a DOI recovery that is shared equally with DOI's co-trustees.

Past assessment costs, on the other hand, are by their nature divisible and cannot be co-owned or "jointly" recovered. Even when all of the trustees' assessment costs are negotiated with potentially responsible parties on a lump sum basis, the ultimate division of those recovered costs is based on past trustee expenditures and individual trustee claims of entitlement to their own past assessment costs. These distinct claims of entitlement make the past assessment cost recovery divisible by nature. Thus, past assessment costs of non-DOI trustees (state, tribal, or federal) cannot properly be characterized as a DOI recovery and cannot go into the Restoration Fund.

It is important to make certain that Restoration settlements and consent decrees clearly sort out the various trustees' past assessment costs, so that the only past costs that go into the Restoration Fund are DOI's own past costs.¹ Where a joint recovery includes future "assessment" costs,² including those necessary for restoration planning or implementation,

¹ In the alternative, if a settlement is reached before the trustees decide how to divide a lump-sum recovery for past assessment costs, placing the assessment cost recovery into a court registry account is also an option. In such a case, however, the subsequent division by the trustees should be done expeditiously so that DOI's recovered costs may be placed in the Restoration Fund and become available for assessment activities.

² In some cases, what have sometimes been described as future "assessment costs" are more properly characterized as restoration costs because they pertain to implementing restoration, rather than to developing a claim. In other cases, however, a settlement that does not include all PRPs may include a recovery that can be used for additional assessment activities to

the settlement or consent decree should clearly identify these as *future* trustee costs that are part of the joint recovery, so as to avoid any confusion with past assessment costs.³

In summary: (1) the only past assessment costs that may be deposited into the Restoration Fund are DOI's own past costs, (2) recoveries for past assessment costs incurred by non-DOI trustees must be segregated and excluded from payments deposited into the Fund, preferably in the consent decree or other settlement document, and (3) DOI recoveries for restoration costs and future assessment costs, including joint and indivisible recoveries shared with other trustees, may be deposited into the Fund.

This guidance has been approved by the Natural Resource Damage Assessment and Restoration Program Work Group and Executive Board. Please distribute this memorandum to the appropriate Restoration personnel in your offices.

Thank you.

cc: Restoration Program Executive Board
Restoration Program Work Group
Restoration Program Fund Manager
DAS - Policy & Int'l Affairs

further develop a claim against the non-settling PRPs. In both cases, because the "assessment" costs are to be incurred in the future, and are not based on individual trustee entitlement, they may be jointly and indivisibly recovered.

³ For resources subject to co-trusteeship, future costs (restoration or "assessment") may be jointly and indivisibly recovered where they will not be divided based on individual trustee entitlement, but rather based on trustee council decisions about how best to proceed with the assessment or to implement restoration.

SETTLEMENT TRACKING FORMS

Purpose:

1. To identify the financial components of a settlement deposited into the DOI Restoration Fund:
 - By type or purpose of deposit (past costs, future assessment, future restoration)
 - By bureau, office, or reimbursement to Fund
2. To provide upper management with a brief summary of the settlement, including financial aspects, settlement terms, PRPs, co-trustees, location, and other aspects you feel are relevant.

Case Teams (bureaus & SOL) are jointly responsible for fully completing the tracking form. Completed forms should accompany the settlement documents (consent decree or other administrative settlement) as they are being routed for management approval. Final, surnamed copies should be immediately provided to the Restoration Fund Manager.

Who surnames the tracking form? Depends on your respective bureau or office delegations.

Minor adjustments (additional interest, DOJ 3%, etc) can be made by Fund Manager (pen & ink changes)

Form will be adjusted in near future to accommodate inclusion of indirect costs.

EXAMPLE

U.S. DEPARTMENT OF THE INTERIOR
NATURAL RESOURCE DAMAGE ASSESSMENT SETTLEMENT FORM

DOJ Case No. 90-11-2-1041 and 90-11-3-1424 Court Case Reference: _____
 REGION: 3 STATE/COUNTY: Michigan / multiple counties NEAREST TOWN: Saginaw

Site/Case: Saginaw River & Bay FUND ACCOUNT NUMBER 14X5198

Responsible Parties: _____
 General Motors Corporation; City of Saginaw; City of Bay City; _____
 Michigan Department of Transportation; U.S. Army Corps of Engineers. _____

(Use additional sheets if necessary)

Funds from a Court Registry account or similar? Yes No DATE 11-20-98
 If yes, give total amount, manager, and location in Remarks section. See below

BUREAU/OFFICE	Agency Surname	Total Settlement Dollars Received	Assessment Cost Recovery (Past)	Future Assessment Costs	Restoration Future Work (\$)
Funds from NRDAR Fund		\$560,000.00	\$560,000.00		
Bureau of Indian Affairs		\$0.00			
Bureau of Land Management		\$0.00			
Bureau of Reclamation		\$0.00			
Fish and Wildlife Service		\$10,890,000.00			\$10,890,000.00
National Park Service		\$0.00			
Geological Survey		\$0.00			
Office of Environmental Policy and Compliance		\$0.00			
Office of the Solicitor	<i>Adel 1/24/98</i>	\$10,000.00	\$10,000.00		
Other:		\$0.00			
TOTAL:		\$11,460,000.00	\$570,000.00	\$0.00	\$10,890,000.00

TOTAL DOI SETTLEMENT AMOUNT: (this action) \$11,440,000.00
 TOTAL SETTLEMENT (All Trustees): \$28,470,000.00

REMARKS / NOTES / OTHER:
 Payment of \$570,000 for past damage assessment costs incurred by DOI.
 Payment of \$10,890,000 into NRDAR Fund for restoration activities as follows:
 \$10,640,000 to be paid on behalf of Trustees 7 days after notice of entry.
 \$250,000 to be paid by U.S. Army Corps of Engineers for dredging.

The Saginaw Bay Court Registry Account established in the U.S. District Court for the Eastern District of Michigan titled "Restoration Account".
 First payment of \$94,974.74 due 30 days after entry of Consent Judgement. Additional deposits of \$1 million each year on 4th, 5th, and 6th
 anniversaries of entry of Consent judgement, for a total of \$3 million. Any surplus dredging funds remaining from the \$10.64 million in the DOI
 NRDAR Fund will also be deposited into the Court Registry Restoration account.

EXAMPLE

U.S. DEPARTMENT OF THE INTERIOR
NATURAL RESOURCE DAMAGE ASSESSMENT SETTLEMENT FORM

DOJ Case No. 90-5-1-1-06628 Court Case Reference: 99-2961

REGION: _____ STATE/COUNTY: Louisiana / Terrebonne Parrish NEAREST TOWN: Houma

Site/Case: Lake Barre Oil Spill, LA REGION: 4 FUND ACCOUNT NUMBER 14X5198

Responsible Parties: _____ DATE: 2-25-00 PARTIAL SETTLEMENT: YES _____ NO X _____
 Equilon Pipeline Co. LLC (successor to Texaco) NRDA Project No. 0172 FINAL SETTLEMENT: YES X _____ NO _____

(Use additional sheets if necessary) TOTAL DOI SETTLEMENT AMOUNT: (this action) \$31,100.26
 TOTAL SETTLEMENT (All Trustees) \$510,584.77

Funds from a Court Registry account or similar? Yes No X _____ (plus future costs)

If yes, give total amount, manager, and location in Remarks section.

BUREAU/OFFICE	Agency Surname	Total Settlement Dollars Received	Assessment Cost Recovery (Past)	Future Assessment Costs	Restoration Future Work (\$)
Funds from NRDAR Fund		\$0.00			
Bureau of Indian Affairs		\$0.00			
Bureau of Land Management		\$0.00			
Bureau of Reclamation		\$0.00			
Fish and Wildlife Service	<i>A. De. Hall 4/17/00</i>	\$27,254.04	\$17,254.04		\$10,000.00
National Park Service		\$0.00			
Geological Survey		\$0.00			
Office of Environmental Policy and Compliance	<i>Stephen J. ...</i>	\$254.09	\$254.09		
Office of the Solicitor	<i>4/2/00</i>	\$1,820.00	\$1,820.00		
Office of Policy Analysis	<i>2/25/00</i>	\$1,772.13	\$1,772.13		
TOTAL:		\$31,100.26	\$21,100.26	\$0.00	\$10,000.00

REMARKS / NOTES / OTHER:
 Co-trustees at this site: NOAA, State of Louisiana (LOSCo, LDEQ, LDWF, LDNR)
 Settlement with PRP (Equilon Pipeline Co.) provides for state and Federal trustees past and future assessment costs, and future restoration oversight and monitoring costs.
 PRP is to perform in-kind restoration actions, specifically the planting of 4 acres of salt marsh vegetation on East Timbalier Island, where a Coastal Wetlands Act project is being undertaken to restore the island.
 PRP is required to acquire a surety bond / letter of credit / or establish a trust fund valued at \$750,000 to guarantee the performance of the agreed-to restoration work.

**U.S. DEPARTMENT OF THE INTERIOR
NATURAL RESOURCE DAMAGE ASSESSMENT SETTLEMENT FORM**

DOJ Case No. _____ REGION: _____ STATE/COUNTY _____ COURT CASE REFERENCE: _____ NEAREST TOWN: _____

Site/Case: _____

Responsible Parties: _____ FUND ACCOUNT NUMBER 14X5198

DATE: _____ PARTIAL SETTLEMENT: YES _____ NO _____

NRDA Project No. _____ FINAL SETTLEMENT: YES _____ NO _____

(Use additional sheets if necessary)

Funds from a Court Registry account or similar? Yes _____ No _____

TOTAL DOI SETTLEMENT AMOUNT: (this action) _____

TOTAL SETTLEMENT (All Trustees-Joint Recovery): _____

BUREAU/OFFICE	Agency Surname	Total Settlement Dollars Received	Assessment Cost Recovery (Past)	Future Assessment Costs	Restoration Future Work (\$)
Funds from NRDAR Fund					
Bureau of Indian Affairs					
Bureau of Land Management					
Bureau of Reclamation					
Fish and Wildlife Service					
National Park Service					
Geological Survey					
Office of Environmental Policy and Compliance					
Office of the Solicitor					
Office of Policy Analysis					
TOTAL:					

REMARKS / NOTES / OTHER: _____

JOINT RESTORATION SETTLEMENTS

DOI Restoration Fund Prospectus

Intended to help educate your co-trustees about the DOI Fund:

- How it operates, & What it offers
- Interest policy – Interest stays with project
- No management fees or charges
- Investment options
- No allocations made without all trustees' concurrence (NO unilateral withdrawals)
- Allocations can be made ONLY to co-trustees (as identified in Consent Decree or Trustee MOU)
- Fund Manager needs final signed copies of Consent Decree(s) and Trustee MOU(s)

Refer to Non-DOI Deposits memo dated 1-26-01 for criteria to deposit joint settlements into the DOI Fund

EFT Form

Electronic Funds Transfer (EFT) is used to transmit approved settlement allocations to non-Federal co-trustees

Debt Collection Act of 1996 requires Federal agencies to make all payments by EFT after January 1, 1999

Form needs to be completely filled out and returned to Fund Manager (via FAX is acceptable)

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The DOI Restoration Fund and Joint Recoveries

U.S. Department of the Interior
Natural Resource Damage Assessment and Restoration Program

Background: The Department of the Interior Restoration Fund was created in the *Fiscal Year 1992 Interior and Related Agencies Appropriations Act (P.L. 102-154)*. The Act provided permanent authority to accept receipts for damage assessment and restoration activities (as authorized under CERCLA, Clean Water Act, OPA, and the Park Service Resource Protection Act) and provided that such receipts be available without further appropriation. Later in that same year, the *Disaster Emergency Supplemental Appropriations Act for Fiscal Year 1992 (P.L. 102-229)* provided the authority to invest Fund receipts and that such amounts and accrued interest shall remain available without further appropriation. The provision “without further appropriation” means that the Department (and its co-trustees) can make use of such funds without further Congressional approval. The permanent appropriation for the Fund is codified at 43 U.S.C. Sections 1474b and 1474b-1.

Limitations on Deposits: Joint and indivisible restoration settlements shared between DOI, other Federal trustees, and non-Federal trustees may be deposited into the Restoration Fund. Any settlement amount to which a non-DOI trustee has or would have a distinct, divisible interest, including past assessment costs, may not go into the Fund. Such amounts should instead be separately identified in the consent decree or settlement document, and paid directly to the non-DOI trustee.

Dedicated Interest: Any interest earned on restoration funds deposited into the DOI Restoration Fund may only be used for restoration activities at the site that generated the interest.

Investment Options: The Restoration Fund is limited by law to investing only in U.S. government securities. These are U.S. Treasury bills (generally available in 30-day increments) or Treasury notes (available in year increments). For shared restoration settlements deposited into the DOI Restoration Fund, it is the responsibility of the site Trustee Council to develop suitable Cash Flow Plans that will determine the cash needs and the duration of investments at that respective site. In the absence of Trustee Council directions regarding investment and cash needs, the settlement funds will be invested into 30 day Treasury bills. The advantage of using Cash Flow Plans allows the Fund to invest in longer term securities, thereby earning a greater yield.

Safety of Restoration Accounts: As noted above, the Restoration Fund invests exclusively in U.S. Government securities, which are backed by the full faith and credit of the United States. By law, natural resource damages recoveries (other than recovered past assessment costs) may be spent only

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to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources for which the recovery was obtained. Therefore, settlement recoveries for restoration that are deposited into the DOI Restoration Fund may be spent only for restoration activities associated with that settlement and cannot be diverted to other uses. In addition, because the Fund is a permanent appropriation, it is not subject to annual appropriation by Congress, and settlement funds are available to the trustees until expended.

Use of Shared Restoration Settlements for Matching Purposes: Depending upon the specific authorities governing a Federal grant program, monies from a shared joint restoration recovery deposited into the Restoration Fund by the Department and a non-Federal trustee, and subject to some joint and binding control by the non-Federal trustee, may be transmitted to the non-Federal trustee and subsequently used as matching funds for a Federal grant. The Trustee Council must agree that the funds are to be made available to such a non-Federal trustee and are to be proffered as a non-Federal match to accomplish restoration activities consistent with CERCLA and OPA. Further, the grant must also accomplish an objective consistent with the Federal program providing the grant funding. It is critical to emphasize that the funds in question must be transmitted from the Restoration Fund directly to the non-Federal trustee. Funds transmitted to a Federal trustee and then subsequently disbursed to a non-Federal entity would not qualify as a non-Federal match for a Federal grant program.

Process to Withdraw and Allocate Funds: Once deposited, shared settlement funds can be withdrawn and allocated only pursuant to authorized and documented directions from the respective co-trustees. Generally, such documentation comes in the form of a Trustee Council resolution, signed by all members of the Trustee Council. However, the specific requirements in any given case are dictated by the terms of the consent decree and/or Trustee Memorandum of Understanding.

Additionally, it is important to note that funds can be disbursed only to Trustee agencies, as identified in the consent decree and/or Trustee Memorandum of Understanding. Funds cannot be disbursed directly to other entities. Any subsequent payments by trustee agencies to non-trustee third parties to conduct restoration activities must be done pursuant to trustee agency authorities (e.g., contacting authorities). Requests for allocation of funds to trustee agencies should be routed to the Fund through the designated Lead Administrative Trustee. Generally, allocation requests will be processed and disbursed in approximately two weeks. Funds are transferred to Federal co-trustees via an SF-1151 (non-expenditure transfer), while funds to non-Federal co-trustees are transmitted via electronic transfer (EFT). Where EFT is not feasible, a check will be issued.

Fees and Charges: The DOI Restoration Fund has no fees or charges for its services.

Additional Requirements: The DOI Restoration Fund requires that copies of final, fully-signed court-entered consent decrees and Trustee Memorandums of Understanding are transmitted to the Fund Manager in a timely fashion. Such documentation must be on file before any allocation request can be processed.

U.S. Department of the Interior
Natural Resource Damage Assessment and Restoration Program
Automated Clearing House (ACH) Payment Enrollment Form

PRIVACY ACT STATEMENT	
The following information is provided to comply with the Privacy Act of 1974 (Public Law 93-579). All information collected on this form is required under provisions of 31 U.S.C. 3322 and 31 CFR 210. This information will be used by the Treasury Department to transmit payment data by electronic means to the Trustee's financial institution. Failure to provide the requested information may delay or prevent the receipt of payments through the Automated Clearing House Payment System.	
PAYEE / TRUSTEE INFORMATION	
NAME:	TAXPAYER ID NO. (TIN)
ADDRESS:	
CITY	STATE
ZIP CODE	
CONTACT PERSON NAME:	TELEPHONE NUMBER:
FINANCIAL INSTITUTION INFORMATION	
NAME:	
ADDRESS:	
CITY	STATE
ZIP CODE	
ACH COORDINATOR NAME:	TELEPHONE NUMBER:
NINE DIGIT ROUTING TRANSIT NUMBER (RTN)	

DEPOSITOR ACCOUNT TITLE:	
DEPOSITOR ACCOUNT NUMBER:	LOCKBOX NUMBER:
TYPE OF ACCOUNT:	
_____ CHECKING	_____ SAVINGS
_____ LOCKBOX	
SIGNATURE AND TITLE OF AUTHORIZED OFFICIAL:	TELEPHONE NUMBER:

Return completed forms to the DOI Natural Resource Damage Assessment and Restoration Program, Attn: Fund Manager, 1849 C Street NW, Mailstop 4449, Washington, D.C. 20240
Telefaxed copies are acceptable (202) 208-2681

DOI SOLICITOR OPINIONS ON NRDAR FUND ISSUES

Using Joint Restoration Settlement Funds as “non-Federal” Monies for Matching Federal Grants – memo dated 7-29-99.

- Details under what conditions joint settlements held in the DOI Restoration Fund may be used for matching purposes
- Funds must first be transmitted to non-Federal trustee to qualify as a non-Federal match
- Ultimately, it is up to the awarding grantor agency to make determinations as to the matching requirements of their specific grant programs

Duration of Easements and Deed Restrictions Implemented as Restoration Actions, memo dated 11-23-99