



United States Department of the Interior

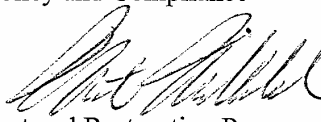
OFFICE OF THE SECRETARY
Washington, D.C. 20240



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Memorandum

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

From: Mat Millenbach, Program Manager 
Natural Resource Damage Assessment and Restoration Program

Subject: Departmental Policy on Natural Resource Trusteeship

The purpose of this memorandum is to issue Departmental policy on asserting natural resource trusteeship for natural resource damages and restoration claims prepared under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA). Both the Restoration Program Work Group and the Executive Board have approved this policy.

Previously, the Department has not adopted a comprehensive policy on the extent to which it may assert natural resource trusteeship. The Department's involvement in various natural resource damage assessment and restoration cases, including the litigation involving hazardous substance contamination in the Coeur d'Alene Basin in Idaho, U.S. v. ASARCO, has made it appropriate and necessary to issue a formal, comprehensive description of the Department's policy on natural resource trusteeship.

The attached policy statement represents the Department's policy on asserting natural resource trusteeship in natural resource damage assessment and restoration cases, and supersedes any prior statements to the extent they could be construed as inconsistent with this policy.

Department of the Interior's Policy on Natural Resource Trusteeship under CERCLA, CWA, and OPA

The Secretary of the Interior acts as a trustee for natural resources injured as a result of releases of hazardous substances or discharges or threats of discharge of oil. It is the policy of the Department of the Interior to exercise, as appropriate, its natural resource trusteeship to the fullest extent authorized by law.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) defines "natural resources" to mean "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States; 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; or any foreign government. CERCLA § 101(16), 42 U.S.C. § 9601(16). The Oil Pollution Act (OPA) contains a similar definition of natural resources. OPA § 1001(20), 33 U.S.C. § 2701. The Clean Water Act (CWA) authorizes the President to act on behalf of the public as trustee of natural resources injured by discharges in violation of the Act. CWA § 311(f)(5), 33 U.S.C. § 1321(f)(5).

The President designates federal natural resource trustees, authorized to bring claims pursuant to CERCLA, OPA, and the CWA, in the National Contingency Plan (NCP). The NCP interprets the scope of federal natural resource trusteeship to extend to resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled (referred to as "managed or controlled") by the United States, including "supporting ecosystem" resources. 40 CFR § 300.600. The NCP recognizes that State and Tribal trusteeship similarly includes natural resources managed or controlled by States and Tribes, including supporting ecosystem resources.

Federal trusteeship may be derived from any federal authority or combination of authorities, such as treaties, statutes, regulations, or Executive Orders, which give the Federal government legal rights in or the responsibility or legal authority to manage or control or protect natural resources. Such federal authority need not be exclusive, comprehensive, or primary, but it must reflect a federal interest in or authority over the natural resources. In many cases, federal trusteeship over natural resources may overlap with that of States or Tribes or both.

The Secretary of the Interior acts as trustee for natural resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the Department of the Interior, including their supporting ecosystems. 40 C.F.R. § 300.600(b), (b)(2), and (b)(3). The NCP cites as examples of Interior's trusteeship the following natural resources and their supporting ecosystems: migratory birds; anadromous fish; endangered species and marine mammals; federally owned minerals; and certain federally managed water resources. 40 C.F.R. § 300.600(b)(2). This list of examples is not exclusive. As a land managing agency, the Department has trusteeship over natural resources, including their supporting ecosystems, located on, over, or under land administered by the Department of the Interior. 40 C.F.R. § 300.600(b)(3). Federal trusteeship extends to natural resources, including their supporting ecosystems, that use federal lands and resources, that are subject to federal rights, or that are

subject to rights that may arise as an incidence to land ownership. The NCP also designates the Secretary as trustee for those natural resources for which an Indian Tribe would otherwise act as trustee in those cases where the United States acts on behalf of the Indian Tribe. 40 C.F.R. § 300.600(b)(2).

This policy provides general guidance on the Department's trusteeship. It is not intended to describe the full extent of the circumstances under which, or the natural resources over which, the Department may assert trusteeship. The specific scope of the Department's trusteeship in any given case will depend upon the affected natural resources and the federal rights, authorities, and interests in those resources. Bureaus within the Department must consult with the Solicitor's office for advice on the scope of trusteeship that may be asserted in a particular case.

It is the policy of the Department of the Interior to consult, coordinate, and cooperate with other natural resource trustees. 521 DM 1.3H. While recognizing the natural resource trusteeship of States, Tribes, and other Federal agencies, it is also the policy of the Department to reserve the ability to assert its own natural resource trusteeship in any given case to the fullest extent authorized by law, and to exercise it as appropriate.

This policy supersedes any prior policy statements addressing the scope of federal or the Department's natural resource trusteeship that could be construed as inconsistent with this policy.