Natural Resource Damage Law and Policy - With a Special Emphasis on the Indian Tribes

Raymond Cross
*University of Montana School of Law, ray.cross@umontana.edu*

William Rodgers

Follow this and additional works at: [https://scholarship.law.umt.edu/plrlr](https://scholarship.law.umt.edu/plrlr)

Part of the [Law Commons](https://scholarship.law.umt.edu/plrlr)

**Recommended Citation**


This Conference is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land and Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
I'd like to add my welcome to the community of Missoula and beyond.

Before I introduce our keynote speaker, Dr. William Rodgers from the University of Washington, I'd like to talk a little bit about your role, because the world you create for them, and that's what this conference is about, that they get a sense beyond the law, your contributions, your exceptions, your hopes, your aspirations, and in some instances, your fears and your dreams.

So once again, I'd like to welcome you to the 30th annual Public Land Law Conference, the oldest land law conference in the nation. A tribute to the memory of one of the great law professors and mentors here at the law school, Margery Hunter Brown, who created both the Federal Indian Law and Public Land Law [program], so I think of her each time we hold this conference.

When you think about where we're going with respect to public lands, you also have to think about where we came from, a world, a country that doesn't know its history or misunderstands its future.

The Australian ecologist, Tim Flannery, in his book *The Eternal Frontier, an Ecological History of North American Continent and Its Peoples*, tells of the disastrous ecological impacts of the European people of this continent in the 17th and 18th centuries.

He recounts the fatal impacts of the choices made by the American people in leveraging open the North American continent to non-Indian settlement and development. He tells us at the dawn of the 19th century that America was a nation of five million people and only five millionaires. A


2. Raymond Cross teaches introductory and advanced courses in Indian and Public Land law at The University of Montana School of Law. He works extensively with Indian tribes, Indian organizations, and federal agencies on issues of Indian education, tribal self-determination, and cultural and natural resources preservation. Professor Raymond Cross' legal career in Indian Country is chronicled in a new book entitled Coyote Warrior: One Man, Three Tribes and the Trial That Forged A Nation (Little, Brown Publishing Co. 2004).

hundred years later, at the dawn of the 20th century, the U.S. had a population far greater than that of any European nation, had amassed unimaginined wealth and power, and it also produced the world's first billionaire, John D. Rockefeller.

Flannery recounts, in *The Eternal Frontier*, the ecological costs of American growth and power. His words: By the 1950s, North Americans had eliminated about four-fifths of the continent's wildlife, cut more than one-half of its timber, all but destroyed its native cultures, destroyed its most productive fisheries, and depleted a good proportion of its soils. They had just had a great victory in war and they created one of the most affluent and self-contented societies the world has ever seen. Yet, the pillage of the nature and the natural resources was not yet finished.

By 1999 nearly 1200 North American species had been placed on the official endangered list. And this is a gross underestimate, for it's been estimated that 60,000 species are in grave danger of extinction on this continent.

The challenge that Professor Flannery issues to us, as an American people, is he asks, is it necessary to destroy nature to maintain a great American society? That's a question that lawyers like myself and professors like Professor Rodgers can't answer, only you collectively, as an American people, can answer.

He has a mixed opinion whether the American people will meet the challenges of the 21st century, the ecological challenges that demand not only backward-looking remedies and laws such as remediation and recovery, but demand forward-looking solutions based on some appropriate version of the precautionary principle that requires we more deeply understand the nature of human actions, its impact on the natural environment and our capacity to change, not just legally, but behaviorally and perhaps even morally.

He is hopeful -- Dr. Flannery is hopeful that the minds of the American people, as well as their policymakers, will change and can change in favor of a new moral and legal awareness, one that can meet the challenges of ecological crisis and catastrophe, not just at the local level, as we're going to talk about here, but at the regional and global level.

In his opinion, the 19th century, which was called the disposition or land disposal era of public land law, was a century of a breakdown of law and, to some extent, moral order.

He hopes for a new ecological era, that the greatness of America evidenced in industry and entrepreneurship will be exceeded in the 21st century by ecological consciousness and imagination.

But once again, those are not the problems of lawyers, law professors, or even policymakers, it's a product of community and the people learning from their earliest understandings as children to the behavior as informed adults.
One of the functions, and I think the most important function of a conference such as this, is to provide a forum for discussion, your discussion, your input, your ideas, and that you speak back in a way to the lawyers, the policymakers, the teachers, so that you can better understand whether your children and communities, your organizations can meet these challenges, fashioning new laws that go beyond the backward-looking ideas of recovery and remediation.

Some questions last night [during Lynn Scarlett's Keynote Address] focused on the fact that the Superfund kiln is empty, that Exxon Valdez cost over more that half of that fund and has not yet ended, whether the reopener provided for in Exxon Valdez will be used to address the rightful claims of Native cultures that suffered so much in that one incident.

So looking forward to fashioning new laws, new enforcement mechanisms, Flannery says, requires a deeper understanding of our own human nature and action and behavior. Without that understanding, new laws can't be crafted and can't be enforced in a way that accords with redirecting, realigning, thinking, action and behavior.

So it's such an honor to introduce one of those deep thinkers, a person that worked and studied the Exxon Valdez catastrophe on a large-scale level, whether we were adequate in our response to that disaster, and what lessons we could learn from past catastrophes.

As I say, the best conferences are always the conferences that are about you, about what you take away from these conferences, the seeds that you plant in your own community organizations, the action you take by changing your daily behaviors, the stories, parables, cautionary tales you tell your children so that they'll understand the mistakes and missteps of their fathers and mothers and grandfathers and grandmothers.

Indeed, in many ways, thinking about Flannery's book and the loss of aboriginal America, the loss of those values that we want so desperately to understand and retain through law and action, in some ways, rather than thinking about back to the future, it's back to the past, so that we can retain something that made America exceptional, and that our confrontation, when the first Europeans came to this continent, that made them exceptional, transformed them from Europeans into Americans.

Dr. Rodgers will speak about the new Americans, fashioned into the new frontier, the frontier of not conquering the world, not destroying the past, but rebuilding the future in a way that we look at ourselves, scrutinize and re-understand ourselves so that when we think about ecological action, whether it's recovering the Clark Fork, remediating the harm of a century of heavy metal pollution behind the Milltown Dam, we can then be far more cautious, far more respectful, far more humane in our future development choices.

I'd like to introduce Dr. William Rodgers, professor of law. He is serving his second five-year appointment as a Stimson Bullitt professor of environmental law [at the University of Washington School of Law]. He's ad-
mitted to bars in New York, Washington and [the District of] Columbia. He's worked on important Indian law cases, the basis of what's called *U.S. v. Washington*, created in effect by our own alumnus, Judge Bolton.

So he's well qualified to talk about not just the past, but the future of ecological history and law. He's written a four-volume treatise on environmental law, scores of essays, and he's appeared in the Supreme Court on behalf of Indian Tribes, he published the Handbook of Environmental Law in 1977, a second edition in 1994.

I can't think of anyone better qualified to talk from that perspective on a broad-gauge thinking that allows you to think about your roles and responsibilities to the future of American ecological law.

Please welcome Dr. William Rodgers.

**DR. WILLIAM RODGERS:**

Thank you so much, Professor Cross. It's so great to be here. Thanks for having me. And I see so many colleagues and former students and former associates and even a few adversaries in the room. Welcome to everybody. It's just great and exciting to be here.

Let me take a few moments before I start running through my slides. I wanted to first address the students. You have an incredibly creative and entrepreneurial effort going on over there at the Milltown Dam, it's so exciting, it makes my heart beat.

The difficulty -- and no one ever feels sorry for academics or students, the difficulty is to try to capture that and generalize from it, to learn from it, because so much of it is individualized. Three and a half years of negotiations and the consent decree is really the old contract, and so it's a case-by-case issue, and it's difficult for us to learn generally from these experiences.

I should say, we do make a problem out of law school when we teach doctrine only. I do love these case experiences because that's life. If I were to talk to you about the big dam removal in western Washington, it would probably be the Elwha Dam on the Olympic peninsula, a non-FERC dam, not driven by the Endangered Species Act, it's not driven by Superfund, there's a special act of Congress dealing with it, so you'd have to undertake an entirely separate body of law to appreciate that.

Also, as I look across the spectrum of environmental issues, what we're looking at here today is simply illustrative. The question of complexity and time is everywhere.

I saw my first 25-year-old MPDES permit the other day. FERC licenses, as you know, are measured 40 to 50 years and running. We have habitat conservation plans under the Endangered Species Act, 50 years, many of the[ir] life span[s], and so we are presuming to have law work over these very substantial periods of time.

I just read of a mining case in the Everglades in Florida - phosphate mining within the Everglades - functionally the permit there, a 404 permit,
deals with 50-year mining plans. So as I see these problems, let's make law work over 50 years, and this is a serious, serious challenge.

Let me again, before I get on to the specifics, talk a little bit about the theory of these things. Lynn Scarlett, I thought, was wonderful last night and she introduced you to this question of how clean is clean. We often call that a baseline issue. To what do you aspire in your restoration endeavors?

There was a beautiful article written by a fellow named Jeremy Jackson published in *Science* in 2001. It was done basically with his co-workers at the Scripps Institute, and it's a beautiful account of the baseline. I can't go into it other than to say -- and I know you'll agree with me on this -- we all have our own baseline, the way of the world as it used to be, most of them are when you're about eight or nine years old. I remember that, I had my chickens and my ducks before the highway came through and it was a beautiful, beautiful world -- pigs too.

Jackson presents that question: what is it that we aspire to in these clean-ups? Lynn Scarlett is quite right that in many particulars, this is a policy choice, but there are huge variations in what our aspirations are.

And you've often heard about -- and I've done a little work on the Columbia River -- [that] the strongest environmental law in the world, the Endangered Species Act, aspires to restore Columbia River fisheries to the levels of 1986, there were really big ones there.

So [it] really matters how you look back in time, how you measure your own aspirations and what you're trying to do. And I know this is one reason I'm very fond of the Indian tribes, and not recently so, because I've had the good fortune of working with them for my career, they do tend to have very bold baselines because they have extremely long memories and a solid, solid history.

Lynn Scarlett raised the issue of how do you make this system work over time. Cooperation. Well, true, and there is a lot of discussion on this. The principle writer is Elinor Ostrom. She's published a number of works on systems that actually do work, commons that function over time.

One of them was the great tribal fishery at Celilo Falls. And let me tell you - and Ostrom -- these guys are not easy to regulate. That was a sustainable fishery, but you had some tough customers there, and functionally you have to control that system.

The reason that's a wonderful test case for us all, [is that] the capacity to destroy that fishery was always there, and [as] the system developed, it was primarily enforced by a group called Celilo Fish Committee. There were properties in that regime so people were fighting for their properties, and fighting for their children, while they fought for the fishery. There was tremendous oversight and there was very effective enforcement within the Celilo Fishery.

My heart jumped when I found with some co-authors of mine, the will of a fellow named Sampson Tulee. Sampson Tulee was a tough old Yakima
Indian who fished at Celilo. He did make it to the Supreme Court, in the case Washington v. Tulee, 1941.

But let me tell you about Tulee's will. When we talk about law and controlling these regimes as they extend over time, Tulee left his fishing sites he described as four, sometimes five sites depending upon the height of the river, to his children for all time.

So what he created there was a fee tail. Go back - if your brain has stopped, it's first year property. But as you go back, the idea is that property stays within the family. The world that he sees is a world where his children, and he names them all in his will, are going to be fishing at that spot under the same circumstances that he is fishing. So functionally he is living, his world, has tremendous continuity and sustainability written into that.

As I say, the broader studies that have been done on sustainability are effective and there's something you [sh]ould ask about the Milltown Dam, who's going to be here over these next 50 years? Who's going to do the monitoring? Is there effective enforcement? Are there ways to defect from this deal?

Of course, one of the greatest defectors that we have is bankruptcy law. ASARCO, American Smelting and Refining Company's bankruptcy just last year was a tremendous blow to the environmental laws.

My life began with American Smelting and Refining Company and they were all powerful, there was no way they would disappear from the Earth, but they have and it's a tremendous impact financially upon these regimes, the very ambitious legal regimes that we aspire to.

So let me talk a little bit about the Indian Tribes in particular and natural resource damages. In reading Professor Cross's book, Coyote Warrior, the measure I use [for] whether I like a book is whether it makes me cry, and it did, it's a fantastic book. Everybody loves success stories, we all want to hear them, that's why this Milltown Dam endeavor has to work.

I was the lawyer for the Puyallup Tribe in South Puget Sound for many years. They have done wonderfully over the last several years and have been served tremendously by the law. Many of the fishermen were fugitives when I began there, and now the Puyallup Tribe in South Puget Sound is one of the largest employers in Pierce County. So there really are success stories as you look at these regimes.

I want to show you first some of the different variations that the tribes bring to this critical question of natural resource damages. One, in particular, I want you to think about is this issue of subsistence, [and] protection of subsistence, [and] a special, somewhat different law. The tribes do have these somewhat different laws, the trust responsibility that a lot of people take seriously. They are, in these natural resource damage cases, now the third trustees.

I want to mention the question of how clean is clean. Many of these problems are so difficult that there's a tempting stopping point of putting up
the signs. Put up, "Be careful," "Don't go close to the regime," "Don't eat the shellfish," "Stay away from the fisheries." For example, [there is] Lake Roosevelt behind Grand Coulee Dam just downstream from the Trail B.C. Smelter. We now know it as the Teck Cominco Case. [Or that] women of childbearing age should stay away from bass caught from Lake Whatcom.

One with particular potency comes from my backyard. The properties that are relevant here are the treaty fishing properties. The so-called Stevens Treaties have off-reservation fishing clauses extending to a wide variety of fish, including shellfish.

At a meeting of tribal leaders in Umatilla a few weeks ago, they were quite struck by what a sign said, "Do not collect or consume bottom fish, shellfish or seaweed from Puget Sound waters in King County, particularly where warning signs are posted." I think that's saying twice - stay away from shellfish.

If you were a shellfish proprietor, you'd look at that as an offense, conceivably a taking, and certainly something you'd want to fix. The baseline that settles for a warning sign is not the baseline to which you aspire. You must look farther back to when shellfish could be used.

Let me turn to natural resource damages and the particular role of the Tribes. I was pleased that I was able to pick some of the same sites that our [keynote] speaker did last night. Tar Creek, the Pegasus Mine is a tremendous case, and references have been made to the Exxon Valdez.

But, first let me say a few words about the island of Kaho'olawe. I had the good fortune of being in the Marine Corps and, I was taught by a lot of those old Marines who fought in World War II. Before they went to the South Pacific they went to the island of Kaho'olawe, basically a practice island for the South Pacific invasions.

The naval vessels would pepper the island, the eighth island of Hawaii, it was blasted, peppered, smashed and obliterated in World War II in practice invasions, and now it's coming back. The Natives have had a tremendous role in that. There have been several acts of Congress dealing with the restoration of Kaho'olawe, the removal of the ordinance is a tremendous challenge. The inspiration there is present however, and the history is well known to many and it's still inspirational.

I wanted to call to your attention, to one of those amazing and ongoing restoration stories in which Natives have a tremendous role.

As a plea of sympathy, much of what you deal with and as practicing lawyers - I don't see how you do it. I mean, it's hard enough for me, an academic, where my reputation doesn't turn on getting it right every time.

There's a tremendous body of material that you have to absorb. This is just one example, the esoteric that you find in these codified environmental laws. I'll sum it up for you, although you're not supposed to do that with statutes. What the law says is that if the environmental impact statement identifies certain natural resource damages as something that's going to be lost on an irreversible and irretrievable basis, and if these are clearly speci-
fied, and if the specification of these losses do not violate the Indian Trust doctrine, then there can be no recovery from these natural resource damages.

Now, I've done the math for you on whether these things will actually happen, and my combined probabilities here come out to something like 4,500 to 1. It isn't going to happen, but at the same time you have to plan for it. So there is some transaction cost bound up in these calculations.

Now let me talk a little bit about the Teck Cominco case, and for those of you who are law students, you've all heard of the Trail British Columbia Smelter. It stands for the international law, and the proposition that a polluting source in one country shall not be allowed to contaminate another country.

Everybody knows, in theory, what the Trail British Columbia case stands for, but actually the smelter's still functioning, still discharging waste, and [that waste] is still arriving in Lake Roosevelt.

Lake Roosevelt, again, is one of these wonderful and among other things phenomenal tribal justice stories. Because behind Grand Coulee, as the flooding came - no one knows this better than Ray Cross - the Colville Indians were the primary victims, having their transportation disrupted, they lost their lowlands, tremendous losses over time, tremendous suffering over time. By the way, 50 years later they have a share of the revenues from Grand Coulee Dam. So that issue basically took 50 years to resolve.

But one of the contemporary problems from Teck Cominco is the discharge of these toxins coming down from across the border, down into Lake Roosevelt. Remember, Lake Roosevelt is behind Grand Coulee. To this day, [while] Grand Coulee probably had a big hand in the outcome of World War II, it's still the third largest generator of power on Earth from a hydroelectric facility. It's an incredible facility. No one's talking about taking out Grand Coulee, but the problems are still present.

And I just want to show you the graphics to try to make the connection to the technical people here, these pictures are phenomenal and they are so exciting, and they say so much. These pictures were prepared by the EPA staffers in Region 10 who worked on it.

You'll see measures here of heavy metals and up at the top you have the Canadian border. You have the river miles on the left-hand side as you come downstream, [and] the Colville Reservation starts up at the bottom of the picture there.

So you basically have a graphical presentation of the extent of the contaminants in the sediments as you move through time. And I think that first one is copper and then we have lead. Notice the different variations in the lead distribution, and higher concentrations down where the Colvilles live. The lead plaintiff is Joseph Pakootas, who is a Colville tribal member, a tribal council member. And now we have -- that's arsonic distributed through the same world. And there are a couple more of these slides showing you the distribution of heavy metals.
That case has just been decided by the 9th Circuit. No, not en banc yet, [but] they're seeking to go en banc. But this is a beautiful example of a complex, seemingly difficult question, with a history now extending well past a half a century.

Getting a legal handle on this case is a real challenge and we can't accept the black letter law that gave us the Trail Smelter rule without understanding that it isn't functional in fact.

Let me get back into the pictures I want to introduce you to. I want to use what, to me, are inspirational stories. We've heard references to the Tar Creek Superfund site, and again I want to show you a few pictures of that to give you a sense of the enormity of the challenges and why we should admire and applaud the people who actually take these things on. I speak to many staffers and often urge them, "look, you've got to write down your story before you're dead." This is important, these are important histories. And to do these and to undertake these challenges is enormous.

There are the so-called chat piles at the Tar Creek Superfund site. Mickey Mantle grew up there and I always wanted to think that he hurt his knee on one of those chat piles as he rounded first base; I'm not sure of that.

There are sinkholes at Tar Creek. And I won't pause, other than to say, how do you fix this? How much material do you move? Where do you move it? Do you just put up a sign and say, "We quit?" What is the aspiration as we attack these tremendous challenges and the dust?

To use a few case studies that have inspired me and that I know are huge challenges as we look ahead to the future. These are some of the big cases you're all familiar with. Interestingly, Lynn Scarlett mentioned Montrose Chemical as one of the big examples of a successful settlement.

I happen to know how that Montrose case started, and the histories are always much more elaborate than they appear to be. Montrose was the last producer of DDT in the United States and for many years it discharged its waste through the Hyperion Sewage Treatment Plant. So basically the chlorinated hydrocarbons would pass right through the sewage treatment plant into Santa Monica Bay, and that's the reason the Eagles haven't been there for 40 or 50 years. As you know, the chlorinated hydrocarbons get concentrated on the food chain. At the top of the food chain, [this is] the primary problem with both Peregrine Falcons and Bald Eagles. This goes back to the original EDF cases in the Wisconsin 1968 DDT hearing. The problem was soft-shelled eggs, the presence of the chlorinated hydrocarbons preventing reproduction. So when you see a Bald Eagle down there it really is a tremendous occasion.

But this case began actually before the 1972 Clean Water Act amendments, under the old Refuse Act that forbid dumping refuse into navigable waters.

When the 1972 amendments came in, like so much law -- that's why you've got to write it down -- what you do is copy something that works. And the old Refuse Act, it's still in the law, but it's copied in the Clean Wa-
The Refuse Act, that no discharge, which would be no pollutants -- no discharge of pollutants into navigable waters, that came right out of the Refuse Act.

The Muskie staffers worked on that. Tom Jorling was one of them, Leon Billings was the other, they were basically copycats in how they created the Clean Water Act, which was then known as the Federal Water Pollution Control Act of 1972. You can be tremendously creative if you copy the right regime.

So I'm not putting down copycats, we all do it and we want to see the best example and we want to see where it worked and apply those ideas elsewhere.

.Anyhow, there's tremendous experience in these cases. But I know that those [of you] - especially those of you working on this FACA committee on natural resource damages - it's both exciting and depressing when you look at the whole idea of the trustee council. What's so exciting about that? Here is a completely new institution just invented. Trustee councils, what are they supposed to do? Nobody really knows.

It's a regime that's invented there to do something. We do know the Justice Department said, "well, create these trustee councils and they should act by reference to unanimity." That's obeying the law, but how they do it, how they pick their priorities, what do they do for procedures, do we learn over time? These case studies are so important, we do want to learn over time on how they do it and we don't want to just do the same thing over and over and over again.

These are tremendously creative institutions, entirely new inventions, trustee councils, and they're working -- that's why I'm hoping this FACA committee can do something and let us know what's happening here.

By the way, I did have the privilege of working on the old original Federal Advisory Committee Act, and it was Lee Metcalf's law, a senator from Montana. And I have to tell you, I loved that guy. He was -- what a sweet man he was.

FACA was really a good government measure. We were going to get behind the influences of government and bring them into the open. There are a lot of good thoughts behind FACA and I hope they endure over time, and I have a lot of optimism about this new FACA committee and hope they do productive and important work.

Let me just mention three tribal cases [that] in many ways are inspirational. I want to show you some of the possibilities of natural resource damages.

To underscore something that Ray Cross mentioned about the importance of having theories, the importance of explaining where you've been, a big part of having the success over time, of course, is monitoring over time.

At Celilo, remember, that fishery that worked, there were eyes everywhere. It looks chaotic, they were all fishing with dip nets and they have these cable cars, and it looks like nobody knows what's going, but they really do know what's going on. Everyone can see what is happening func-
tionally over time. There is constant review and understanding and feedback and acknowledgment of what's happening over time.

It isn't easy to run these systems and it's really hard to run them effectively for 50 years and to monitor what's going on and to learn something as you go.

Here are some of the cases that have inspired me recently. That Makah case, the Tenyo Maru oil spill on the Washington coast. And you see the oil basically oiled the whole coastline there, killed 10 percent of an endangered species, had tremendous impacts on a wide variety of species. That's really the kill list of that Tenyo Maru oil spill. The case was settled in, again, a tremendously creative effort by -- one of the lead fellows was a lawyer named Bud Walsh, and he did a tremendous effort on this. John Arum is the attorney for the Makah.

These cases usually do end in a consent decree. So there's a special deal, a contractual resolution and there's some very creative details buried in there arising out of this three-party natural resource damage settlement.

The tribes do bring a different view, I think, not only their different law. Their interest in protecting subsistence and their desire not to have it submerged in a general acknowledgement of warning statements. They bring a different perspective, sometimes a longer view on the question of restoration. These are some of the details in the Tenyo Maru oil spill.

I notice from the agenda that you are going to have some people talk about the Coeur d'Alene case, very similar to what Teck Cominco is. My hats are off to the people who tried that. You know when you talk about scorched-Earth litigation, you want to pat them on the back before they pass. It's just so difficult to maintain these cases, and I have some of the particulars up there.

The tribal NRD action was very important here because it eventually brought the U.S. back into the picture. So there was some interesting political variations. That's what the litigation looked like, a tremendous trial. It had to be exhausting. And we have a tremendous record of what happened over there.

Whether we can bring it back and whether the restoration can survive the loss of American Smelting and Refining Company, whether we can do this over time, whether you can contain sediments at the bottom of a lake effectively, these are all the issues that you're facing at Milltown.

Let me say one thing about Milltown. If you don't show environmental benefits from these projects, they're not going to happen that frequently. There has to be some return on these endeavors or skepticism will take over.

Whatever you say about the old miners, they brought some economy to the community, and they did have jobs, while they did some damage along the way.

You can't ride the righteous expectation bandwagon very far. People want to see good things happen, and we heard wonderful plans for these
good things yesterday, but we do want to see this over time. And while many of these cases are now in their infancy, we'll have to see some returns.

I'll close with a series of comments on the Exxon Valdez and the re-opener, really the biggest natural resource damage case that there has ever been. There was a question yesterday about the use of criminal law and its relationship to the natural resource damages.

As far as I can tell in the original Exxon settlement, money moved from one category to another and money moved probably away from natural resource damages into the category of criminal fines, it's then distributed in a somewhat different way. So there is tremendous desecration and great challenges that the decision-makers face.

One other aspect of the natural resource damages -- or it's not part of the natural resource damages, but it's part of the case that I want to mention to you. You're always dealing with a little bit of pin the tail on the donkey. You know, "I'm only dealing with this part of the case."

I know one of the aspects of the case that has caused such great stress in Alaska all the way across the community are the punitive damages. And the trial up there - I guess it was concluded in 1994 - it was a spectacular trial. The lawyers who did it did a phenomenal job.

They came up with a judgment of 5 billion dollars and they used, as a reference point, Exxon profits for the preceding five years, averaged out to be 5 billion dollars. So they won that incredible verdict of 5 billion dollars in 1994.

This judgment is to be allocated among the fishermen, and I've talked to a lot of them and have a lot more on film talking about it. A lot of the natives and the fishermen were expecting to see this money in 1994. That has not happened.

So since 1994, it went up to the Court of Appeals once and the Court of Appeals, in light of Supreme Court decisions said, well, 5 billion is a little too much, and it went back down. Judge Holland set the damages at 4 billion, it went back up and the Court of Appeals said, well, in the light of this and that, it's a little bit too much and sent it back down. And Judge Holland then set the punitive damages at 4.5 billion dollars - this is known as the district judge is getting annoyed. That 4.5 billion dollar verdict was argued earlier this year, it's still pending. So there will be a big announcement and another ruling and a major initiative in the context of the Exxon spill. But we're talking about natural resource damages, that is, as you'll see, a sub-theme going on here.

The natural resource damages, the particular issues there were the progression of the oil spill as it basically traveled down and hit the 20 villages, tremendous impacts, not a few of which were occasioned by the cleanup.

There's a lot of debate whether the cleanup did more damage than the original spill. I don't know whether we'll ever resolve that.
The particular that I want to call to your attention is the so-called re-opener clause, and there have been several, I understand, in natural resource damage settlements. This is the first one that’s been invoked.

In this original settlement back in 1991, the spill of course was 1989, Exxon agreed to pay the money that went into the trustee council - 900 million dollars over ten years - but there was a reopener clause in there.

The particulars of the reopener clause were a wonderful example of creative law. It was made up at the time by the attorneys and there are six conditions. I want to just call them to your attention, because you can see how these six conditions present a number of issues that you will confront as you consider natural resource damages over time.

One of the conditions is, “one or more populations, habitat or species must have suffered.” Well, one of the big issues in natural resource damages is the extent to which you can take into account people. I mean, is subsistence a natural resource damage? Is, as Raymond Cross mentioned, damage to culture a natural resource damage?

This is a legal issue presented by this settlement decision. No one went to a court. And one of the, I know, difficulties that the state of Alaska had is that this language is addressed to ducks and seals and sea lions. There's nothing in there about people and, therefore, that money should be devoted to restoration only of the non-human living creatures. That's issue number one. Notice the other language they use, what about the degree of injury? A substantial loss or substantial decline in the areas affected by the oil spill.

Lynn Scarlett spoke of the importance of demonstrating restoration, but how do you measure it? Right now this case is testing the limits of ecological science, not only to mention law, the spill was in 1989. It's true the herring have never come back, but linking up that spill to damage 17 years later is really putting a lot of pressure on ecological science.

I have to say, on Exxon's behalf, they're looking pretty smart here, but I would think at some point they may well say, well, you know, global warming has had a role here, and of course, they haven't acknowledged that yet, but it may show up here defensively.

The question of proving this damage over time, and one of the difficulties with the herring, is that you do have these fluctuating populations. So what is natural over time and how long do you have to look at it?

The primitive old cause in fact: “did the refrigerator fall on somebody's head?” That's [not] the cause in fact we're dealing with. The ecological cause in fact is so much more subtle and so much more difficult.

I've been educated on this by a guy named Robert Paine, who is a great ecologist at the University of Washington. And they have difficulty tracing perturbations, as they say, through space and time.

[Then you have] your causation question. Show me that this damage, whether it's damage to subsistence, whether it's the depressed population of Harlequin ducks, whether it's whale -- the killer whale populations that
haven't come back, whether it's herring, show me that this is linked to that spill.

[Lastly,] if this ever goes to trial, let's give three cheers for all litigators. Injury could not reasonably have been known nor could it have reasonably been anticipated by any trustee.

Well, I guess that calls for discovery of everything the trustees knew and everything the trustee's scientists knew in 1991. Did anybody know -- could they have imagined that the oil would still be there many years later in toxic amounts, bio available, as they say. If that trial happens, I want to read about it, I'm not sure I want to be there.

And then cost of restoration must not be grossly disproportionate to the magnitude of the benefits anticipated. It's interesting. The extent to which cost benefit analysis actually figures in these cases, as you look through the law of restoration, the natural resource damages - the idea is to bring it back. And there is no explicit invitation to do the cost benefit, weighing what we know that we are going to be discovering in a lot of environmental law. But here we do have this little cost benefit test written into it for purposes only of the Exxon Valdez settlement, so very interesting case. And then the detail plans for restoration are to be filed 90 days before demanding any payment.

The long and the short of this - when the government was before Judge Holland in the original settlement, they explained the nature of the reopener and declared that the governments do not believe that they will ever need to invoke this clause. Of course, the lawyers who say this -- [herein lies] the problem with a 50-year litigation - mean "I'm not going to be here in 50 years, so as far as I'm concerned this is a dead issue." And as you know, when they negotiate these 50-years plans, that's exactly how they feel. In 50 years, I'm going to be dead. It's going to be somebody else's problem. And therefore, in some particulars this is a very successful resolution. I can go home happy. And I'm leaving it to the next 50 years. The governments, they are still here 15 years later and it's their problem.

There was some reference, Lynn Scarlett mentioned to the old calculus that have to be made in these natural resource damage cases. This is the best [guess] I [have] about how the reopener got set at 100 million, no reason at all.

The best re-creation [of] the situation: William Reilly, who was the EPA administrator in 1991, insisted that it be 300 million, so that's how it came out to 100 million. I know the Alaska governor, Wally Hickel, said the settlement had to have a "b" in it, as in b-b-billion. Divide it up any way you will.

What were the original damages calculated from the spill of the Exxon Valdez? Here you get the contingent valuation studies. One of the guys who did it, he was a colleague and friend of mine, his name is Gardner Brown -- actually, I tell the story of Gardner, but I think he started working for Exxon and then got traded to the U.S. I don't know how this came
about. There's always a deal, so I don't know how -- maybe they form draft
picks later or something, but he was able to work on both sides.

And when you hear Gardner talk -- You know contingent valuation, they
go around and ask people, how much would you pay if, and they were deal-
ing with the figures that Gardner had in the original spill, the 3 to 15 billion
dollars.

So I can see why Lynn Scarlett would look at that and say, "whoa, we
need a better methodology." Anyhow, that methodology hasn't been ser-
viceable and contingent valuation hasn't worked over time.

Now, the money of course is to go to restore, rehabilitate or acquire the
equivalent of, and can you buy exceptional places? That's another problem,
and I learned this lesson very well from my friends, the Columbia River
Indians, because as they lost their fishing places, they were looking for in
lieu sites. I don't want your money, give me another good fishing place.
But of course, there's always somebody else somewhere else. It came up
last night in the discussion, very adroitly, about off-site mitigation. Some
of that Exxon Valdez money went to Chesapeake Bay, maybe the FACA
advisory committee can do an investigation on that part of the expenditures,
because there is a lot of politics, do I dare say, involved, and remember how
this money gets allocated is anybody's business.

One of the real difficulties that I've had with that Exxon Valdez situation
is that the tribes weren't on it for a variety of legal reasons we don't have to
go into. But it does matter, if you are one of three trustees and they're sit-
ting at the table allocating the pot.

In any event, that's identification of some of the things lost. This is
Judge Holland saying, there is no particular, special tribal right of subsis-
tence.

The thing about subsistence, the reason that really helps, if you have a
subsistence claim on this matter of restoration, you have, as it were, the
property right and it's not a liability right. It's not really, I'm not happy, you
give me some money and then go to the grocery store, that does not exist in
Tatitlek.

If you take away the bidarkies and buy a grocery store, there's no way
you can compensate me for that, you have to make sure that the bidarkies
are there. When the Natives speak about the table being set as the tide goes
out, that's inspirational and moving and it's also legally significant, because
the argument is, make this suitable for my use and my need. That sign isn't
going to do it. It's got to be restoration, meaning those populations and
those species that we live on. Subsistence is very important here. Things
happen very rapidly in this transition. We did file a petition on behalf of the
Natives, but I never had an account of how this really happened.

One of the really interesting legal challenges in the Exxon Valdez re-
opener is that there was a deadline. So if the extra 100 million dollars was
not remanded by the U.S. as of June 1 of this year, it would have gone
away.
I certainly was hoping that the U.S. would do this, and I know there was tremendous interest on this issue within government circles and eventually the demand for the 100 million dollars was made, or in this instance, 92 million dollars. The plan was filed June of this year, the demand was made, and we'll see what happens next. As far as I know, it hasn't paid yet, but it seems to be a contested issue. We now have a live case on the reopener, and the reopener will be talking about ongoing natural resource damage 17 years after the Exxon Valdez.

I did want to show you, and I've included it in the materials, some of the evidence on damage to subsistence. This is somewhat out of the range of science that most of you deal with, but the Alaska Fish and Game did some very interesting studies and they had to come up with ways to measure damage to subsistence. You have on these materials, what they call the 10 Years After Study and the 15 Years After Study, which was an analysis of the extent to which subsistence in the Native villages had been damaged on an ongoing basis as a result of the spill. You'll see that in the nature of the questions asked how they purport to measure that loss.

In one sense [I] will apologize for my emphasis on the tribes, but in another sense, I will defend that choice. We're all looking for differences here that matter and inspirations that take a somewhat different direction, and ways for making these systems work. I think the tribes have a tremendous role here with these particular differences. And if they are at the natural resource trustee table, sitting on the councils themselves, I think the outcomes would be considerably different. Now, we'll never know, you'd have to run the experiment, and we don't run these experiments very well.

I've mentioned the importance of these subsistence uses and then the basic question of how you define recovery. You all have to do that. You'll all have to have an opinion on the baseline. You should all read Jeremy Jackson's work, he talks about how many turtles were in the Caribbean when Columbus was there. And you've got to answer [the baseline] question as you go along.

You know, FERC has its own baseline. FERC's baseline is what's left after the project that we licensed last time. So they have a very un-ambitious baseline in a FERC project. It's, "are you going to kill anything beyond what was already killed?" This is an important question for everybody.

Let me close by reiterating what I said. Again, it's so exciting, you're at a great historical moment in time and you want to capture it the best you can and measure its success over time, the best you can. And you've got to appreciate that something has happened here.

You know, you're living this history. So this Milltown Dam removal is as exciting in your part of the world as the Elwha Dam is in mine.

And for the scientists, you know, it's tremendously exciting. My dear friend, who's the head of the science center, her name is Usha Varanasi in Seattle, her scientists are so anxious to see the removal of the Elwha Dam because just below it four miles down you have the remnants of eight tre-
mendous species of salmon, including some of the largest [species of salmon] on the planet.

The Elwha River Chinook were all close to 100 pounds for the reason that they had to get up into the Olympics really fast. These are big, strong salmon. And I've seen them myself beating their heads against that dam.

The opportunity to see this new world unfold as the dam's removed is so exciting, and I thank you for inviting me.