



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

The Hanford Natural Resources Trustee Council and Making the Public Whole
By Russell Jim, Yakama Nation
HNRTC Meeting, January 17-19, 2012
Yakima, Washington



The Trustee Council has begun work on a preliminary estimate of damages. This work, if done properly, will serve the Trustee Council, budget planners and policymakers, and most importantly the public. It must be conducted in an open, transparent, and accountable manner, according to Council operating procedures. There will be differences of opinion about approaches for estimating damages and what the final report means for Hanford cleanup and for restoring resources, which is to be expected. However, transparent reporting of different assumptions and approaches and what they mean for estimating damages will be the primary value of this effort.

The Hanford Trustee Council has as its primary responsibility to make the public whole. That means that the Federal and State governments take actions necessary to restore or replace all injured resources on behalf of their citizens. It means that the Yakama Nation government ensures full restoration of resources under the Treaty of 1855.

However, this responsibility seems to have gotten lost somewhere between a lack of urgency and a desire to compile information while deferring decisions. More troubling, the Council at times appears to balance its trusteeship against competing interests which are in conflict with the duty to restore or replace injured resources.

This work is being conducted on behalf of the public, using public funding. Yet, there has been discussion by some trustees that significant Trustee Council work should be withheld from the public. Why? Because 'the public might not understand it.' They might 'blow it out of proportion.' We have even heard, 'what would we gain by releasing it? ... our lives are easier if we don't go down this path.'

So, have we come a full 180 degrees, from making the public whole to making our lives easier?

The law is clear that an entity responsible for hazardous releases is liable for NRDA assessment costs and damages. The Yakama Nation put its interests on the line to secure a Federal court ruling which affirmed that this work can and should begin before cleanup is finished. The Yakama Nation has a clear policy for Hanford which includes imposition of liability on responsible parties, as called for in CERCLA. This policy does not call for balancing injury assessment and restoration against competing interests.

The Yakama Nation intends that all resources which have been injured will be restored. The Yakama concern is that necessary work to carry out this damage assessment is being impeded or thwarted by interests which are in conflict with the public trust doctrine. Rather than focus on timely, efficient completion of the NRDA, the Council has sometimes adopted the role as mediator for interests outside of its authority.

It is not the duty of the Trustee Council to second guess DOE budget priorities, whether they pertain to nuclear weapons development, alternative energy, or cleanup funding. Trusteeship includes the responsibility to secure funds necessary to complete the injury assessment. Yet, the Council seems to readily adopt the role of defender of other DOE prerogatives at the expense of its own budgets – this year, the NRDA budget was cut in half by DOE, with apparent acceptance by the Council.

What is the cause of such deference to the responsible party? Hopefully this is not the result of DOE's role in funding the NRDA work. If a legal matter arises, should it be referred to DOE legal counsel? On the question of whether the PED is a public document, the Trustee Council requested the legal opinion of the polluter.

But let us be clear about the most troubling aspect of this process. DOE has legal obligations as a trustee. DOE also is also the liable party and is responsible to fund the assessment work. There is nothing contentious about this statement -- this is simply the reality under the law. All conflicts and difficulties arising from this situation can be resolved with a transparent and accountable decision process.

The problem arises when the Council sidesteps or ignores the distinct role of each trustee, and their specific obligations, in favor of conciliation on matters beyond the Council's mandate. The collaborative process established to represent the public trust is subverted when decisions consider not only trusteeship and making the public whole, but how legal or policy or budget concerns of the liable party should be factored into the decision process.

It is outside of the responsibility of the trustee Council to deliberate on policy priorities of DOE or of any other trustee. This is not to suggest that we should be ignorant of political reality. But taking into account and trying to resolve policy matters beyond the Council's authority dilutes and weakens the clear mandate to restore or replace injured resources.

We believe that in all matters pertaining to this Trustee Council, that DOE should uphold the highest standards of a trustee, as should USFWS and NOAA, to make the public whole. Any countervailing concerns should be left with those who are paid to do that work. We also believe that the trust responsibility by Federal agencies to Tribal governments should be carried out to the highest standards. We believe that each Federal representative here has an obligation to meet with our government, to consult on the NRDA, and to better understand how our Treaty rights and resources are affected.

By focusing on the work ahead solely as trustees, we expect to make significant progress in restoring Hanford's resources for the benefit of all. We look forward to the work ahead, to completing the preliminary estimate of damages, the injury assessment plan, and the assessment itself.

"...all Treaties made under the Authority of the United States, shall be the supreme Law of the Land...anything in the Constitution or Laws of any State to the contrary notwithstanding." (Article VI of the US Constitution)

"...the Treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

"How the words of the Treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

"The Treaty was not a grant of rights to the Indians but a grant of rights from them-a reservation of those not granted."

"The Treaty negotiations were with the tribe. They reserved rights, however, to every individual Indian as though named therein...And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees. That those rights are also reserved to the descendants of the Treaty Indians, without limitation in time..."