

Bait and Switch:

The Troubling Disconnect Between Natural Resource Trustees' Restoration Claims and Restoration Actions

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Now that there is at least a decade-long track record with natural resource damage (NRD) claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Oil Pollution Act (OPA) and the Clean Water Act (CWA), it is useful to compare the restoration damages claims asserted by natural resource trustees with the restoration measures selected and implemented by those trustees. Given that trustees represent to courts, to potentially responsible parties (PRPs), and to the public that their restoration damages claims quantify the amount of damages necessary to restore injured resources and lost resource services, it is reasonable to expect that trustees will implement either the restoration actions they use to quantify those damages or some similar restoration measure. Upon close examination, however, it is clear that there is a serious disconnect between some trustees' restoration claims and their subsequent restoration actions.

For example, the trustees' NRD claims arising from the Exxon Valdez spill were based upon alleged losses to fish, seabirds, otters, oiled beaches and other marine organisms, and habitat. It is somewhat surprising then that more than \$460 million of the \$900 million civil settlement recovered by the Valdez trustees has been spent to acquire title or conservation easements in land, including substantial amounts of uplands miles away from any of the impact areas.

Although some may debate the merits of such habitat acquisition measures and the extent to which they will restore the resource injuries caused by the Valdez spill, it is clear that the cost of such land acquisition measures was not the basis for the Valdez trustees' claims. The rather tenuous connection that appears to exist between the Valdez injuries, the settlement, and some of the restoration measures being taken is troubling given that each of the federal statutes authorizing NRD claims only authorize the recovery of compensatory NRD. When the connection between restoration claims and restoration actions becomes as loose as it appears to be in the Valdez example, serious questions arise as to whether the settlement was limited to compensatory as opposed to punitive damages.

Because the Valdez case was settled before trial and because it resolved claims arising from an emotionally charged accident

and its aftermath, there is reason to be cautious about drawing too many conclusions from that case. Unfortunately, the Valdez case experience is not the only instance in which trustees' injury and damages claims and the restoration actions taken by trustees have substantially diverged. In fact, there is a much clearer and greater divergence between the State of Montana's restoration damages claims relating to the Clark Fork River Basin when compared to its restoration actions taken to date. In the CERCLA NRD litigation it brought, Montana developed several restoration alternatives for each resource area ranging from monitoring the recovery of allegedly injured resources to creation of replacement resources through varying levels of physical restoration measures such as waste removal and re-vegetation efforts beyond those anticipated to be implemented

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as part of remediation. For many of the resources, the state selected the most intensive or one of the most intensive physical restoration or replacement scenarios. These intensive physical restoration efforts were projected by the state to cost over \$340 million. For example, the State estimated that \$54,550,000 would be required to construct, fill and operate two reservoirs in Butte, Montana to replace injured groundwater, even though Butte has, for many years, had a central water system with a clean water supply from another river basin. Although more than three years ago, the state settled its Butte groundwater restoration claim and most of its other claims for over \$120 million, the state has not even mentioned, much less taken any steps toward, the construction of those reservoirs. What has been clear to Atlantic Richfield for many years should now be clear to everyone: Montana's restoration claims were based on fanciful restoration scenarios whose only purpose was to generate a large monetary claim.

Montana has signaled what it really thinks about the restoration scenarios that formed the basis of its restoration damages claims by scarcely mentioning those scenarios in its recent document entitled *Restoration Plan Procedures and Criteria*. In that document, the state completely abandoned the restoration scenarios that formed the foundation for its restoration damages claim and asserted that "The state believes the preferable approach is to develop and fund annual restoration work plans based upon proposals for projects from a variety of governmental agencies, individuals and private entities." The state also fundamentally altered the timing and magnitude of the restoration measures to be implemented by

deciding that its restoration planning process will occur on an annual basis and that the annual restoration grants will be limited to the interest generated by the settlement trust fund. The state is now nearing completion of its third annual restoration grant process. With only one or two exceptions, the restoration projects being funded do not even remotely resemble the restoration scenarios upon which the State based its original claim.

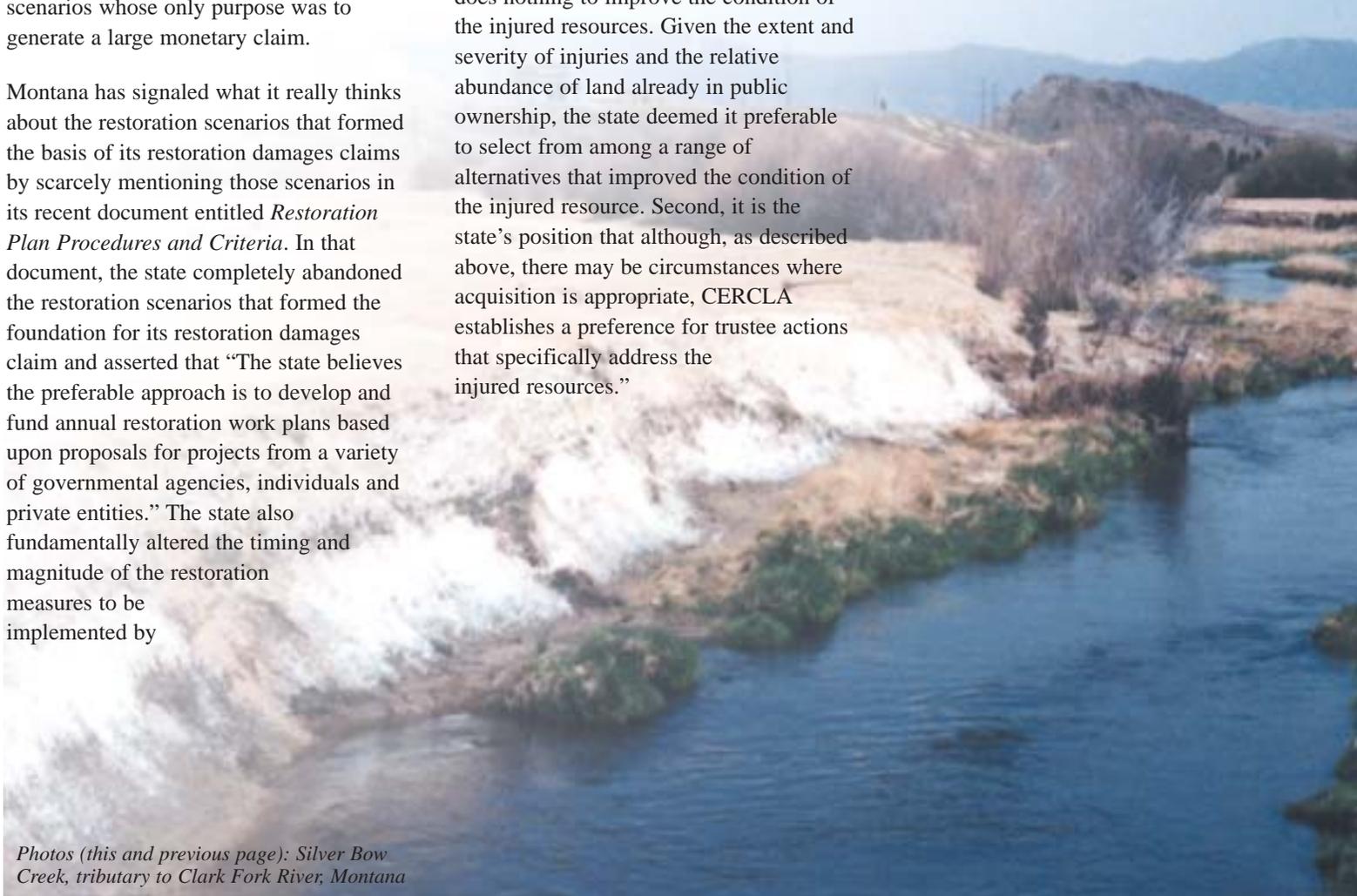
Even more remarkable is the fact that the state has granted or is in the process of granting more than \$8 million to obtain title or conservation easements in land. This is remarkable because in its litigation papers the state justified, in part, its selection of expensive physical restoration measures by arguing that "the state decided, with one exception, not to display alternatives that entailed acquisition as a means of replacing lost services. The state arrived at this decision for two basic reasons. First and foremost, acquisition does nothing to improve the condition of the injured resources. Given the extent and severity of injuries and the relative abundance of land already in public ownership, the state deemed it preferable to select from among a range of alternatives that improved the condition of the injured resource. Second, it is the state's position that although, as described above, there may be circumstances where acquisition is appropriate, CERCLA establishes a preference for trustee actions that specifically address the injured resources."

The state's sudden and unexplained change of heart suggests that the state's earlier restoration scenarios were simply litigation positions intended to extract the maximum payment possible and not bona fide restoration measures the state expected to implement. The state's change of heart may also be a tacit acknowledgement that where remedies such as those selected in the Clark Fork River Basin fully consider ecological risk issues, there are few, if any, residual injuries remaining to be addressed. Regardless of the motivation for the state's fundamental change in position, such bait and switch tactics must be eliminated if NRD claims, and CERCLA NRD claims in particular, are to result in the kind of prompt, cost effective compensatory restoration that Congress intended.

Information concerning the Exxon Valdez trustees' claims and restoration actions is available at www.oilspill.state.ak.us.

Information concerning the State of Montana's restoration planning and implementation is available at www.doj.state.mt.us

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Photos (this and previous page): Silver Bow Creek, tributary to Clark Fork River, Montana