

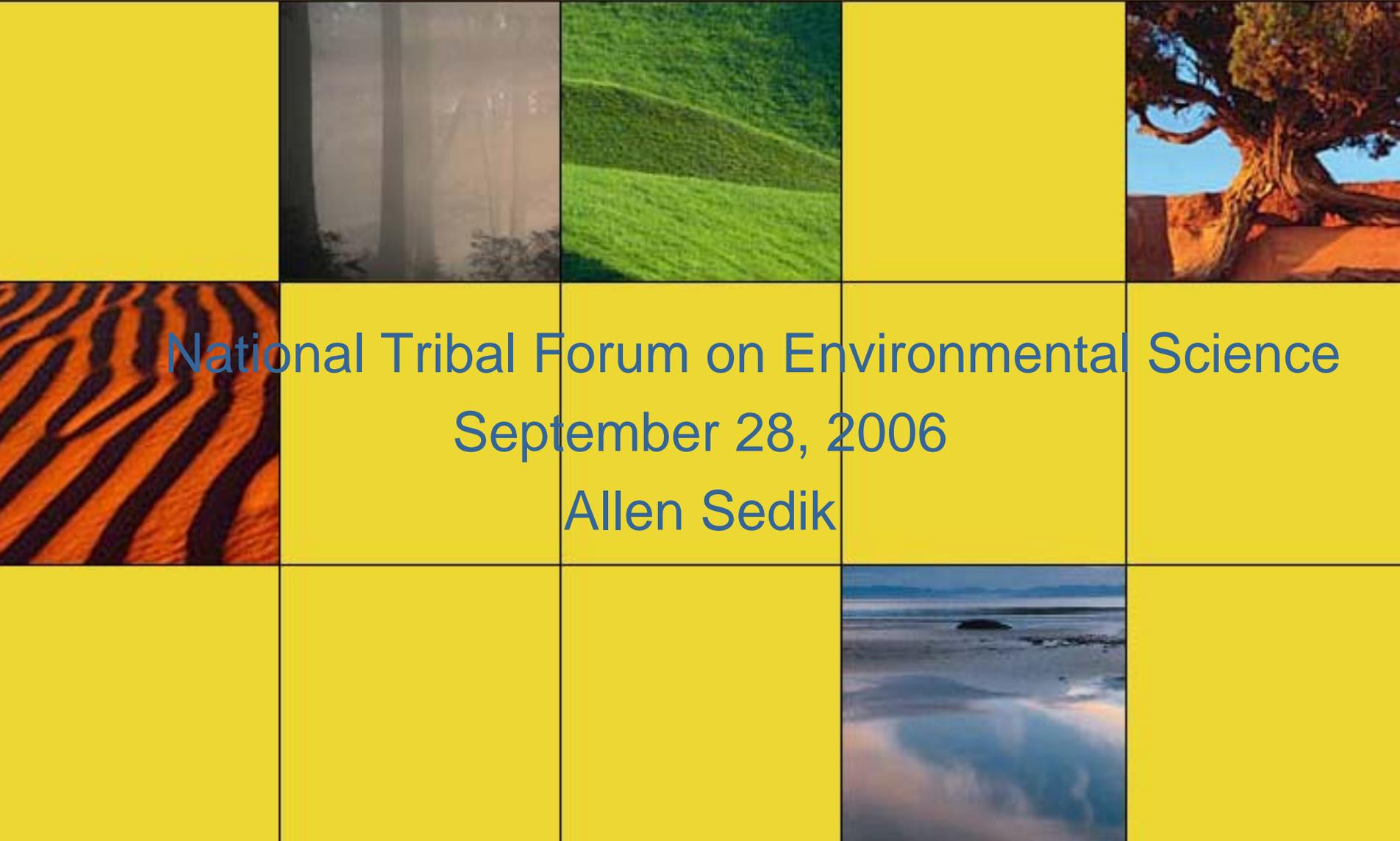
NRDAR: Tribal Trusteeship

Nothing is Easy

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“Not Easy,” but Important

- Reservation resources and natural resources appertaining to a tribe are the tribe’s world
- Tribal resources are limited and restrictions on use may be viewed as abrogating treaty rights

(abrogate-to abolish or nullify by formal or official means)



Use Restrictions: Examples

- Fish advisories
- Hunting advisories
- Use restriction of trust land.



Tribal Trusteeship is Complicated

CERCLA and OPA –
Similarities and Significant Differences



Formal Designation of Trustees

- Created in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA)
- Designated in Subpart G of the National Contingency Plan (NCP), 40 CFR Section 300.600 (b)(2)



NCP- Designated Trustees

- Secretary of the Interior
- Secretary of Commerce
- Secretary of Agriculture
- Secretary of Defense
- Secretary of Energy
- States
- Indian Tribes
- Foreign Countries



Natural Resources- Definition

- “Land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources...” CERCLA Sect. 101 (16); OPA Sect. 1001 (20)



CERCLA Definition of Indian Tribe

- Section 101(36) – definition of “Indian tribe” – “any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native Village but not including any Alaska Native regional or village corporation , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” (federally recognized Indian tribe)



Tribal Trusteeship – CERCLA

- Section 107(f)(1) – “...for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation...”



OPA's Definition of Indian Tribe: CERCLA with a Twist

An Indian tribe is “any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and **has governmental authority over lands belonging to or controlled by the tribe.**” (OPA Section 1001(15))



Tribal Trusteeship - OPA

- Section 1006(a)(3) –“for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe..”



Tribal Trusteeship – Treaties and Settlement Acts

- Treaties – may create or affirm rights
- Executive Orders – may establish reservations
- Aboriginal Rights- on or off reservation
- Statutes/Settlement Acts- may extinguish or confirm certain aboriginal or treaty rights and/or claims based on interest in natural resources and/or land
 - § 1723 of Maine Indian Claims Settlement Act (25 U.S.C. §§ 1721 et seq.)
 - Connecticut Indian Land Claims Settlement Act (25 U.S.C. §§ 1751, et seq.)
 - Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Title II of P.L. 101-618, 104 Stat. 3294)



Tribe as Trustee

- Can act on their own or have the Federal Government act as trustee on their behalf
CERCLA Section 107(f)(1), Section 107(f)(2)(A) with Section 126(d)(2), 42 USC Section 300.600(b)(2), OPA Section 1006(c)(1)(B), and Section 1006(c)(3)
- Statute of limitations may be extended 2 years— CERCLA Section 126(d)



Tribe as Trustee Cont.

- Rebuttable presumption not applicable if tribe acts as own trustee – CERCLA Section 107(f)(2)(C)
- BIA is a co-trustee over the same natural resources as the tribe - CERCLA Section 107(f)(2)(A) with Section 126(d)(2), 42 USC Section 300.600(b)(2), OPA Section 1006(c)(1)



Tribe as Trustee Cont.

- Tribe is a member of the trustee council
 - Decisions by consensus
 - Confidentiality agreement
- Funding sources
 - DOI NRDAR Program fund
 - BIA Attorney and litigation support funds



Tribal Claims

- Tribal damages likely to include proportionately large claim for lost cultural use **of natural resources**
- Quantification is difficult because lost cultural use **of natural resources** is “priceless”
- Other Trustees (DOI, NOAA, State) will not be claiming damages for tribal lost cultural use **of natural resources**, so consolidated claims are important



Use of Recovered Funds

- General standard for the use of recovered funds is for the restoration, rehabilitation, or replacement or acquisition of the equivalent of injured natural resources; and
- Reimbursement of past assessment costs.



“Acquire the Equivalent” may not be a Viable Option for Tribes

- Acquisition of non-reserved resources would lack trust status protections
- Treaties did not envision acquisition of equivalent to compensate for lost resources



If not a Natural Resource Trustee, the Tribe may be a “Claimant” for Damages under OPA

- OPA defines claimant as “any person or government who presents a claim for compensation..” OPA Section 1001(4)
- As governments, Indian tribes may be claimants
- As persons, tribal members may be claimants



Types of Damage Claims Allowable

- **Real or Personal Property** – “Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable, by a claimant who owns or leases that property.”
- OPA Section 1002(b)(2)(B)



Types of Damage Claims Allowable Cont.

- **Subsistence Use** – “Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.” – OPA Section 1002(b)(2)(C)



What is Subsistence Use of Natural resources?

- A subsistence use of natural resources is a historical or long-term, non-commercial dependence on natural resources to obtain the minimum necessities of life. This may include the use of a natural resource for one or more of the following purposes –
 - Direct personal, family or household consumption as food, medicine, shelter, fuel, clothing, tools or transportation;



What is Subsistence Use of Natural resources? Cont.

- Making and selling handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal, family or household consumption;
- Barter or sharing for personal, family or household consumption;
- Customary trade; and
- Perpetuating traditional subsistence-based cultural or customary ways of life.



Types of Damage Claims Allowable Cont.

- **Profits and Earning Capacity** – “Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.” – OPA Section 1002(b)(2)(E)
- More information can be found on the National Pollution Funds Center Website
www.uscg.mil/hq/npfc



DOI NRDAR Program Fund

- Tribe must be a member of the trustee council along with DOI, or have DOI acting on their behalf
- A DOI Bureau submits the funding proposal to the NRDAR Program Office
- Reimbursable funding process, **NOT** a grant
- All Program funds received must be accounted for in detail, at a minimum, on an annual basis
- Any recovered past assessment costs, up to the amount provided by the DOI NRDAR Program Office, must be repaid to the DOI NRDAR Program Office



Types of Funding

- **Feasibility Funding**
- **Initial Case Funding**
 - Must have a PAS, MOU and a DOI Authorized Official assigned
 - Highly competitive
- **Ongoing Case Funding**
 - Requires submittal of an annual proposal
 - Milestones must be met and progress demonstrated



BIA Attorney Fee and Litigation Support Funds

- Procedures for requesting attorney fee funding are in 25 CFR 89.43
- Requests for litigation support funds require
 - Why the funds are required
 - What the funds will be used for
 - Breakout of the amount of funding needed for each activity
- Submit request to
 - BIA Division of Natural Resources
 - 1849 C Street NW
 - MS 4655 MIB
 - Washington, DC 20240
 - Attn: Bob Gartner



Sovereigns

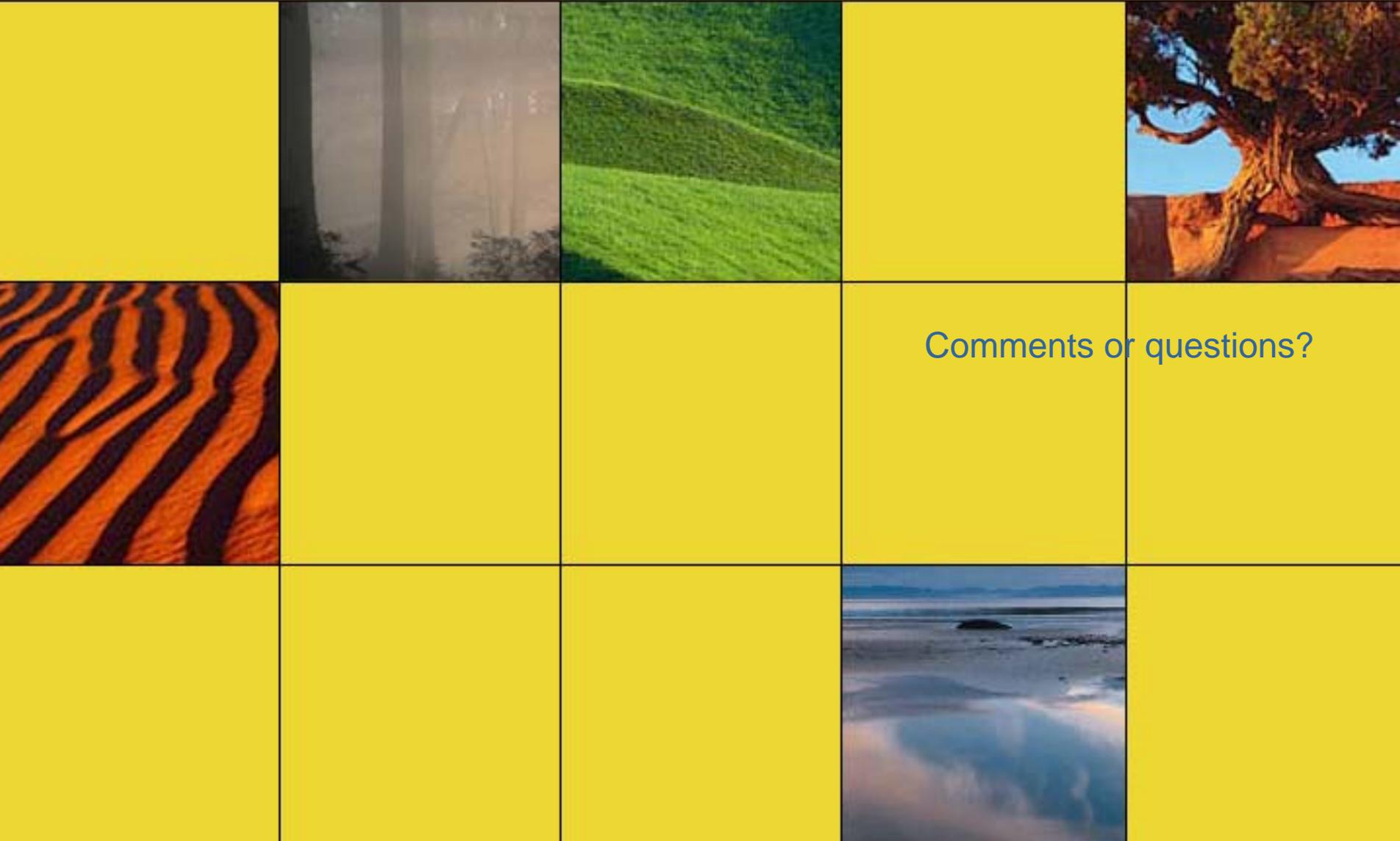
- Indian tribes are separate sovereigns
- In general, states do not share natural resource trusteeship with tribe for reservation resources
- All federal agencies, including each DOI bureau, have trust responsibility for tribal trust resources



Contact Me

- If you have questions -- or
- If you'd just like to talk NRDAR
- Please contact me at
- 202-208-5474

Thank You!



Comments or questions?