

NATURAL RESOURCE DAMAGES & LIABILITY: NEGOTIATION EXERCISE
FALL 2016

Background: Nestled deep in the Colorado Rockies, the Oso Negro silver mines have yielded over \$2 billion worth of ore during the past two centuries. Discovered by pioneer prospectors in the early 1800s, the mines attracted a steady stream of small mining companies that steadily dug deep into the mountainside. With a brief break during the Civil War, the mine operated continuously and yielded silver, lead and copper. In 1898, the mining corporate giant Jackson Campbell, Inc., purchased the site and operated it continuously until the start of World War II. At that point, the U.S. Department of Defense purchased the site from Jackson Campbell as a critical wartime asset, and it then controlled and operated the site until 1949. At that point, the United States sold the site to the family-owned mining partnership Halter Hills LLP. Halter Hills ran the site for nearly 50 years, and the company still owns the mine today.

To extract usable concentrations and quantities of silver, lead and copper from the mine, the operators all used similar techniques. First, they blasted the rock to excavate tunnels into the mountain. This process created enormous piles of rubble and debris, which remain piled near the mine today. This debris contains trace amounts of explosives residue. Second, they crushed the usable ore into large piles, sprayed acidic washwater onto the piles, and then extracted the silver from both the washwater and small fragments washed from the piles. They also removed large ingots that contained visible traces of lead. This process resulted in substantial piles of overburden and waste rocks. Last, each of the operators used an on-site smelter with an open furnace to melt some of the ore to recover usable concentrations of copper and lead. This process created enormous heaps of waste slag. The operators piled the slag into large mounds near the mine. All of the waste piles are exposed to the elements, and rainwater runoff from them flows directly to the adjacent Hester's Slough, a meandering and muddy creek that ultimately feeds into the Colorado River.

The smelter's smokestack emissions have caused substantial soil contamination over 40 square miles downwind from the mine. The contamination consists predominantly of lead, and it forms a continuous gradient of poisoned soil from the mine's boundary into New Mexico.

The contamination, as expected, has affected wildlife in the region. Hester's Slough has become a lifeless stream with brightly discolored sediments, and in fact there are no records of any fish, mammals or even bacteria in the stream for over 50 years. The contaminated soil from the smelter emissions has allegedly depressed reproducing populations of raptors and migratory songbirds. And the mine, of course, remains an open eyesore, and it continues to discharge highly acidic leachate that contains extreme concentrations of heavy metals.

The mountain's veins have now played out, and the mine shut down in 2005 when new environmental permitting and closure requirements appeared likely. Halter Hills LLP remains in existence as a wholly-owned subsidiary of Halter Monopolies, which operates profitable mines through other wholly-owned subsidiaries.

The Remediation. The U.S. Environmental Protection Agency (EPA) has investigated the mine site, and it has decided to add the site to the National Priorities List as a federal CERCLA site. EPA has issued general notice letters to Jackson Campbell, Inc., Halter Hills LLP, Halter Monopolies, and the U.S. Department of Defense. Given the potentially sizable environmental impact of the site, EPA has also offered to include natural resource damage claims in any consent agreement or order that would resolve liabilities at the site and help implement a speedy and effective cleanup of the site.

The remediation effort under CERCLA will likely involve the removal, consolidation and capping of contaminated sediments at a large on-site landfill at the abandoned mine. Hester's Slough will have its contaminated sediments removed and added to the landfill. The mines will require an on-going active dewatering program and treatment plant to make the mine leachate suitable for discharge to the stream. This remediation will require at least 15 years and nearly \$100 million. EPA has notified Jackson Campbell, the U.S. Department of Defense, Halter Hills Inc., and Halter Monopolies that the agency has initially classified them as a potentially responsible party.

The Restoration. The State of Colorado wishes to restore the damaged natural resources, but it has taken a much more aggressive stance than the United States and its trustee, the U.S. Fish & Wildlife Service. The State has already prepared a complaint to seek damages for injuries to natural resources within its jurisdiction, and they have approached a sophisticated outside plaintiff's firm to help pursue the claim.

The Haddad Hopi tribe has ancestral lands within its tribal jurisdiction that have become contaminated from the smelter emissions and washed out sediments from the tailings piles. They historically fished in Hester's Slough before the mine began operations, but they have obviously avoided fish from the stream for nearly a century. Runoff and leachate discharges from the abandoned mines also potentially threaten their groundwater and drinking water sources. Last, the tribe has historically used an area adjacent to Hester's Slough for tribal religious ceremonies that involve bathing in the river. Because of recent sampling results, the tribe has been forced to abandon its ceremonies at that location.

Last, other parties have emerged who may play a key role in the restoration effort. The Oso Negro Mountainkeeper is an environmental advocacy group that pursues strategic litigation to force environmental remediation and citizen suits to force compliance with federal and state

environmental laws. They want to intervene and participate in any natural resource damage discussions and cleanup actions, and it aggressively uses lawsuits and lobbying to pursue their goals. Green Insurers, by contrast, is mainly concerned about clarifying its potential liability for restoration costs at the site as the insurer for Jackson Campbell, Inc. The company issued a comprehensive general liability policy to the business in 1968 that would cover a sudden and accidental release from the company's operations that caused pollution. The policy limit is \$1 million.

EPA has not yet selected a final remedial action to clean up the site contamination, and the trustees have not yet even begun to identify possible natural resource restoration actions. Rough initial estimates for the remediation costs reach up to \$100 million to remove contaminated sediments and soils, and the restoration action can cost up to \$50 million based on the selected action.

The Challenge. The State of Colorado has delivered a demand letter to all of the potentially responsible parties, and they have decided to meet to negotiation a preliminary agreement in principle to proceed at the site (if possible). The parties and their counsel include:

Party	Counsel	Notes
Jackson Campbell, Inc.		
United States Department of Defense		
Halter Hills LLP		
Halter Monopolies		
Haddad Hopi Tribe		
State of Colorado		
Oso Negro Mountainkeepers		
U.S. Fish & Wildlife Service		
Green Insurers		

Jackson Campbell, Inc.

- Your client started the first significant mining operations at the site, and has likely contributed to substantial portions of the site contamination (including air emissions, sediment transport and groundwater impacts). As a result, Jackson Campbell, Inc. will almost certainly be identified as a major potentially responsible party at the Oso Negro site.
- While Jackson Campbell complied with all applicable state laws and obtained proper licenses for undertaking mining operations, it did not ever receive a federal permit or other environmental authorization because the federal government at that time did not require them.
- Jackson Campbell is a large multinational corporation that still posts billions of dollars of corporate earnings on an annual basis. It continues to operate substantial mining assets in the United States.
- At this time, we have not yet located the purchase agreements between Jackson Campbell, Inc. and the U.S. Department of Defense (at that time, the U.S. Department of War). As a result, there is no information about possible indemnification arrangements or retentions of liability.
- Jackson Campbell recognizes that it will bear a large portion of responsibility for the site, and is willing to cooperate in remediation and restoration activities. It will not do so without significant participation by all responsible parties, and it will gladly seek out creative solutions that will minimize its ultimate liability.

The U.S. Department of Defense

- The U.S. Department of War assumed outright ownership of the Oso Negro site to maintain wartime production of critical metals needed for the war effort during World War II. In that capacity, the Department oversaw and directed the creation and disposal of the tailings waste piles, air emissions from the smelter operation, and depositing of waste slag onsite.
- The Department acknowledges that its activities contributed to contamination, but it feels that it cannot become a major potentially responsible party at the site without exposing itself to huge environmental liability risks from contamination at innumerable other mines and metal operations conducted during World War II.
- The Department would consider a minor contribution to the clean-up effort (either in cash, services or both), but only if it included a denial of legal responsibility as part of a settlement to resolve potential litigation risks. The Department also remains open to a creative settlement that would minimize its ultimate remediation and restoration liability risks.

Halter Hills LLP

- Halter Hills LLP is a small company owned by the same for over fifty years. The sole asset of the company is the Oso Negro Site. The company has a small amount of available funds and considerable technical expertise with mining operations, and its employees are deeply familiar with the site and its past operations.
- Halter Hills LLP's owners feel strong that their small-scale operations during the past 50 years have made only a small contribution to the overall contamination at the Site, and that they should pay only a small share (if any) of the remediation or restoration costs. In particular, the company owners deny that they ever operated the smelter, and Halter Hills LLP did not disturb or add materials to the large historical slag piles left by Jackson Campbell, Inc. and the U.S. Department of Defense. They also took no steps to protect the piles from environmental exposure or dispersal from wind and rain.
- Halter Hills LLP took out the comprehensive general liability insurance policy with Green Insurers, and it is the sole beneficiary of the policy's \$1 million coverage.
- In 2000, Halter Hills LLP was merged with a new holding company, Halter Monopolies. Halter Hills LLP is now a wholly-owned subsidiary of the holding company. The two companies share exactly the same officers, directors and management team, and the Halter family effectively operated the mine for Halter Hills LLP while serving as the controlling parties of Halter Monopolies.
- Despite their strong denial of responsibility for the bulk of the site's contamination, Halter Hills LLP and its owning family are willing to participate in any creative or innovative settlements that might get the site cleaned up and minimize their liability. If at all possible, however, they want to maintain control and ownership of the site after it is cleaned up (and restored to full market value).

Haddad Hopi Tribe

- The Haddad Hopi tribe has lived in the area adjoining the Oso Negro Site for centuries, and the forested areas nearby are their ancestral home. The tribe is recognized by the U.S. federal government, enjoys treaty rights that guarantee them the ability to fish in the Colorado River, and have their own reservation territory next to the mine. As result, the tribe has status as a natural resource trustee for any fish or animals from their reservation territory that might be injured by contamination from the mine.
- The Oso Negro mine lies in a mountain that has always held special religious significance for the Haddad Hopi, and they believe that the Wind Spirits make it their home. Before the mining operations began, the Haddad Hopi held religious ceremonies on the mountain, and they sent their young men to the mountain for spirit quests as a right of passage into adulthood. The mountain and surrounding forests retain deep cultural and religious significance for them, although they do not have any ownership or property interest in them outside of their reservation territory.
- The Haddad Hopi have always viewed the mining operation as a sacrilegious action, and they have historically opposed the issuance of any mining permits or expansion of industrial operations at the site.
- The Haddad Hopi strongly support a full remediation and restoration of the mountain forests, and they want to assure that mining operations do not restart at the mountain for the foreseeable future. They remain open to any creative resolution that would assure a speedy restoration of the Site which meets these conditions.

U.S. Environmental Protection Agency

- The U.S. Environmental Protection Agency is responsible for the remediation of the Oso Negro site. The agency, however, has no capacity to act as a natural resource trustee for any wildlife or fish resources located on or near the Oso Negro site.
- The size and scale of the contamination at Oso Negro poses a substantial challenge to the agency's resources. As a result, it will either seek to shift as much costs as possible to responsible parties, or will want to select a remedy that will not consume an unreasonable amount of its clean-up funding. If so, EPA will likely prefer to consolidate contaminated soils and sediments into an on-site landfill, cap them with an impermeable plastic layer, and then monitor the landfill for decades to assure that it does not contaminate groundwater or other resources. EPA would also prefer to seal the mineshafts and leave the contamination in place within the mountain (if it can verify that this approach would keep any pollutants entombed for the foreseeable future).
- While EPA is willing to issue a unilateral administrative order to the potentially responsible parties to clean up the site and restore its natural resources, the agency views this option as a last resort. Such an order would be extremely controversial, could spark contentious litigation in the future, and may not be legally enforceable against another federal agency (the U.S. Department of Defense).
- EPA is willing to be creative and flexible in reaching a settlement, but only if the agreement assures that the mining site is fully remediated. It is willing to assist with any natural resource restoration efforts, but only if they do not unreasonably impede the immediate cleanup.

State of Colorado

- The State of Colorado is a trustee for natural resources damages by contamination from the Site, in particular the adjoining forested areas, the waters and subsurface banks of Hester's Slough, and any migratory waterfowl that use those areas. While it prefers to restore the damaged areas through directly remediating and recreating the contaminated areas to their original state, the State is also willing to entertain creative alternatives or monetary compensation that can be used to expand other natural resource areas held by the State.
- The State is a participant in EPA's remediation action, but it is contributing only a 10 percent share of the costs for any agency-lead action at the Site. Colorado strongly prefers a remediation action that removes the contamination as much as possible for offsite disposal in a landfill located in another state. Colorado also prefers to dredge the contaminated sediments from Hester's Slough and rebuild the stream. Choosing this strategy would likely double the costs of EPA's proposed \$100 million remedial action.
- The governor's office (and the agency leadership appointed by her) are from the opposite political party from the current holders of the U.S. Presidency and the controlling party of both Houses of the U.S. Congress. As a result, tensions between the state and the federal political leadership have grown substantially, and the State feels little compunction in pursuing remedies and restoration that might involve financial contribution, liability or public exposure of the U.S. government.
- If the United States and other natural resource trustees cannot reach a settlement in principle that fully compensates the State for all of its estimated damages to state resources (approximately \$10 million of the total \$50 million estimated restoration costs), the State is willing to pursue its own natural resource damage recovery action under Colorado state laws, public nuisance actions and public trust theories of recovery.

U.S. Fish & Wildlife Service

- The U.S. Fish & Wildlife Service (F&WS) is acting as the lead natural resource agency for coordinating trustee discussions and joint statements. F&WS has a strong interest in full recovery of the estimated \$10 million in natural resource damages, including any costs needed to restore wildlife and migratory waterfowl injured by contamination at the Site.
- F&WS is open to innovative and creative settlements, and it is sophisticated in assessing and implementing restoration actions that involve the valuation of lost natural resource use and offsetting that loss through creation or expansion of alternative or substitute natural resources.
- F&WS wants a settlement as soon as possible so that restoration can begin immediately without requiring a substantial contribution from the agency's limited funds.

Green Insurers

- Green Insurers is a large corporate insurer that writes policies to cover a broad range of risks, including casualty, home owner, automobile and business risks. It is not a specialist in environmental risk policies or Superfund sites. Frankly, it is perplexed and bewildered to be brought into this large Superfund action and natural resource damage restoration claim based on an old historical policy issued long before the CERCLA program was in existence.
- Green Insurers issued a large number of this type of comprehensive general liability policies to businesses to help protect them against risks such as fires, business interruption, theft, and other normal business risks. As a result, Green Insurers is deeply concerned that any concession of liability at this site will open the floodgates of liability claims from its other policy holders who have become potentially responsible parties at CERCLA sites.
- Green Insurers frankly doesn't care about restoration of the natural resources or the remediation of the site – it only wants out of the site as quickly as possible without jeopardizing the company's legal position at any future Superfund or natural resource damage cost demands. It is willing to offer up to \$500,000 to settle the claim, and – if pressed – it would consider paying up to the full value of the policy. But the company will absolutely not concede any liability or legal responsibility for payment of these types of claims under comprehensive general liability policies.