

THE RIGHTFUL POSITION: THE BP OIL SPILL AND GULF COAST TRIBES

“Only after the last tree has been cut down . . . the last river has been poisoned . . . the last fish caught, only then will you find that money cannot be eaten.” – Cree Indian philosophy.¹

I. INTRODUCTION

On April 20th, 2010, an oil rig named *Deepwater Horizon* suffered a massive explosion, killing eleven people, injuring dozens more, and kicked off the worst environmental disaster in United States history.² Among the victims, including the eleven oil rig workers killed in the initial explosion,³ are commercial fisherman, restaurant owners, the tourism industry, and, of course, the Gulf Coast itself.⁴ Alongside these victims are tribal nations that inhabit the coastal regions.⁵

One such Indian nation, the United Houma Nation, faces a particularly harsh struggle. The Houma, alongside other non-federally recognized tribes, faces unique struggles that their federally recognized brethren do not.⁶ For instance, federally recognized tribes are allowed to participate in the spill recovery process and are in direct contact with government

¹ FAMOUS QUOTES, STUDYENGLISHTODAY.NET, <http://www.studyenglishtoday.net/quotes.html> (lasted visited Oct. 3, 2010).

² CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41262, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 1 (2010).

³ Guy Crittenden, *Understanding the initial Deepwater Horizon fire*, HAZMAT MAG., May 10, 2010, available at <http://www.hazmatmag.com/issues/story.aspx?aid=1000370689>.

⁴ Greg Bluestein, Mary Foster & Tamara Lush, *100 Days of Oil: Gulf Life Will Never Be the Same*, ABC News, <http://abcnews.go.com/Business/wireStory?id=11266280> (last visited Mar. 8, 2011).

⁵ See Terri Hansen, *Gulf oil disaster propels tribes into crisis*, MOTHER EARTH JOURNAL, <http://mother-earth-journal.com/2010/05/tribes-face-crisis-after-oil-spill-in-gulf/> (last visited Mar. 8, 2011).

⁶ *State recognized tribes face greater oil spill risks*, IND. COUNTRY TODAY, <http://www.indiancountrytoday.com/national/95612344.html> (last visited Mar. 19, 2011) [hereinafter *State recognized tribes*].

officials.⁷ However, as spill cleanup is ongoing, irreversible damage has already been done.

Those that have been harmed by the oil spill seek an adequate remedy. On June 15, 2010, President Obama promised the nation he would “make BP pay for the damage” it caused.⁸ Subsequently, at the President’s urging,⁹ BP allocated money to fund an escrow account managed by the Gulf Coast Claims Facility¹⁰ and its administrator, Kenneth Feinberg.¹¹ In addition, aggrieved parties may seek compensation from the Oil Pollution Act of 1990 (“OPA”), passed in the aftermath of the *Exxon Valdez* oil spill.¹² However, with a damage cap of \$75 million dollars, the remedy under the OPA has been considered less than adequate.¹³

For the Houma, and other Gulf Coast tribes, the question revolves around how adequate can a remedy be when the harm done is to Indian culture itself. Part II explores a brief history of the *Deepwater Horizon* incident which later brought on the oil spill. Part III looks at the damages done to tribal agricultural and communities. Part IV analyzes the nature of Anglo-American remedies law and how it is incompatible with Native American values by showing that communal harm is not a cognizable basis for damages. This Comment asks whether there is such a thing as an adequate remedy when American law only recognizes harm to the individual, and not the communal harm suffered by Native American communities.

Thus, the conclusion presents itself: adequate remedies for Native American cultural injuries can only be created by Congress, the branch

⁷ *Id.*

⁸ Barack Obama, President of the United States, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

⁹ In his blog, the Honorable Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, opined that President Obama’s use of his “prestige,” and “moral authority” as President may have constituted an abuse of presidential Power. Richard Posner, *Abuse of Presidential Power?*, BECKER-POSNER BLOG (July 18, 2010, 4:21 PM), <http://www.becker-posner-blog.com/2010/07/abuse-of-presidential-power-posner.html>.

¹⁰ GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com> (last visited Feb. 22, 2011).

¹¹ *See* GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/press1.php> (last visited Mar. 8, 2011).

¹² *See* JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL33705, OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS 9 (2010).

¹³ *See* Kim Hollaender, *The BP Oil Spill and Its Impact on Industry Players and Their Attorneys*, in UNDERSTANDING THE BP OIL SPILL AND RESULTING LITIGATION: AN IN-DEPTH LOOK AT THE HISTORY OF THE OIL POLLUTION AND THE IMPACT OF THE GULF COAST OIL DISASTER (2010), available at 2010 ASPIA 11.

that has the power to regulate commerce with the Indian tribes.¹⁴ Judicial review cannot provide an adequate remedy. United States Supreme Court Justice Jackson opined that adjudicating Indian claims would occur with a false pretense based on “the most unrealistic and fictional assumptions” because the “Indian problem is essentially a sociological problem, not a legal one.”¹⁵ Therefore, only Congress can make reasonable attempts to address the problems of insufficient Indian remedies.

II. THE SOURCE OF THE HARM

A. *Deepwater Horizon*

The *Deepwater Horizon* is a mobile offshore drilling unit (“MODU”).¹⁶ It was built by Hyundai Heavy Industries Shipyard in 2001,¹⁷ and is currently owned by Transocean.¹⁸ Transocean, in turn, leased the *Deepwater Horizon* to British Petroleum (“BP”) for its use in offshore drilling in the Gulf of Mexico.¹⁹ BP obtained a lease from the Minerals Management Service to conduct such drilling.²⁰ On April 20, 2010, the *Deepwater Horizon* was drilling in the Macondo Prospect,²¹ the name given to the oil reservoir by BP.²² Considered the “cutting edge of drilling technology,” the *Deepwater Horizon* was a floating rig, held in place over the drill site by GPS satellites and water thrusters.²³ At the time of the explosion, the *Deepwater Horizon* was located fifty miles off the coast of Louisiana.²⁴

¹⁴ See U.S. CONST. art. I, § 8, cl. 3.

¹⁵ *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 355 (1945) (Jackson, J., concurring).

¹⁶ HAGERTY & RAMSEUR, *supra* note 2, at 9.

¹⁷ MALCOLM SHARPLES, RISK & TECHNOLOGY CONSULTING INC., POST MORTEM FAILURE ASSESSMENT OF MODUS DURING HURRICANE IVAN 50 (2004), available at http://www.boemre.gov/tarprojects/548/Ivan_FinalReport.pdf

¹⁸ Crittenden, *supra* note 3.

¹⁹ *Id.*

²⁰ HAGERTY & RAMSEUR, *supra* note 2, at 9.

²¹ Specifically, the Macondo 252 well. Press Release, Deepwater Horizon Incident Joint Information Center, Statement from Admiral Allen on the Successful Completion of the Relief Well (Sept. 19, 2010), available at <http://www.deepwaterhorizonresponse.com/go/doc/2931/900707/>.

²² The official name of the sector where the incident occurred is Mississippi Canyon block 252. The Macondo Prospect was owned by BP. See *Macondo Prospect, Gulf of Mexico*, OFFSHORE-TECHNOLOGY.COM, <http://www.offshore-technology.com/projects/macondoprospect/>.

²³ Crittenden, *supra* note 3.

²⁴ HAGERTY & RAMSEUR, *supra* note 2, at 1.

B. Explosion and the Oil Spill

For purposes of brevity, the inner workings of the *Deepwater Horizon*'s drilling apparatus will not be explored.²⁵ However, one aspect that is the subject of considerable scrutiny is the Blowout Preventer ("BOP"). The BOP is a series of valves that are supposed to close in the event of a sudden spike in pressure from the drilling site.²⁶ In this instance, the BOP failed to engage.²⁷ When the *Deepwater Horizon* exploded, it killed eleven workers.²⁸ The flames were 200 to 300 feet high and "were visible up to thirty-five miles away."²⁹ The fire burned for two days and the rig itself sunk into the Gulf.³⁰ The Macondo well began gushing oil into the Gulf at a tremendous rate.

In August 2010, it was estimated that five billion barrels of oil were spilled into the Gulf.³¹ The oil spill is the largest in American history, dwarfing the *Exxon Valdez* oil spill several times over.³² Oil washed ashore in Louisiana, Mississippi, and Alabama.³³ Since the explosion, the tourists stopped visiting the area and, as a result, numerous businesses saw a drop in profits.³⁴ It is difficult to summarize all of the human tragedy stemming from the disaster, much less the enormous environmental damage.

On September 19, 2010, the relief well was successful, and the Macondo well was dead, thus stopping the leak.³⁵ According to the title

²⁵ Those wishing to do so may refer to *id.* at 3 -- 4.

²⁶ These spikes are referred to as "kicks." *Id.* at 3 -- 4.

²⁷ *Id.* at 3.

²⁸ Crittenden, *supra* note 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 2, 2010, available at http://www.nytimes.com/2010/08/03/us/03spill.html?_r=2&fta=y. In other measurements, the amount of oil spilled is over 200 million gallons. Brian Skoloff, *Final well sealing small comfort to Gulf residents*, BLOOMBERG BUS. WK., Sept. 19, 2010, available at <http://www.businessweek.com/ap/financialnews/D9I9MSV00.htm>.

³² HAGERTY & RAMSEUR, *supra* note 2, at 1. One attorney mentioned a *60 Minutes* report that estimated the amount of oil released into the Gulf was the "equivalent of the *Exxon Valdez* spill every four to seven days." Scott Summy, *The Legal Challenges and Ramifications of the Gulf Oil Spill*, in UNDERSTANDING THE BP OIL SPILL AND RESULTING LITIGATION: AN IN-DEPTH LOOK AT THE HISTORY OF OIL POLLUTION AND THE IMPACT OF THE GULF COAST OIL DISASTER (2010), available at 2010 ASPIA 11.

³³ HAGERTY & RAMSEUR, *supra* note 2, at 1.

³⁴ Skoloff, *supra* note 31.

³⁵ Press Release, Deepwater Horizon Incident Joint Information Center, *supra* note 21.

of an online news article, the announcement brought “small comfort” to Gulf coast residents.³⁶

C. Dispersants

The United States government authorized BP to use dispersants on the growing oil spill.³⁷ The main dispersant used, Corexit® 9500, was manufactured by Nalco Company³⁸ and, according to a class action lawsuit filed against Nalco and BP, it is “four times more toxic than the oil itself[.]”³⁹ The class action complaint also states over one million gallons of Corexit have been used in the Gulf.⁴⁰ After prodding from the Environmental Protection Agency, Nalco revealed some of Corexit’s components such as 2-butoxyethanol, “a chemical that can cause liver and kidney damage and other health problems[.]”⁴¹ Other ingredients are barred from public release because they are confidential business information.⁴²

Dispersants present another twist in evaluating the total damages against the environment:

... [U]ntreated oil quickly rises to the surface, where it can be skimmed with relative ease. But treated with dispersant, it becomes a submerged plume, unlikely to ever float to the surface, and destined to migrate through underwater currents to the entire Gulf basin and eventually the North Atlantic. ... Plus, dispersants may well kill the ocean’s first line of defense against oil: the natural microbes that break oil down for other microbes to eat.⁴³

As far as legal liability is concerned, “[d]ispersant clouds the estimates of the spill, guaranteeing that the true size will never be known and BP’s liability will be vastly underestimated.”⁴⁴

III. DAMAGES

Among the victims of the oil spill are Gulf Coast tribes. The Pointe-au-Chien Indian Tribe⁴⁵ lives along the bayous of southern Louisiana,

³⁶ Skoloff, *supra* note 31.

³⁷ *What are oil dispersants?*, CNN (May 15, 2010), <http://edition.cnn.com/2010/US/studentnews/05/15/oil.spill.dispersants/>

³⁸ *Id.*

³⁹ Class Action Complaint at 4, *Parker v. Nalco Company*, No. 10CV01749 (E.D. La. June 16, 2010), 2010 WL 2470724.

⁴⁰ *Id.*

⁴¹ Kate Sheppard, *Bad Breakup, Why BP doesn’t have to tell the EPA – or the public – what’s in its toxic dispersants*, MOTHER JONES, Sept./Oct. 2010, at 41.

⁴² *Id.*

⁴³ Julia Whitty, *BP’s Deep Secrets*, MOTHER JONES, Sept./Oct. 2010, at 35 (internal quotations omitted).

⁴⁴ *Id.* at 39.

comprising 700 members.⁴⁶ Tribal chairman Charles Verdin stated the oil coming into their waterways posed a threat to burial grounds, sacred sites, and traditional areas of fishing.⁴⁷ Tribal agriculture consists of alligator, fish, shrimp, and oysters.⁴⁸ Commercial fishing remains a large employer of Pointe-au-Chien Indians and BP hired some Pointe-au-Chien fisherman to help with the cleanup, and provided them with booms to deflect oil away from their lands.⁴⁹ According to the Pointe-au-Chien's website, the shrimping season has re-opened; however, some fishermen have not returned because oil remains in the water.⁵⁰ In addition, it is unknown whether the water contains dispersants.⁵¹ Charles Verdin stated that most of the areas the tribe uses for fishing have been shut down.⁵² Looking ahead, he stated: "It's hard to imagine or see our future We just don't know."⁵³

The United Houma Nation is also a state recognized tribe, containing over 17,000 members.⁵⁴ When testifying before the Subcommittee on Insular Affairs Wildlife and Oceans, Principal Chief of the United Houma Nation, Brenda Dardar Robichaux testified that the entire Houma culture is on the brink of extinction.⁵⁵ Like many tribal nations, the Houma has a deep affection for their land because it provides them with their entire subsistence and is intimately connected to their culture:

The relationship between the Houma People and these lands is fundamental to our existence as an Indian nation. The medicines we use to prevent illnesses and heal our sick, the places our ancestors are laid to rest, the fish, the shrimp, crabs and oysters our people harvest, our traditional stories and the language we speak are all tied to these lands inextricably. Without these lands, our culture and way of life that has been passed down generation to generation will be gone.⁵⁶

⁴⁵ See POINTE-AU-CHIEN INDIAN TRIBE, <http://pactribe.tripod.com/> (last visited Dec. 28, 2010).

⁴⁶ *State recognized tribes*, *supra* note 6.

⁴⁷ Hansen, *supra* note 5.

⁴⁸ POINTE-AU-CHIEN INDIAN TRIBE, <http://pactribe.tripod.com/id2.html> (last visited Dec. 28, 2010).

⁴⁹ Hansen, *supra* note 5.

⁵⁰ POINTE-AU-CHIEN INDIAN TRIBE, *supra* note 45.

⁵¹ *Id.*

⁵² Hansen, *supra* note 5.

⁵³ *Id.*

⁵⁴ *State recognized tribes*, *supra* note 6.

⁵⁵ *Our Natural Resources at Risk: The Short and Long Term Impacts of the Deepwater Horizon Oil Spill Before the Subcomm. on Insular Affairs Wildlife and Oceans*, 111th Cong. (2010) (statement of Brenda Dardar Robichaux, Principal Chief, United Houma Nation) [hereinafter *Natural Resources*].

⁵⁶ *Id.*

An oyster farmer in Louisiana remarked that if the oil spill shut down his business then he would lose more than his livelihood, but also his "lifestyle."⁵⁷ According to the article in which the farmer's words were quoted, oil hit his fishing grounds and shut down his business.⁵⁸ Similarly, the United Houma has used marsh lands for their source of agriculture.

The Houma farm the marsh lands for crab, shrimp, oysters, and garfish.⁵⁹ Tribal citizens make their entire livings off what the Gulf Coast provides for them.⁶⁰ The Houma are fishermen, having to rely on traditional food sources because of the lack of educational opportunities within tribal lands.⁶¹ According to the testimony of Chief Robichaux, the BP oil spill presents the Houma with the greatest challenge in their tribal history and the greatest threat to their culture.⁶² The estuaries where tribal fishermen go to harvest fish and edible wildlife face destruction, thus preventing them from reproducing for the next season's harvest.⁶³ From there, the land itself will deteriorate and become polluted, making the oil spill "a death threat to our culture as we know it."⁶⁴ It does not help that the land has already been damaged from four major hurricanes previous to the oil spill.⁶⁵

IV. THE RIGHTFUL POSITION

A. Money as the Basic Concept

"The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."⁶⁶ The quote is drawn from *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958), a case dealing with harm committed against Native Americans. This fundamental principle is intended to make the injured party whole and place him in no better a position than before the harm occurred.⁶⁷

⁵⁷ Bruce Barcott, *Forlorn in the Bayou*, NAT'L GEOGRAPHIC, Oct. 2010, at 65.

⁵⁸ *Id.*

⁵⁹ *Natural Resources*, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* "Katrina and Rita in 2005 and Ike and Gustav in 2008. . . ."

⁶⁶ *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958).

⁶⁷ *See Stringer v. Dilger*, 313 F.2d 536, 541 (10th Cir. 1963).

However, this basic concept of remedies is premised on a cultural viewpoint that many do not consider.⁶⁸ American jurisprudence has determined that money is the prime vehicle of restoring a victim to his or her rightful position.⁶⁹ The law hits a unique barrier when it has to provide compensation for injuries that cannot be healed with money. However, an entirely new circumstance arises when harm is committed against one's culture.

B. Missed Opportunities

1. *In re Exxon Valdez*

On March 24, 1989, the oil tanker, *Exxon Valdez*, spilled approximately 11 million gallons of crude oil into the Prince William Sound after it struck a reef.⁷⁰ Similar to the *Deepwater Horizon* spill, the oil from the *Exxon Valdez* adversely affected miles of coastland, and seriously harmed commercial fishing industries.⁷¹ Later sociological studies projected the disruption the oil spill caused to the social fabric of a small fishing town:

The psychological surveys in the Cordova, [Alaska] study detailed sleepless nights, unfocused anger, misplaced emotions, unwanted thoughts, lost friendships and soured family relationships among the people of Cordova. Those feelings lasted for years, and many never did heal. Residents say that untold divorces, suicides and bankruptcies resulted from the spill.⁷²

According to the study, the "disintegration" of the community happened slowly, over the course of three to five years.⁷³ The United Houma are currently undergoing similar stress.⁷⁴

Also similar to the *Deepwater Horizon* spill, the *Exxon Valdez* disaster spawned numerous lawsuits.⁷⁵ Among them was *In re the Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856 (D. Alaska 1994) ("*Exxon*"), in which the plaintiffs, a group of Alaskan Native Americans

⁶⁸ According to the author of a widely used remedies textbook, remedies "give meaning to obligations imposed by the rest of the substantive law." DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1 (4th ed. 2010).

⁶⁹ *Id.* at 3.

⁷⁰ Gregory R. Schaaf & Miles S. Apple, *Past Disasters Help Predict Gulf Oil Spill's Impact*, AM. BANKR. INST. J., Nov. 2010, at 55.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Mark Schleifstein, *Gulf residents, businesses say they're still suffering from BP oil spill effects*, TIMES-PICAYUNE, Dec. 22, 2010, available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/12/gulf_residents_businesses_say.html.

⁷⁵ See *In re Exxon Valdez*, 270 F.3d 1215, 1224 n.12 (9th Cir. 2001) (Collected cases).

sued the Exxon Shipping Company and Exxon Corporation for damages caused by the spill.⁷⁶ The plaintiffs' cause of action was public nuisance, and their argument was that they could show a special injury that was different in kind suffered by the general public.⁷⁷ Their special injury was harm done to their culture or their "subsistence way of life."⁷⁸ Specifically, the plaintiffs claimed injury to their "personal, economic, psychological, social, cultural, communal and religious form of daily living that is dependent upon the preservation of uncontaminated natural resources, marine life and wildlife."⁷⁹ Thus, their requested relief was non-economic damages.⁸⁰

The plaintiffs' counsel argued that "the unique nature of their subsistence lifestyle is the keystone to their culture," and that the spill damaged this lifestyle.⁸¹ Exxon's counsel equated Native Americans to "fervent environmentalist[s]" because they both adore nature, or "an avid sport fisherman or hunter[.]"⁸² Just because the plaintiffs participated in their subsistence way of life with a greater intensity than the general public, they could not prove a special injury.⁸³ Essentially, "[a]ll Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives."⁸⁴ District Judge H. Russel Holland granted summary judgment in favor of Exxon.⁸⁵

Judge Holland opined that subsistence is just as much a part of the American culture as a Native American culture;⁸⁶ therefore, "[n]either the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique."⁸⁷ While offensive to many Native Americans – almost certainly to the plaintiffs – it is too easy to dismiss such views as naïve or ignorant. The nature of the problem underlying this opinion is the inability of American jurisprudence to recognize the com-

⁷⁶ *In re* The Exxon Valdez, No. A89-0095-CV, 1994 WL 182856 (D. Alaska Mar. 23, 1994).

⁷⁷ *Id.* at *1.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at *5.

⁸⁶ As Judge Holland put it, "All Alaskans, and not just Alaska Natives, have the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings." *Id.* at *2.

⁸⁷ *Id.*

plex intricacies and dynamics that comprise Native American culture: "In the last analysis, what the Alaska Natives seek is a recovery which is not founded upon any legal theory currently recognized by maritime law. They assert that theirs is a non-market economy, and that their damages should not be measured by market economy standards."⁸⁸ However, in the end, the plaintiffs knew they had to accept money payments, but they did not know how they would calculate the monetary value of their lost culture.⁸⁹ Still, Judge Holland encouraged the plaintiffs to exercise their right to bring suit against Exxon for provable economic damages.⁹⁰

Finally, Judge Holland did what he could to comfort the plaintiffs, by reminding them that their culture, though wounded, would survive so long as they had the will to keep it alive:

[A person's] culture – a person's way of life – is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life. If (and we think this is not the case) the Native culture was in such distress that the *Exxon Valdez* oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1989. Development of the Prudhoe Bay oil fields, the construction of processing facilities, and the trans-Alaska pipeline on the North Slope of the Brooks Range were, in all probability, a much greater and certainly longer-lasting incursion into Native culture than the *Exxon Valdez* oil spill, yet the Inupiat have thrived. The court doubts that they are less committed nor less successful in preserving their Native culture than are the Native people of Prince William Sound, Kodiak, or the Cook Inlet area. The *Exxon Valdez* oil spill was a disaster of major proportions, but it did not deprive Alaska Natives of their culture.⁹¹

On appeal, the Ninth Circuit affirmed the District Court's "thorough and well-considered opinion[.]"⁹² In the interim time between the District Court's decision and the Ninth Circuit's, Judge Holland granted an exception for special injury claims made by tribal fisherman for harm against their subsistence way of life.⁹³ The plaintiffs settled their commodity claims, accepting commercial harvest damages, but did not touch the cultural damages claims rejected by the District Court.⁹⁴ When arguing their appeal, the plaintiffs' counsel argued that the harm against the plaintiffs' subsistence way of life had an *economic* value, but offered no

⁸⁸ *Id.* at *3.

⁸⁹ *See id.* at *3 n.11.

⁹⁰ *See id.* at *5 n.14.

⁹¹ *Id.* at *4.

⁹² *In re The Exxon Valdez*, 104 F.3d 1196, 1197 (9th Cir. 1996).

⁹³ *Id.* at 1197-98.

⁹⁴ *Id.* at 1198.

case law authority to support this argument.⁹⁵ In fact, there was not any in existence.⁹⁶ Since the plaintiffs were arguing they suffered an economic loss, and all economic loss claims were settled prior to oral argument, the plaintiffs' cultural damage claims were moot.⁹⁷

As precedent, the *Exxon* cases are damaging to Native American plaintiffs seeking justice for cultural harm.

2. *United States v. Hatahley*

In *Hatahley*, Bureau of Land Management agents seized and destroyed several horses and burros that belonged to the Navajo Indians in an event that was described as "horrible, monstrous, atrocious, cruel, coldblooded depredation, and without a sense of decency."⁹⁸ After lengthy litigation,⁹⁹ the value of each horse and burro destroyed was fixed at \$395 and each plaintiff received \$3,500 for mental pain and suffering.¹⁰⁰ In addition, the plaintiffs were awarded one-half the value of various livestock the plaintiffs owned during the time period between the animals' destruction and last hearing.¹⁰¹

District Court Chief Judge Willis W. Ritter felt that the animals' value stemmed from their peculiar nature or training.¹⁰² It even declined to hear evidence of the availability of similar animals in the immediate vicinity.¹⁰³ The Tenth Circuit overruled this determination – the proper measure of damages for the lost horses and burros should have been fair market value and not their replacement costs.¹⁰⁴ Likewise, the Tenth Circuit vacated the damages award for mental pain and suffering because it was "wholly conjectural and picked out of thin air."¹⁰⁵

The problem the Tenth Circuit had with the District Court's valuation of the plaintiffs' harm stemmed from Judge Ritter's feelings towards the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ "[Plaintiffs'] arguments miss the mark, however, for all economic claims were resolved in the settlement, and the district court's judgment is specifically limited to non-economic claims." *Id.*

⁹⁸ *United States v. Hatahley*, 257 F.2d 920, 925 (10th Cir. 1958) (internal quotations omitted).

⁹⁹ The case had gone through the District Court, the Tenth Circuit, the United States Supreme Court and then back to the District Court. *See id.* at 921–22.

¹⁰⁰ *Id.* at 922.

¹⁰¹ *Id.*

¹⁰² *Id.* at 923.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 925.

mistreatment of the plaintiffs by the government and white ranchers.¹⁰⁶ In particular, his award of \$3,500 for each plaintiff – an arbitrary action according to the Tenth Circuit – stemmed from each plaintiff’s grief and mourning over the loss of the animals which played a particular role in their culture; therefore, each plaintiff suffered equally and the damage award should have been the same.¹⁰⁷ Judge Ritter based the damage award on “community loss,” and “community sorrow”:

It is not possible for the extent of the mental pain and suffering to be separately evaluated as to each individual plaintiff. It is evident that each and all of the plaintiffs sustained mental pain and suffering. Nor is it possible to say that the plaintiffs who lost one or two horses sustained less mental pain and suffering than plaintiffs who lost a dozen horses. The mental pain and suffering sustained was a thing common to all the plaintiffs. *It was a community loss and a community sorrow shared by all.* On this basis, the Court finds and awards the sum of \$3,500.00 to each of the plaintiffs as a fair and reasonable approximation of the mental pain and suffering sustained by each, as a proximate result of the taking of the horses by the defendant.¹⁰⁸

The Tenth Circuit disagreed because pain and suffering is a “personal and individual matter, not a common injury, and must be so treated.”¹⁰⁹ Simply put, “everyone should be treated the same. Racial differences merit no concern.”¹¹⁰

C. Cultural Harm

Both *Exxon* and *Hatahley* are examples of American jurisprudence’s blindness to Native American culture. In particular, the tribes along the Gulf Coast that have been harmed by the *Deepwater Horizon* oil spill cannot look forward to any adequate remedy to compensate them for the harm done to their homelands. As the previous cases noted, American remedies law is focused on the individual¹¹¹ – even a class action suit, such as the one brought by the plaintiffs in *Exxon*, is merely a collection of individual plaintiffs.¹¹² Furthermore, Native American social and cultural dynamics are of no concern to an American courtroom because everyone is treated the same, “[r]acial differences merit no concern.”¹¹³

¹⁰⁶ Judge Ritter even suggested Presidential and Congressional investigations, as well as threatening to conduct the investigation himself. *Id.* at 925–26.

¹⁰⁷ *Id.* at 925.

¹⁰⁸ *Id.* at 925 n.5 (emphasis added).

¹⁰⁹ *Id.* at 925.

¹¹⁰ *Id.* at 926.

¹¹¹ *See id.* at 925.

¹¹² An excellent description of class actions are provided by Judge Richard Posner in *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 744–46 (7th Cir. 2008).

¹¹³ *Hatahley*, 257 F.2d at 926.

The idea of cultural or community harm is virtually unknown in American remedies law.

Other writers have called for sensitivity in the law for Native American culture, arguing that communal harm or recognition of Native Americans' spiritual and cultural relationship to the land should be taken into consideration.¹¹⁴ However, as the court in *Hatahley* inferred, the plight of Native Americans does not rest with the courts, but rather the political branches.¹¹⁵ As Professor Debora Threedy examined in her well-written and thorough legal archaeology of the *Hatahley* case:

Ironically, Ritter agreed with the [Tenth Circuit's] quote from Justice Jackson that characterized the Indian problem as "essentially a sociological problem, not a legal one." Ritter was acutely conscious of the limitations of any legal remedy in this litigation: "In the final analysis nothing that I can do here will solve [the problem of how these Navajo are to survive]." Indeed, the limited legal remedy available is one of the reasons he called for congressional action.¹¹⁶

In this particular instance, Congress has done something about oil spills – notably, the Oil Pollution Act, passed in the wake of the *Exxon Valdez* disaster. Other remedies are available as well; however, each one is inadequate in some respects.¹¹⁷

1. The Oil Pollution Act

The Oil Pollution Act¹¹⁸ was the result of at least a decade of congressional debate and, of course, the pressure of dealing with the *Exxon Val-*

¹¹⁴ See, e.g., William M. Bryner, Note, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 299 (1995) (Commenting on *Exxon Valdez* and other cases concerning Alaska Native villages and advocating for a recognition of the "complex web of relationships that define and distinguish [an Indian tribe's] traditional culture"); Connie Sue Manos Martin, *Spiritual and Cultural Resources as a Component of Tribal Natural Resource Damages Claims*, 20 PUB. LAND & RESOURCES L. REV. 1 (1999) (Advocating that spiritual and cultural resource damage should be included in tabulating a National Resource Damages claim under the Comprehensive Environmental Response, Compensation, and Liability Act. The author noted that "[w]hat is difficult, although not impossible, is assessing the amount of damages to a spiritual or cultural resources, because it requires the translation of traditional Tribal belief systems into the American jurisprudence system").

¹¹⁵ See *Hatahley*, 257 F.2d at 926.

¹¹⁶ Debora L. Threedy, Article, *United States v. Hatahley: A Legal Archaeology Case Study in Law and Racial Conflict*, 24 AM. INDIAN L. REV. 1, 70 (2010).

¹¹⁷ For brevity purposes, not every statute and form of compensation will be addressed. For a good overview of the federal statutory and regulatory scheme see HAGERTY & RAMSEUR, *supra* note 2, at 6–10.

¹¹⁸ Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2719 (2004).

dez spill in 1989.¹¹⁹ Preexisting federal statutes were an “ineffective patchwork.”¹²⁰ The OPA gave the federal government the authority to determine the level of oil spill cleanup required as well as the power to monitor or direct cleanup efforts, or completely take over the cleanup itself.¹²¹

A point of contention is OPA’s liability cap for offshore facilities of \$75 million plus removal costs.¹²² With environmental and non-environmental damages well beyond \$2 billion, the cap is flaccid.¹²³ There have been calls to lift the cap and place the entire cost of the oil spill on BP; however, this legislation is tied up in Congress.¹²⁴ BP has promised not to limit its liability to \$75 million,¹²⁵ and has placed \$20 billion into the Gulf Coast Claims Fund.¹²⁶

There is a section of OPA that addresses subsistence use of “natural resources”¹²⁷ damages, even allowing for tribal nations to make a claim for damages.¹²⁸ There is some case law expounding on subsistence use, explaining that the party claiming such a loss must show that he or she

¹¹⁹ RAMSEUR, *supra* note 12, at 8–9.

¹²⁰ *Id.* at 8. The statutes in question were: the Clean Water Act of 1972, the Deepwater Port Act of 1974, Trans-Alaska Pipeline Authorization Act of 1973, the Outer Continental Shelf Lands Act Amendments, and the National Oil and Hazardous Substances Pollution Contingency Plan. *Id.* at 7–8.

¹²¹ Oil Pollution Act of 1990 § 4201.

¹²² *Id.* at § 1004.

¹²³ See Hollaender, *supra* note 13. There is an exception if the plaintiff can prove that the oil spill was the result of gross negligence or willful misconduct. Oil Pollution Act of 1990 § 1004. However, much like other portions of the statute, the OPA has not been thoroughly tested through litigation.

¹²⁴ See, e.g., Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).

¹²⁵ Jennifer A. Dlouhy, *Feds Sue BP, other companies over oil spill*, CHRON, Dec. 16, 2010, available at <http://www.chron.com/disp/story.mpl/business/7341277.html>.

¹²⁶ See GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q1> (last visited Dec. 26, 2010); *BP spent \$1.86M on lobbyists in 3Q*, ASSOCIATED PRESS, Nov. 29, 2010, available at <http://www.businessweek.com/ap/financialnews/D9JPQNVG0.htm>.

¹²⁷ Oil Pollution Act of 1990 § 1001(20):

[L]and, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government[.]

See also *id.* at § 1006.

¹²⁸ See *id.* at § 1006(a)(3). Specifically, a claim for damages must be made through a trustee on behalf of a tribe. *Id.* at § 1006(b)(1).

used natural resources to obtain the “minimum necessities of life.”¹²⁹ There are two problems with this. First, OPA’s language seems to require that the tribal plaintiff be a member of a federally recognized tribe, which many Gulf Coast tribes are not.¹³⁰ Second, as another author pointed out, subsistence use is predominately an individual right, not a communal one.¹³¹ Just as the plaintiffs in *Exxon* and *Hatahley* learned, the courts of the United States do not recognize community-based harm.

Also, OPA’s method of compensating harm to natural resources is to award costs for “restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources,” plus diminution of the natural resources and costs to assess those damages.¹³² The purpose of these damages is to return the affected land to its “baseline” condition.¹³³ Determination of “baseline” conditions is difficult because complex ecosystems such as the Gulf Coast suffer from lack of scientific data and insufficient knowledge of long-term effects of oil on marine organisms.¹³⁴ And, as one author noted, “[w]hat is difficult, although not impossible, is assessing the *amount of damages* to a spiritual or cultural resource, because it requires the translation of traditional Tribal belief systems into the American jurisprudence system.”¹³⁵

How the United Houma, Pointe-au-Chien or other Gulf Coast tribe can translate the loss of their subsistence culture into a dollar amount that a court may attempt to compensate for is beyond the scope of this Comment. Given that *Exxon* and *Hatahley* render a potential communal harm claim under OPA useless, Gulf Coast tribes are left with filing individual lawsuits and taking their chances in court.

2. Common Law Remedies

Traditionally, common law causes of action such as “nuisance, trespass, negligence, or strict liability, are the traditional ways to seek

¹²⁹ See *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008, 1015 (E.D. La. 1993).

¹³⁰ See discussion *infra* Parts IV.C.4.

¹³¹ Bryner, *supra* note 114, at 298. Even though a community may starve, “the actual consumption of those resources and the physical benefit derived therefrom necessarily occur at an individual level.” Native Americans do not engage in subsistence activities for sustenance because it “enables the Native peoples to feel at one with their ancestors, at home in the present, [and] confident of the future.” *Id.* at 299. As Bryner also notes, a “Group Right to Culture,” would encompass the “complex web of relationships that define and distinguish [Native Americans’] traditional culture.” *Id.*

¹³² Oil Pollution Act of 1990 § 1006(d)(1)(a)–(c).

¹³³ HAGERTY & RAMSEUR, *supra* note 2, at 24 & n.99.

¹³⁴ See *id.*

¹³⁵ Martin, *supra* note 114, at 11.

recovery where property has been directly injured by another.”¹³⁶ In addition, such claims – if not already preempted by various federal statutes – will fall under maritime law because the harm occurred within navigable waters.¹³⁷

If used as precedent, the *Exxon* case may thwart Indian tribes again: the plaintiffs’ public nuisance case was decided according to maritime law principals, thus providing a defendant with means to dismiss the case.¹³⁸ As stated earlier, the plaintiffs’ claim did not rest on any principle founded in maritime law.¹³⁹ On appeal, the plaintiffs conceded that maritime and nuisance law derived from the Second Restatement of Torts view that communal damage claims were not recognizable in an American court.¹⁴⁰ The Second Restatement’s views on the individuality of harm also parlays into negligence,¹⁴¹ strict liability,¹⁴² and trespass.¹⁴³

3. *The Gulf Coast Claims Facility*

The Gulf Coast Claims Facility (“GCCF”) offers compensation for five types of claims, including loss of subsistence use of natural resources.¹⁴⁴ The definition of “subsistence use of natural resources” is

¹³⁶ Harvey M. Sheldon, *The Prospect for Claims Arising from the Gulf Coast Oil Spill*, in UNDERSTANDING THE BP OIL SPILL AND RESULTING LITIGATION: AN IN-DEPTH LOOK AT THE HISTORY OF THE OIL POLLUTION AND THE IMPACT OF THE GULF COAST OIL DISASTER (2010), available at 2010 ASPIA 11.

¹³⁷ *Id.*

¹³⁸ *In re The Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856 (D. Alaska 1994).

¹³⁹ *Id.*

¹⁴⁰ *In re The Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1996). See *Exxon*, 1994 WL at *2 (citing RESTATEMENT (SECOND) OF TORTS § 821C, cmt. b (1979) (“The *private individual* can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree.”) (emphasis added)).

¹⁴¹ See RESTATEMENT (SECOND) OF TORTS § 281, cmt. c (1965) (“In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other *individually*, or to a class of persons . . . of which the other is a member.”) (emphasis added).

¹⁴² See RESTATEMENT (SECOND) OF TORTS § 519(1) (1977) (The general principle behind abnormally dangerous activities: “One who carries on an abnormally dangerous activity is subject to liability for harm to the *person*, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”) (emphasis added).

¹⁴³ See RESTATEMENT (SECOND) OF TORTS § 157 (1965) (A possessor of land must be a “*person*”).

¹⁴⁴ The types of claims allowed are: 1) removal and clean up costs; 2) damages to real or personal property; 3) lost earnings or profits; 4) loss of subsistence use of natural re-

almost a complete match with OPA's definition of the same terms as well as "minimum necessities of life" language used to interpret subsistence within OPA.¹⁴⁵

"Individuals" and businesses are allowed to file claims with the GCCF,¹⁴⁶ and have the option of filing for Final and Interim claims.¹⁴⁷ Final claims attempt to resolve the entire claim against all responsible parties and waive a claimant's right to pursue litigation.¹⁴⁸ As of February 21, 2011, over \$3.4 billion has been paid in claims.¹⁴⁹ Most of this amount has been for lost earnings and profits claims.¹⁵⁰ \$79,285.71 has been paid for loss of subsistence use of natural resources.¹⁵¹ Administrator Kenneth Feinberg announced that payments would be generous.¹⁵² In comparison, when he managed the September 11th Victim Compensation Fund,¹⁵³ Feinberg awarded \$250,000 for non-economic loss per decedent plus \$100,000 for non-economic losses sustained by each spouse and each dependent – totaling \$7 billion distributed within three years.¹⁵⁴ Now, he has \$20 billion set aside by BP to distribute to claimants.

Obviously, a tribal nation is not an "individual" within the parameters set by *Exxon* and *Hatahley*, leaving any Gulf Coast tribe no recourse but

sources; and 5) physical injury or death. *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q10> (last visited Feb. 22, 2011).

¹⁴⁵ *Id.* "Loss of Subsistence Use of a Natural Resource is when an Individual or Business can no longer use a natural resource to obtain food, shelter, clothing, medicine or other minimum necessities of life because the natural resource has been injured, destroyed or lost because of the Spill. For example, an Individual who uses fish or other wildlife for food but can no longer do so because of the Spill may file a Loss of Subsistence Use claim." See discussion *supra* Part IV.C.1.

¹⁴⁶ GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q7> (last visited Feb. 22, 2011).

¹⁴⁷ *Summary of Options for Submission of Final and Interim Payment Claims*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/summary_options.pdf (last visited Dec. 27, 2010).

¹⁴⁸ *Id.*

¹⁴⁹ *Overall Program Statistics*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (last visited Feb. 22, 2011).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Compared to 258,751 claimants who claimed lost earnings or profits, only fifteen claimed loss of subsistence use of natural resources. *Id.*

¹⁵² *FEINBERG ANNOUNCES FASTER AND MORE GENEROUS PAYMENTS FROM GCCF*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/press6.php> (last visited Dec. 27, 2010).

¹⁵³ See KENNETH R. FEINBERG, ET AL., U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, v (Vol. I), available at http://www.usdoj.gov/final_report.pdf

¹⁵⁴ LAYCOCK, *supra* note 68, at 150.

to have its citizens file individual claims. United Houma and Pointe-au-Chien citizens may have claims for personal injury if prolonged exposure to odor-causing pollutants or oil washed ashore is recognized by the GCCF.¹⁵⁵ Tribal fisherman will have claims for economic loss stemming from their inability to fish in tribal waters.¹⁵⁶

4. Lack of Federal Recognition

As stated earlier, tribes such as the United Houma and Pointe-au-Chien do not have federal recognition status. Keeping in mind that being a Native American is a political identity and not a racial one,¹⁵⁷ Congress has set forth requirements through which a group of Native Americans may petition to become federally recognized as an Indian tribe and, thus, become "Native Americans."¹⁵⁸ Once a potential Indian tribe has met all of the requirements, it is deemed federally recognized and gains access to several benefits, such as tribal sovereign immunity.¹⁵⁹ This process is painfully slow, often taking decades for a tribe to get to the final stages wherein there is no sure hope of success.¹⁶⁰ The United Houma, for example, began the process in 1979 and are still waiting.¹⁶¹ Tribes may also apply for state recognition; however, in cases where communication with the federal government is helpful or necessary, this is not enough.¹⁶² Furthermore, federal disaster relief is filtered only to federally recognized tribes, and not to tribes such as the Houma or Pointe-au-Chien.¹⁶³

Under the OPA, an "Indian tribe" may have a claim for damages to natural resources against the liable party.¹⁶⁴ However, the OPA defines an "Indian tribe" as any:

¹⁵⁵ See Hansen, *supra* note 5.

¹⁵⁶ *Id.*

¹⁵⁷ See Means v. Navajo Nation, 432 F.3d 924, 933 (9th Cir 2003).

¹⁵⁸ See 25 C.F.R. § 83.2 (1994). There are seven elements, or criteria, that a petitioning tribe must meet before the Department of Interior formally acknowledges an Indian tribe as federally recognized. See 25 C.F.R. § 83.7 (1994).

¹⁵⁹ Kahawaiolaa v. Norton, 386 F.3d 1271, 1273 (9th Cir. 2003) ("Federal recognition affords important rights and protections to Indian tribes, including limited sovereign immunity, powers of self-government, the right to control the lands held in trust for them by the federal government, and the right to apply for a number of federal services").

¹⁶⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-415T, INDIAN ISSUES: MORE CONSISTENT AND TIMELY TRIBAL RECOGNITION PROCESS NEEDED 2 (2002).

¹⁶¹ This journey has also involved litigation. See United Houma Nation v. Babbitt, No. CIV. A. 96-2095, 1997 WL 403425 (D.D.C. July 8, 1997).

¹⁶² See *State recognized tribes*, *supra* note 6.

¹⁶³ Rob Capriccioso, *Obama mentions tribes as part of oil spill restoration; chief testifies on mess*, IND. COUNTRY TODAY, June 18, 2010, available at <http://www.indiancountrytoday.com/national/96574864.html>.

¹⁶⁴ Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1006(a)(3), 104 Stat. 484 (1990).

Indian tribe, band, nation, or other organized group or community . . . 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.¹⁶⁵

This language refers to federal recognition. While words like “group,” and “community” are used, it probably does not mean that the remedies are also awarded on a communal basis.

V. CONCLUSION

American remedies are based on Anglo tradition, not Native American.¹⁶⁶ As such, Anglo tradition only recognizes individual recoveries and not those based on injuries to community or culture. Attempting to shift the law of remedies to recognize communal harm “would require a wholly different law of remedies, and perhaps a wholly different role for courts in the constitutional scheme.”¹⁶⁷ This is why the ultimate conclusion and recommendation of this Comment is for Native Americans to seek recourse through Congress. A secondary recommendation is to advise Native Americans, whether affected by the BP oil spill, or any other wrong that has affected Native American culture, archaeological sites, agriculture, or religion to seek some form of compensatory remedy even though it cannot be pled as communal harm. The *Hatahley/Exxon* rule was derived from Native American injuries, but for the benefit of non-Native American recoveries. Native Americans might as well derive *some* benefit from this philosophy, whether they pursue litigation or other remedy.

This Comment sought to answer the question of whether any Native American tribe affected by the BP oil spill could truly be placed back into its rightful position with the available array of American compensatory remedies. The answer to this question is no. However, as American citizens – regardless of federal recognition – Native Americans are entitled to whatever money they can get from BP, and they should pursue this. In the meantime, Congress is the only available avenue for anything close to meaningful as far as a true remedy is concerned. No American court of law can grant a true remedy because money cannot replace the agricultural and archeological systems that have been permanently devastated by the oil spill. Buried ancestors cannot be comforted, Native American diets cannot be determined to be completely safe for consumption, and tribal culture cannot be repaired with money.

¹⁶⁵ *Id.* at § 1001(15).

¹⁶⁶ See LAYCOCK, *supra* note 68, at 3.

¹⁶⁷ *Id.* at 1004.

If there is no adequate remedy to replace what has already been lost, then secondary alternatives will have to suffice. Aside from money via litigation or the Gulf Coast Claims Facility, increased federal aid for reclamation and oil cleanup will be helpful. And, as a kind gesture, Congress could grant the United Houma and other tribes the federally recognized status they have been seeking.

Hopefully, as the Native American problem is “sociological,” Congress can address the root cause of insufficient judicial remedies in American courtrooms:

[W]hen one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of inter-related orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.¹⁶⁸

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¹⁶⁸ Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005).