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## **THE ROLE OF BILATERALISM IN FULFILLING THE FEDERAL-TRIBAL RELATIONSHIP: THE TRIBAL RIGHTS-ENDANGERED SPECIES SECRETARIAL ORDER**

By Charles Wilkinson\*

On June 5, 1997, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley signed a jointly-released Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act."<sup>1</sup> The Order culminated a year-and-a-half of work by tribes and federal officials to craft an administrative system for resolving difficult questions involving tribal rights and the Endangered Species Act (ESA).<sup>2</sup> The Order is important for the ESA's implementation. It also carries broader significance, for it serves as one major example of how the government-to-government relationship between the United States and Indian tribes can be successfully implemented.

Most tribes have quite regular governmental relations with federal agencies and members of Congress concerning those matters that affect just that tribe—for example, a land acquisition, the construction of a new clinic, or retrocession of jurisdiction for a particular reservation. The relationship becomes far more complex, however, when it comes to those overarching, comprehensive issues that affect all tribes, whether those issues involve natural resources, tribal jurisdiction, health, education, child welfare, economic development, the trust relationship, or other concerns.

Part of the difficulty traces to the sheer number of tribes—about 500 recognized tribes, each with its own sovereignty and individual circumstances, in the continental United States and Alaska. Tribal leaders

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\* Moses Lasky Professor of Law, School of Law, University of Colorado. Gary Morishima of the Quinault Management Center and Bruce Davies of the Northwest Indian Fisheries Commission prepared summaries and analyses of these events; their work has been most useful in preparing this article. I also thank my assistants, Scott Miller and Cynthia Carter, for their support.

I took part in most aspects of this process as one of the tribal representatives. Much of this article is drawn from those personal experiences. I am indebted to all of the many participants in this venture; their knowledge and insights have greatly expanded my understanding of these issues.

1. The Secretarial Order and its Appendix are reproduced as an addendum to this article, *infra* pp. 1089–1107.

2. 16 U.S.C. §§ 1531–1543 (1994).

are at once protective of their own tribe's independence and respectful of the independence of other tribes. As a result, the idea of creating a national tribal consensus, however useful it might be on a particular issue, breeds extreme caution. Because the necessary condition for relations with the United States—a consensus among the tribes—is difficult to achieve, the tribes tend to move slowly with inter-governmental relations on national issues.

The federal government has its own difficulties arising from the same basic fact—the large number of tribes. To be sure, many a federal official has eschewed government-to-government dealings because of a busy schedule, inadequate knowledge of complex subject matter, or indifference that can border on racism. Yet many other good and capable federal officers have been stymied by legitimate questions. Who speaks for the tribes? How do I know that Indian country is on board?

Once the predicate for government-to-government dealings—a reasonably clear consensus in Indian country—is established so that both tribal and federal officials can proceed with negotiations, other questions arise. Who will sit at the table? What will the protocols be? Additional problems stem from the fact that Indian issues affect many parts of the federal government other than the Bureau of Indian Affairs or the Department of the Interior. In the case of the ESA, for example, the U.S. Fish and Wildlife Service (in the Department of the Interior) and the National Marine Fisheries Service (in the Department of Commerce) administer the ESA. In addition, the Bureau of Land Management and the Bureau of Reclamation, both in the Department of the Interior, had considerable interest in the tribal-ESA negotiations, as did the Forest Service (in the Department of Agriculture). As a result, people without much knowledge of Indian policy and law may be at the table. How much time should be spent bringing them up to speed?

The matter of educating negotiators unfamiliar with Indian issues is not easy to resolve. It is critical that federal participants have a strong sense of the context of tribal claims, which are legally complex, historically based, and culturally influenced. On the other hand, busy federal negotiators may resist time-consuming briefings on what might appear to be background material.

Still another problem involves the many interested federal officials not at the table. Some of them have strong interests—and views—and yet will not have the benefit of the information and perspectives gained by the negotiators. How can the negotiators have authority and flexibility in

the face of attempts by other officials, not at the table, to undermine or overrule their efforts and commitments?

The negotiations over the ESA involved these and other aspects of the government-to-government relationship. This essay recounts the processes leading up to the issuance of the Order and explores the extent to which the development and content of the Order fulfills the promise of a serious, bilateral relationship between the federal and tribal governments.

## I. DEVELOPING THE TRIBAL POSITION

During the 1970s, as Congress vastly expanded federal environmental laws, tribes had intermittent brushes with the enforcement of laws protecting animal species, notably eagles.<sup>3</sup> By the mid-1990s, the ESA had become a major concern for tribes. Stresses on the environment had increased, especially in the West. The tribes had become much more active in resource management and development. The Act, fortified by the U.S. Supreme Court's ruling in *Tennessee Valley Authority v. Hill*,<sup>4</sup> was administered strictly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Although the environmental impacts had been created by non-Indian development, the tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting; tribal leaders strenuously objected to the federal officials' lack of respect for tribal sovereignty and resource management practices.<sup>5</sup> In Congress, legislative proposals regarding ESA reauthorization were pending.<sup>6</sup>

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3. See, e.g., *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980) (holding that Bald Eagle Protection Act abrogated treaty right to hunt); *United States v. White*, 508 F.2d 453 (9th Cir. 1974) (holding that Bald Eagle Protection Act was inapplicable to takings by Indians pursuant to treaties). Later, the U.S. Supreme Court held that the Bald Eagle Protection Act superseded tribal hunting rights. *United States v. Dion*, 476 U.S. 734 (1986).

4. 437 U.S. 153 (1978).

5. See generally *Indian Tribes and the Endangered Species Act: Experiences and Perspectives from the Pacific Northwest* (report), presented to Tribal Workshop on the Endangered Species Act, Seattle, Wash. (Feb. 1-2, 1996) [hereinafter Tribal Workshop] (copy on file with author); see also, e.g., Ed Marston, *Cease-fire Called on the Animas-La Plata Front*, High Country News, Nov. 11, 1996, at 1.

6. See, e.g., *Endangered Species Conservation and Management Act of 1995*, H.R. 2275, 104th Cong.; *Endangered Species Act Reauthorization: Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works*, 104th Cong. (1995).

During November and December 1995, and January 1996, an ad hoc group, comprised mostly of tribal resource managers and tribal lawyers, held a series of conference calls to see what, if anything, should be done.<sup>7</sup> The group explored a variety of options, ranging from simply doing nothing to various forms of legislation, administrative relief, and litigation. An overriding question was whether it was realistic for the tribes to develop a unified tribal position on a course of action.

The ad hoc group decided that the ESA issue was of sufficient importance to the tribes that a national meeting should be held. The workshop should be held quickly, since there was a great deal of activity in Washington, D.C., on ESA issues; there was a danger that, with the tribes inactive, other interest groups—industry, environmentalists, and the states—might adopt firm positions on ESA reauthorization without any tribal input. Because sensitive issues of strategy would be discussed, the meeting would be open only to tribal members and tribal representatives. The American Indian Resources Institute agreed to act as convener, and fifteen other national and regional organizations joined as co-sponsors.<sup>8</sup>

The first tribal workshop on the ESA met in Seattle on February 1–2, 1996. In spite of very short notice, approximately 130 people from Indian tribes and tribal organizations across the country attended. The conveners kept the workshop open and flexible, with an opportunity for broad participation from the attendees. Presenters explained the ESA and the current status of tribal rights. Representatives from different areas discussed the impact of the ESA in their regions. Members of the ad hoc

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7. Participants in these conference calls included: Jim Anderson and John Hollowed, Northwest Indian Fisheries Commission; Howard Arnett, attorney for Confederated Tribes of the Warm Springs Reservation of Oregon; Sylvia Cates, attorney for White Mountain Apache Tribe; John Echohawk, Native American Rights Fund; Billy Frank, Jr., Nisqually Tribe; Laurie Jordan and Ted Strong, Columbia River Intertribal Fish Commission; Gary Morishima and Richard Reich, Quinault Management Center; Mark Phillips, Legislative Consultant for Confederated Tribes of the Warm Springs Reservation of Oregon; Stanley Pollack, attorney for Navajo Nation; Ken Poynter, Native American Fish & Wildlife Society; Joann Reynolds, Intertribal Timber Council; Richard Trudell, American Indian Resources Institute; Charles Wilkinson, University of Colorado School of Law; Mary Wood, University of Oregon School of Law; Jim Zorn, Great Lakes Indian Fish & Wildlife Commission.

8. In addition to the American Indian Resources Institute, the consortium consisted of Affiliated Tribes of Northwest Indians; Alaska Federation of Natives; Colorado River Basin Tribes Partnership; Columbia River Intertribal Fish Commission; Great Lakes Indian Fish & Wildlife Commission; Intertribal Agricultural Council; Inter-Tribal Council of Arizona; Intertribal Timber Council; Mni Sose Intertribal Water Rights Council; National Congress of American Indians; National Tribal Environmental Council; Native American Fish & Wildlife Society; Native American Rights Fund; Northwest Indian Fisheries Commission; and United Southeast and Eastern Tribes.

working group presented various options. The meeting was then opened up for discussion. The Seattle Workshop, which was perhaps the most informed and comprehensive discussion of natural resources issues I have ever attended, laid the foundation for the tribal effort that would lie ahead.

As is typical of Indian gatherings, the quality of the language at the Seattle Workshop was notably different than at Anglo meetings. Instead of generic allusions to “forests,” “rivers,” and “species,” the discourse was replete with specific references to eagles, hawks, ducks, geese, salmon and steelhead, suckers, sea lions, wolves, bison, ferns, wocus, berries, meadows, mountains, hillsides, rocks, soil, and many other aspects of the natural world. Importantly, most of these references were not made with respect to some issue or conflict. Instead, they were made to illustrate how we are connected to all of nature, or were offered in an almost offhanded way—not to make any specific point, but simply as an organic part of a statement by a person who knew the natural world and felt a part of it. Ted Strong, a member of the Yakama Nation and Director of the Columbia River Intertribal Fish Commission, alluded to this, saying, “That is something the elders speak about continuously—the idea of knowing something about where we come from, why we are here, and the appropriate names for species, suggesting a reverence for the reasons these species exist.”<sup>9</sup>

The remarks of a few speakers will serve as examples of the level and detail of the discourse. Elwood Miller, of the Klamath Tribe in Oregon, following a custom of many Indian people, introduced his remarks by explaining what his homeland is like. “In our neck of the woods, that’s where the waters begin. It jumps out of the ground right there in the Klamath country and begins its trek toward the ocean and ends up down in Yurok territory on the coast.”<sup>10</sup> Billy Frank, Jr., who has lived his life along the Nisqually River, also told the gathering about his homeland, where the meeting was being held.

As you see, our mountain is sticking up today and our mountain along the coast is sticking up. . . . Our salmon here travel a long way. They travel up to the Aleutian Islands when they leave these rivers along this mountain and they travel clean out as far as the

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9. Ted Strong, Remarks at the Tribal Workshop, *supra* note 5 (transcript on file with author).

10. Elwood Miller, Remarks at the Tribal Workshop, *supra* note 5 (transcript on file with author).

Japanese waters to Russia and they come home, right back to these waters here.<sup>11</sup>

Later, Frank alluded to the habits of one of the Northwest's protected species:

The marbled murrelet stays in the old growth trees, in this canopy, along our coast, along our Puget Sound, along our range of mountains. We can't see them but they're living there. Early in the day, they go out into the ocean, and they float around like ducks, out in the Sound, out in the Strait of Juan de Fuca.<sup>12</sup>

One enduring message from the Seattle Workshop, then, emerged from the texture of the language—low-key, subtle, and instinctive—a reminder of how much knowledge exists in Indian country. Evidencing reverence for the land, the language also serves as a pervasive reminder of Indian people's stake in the administration of the ESA.

A number of themes emerged at the Seattle Workshop. One recurring message was that the ESA is too narrow; its emphasis on single-species management fares poorly in comparison with the tribes' holistic management approach. Several tribal resource managers emphasized that, striving for true integrated resource management, they focus on whole natural systems. Chairman Ronnie Lupe of the White Mountain Apache Tribe had previously testified before Congress:

In our Apache tradition, we do not manage our lands for the benefit of a particular species[. . .] we strive to protect the land and all the life forms that it supports. Our homeland is too vast for just one species. . . . The diversity of our land provides habitat for a wide variety of plants and animals and each is important to us. The pressures of environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to manage our lands for a single species was a contradiction of our view of life.<sup>13</sup>

Indian spiritual beliefs and ties to the natural world affect their land and water management practices. To the tribes, these beliefs and practices result in different, but better, management than required by the

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11. Billy Frank, Jr., Nisqually Tribe, Remarks at the Tribal Workshop, *supra* note 5 (transcript on file with author).

12. *Id.*

13. *Endangered Species Act Reauthorization: Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works*, 104th Cong. (1995) (written testimony of Ronnie Lupe, Chairman, White Mountain Apache Tribe) (copy on file with author).



ESA. Numerous speakers underscored the spiritual tie that Indian people feel toward the natural world. Chairman Lupe observed:

White Mountain Apaches never saw themselves as separate from Mother Earth. We are one with the land. Hunting was not for sport but to provide food and clothing. We have always been taught to respect the land and living things because we have a sacred responsibility for the stewardship of the lands that the Creator has provided us.<sup>14</sup>

Jody Calica, of the Confederated Tribes of the Warm Springs Reservation, said:

I'm glad we have three chiefs [on the Warm Springs Reservation] there. Those three chiefs represent a history and a heritage that goes back about 40,000 years, 800 generations. The problems that we're talking about today have come about in the last three or four generations. There was a quality of life that our people enjoyed which was carried on for at least 800 generations because the values, the visions, and the practices of our people were not driven by dollars or material gain. This was a time when spiritual law, natural law, and human law were one. Now we're in a situation where it seems human law is manipulating spiritual law and natural law.<sup>15</sup>

Ted Strong also spoke to the spiritual dimensions of tribal laws:

We have proven to the world that it is possible for tribal peoples and thus any peoples to sustain their life and their culture if they are willing to respect the laws of nature. These are the laws that have been here since the beginning of time, that should provide the guidance, whether it be legally, spiritually, or otherwise, for such things as the Endangered Species Act. But it is difficult to take that sense of spiritualism that is inherent in natural law and transform that into legal language. The tribes have done that over the years by their practices, their customs, their traditions, that are heavily endowed in their ceremonies. The ceremonies that we have helped insure that the laws of nature are implemented. Our elders taught our children by the use of our ceremonies.

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14. Ronnie Lupe, Keynote Address at the Tribal Workshop, *supra* note 5 (transcript on file with author).

15. Charles Jody Calica, Remarks at the Tribal Workshop, *supra* note 5 (transcript on file with author).

....

[W]e have seen [natural resources] transformed from their original purposes of spiritual, neighbor[ly] kind of existence with native peoples, to economic and financial conversions. That is measured and thus today, rather than having spiritual qualities, natural resources have a financial quality. They're measured in terms of their ability to provide some kind of wealth.... We feel particularly concerned about this.<sup>16</sup>

Many people at the workshop expressed outrage at any attempt to regulate Indians under the ESA because it implies that tribes lack the capability to manage their resources in a way that protects animal species. Tribal resource management has become increasingly professionalized over the past generation. Nearly all tribes now have formal natural resources agencies, and most of the larger tribes have natural resources staffs of fifty, one hundred, or more.<sup>17</sup> Importantly, tribes have worked hard to utilize traditions, values, and knowledge that have been gained over millenia. One major development has been the ability of tribes to contract with the Bureau of Indian Affairs (BIA) to take over the BIA's management functions.<sup>18</sup> The BIA has been heavily criticized for its resource management, especially in the areas of mineral development and timber harvesting, and many tribes have now assumed these responsibilities.<sup>19</sup>

Participants at the Seattle Workshop emphasized the cutting-edge work by individual tribes and intertribal resources organizations. In timber harvesting alone, the White Mountain Apache Tribe has reduced the timber harvest from ninety-two million board feet under the BIA regime to fifty-four million under tribal control,<sup>20</sup> the Yakama Nation

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16. Strong, *supra* note 9 and accompanying text.

17. Interview with James R. Anderson, Executive Director, Northwest Indian Fisheries Commission, in Olympia, Wash. (Jan. 31, 1997); Interview with Robinson Honani, Hopi Dep't of Natural Resources, in Kykotsmovi, Ariz. (Mar. 23, 1993); Interview with Joe Muniz, Tribal Councilmember & Director of Natural Resources, Jicarilla Apache Tribe, in Dulce, N.M. (Mar. 26, 1997); Interview with Richard Trudell, Executive Director, American Indian Resources Institute, in Seattle, Wash. (Feb. 1, 1996).

18. See generally Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 2203-07, 2209-10, 2212-13 (codified as amended at 25 U.S.C. §§ 450a-450n (1994)).

19. See, e.g., David H. Getches et al., *Federal Indian Law: Cases and Materials* 652 (3d ed. 1993) (citing Angelo A. Iadarola, *Indian Timber: Federal or Self-Management?* (1979) (characterizing BIA management of tribal forests as ranging from "mediocre to abysmal")).

20. Lupe, *supra* note 14.

allows only minimal clearcutting,<sup>21</sup> and the Jicarilla Apache Tribe adopted a five-year moratorium on harvesting in the early 1990s.<sup>22</sup> As Jody Calica put it, “Some reservations out there are managing in 250–300 year time frames, managing old-growth forests—that’s visionary.”<sup>23</sup>

The workshop gave considerable attention to the question of whether, as a matter of law, the ESA applies to activities by Indian tribes or individuals exercising treaty rights. The U.S. Supreme Court has held that federal statutes do not abrogate Indian treaty rights unless there is “clear evidence” that Congress actually considered the issue and chose to abrogate the treaty.<sup>24</sup> With the exception of a special provision for Alaska Natives,<sup>25</sup> the ESA is silent as to Native Americans. The cases are split on the applicability of the ESA to tribes.<sup>26</sup> One middle ground between complete coverage and complete exclusion of tribes under the ESA is that federal agencies can impose restrictions on tribes if, and only if, the agency can meet the requirements of “conservation standards” developed in federal cases under analogous circumstances. The “conservation standards” allow regulation if:

- (1) The proposed conservation measures are reasonable and necessary for species preservation;
- (2) The proposed conservation measures are the least restrictive available to achieve the required conservation purpose;
- (3) The proposed conservation measures do not discriminate against Indian activities, either on their face or as applied;

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21. Telephone Interview with Edwin Lewis, Dep’t of Forestry Management, Yakama Indian Nation (Sept. 16, 1997).

22. Muniz, *supra* note 17.

23. Calica, *supra* note 15.

24. *United States v. Dion*, 476 U.S. 734, 740 (1986).

25. *See* 16 U.S.C. § 1539(e) (1994).

26. *See United States v. Dion*, 752 F.2d 126 (8th Cir. 1985) (en banc) (finding no abrogation), *rev’d on other grounds*, 476 U.S. 734. On review in *Dion*, the U.S. Supreme Court based its ruling on the Bald Eagle Protection Act and did not reach the ESA issue. 476 U.S. at 745. *But see United States v. Billie*, 667 F. Supp. 485 (S.D. Fla. 1987) (finding abrogation).

*See generally* Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 Or. L. Rev. 543, 563–74 (1991); Tim Vollmann, *The Endangered Species Act and Indian Water Rights*, 11 Nat. Resources & Env’t 39 (1996); Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 *Env’tl. L.* 733, 778–79 (1995).

- (4) The conservation purpose cannot be achieved through the regulation of non-Indian activity; and
- (5) Voluntary tribal conservation measures are not adequate to achieve the conservation purpose.<sup>27</sup>

The Seattle Workshop made no "hard and fast decisions," but it did authorize a report that set out "principal findings" and detailed an "emerging consensus" as to how tribes should proceed under the ESA.<sup>28</sup> The participants agreed to a finding that the "the ESA does not and should not apply to Indian tribes."<sup>29</sup> Instead, "Tribal rights to manage their resources in accordance with their own beliefs and values must be protected."<sup>30</sup>

Another main finding emphasized that non-Indian development has resulted in widespread habitat destruction: "[T]ribes are now being asked or required to shoulder an unfair and disproportionate responsibility for conservation to make up for past and continuing degradation of the environment resulting from non-Indian development."<sup>31</sup> This was a continuing theme at the workshop. Lionel Boyer, from the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho, was one of the many who spoke to it:

With the encroachment of the non-Indians into our territory, we have seen vast losses of our land, vast losses of areas that we used to enjoy and where we used to exercise our traditions.

. . . .

We saw a great loss of resources—resources that were traditional for our subsistence, medicinal purposes . . . . We saw the loss of many of our spiritual objects—for instance the buffalo. They thought to get rid of the buffalo was a good way to defeat the Indians. But the buffalo are slowly returning. We saw the loss of the wolf, a very spiritual animal to many of us. The bear, the salmon, the seals—all of these we have lost access to, if not all, a portion of them. The great spirit bird, the eagle. Many of the tribes have lost access to the use of this great bird. They have lost access

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27. See Wood, *supra* note 26, at 792–93 (discussing standards).

28. See Memorandum summarizing Tribal Workshop on the Endangered Species Act (Feb. 20, 1996) [hereinafter Tribal Memorandum] (copy on file with author).

29. Gary S. Morishima, Indian Tribes and Endangered Species 4 (report), *presented to National Indian Timber Symposium* (June 6, 1997) (copy on file with author).

30. See Tribal Memorandum, *supra* note 28, at 2.

31. *Id.*

to be able to use the bird the way they normally do in their spiritual ventures. We have lost the hawk, which is spiritual to many of us, the osprey. We have also lost the spiritual sites, if not total loss, we have lost access, or presently have restricted access to those spiritual sites, where we make contact with the Creator. We have lost access to many of our spiritual healing waters. We have even lost access to many of the soils that we use for spiritual and healing purposes. The things we use which have great significance to each of us in a spiritual way is very limited, we have lost access to be able to seek them out, to go into the areas where they are. Any time that we disclose a site to the non-Indians, we tend to lose access to that site. These sites we protect. The uses of these resources we protect.<sup>32</sup>

The federal trust responsibility to tribes, the workshop participants found, goes far beyond the ESA and includes an affirmative duty<sup>33</sup> to restore tribal lands and adjacent federal lands so that tribes will be able to utilize the species: "The ESA deals with existence thresholds for individual species. Trust responsibilities require the restoration of resource productivity to the point where [resources] are capable of sustaining tribal utilization."<sup>34</sup>

As the workshop dealt with many complex issues, the participants wanted time to reflect and to report back to their tribes before settling on a course of action. The participants did conclude, however, as the foundation for the "emerging consensus," that it was time for tribes to take some form of action. "There is a critical need for tribes to deal with the ESA since issues strike at the heart of trust . . . protection and tribal sovereignty."<sup>35</sup> Tribes should take the initiative.

Tribes should look beyond the ESA to accomplish long-term objectives. Consideration should be given to pushing tribal legislation on "ecosystem management approaches" to move beyond [the] species-by-species, last ditch focus of the ESA, toward addressing causes for species declines and sustainable cultures and economies. The effort should build upon principles of

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32. Lionel Boyer, Remarks at the Tribal Workshop, *supra* note 5.

33. See generally Wood, *supra* note 26, at 742-49.

34. Tribal Memorandum, *supra* note 28, at 2.

35. *Id.* at 3.

holistic management, sustained utilization of resources, spirituality and continuity of unique cultures and beliefs, and stewardship.<sup>36</sup>

The Seattle participants organized a working group to examine legislative and administrative alternatives. The broad-based working group, comprised of twenty-five people from all regions of the country, was directed to make its recommendations at a second workshop, the date of which would be decided upon later.<sup>37</sup> Working group members were urged to keep tribes advised, formally and informally, of the group's deliberations.<sup>38</sup>

The working group held numerous telephone conference calls. After considering various options involving litigation and legislation, the group increasingly focused on the approach taken in the Statement of Relationship that the White Mountain Apache Tribe and the USFWS signed in 1994.<sup>39</sup> The Statement of Relationship, personally negotiated by Chairman Lupe and Director Mollie Beattie, is designed to move away from "train wrecks"—swords' point disputes over whether or not the ESA affects tribal rights—and toward on-the-ground professional management. The Statement calls for extensive cooperation and exchange of information between the Tribe and the Service, and effectively gives a presumption of regularity to the Tribe's integrated resource management plan. The essence of the Statement—which all parties agree has worked well at White Mountain—is to avoid ESA conflicts through good, cooperative tribal land management. The Statement, which never explicitly refers to the ESA, takes no position on the statute's applicability to the Tribe.<sup>40</sup>

The working group decided to recommend to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the Statement of Relationship. The working group put together a draft position paper calling for a secretarial

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36. *Id.*

37. *Id.* at 4.

38. Members of the working group were: Jim Anderson, Howard Arnett, Karen Atkinson, Lionel Boyer, Charles Jody Calica, Sylvia Cates, John Echohawk, Billy Frank, Jr., Keller George, Donna House, Laurie Jordan, Gary Morishima, George Nemago, Mark Phillips, Jaime Pinkham, Stanley Pollack, Ken Poynter, Richard Reich, Joann Reynolds, Kim Simon, Richard Trudell, Charles Wilkinson, Mary Wood, Patricia Zell, and Jim Zorn. Robert Brauchli, Charles O'Hara, and Charles Stringer, all staff at White Mountain Apache, joined the working group during the summer and made major contributions.

39. Statement of the Relationship between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (Dec. 6, 1994) (copy on file with author).

40. See generally Lupe, *supra* note 13, at 4–5.

order that would apply nationally and that would expand upon the ideas in the Statement of Relationship. The basic policy decision was that such an administrative system, if effective, might result in deference to tribal sovereignty and good working relationships with the federal agencies and, as well, obviate or greatly diminish the need for legislation or litigation.

The proposed position paper was widely circulated to Indian country, and a second workshop was held in San Francisco on June 24–25, 1996. With the context set by the Seattle Workshop, the San Francisco Workshop participants—satisfied that an attempt to achieve a secretarial order was the best course—spent most of their time making technical changes to the position paper. The redrafted position paper was then circulated to the tribes and further changes were made in response to tribal comments. By August, the tribes were ready to present their case to Secretary of the Interior Bruce Babbitt.

## II. IMPLEMENTING THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP

Jim Anderson, Director of the Northwest Indian Fisheries Commission, agreed to serve as the tribal coordinator with Secretary Babbitt's office. Anderson was able to schedule a meeting with Babbitt in Washington, D.C., on September 4, 1996. A week in advance of the meeting, five Indian Leaders—Billy Frank, Jr., John Echohawk, Richard Trudell, Ted Strong, and Jaime Pinkham—sent a letter to Babbitt enclosing the Tribal Position Paper, entitled "Indian Tribes, Endangered Species, and the Trust Responsibility."<sup>41</sup> The position paper, twelve pages long, explained the tribal concerns and set forth a proposal for administrative reform. The letter requested that the meeting accomplish three objectives:

- (1) appointment of a small task force of high-level Interior Department officials to work with a similar team of tribal representatives to develop a secretarial order relating to tribal rights and the ESA;
- (2) coordination with the Secretary of Commerce so that high-level Department of Commerce officials will actively participate in the negotiations; and

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41. Letter from Billy Frank, Jr., et al. to Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 28, 1996) (copy on file with author).

- (3) creation of a schedule calling for negotiations to start in September and conclude by mid-November.<sup>42</sup>

Babbitt had been briefed on the issues and the nature of the tribal position by advisors, including Professor David Getches of the University of Colorado School of Law, who, during his sabbatical, was serving as Special Counsel to Babbitt. The September 4th meeting between tribal leaders and Babbitt went well, and Babbitt agreed that the tribal requests were reasonable. At a second meeting, on September 20th, Babbitt agreed to proceed with the development of a joint secretarial order with the Department of Commerce and to give the negotiations with tribal representatives a high priority as requested in the tribal letter.<sup>43</sup>

Babbitt, working closely with the Commerce Department, appointed a negotiating team. Over the next several months, four two-day negotiating sessions were held with tribal negotiators: in Boulder, Colorado, on October 23–24, 1996; in Minneapolis, Minnesota, on December 18–19, 1996; in Fairfax, Virginia, on January 8–9, 1997; and in Albuquerque, New Mexico, on January 29–30, 1997. The main characteristics of those meetings, with respect to the extent they fulfilled a working government-to-government relationship, were as follows.

First, besides technical advisors, the federal and tribal negotiating teams included high-level representatives of acknowledged stature from federal agencies and Indian country. The lead Interior negotiators were Don Barry, Deputy Assistant Secretary for Fish, Wildlife, and Parks, and Jamie Rappaport Clark, Assistant Director for Ecological Services,

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42. *See id.* at 1.

43. Tribal representatives at the September 4th and 24th meetings included: Billy Frank, Jr., Northwest Indian Fisheries Commission; Ted Strong, Columbia River Intertribal Fish Commission; Pliny McCovey, Intertribal Timber Council; Delvis Heath, Confederated Tribes of the Warm Springs Reservation of Oregon; Nelson Wallulatum, Confederated Tribes of the Warm Springs Reservation of Oregon; Richard Trudell, American Indian Resources Institute; Terry Williams, Northwest Indian Fisheries Commission; John Echohawk, Native American Rights Fund; Gary Morishima, Quinault Management Center; Howard Arnett, attorney for Confederated Tribes of the Warm Springs Reservation of Oregon; and Jim Anderson, Northwest Indian Fisheries Commission. Secretary Babbitt was accompanied by Anne Shields, his Chief-of-Staff, and David Getches, Special Counsel to the Secretary.

The secretarial order procedure is not subject to federal rulemaking requirements because it sets internal policy within agencies of two departments, principally USFWS and NMFS, and does not create new law. *See* Secretarial Order: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, June 5, 1997, § 2(A)–(C), reproduced *infra* pp. 1089–90 [hereinafter Secretarial Order]. *See generally* U.S. Dep't of the Interior, *Departmental Manual*, pt. 12, ch. 1 (July 24, 1992) (outlining guidelines for secretarial orders).



USFWS.<sup>44</sup> Other members of the federal team were Terry Garcia, General Counsel of the National Oceanic and Atmospheric Administration (NOAA) (the parent agency of NMFS); Bob Ziobro, Fishery Biologist, NMFS; and Molly Holt, Office of General Counsel of NOAA.<sup>45</sup> John Leshy, Solicitor of the Department of the Interior and one of Babbitt's closest confidants, was not at the table for the federal team, but followed the negotiations and made several important rulings on legal issues. Indian leaders included Billy Frank, Jr., Chairman Ronnie Lupe, Jaime Pinkham, John Echohawk, and Terry Williams.<sup>46</sup>

Second, the structure and protocols of the negotiating sessions were carefully negotiated between representatives of the two teams. This was a bilateral federal-tribal effort, not a unilateral federal enterprise, despite the fact that the negotiations were aimed at a secretarial order. The locales of the sessions were set to meet the conveniences of both sides equally. Agendas were jointly developed and drafted. Extensive protocols for the conduct of negotiating sessions were drafted and adhered to during the negotiations.<sup>47</sup>

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44. During the negotiations, Secretary Babbitt nominated Barry to fill the position of Assistant Secretary for Fish, Wildlife, and Parks, vacated by George Frampton, and put forth Clark's name for the Director of Fish and Wildlife, as a successor to the late Mollie Beattie.

45. Representatives of the BIA and the office of Assistant Secretary of Indian Affairs Ada Deer (Mike Anderson, Gary Rankel, and Kate Vandemoer) and NMFS (Bob Turner) also attended most of the meetings. Administrative support for the meetings was provided by tribal, NMFS, and USFWS staff.

46. Technical advisors, who also participated at various times as tribal negotiators, included Howard Arnett, Robert Brauchli, Gary Morishima, Charles O'Hara, Charles Stringer, and Charles Wilkinson.

47. See Ground Rules for Joint Tribal/Federal Team (Oct. 23, 1996) (copy on file with author). The Rules provide:

1. The intended products for these discussions are described in the initial (October 23–24) meeting "Objectives."
2. Discussion in joint team meetings will be conducted by team members. It is expected, however, that, at the request of a team member, other individuals may be called upon from time to time to contribute their knowledge and perspectives to make sessions more productive and successful.
3. Interested observers invited by Indian tribes, or federal agencies involved in the discussions, may attend meetings, but will be asked to make their views known through their respective team members.
4. Each team can request caucuses as needed to discuss issues.
5. Results of proceedings will be recorded via mutually agreed minutes.
6. All members will make a good faith effort to try to reach consensus on all aspects of the discussions.

Third, and critically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical, and legal background. Similarly, the negotiators on both sides would have to understand the real-world problems faced by field-level federal and tribal administrators.

In response to this, at the first meeting in Boulder, the agenda set aside a two-hour block of time in the morning—one hour for the federal team and one hour for the tribes—to make introductory presentations. During this segment, Chairman Ronnie Lupe of the White Mountain Apache Tribe delivered an extemporaneous oration about the Apache world view and his tribe's philosophical web of family, community, land, and spirituality. Chairman Lupe's speech included a poignant tribute to Mollie Beattie, who died at the age of forty-nine and with whom the Chairman negotiated the Statement of Relationship at White Mountain—ultimately an agreement based on trust and mutual love for the natural world.<sup>48</sup> Chairman Lupe's deeply moving words set the tone for the whole process and were referred to many times during the negotiations that ensued. In addition to the scheduled presentations during the first morning of the Boulder meeting, several other agenda items were designed to allow the tribal side to explain some of the many unique and varied circumstances that apply when federal laws are sought to be extended into Indian country. All of the later negotiating sessions

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7. If the participants are unable to reach consensus on a particular topic, they shall develop a mutually acceptable issue statement and of [sic] the alternative views and supporting rationales for addressing the issue. Tribal and federal teams shall jointly make a presentation of the agreements reached and of the areas of remaining disagreement to Secretary of Interior Babbitt when the personal attention of the Secretary appears advisable.
  8. The parties will maintain a consolidated working draft of a Secretarial Order as discussions proceed, memorializing areas of agreement and identifying areas of disagreement. At each meeting, the participants will review the issue list and determine if agreements can be reached and identify critical issues that must be resolved in order to reach a satisfactory conclusion.
  9. Agendas will be jointly developed by the tribal and federal teams.
  10. Discussion team members will make a good faith effort to attend all sessions. If a team member is unable to attend a meeting, an alternate may be designated.
  11. A neutral facilitator(s) may be used as mutually agreed.

*Id.*

48. As far as I can tell, Chairman Lupe's speech was, unfortunately, never recorded or transcribed. On Mollie Beattie's remarkable career, see *Tributes: Mollie H. Beattie (1947-1996)*, 21 Vt. L. Rev. 735 (1997).

dedicated substantial amounts of time—sometimes as scheduled formal agenda items, more often in response to particular needs at particular times—to background information about tribal experiences.

The importance of this aspect of the process cannot be overstated. The detailed education about tribal issues allowed the federal negotiators, most of whom had previously spent little time on Indian matters, to understand the true distinctiveness of Indian policy: the depth of the commitment of Indian people to preserve and protect tribal sovereignty, their homelands, the trust relationship, and Indian culture. With that foundation, the federal negotiators were able to see the tribal positions with new eyes.

Yet the wealth of information came at a cost. On one level, this Order was developed with exceptional speed—a major policy document of this sort would normally take years, not months, to wind its way through two federal cabinet-level agencies. But, on another level, the process was enormously burdensome on the federal team. The members had to put aside many of their other duties to deal with the preparation for meetings, the meetings themselves, several long conference calls, and countless individual phone calls, faxes, and e-mail messages. All of that, however, was necessary to address the complicated concepts and legions of details that had to be resolved in order to craft a fair and workable system for harmonizing the administration of a complex federal statute with special Indian rights.

One inescapable characteristic of implementing a meaningful government-to-government relationship with Indian tribes is that it requires a commitment of time by high-level government officials that exceeds the time required to make decisions in most other areas of public policy.

Fourth, the federal negotiators—all of whom came into the process thinking of themselves as administrators of the ESA and its implementing regulations—came to understand that this Secretarial Order necessarily had to encompass both Indian law and the ESA. Although the BIA is often associated with the trust relationship, officials across the federal government, in and out of the Interior Department, are charged with trust duties when special Indian rights are involved.<sup>49</sup> At the

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49. See generally Felix S. Cohen, *Handbook of Federal Indian Law* 220–25 (Rennard Strickland et al. eds., Michie Co., 1982) (1942); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1523–35; Wood, *supra* note 26, at 743–44. See also *id.* at 749–62 (providing detailed examination of trust policies of several federal agencies); *id.* at 762–99 (discussing trust in ESA context).

end of the Boulder meeting, Deputy Assistant Secretary Don Barry, referring to the objectives set out in the negotiated agenda for the session, reminded the participants that the central objective of these negotiations was to “harmonize” Indian law and the ESA.<sup>50</sup> Over the course of the negotiations, the meaning of this observation became much more sweeping than even Barry had appreciated, as the participants struggled to find an accommodation between two complex and often conflicting bodies of law that had never been previously examined together in the administration of federal policy. For example, when the ramifications of treaty rights and the trust relationship had been fully explored, it became apparent that the ESA should be applied differently, and in a more limited manner, with respect to consultations under Section 7 and takings under Section 9 than is the case with any other entities or persons.<sup>51</sup> There are numerous other examples in the Secretarial Order. The order of the subjects listed in the title of the Secretarial Order—“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”—carries an important substantive message.

The final distinguishing feature of the negotiating process plainly dulled some of the impressive accomplishments. In the view of tribal participants, federal positions were unduly influenced by persons who had not been at the table and who had not had the benefit of the detailed background on Indian issues that the federal team members had received. Although the federal negotiating team had considerable autonomy, ultimately its work was not sealed off from federal officials in other agencies.

The issue arose shortly after the Boulder meeting. Tribal representatives drafted a proposed secretarial order and submitted it to the federal team. The federal team reviewed the tribal proposal and submitted its own version. In developing its proposal, the federal team circulated drafts to individuals in NMFS, USFWS, the Bureau of Land Management (BLM), the Bureau of Reclamation, the Interior Solicitor’s Office, the Forest Service, and other agencies. In several cases, the federal team frankly acknowledged that provisions had been included in the draft because outside people had insisted upon them. This pattern

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50. See Government-to-Government Relations to Promote Healthy Ecosystems: A Joint Tribal/Federal Effort to Develop a Secretarial Order Concerning Indian Tribes and the Endangered Species Act (ESA) (Oct. 23–24, 1996, Boulder, Colo.) (discussing “harmonizing” objective) (copy on file with author).

51. See Secretarial Order § 5, princ. 3(C), *infra* p. 1095 (addressing Section 9 takings); *id.* app. § 3(C), p. 1104 (addressing Section 7 consultations).

continued throughout the negotiations as the two teams exchanged drafts and, eventually, began negotiating on a single merged draft. Tribal representatives were frustrated and angry at the continuing influence of these “shadow” figures, who, in some cases, had been longtime opponents of the recognition of tribal rights.

To the credit of the federal team and Solicitor John Leshy, these “shadow” positions were scrutinized carefully and the great majority of them were rejected—precisely because the proponents lacked the full context of the negotiations. Further, it would be unrealistic to expect that federal negotiators could be completely insulated from the many people in the bureaucracy concerned with the issues—any more than tribal negotiators could proceed without input from Indian country. Nevertheless, the tribal team had attempted to determine the scope of its authority through the tribal meetings and the development of the tribal position paper; in turn, the tribal representatives sought and expected a procedure in which an informed, high-level team—in consultation with a fully-involved Solicitor—would have broad authority and would report directly to the Secretary. The process achieved that to a significant degree but, as the next section will discuss, the final Order was influenced in a number of respects by the views of people who had little understanding of the federal-tribal relationship the Order was designed to implement.

### III. THE SECRETARIAL ORDER

The Order that resulted from the tribal-federal negotiations, rather than amounting to a victory for either side, achieved what it was designed to accomplish—a sensible harmonizing of Indian law and the ESA. At the same time, Indian tribes and federal agencies both gained a lot. If the Order is implemented as intended, management and administration by both federal and tribal officials will proceed more smoothly and effectively. The tribes will have considerably more autonomy in managing the resources of their homelands. Animal species and the ecosystems upon which they depend will benefit as well.

Structurally, the first three sections of the Order set out technical provisions and definitions. Section four summarizes the nature of tribal rights to land, tribal sovereignty, and the federal trust responsibilities.<sup>52</sup> The purpose of this section is to give federal employees administering the ESA in the field notice of the special tribal rights that are an essential

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52. *Id.* § 4, p. 1091.

part of the Order. Section five sets out five principles, or directives, that, with explanatory text, form the substantive basis for the Order:

- Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.
- Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.
- Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
- Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.
- Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.<sup>53</sup>

The text accompanying Principles One and Three calls for extensive cooperation between tribes and federal administrators, especially when tribes are adopting, amending, and implementing tribal conservation and management plans. Federal administrators and representatives from the White Mountain Apache Tribe emphasized that this cooperation has had significant positive effects and is the reason that the Statement of Relationship has worked so well at White Mountain. With tribal and federal administrators exchanging information on a regular basis, they should be able to anticipate and respond to developing problems in furtherance of the common goal of protecting species and promoting healthy ecosystems. In this context, Principle 3(B) of the Order sets out one of its central provisions, that “the Departments shall give deference to tribal conservation and management plans.”<sup>54</sup>

The text accompanying the principles has other important provisions. Departmental employees should generally seek tribal permission before entering Indian reservations.<sup>55</sup> Indian lands are specifically identified as

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53. *Id.* § 5, p. 1092.

54. *Id.* § 5, princ. 3(B), p. 1095.

55. *Id.* § 5, princ. 1, p. 1093; *see also infra* text accompanying note 77.

retained lands belonging to tribes and not public lands—correcting a misconception held by many federal employees.<sup>56</sup> If the layers of cooperation and the provision of federal support to tribes raise the possibility of an incidental take under Section 9 of the ESA, the Departments must still satisfy the “conservation standards”<sup>57</sup> before enforcement is sought under the ESA or under the trust responsibility.<sup>58</sup>

The Order also contains provisions establishing special studies, leading toward recommendations to the Secretary, on Alaska Natives<sup>59</sup> and on cultural and religious uses of natural products.<sup>60</sup> The intent is that both of these efforts will involve bilateral negotiations similar to those that resulted in the Order. The Order also encourages the use of dispute resolution processes, evidencing the negotiators’ determination to resolve disputes outside of court if possible.<sup>61</sup>

The Order includes an appendix that sets out additional provisions. The idea of an appendix was set forth at the first negotiating session by Jamie Rappaport Clark, since appointed as USFWS Director, who wanted to be certain that the Order would contain specific, detailed instructions to aid field personnel in on-the-ground administration.<sup>62</sup> As the negotiations progressed, the appendix became every bit as important as the Order proper. Especially notable are sections setting out special procedures for cooperating and consulting with tribal governments during the listing process,<sup>63</sup> Section 7 consultations,<sup>64</sup> and the development of habitat conservation plans involving non-tribal entities but affecting tribes.<sup>65</sup> As further evidence of the concern for seeing that the Order actually be implemented on the ground, Clark emphasized that the Departments would begin an extensive training program for employees after the signing of the Order.

These government-to-government negotiations, then, resulted in several advances for the tribes. The Order recognizes the unique

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56. See Secretarial Order § 5, princ. 2, *infra* p. 1094.

57. See *supra* note 54 and *infra* note 73.

58. Secretarial Order § 5, princ. 3(C), *infra* p. 1095.

59. *Id.* § 7, p. 1097. See also *infra* text accompanying note 70.

60. Secretarial Order § 8, *infra* p. 1097.

61. *Id.* § 9, p. 1098.

62. See Memorandum from Bruce Davies, Northwest Indian Fisheries Commission, to participants in Seattle and San Francisco Workshops on Indian Tribes and the Endangered Species Act 4–5 (Apr. 11, 1997) [hereinafter Davies Memorandum] (copy on file with author).

63. Secretarial Order app. § 3(B), *infra* p. 1102.

64. *Id.* app. § 3(C), p. 1104.

65. *Id.* app. § 3(D), p. 1105.

characteristics of tribes and tribal lands. It establishes a special place for tribes, tailored to the characteristics of tribal sovereignty and the trust duty, in all the key areas of administration of the ESA. It is also a practical document that focuses on relationships in the field between tribal and federal resource managers. The Order does not accomplish what the tribes would cherish most—a definitive statement that the ESA does not restrict tribes. However, it is neutral on the issue of ESA coverage, gives explicit deference to tribal decisions, and establishes a number of significant procedural steps and substantive requirements before federal officials can seek to apply the ESA to tribes.

While the Order is, on balance, favorable from the tribes' standpoint, there were a number of disappointments. Five issues were chief among them. First, the negotiators refused to acknowledge the duties of the affirmative trust obligation, as set forth in the important scholarship of Mary Christina Wood.<sup>66</sup> The affirmative trust obligation would require the federal government, as trustee, to take actions in managing federal lands and sometimes in regulating non-Indian lands to restore habitat degraded by non-Indian development.<sup>67</sup> The response of the federal negotiators, apparently at the behest of BLM and Bureau of Reclamation employees not at the table, was that fulfilling the affirmative trust obligation would establish a duty higher than ESA recovery standards, and that these negotiations should be limited to the context of the ESA.<sup>68</sup>

The federal negotiators also refused to include Alaska Native tribes in the Order. The megapolitics of Alaska, where the Ninth Circuit Court of Appeals has recently recognized Indian country for Alaska Native village governments,<sup>69</sup> made the issue too sensitive for inclusion in spite of bitter protests by tribal negotiators. The Alaska situation, however, is addressed in section seven of the Order, a middle-ground position that calls for a special study, to be completed within one year, "to harmonize . . . the rights of Alaska Natives . . . and the [ESA]."<sup>70</sup> The study will

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66. See Mary Christina Wood, *Protecting the Attributes of Tribal Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109.

67. *Id.* at 227–33.

68. Davies Memorandum, *supra* note 62, at 7.

69. *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996) (holding that Alaska Native Claims Settlement Act did not extinguish Indian country in Alaska), *cert. granted sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 117 S. Ct. 2478 (1997).

70. Secretarial Order § 7, *infra* p. 1097.



proceed with the “full cooperation and participation of Alaska tribes and Natives.”<sup>71</sup>

A third area of disappointment for the tribes involved the application of the “conservation principles.”<sup>72</sup> The Order applies the principles directly to Section 9 takings,<sup>73</sup> but applies them only in a highly attenuated fashion with respect to Section 7 consultations.<sup>74</sup> In addition, the Order distinguishes “direct” from “incidental” takings and applies the conservation standards as a whole only to incidental takings.<sup>75</sup> In the tribes’ view, comprehensive application of the conservation standards is a key to avoiding confrontations between the ESA and tribal rights.

Fourth, the Order limits special tribal rights, including the power to regulate, to “Indian lands,” rather than applying the more expansive Indian country definition.<sup>76</sup>

A final major objection by tribes involved entry onto reservations.<sup>77</sup> The provision has much to commend it, generally prohibiting entry without tribal permission onto Indian reservations. The provision contains a loophole, however, allowing entry “when determined necessary for . . . law enforcement activities.”<sup>78</sup> This was insisted upon by Justice Department attorneys not involved in the negotiations. For tribal negotiators—although the guarantee in the Order is apparently the first statement on record in favor of a requirement of tribal permission for entry by federal officials onto reservations—the qualifier smacks of a retreat to old notions current when the BIA, not tribes, was the real government in Indian country. The qualifier is not typical of the Order as a whole, but it left a bad taste in the tribal negotiators’ mouths, especially, coming as it did from “shadow” negotiators not privy to the

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71. *Id.*

72. *See supra* note 57 and accompanying text.

73. Secretarial Order § 5, princ. 3(C), *infra* p. 1095. The Order, however, articulates the second “conservation principle” as requiring that tribal officials show that “the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities.” *Id.* Tribal negotiators believed the proper formulation to be that the purpose of the regulations *cannot be achieved solely by regulation of non-Indians.*

74. *Id.*

75. *Id.*

76. “Indian lands” is defined in the Order, § 3(D), *infra* p. 1091. Regarding “Indian country,” which includes all land—including fee lands—within reservation boundaries, see 18 U.S.C. § 1151 (1994).

77. Secretarial Order § 5, princ. 1, *infra* at 1093.

78. *Id.*

rich and extensive background that had been obtained by the federal negotiators at the table.

#### IV. CONCLUSION

The two Secretaries signed the Order at a festive ceremony, attended by nearly 200 people, in the ornate, high-ceilinged Indian Treaty Room in the Old Executive Office Building. Jaime Pinkham, Chairman Ronnie Lupe, and Billy Frank, Jr., made statements on behalf of the tribes. U.S. Senator Daniel K. Inouye, longtime champion of tribal rights, offered brief remarks. Secretary William M. Daley and Secretary Bruce Babbitt offered their views. The Secretaries then signed a poster-sized ceremonial document inscribed with the title of the Order and several of its key passages. To underscore the bilateral nature of the process, Chairman Lupe and Billy Frank, Jr., also affixed their signatures.

Secretary Babbitt stressed the issue of bilateralism in his remarks. He reported that he had asked his staff, in preparation for the occasion, to research the history of the Indian Treaty Room. He learned that no Indian treaty had ever actually been signed there. But the Order, he said, was “the equivalent of a treaty” because it was created out of a “mutuality” between the United States and “sovereign tribal governments.” “It is my hope,” he concluded, “that from this day on we will banish forever the traditional treaty process that has been one-sided, overbearing and not infrequently unfair.”<sup>79</sup>

One secretarial order, of course, cannot eliminate two centuries of overbearing federal policy toward Indian people. Yet the Order does show that the government-to-government relationship can be administered mutually, faithfully, and productively. Already, there is talk of using “the tribal rights-ESA process” to address other problem areas—not just the two study areas identified in the Order (cultural and religious uses of natural products and the relationship with Alaska Native governments), but also other difficult issues such as Indian water rights.

The idea of replicating the process, however, should include warning signals. Even in the late 1990s, most federal employees think of Indian policy as being carried out by unilateral federal actions, not by a mutual government-to-government relationship. It would be easy, in future efforts supposedly patterned after this one, to dilute the process, accomplish little, and generate anger in Indian country. So it is important

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79. Remarks of Bruce Babbitt, Washington, D.C. (June 5, 1997); see also Scott Sonner, *Feds Defer to Tribes on Species Act*, America Online News (June 5, 1997).

to mark down the distinguishing characteristics that allowed this process to succeed.

The Order did not result from the traditional Interior Department process in which an agency, occasionally consulting with the tribes, develops a policy on some Indian issue and then works a proposal up through the departmental approval system for the signature of the Secretary or some other senior official.

Instead, the Secretary himself initiated this process. The tribes had been hard at work on the issue for more than a year, but the essential quality of bilateralism did not exist until September 1996, when the Secretary met with tribal representatives and ordered his staff to negotiate with a tribal team.<sup>80</sup>

Babbitt's directives encompassed more than bilateral negotiations. He gave the project the highest priority, urging that talks begin within one month and that a negotiated secretarial order be put on his desk no later than early January 1997.<sup>81</sup> Babbitt's request that any disagreements between the federal and tribal teams be submitted to him for mediation underscored that this was a secretarial-level enterprise. The final critical element of the process, the appointment of high-level departmental officials to the federal team, assured that the process would carry weight in the Interior and Commerce agencies—where opposition inevitably develops for any proposal that recognizes substantial tribal rights.

The bilateralism was carried through the negotiating process where the two teams, as equals, developed protocols, set meeting dates, negotiated, developed working drafts, and eventually agreed upon a final Secretarial Order. As noted, the tribes found warts in the process, most notably the influence of "shadow" negotiators not at the table. This is a difficult issue that was not anticipated (although it should have been) by Secretary Babbitt or either team at the beginning of the negotiations. Otherwise, all of the previously discussed elements of bilateralism were followed faithfully in the development of the Order.

Strong headwinds will have to be faced if this approach is to be followed in the future. The role of federal officials not at the table will have to be resolved satisfactorily. Even more fundamentally, an Interior Secretary (and often, as here, secretaries from other departments) must have the will to give the issue in question a high priority, as Babbitt did.

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80. See *supra* text accompanying note 43.

81. In fact, although the Order was signed in June 1997, it was completed, except for minor word changes, in February, and the process was given top priority by all participants from beginning to end.

And the negotiators must be willing to make a major time commitment to the process. Although the time period usually will not be as short as it was for this Order, bilateralism of this kind will always be taxing on the participants.

One of the perpetual obstacles to implementing the trust and the government-to-government relationship successfully was capsulized in a recent discussion I had with an experienced, conscientious, and able official of USFWS. He is a strong advocate for wildlife protection and has no agenda against Indians. He had seen the final Order, and we discussed it. At the end of the conversation, he said, "Well, I'll abide by it but I can't be expected to carry out Indian policy. My job is to administer the Endangered Species Act."<sup>82</sup> For him, implicitly, Indian policy is cabined and subordinate.

He would not have made that comment if he had served on the negotiating team and had engaged in the long discussions about how the trust does bind federal officials when they deal with tribes—and how ultimately the Interior Department, including USFWS, must harmonize Indian law and the ESA. Nor, since I believe that USFWS will put on quality training sessions in the implementation of the Act, would he be likely to make such a statement after going through the training program. Yet inevitably, both in this tribal rights-ESA process and in others that may follow, people not at the table will try to influence the process and people without the necessary background will be called upon to carry out policy at the junctions of Indian law and other laws. Achieving true bilateralism will be a continuing challenge.

Still, I hope that conscientious people will go down this path in the future. The Order is no dramatic breakthrough, no Olympian moment in federal Indian policy. It is just a sensible, fair approach to a thorny area of policy developed by people who took the time to listen, negotiate, open up their minds, and take some chances. But, in a complicated world, this is exactly where progress is often made—in measured, collaborative approaches to particular problems. And the worth of the process stands out in sharp relief because it was set against the long and mostly dreary canvas of federal-tribal relations. The pageantry in the Indian Treaty Room did not commemorate some epic event, but it did rightly celebrate a solid accomplishment that holds out promise for those who believe that an honest, open, and hardworking mutuality ought to serve as the foundation for Indian policy.

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82. Conversation with USFWS official, in Washington, D.C. (Mar. 11, 1997).

# SECRETARIAL ORDER

## **Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act**

### **Sec. 1. Purpose and Authority.**

This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. § 1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

### **Sec. 2. Scope and Limitations.**

(A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or

modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

### **Sec. 3. Definitions.**

For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which

the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term “tribal trust resources” means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term “tribal rights” means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term “Indian lands” means any lands title to which is either: (1) held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

#### **Sec. 4. Background.**

The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns;

inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

#### **Sec. 5. Responsibilities.**

To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:



**Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.**

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

**Principle 2.** THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

**Principle 3.** THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.

**(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.**

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

**(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.**

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

**(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.**

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such

notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

**Principle 4.** THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

**Principle 5.** THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal

information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

**Sec. 6. Federal-Tribal Intergovernmental Agreements.**

The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

**Sec. 7. Alaska.**

The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

**Sec. 8. Special Study on Cultural and Religious Use of Natural Products.**

The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the

Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

**Sec. 9. Dispute Resolution.**

(A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

**Sec. 10. Implementation.**

This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

**Sec. 11. Effective Date.**

This Order, issued within the Department of the Interior as Order No. 3206, is effective immediately and will remain in effect until amended, superseded, or revoked.

## Secretarial Order on Tribal Rights and the ESA

This Secretarial Order, entitled “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

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Bruce Babbitt  
Secretary of the Interior

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William M. Daley  
Secretary of Commerce

Date: June 5, 1997

**APPENDIX**

*Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206*

**Sec. 1. Purpose.**

The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

**Sec. 2. General Policy.**

**(A) Goals.** The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

**(B) Government-to-Government Communication.** It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

**(C) Agency Coordination.** The Services have the lead roles and responsibilities in administering the Act, while the Services and other



federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

**(D) Technical Assistance.** In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

**(E) Tribal Conservation Measures.** The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

**Sec. 3. The Federal Trust Responsibility and the Administration of the Act.**

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

**(A) Candidate Conservation.**

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

**(B) The Listing Process.**

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a

## Secretarial Order on Tribal Rights and the ESA

species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of “balancing tests” to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and

provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

**(C) ESA § 7 Consultation.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the

affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

**(D) Habitat Conservation Planning.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures

incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

**(E) Recovery.**

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally-designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of *Endangered and Threatened Wildlife and Plants* occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

**(F) Law Enforcement.**

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

