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# Conserving Ecosystems through the Secretarial Order on Tribal Rights

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# Conserving Ecosystems Through the Secretarial Order on Tribal Rights

Sandi B. Zellmer

American Indian nations successfully manage habitat for wildlife species on reservation lands through tribal law and through traditional cultural practices. Beyond reservation boundaries, many tribes are involved in managing wildlife habitat through cooperative management agreements with federal and state agencies. Tribes do this because wildlife is important to them for cultural, economic and religious reasons, not because they are required to do so by the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. Nevertheless, the ESA looms over Indian Country like the sword of Damocles: While the Act contributes to the conservation of tribal wildlife resources by imposing federal penalties on those who harm listed species, at the same time it may severely limit prospects for the development of reservation resources. In particular, the designation of critical habitat on Indian lands superimposes federal prerogatives on tribal management decisions, undermining the sovereign authority of tribal governments over trust resources, while providing relatively minimal protection for the species.

In 1997, the Secretaries of the Departments of the Interior and Commerce issued Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (Secretarial Order) <[www.fws.gov/r9endspp/esatribe.html](http://www.fws.gov/r9endspp/esatribe.html)> (visited: October 11, 1999). The Secretarial Order provides a vehicle for turning the ESA sword into a tool for cooperative approaches that equitably distribute the conservation burdens among tribal, federal, state and private interests.

Congress enacted the ESA to conserve imperiled wildlife species and their ecosystems and, ultimately, to provide for the recovery of those species so that they no longer require special protections. 16 U.S.C. § 1531(b). The ESA directs the two federal agencies with lead roles in protecting species, the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the

Department of Commerce (collectively referred to as the Services), to identify species in need of protection by placing them on the endangered or threatened species list. 16 U.S.C. § 1533(a)(1), (c). The ESA also charges the Services with designating critical habitat for areas essential to the conservation of listed species if those areas are (1) occupied and requiring special management considerations, or (2) outside the geographical area occupied by the species but essential for the species' conservation. 16 U.S.C. § 1533(a)(3).

The ESA directs the Services to designate critical habitat "to the maximum extent prudent and determinable" at the time a species is listed, 16 U.S.C. § 1533(a)(3), but designation can be delayed due to insufficient information. *See* 50 C.F.R. § 424.12. In determining whether an area should be included in the designation, the Services must first identify occupied or unoccupied but suitable areas, based on the best scientific data available. 16 U.S.C. § 1533(b)(2). The Services must then consider the economic and other relevant impacts of designation. Suitable areas may be excluded if the "benefits of exclusion outweigh the benefits of designation," unless exclusion would result in extinction of the species. *Id.*

Once critical habitat is designated for a listed species, a tri-partite system of protection comes into force. Section 9 of the ESA, which is immediately triggered upon the listing of the species, prohibits the unauthorized "take" of a listed species by any person, regardless of whether the action occurs on federal, state, tribal or private lands. 16 U.S.C. § 1538(a). Section 9 prevents harm to the species caused by either direct action, such as hunting or harassment, or modifications to habitat that actually injure the species by impairing essential behavior patterns, even if the habitat has not been designated as critical. *See Sweet Home v. Babbitt*, 515 U.S. 687 (1995) (upholding Secretary's definition of "harm" codified at 50 C.F.R. § 17.3).

Section 7, 16 U.S.C. § 1536, provides two additional layers of protection for activities with a federal nexus, such as the approval of leases on Indian lands by the Bureau of Indian Affairs (BIA), *see, e.g.*, 25 U.S.C. § 415; 25 C.F.R. § 162. Under Section 7, the acting agency must consult with FWS or NMFS to ensure that the action is not likely to jeopardize the continued existence of any listed species. Consultation is also

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required to ensure that the action will not result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). See 50 C.F.R. § 402.02 (defining adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species"). If a species or its habitat may be adversely affected, FWS or NFMS issues a biological opinion (BO) detailing the effects of the proposed action. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h). The action cannot go forward if the BO concludes that no reasonable and prudent alternative will avoid jeopardy to the species or adverse modification of critical habitat. See *TVA v. Hill*, 437 U.S. 153, 174 (1978).

Although Section 9 and Section 7 both affect activities in Indian Country, protection of critical habitat is accomplished only through the consultation requirements of Section 7. Thus, designation of critical habitat has a more marked effect on Indian lands than it does on private lands, which are not covered by Section 7 absent federal funding or permit requirements. In developing a baseline against which to measure effects of a proposed action, FWS considers the cumulative impacts of past and ongoing actions on the species and its critical habitat. 50 C.F.R. § 402.02. In general, private and state lands in the vicinity of Indian Country have been more extensively altered by resource extraction and by urbanization, so a jeopardy determination is almost preordained to impose a heavier burden on Indian lands. A more recent development proposal by a tribe may well be precluded as the "straw that would break the camel's back"—the added activity that, given past and ongoing non-Indian activities, impermissibly degrades critical habitat.

### *The Single-Species Approach of the ESA*

The 1990s marked a dramatic shift among federal land managers toward biodiversity and ecosystem management, concepts largely unexplored at the time the ESA was passed. Although the ESA, in prefatory language, identifies ecosystem integrity as an overarching goal, see 16 U.S.C. § 1531(b), the substantive provisions of the Act focus on individual species rather than variability within and among living organisms and their ecosystems. The ESA's single-species approach has been criticized as one-dimensional and even myopic, and as inconsistent with tribal objectives for integrated resource management. The White Mountain Apache, for example, believe that "managing ecosystems rather than individual listed species is the most practical long-term approach to preserving biodiversity, which is the ultimate intent of the [ESA]." *Chairman's Corner: Congress Hears About Our Relationship with the U.S. Fish and Wildlife Service*, FORT APACHE SCOUT, Aug. 4, 1995, at 2.

If the Act were recast in terms of ecosystem management (i.e., protecting the integrity of entire natural

systems), it would be more consistent with many tribal resource management programs. Shifting the ESA's focus to ecosystem management, however, may carry a high price: Absent the more definite biological requirements flowing from the needs of a particular species, management goals can easily be defined in anthropocentric terms. See Oliver A. Houck, *Are Humans Part of Ecosystems?*, 28 ENVTL. L. 1 (1998). Ecosystems then become whatever humans want them to be, and ecosystem management nothing but "politics, with a strong flavor of law avoidance." Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 975 (1997). The minimum threshold provided by the ESA—species survival—provides a bottom line that cannot be manipulated easily or relegated to the back seat in the face of economic pressure.

The existing statute, at least in theory, advances biodiversity principles through its critical habitat provisions. Designations in areas not yet occupied by listed species could provide contiguous, interconnected blocks of habitat, which are more beneficial for foraging and dispersal than fragmented habitat. Species well-distributed across their range are less susceptible to extinction than those confined to a few small, fragmented portions of their range. See Reed Noss, *Some Principles of Conservation Biology as They Apply to Environmental Law*, 69 CHI-KENT L. REV. 893, 900-01 (1998).

In actuality, however, the designation of critical habitat adds little protection beyond the ESA's "first line" of defense—inclusion on the endangered or threatened species list. The bedrock requirements of the Act, its prohibitions on "take" and jeopardy, both kick in as soon as a species is listed. The primary effect of designation is felt in unoccupied areas that are only marginally suitable for the species, because degradation of habitat that could reasonably be expected to harm a listed species is already prohibited as a "take" under Section 9, or as jeopardy in situations where Section 7 is applicable. See 64 Fed. Reg. 31,871, 31,872 (June 14, 1999) (Notice of Intent to Clarify Role of Habitat). FWS gives designation its lowest priority, and characterizes it as one of the "most costly and controversial classes of administrative actions"—costly because of lengthy and involved requirements for rulemaking National Environmental Policy Act (NEPA) analysis, and controversial because of the perception that designation is a heavy-handed federal usurpation of local land-use decision-making and economic development. See 62 Fed. Reg. 39,129, 39,136 (July 22, 1997) (Final Determination of Critical Habitat for the Southwestern Willow Flycatcher).

In contrast to the minimal protection that critical habitat designation provides for endangered species, reservation lands and resources unquestionably play a critical role in the survival of Indian nations. But the conservation of biological diversity, including threatened and endangered species, and the advancement of

tribal interests are not mutually exclusive. In tribal cultures, a wide variety of wildlife and plant species are valued for a range of reasons, from the economic to the religious. If, in carrying out their duties, the Services show genuine respect for tribal sovereignty and the federal trust responsibility to the tribes, the ESA, particularly its critical habitat provisions, could be implemented in a much more holistic manner, beneficial for both tribes and wildlife.

### *Prioritizing Indian Interests*

The uncompromising requirements of the ESA pose a dilemma not only for tribes but also for the Services, which, in addition to protecting listed species, are charged with trust responsibilities toward the tribes. In the mid-1990s, tribal representatives engaged the offices of the Secretaries of the Interior and Commerce in discussions on how the Services could better effectuate their trust responsibility to the tribes. In 1997, largely in response to this tribal initiative, the two Secretaries issued the Secretarial Order, seeking to harmonize the federal trust responsibility and the statutory missions of FWS and NMFS in implementing the ESA. *Secretarial Order* <[www.fws.gov/r9endspp/esatribe.html](http://www.fws.gov/r9endspp/esatribe.html)>. See Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1066-75 (1997). The Secretarial Order strives to ensure that tribal lands are not treated like public lands, and that Indian tribes do not bear a disproportionate burden for the conservation of listed species. See Secretarial Order § 1; § 5 princ. 2.

The Secretarial Order, through its appendix, affirmatively prioritizes tribal interests over those of other landowners or managers:

Critical habitat *shall not be designated* in such areas [that affect trust resources, tribally owned fee lands or the exercise of tribal rights] *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.

Appendix § 3(B)(4) (emphasis added).

Before restricting habitat modifications that could result in incidental takings, the agencies must find, *inter alia*, that the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities and that the restriction does not discriminate against Indian activities. Secretarial Order § 5, princ. 3(C). In addition, restrictions should not be mandated unless voluntary tribal measures fail to achieve the conservation purpose. *Id.*

Prioritizing tribal interests over those of other landowners can be justified on several grounds. The Secretarial Order itself recognizes that “[t]he unique

and distinctive political relationship between the United States and Indian tribes . . . differentiates tribes from other entities that deal with, or are affected by, the federal government.” *Id.* § 4. Preferences for federally recognized tribes do not violate equal protection principles as they are based not on impermissible racial classifications but on the United States’ “unique obligations” toward tribes. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Even more than the employment preferences at issue in *Morton*, the tribal land base compels federal protection as an important—perhaps the most important—trust resource. Pursuant to treaties, American Indian tribes ceded most of their aboriginal lands to the United States in exchange for the “absolute and undisturbed use” of retained lands, free from incursion by non-Indian settlement. See CHARLES F. WILKINSON, *INDIANS, TIME AND THE LAW* 16-18 (1986). The United States, in turn, has a trust responsibility toward federally recognized tribes as “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . .” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). The federal trust responsibility includes, as one of its key attributes, the duty to support tribal political and economic self-determination through the use of retained lands.

In western culture, real property is a concept of almost mythical proportion. Compelling as Blackstone’s ideal of “total dominion” over property is to Anglo-American societies, see WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 2-11 (1766), in ROBERT C. ELLICKSON, ET AL., *PERSPECTIVES ON PROPERTY LAW* 37-38 (2d ed. 1995), land takes on even greater significance to many Indian nations. For land-based tribes, real estate is neither fungible nor is it freely bought and sold. Instead, the land is the “essential base of tribal culture, development, and society.” *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987), citing FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 209 (Rennard Strickland, ed. 1982). American Indian people often describe themselves as “belonging to” the land, instead of vice versa, and the land is viewed as the “mother” or “the heart of everything that is.” See Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. REV. 24, 252-53 (1989).

Development of reservation resources, more than simply a stick in a tribe’s bundle of property rights, is critical to the fulfillment of tribal self-determination and the survival of land-based Indian nations as nations. See Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 444-46 (1998). Both Congress and the judiciary have recognized that the economic use of natural resources found on Indian lands is a matter of utmost importance. The Supreme Court, for example, has upheld the tribes’ sov-

ereign authority to control economic development on reservations by implementing comprehensive hunting and fishing regulations, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); taxing mining activities, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); and operating on-reservation gaming enterprises, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 (1987).

Designation of critical habitat elevates federal wildlife priorities over tribal interests by imposing a *de facto* federal zoning system on Indian lands. Traditional zoning or land use regulation divides land in accordance with uses deemed compatible and consistent with the good of the community, thereby inhibiting the individual landowner's enjoyment of property. Zoning provides a community, through its local government authority, a vehicle with which to express or define "its essential character." *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., announcing the judgment of the Court in one of two consolidated cases and concurring in the result in the other). This fundamental sovereign power to control land use is "especially vital" to the economic security, health and welfare of American Indian tribes, "who enjoy a unique historical and cultural connection to the land." *Brendale*, 492 U.S. at 458 (Blackmun, J., concurring in one of two consolidated cases and dissenting in the other). The inability to "engage in the systematic and coordinated utilization of land" has a severe impact on tribal self-governance. *Id.*

Critical habitat designation effectively creates a wildlife "district" zoned for habitat, while incompatible uses, such as oil and gas development, must be undertaken elsewhere. The imposition of critical habitat over portions of a reservation significantly limits tribal sovereignty by interfering with a tribe's ability to use Indian lands in a manner consistent with the tribe's own cultural and economic goals. Further, designation can result in patchwork administration of the land base that defeats comprehensive tribal planning.

Moreover, substantial evidence exists that tribes do not really need the mandates of the ESA. Rather, guided by traditional ecological values, many tribes do a better job managing their natural resources than do federal agencies armed with federal mandates. The decision-making processes of many Indian nations reflect stewardship and sustainability, emphasizing, not short-term returns, but the effects on the seventh generation of the people. See Rebecca Tsosie, *Tribal Environmental Law*

*in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Environmental Knowledge*, 21 Vt. L. REV. 225, 274-76, 288 (1996).

Several tribes, for example, have adopted innovative timber programs, which reduce annual harvest from former BIA-established quantities and restrict the use of clear-cutting as a harvest method. The Menominee Tribe of Wisconsin has achieved a sustainable forestry program by integrating science, technology, and sound business practices within a cultural context that emphasizes intergenerational equity. Menominee Tribal Enterprises, <http://205.213.138.5/mte/home.htm> (visited June 23, 1999). See Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127, 142 (1994). The White Mountain Apache Tribe has reduced timber harvest from BIA levels by almost 50 percent and canceled several old-growth timber sales due to cultural and environmental

concerns. See Chairman's Corner, FORT APACHE SCOUT, Aug. 4, 1999. Similarly, the Southern Ute resource management plan utilizes sustainable selective forestry methods and minimizes erosion by preventing harvest on steep slopes. *Southern Ute Indian Tribe v. U.S. Fish and Wildlife Service*, No. 96-M-1369, Complaint ¶¶ 54-56 (D. Colo. filed June 11, 1996) (Southern Ute Complaint).

As a result of tribal stewardship, coupled with the extensive development of surrounding non-Indian lands, some reservations have become enclaves of suitable habitat for listed species.

According to former Tribal Chairman Ronald Lupe of the White

Mountain Apache Tribe, listed species found on the reservation "are rare because there are few healthy habitats elsewhere. . . . Those who sought to impose the ESA upon our Tribe and our aboriginal lands . . . had long ago exterminated native animals and plants and had erected cities of concrete and steel." Chairman's Corner, FORT APACHE SCOUT, Aug. 4, 1999. Although there is a shared responsibility for the preservation of species, those who have exercised stewardship may feel, with some justification, that the burdens of conservation should be borne, to the greatest extent possible, by those who benefited from activities that drove species to extinction and degraded their habitat. The Secretarial Order can be used to ensure that Indian nations are not required to forego economic opportunities to compensate for the effects of past development and habitat degradation, unless the survival of a species really is at stake.

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## Natural Heritage

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proving that Mae West was wrong—too much of a good thing is bad for our river ecosystems.

The core problem is that traditional flood control and reclamation projects generate hydropower revenues that keep rolling in, in an endless stream, generating demands for still more projects. Those revenue streams could be the funding source for a national river restoration program. It is now time to redirect these revenues to finance a truly national river restoration partnership with the states and the tribes. It will, however, take an intensive grassroots effort to persuade Congress to root out obsolete programs and to plant these initiatives in their place.

The benefits of river restoration also extend into the communities where we live. When I first saw the

Potomac River as a college student, it was rank with raw sewage, its banks strewn with trash. The historic C&O Canal and its towpath were to be filled in and paved over for a freeway.

Today I live near the banks of that same river, now cleaned up and restored. The striped bass and shad have returned, along with the bald eagles and cormorants and osprey. On a summer day, families picnic on the grass by the old lock-keeper's house, the river is crowded with sail boats, and the towpath is alive with bikers and joggers. By restoring these waters we have also restored the community. Yet even here, our voyage of restoration is not complete. There is still an upriver dam blocking fish passage, and in a few weeks I will be out with the sledgehammer to start taking it down. 🌳

## Tribal Rights

(Continued from page 165)

### *Meeting Conservation Goals through Cooperative Management*

Beyond its substantive provisions, the Secretarial Order addresses procedural concerns by encouraging meaningful consultation and intergovernmental partnerships. See, e.g., Secretarial Order, app. §§ 6, 9(A). It directs FWS and NMFS to provide assistance for the development of tribal conservation plans. Secretarial Order § 5, princ. 3(A). When such plans are in place, they should be given deference, *id.* princ. 3(B), and should serve as the basis for developing reasonable and prudent alternatives to activities that would jeopardize a listed species or adversely modify critical habitat, app. § 3(C)(3)(a), (d). In addition, the Secretarial Order encourages intergovernmental agreements and habitat conservation plans for management of multijurisdictional ecosystems and conservation of both listed and sensitive species. See *id.* § 2(E).

Cooperative agreements, including co-management, provide one of the most effective vehicles for harmonizing the trust responsibility with species conservation. Given the United States' trust responsibility and self-determination policy, and the tribes' intimate knowledge of reservation resources, co-management agreements with bilateral decision-making authority are particularly appropriate when federal agencies assert control over wildlife and its habitat on Indian land. Co-management agreements may also be appropriate for some areas outside of reservation boundaries.

Although the Secretarial Order plainly acknowledges that tribes are the proper governmental entities

to manage tribal lands and resources, Secretarial Order § 5, princ. 3(B), it falls short of providing them with mutual decision-making authority, even for on-reservation tribal resources. Federal agencies are often reluctant to agree to tribal co-management authority, particularly where public lands are involved, fearing that tribes will exercise a "veto" over what agencies regard to be discretionary activity.

Despite such reluctance, co-management of trust resources has been employed successfully to avoid litigation and to resolve ongoing disputes over treaty rights. For example, federal wildlife agencies have entered into agreements with tribes for the management of fishery resources both within reservations and beyond. The Columbia River Intertribal Fish Commission, comprised of the Nez Perce Tribe and the Confederated Tribes of the Umatilla, Warm Springs and Yakama Indian Nations, performs an active and integral role in the co-management of salmon and steelhead in the Pacific Northwest. It manages the harvest of specific runs, as well as seasons and hatchery production, and places heavy emphasis on resource management, including instream flows and riparian habitat protection and restoration throughout the basin. See [www.critfc.org/text/HISTORY.HTM](http://www.critfc.org/text/HISTORY.HTM) (visited June 24, 1999). The CRIFC employs a well-respected staff of biologists and other scientists, along with enforcement officers. Wilkinson, *Indian Tribal Rights and the National Forests*, 34 IDAHO L. REV. at 448-49. The technical and scientific expertise of CRIFC is "second to none" in salmon management. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST* 213 (1992).

Tribes are also playing a key role in the management of broad-ranging terrestrial species that traverse Indian and non-Indian lands, including lands that are not subject to treaty rights. In 1995, the Nez Perce Tribe entered into an agreement with FWS to manage the gray wolf reintroduction program in the State of Idaho. Nez Perce Tribal Wolf Recovery and Management Plan for Idaho, FWS No. 14-48-0001-95-538 (Aug. 8, 1995). Although only FWS is a signatory with the tribe, other agencies involved include the Idaho Department of Fish and Game and the U.S. Forest Service. The tribe agreed to engage in monitoring, research, and public outreach and education regarding wolf reintroduction in central Idaho, and to assist in predator control. *Id.* at 10-14. Land use controls, including road closures and restrictions on federal grazing allotments, could be required, though they are not anticipated. *Id.* at 17. In spite of a pending challenge to the wolf reintroduction program, the program has been hugely successful. The wolves—now numbering more than one hundred in Idaho—are well on their way to recovery. See Cate Montana, *Nez Perce and Grey Wolf: Both Banished, They Recover Together*, INDIAN COUNTRY TODAY, Feb. 15-22, 1999, at B1-B2.

Some cooperative management agreements go beyond the needs of any one particular species, particularly in the context of watershed and water quality management. The Umatilla Tribes' restoration plan for the Wildhorse Creek watershed, which lies partially within their reservation, focuses on nonpoint source pollution, involving private and state actors in stream-bank planting, fencing and measures to minimize the impacts of dams on natural flow regimes. A watershed strategy has also been adopted by the Nez Perce Tribe, in partnership with Wallowa County, Oregon. See Reed D. Benson, *A Watershed Issue: The Role of Streamflow Protection in Northwest River Basin Management*, 26 ENVTL. L. 175, 192-93 (1996).

Just as tribes may look beyond the needs of specific species, they also may draw upon federal laws other than the ESA. For example, the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 to 470x-6 (1994 and Supp. 1999), can be used to provide a measure of protection for places that are eligible for the National Register of Historic Places because of their importance in the cultural practices of a living community. The National Park Service (NPS) has coined the term as "traditional cultural properties" (TCPs) to describe such historic places. See PATRICIA L. PARKER & THOMAS F. KING, NATIONAL PARK SERV., NATIONAL REGISTER BULLETIN 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (1990). TCPs may hold importance for tribal cultural practices because of the wildlife and plant species in the area, and, where such places are still within tribal jurisdiction, the web of life may be intact because of its cultural importance to a tribe.

As amended in 1992, the NHPA authorizes tribes to play a prominent role in the review of federal actions

that may affect historic properties, including TCPs. NHPA § 101(d); 16 U.S.C. § 470a(d). With respect to lands within reservation boundaries, tribes now have the right to take over functions that would otherwise be performed by the State Historic Preservation Officer. Outside reservation boundaries, tribes have the right to participate in the review of federal actions that would affect historic places that hold religious and cultural significance to a tribe. Tribes may choose to emphasize the NHPA rather than the ESA in trying to protect places in the natural world where wildlife and plants are important to them because the federal law expressly provides the opportunity for them to bring their cultural values and practices into the decision-making process. In addition, the NHPA, unlike the Secretarial Order, expressly recognizes tribal governmental authority over all lands within reservation boundaries, not just Indian lands held in trust or restricted status. See Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 528-29 (1999). Finally, the NHPA consultation process typically concludes in a memorandum of agreement (MOA) among the consulting parties, and a tribe with interests in protecting a TCP can agree to assume co-management responsibilities for the TCP as part of the MOA. See 64 Fed. Reg. 27,044 (May 18, 1999) (revised final regulations of the Advisory Council on Historic Preservation).

### *A Before and After Snapshot*

Has the Secretarial Order made a genuine difference in the way the Services implement the ESA when Indian lands are at stake? A review of designation decisions made before the order was issued indicates that the federal government's *modus operandi* for conserving species had been to try to impose the burden of conservation on Indian lands just as if they were federal public lands. The experiences of the tribes affected by the Mexican spotted owl designation are informative. The White Mountain Apache reservation, which includes five ecosystem zones ranging from arid desert to sub-alpine forest, is home to numerous sensitive and listed wildlife species. This is not surprising given the rural and relatively undeveloped condition of the reservation vis-à-vis surrounding areas. When FWS proposed critical habitat for the Mexican spotted owl, the proposal included reservation lands. Tribal Chairman Lupe predicted that the designations would undermine the tribe's "entire wildlife and land-management philosophy," and paralyze tribal resource development activities, including its sawmill, cattle industry and ski area. Chairman's Corner, FORT APACHE SCOUT, Aug. 4, 1999. Ultimately, FWS excluded the White Mountain Reservation, as well as the Jicarilla Apache Reservation, from the designation because the Tribes adopted con-

ervation plans or agreements which, in the Service's view, removed threats to the species. 60 Fed. Reg. 29,914, 29,929-31 (1995).

The Southern Ute Tribe felt the burden of the final Mexican spotted owl designation more heavily. Because the tribe had not submitted a conservation plan, the final critical habitat designation included 61,500 acres of the Southern Ute's reservation lands—approximately 21 percent of the tribe's total land base. 60 Fed. Reg. at 29,919. Overall, Indian reservations, including the Southern Ute's, comprise slightly less than 20 percent of the total designated area, with the balance consisting almost entirely of federal public lands. *Id.* at 29,921, 29,917. In comparison, the designation includes only minuscule amounts of state and private land. *Id.* at 29,919.

In a lawsuit filed in federal district court in Colorado, the tribe alleged that the designation interfered with its sovereign right to manage its lands and resources and to implement tribal policies for the protection of wildlife, in turn threatening economic stability and growth, in violation of the trust responsibility and the ESA, as well as other federal statutes. Southern Ute Complaint, No. 96-M-1369 (June 11, 1996). The FWS acknowledged that the decision could have adverse effects on rural economies dependent on logging, including economically depressed Indian nations. 60 Fed. Reg. at 29,926-27. Yet, according to the record of decision, there is no evidence that owls are present on the reservation, *id.* at 29,917; the tribe alleged that "the physical and biological features of suitable owl habitat" do not even exist on the reservation, Southern Ute Complaint, ¶ 23. The court did not reach the merits of these claims but, rather, dismissed them as moot when the designation was set aside for failure to comply with NEPA. See *Coalition of Counties for Stable Growth v. U.S.F.W.S.*, Civ. 95-1285 (D.N.M.), slip op. (Apr. 1, 1997), citing *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F3d 1429 (10th Cir. 1996).

The FWS's track record did not immediately improve after the Secretarial Order was issued. The first post-order final designation affecting Indian lands, the Southwest Willow Flycatcher decision, included lands of the Yavapai-Apache Tribe in Arizona and Pala Mission Tribe in California. 62 Fed. Reg. 39,129, 39,135-36 (July 22, 1997). Although the final rule references the Secretarial Order, it fails to make the required findings regarding the essential nature of habitat on tribal lands, compared to surrounding non-Indian lands, and it appears that only cursory consultation with affected tribes occurred, perhaps as a result of a tight court-ordered designation deadline, see *id.* at 39,135. In another post-order final rule, the designation of critical habitat for the Rio Grande silvery minnow contains tribal lands belonging to the pueblos of Cochiti, San Felipe, Santo Domingo, Santa Ana, Sandia, and Isleta. See

64 Fed. Reg. 36274-81 (July 6, 1999). There, the FWS found that the designated area, which encompasses the last remnant of habitat still occupied by the silvery minnow, is essential to achieve the survival and recovery of the species, and that voluntary tribal measures were not adequate to achieve the necessary conservation purpose. *Id.* at 36281. FWS, however, acknowledged that minimal time had been allowed for consultation, again due to the constraints of a court-ordered deadline. *Id.*

On the other hand, subsequent designations—those for which the initial proposal was published after the Order was issued—provide some evidence that a change has taken place. Both NMFS and FWS have excluded Indian trust lands in post-order decisions: the Tohono O'odham Indian Reservation lands were excluded from the proposed and final designation for the cactus ferruginous pygmy-owl in Arizona, see 64 Fed. Reg. 37,419, 37,423 (July 12, 1999); the Nez Perce, Yakama, Warm Springs and Colville reservation lands were excluded from the proposed designation for steelhead runs in Washington, Oregon, Idaho and California, 64 Fed. Reg. 5740, 5746 (Feb. 5, 1999); and the lands of the Siletz, Cow Creek, Coquille and Coos/Lower Umpqua/Siuslaw Tribes were excluded from the proposed designation for the Oregon Coast coho salmon, 64 Fed. Reg. 24,998, 25,004 (May 10, 1999). In addition, in its final rule for California and southern Oregon Coast coho salmon, NMFS excluded the Hoopa Valley, Karuk, Round Valley, Yurok and Quartz Valley reservations, as well as a number of rancherias, noting that tribal resource management plans represented an alternative to designation of critical habitat. 64 Fed. Reg. 24,049, 24,058 (May 5, 1999).

Although the order appears to be advancing tribal interests in sovereignty and use of natural resources, if a tribe were to disagree with a designation decision, the order would provide little solace, for it does not create any legally enforceable rights. See Order § 2. In other words, neither a tribe nor an individual member will be able to bring a direct action under the order if its provisions are ignored. Courts can, however, look to the provisions of an executive or secretarial order for guidance in interpreting the common law trust obligation, and in determining whether an agency's affirmative trust responsibilities have been met. See *Oglala Sioux Tribe of Indians*, 603 F.2d at 720-21. The trust duty owed to the tribes is enforceable in court "whether or not agencies articulate those duties in the form of binding rules." 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 ENVTL. L. 733, 752 (1995).

Moreover, failure to comply with a secretarial order's provisions may render an agency action subject to invalidation as "arbitrary and capricious" under the

Administrative Procedure Act. 5 U.S.C. § 706(2). See *Seldovia Native Association, Inc. v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990). In making the designation decision, the Secretarial Order's appendix directs the agencies to "evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands." Secretarial Order, appen. § 3(B)(4). More specifically, with respect to critical habitat, the appendix provides that designations shall not occur on Indian lands unless "determined essential to conserve a listed species." *Id.* Accordingly, when considering a designation that might include Indian lands, FWS or NMFS must build a record that includes consideration of options that would avoid the need for designation on Indian lands. Affected tribes can shape the record through input and participation. If the agency's ultimate conclusion goes against the factual findings in the record, including evidence submitted by a tribe, the decision to designate may be found arbitrary and capricious.

Finally, failure to exclude tribal lands from designation may be found inconsistent with the language of the ESA itself, which requires FWS to consider not only the scientific criteria for designation, but also economic and "other relevant impacts." 16 U.S.C. § 1533(b)(2). The ESA further provides that identified areas should be excluded from the final critical habitat designation if the "benefits of exclusion outweigh the benefits of des-

ignation" unless exclusion would result in extinction of the species. *Id.* If the agencies had any doubt as to the "relevancy" of the trust obligation in implementing the ESA, the Secretarial Order makes it abundantly clear that effects on trust resources, be they economic in nature or otherwise, are relevant, and that such effects should weigh heavily against designation.

The Secretarial Order places significant limitations on agency discretion to designate critical habitat in Indian Country, and it effectuates the ESA's requirement that identified areas be excluded from designation if the benefits of exclusion outweigh the benefits of inclusion. The fulfillment of tribal self-determination and the trust responsibility toward Indian lands and natural resources should weigh heavily in favor of exclusion in most cases. As a result, only those areas within Indian country which are truly critical to the survival of an endangered or threatened species, as shown by compelling scientific data, should be included within the designation, and then only after other conservation measures, including tribal custom or law and cooperative agreements, have been considered. Whether the Secretarial Order will live up to its potential for reconciling the mandates of the ESA with the federal trust responsibility to the tribes remains to be seen. It will depend, in large part, on the extent to which the two Services engage in meaningful consultation with the tribes. 

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## Snapshot Interview

*(Continued from page 199)*

came to this land the tribes were doing a good job at living in harmony with those resources, many of which are nonrenewable. In the last 500 years, some of those resources have been put to good use, but many of them have been depleted, mismanaged or spoiled. I think that tribes have a lot to offer to get things back to where the resources can be used, but properly, and taken care of. More of a balance between humans and the elements.

**NR&E:** In your presentation today, [at the Fall Meeting] you said several things. What are the most important points in your presentation?

**McCoy:** I was encouraging the attendees to learn the basic principles of federal Indian law. That tribes are sovereigns and federal law recognizes that. That the tribes are sovereign over their members and their territory and federal law recognizes that. And that tribal sovereignty exists unless and until Congress takes it away. These things are the law, they aren't just things that tribes dream of or that people make up. They are very real aspects of federal law and if one doesn't understand them, one doesn't understand tribes or Indian people.

**NR&E:** NARF is there trying to insist, and get those

rights ... to be sure everyone's attentive to those rights?

**McCoy:** That's right, and that goes back to that educational or communication component. John Echohawk, NARF's long-time executive director, has recently been saying that if people don't understand tribal sovereignty they are intellectually illiterate. And I believe that.

**NR&E:** Any questions or Indian issues that you'd like to address?

**McCoy:** You haven't asked about NARF's biggest lawsuit ever. In 1996 NARF filed a case in federal district court which since has been certified as a class action. We represent hundreds of thousands of individual Indians on their claims against the federal government and allege over a century of mismanagement and misaccounting of their "Individual Indian Money" accounts. These are the accounts that by federal law the government must keep for Indians. The accounts represent the payments owed by the government for Indian land, and the money that the Indians' land and natural resources—timber, oil and gas, and grazing lands— has earned over the years. Some of the accounts date back at least to