

## INDIAN TRIBES AND ENDANGERED SPECIES

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*"What is man without the beasts? If all the beasts were gone, men would die from great loneliness of spirit, for whatever happens to the beast also happens to man. All things are connected. Whatever befalls the earth befalls the sons of the earth."*

Attributed to Chief Seeathl, Suquamish

The Endangered Species Act (ESA) is among the most powerful environmental statutes of the United States. But for Indian tribes, the ESA is a double-edged sword. On the one hand, the ESA can bring the force of the federal government to bear on trying to prevent species of concern to tribal communities from becoming extinct. On the other hand, the ESA has increasingly been administered in a manner that seems to be leading to a head on collision between trust responsibilities, tribally reserved rights, and protection of threatened and endangered species.

White Mountain Apache Chairman Ronnie Lupe eloquently expressed his alarm in a speech before the Intertribal Timber Council:

*"Increasingly, attempts to implement the Endangered Species Act on Indian reservations have become affronts to the federal trust responsibility and direct attacks on tribal sovereignty. When the Endangered Species Act was enacted in 1973, few of us realized that the Act would one day threaten our right to self-governance and our right to maintain our tribal traditions and way of life. As sovereign Indian tribes, we cannot allow ourselves to be dictated to by outsiders, particularly over issues as sensitive as the management of our lands and waters."<sup>2</sup>*

Because of growing concern over the impacts of the ESA and other federal conservation laws on tribal communities, a consortium of tribal organizations<sup>3</sup> sponsored

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<sup>2</sup> Proceedings of the Twentieth Annual National Indian Timber Symposium, May 13-17, 1996. Intertribal Timber Council, Portland, Oregon, pp153-159.

<sup>3</sup> Affiliated Tribes of Northwest Indians, Alaska Federation of Natives, American Indian Resources Institute, 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,

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workshops in February and June of 1996 to provide a forum where representatives from Indian tribes and tribal organizations could share perspectives. Three primary factors spurred the consortium to convene the workshops. First, federal administration of the ESA goes straight to the core of two issues of utmost concern to tribal communities, protection of trust assets and tribal sovereignty. Second, reauthorization of the ESA posed potentials for legislative mischief that could undermine tribal interests. Third, frustration and concern over adverse impacts of federal agency actions could push tribes into seeking relief through litigation.

**PROTECTION OF TRUST ASSETS AND TRIBAL SOVEREIGNTY:**

Tribal concerns for protection of trust resources went far beyond the need to prevent species from becoming extinct. While the ESA dealt with existence thresholds for individual species, tribes believed that trust responsibilities constituted an affirmative federal obligation to restore the resource to the point where adequate tribal utilization could be sustained.

Indian lands were becoming sanctuaries where threatened or endangered species seek refuge. Tribal actions were not causing the problems that were driving species to be listed under the ESA, yet tribes were being asked or required to shoulder much of the conservation burden. This issue was not about sharing the responsibility for conserving species. Indian people have always had a profound reverence and respect for all living things that walk, swim, fly, or grow roots. Rather, the issues raised were of ethical and moral questions of fundamental fairness. Tribes were being denied their rights to manage, utilize, and develop their resources according to their own needs and priorities in order to compensate for past and continuing degradation of the environment caused by non-Indian development and mismanagement. The ability of tribes to exercise their own prerogatives was being preempted by the actions of the federal agencies responsible for administering the ESA.

The trust relationship between Indian tribes and the United States uniquely affected tribal resources. Tribal lands were private assets set aside for exclusive use and occupancy of tribes. Yet the fact that these resources were held in trust for Indian beneficiaries by the U.S. subjected them to far more stringent restrictions than other private lands. The involvement of Federal agencies, acting as trustee or in permitting capacities, subjected tribal resources to ESA consultation requirements. This resulted in a propensity for the USFWS and NMFS, through actions such as the designation of critical habitat, to try to impose public values on tribal uses of tribal resources.

Species-by-species management was incompatible with tribal perspectives of a holistic interrelationship between man and the environment. In the same speech at the 1996 National Indian Timber Symposium, Chairman Lupe went on to say:

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Native American Fish & Wildlife Society, Native American Rights Fund, Northwest Indian Fisheries Commission, United Southeast and Eastern Tribes.

*"In our Apache tradition, we do not manage our lands for the benefit of a single species, we strive to protect the land and all the life forms it supports. Our homeland is too vast to manage our resources for a single 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 extreme environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to force management practices on us that focused on single species was a contradiction of our view of life."*

#### **REAUTHORIZATION:**

In the legislative process of reauthorizing the ESA, Congress was considering a number of modifications that could affect tribal interests. First, there was a growing propensity to defer more and more responsibility to the States for administration of the ESA. Second, the Republican-controlled Congress was considering several amendments that would address private property issues and amend procedures for species listing and recovery.

Tribal concerns for potential legislative mischief were heightened by the election of so many new Congressional representatives who were either antagonistic to tribal interests or had little knowledge of, or concern for, Indian tribes. Congress had already taken, or was in the process of considering, legislation that adversely affected Indian tribes on a number of other fronts, such as substantially reducing appropriations for Indian programs and eliminating the ability to treat tribes as States for purposes of administering the Clean Water Act.

#### **LITIGATION:**

In administering the ESA, federal agencies had adversely affected Indian tribes in several ways, such as designating critical habitat on reservation lands, delaying or denying approval of projects that promote the health and economies of reservations, and arresting religious practitioners for possessing animal parts. Growing frustration in Indian country could precipitate litigation without a full appreciation for potential precedents that may be established.

#### **THE NATURE OF THE WORKSHOPS**

The February workshop was organized in two major parts. First, regional presentations and papers from the Pacific Northwest, Colorado River, Northern Plains, the Southwest, Great Lakes, Midwest, East Coast, Alaska, and the Southern Plains provided a means of sharing tribal experiences with the ESA. In addition, speakers from the academic community, the Office of the Assistant Secretary for Indian Affairs, and the Senate Indian Affairs Committee offered their perspectives. A better appreciation and understanding of the diversity and complexity of issues that tribes are encountering was gained by sharing

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experiences and viewpoints. The second part of the workshop concentrated on the presentation and discussion of several legislative and administrative options for addressing problem areas.

Workshop participants engaged in an illuminating, far-ranging discussion about their experiences and a variety of approaches that could be taken to address tribal concerns. Jody Calica from the Confederated Tribes of the Warm Springs Reservation, summarized his thoughts on the closing day of the session. *"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 that human law is manipulating spiritual law and natural law."* The following conclusions were reached at the February workshop:

- There is a critical need for tribes to deal with the ESA since issues strike at the heart of trust asset protection and tribal sovereignty.
- The ESA does not and should not apply to Indian tribes. The special nature of Indian trust assets causes tribal actions to be subject to the ESA due to the involvement of federal agencies. Indian tribes didn't cause the problems leading to species decline. There is a moral and ethical problem with requiring tribes to compensate for environmental degradation and pressures leading to species extinction which are caused by non-Indian development. Tribes are being dispossessed of what little they have left, even to the point where they are unable to provide for fundamental health and welfare needs of their communities. Trust responsibilities, tribal sovereignty, and reserved rights are falling victim to the ESA.
- Tribes have, and should take advantage of, the opportunity to change the nature of the ESA controversy. The real debate over the ESA should focus on the moral-ethical issue of how man relates to the land, water, animals, and plants that share the earth. Tribes have a higher standard than the ESA's single-species approach to preventing species extinction. Instead, tribal beliefs center on sustaining resources and the ecosystems upon which they depend in accordance with tribal cultural and societal values; the visions and practices of Indian people reflect the view that spiritual, human, and natural law are one.
- Tribes should look beyond the species-by-species, last ditch focus of the ESA, toward addressing causes for species declines and sustainable cultures and economies. Efforts should be founded upon principles of ecosystem management, stewardship, sustained utilization of resources, spirituality, and continuity of unique cultures and beliefs.
- To be successful, tribes will have to be active, highly visible, and well organized. It will be important for tribes to be unified and to develop working coalitions. Public, and hence political, support for tribal positions will have to be developed. Strategies must include a strong effort to educate the Congress on tribal issues and positions.

- Tribes will likely be forced to engage the ESA reauthorization effort. Tribal issues have become too high profile to expect them to be overlooked and some in the Legislative Branch are too vested in philosophies opposed to tribal sovereignty and control. The means to diminish tribal rights may be indirect, perhaps through a "balancing" of considerations for impacts on conservation, private property and treaty obligations, or a statement to the effect that species protection would become paramount when conservation goals supersede other public objectives and obligations. Efforts for non-tribal interests to use tribes to pursue their own agendas should be expected.<sup>4</sup>
- Tribal initiatives will have to overcome several difficult hurdles, principal among them being the propensity for this Congress to defer to the States, the desire for non-Indian interests to gain access to tribal resources, and the zeal of some environmental groups. Efforts that are perceived to weaken State jurisdiction will be particularly problematic. Tribes will need to pursue a variety of approaches to protect their rights and interests involved in the ESA. Efforts will be needed to put policy foundations in place and to establish cooperative, collaborative, field-level working relationships. At the field level, sustainability should be defined in technical terms and supported by good tribal science because many battles will be fought "on the ground."
- Tribes should pursue the establishment of new Administration-wide policies, such as joint Secretarial (Interior and Commerce) or Executive orders. Development of meaningful and

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<sup>4</sup> At the February ESA workshop, tribal leaders cautioned that various non-Indian groups could try to use tribal rights and interests to advance their own causes. A prime example is the environmental community's unconscionable exploitation of Chief Sealth to increase credibility and public support for philosophical dogma. The opening quotation to this paper has been widely attributed to Chief Sealth (Noah Seath), anglicized as Chief Sealth or Chief Seattle. These words have appeared thousands of times in calendars, books, films, posters, brochures, and even internet web sites in various forms - sometimes as an 1854 speech to Washington Territorial Governor Isaac Stevens, sometimes as a letter to the "Great White Father", President Franklin Pierce. The speech (and several versions of it), entitled "This Earth is Sacred," has become one of the most widely quoted and published statements of environmental responsibility. But the speech is bogus. It is from a pro-environmentalist film that was aired on national television in 1971 ("Home" - produced in the United States for the Southern Baptist Convention). The script for the documentary was written by Ted Perry as a fictional version of what Sealth might have said today; the author had no idea that anyone would consider his work anything else. Perry expected to receive credit for his work, but various publishers and people pursuing environmental agendas decided that the romanticized, passionate call for ecological responsibility would sell better if represented as being the actual words of Chief Sealth. In a column written for the Seattle Times on July 1, 1991 ("Words of Chief Seattle eloquent - but not his") about a growing controversy over Chief Sealth's speech, Ross Anderson said, "Myth dies hard. Especially a myth that serves the ends of a vibrant environmental movement." (For a history of the origins of the 1970's version of Chief Seattle's speech, see Kaiser, R. "Chief Seattle's Speech(es): American Origins and European Reception" published in *Recovering the Word: Essays on Native American Literature* by the University of California Press, 1987. See also Buerge, D. "Seattle's King Arthur: How Chief Seattle continues to inspire his many admirers to put words in his mouth", *Seattle Weekly*, July 17, 1991.)

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useful intergovernmental arrangements will require elevating issues to higher policy levels within the Administration.

Tribal representatives attending the workshop supported the establishment of a workgroup to draft a position paper and develop a proposed strategy for consideration by Indian tribes. Basic issues were to be emphasized, premised upon the unique status of tribes and the special nature of tribal governments with the United States. The primary emphasis was to be rooted in fundamentals - protection of tribal sovereignty, trust responsibilities, treaties, the U.S. Constitution, and government-to-government relationships. The tribal position was to incorporate the following major concepts:

- Tribal perspectives of interrelationships between man and his environment, with emphasis on conservation, utilization, ethics, spirituality, and values;
- Support for comprehensive tribal authority to manage on-reservation resources, accompanied by a statement of guiding principles for stewardship and distribution of the conservation responsibility, including explicit standards that must be met before non-tribal authorities can be imposed;
- Guidelines for controlling impacts of destructive development by non-Indians on resources of interest to tribes; and
- Protection for Indian religious practitioners.

A workgroup comprised of a broad spectrum of tribal interests from around the country was established on a voluntary basis to further develop these concepts for consideration by interested tribes at a second ESA workshop. The direction established at the second workshop reinforced the central elements identified in February, focusing on three fundamental concepts:

- Attempt to minimize the potential for conflict and confrontation that could lead to a "train wreck" between the ESA and tribal rights, holding firm to the position that the ESA does not abrogate or diminish tribal rights.
- Affirm tribal rights to manage tribal lands and resources and to exercise reserved rights; seek deference to tribal resource management plans and practices wherever possible.
- Ground these concepts within the trust responsibility of the United States. Seek a commitment by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service to work collaboratively and cooperatively with Indian tribes on a government-to-government basis to address mutual concerns and advance common interests. Seek technical and financial assistance to support and enhance the capacity of Indian tribes to protect, restore, conserve, and enhance species of concern.

Following the June workshop, a tribal position paper was developed and circulated for comment within Indian country. Tribal suggestions and concerns were addressed in July and early August. In late August, the position paper was transmitted to Interior Secretary Bruce Babbitt accompanied by a request to appoint a small, high-level task force to work with a similar team of tribal representatives to craft a Secretarial Order to provide policy guidance for administration of the ESA when tribal rights or resources may be affected. The ability of tribes with many different interests and perspectives to develop a unified position on the ESA was critical to move issues forward within the Administration because discussions could concentrate on fundamental principles and relationships.

On September 20, 1996, Secretary Babbitt convened a meeting with members of his staff and a few tribal representatives from the workgroup to discuss the tribal position paper and the request to initiate a process to draft a Secretarial Order. The Secretary decided to initiate the effort to harmonize the trust responsibility towards Indian tribes with administrative obligations flowing from the ESA and made a personal commitment to be directly involved in the process.<sup>5</sup> Tribal and federal members of the Task Force<sup>6</sup> were appointed shortly thereafter.

The Task Force operated according to groundrules that were designed to prevent gridlock. Four meetings were convened from October 1996 to January 1997 for face-to-face deliberations. Attendance of several tribal observers at these sessions provided helpful advice and invaluable technical support. Working drafts were exchanged between meetings and numerous conference calls were arranged to address a number of difficult and complex issues. The forum provided a rare opportunity to share diverse perspectives through open and candid dialogue by focusing on solutions rather than problems and barriers. The meetings of the Task

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<sup>5</sup> The Secretary's decision was apparently influenced by three major factors: (1) the positive experience of the late Mollie Beattie, Director of the Fish & Wildlife Service in successfully negotiating a statement of relationships with White Mountain Apache Chairman Ronnie Lupe which set aside differences and focused on promoting healthy ecosystems; (2) the outstanding reputations of the tribal leaders who were involved in the process; and (3) the advice of David Getches, a Law Professor from the University of Colorado who was working on sabbatical with the Department of the Interior.

<sup>6</sup> Federal members of the Task Force consisted of Don Barry (Deputy Assistant Secretary for Fish, Wildlife and Parks, Interior), Jaime Clark (Assistant Director, Ecological Services, U.S. Fish & Wildlife Service); Terry Garcia (General Counsel, NMFS, NOAA, Commerce); Sally Yozell (General Counsel, NMFS, NOAA, Commerce), Molly Holt (NOAA, NMFS, Commerce); Bob Ziobro (NOAA, NMFS, Commerce). Tribal representatives included Billy Frank Jr. (Chairman, Northwest Indian Fisheries Commission), Ronnie Lupe (Chairman, White Mountain Apeche Tribe), Jaime Pinkham (President, Intertribal Timber Council, Councilman, Nez Perce Tribe), John Echobawk (Executive Director, Native American Rights Fund), Terry Williams (Tulalip Tribe), Howard Arnett (Counsel to the Confederated Tribes of the Warm Springs), Gary Morishima (Technical Advisor, Quinalt Nation), and Charles Wilkinson (Law Professor, University of Colorado). Task Force sessions were open to tribal observers. The Task Force was supplemented with several other representatives from the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and Indian tribes during its deliberations.

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Force took on a rare atmosphere of mutual respect and appreciation for different points of view. Many difficult pitfalls and hurdles were identified and overcome through the leadership and commitment that were demonstrated time and again on both the tribal and federal sides. The Task Force experience was rewarding at times and frustrating at others, particularly when tribal representatives found themselves negotiating with "shadows" within the Administration who were not fully engaged in the process.

The Task Force has completed its work. On June 5, 1997, Interior Secretary Bruce Babbitt and Commerce Secretary William Daley jointly issued a Departmental Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" in a ceremony in the Indian Treaty Room of the Old Executive Office Building in Washington, D.C. The signing ceremony was attended by approximately 200 people, including tribal leaders, representatives of the Interior and Commerce Departments, Congressional staff, and the press. Nelson Wallulatum, Jaime Pinkham, Ronnie Lupe, and Billy Frank, Jr. provided tribal perspectives. Secretary Babbitt and Secretary Daley focused on trust responsibilities and collaborative, government-to-government relationships to protect sensitive species and ecosystems. Senator Daniel Inouye of the Senate Committee on Indian Affairs remarked that the process used to develop the order would serve as a good model for addressing other complex and difficult issues arising in tribal-federal relations.

The Order is accompanied by an Appendix that provides specific administrative guidance to the U.S. Fish & Wildlife and National Marine Fisheries Services. In a nutshell, this set of documents recognizes the unique sovereign status of Indian tribes, supports government-to-government collaboration in ecosystem management, provides for deference to tribal conservation plans for Indian lands that address conservation needs of ESA listed species, and institutionalizes tribal involvement in federal ESA actions that may affect tribal lands, rights, or resources. It also brings traditional knowledge to bear on modern-day problems while providing technical assistance and training to enhance tribal resource management capabilities.

The Order does not change legal mandates of the Departments or establish new rights for Indian tribes. Rather, it provides policy guidance that minimizes the potential for conflict and confrontation by harmonizing federal trust responsibilities, reserved rights, and administrative responsibilities under the ESA. Training programs are being developed to familiarize Interior, Commerce, and tribal personnel with the Order and its requirements, underlying philosophies, and expectations.

It was not possible to reach complete agreement in all areas; some particularly contentious issues, such as the applicability of the Order to Alaska Natives, religious and cultural uses of listed plants and animal parts, and impacts on tribal water rights, had to be deferred to special studies. Nonetheless, a great deal of common ground has been found by bringing tribal and federal representatives together to collaboratively develop the Order. In its final form, the Order reflects a creative and constructive tension between tribal and federal



views regarding the ESA and trust responsibilities. A solid framework for government-to-government discourse and cooperation to address the needs of both the resources and tribal communities will hopefully emerge as the Order is ultimately implemented.

The Order is, of course, only a piece of paper whose true value will be determined through hard work at the local level where lasting partnerships must be built between individual tribes and federal agencies. At the national level, the personal involvement of Secretary Babbitt and Secretary Daley signals high level commitment and support. Several federal representatives who participated in development of the Order are now in positions<sup>7</sup> where their first-hand knowledge of tribal perspectives can help them address tribal concerns with substance and sensitivity. In short, the Order creates an opportunity and framework that can make a lasting difference for the future health of both ecosystems and tribal communities.

I am pleased and honored to have been a part of the process.

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<sup>7</sup> Don Barry, who served as the chief negotiator for the federal team, has been nominated to fill the position of Assistant Secretary for Fish, Wildlife, and Parks within the Department of the Interior. Jaime Rappaport Clark has been nominated to serve as Director of the U.S. Fish & Wildlife Service. Terry Garcia has been appointed as Acting Assistant Secretary for Oceans and Atmosphere of the Department of Commerce.