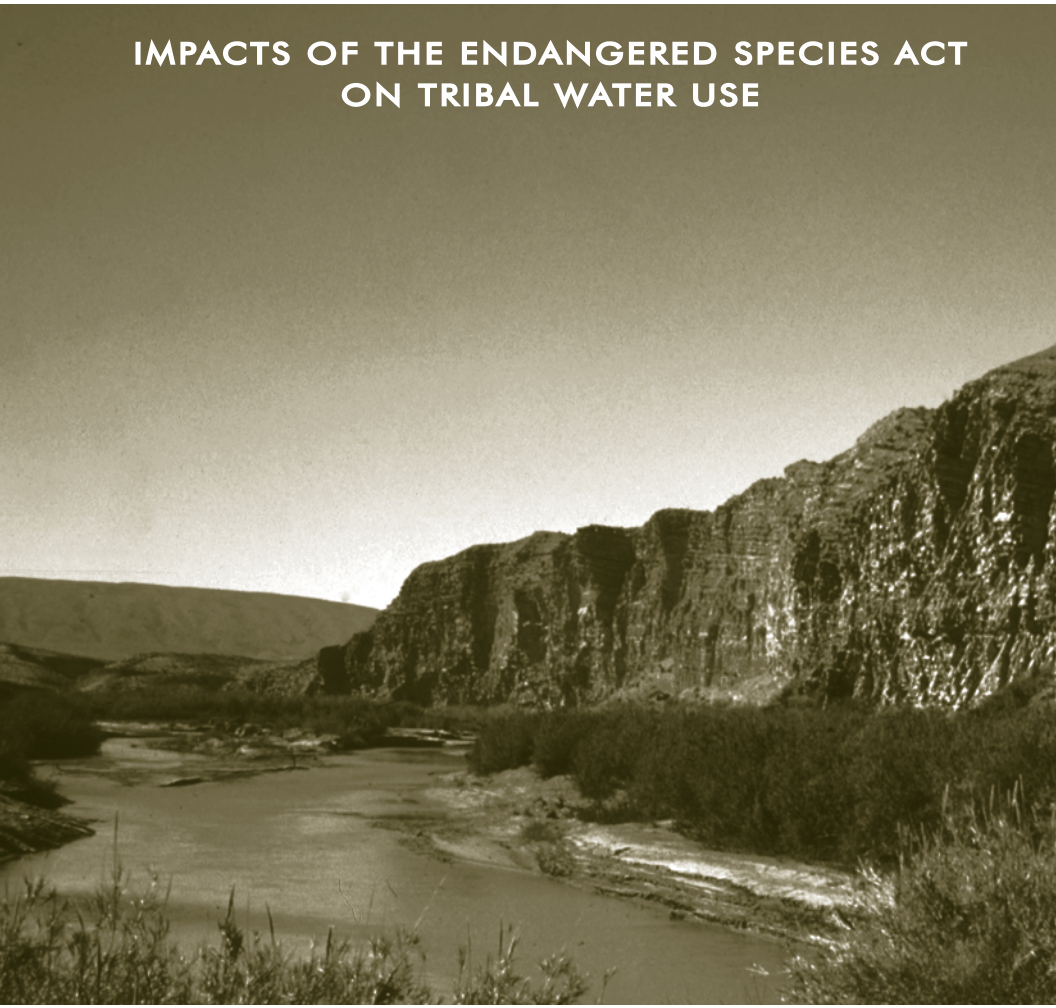
# Protecting the Fish and Eating Them, Too

## IMPACTS OF THE ENDANGERED SPECIES ACT ON TRIBAL WATER USE



LAUREN LESTER

Winner of the 2005 Lillian S. Fisher Prize
in Environmental Law and Public Policy

UDALL CENTER FOR STUDIES IN PUBLIC POLICY
THE UNIVERSITY OF ARIZONA

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*Udall Center Publications*
Robert Merideth, Editor in Chief

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Support for *Udall Center Publications* is provided by
the Morris K. Udall Foundation.

Additional support for this publication comes from
the Lillian S. Fisher Endowment.

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Lauren (Whattam) Lester, a recent graduate of the James E. Rogers College of Law at the University of Arizona, developed an expertise on the intersection of Indian law and environmental law, specifically water law. Lester, who hails from Ellicott City, Md., graduated cum laude from the University of Maryland with an undergraduate major in sociocultural anthropology. She wrote her honors thesis about the integration of traditional dispute resolution processes, known as "peacemaking," into modern tribal court systems, using the Navajo and Seneca Nations as case studies.

*Protecting the Fish and Eating Them, Too:*
*Impacts of the Endangered Species Act on Tribal Water Use*
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Winner of the 2005 Lillian S. Fisher Prize
in Environmental Law and Public Policy
ISBN 1-931143-25-0

Published by the Udall Center for Studies in Public Policy
at the University of Arizona



Cover photo courtesy of U.S. Geological Survey Library:
Big Bend National Park, Texas, Rio Grande River and Sierra San Vicente,
by R.L. Brown, 1970

Designed by Colleen Loomis

A special thanks goes to Robert Glennon, the Morris K. Udall Professor of Law and Public Policy in the James E. Rogers College of Law at the University of Arizona, for his assistance with the Fisher Prize program.

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# INTRODUCTION

The scarcity of water in the American West and the increased demands for the resource have created much tension of late between tribes, endangered species advocates, and the holders of water rights granted by the states for non-Native consumptive uses. This is particularly true in the more arid regions of the West: "[i]t is possible that no problem of the Southwest section of the Nation is more critical than that of scarcity of water. As southwestern populations have grown, conflicting claims to this scarce resource have increased."[1] The over-allocation of water by state governments is increasingly at odds with both habitat preservation of endangered aquatic species and tribes' exercising their water rights for consumptive uses.

As tribes actively quantify their water rights and pursue development projects that enable them to use the water, they are faced with a seemingly insurmountable problem: how can tribes promote future economic development and at the same time ensure the protection of species under the Endangered Species Act in the face of federal consumptive-water-use restrictions.

As tribes pursue serious economic development in an effort to exercise tribal sovereignty and increase self-determination, they are being told that there is no longer any room at the table because everyone else has polluted or otherwise altered the water too much, and thus, further development might jeopardize the existence of the species in a given watershed. The irony is that non-Indian development activities bear primary responsibility for bringing

many species to the brink of extinction, but in many places tribes are now shouldering a disproportionate burden in the effort to conserve listed species.

This book begins with a general overview of tribal water rights followed by a description of the Endangered Species Act, specifically those requirements imposed by the act that provide for the protection of habitat for listed species. Next is a discussion about the intersection of critical habitat designation and the development of consumptive water use on reservation lands. A case study of the critical habitat designation of the silvery minnow in the Middle Rio Grande River, New Mexico, illuminates the issue. Finally, the book provides an evaluation of tribal and agency recommendations regarding critical habitat designation in Indian Country, and sets out further recommendations for protecting both species habitat and tribal sovereignty.

# TRIBAL WATER RIGHTS

A general overview of the system of water appropriation in the West and the role of tribes within this system is essential to understanding the unique implications of critical habitat designation in watersheds where tribes hold their water rights.

## Doctrine of Prior Appropriation in the West: "First in Time, First in Right"

State laws, not federal laws, generally govern water allocation and use, and Western states primarily allocate the right to use water based on the doctrine of prior appropriation.[2] Although the states officially consider water a public resource, they have recognized a permanent property right in the private use of water.[3] The basic premise of the prior appropriation doctrine is that available water is allocated on a first-come, first-served basis to anyone who puts the water to beneficial off-stream use without waste.[4] Such a right is conveyed relative to more senior water-right holders in the basin, and anyone who acquires a water right subsequent to the first user ("junior users") can utilize their share only after the more senior users have used his or her shares.

In times of drought, junior users may, in effect, only have "paper" rights as opposed to "wet" rights because there may not be enough water left over for the junior users after the senior users take their allotted shares. Thus junior users bear the brunt of a water shortage, and the more recent a junior user's priority date, the more likely it is that the user will not have any water in a time

of shortage, regardless of the particular "beneficial use" to which the water is allocated. For example, by the end of a typical, recent summer in Oregon, there is only enough water on many of the streams throughout the state to supply users who had established or acquired their rights by the late 1800s.[5]

For the most part, priority date is the sole criterion for determining the "pecking order" of water use. As long as a user's application of the water is deemed "beneficial" by the state, the state will not prioritize allocation based on the particular use. For example, under traditional prior appropriation principles, a municipality with a priority date of August 11, 1935, will not have priority to use water during a drought at the expense of an irrigator with a priority date of October 30, 1895, merely because the water will be used for human consumption instead of crop watering.[6]

States recognize certain restrictions on water rights, such as the source of water, season of use, point of diversion, type of use, and maximum amount that can be used. Many of these elements can be changed, but only with permission from the state.[7] One of the most important restrictions on water rights under the doctrine of prior appropriation is the potential to lose the water right by abandonment or forfeiture. The concept of abandonment, arising out of common law, requires an intention to relinquish a known water right, while forfeiture is a statutory creation under which all or a portion of a water right reverts back to the state after a specified period of non-use.[8] It is on this point that tribal water rights diverge from other water rights under the prior appropriation doctrine.

## The *Winters* Doctrine: The Foundation of Tribal Water Rights

The doctrine of prior appropriation has unique implications for Western tribes. In the 1908 U.S. Supreme Court case *Winters v. United States*, the Court determined that the United States implicitly reserved sufficient water for tribes to make productive the land set aside in treaties, agreements, and executive orders.[9]

In other words, in order for the reservation to serve as a viable homeland for the native peoples, the reservation inhabitants would need enough water to make their land productive. This decision is known as the *Winters* doctrine, or the doctrine of reserved rights.

Within the framework of the doctrine of prior appropriation, Indian water rights are generally some of the most senior rights over a water source because the priority date for reserved water rights is generally set at the date the reservation was established.[10] Furthermore, since the water rights are "reserved" in nature, they are not subject to abandonment or forfeiture for non-use. This means that Indian reserved water rights allow reservation water users to preempt others who have been using water for years, thus disrupting the "first in time, first in right" regime. While the *Winters* decision gives tribes the opportunity to develop water resources and move toward self-sufficiency, the reality has been quite different.

> During most of [the] 50-year period [following the *Winters* decision], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of [the] Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations. . . . With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects.[11]

As a result of this disregard for tribal water rights, compounded by a general lack of capacity on the part of tribes to build water projects, most tribes have been unable to utilize their *Winters* rights effectively.[12] This situation is now beginning to change as

more tribes exercise greater sovereignty and gain economic self-sufficiency. In order to develop their reservations, tribes need sufficient water and are thus asserting their *Winters* rights, often in basins that are already over-allocated. Needless to say, determining how much water each tribe is entitled to has caused great conflict in recent years between different water interests.

**Quantification and Adjudication of Reserved Water Rights**

In the 1963 *Arizona v. California* decision, the United States Supreme Court affirmed the *Winters* doctrine, recognizing that the creation of reservations was not just limited to land, but also included sufficient water.[13] The Court also determined that "the water was intended to satisfy the *future as well as the present needs* of the Indian Reservations and . . . that enough water was reserved to irrigate all the practically irrigable acreage on the reservations" in order to fulfill the purpose of the reservation.[14] Under this standard, tribes are generally entitled to a substantial amount of surface water.[15]

Furthermore, in its Supplemental Decree to the case, the Court clarified that while the quantity of water necessary to supply consumptive use required for irrigation was to be used as the means of determining the quantity of adjudicated water rights, it did not constitute a restriction on the use of the water solely for irrigation or other agricultural application.[16] The total entitlement depends only on the size of the land base of the reservation, and does not turn on the number of tribal members or population density of the reservation. As the case dealt primarily with tribes located in the Colorado River Basin, the Court noted that the reservations were not in the most desirable locations, and that the land has always been quite arid, so Congress must have realized that "water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."[17]

Water users with quantified water rights on streams with Indian reserved rights see the existence of these reserved rights as a ticking time bomb. Junior users on these watersheds are in jeopardy of losing their "wet" water rights not only because of the more

senior tribal reserved rights, but also because of the uncertainty of how large the Indian water rights might be when quantified. Therefore, states and non-Indian water users in watersheds that have reserved rights have pressed for quantification of these rights.[18] Not surprisingly, this quantification process has proved difficult, expensive, and, in many cases, quite lengthy.[19]

Many tribes, however, have been reluctant to have their water rights quantified through a court adjudication process because once the amount that a tribe is entitled to has been determined, it cannot be re-allocated. Some tribes fear that they will not get enough water to satisfy future uses and then find themselves unable to revisit the issue due to *res judicata*. Furthermore, the McCarran Amendment requires that all water claims of the United States and tribes be adjudicated in state court, so tribes are at the mercy of the states, a reality that worries some tribes given the historically tenuous relationship between states and tribes.[20] Despite these concerns, many tribes have adjudicated their water rights. A notable example is the recently completed adjudication and settlement of Nez Perce water rights in the Snake River basin.

Since 1998, the Nez Perce tribe, the state of Idaho, the United States, and local communities and water users participated in mediation as part of the Snake River Basin Adjudication (SRBA) to resolve the Nez Perce's claims in the Snake River.[21] The parties agreed to a "Term Sheet" to guide the settlement of the case and to set out the responsibilities of the parties over the 30 year term of the agreement.[22]

The Term Sheet consists of three major components. The first is the Nez Perce Tribal Component, which, among other things, quantifies the tribe's reserved right for on-reservation, consumptive water use at 50,000 acre feet a year with a priority date of 1855; establishes a $50 million trust fund for water and fisheries development; and allocates $23 million for the construction of a water supply and sewer system on the reservation.[23] The second component is the Salmon/Clearwater Habitat Management and Restoration Initiative, which establishes in-stream flows for fish protection on streams of importance to the tribe, establishes

a habitat fund, and requires the state of Idaho to administer a cooperative agreement under the Endangered Species Act.[24] The final component, the Snake River Flow Component, deals more generally with minimum flows and flow augmentation between the state of Idaho and the Bureau of Reclamation.[25] The Term Sheet is well on its way to implementation. Congress passed the Snake River Water Rights Act of 2004 on November 20, 2004, and both the Idaho legislature and the Nez Perce tribe agreed to the Term Sheet in March 2005.[26] As the final step toward implementing the agreement, the SRBA court must enter a final consent decree.[27]

As an alternative to the formal adjudication process, other tribes have entered into negotiation agreements with state and federal governments to quantify their water rights. For example, after more than a decade of negotiation, the Confederated Tribes of Warm Springs reached a settlement with the state of Oregon over the tribes' rights to water from the Deschutes River Basin in 1996.[28] The tribes, whose water rights dated back to their 1855 treaty with the United States, worked with the state to develop an agreement that balanced existing water rights, urban development, and irrigation with the tribal priority of preserving flows for fish and the aquatic ecosystem.[29] Many tribes in the Southwest have also entered into water rights settlements with somewhat mixed results, including the Navajo Nation, the Tohono O'odham Nation, the Gila River Indian Community, the Ute Mountain Ute Tribe, the Southern Ute Indian Tribe, the Jicarilla Apache Nation, and the San Carlos Apache Nation.

In quantifying Indian reserved water rights, whether through negotiation and settlement or adjudication, the federal government has a special duty to protect tribal resources that emanates from the federal trust relationship between tribes and the federal government.

## Federal Trust Responsibility

The federal trust responsibility arises out of common law, and was first established by Chief Justice Marshall in three definitive cases commonly known as the "Marshall Trilogy."[30] Basically, the federal

government has a fiduciary duty to tribes, and holds reservation resources in trust for the tribe.[31] This trust relationship contributes to the unique legal posture of the tribes in the United States.[32]

The Bureau of Indian Affairs (BIA) within the Department of the Interior (DOI) is the primary instrument for carrying out the trust responsibility.[33] A significant portion of the BIA's activities include management of resources held in trust for the tribes, such as water rights.[34] The responsibility of the BIA and its position as a federal agency can create problems because Indian interests often conflict with the interests of other agencies, including bureaus within the DOI, such as the Bureau of Reclamation and the Fish and Wildlife Service. Attempts to balance these interests without full participation of tribal governments undermines the federal government's trust obligations to tribes.[35] This is especially true in the context of reserved water rights. As the National Water Commission observed, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters."[36]

In the context of water, the District of Columbia Court of Appeals in *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy* extended the fiduciary duty to any federal government action, not just actions that involve Indian property rights.[37] The tribe alleged that the Department of the Navy breached its fiduciary obligations to the tribe by leasing acreage and contiguous water rights to local Nevada farmers, resulting in diminished water flow into Pyramid Lake, home to two endangered species of fish on the Paiute reservation.[38] The court stated that the Secretary of the Navy did have a fiduciary duty to preserve the Pyramid Lake fishery, but found that the Secretary had not breached this duty due to the district court's finding that the fish were no longer in jeopardy because of steps taken by the Department to conserve water for the fish.[39]

Even though the interests of the Pyramid Lake Paiute were aligned with the protection of critical habit for fish under the Endangered Species Act, the Pyramid Lake dispute brings

to light the potential conflict that federal agencies charged with protecting endangered and threatened species may have in trying to simultaneously fulfill their trust responsibilities to tribes and carry out their mandates under the Endangered Species Act. Due to this tension, federal agencies should rely less on the trust responsibility and should instead focus on developing government-to-government relationships with tribes based on respective treaties when managing endangered species.

Before detailing proposals for change, however, an overview of the Endangered Species Act is warranted.

# CRITICAL HABITAT DESIGNATION UNDER THE ENDANGERED SPECIES ACT

## Purpose of the Act

The overarching purpose of the enactment of the Endangered Species Act (ESA) in 1973 was to protect the nation's biological diversity. The Department of the Interior is responsible for implementing the ESA via the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).[40] The stated purpose of the Act is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species."[41] Congress further set out the policy behind the ESA as follows:

> (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.
>
> (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.[42]

As the U.S. Supreme Court noted in *Tennessee Valley Authority (TVA) v. Hill*, "examination of the language, history, and structure of the legislation . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[43]

One of the first judicial tests of the ESA, *TVA v. Hill* affirmed the sweeping protections of the ESA and the power of a critical habitat designation.[44] The Tennessee Valley Authority was working on the Tellico Dam and Reservoir Project on the Tennessee River that would turn a portion of the river into a reservoir.[45] During construction a scientist discovered a previously unknown species of fish, the snail darter, that lived only in the area to be inundated by the dam.[46] The Secretary of the Interior listed the fish as an endangered species and designated that area of the river as critical habitat, mandating that further actions by federal agencies could not result in the destruction or modification of the critical habitat area.[47] Citizens filed a suit under Section 11 of the ESA to protect the snail darter by seeking to enjoin completion of the dam and impoundment of the reservoir.[48] The Court determined that, upon finding that a federal agency action would jeopardize the existence of or harm the critical habitat of an endangered species, the court should enjoin the action regardless of cost or degree of project completion, as the plain language of the statute did not require such a balancing of the equities.[49]

After the Supreme Court first interpreted the critical habitat provision of the ESA in *TVA v. Hill*, Congress quickly amended the Act to define critical habitat as a specific geographic area occupied by the species, and provided the Secretary of the Interior with criteria for determining critical habitat that included economic considerations.[50] Specifically, the parameters of a critical habitat designation are set out as follows:

> (A) The term "critical habitat" for a threatened or endangered species means
>
> > (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of

> section 1533 of this title, on which are found those physical or biological features
>
> > (I) essential to the conservation of the species and
> >
> > (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> (B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.[51]

The designation of critical habitat for a listed species by the Secretary follows a statutorily mandated process.

**Designating Critical Habitat**

When the Secretary of the Interior makes a decision to list a species as endangered or threatened, only the "best scientific" evidence is to be considered, not the economic implications of the listing.[52] But the Secretary may take more factors into account when designating a critical habitat for a listed species. When specifying any particular area as critical habitat, the Secretary makes the decision on the "basis of the best scientific data available and after taking into consideration

the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[53]

Unlike a listing decision, Section 4 of the ESA gives the Secretary the authority to perform a balancing test to determine if the exclusion of an area as critical habitat outweighs the benefits of designating the area.[54] The Secretary may exclude an area from a critical habitat designation under this balancing test unless the exclusion will result in the extinction of the species in question.[55]

The ESA requires the Secretary to make a critical habitat designation at the time a species is listed. If the "critical habitat of such species is not then determinable," the Secretary is given an extra year to make the designation.[56] After which, the Secretary must "publish a final regulation, based on data available at that time, designating, *to the maximum extent prudent*, such habitat."[57] Despite this statutory mandate, the Secretary routinely declines to designate critical habitat.[58] Under Fish and Wildlife Service regulations, if the Service determines that it is "not prudent" to designate a critical habitat when listing a species, designation is not required.[59] "Not prudent" findings are made when the designation will increase the threat to the species or is not beneficial.[60]

In addition to critical-habitat-designation requirements, Section 4 also requires the Secretary to develop and implement recovery plans for the conservation and survival of listed species unless the Secretary determines that a plan would not promote the conservation of the species.[61] The plans are to contain (1) site-specific management actions necessary to achieve conservation; (2) measurable criteria that, if met, would result in removal of the species from the list; and (3) estimates of time and money required to carry out those measures.[62] Federal actions in areas where a listed species is present also require protective actions and assessments.

**Consultation Provisions as Applied to Critical Habitat**

Under Section 7 of the ESA, all federal agencies have an affirmative duty to conserve listed and proposed species when carrying out their activities.[63] A federal agency must consult with the Secretary of the Interior to "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat."[64] FWS regulations define "destruction or 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."[65]

Agencies must follow a three-step procedure to ensure that they comply with the requirements of Section 7: (1) an agency must inquire with the FWS about the presence of endangered species in the area where the agency proposes to act; (2) if the FWS indicates that such species are present, the agency must prepare a biological assessment to determine if the proposed action is likely to affect the species given the baseline of existing activities already affecting the species; (3) if the second step indicates that the species is likely to be affected, the agency must formally consult with the FWS.[66] The FWS would then issue a formal "biological opinion" assessing whether the proposed activity is likely to jeopardize the continued existence of proposed or listed species or adversely affect critical habitat of proposed or listed species.[67] If the consulted agency finds that a proposed action is likely to adversely affect species survival or critical habitat, the agency determines whether there are any "reasonable and prudent alternatives" (RPAs) that would not jeopardize the species or adversely modify critical habitat.[68]

Section 7 implementation has resulted in tribes bearing a disproportional burden of protecting listed species.[69] Agencies do not estimate potential impacts of future activities on endangered species, including water projects intended to benefit tribes, even where Indian water rights are senior to those of the beneficiaries of any project on which the action agency and FWS may be consulting.[70] The absence of a provision for comprehensive, integrated analysis of future impacts under Section 7 has major

implications for Indian consumptive water use as the procedure basically turns the prior appropriation system on its head, such that tribes' newly quantified senior water rights may be rendered nothing but "paper" rights.[71]

**Prohibitions and Exceptions**

An additional layer of protection afforded an endangered or threatened species, triggered at the time the species is listed regardless of whether critical habitat was designated or not, is the prohibition of the unauthorized "take" of a listed species under Section 9 of the ESA.[72] Section 9, which applies not only to federal agencies but to all persons, defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" a listed species.[73] Although Section 9 does not expressly apply to the modification or destruction of critical habitat, alteration of occupied critical habitat would probably be considered a prohibited take. The definition of "harm" in the regulations includes the adverse modification or degradation of any habitat that results in death or injury to listed species by significantly impairing essential behavior patterns such as breeding or feeding.[74] Liability for a take for an otherwise lawful activity can be avoided by obtaining an incidental take permit under Section 10, however.

Section 10 provides several different mechanisms for allowing an incidental take of a listed species. A non-federal entity may take a listed species for scientific or conservation purposes provided the entity first submits a "habitat conservation plan" (HCP).[75] The HCP should minimize the impact of the taking and assure that it "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[76] Section 10 also provides for "safe harbor agreements" and "conservation agreements." When entering into "safe harbor agreements," the FWS assures the permittee that no additional restrictions will be placed on the land in exchange for encouraging species recovery on non-Federal lands, though the agreement must actually provide a benefit to listed species on their land.[77] Congress included Section 10 in order to mitigate the conflicts between listed species and economic

development activities and to encourage cooperation between the public and private sectors.[78]

While these Section 10 agreements may seem like good options for tribes to consider when pursuing economic development activities on areas designated as critical habitat, generally the agreements are not desirable for tribes.[79] According to one commentator, "They raise issues of sovereignty, jurisdiction, and applicability of the ESA. They are often expensive and time-consuming, and public involvement through NEPA can compromise protection of sensitive cultural and religious information. Tribal conservation goals can often be met through mechanisms outside of the ESA."[80]

At an ESA workshop on the Pascua Yaqui reservation hosted by the FWS on November 9, 2004, several Southwest tribes expressed similar concerns regarding tribal sovereignty and sensitive information being subject to requests under the Freedom of Information Act when it is turned over to the federal government.[81]

# CRITICAL HABITAT DESIGNATION AND CONSUMPTIVE WATER USE IN INDIAN COUNTRY

## A Threshold Matter: Do Critical Habitat Designations Apply to Tribes?

It is still unsettled as a matter of law whether, or to what extent, the ESA applies to tribes or tribal lands, as the text and the legislative history of the ESA is completely silent about applicability to tribes.[82]

Courts have struggled with what to do when a "statute of general applicability," such as the ESA, conflicts with Indian rights. The U.S. Supreme Court in *FPC v. Tuscarora Indian Nation* determined that "a general statute in terms applying to all persons includes Indians and their property interests."[83] Courts have found that this general rule is subject to certain exceptions:

> A federal statute that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) there is proof "by the legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations[.]"[84]

In practice, these exceptions have rarely prevented the application of laws of general applicability to tribes.[85] Furthermore, courts have declined to recognize an exception from the ESA with respect to tribes.[86]

As far as the ESA is concerned, designated critical habitats are only protected from *federal* acts that might endanger the species because critical habitat is linked only to the Section 7 consultation process and is "only enforceable when a federal nexus sufficient to trigger a section 7 consultation exists."[87] As a practical matter, however, the ESA and its critical habitat designations come into play for most water development projects in the west, including Indian water projects, due to the fact that the water projects involve federal funding, permitting, or other action.[88] Therefore, both the tribes and the federal government have found it necessary and advantageous to come up with guidelines to govern their relationship when dealing with issues such as compliance with the ESA.

## Relevant Federal Policy Statements Regarding Tribal Consultation and the Endangered Species Act

### *Executive Order 13175 (2000): Consultation and Coordination with Indian Tribal Governments*

Executive Order 13175 expands the principles set out in the Presidential Memorandum of April 29, 1994, which called for agencies undertaking activities that affect tribal rights or trust resources to do so in a manner respectful of tribal sovereignty and the trust relationship between tribes and the federal government.[89]

Executive Order 13175 extends these principles to the realm of policymaking and regulation, and reaffirms the commitment to engage in effective government-to-government relationships with tribes.[90] In affirming the trust relationship, the Order emphasizes the importance of the right of tribes to self-governance and self-determination.[91]

The Executive Order sets out criteria to guide agencies when implementing policies and submitting legislative proposals: (1)

policy should be consistent with the trust responsibility; (2) the "Federal Government shall grant tribes the maximum administrative discretion possible;" and (3) agencies should "encourage tribes to develop their own policies to achieve program objectives," make efforts to preserve the authority of tribes when setting standards, and "defer to Indian tribes to establish their own standards."[92]

The Order also includes guidelines for the consultation process with tribes. Agencies "shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications," and should consult with tribes early in the regulation formation process.[93] Furthermore, agencies are directed not to impose direct compliance costs on tribes through regulation without providing them with the necessary funds to comply.[94] The President implemented this guideline to reduce the number of unfunded mandates that tribes are faced with. Furthermore, when a final regulation is issued in the Federal Register, agencies are required to provide a statement to the Office of Management and Budget (OMB) summarizing the agency's consultation with tribes in promulgating the rule.[95] Finally, the Executive Order encourages agencies to use negotiated rulemaking or other consensus-seeking mechanisms for developing regulations that relate to tribal trust resources.[96]

*Secretarial Order 3206 (1997): American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*

While Executive Order 13175 announces a broad policy that applies to all federal agencies, Secretarial Order 3206 (SO 3206) is specific to the implementation of the ESA.

SO 3206 was the result of several government-to-government negotiations between tribes and the Departments of the Interior and Commerce, and provides policy direction to the FWS and the NMFS on implementing and applying the ESA in ways that include collaboration with tribes.[97] Though it does not resolve the legal uncertainties regarding the applicability of the ESA to tribes, it does set forth procedures for harmonizing tribal rights

and the goals of the ESA to the greatest extent possible within a government-to-government framework.[98]

SO 3206 is based on five main principles: (1) the departments will "work with tribes on a government-to-government basis to promote healthy ecosystems;" (2) the departments will "recognize that Indian lands are not subject to the same controls as Federal public lands;" (3) as trustees, the departments will assist tribes in managing their own resources in a manner that precludes the need for conservation restrictions and promotes healthy ecosystems; (4) the departments will exhibit sensitivity to "Indian culture, religion and spirituality;" and (5) the departments will facilitate the mutual exchange of information by making pertinent information available to tribes, and protecting sensitive information given to them by the tribes.[99] The Order includes an appendix that sets out more detailed criteria for the agencies to follow when implementing specific portions of the ESA.

SO 3206 itself makes only one explicit reference to critical habitat designations: "[n]othing in this Order shall be applied to authorize [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."[100] The appendix, however, sets out a more specific guideline for the FWS and NMFS to use when designating critical habitat:

> In keeping with the trust responsibility, [the agencies] shall consult with the affected tribes 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 a 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.[101]

This provision has particular importance when agencies contemplate designating critical habitat in a water source that contains reserved tribal water rights, as these water rights are a valuable tribal resource that has long received inadequate protection by the federal government via the Bureau of Reclamation.

*Indian Policy of the Bureau of Reclamation (1998)*

The Bureau of Reclamation, the entity within the Department of the Interior that manages the navigable waters in the West, has an agency-wide policy, implemented on February 25, 1998, that guides its relationship with tribes. The Bureau generally aspires to "actively seek partnerships with Indian tribes to ensure that tribes have the opportunity to participate fully in the Reclamation program as they develop and manage their water and related resources."[102] It then goes on to affirm the Bureau's commitment to recognize the inherent powers of tribal sovereignty and self-government, and to implement activities in a manner consistent with the unique government-to-government relationship between the tribes and the federal government.[103] Specific to the ESA, the Bureau commits to "implement the Endangered Species Act in a manner that respects the exercise of tribal sovereignty over the management of Indian lands and tribal trust resources" consistent with SO 3026.[104]

**Implications of Federal Policies on the Development of Indian Reserved Water Rights**

Shortly after releasing SO 3206, then Secretary of the Interior Babbitt created the Working Group on the Endangered Species Act and Indian Water Rights. The impetus for forming the group stemmed from a number of Southwestern tribal representatives who expressed concern that Indian water resource development was not adequately or sufficiently addressed in the government-to-government consultation as outlined in SO 3206.[105] The group, chaired by Southwest Regional Solicitor Tim Vollman, was formed to assess the implementation of Section 7 of the ESA in relation to Indian water resource development, recognizing that tribal interests have historically received a much lower

priority in federal planning for the harnessing of the resources to benefit their communities.[106] After extensive consultation with tribal groups, the Working Group issued its report and recommendations in 2000.

The Working Group recognized that the tribes' ability to exercise consumptive use of reserved water rights is a growing concern where "Congress has enacted legislation designed to enable Indian tribes to exercise their water rights, including many Indian water right settlements enacted [in recent] years."[107]

During the group sessions, tribes argued that the federal trust responsibility requires that any decision to move forward with a federal or non-federal non-Indian water project on a stream with Indian water rights must consider and mitigate any adverse impact on future exercise of the Indian right caused by the new project.[108] *Northwest Sea Farms v. U.S. Army Corps of Engineers* clarified the affirmative nature of the trust obligation and the United States' obligation to take tribal water rights into consideration even when no express regulatory authority exists to do so, such as in the context of ESA implementation.[109] But this has not always been the case, especially in the context of critical habitat designation and Section 7 consultation in water basins implicating tribal water rights. As a result, tribes feel that they are now shouldering a disproportionate conservation burden, as they are basically paying the price for the environmental degradation of water sources by non-Indian water projects.[110] Furthermore, due to the structure of Indian resource development, tribes are more likely to encounter ESA issues than private and state parties because of the federal involvement in most of these projects.[111]

The Working Group issued several recommendations in an attempt to remedy these inequities.[112] The recommendations dealing specifically with critical habitat designation will be discussed in further detail later. Before recommendations are warranted, however, it is instructive to examine the effect that these newly enunciated policies have had on recent critical habitat designations.

## Application of Federal Policy to Recent Critical Habitat Designations

Executive Order 13175, Secretarial Order 3206, Reclamation's Indian Policy, and the Working Group recommendations are merely policy statements that direct the activities of the Bureau of Reclamation, FWS and NMFS and do not carry the force of law.[113] But the agencies seem to be making somewhat of an effort to follow them when making critical habitat designations, as evidenced by the ESA workshop held at the Pascua Yaqui tribal headquarters, and by the recent designation of critical habitat for the bull trout discussed below. The FWS has enunciated a process for consulting with tribes that consists of several different levels of formality ranging from informational briefings, to stakeholder subgroups, to tribal working groups, to the most formal option of asking a tribal member to be a member of a technical recovery team.[114] Presumably, the consultation method chosen depends on how significant the species is to the tribe, both economically and culturally.[115]

When making the highly controversial critical habitat designation for the Mexican spotted owl, the FWS decided to exclude the tribal lands of the San Carlos Apache Nation from the designation because the tribe had put in place its own management plan that the agency deemed adequate to protect the species.[116] When an environmental group filed suit in federal district court, the District Court of Arizona determined that the FWS could reasonably exclude tribal land when designating critical habitat for the endangered spotted owl on the ground that the benefit of maintaining a good working relationship with the tribe, which was pursuing its own natural-resource protection program, outweighed any benefit to the owl of including tribal land in habitat designation.[117]

More recently, the FWS chose to exclude the tribal lands of the Confederated Tribes of Warm Springs (Columbia River population), the Blackfeet Nation (Saint Mary/Belly River population), the Swinomish tribe, the Quinault Indian Nation, the Muckleshoot Tribe, the Jamestown S'Klallam Tribe, the Hoh Tribe,

and the Skokomish Tribe in its most recent designation of critical habitat for the bull trout. In doing so, the FWS pointed to the tribes' development of habitat conservation plans and/or their conducting "numerous habitat restoration and research projects designed to protect or improve habitat for listed species."[118] The FWS did, however, designate critical habitat for the fish on portions of the reservations of the Yakama Nation, Coeur D'Alene Tribe, Kalispell Tribe of Indians, Nez Perce Tribe, the Confederated Salish and Kootenai Tribes' lands on the Flathead Indian Reservation, and the Confederated Tribes of the Umatilla Indian Reservation. FWS justified this by stating that "[these tribes] do not have resource management plans that provide protection or conservation for the bull trout and its habitat." [119]

It seems that the FWS is willing to exclude tribal lands from critical habitat designations when the tribe has a conservation plan and legal infrastructure in place that will reasonably assure conservation of the species on reservation lands. The irony of this is that the tribes that do not have these elaborate ecosystem conservation plans in place could probably benefit the most from economic development projects, most of which require consumptive water use in some capacity. Therefore, further changes are needed to ensure that the federal government is adequately balancing its obligation to deal with tribes on a government-to-government basis with the mandated duties under the Endangered Species Act. A case study is instructive to illustrate these points.

# CASE STUDY: THE SILVERY MINNOW IN THE MIDDLE RIO GRANDE RIVER BASIN

The situation in the Middle Rio Grande River Basin is a classic example of how the designation of critical habitat in a fully appropriated river system located in an extremely arid, but quickly growing, state can cause a whole host of disputes among various interests.

In 1999, the FWS designated the entire 163-mile stretch of the Middle Rio Grande River as critical habitat for the silvery minnow, concluding that the designation would have no economic impact beyond the initial listing decision.[120] Significant to the current discussion, the original designation included lands of four pueblos: Santa Ana, Isleta, Sandia, and Santo Domingo.[121] The District Court of New Mexico set aside the designation on several grounds, one of which was that the FWS did not adequately scrutinize alternatives under the National Environmental Policy Act (NEPA) to designating the entire river.[122] The Court also disagreed with the FWS's conclusion that no economic impact would result, pointing out the river was already fully allocated and no more water is available for other uses.[123]

Meanwhile, environmental groups filed suit against various federal agencies and the City of Albuquerque seeking an order to complete Section 7 consultation on virtually all aspects of the Middle Rio Grande Project, as well as an order to prepare an Environmental Impact Statement pursuant to NEPA to assess actions to increase

the efficiency of the Middle Rio Grande Conservancy District Irrigation System that services six pueblos with some of the most senior water rights.[124] After the suit was filed, the state of New Mexico intervened, and the parties were ordered to mandatory mediation.[125]

State and federal agencies developed a proposed settlement in which state-owned water in upstream reservoirs would be released to keep the minnows alive while the parties sought a more permanent answer to preserving the minnow.[126] In addition, federal agencies issued a new biological opinion and filed it with the court in June 2001. The new scope of the Section 7 consultation implicated every pueblo and tribe along the river, but these new agreements were negotiated without any consultation with the pueblos, who were not informed of the new biological opinion in time to provide meaningful comment.[127]

Despite the failure of the federal government to sufficiently consult with the pueblos at the beginning of the designation process, the FWS ultimately decided to exempt the pueblo lands from the final critical habitat designation.[128] The decision to do so was based in part upon the fact that the pueblos developed "voluntary conservation plans that provide greater conservation benefits than does the critical habitat designation."[129]

In coming up with a recovery plan for the silvery minnow, the FWS has included pueblo members as part of a stakeholder team and a tribal working group.[130] At one point the FWS, the Bureau of Reclamation, the Pueblo of Sandia, and other participants in the silvery minnow recovery effort contemplated locating an off-channel sanctuary for the minnow on Sandia land, which the pueblo would have operated, but the participants have since rejected that location in favor of another site on Middle Rio Grande Conservancy District land.[131] However, two of the pueblos have recently received federal money in the form of Tribal Landowner Incentive Program (TLIP) grants[132] to support silvery minnow research and habitat conservation by the tribes.[133] In 2004, the Pueblo of Isleta received $150,000 to design and construct rearing habitat for the silvery minnow.[134] In 2005, the Pueblo of Santa Ana

received $149,997 to conduct a survey and habitat assessment of the silvery minnow as part of the Pueblo of Santa Ana Rio Grande Restoration Program.[135] While the TLIP and the Tribal Wildlife Grant (TWG) program allow tribes to exercise more control over their wildlife management efforts, more steps must be taken to ensure that tribes can exercise greater control over recovery efforts for endangered species and their habitats on tribal lands.

# RECOMMENDATIONS

## Tribal Recommendations Concerning Critical Habitat Designation

During the sessions of the DOI Working Group on the Endangered Species Act and Indian Water Rights, the tribes initially came up with several procedural and substantive recommendations pertaining to critical habitat designation:

> [Procedural:] (4) The ESA regulations pertaining to critical habitat designation should be amended to provide that whenever the action involves tribal interests, all affected Indian tribes must be included as parties to the designation process, and must be included as parties to the consultation process.[136]

> [Substantive:] (2) [T]he ESA regulations should be amended to provide that when designating critical habitat of an endangered species, if an alternative to the critical habitat designation would be equally effective in preserving the species, and would concurrently protect Indian tribal interests in their federally reserved resources, the FWS must choose that alternative; (3) FWS should be required to examine impacts of critical habitat designation on tribal resources and tribal economies.[137]

## Working Group Formal Recommendations Pertaining to Critical Habitat Designations

As part of the "Recommendations" portion of its report, the Working Group came up with the following recommendations relating specifically to critical habitat designation:

> Objective 5: There should be express considerations of the impact of proposed designations of critical habitat on the exercise of Indian water rights, and areas should be excluded from such designations if there is an adverse impact on those rights.
>
> Recommendation 5.A: [FWS] should consider each Indian reservation affected by a proposed designation of critical habitat as one economic unit, and explicitly address in its economic analysis the economic impacts on Indian tribes affected by the proposed designation.
>
> Recommendation 5.B: [FWS] should exclude an area from a critical habitat designation if the designation will cause significant adverse impacts to the future exercise of Indian water rights and these impacts outweigh the benefits of designating that area unless the failure to designate such an area will result in the extinction of the species.[138]

## Evaluation of Recommendations

While the recommendations represent a step in the right direction, they do not go far enough. As one commentator, Harold Shepherd, has noted, ". . . in actual practice the recommendations may allow the government to continue to rely on tribes for shouldering the bulk of the responsibility in resolving conflicts between water users and listed species."[139] Shepherd also points out that, while many of the substantive directives apply to all of the agencies within the Department of the Interior, others only apply to the FWS.[140] The fact that many of these recommendations exclude the Bureau of Reclamation significantly curtails their effectiveness as the Bureau

is the primary acting agency for most of the water development projects that affect tribal water rights.[141]

While the Working Group adopted some of the tribes' concerns, the recommendations are merely policy statements – evidenced by the use of the word "should" instead of "shall" – that do not carry the force of law.

They reaffirm the amorphous balancing test referenced in the ESA, which could be used to ignore tribal interests as well as it could be used to bolster them. For example, while the District Court of Arizona has recognized that the interest of maintaining good relationship with tribes can tip the scale in favor of declining to designate critical habitat in Indian Country, the courts could easily accord the FWS just as much deference for a contrary decision, especially if the only doctrine the court must consider is the equally amorphous trust doctrine.

**Additional Recommendations**

Commentators argue that critical habitat designation on reservation lands is generally not appropriate as it is inconsistent with the trust relationship and the promotion of self-government and self-determination.[142] Bolstering their position is the repeated assertion by the FWS that critical habitat designation is of limited value, and generally the costs imposed by designation vastly outweigh the benefit realized from the designation as the species is afforded significant protections just by virtue of the listing itself.[143]

*Government-to-government management*

Given the limited value of critical habitat designation and the fact that designating critical habitat on tribal lands undermines principles of tribal sovereignty and government-to-government relationships formed by treaties, the FWS should develop co-management plans and Memoranda of Understanding with tribes instead of imposing critical habitat designations on them. The Upper Colorado River Endangered Fish Recovery Program provides an example of how this relationship might work. The Program is a collaborative,

basin-wide process that seeks to reconcile fish protection and recovery with continued water development.[144] Recently the Ute tribe secured a FWS Tribal Wildlife Management Grant (TWG) to further the Program's effort by developing a native-fish management plan and outreach program for further recovery of the endangered fish in their watershed.[145]

In cases where tribes do not already have a habitat management plan in place, the FWS should work with the tribe to put one together with the use of monies from the TWG program and Tribal Landowner Incentive Program (TLIP), and additional funds should be allocated to these programs by Congress in order to reflect this new priority. The goal is to assist tribes in exercising their retained autonomy to manage their own resources. As Chairman Lupe of the White Mountain Apache noted, "We are self-regulating. If our homeland is destroyed, we have nowhere else to go. We will not allow for that to happen."[146]

*Codification*

While SO 3206 and the Bureau of Reclamation's Indian Policy reflect the goals of tribal autonomy and government-to-government relationships, they do not go far enough. SO 3206 explicitly states that it is not a legally binding document, and orders signed by Secretaries are basically considered interpretive rules that clarify existing law.[147] Furthermore, the order and the policy can be changed or revoked unilaterally without the consent of the tribes. Therefore, codification of procedural and substantive consultation provisions within the ESA is necessary. Specifically, Congress should amend 16 U.S.C. § 1533(b)(2) to explicitly require consultation with tribes throughout the listing and designation process. Congress should also consider adding a new section similar to Section 6 of the ESA to reflect the allocation of federal monies directly to tribal programs. Section 6 deals with cooperation with the states and provides money to them for species and habitat conservation. In essence, this would codify the TWG program and thus would ensure that sufficient funds are available for tribal wildlife management programs.

*Water distribution reform*

In order to reduce the burden on tribes to protect endangered species in the context of water, the Bureau of Reclamation should work with states and private owners of water rights to assure that tribes are able to utilize their allotted water. This may mean the federal government must lease or buy water from state or private users for the benefit of the tribes. It may also mean that junior users may have their allocations reduced so that tribes may be able to exercise their more senior rights. This may also create an extra incentive for the Bureau to work with the states to increase the efficiency of existing projects that service these junior users in an effort to avoid reducing or denying water to them. Furthermore, to do so would comport with the policy announced by Congress in the ESA that "[f]ederal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species." [148]

*Sustainable development by Native nations*

Finally, in an effort to make long-term beneficial decisions for their tribe, tribal officials should seek to use their water allotments in a sustainable fashion, and should attempt to adhere to the Cornell-Kalt model[149] for economic development when choosing which consumptive water-use projects to pursue.

Under the model, tribes should (1) strive for actual, or de facto, sovereignty over certain enterprises; they should (2) develop effective institutions of self-government by keeping business separate from government functions, and (3) they should strive for a cultural match when choosing what economic development projects to undertake.[150] Following those guidelines will help tribes make choices that encourage the efficient use of their limited resources so that future generations will enjoy the benefits of water and wildlife resources on reservations lands.

# CONCLUSION

Critical habitat designation on reservation lands under the Endangered Species Act can substantially impede the development of consumptive water use on Indian lands. This poses a unique problem in the realm of Indian water rights given the implications of the special relationship between the tribes and federal agencies and the *Winters* doctrine of reserved water rights. Compounding the issue is the fact that federal and state entities have largely ignored tribal reserved water rights until very recently in contemplating the development of water projects in the West. Consequently, much of the damage that has resulted in various aquatic species teetering on the brink of extinction was caused by non-Indian water projects, and now tribes are forced to pay the price for it.

But both the conservation of endangered species in or along tribal waterways and the sustainable development of tribal consumptive water use can be achieved through amendment of the ESA to reflect the government-to-government relationship between tribes and the federal government, and through the cooperation of state and federal agencies in assuring that other water users share the burden of species protection so that tribes get their due allotment of water under the *Winters* doctrine. In turn, tribes must choose their consumptive water use projects wisely, and they must attempt to formulate protection plans for endangered and threatened species in their watersheds.

# NOTES

[1] *Colo. River Conservation Dist. v. U.S.*, 424 U.S. 800, 804 (1976).

[2] Conversely, the more water-rich Eastern and Midwestern states primarily allocate water based on the riparian rights doctrine, which allows all landowners along a natural watercourse to make reasonable use of the adjacent waters. Thus, in a time of drought, all water users along a watercourse share the burden of a reduced supply.

[3] Reed Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 Nat. Resources J. 29, 35 (2004).

[4] Putting water to a "beneficial use" is critical in order to prevent perceived abandonment or forfeiture of the right to use the water. However, states do not have one uniform, universal definition of what constitutes a beneficial use. Generally, a beneficial use constitutes a use that the state recognizes as providing some sort of social benefit. Examples may include irrigation, livestock watering, and, more recently, in-stream water rights to protect water quality and aquatic life. A water user cannot, however, acquire a right to more water than is reasonably necessary to carry out that specific purpose, as to do so would be wasteful and thus prohibited. *Id*. at 36. In reality, though, the traditional prohibition is rarely enforced as most states do not require users to measure how much water they used in a given time period. *Id*. at 59.

[5] Oregon Water Resources Department, *Water Rights in Oregon: An Introduction to Oregon's Water Laws and Water Rights System*, 42 (November 2002).

[6] Several states have passed statutes that create special rules for water appropriation during a drought, however. For example, in Oregon, when the Governor declares a drought, the Oregon Water Resources Department can, but does not have to, give preference to stock watering and household consumptive uses regardless of the priority date. O.R.S. § 536.750(1)(c) (2003).

[7] Benson, *supra* note 3, at 37.

[8] Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 Envtl. L. 1137, 1142-43 (1998) (citations omitted).
[9] *Winters v. U.S.*, 207 U.S. 564, 577 (1908).
[10] *Ariz. v. Cal.*, 373 U.S. 546, 600 (1963).
[11] U.S. National Water Commission, *Water Policies for the Future—Final Report to the President and to the Congress of the United States*, 474-75 (1975).
[12] *See* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law* 799 (4th ed. 1998) [hereinafter Getches et al.].
[13] *Ariz. v. Cal.*, 373 U.S. at 600.
[14] *Id.* (emphasis in original). The "practically irrigable acreage" (PIA) standard is not universally applied, however, due to perceived flaws in the assumptions underlying the standard and the inequitable results that it may produce. For example, the Arizona Supreme Court has recently rejected the standard in favor of a multi-factor approach to quantifying Indian water rights that looks at elements such as a tribe's present and projected population, the resources available on the reservation, the cultural significance of water to the tribe, and the tribe's past water use. *See* E. Brendan Shane, *Litigation Update: Arizona Supreme Court Rejects Practically Irrigable Acreage Standard for Allocating Indian Water Rights*, 5 U. Denv. Water L. Rev. 500 (2002). The United States Supreme Court has not yet rejected the PIA standard. It declined an opportunity to do so in 1989 when the issue was squarely before the court in the context of the Wyoming Supreme Court's quantification of Indian water rights on the Wind River reservation. An equally divided court affirmed the state court's decision to use the PIA standard without issuing an opinion. *Wyo. v. U.S.*, 492 U.S. 406 (1989).
[15] *Winters* rights extend to surface waters such as rivers, tributaries, streams, lakes and springs that "arise upon, border, or traverse a reservation." Getches et al. *supra* note 12, at 805. The Supreme Court has not determined whether *Winters* rights extend to groundwater underneath the reservation, nor has the court directly addressed whether the *Winters* doctrine gives tribes the right to insist upon a certain level of water quality. *Id.*; *see also* Amy Choyce Allison, Note & Comment, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 Wash. L. Rev. 1193 (2002).
[16] *Ariz. v. Cal.*, 439 U.S. 419, 422 (1979).
[17] *Ariz. v. Cal.*, 373 at 598-599.
[18] Getches et al., *supra* note 12, at 816.
[19] *Id.* Because of the numerous interests involved in any watershed adjudication, the quantification process can take decades to complete, especially in water sources that are already over-allocated, as many in the Southwest are. For example, the San Juan River General Stream Adjudication in New Mexico was initiated in 1975, and was still outstanding as of 2001. Stanley M. Pollack, The Endangered Species Act as a Constraint on Tribal Water Development in the

San Juan River Basin §(I)(A)(3) (2001) (citing *N.M. v. U.S.*, No. 75-184, Dist. Ct. 11th Judicial District, San Juan County, NM) (unpublished outline, on file with author).

[20] Snake River Currents, Vol. 4, Issue 11 (Nez Perce Tribe Department of Natural Resources, Lapwai, Idaho), Nov. 2004, *available at* http://www.nezperce.org/~srcurrents/November%202004.htm.

[21] U.S. Dept. of the Interior, Fact Sheet on Snake River Water Agreement (May 15, 2004), *available at* http://www.doi.gov/news/NPFactSheet.pdf [hereinafter Snake River Fact Sheet]. The Nez Perce claims to instream flows in the Snake River to protect its treaty-based fishery was the largest remaining issue in the state's adjudication of water rights in the Basin. Press Release, U.S. Dept. of the Interior, Nez Perce Water Rights Settlement Benefits Tribe, Idaho, Pacific Northwest (May 14, 2004), *available at* http://www.doi.gov/news/040515a.

[22] Snake River Fact Sheet, *supra* note 21.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] Press Release, Native American Rights Fund, Major Water Rights Settlement Agreement Accepted by Nez Perce Tribe of Idaho (April 1, 2005) (on file with author).

[27] *Id*.

[28] Associated Press, *Warm Springs Tribes Settle Water Rights*, The Nugget Newspaper (1996) *available at* http://www.nuggetnews.com/archives/960904/front4.shtml.

[29] *Id*.

[30] The three cases are *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831); and *Worcester v. Ga.*, 31 U.S. 515 (1832). These cases established the "guardian-ward" relationship between the federal government and the tribes.

[31] For the purposes of the trust evaluation process under the Tribal Self-Governance Act of 1994, trust assets include:

> "(1) Other assets, trust revenue, royalties, or rental, including natural resources, land, water, minerals, funds, property, assets, or claims, and any intangible right or interest in any of the foregoing;
>
> (2) Any other property, asset, or interest therein, or treaty right for which the United States is charged with a trust responsibility. For example, water rights and off-reservation treaty rights."

25 CFR 1000.352(2)(b) (2005).

[32] *See* William Canby, *American Indian Law* 35 (3rd ed. 1998).
[33] *Id*. at 46.
[34] *Id*. at 47.
[35] *Id*.
[36] National Water Commission, *supra* note 11, at 475.
[37] *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 499 F.2d 1410, 1420 (D.C. Cir. 1974).
[38] *Id*. at 1412.
[39] *Id*. at 1420-21.
[40] The FWS is primarily responsible for administering the ESA. However, for oceangoing species, the National Marine Fisheries Service is primarily responsible for listing decisions. The current discussion focuses on the role of the FWS.
[41] 16 U.S.C. § 1531(b) (2005). Under the ESA, an "endangered species" is one that is "in danger of extinction throughout all or a significant portion of its range[.]" 16 U.S.C. § 1532(6) (2005). A "threatened species," on the other hand, is one that is "likely to become and endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20).
[42] 16 U.S.C. § 1531(c).
[43] *TVA v. Hill*, 437 U.S. 153, 174 (1978).
[44] *Id*. at 179.
[45] *Id*. at 157.
[46] *Id*. at 158.
[47] *Id*. at 162.
[48] *Id*. at 164.
[49] *Id*. at 194-95.
[50] Ann K. Wooster, Annotation, *Designation of "Critical Habitat" Under Endangered Species Act*, 176 ALR Fed. 405 §2 (2004).
[51] 16 U.S.C. § 1532(5).
[52] 16 U.S.C. § 1533(b)(1)(A) (2005). A decision by the Secretary not to list a species will be upheld unless there is absolutely no data justifying the decision not to list it. The Secretary has very broad discretion in making listing decisions.
[53] 16 U.S.C. § 1533(b)(2). The Ninth Circuit, however, determined that other "relevant impacts" that the Secretary may consider must relate directly to the preservation of a species. *Douglas County v. Babbitt*, 48 F.3d 1495, 1506 (9th Cir. 1995).
[54] 16 U.S.C. § 1533(b)(2).
[55] *Id*.
[56] 16 U.S.C. § 1533(b)(6)(C)(ii).
[57] *Id*. (emphasis added).
[58] Benson, *supra* note 3, at 38.
[59] 50 C.F.R. § 424.12(a)(1) (2004).

[60] *Id*.
[61] 16 U.S.C. § 1533(f)(1).
[62] 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).
[63] 16 U.S.C. § 1536(a)(1) (2005). Actions that might trigger ESA consultation include, among many other things, the construction, funding, and operation of water projects.
[64] 16 U.S.C. § 1536(a)(2).
[65] 50 C.F.R. § 402.02 (2004). It is important to note, however, that two federal appellate courts have invalidated this provision. *Sierra Club v. U.S. Fish and Wildlife Serv*., 245 F.3d 434, 441-42 (5th Cir. 2001) ("Requiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits."); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv*., 378 F.3d 1059, 1069 (9th Cir. 2004) (holding that the definition of "destruction or adverse modification" in the regulation is an impermissibly narrow interpretation of the ESA that focuses only on survival, not recovery, of listed species). But the FWS has not amended the regulation, stating recently in its designation of critical habitat for the California Tiger Salamander that "[i]n response to the [Ninth Circuit] decision, the Director provided guidance to the Service based on the statutory language." 70 Fed. Reg. 49,379 (August 23, 2005). A more expansive definition of "destruction or adverse modification" means that a lower level of impact on critical habitat by a federal agency will trigger the need for Section 7 consultation.
[66] *Thomas v. Peterson*, 735 F.2d 754 (9th Cir. 1985).
[67] 16 U.S.C. § 1536(b). Federal actions subject to Section 7 consultation are considered in the order in which they are requested by the action agencies.
[68] Sylvia A. Cates, *Endangered Species and Tribal Lands: The Trust Responsibility, Consultation, Recent Developments*, CLE: Environmental Law on the Reservation, J-11 (CLE International 2001) (on file with author).
[69] *Id*. at J-12.
[70] Final Report and Recommendations of the Working Group on the ESA and Indian Water Rights, 65 Fed. Reg. 41,709 (July 6, 2000) (full report on file with author) [hereinafter Working Group Report].
[71] *Id*.
[72] 16 U.S.C. § 1538(a) (2005).
[73] *Id*.
[74] Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Tribal Sovereignty Come First*, 43 S. D. L. Rev. 381, 396 (1998) (citations omitted); *see also Sweet Home Chapter v. Babbitt*, 515 U.S. 687 (1995).
[75] 16 U.S.C. § 1539(a) (2005).
[76] *Id*.

[77] U.S. Fish and Wildlife Service, Endangered Species Act Overview (Nov. 9, 2004) (unpublished Power Point presentation, on file with author).
[78] Cates, *supra* note 68, at J-12.
[79] *Id*.
[80] *Id*.
[81] Author's personal observation as a conference attendee.
[82] Cates, *supra* note 68, at J-4.
[83] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 115-16 (1960).
[84] *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
[85] Getches et al., *supra* note 12, at 327.
[86] In *U.S. v. Dion*, 476 U.S. 734, 746 (1986), the United States Supreme Court expressly declined to decide whether the ESA abrogated treaty rights.
[87] 64 Fed. Reg. 31,871 (June 14, 1999).
[88] Cates, *supra* note 68, at J-16.
[89] Presidential Memorandum (April 29, 1994) *available at* http://www.epa.gov/indian/clinton.htm.
[90] Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).
[91] *Id*. at §2.
[92] *Id*. at §3.
[93] *Id*. at §5.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] Cates, *supra* note 68, at J-8.
[98] *Id*.
[99] Interior/Commerce Secretarial Order No. 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (copy on file with author) [hereinafter SO 3206].
[100] *Id*. at §2(D).
[101] SO 3206, *supra* note 99, appendix at §3(B).
[102] Indian Policy of the Bureau of Reclamation (Feb. 28, 1998) *available at* http://www.usbr.gov/native/naao/policies/indianpol.pdf.
[103] *Id*.
[104] *Id*.
[105] Working Group Report, *supra* note 70.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Northwest Sea Farms v. U.S. Army Corps of Engineers* , 931 F. Supp. 1515, 1520 (WD Wash. 1996).
[110] Zellmer, *supra* note 74, at 426-27.
[111] Pollack, *supra* note 19, at §IV(C).
[112]Working Group Report, *supra* note 70, at Recommendations section.

[113] Zellmer, *supra* note 74, at 384.
[114] Author's notes, ESA Workshop on SO 3206, Pascua Yaqui Pueblo (November 9, 2004).
[115] For a recent example of ostensibly extensive collaboration between the FWS and the San Carlos Apache, see Listing [of the] Gila Chub as Endangered with Critical Habitat, 70 Fed. Reg. 66,663 (November 2, 2005) (under SO 3206 and Executive Order 13175, the FWS declined to designate two streams on San Carlos Apache land known to be currently occupied by Gila chub as critical habitat, citing the tribe's implementation of a Fisheries Management Plan and expressing a desire to maintain a good working relationship with the tribe to promote conservation of the chub).
[116] *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1093 (2003) (citing 66 Fed. Reg. 8530).
[117] *Id*. at 1105.
[118] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bull Trout, 70 Fed. Reg. 56,211, 56,242 (September 26, 2005).
[119] *Id*. at 56,264.
[120] Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,275 ( July 6, 1999).
[121] Press Release, U.S. Fish and Wildlife Service, Critical Habitat Designated for Rio Grande Silvery Minnow (February 19, 2003) *available at* http://news.fws.gov/newsreleases/r2/80E05754-999C-4F07-975C02364216EAA6.html.
[122] Cates, *supra* note 68, at J-18.
[123] *Id*.
[124] *Id*.
[125] *Id*. at J-19.
[126] *Id*.
[127] *Id*.
[128] FWS Press Release, *supra* note 121.
[129] *Id*.
[130] Author's notes, ESA Workshop on SO 3206, Pascua Yaqui Pueblo (November 9, 2004).
[131] *Id*.; email update provided to author by Cynthia Abeyta, Middle Rio Grande Coordinator/Hydrologist, New Mexico Ecological Services Field Office, FWS (December 6, 2005) (on file with author).
[132] The FWS created the TLIP to support "federally recognized Indian tribes to protect, restore, and manage habitat for species at-risk, including federally listed endangered or threatened species, as well as proposed or candidate species on tribal lands." Press Release, U.S. Fish and Wildlife Service, Secretary Norton Announces $8 million in Grants to Tribes to Help Conserve Fish and Wildlife (August 11, 2005) available at http://www.fws.gov/southeast/

news/2005/r05-077.html. The FWS also operates the Tribal Wildlife Grant (TWG) program to support "federally recognized Indian tribes to develop and implement programs that benefit wildlife and their habitat, including non-game species on tribal lands." *Id.*

[133] *Id.*; Author's notes from ESA SO 3206 Workshop, Pascua Yaqui Pueblo (November 9, 2004).

[134] Author's notes from ESA SO 3206 Workshop, Pascua Yaqui Pueblo (November 9, 2004).

[135] FWS Tribal Grant Press Release, *supra* note 132.

[136] Working Group Report, *supra* note 70.

[137] *Id.*

[138] Working Group Report, *supra* note 70, at Recommendations section.

[139] Harold Shepherd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 Envtl. L. 901, 940 (2001).

[140] *Id.*

[141] *Id.*

[142] Cates, *supra* note 68; Zellmer, *supra* note 74.

[143] FWS Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871 (June 14, 1999).

[144] It is important to note, however, that serious concerns about the effectiveness of this program have been raised, as it still allows significant additional depletions of the river, and 12 years later none of the fish have been delisted. Benson, *supra* note 3, at 43 (citing Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 Ariz. L. Rev. 197 (1998); Hanna Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 Nat. Resources J. 561, 573-74 (2001).

[145] Swimming Upstream, Winter 2004 Newsletter, (Upper Colorado River Endangered Fish Recovery Program), *available at* http://coloradoriverrecovery.fws.gov/winter04.pdf.

[146] Zellmer, *supra* note 74, at 435.

[147] *Id.* According to Zellmer, an action that violates the order could possibly be considered "arbitrary and capricious" under the Administrative Procedures Act, but the order is not directly enforceable.

[148] 16 U.S.C. § 1531(c)(2).

[149] *See* Steven Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in What Can Tribes Do?: Strategies and Institutions in American Indian Economic Development 1, 33 (Stephen Cornell & Joseph P. Kalt eds., 1992).

[150] *Id.*

# ABBREVIATIONS

| | |
|---|---|
| BIA | Bureau of Indian Affairs |
| DOI | Department of the Interior |
| ESA | Endangered Species Act |
| FWS | U.S. Fish and Wildlife Service |
| HCP | habitat conservation plan |
| NEPA | National Environmental Policy Act |
| NMFS | National Marine Fisheries Service |
| OMB | Office of Management and Budget |
| PIA | practically irrigable acreage |
| RPAs | reasonable and prudent alternatives |
| SO | Secretarial Order |
| SRBA | Snake River Basin Adjudication |
| TLIP | Tribal Landowner Incentive Program |
| TVA | Tennessee Valley Authority |
| TWG | Tribal Wildlife Management Grant |

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ISBN 1-931143-25-0