

# **Implementing the Federal Endangered Species Act in Indian Country**



by Marren Sanders

***Native Nations Institute***  
*for Leadership, Management,  
and Policy*

***The Harvard Project***  
*on American Indian  
Economic Development*

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**Implementing the Federal  
Endangered Species Act in Indian Country:  
The Promise and Reality of Secretarial Order 3206**

Marren Sanders

**JOPNA No. 2007-01**

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## **Acknowledgements**

The author would like to thank Robert A. Williams, Jr. for his generous support and assistance in bringing this paper to publication and the editors for their helpful commentary and suggestions.

## **Photography credits**

1) Red-legged frog, California, photo by Mark R. Jennings, courtesy of U.S. Fish and Wildlife Service; 2) Fish technician with the Nez Perce Tribe's Coho Project releases young coho salmon into a tributary of the Clearwater River, courtesy of Columbia River Intertribal Fisheries Council staff; 3) Landscape on the Standing Rock Sioux Tribe reservation, photo by Amy Besaw, Harvard Project.

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JOPNA No. 2007-01

ISBN 10: 1-931143-34-X  
ISBN 13: 978-1-931143-34-9

Library of Congress Control Number: 2007929843

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# Implementing the Federal Endangered Species Act in Indian Country: The Promise and Reality of Secretarial Order 3206

Marren Sanders

## INTRODUCTION

The federal Endangered Species Act (ESA), meant to conserve threatened wildlife species and the ecosystems upon which they depend, is widely recognized for the strength of its broad-sweeping application and stringent requirements.<sup>1</sup> Meanwhile, the ESA is nearly silent regarding its potential application in Indian Country. However, its restrictions prohibiting any person from “taking” a listed species or adversely modifying occupied or otherwise essential habitat can affect tribal as well as federal, state, and privately owned lands.<sup>2</sup> The ESA contains a single subsection providing exemption from the takings prohibition for Native Alaskans and non-Native permanent residents of Alaska Native villages, if the taking is primarily for subsistence purposes.<sup>3</sup>

Nonetheless, by the mid-1990s the ESA had proven to be a

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1. The ESA was enacted in 1973 by the U.S. Congress. 16 U.S.C. §§ 1531-1544 (2007).

2. Under the ESA, a taking means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2007).

3. 16 U.S.C. § 1539(e) (2007).

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source of serious concern for Indian tribes.<sup>4</sup> For instance, the ESA's emphasis on single-species management conflicted with many tribes' holistic management approaches. In addition, many tribes were outraged at any attempt to regulate American Indians under the ESA because it implied that tribes lacked the capability to manage their resources. A larger question, and one that has generated ample litigation, was whether the ESA in fact applied to Indian tribes at all. Lastly, tribes felt that they were being pressured into an unfair and disproportionate responsibility for conservation to make up for habitat destruction and degradation of the environment caused by non-Indians.<sup>5</sup>

In 1997, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley jointly issued Secretarial Order 3206 (SO 3206), entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act."<sup>6</sup> The culmination of months of negotiations between agency officials and tribal representatives, the order's overarching theme was to harmonize the federal trust responsibility to tribes and the statutory missions of the Departments of the Interior and Commerce (collectively "departments") in implementing the ESA. Hailed as "the equivalent of a treaty" by Secretary Babbitt, SO 3206 was signed in the Indian Treaty Room (where, ironically, no Indian treaty had ever actually been signed).<sup>7</sup> With the signing of SO 3206, Secretary Babbitt expressed his hope to "banish forever the traditional treaty process that has been one-sided, overbearing and not infrequently unfair."<sup>8</sup> SO 3206 set forth a general policy that the departments and their agencies should carry out their

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4. Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063 (1997).

5. For a discussion of this topic relative to tribal water rights, see Lauren Lester, *Protecting the Fish and Eating Them, Too*. Udall Center for Studies in Public Policy, The University of Arizona (2006).

6. Available at <http://www.fws.gov/endangered/tribal/esatribe.htm>

7. Wilkinson, 72 Wash. L. Rev. 1063 (1997).

8. *Id.*

responsibilities “in a manner that . . . strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.”<sup>9</sup>

This monograph considers whether SO 3206 has lived up to its promise of true bilateralism between the United States and sovereign tribal governments regarding their rights *vis-a-vis* the ESA process. It first reviews the key requirements of the ESA, pertinent executive orders, and Secretarial Order 3206 itself (see Table 1). It then considers their implications for government-to-government relations in the context of several cases of “final rule” critical habitat designation and a review of scholarly literature.<sup>10</sup> The discussion concludes that while SO 3206 has not yet lived up to its full promise, it is making a difference by assisting federal land managers and sovereign tribal governments in building stronger working relationships while protecting the environment.

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9. *Id.*

10. The term “final rule” refers to the final decision by the appropriate federal service regarding the size and configuration of critical habitat under the ESA, as published in the Federal Register.

**Table 1: Documents Affecting Implementation of the Federal ESA on Tribal Lands**

Date	Title	Source
1973 (with later reviews)	Endangered Species Act (ESA)	U.S. Congress
April 19, 1994	The Clinton Memorandum “Government-to-Government Relations with Native American Tribal Governments”	Office of the President (Clinton)
June 5, 1997	Secretarial Order 3206 “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”	Jointly released by Secretaries of the Interior (Babbitt) and Commerce (Daley)
May 14, 1998 (revoked Nov. 6, 2000 when replaced by EO 13,175)	Executive Order No. 13,084 “Consultation and Coordination with Indian Tribal Governments”	Office of the President (Clinton)
November 6, 2000	Executive Order No. 13,175 “Consultation and Coordination with Indian Tribal Governments”	Office of the President (Clinton)

## OVERVIEW OF ENDANGERED SPECIES ACT REQUIREMENTS

The Endangered Species Act authorizes the Secretaries of the Departments of the Interior and Commerce, respectively, through the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively “services”), to identify species in need of protection by placing them on the endangered or threatened species list.<sup>11</sup> Species eligible for listing as endangered are those that are in imminent danger of extinction, while threatened species are those that are likely to become endangered within the foreseeable future. The ESA prohibits any person from taking a listed species or adversely modifying occupied or otherwise essential habitat and charges the services with designating “critical habitat” for listed species.<sup>12</sup>

In designating critical habitat, the secretaries must first identify occupied or unoccupied but suitable areas that meet the statutory criteria, based on the best scientific data available.<sup>13</sup> The secretaries must consider the economic and other relevant impacts of designation for each area that fits within the definition. After considering those impacts, the agency is to determine whether any identified areas should be excluded from the final critical habitat designation because the benefits of such exclusion outweigh the benefits of designation. Areas that meet the statutory criteria may be excluded from the designation unless exclusion would result in extinction of the species.

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11. 16 U.S.C. §§ 1531-1544 (2007).

12. Critical habitat is defined as the specific areas within the geographical area occupied by the species at the time it is listed, on which are found those physical or biological features that are essential to the conservation of the species and may require special management considerations or protection. Also, specific areas outside the geographical area occupied by the species at the time it is listed may be designated as critical upon a determination by the secretaries that such areas are essential for conservation of the species. 16 U.S.C. §§ 1532(5)(A) (2007).

13. 16 U.S.C. §§ 1533(b)(2) (2007).

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A key section of the ESA, Section 7, is directed at federal agencies, requiring that each agency ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction of critical habitat.<sup>14</sup> A “federal action” includes activities or programs of any kind authorized, funded, or carried out, in whole or in part, by the agency, such as: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. If an agency determines that its proposed action “may affect” an endangered or threatened species, the agency must formally consult with the appropriate service (FWS or NMFS). Tribal development projects can be subject to Section 7 requirements because they often require federal authorization or funding approval.

Consultation begins with a written request from the federal agency planning an action. If the service determines that the action will have no effect on a listed species or habitat, a “no effect determination” is made.<sup>15</sup> If it determines that the action may, but is not likely to affect a species or habitat, an informal consultation between the agencies takes place. If the action is determined likely to affect a listed species or habitat, formal consultation is required and ends with the issuance of a biological opinion. A biological opinion is an opinion of the service as to whether or not the federal action is likely to jeopardize the continued existence of a listed species or result in the “destruction or adverse modification” of critical habitat, which is defined as a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”<sup>16</sup> The biological opinion constitutes a formal assessment of the proposed federal activity.

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14. 16 U.S.C. §§ 1536(a)(2) (2007).

15. 50 C.F.R. § 402.12(k) (2007).

16. 50 C.F.R. § 402.02. (2007).

A federal agency proposing an action, however, is not bound by the findings of the service's biological opinion or its final conclusion as it pertains to the proposed action. Once an agency has completed "meaningful consultation" with the secretary, the final decision of whether or not to proceed with the action lies with the agency itself.<sup>17</sup> Section 7 does not give the Department of the Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred.<sup>18</sup> Section 7 and its requirements apply to all actions where there is discretionary federal involvement and control, but Section 7 requirements are not triggered by advice or consultation with a private entity.<sup>19</sup>

Again, this becomes important for tribes, since federally-funded tribal development projects can be subject to Section 7 requirements. For example, the U.S. Supreme Court has held that lands set aside by the federal government for American Indians reserved, by implication, the then-unappropriated appurtenant water needed to accomplish the purpose of the reservation.<sup>20</sup> This reserved rights doctrine gave tribes senior rights to water over other users. However the ESA requires that the impact of tribal water resource development plans on endangered or threatened species be evaluated and may substantially delay, if not prevent, such development.<sup>21</sup> Given this apparent contradiction, well-developed government-to-government relations between tribes and federal agencies regarding the impact of the ESA on American Indian lands are crucial. These relationships have been addressed to various degrees by the executive memorandum, orders, and agency guidance listed in Table 1 (above), and detailed in the following section.

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17. *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5<sup>th</sup> Cir. 1976).

18. *Id.*

19. *Karuk Tribe of California v. United States Forest Service*, 379 F.Supp.2d 1071, 1102 (N.D.Cal. 2005).

20. *Winters v. United States*, 207 U.S. 564 (1908).

21. *Lester*, Udall Center for Studies in Public Policy (2006).

## STRENGTHENING GOVERNMENT-TO-GOVERNMENT RELATIONS

The executive-branch documents reviewed in this section are not specific to natural resources but rather apply more broadly to federal-tribal, government-to-government relations, which are nonetheless central to SO 3206 and implementation of the ESA in Indian Country.

### **The Clinton Memorandum (1994)**<sup>22</sup>

The Presidential Memorandum of April 19, 1994, entitled “Government-to-Government Relations with Native American Tribal Governments” and known as the Clinton Memorandum, recognizes the unique legal relationship of tribes with the federal government (as set forth in the Constitution of the United States, treaties, statutes, and court decisions), and outlines principles that executive departments and agencies are to follow in their interactions with tribal governments. Issued three years prior to SO 3206, the Clinton Memorandum attempted to clarify the responsibilities of the federal government and its government-to-government relationship with federally-recognized tribes. It stated that, as executive departments and agencies undertake activities affecting tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.<sup>23</sup>

Under the memorandum, each executive department and agency must consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect them. All such consultations are to be open and candid

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22. 59 Fed. Reg. 22,951 (Apr. 29, 1994).

23. The federal government holds 95 million acres of Indian lands in trust for Indian tribes and Indian individuals. “Tribal trust resources” are defined as “natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.” Secretarial Order 3206 § 3(B).

so that all interested parties may evaluate for themselves the potential impact of relevant proposals. Each executive department and agency is to assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during their development.

In addition, each executive department and agency is to take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes, and to work cooperatively with other federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of the memorandum.

The head of each executive department and agency is to ensure that the department or agency's bureaus and components are fully aware of the memorandum and in compliance with its requirements. The Clinton Memorandum explicitly states, however, that it is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

### **Consultation and Coordination with Indian Tribal Governments (1998)<sup>24</sup>**

Issued four years later, Executive Order No. 13,084 (EO 13,084) was intended to supplement but not supersede the 1994 Clinton Memorandum. Entitled "Consultation and Coordination with Indian Tribal Governments," EO 13,084 states that in order to establish regular and meaningful consultation and collaboration with tribes, each agency is to have an effective process by which

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24. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

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tribal governments can provide input regarding the development of regulatory practices on federal matters that significantly or uniquely affect their communities. EO 13,084 also recommends cooperation in developing regulations on issues relating to tribal self-government, trust resources, or treaty and other rights, including negotiated rulemaking. EO 13,084 contains the same disclaimer as the Clinton Memorandum, indicating that it is intended only to improve the internal management of the executive branch and does not create any new enforceable rights.

### **Consultation and Coordination with Indian Tribal Governments (2000)<sup>25</sup>**

In 2000, Executive Order No. 13,084 was expressly revoked by Executive Order 13,175 (EO 13,175), also entitled “Consultation and Coordination with Indian Tribal Governments.”<sup>26</sup> The new order was promulgated to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications. Additionally, EO 13,175 was meant to strengthen the United States’ government-to-government relationships with tribes and to reduce the imposition of unfunded mandates upon them. For purposes of EO 13,175, “policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

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25. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

26. Like the prior executive order that it replaced, EO 13,175 is intended to supplement but not supersede the 1994 Clinton Memorandum. In addition, the disclaimer indicates that EO 13,175 is intended only to improve the internal management of the executive branch and is not intended to and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

According to EO 13,175, in formulating or implementing such policies, agencies are to be guided by the following fundamental principles: (a) the United States' unique trust relationship with Indian tribal governments as set forth in the Constitution, treaties, statutes, executive orders, and court decisions; (b) the recognized right of Indian tribes, as domestic dependent nations, to exercise inherent sovereign powers over their members and territory; and (c) the United States' support of tribal sovereignty and self-determination. In addition to adhering to these fundamental principles, agencies are to respect tribal self-government and sovereignty, honor tribal treaty and other rights, strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments and, with respect to federal statutes and regulations administered by tribal governments, grant these governments the maximum administrative discretion possible.

Agencies are also to encourage Indian tribes to develop their own policies to achieve program objectives, and to defer to Indian tribes to establish standards where possible. In determining whether to establish federal standards, agencies are to consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

EO 13,175 further states that each agency must have a process of accountability to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. In transmitting any draft final regulation or proposed legislation that has tribal implications, each agency is to include a certification from the official designated to ensure compliance with EO 13,175 is carried out in a meaningful and timely manner.

## DEVELOPMENT OF SECRETARIAL ORDER 3206

While executive orders such as those detailed above require federal agencies and departments to follow specific fundamental principles regarding the recognition of tribal self-government and sovereignty and the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments, Congress delegated broad administrative power to the Secretaries of the Interior and Commerce in the interpretation and implementation of these principals. In 1997, the secretaries signed Secretarial Order 3206 to clarify the responsibilities of their departments when actions taken under authority of the ESA affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights.

### Underlying Discussions<sup>27</sup>

Secretarial Order 3206 had its beginnings in late 1995 when an ad hoc group, composed mostly of tribal resource managers and lawyers, convened to discuss what should be done about the pending reauthorization of the ESA – a reauthorization that was very likely to take place without tribal input. The group explored a variety of options, from legislation to litigation, but an overriding question was whether it was realistic for the tribes to develop a unified position on a course of action. The ad hoc group subsequently held the first tribal workshop on the ESA in Seattle in February 1996, attended by some 130 persons from Indian tribes and tribal organizations across the country.

According to Wilkinson, presenters at the workshop explained the ESA and the current status of tribal rights, and representatives

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27. Information throughout this sub-section regarding the conception of Secretarial Order 3206 is taken from *Wilkinson*, 72 Wash. L. Rev. 1063 (1997). Wilkinson attended the February 1996 Seattle meeting (described in the text) and participated in the negotiation sessions between the tribes and the Departments of the Interior and Commerce.

from different areas discussed the impact of the ESA in their regions.<sup>28</sup> The tribal representatives repeatedly expressed concerns that:

- the ESA was too narrow because its emphasis on single-species management fared poorly in comparison with the tribes' holistic management approaches;
- any attempt to regulate Indians under the ESA implied that tribes lacked the capability to manage their resources in a way that protected animal species, even though many tribes had formal natural resource agencies; and
- tribes were being required to shoulder an unfair and disproportionate responsibility for conservation to make up for environmental degradation resulting from non-Indian development.

The participants also agreed that:

- as a matter of law, the ESA did not and should not apply to Indian tribes or individuals exercising treaty rights; and
- tribal rights to manage their resources in accordance with their own beliefs and values must be protected.

The Seattle workshop participants decided that it was time for tribes to take the initiative to look beyond the ESA to accomplish long-term tribal objectives by building upon principles of holistic management, sustained utilization of resources, spirituality and continuity of unique cultures and beliefs, and stewardship, authorizing a report of principal findings and detailing an emerging consensus as to how tribes should proceed under the ESA.<sup>29</sup>

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28. *Wilkinson*, 72 Wash. L. Rev. 1063, 1066 (1997).

29. For more information regarding the report and the process leading to its creation, see *Wilkinson*, 72 Wash. L. Rev. 1063 (1997).

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Later, a 25-member working group recommended that the tribes pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the 1994 Statement of Relationship between the White Mountain Apache Tribe and the FWS.<sup>30</sup> According to Wilkinson, the essence of that statement was to avoid ESA conflicts through effective, cooperative tribal land management. While the statement did not explicitly refer to the ESA and took no position on the ESA's applicability to the tribe, the working group put together its own draft position paper expanding upon the ideas in the statement and calling for a secretarial order that would apply nationally. It was felt that such an administrative system, if effective, might result in deference to tribal sovereignty, in good working relationships with the federal agencies, and diminish the need for legislation or litigation. Meetings began in September of 1996 between representatives from the Departments of the Interior and Commerce and from tribes, leading to the issuance of the order the following summer.

### **The Order (1997)<sup>31</sup>**

On June 5, 1997, in another attempt to clarify the government-to-government relationship surrounding application of the ESA in Indian Country, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley jointly released Secretarial Order 3206, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." Shaped by the earlier discussions between the services and tribal representatives, SO 3206 states that it was created pursuant to the ESA, the federal-tribal trust relationship, and other federal law. Specifically, the order's purpose is to clarify the responsibilities of the Departments of the Interior and Commerce ("departments") and their component agencies, bureaus, and offices when actions taken under authority of the ESA affect, or may affect, Indian

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30. See David H. Getches, et al., *Cases and Materials on Federal Indian Law*, 5th ed., pp. 716-717 (Thomson West) (2005).

31. SO 3206, available at <http://www.fws.gov/endangered/tribal/esatribe.htm>.

lands, tribal trust resources, or the exercise of American Indian tribal rights.

Like the executive orders discussed above, SO 3206 acknowledges the trust responsibility and treaty obligations of the United States and its government-to-government relationship with tribes. The departments are to carry out their responsibilities under the ESA in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the departments. They should also strive to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

SO 3206 explicitly states that because of the unique government-to-government relationship between Indian tribes and the United States, the departments and affected tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed, and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

To achieve the objectives of SO 3206, the departments are to ensure that five principles are followed. The departments must:

- work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems;
- recognize that Indian lands are not subject to the same controls as federal public lands;
- take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems, recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal

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trust resources, and, as trustees, support tribal measures that preclude the need for conservation restrictions;

- be sensitive to Indian culture, religion and spirituality; and
- facilitate the mutual exchange of information related to tribal trust resources and Indian lands, and strive to protect sensitive tribal information from disclosure.

Embodied in these principles is the duty to consult with, and seek the participation of, affected Indian tribes whenever the departments are aware that their actions under the ESA may impact tribal trust resources, the exercise of tribal rights, or Indian lands. That includes providing opportunities for the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

The departments are to give deference to tribal conservation and management plans for tribal trust resources and conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species. In the course of the mutual exchange of information, the departments are to protect, to the maximum extent practicable, sensitive tribal information that has been disclosed to or collected by the departments and must promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the ESA. Under SO 3206 the departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species. These agreements are to strive to establish partnerships that harmonize the departments' missions under the ESA with the tribe's own ecosystem management objectives.<sup>32</sup>

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32. SO 3206 does not apply to Alaska.

The services are to implement their specific responsibilities under the ESA in accordance with specific, detailed instructions contained in an attached appendix, stating that, in keeping with the trust responsibility, the services are to consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights.<sup>33</sup> Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other (non-Indian) lands.

The appendix also includes a section on ESA Section 7 consultations, directing the services to encourage meaningful tribal participation and consider traditional knowledge and tribal expertise during the consultation process. That includes giving full consideration to all comments and information received from any affected tribe and striving to ensure that any alternative selected does not discriminate against such tribe(s).

The services are also to provide timely notification to affected tribes as soon as the services are aware that a draft Habitat Conservation Plan (HCP) may affect tribal trust resources or rights, and are to cooperate with affected tribes to develop and implement recovery plans.<sup>34</sup> At the request of an Indian tribe, the services must enter into cooperative law enforcement agreements

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33. The appendix is considered an integral part of SO 3206 and all sections of SO 3206 apply in their entirety to it.

34. The ESA mandates that the secretaries develop and implement recovery plans for the conservation and survival of listed endangered and threatened species. 16 U.S.C. § 1533(f) (2007). Under certain conditions, the secretaries may issue a permit allowing for the taking of a listed or threatened species that is "incidental" to an otherwise lawful activity. 16 U.S.C. § 1539(a)(1) (2007). The permit applicant must submit a conservation plan that specifies, among other things the impact which will likely result from such taking, what steps the applicant will take to minimize and mitigate such impacts, and what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized. 16 U.S.C. § 1539(a)(2)(A) (2007).

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to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the ESA, within limitations, to full-time tribal conservation law enforcement officers.

Like the executive orders before and after it, SO 3206 explicitly states that it is intended to provide guidance within the departments only and “shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law.”<sup>35</sup> SO 3206 does not preempt or modify the departments’ statutory authorities or the authorities of Indian tribes or the states and, should any tribe(s) and the department(s) agree that greater efficiency in the implementation of SO 3206 can be achieved, nothing in SO 3206 shall prevent them from implementing strategies to do so.

### **HAS SO 3206 LIVED UP TO ITS PROMISE?**

A review of the scholarly literature on Secretarial Order 3206 seems to indicate that the order held great promise for improving government-to-government relationships between tribes and federal agencies and for giving tribes greater control and management authority over endangered and threatened species found on Indian lands. But in reality, has SO 3206 lived up to this promise? And has it been as effective as hoped? The remainder of the paper attempts to answer these questions.

#### **Reactions to SO 3206**

In his 1997 article, Wilkinson called the Seattle workshop leading up to the drafting of SO 3206 the most informed and comprehensive discussion of natural resources issues he had ever

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35. Secretarial Order 3206, § 2(B), available at <http://www.fws.gov/endangered/tribal/esatribe.htm>.

attended.<sup>36</sup> Stating that SO 3206 served as a major example of how the government-to-government relationship between the United States and Indian tribes could be successfully implemented, he felt that it achieved what it was designed to accomplish: a sensible harmonizing of Indian law and the ESA.

Wilkinson felt that, if SO 3206 was implemented as intended, management and administration by both federal and tribal officials would proceed more smoothly and effectively.<sup>37</sup> Tribes would have considerably more autonomy in managing the resources of their lands, and animal and plant species and their delicate ecosystems would benefit. Wilkinson acknowledged that SO 3206 did not accomplish what the tribes cherished most: a definitive statement that the ESA does not apply to tribes. He believed, however, that it established a number of significant procedural steps and substantive requirements before federal officials could seek to apply the ESA to tribes.

Wilkinson also felt that, while SO 3206 was generally favorable to tribes, there were a number of disappointments in its final form.<sup>38</sup> First, the negotiators refused to acknowledge the duties of the affirmative trust obligation that would require the federal government, as trustee, to take actions to restore habitat degraded by non-Indian development. Second, the federal negotiators refused to include Alaska Native communities in SO 3206. Third was the application of the “conservation principles” in a highly attenuated fashion with respect to Section 7 consultations.<sup>39</sup> In

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36. See *Wilkinson*, 72 Wash. L. Rev. 1063 (1997).

37. *Id.*

38. *Id.*

39. According to the order, in the event that the departments determine that conservation restrictions are necessary in order to protect listed species, the departments are to consult with affected tribes and provide written notice to them of the intended restriction. The notice must include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv)

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the view of tribes, comprehensive application of the conservation standards was a key to avoiding confrontations between the ESA and tribal rights. The fourth area of disappointment for tribes was that SO 3206 limited special tribal rights, including the power to regulate, to “Indian lands” rather than applying the more expansive “Indian Country” definition.<sup>40</sup> The final objection involved agency officers’ entry onto reservations. Wilkinson related that, while the provision generally prohibited entry onto Indian reservations by the services without tribal permission, it contained a loophole allowing entry “when determined necessary for . . . law enforcement activities.”<sup>41</sup>

Wilkinson concluded that one secretarial order, of course, cannot eliminate two centuries of overbearing federal policy toward Indian people.<sup>42</sup> Yet SO 3206 did show that the government-to-government relationship can be administered mutually, faithfully, and productively. The pageantry in the Indian Treaty Room on the day SO 3206 was signed did not commemorate some epic event, but it did rightly celebrate a solid accomplishment that held out promise for those who believe that an honest, open, and hardworking mutuality ought to serve as the foundation for Indian policy.

Zellmer, in a 1998 article, echoed Wilkinson’s thoughts and added that SO 3206 marked a significant improvement over the status quo of unilateral federal decision-making on wildlife

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the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose. Secretarial Order 3206 § 5, Prin. (3)(C).

40. “Indian lands” are defined in SO 3206 as “any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.” Secretarial Order 3206 § (3)(D). The term “Indian Country” means all land within reservation boundaries, all dependent Indian communities within the borders of the United States and all Indian allotments, the Indian titles to which have not been extinguished. 18 U.S.C. § 1151 (2007).

41. See *Wilkinson*, 72 Wash. L. Rev. 1063 (1997).

42. *Id.*

issues in Indian Country.<sup>43</sup> She added that, notably unlike most federal Indian policies, SO 3206 was not generated by centralized federal decision making and handed down to the tribes, but was instead the product of tribes coming together to propose ESA policy. Zellmer warned, however, that SO 3206 did not create any legally enforceable rights or change existing law, that orders signed by cabinet-level secretaries are typically considered to be interpretive rules, which merely clarify existing law or regulations, and that SO 3206 can be revoked or amended unilaterally by any administration. But she felt that the spirit of SO 3206 put tribes and listed species on at least an even playing field, and affirmatively elevated tribal needs to a higher priority than the development interests of surrounding, non-Indian landowners and actors. Zellmer stated that if implemented by the agencies and enforced by the courts, SO 3206 could be a valuable tool and precedent for effectuating tribal sovereignty and the trust responsibility as it curbed free-ranging agency discretion and allowed flexibility to address diverse tribal needs and objectives, habitat variations, and the conservation needs of species in a particular ecosystem.

In a subsequent paper in 2000, Zellmer observed that the secretarial order provided a vehicle for turning the ESA sword into a tool for cooperative approaches that equitably distributes the conservation burdens among tribal, federal, state, and private interests.<sup>44</sup> SO 3206 can be used to ensure that Indian nations are not required to forego economic opportunities to compensate for the effects of past development and habitat degradation, unless the survival of a species really is at stake. Zellmer held that SO 3206 fell short of providing tribes with mutual decision-making authority because federal agencies are often reluctant to agree to tribal co-management authority, particularly where public lands are involved, fearing that tribes will exercise a “veto” over what

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43. Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. Rev. 381 (1998).

44. Sandi B. Zellmer, *Conserving Ecosystems Through the Secretarial Order on Tribal Rights*, 14-WTR Nat. Resources & Env't 162 (2000).

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agencies regard to be discretionary activity. According to Zellmer, how effective SO 3206 is will depend, in large part, on the extent to which the services engage in meaningful consultation with the tribes.

In a similar fashion, Suagee suggested in 1999 that it was too soon to assess the implementation of SO 3206, but it did serve as an example of how bilateral negotiations between the tribes and the federal government can yield a national policy that harmonizes the rights and interests of tribes with the policies of national legislation.<sup>45</sup> If carried out faithfully, he stated, SO 3206 can be expected to lead to the resolution of many controversies over the preservation of threatened species in which federal decisions are informed by tribal cultural knowledge and values. Suagee also believed that SO 3206 should yield numerous examples in which ecosystem management by tribes will avoid the perceived need for the services to make policy decisions.

Steven K. Albert, a non-lawyer and then-director of the Pueblo of Zuni Fish and Wildlife Department, stated in 2002 that SO 3206 was the most far-reaching of the executive branch directives and that it had been very well-received by most tribes.<sup>46</sup> Albert concluded that under SO 3206 tribes had considerable authority to manage endangered species on Indian land and could, unlike a state, opt to develop their own conservation plans. He stated that tribes were not advocating abandoning the ESA or non-participation in the recovery process. Instead, they were insisting on the flexibility to be able to perform those functions in a manner consistent with tribal goals and tribal sovereignty. Further, SO 3206 had potentially the greatest impact on how tribes and the federal government would manage endangered species.

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45. Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 *Ariz. St. L.J.* 483 (1999).

46. Steven K. Albert, *American Indian Perspectives on the Endangered Species Act*, 9 *Buff. Envtl. L.J.* 175 (2002).

## The Nation-building Test

Many observers believed that SO 3206, hailed as a new beginning for federal and tribal government-to-government relationships, would be a vehicle for meaningful consultation between tribes and the services and would support tribal sovereignty in regards to the effect of the ESA on Indian lands. Further, the conception and implementation of SO 3206 provides a good example of what Cornell and Kalt call “nation-building.”<sup>47</sup> According to the Cornell and Kalt model, a tribe’s success in economic development depends on certain key, largely political, factors. For instance, the successful tribe practices “de facto” sovereignty, making choices and decisions for its community with the authority of a government. In addition, the tribe must have capable government institutions in place to carry out these choices and decisions. Further, the governing institutions must be legitimate in the eyes of the people they govern, fit with the tribe’s political culture, and have the people’s support.

The Seattle meeting of tribal representatives and follow-up working group exemplify these nation-building principles in action. In this process, the tribes took a stand on the ESA, drafted an initiative, and presented it to the federal government. Together, the departments and the tribes crafted an order to harmonize the ESA process and tribal rights by trading conflict and confrontation for mutual consultation. But although the conception and implementation of the order was a step toward nation-building, the question remains: in the years since it was issued, has SO 3206 lived up to its promise of improved government-to-government relations and greater tribal authority over endangered and threatened species found on Indian lands?

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47. Stephen Cornell and Joseph Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 Am. Indian Culture and Res. J. 187 (1998), available at <http://www.jopna.net/>.

## CRITICAL HABITAT DESIGNATIONS AND TRIBAL LANDS

The first post-3206 final rule regarding the designation of critical habitat in Indian Country boded badly for the promise of the secretarial order. In July 1997, the FWS's final designation of critical habitat for the southwestern willow flycatcher included lands of the Yavapai-Apache in Arizona and the Pala Mission Tribe in California.<sup>48</sup> That designation was court-ordered in response to a suit by the Southwest Center for Biological Diversity. The suit was brought because the FWS had taken no action on its 1993 proposal to designate critical habitat for the flycatcher due to resource constraints. On March 20, 1997, the court ordered the FWS to make a final determination within 120 days. Due in part to the time constraint, the FWS designated the habitat as it was proposed in 1993, with the exception of some minor areas that had been proposed in error. The final rule states that the FWS consulted with both tribes prior to completion of the designation, in order to ensure that tribal cultural values and reserved hunting, fishing, gathering and other rights were considered, but it is questionable whether that consultation was of the sort envisioned by SO 3206. The final rule was issued in the midst of a court ordered timeframe and a scant six weeks after SO 3206 was issued.

Including the flycatcher designation, the services published almost 100 final rules designating critical habitat after the issuance of SO 3206, between June 1997 and January 2006.<sup>49</sup> According to the author's review of these, more than half (fifty-six) indicated that tribal lands were not essential to the conservation of the species involved. Twenty-seven final rules specifically considered including tribal lands in the final designation. Of those, eleven

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48. Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39,129 (July 27, 1997).

49. A list of all final rules involving tribal lands reviewed for this paper is contained in Table 2.

final rules have included tribal lands as critical habitat, while sixteen designations considered but excluded these lands.<sup>50</sup> Based solely on these numbers, one might conclude that SO 3206 is having some effect: after SO 3206, tribal lands seem to be at least less likely to be designated as critical habitat, unless those lands are determined essential to conserve a listed species. Is that really the case? A further discussion of some of the final rules involving tribal lands helps to illuminate the answer.

### **Inclusion of Tribal Lands as Critical Habitat**

In reviewing the eleven final rules that designated tribal lands as critical habitat, one thing is clear: each and every rule was the result of a lawsuit, filed in almost every case by an environmental group. The groups most active were the Center for Biological Diversity and the Defenders of Wildlife. The one exception was the most recent final rule examined by the author designating critical habitat for the Arkansas River shiner.<sup>51</sup> That rule resulted from a lawsuit filed by the New Mexico Cattle Growers Association, in which the court vacated a previous rule that had excluded tribal lands from designation and ordered that a redesignation be completed.<sup>52</sup>

In originally excluding Choctaw and Chickasaw lands in 2001, the FWS met with tribal representatives and determined that the benefits of promoting self-determination and the cooperative

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50. Three final rules clarifying designation for four Vernal Pool Crustaceans and eleven Vernal Pool Plants in California and Southern Oregon (excluding tribal lands) were combined and counted as one rule. See Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46,684 (Aug. 6, 2003), Evaluation of Economic Exclusions From August 2003 Final Designation, 70 Fed. Reg. 46,924 (Aug. 11, 2005), and Re-evaluation of Non-Economic Exclusions From August 2003 Final Designation, 70 Fed. Reg. 11,140 (Mar. 8, 2005).

51. See Final Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner, 70 Fed. Reg. 59,808 (Oct. 13, 2005).

52. See Final Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner, 66 Fed. Reg. 18,002 (Apr. 4, 2001). Ironically, this original designation was completed pursuant to a settlement agreement of a lawsuit filed by the Center for Biological Diversity.

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relationship with the tribes in managing threatened and endangered species and their habitats outweighed the benefits to be obtained from designating critical habitat for the species. In addition, the FWS concluded that designation of tribal lands would provide little if any benefit and that exclusion of those lands from the designation would not result in extinction of the Arkansas River shiner.

In later deciding to include tribal lands in the 2005 rule, the FWS had little to say about them, other than that the lands within the designated area primarily existed as scattered, fragmented tracts that were generally held privately by individual tribal members or were held in trust for the tribe by the Bureau of Indian Affairs (BIA). Perhaps that can be interpreted as meaning that the FWS felt the designation would have little affect on an individual tribe as a whole or on its ability to manage its own resources. But it is difficult to tell because that statement was the only reference in the rule to the tribal lands included in the designation.

### **Exclusion of Tribal Lands as Critical Habitat**

It would be tempting to conclude, based on the above, that the only reason for inclusion of tribal lands in critical habitat designations is the time-pressure brought by lawsuits, settlement agreements, and court ordered deadlines, which tend not to provide the time necessary for the services to meaningfully consult with affected Indian tribes. However, an examination of the sixteen final rules in which tribal lands were excluded demonstrates otherwise. In all but one of the sixteen, the designation was also the result of a lawsuit (again brought mostly by environmental groups), but with different results.

The exception was the final designation for the California and Oregon coast coho salmon in 1999.<sup>53</sup> The tribal lands that would be most affected by the final critical habitat designation were the

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53. See Designated Critical Habitat, Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049 (May 5, 1999).

Yurok Reservation, Hoopa Valley Reservation, Karuk Reservation, and the Round Valley Reservation, all of which are located in the Southern Oregon/Northern California Coasts Evolutionarily Significant Units (ESUs). The tribes opposed the inclusion of their lands and the Yurok and Karuk argued that their existing resource management plans and practices already contributed to the conservation and recovery of the species. The tribes asked that the NMFS defer to tribal management efforts in accordance with SO 3206 and recognize the contribution that tribal management made for the recovery of listed coho salmon.

Rather than expressly defer to the tribal management plans, the NMFS stated that ESA Section 7 consultations through the BIA and other federal agencies, in combination with the continued development and implementation of tribal resource management programs that support coho salmon conservation, represented an alternative to designating critical habitat that would result in a “proportionate and essential contribution” consistent with the goals of the secretarial order. Perhaps this result represents one step in the right direction.

### **Key Rules that Suggest SO 3206 is Making a Difference**

Of the eleven examined final rules that initially designated critical habitat on tribal lands, one final rule – regarding the Rio Grande silvery minnow – eventually removed most, but not all, of the affected tribal lands from an earlier designation. Two additional designations – regarding the arroyo toad and the southwestern willow flycatcher – were entirely vacated by later final rules. Those designations merit a closer look, since they may indicate a positive influence from SO 3206 in changing the approach to government-to-government consultations on critical habitat designations. Another final rule, for the bull trout, provides a clear example of what difference a tribe can make in helping to ensure that its lands are not included as designated critical habitat.

### The Rio Grande Silvery Minnow

On July 6, 1999, the FWS designated critical habitat in New Mexico for the Rio Grande silvery minnow, pursuant to a court order resulting from litigation brought by the Forest Guardians and Defenders of Wildlife.<sup>54</sup> The area designated was the only area where the species had been collected in the recent past and where it was then known to exist, and contained lands belonging to the Cochiti, San Felipe, Santo Domingo, Santa Ana, Sandia, and Isleta Pueblos. As with the southwestern willow flycatcher designation, the FWS indicated that the pre-3206 proposal and studies were followed, given the time constraint imposed by the court.

Before the order was issued, the FWS had invited pueblo representatives to meetings to discuss the proposed critical habitat; no pueblo representatives attended. After the March 1999 court order, the FWS stated that it met with pueblo officials to discuss the impending designation of critical habitat, thereby satisfying the post-3206 requirement of consulting with tribes on a government-to-government basis. Though the Santa Ana Pueblo had taken a leadership role in forming a broad interest-based consortium that sought funding for recovery projects for the silvery minnow and was actively pursuing habitat restoration within its boundaries, and both the Sandia and Isleta Pueblos had enacted Environmental Protection Agency-approved water quality standards as authorized under the Clean Water Act, the FWS stated that voluntary tribal measures were not adequate to achieve the necessary conservation purpose.

In the end, the FWS concluded that tribal and non-tribal activities throughout the stretch of critical habitat were too interdependent to facilitate the separation of the two and that the designation would impose no additional restrictions on activities on Indian lands beyond the prohibitions already in place against harming

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54. See Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,274 (July 6, 1999).

species. In addition, the critical habitat as designated encompassed the last remnant of habitat still occupied by the silvery minnow and was considered the least amount available with which to achieve the survival and recovery of the species.

On November 21, 2000, the Middle Rio Grande Conservancy District challenged the 1999 designation because the FWS had not issued an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA).<sup>55</sup> The United States District Court for the District of New Mexico ordered the FWS to issue both an EIS and a new rule designating critical habitat for the silvery minnow.

In the new designation, the FWS came to a different conclusion about habitat on tribal lands, and excluded the lands of the Santo Domingo, Santa Ana, Sandia, and Isleta Pueblos. This time, the FWS found that the benefits of excluding these lands from critical habitat designation outweighed the benefits of including them and that the pueblos had committed to greater conservation measures on these areas than would be available through the designation of critical habitat. In support of its decision, the FWS stated that the Santa Ana Pueblo's draft safe harbor agreement and existing natural resource program provided significant conservation benefits to the silvery minnow.<sup>56</sup> In addition, the Santo Domingo, Sandia, and Isleta Pueblos all had management plans that provided significant conservation benefits to the minnow, and each tribal council had passed resolutions demonstrating that the management plans would be implemented. The conservation and management efforts of tribes in this instance seem to have led to the exclusion of tribal lands from critical habitat designation.

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55. See Designation of Critical Habitat for the Rio Grande Silvery Minnow, 68 Fed. Reg. 8,088 (Feb. 19, 2003).

56. When referring to legal contracts or agreements, the term "safe harbor" means a provision that provides protection from liability or penalty.

### The Arroyo Toad

On February 7, 2001, the FWS designated critical habitat in southern California for seven species, including the arroyo toad, pursuant to a settlement agreement that facilitated the dismissal of a lawsuit brought by the Center for Biological Diversity and Christians Caring for Creation.<sup>57</sup> The designation included portions of the Soboba, Pala, Rincon, Capitan Grande, Viejas, and Sycuan Indian Reservations because they all contained areas of high-quality habitat within ESUs that were essential to the conservation of the toads. The FWS stated that some of the highest quality and best habitat existed on these lands. There was no mention of SO 3206 in the final rule.

On October 30, 2002, in response to a lawsuit brought by several development organizations, the District Court for the District of Columbia set aside the designation and ordered the FWS to publish a new critical habitat designation final rule.<sup>58</sup> The FWS stated in the new rule that it excluded tribal lands from critical habitat based on economic considerations, specifically, that the costs associated with designating in those areas were too high. Unit 14, which included lands of the Rincon and Pala tribes, had costs associated with designation of nearly \$144 million between the years 2004 through 2025. In support of its decision, the FWS stated that the Rincon and Pala tribes each had a management plan, which offered additional conservation measures to protect arroyo toad habitat on their lands. Unit 17, which included lands of the Barona Band of Mission Indians and Viejas Band of Kumeyaay, had costs of almost \$71 million associated with designation. The Barona and Viejas both agreed to establish a cooperative approach with the FWS concerning arroyo toad conservation on certain lands in Capitan Grande Reservation, which was jointly administered by both tribes. The FWS concluded that there

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57. See Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9,414 (Feb. 7, 2001).

58. See Final Designation of Critical Habitat for the Arroyo Toad, 70 Fed. Reg. 19,562 (Apr. 13, 2005).

was no reason to believe that those exclusions would result in extinction of the species. Again, along with arguments about the costs incurred by designation, proactive management by tribes made a difference in the final designation.

### **The Southwestern Willow Flycatcher**

We now return to examine a redesignation of critical habitat for the southwestern willow flycatcher as the most recent final rule examined by the author that shows that SO 3206 may be making a difference. The Center for Biological Diversity and the New Mexico Cattle Growers Association, the same parties involved in lawsuits that eventually resulted in the inclusion on October 13, 2005 of Choctaw and Chickasaw lands as critical habitat for the Arkansas River shiner, decided to go to court again, this time regarding the southwestern willow flycatcher.

As a result of a suit filed by the Cattle Growers Association, on May 11, 2001, the Court of Appeals for the Tenth Circuit vacated the 1997 final rule that had included lands of the Yavapai-Apache and Pala Mission tribes in Arizona and California as flycatcher critical habitat. Citing a faulty economic analysis, the court instructed the FWS to issue a new critical habitat designation.<sup>59</sup> On September 30, 2003, responding to a complaint brought by the Center for Biological Diversity, the United States District Court for the District of New Mexico instructed the FWS to propose critical habitat by September 30, 2004, and publish a new final rule.<sup>60</sup>

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59. *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277, 1283 (10<sup>th</sup> Cir. 2001) (holding FWS failed to analyze all economic impacts of critical habitat designation, regardless of whether impacts were co-extensive with other causes, rather than only those impacts that were a “but for” result of the designation).

60. See *Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Southwestern Willow Flycatcher (Empidonax traillii extimus)*, 69 Fed. Reg. 60706 (proposed Oct. 12, 2004).

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In making its October 19, 2005 redesignation, the FWS determined that several tribes and pueblos in Arizona, California, and New Mexico had lands essential to the conservation of the flycatcher.<sup>61</sup> Those included lands of the Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Hualapai, Isleta, La Jolla, Pala, Rincon, San Carlos, San Ildefonso, San Juan, Santa Clara, Santa Ysabel, and Yavapai-Apache. The FWS considered several factors, including its relationship with each tribe or pueblo and whether a management plan had been developed for the conservation of the flycatcher on their lands. Management plans had been developed by the Chemehuevi, Colorado River, Fort Mojave, Quechan, Hualapai, Isleta, La Jolla, Rincon, San Carlos, and Yavapai-Apache, while the FWS had developed partnerships specifically for the management of flycatcher habitat with the San Ildefonso, Santa Clara, and San Juan Pueblos in northern New Mexico.

As a result, the FWS excluded all tribal lands in the second designation of critical habitat for the flycatcher. Stating that tribal governments protect and manage their resources in the manner that is most beneficial to them, and that each of the affected tribes exercises legislative, administrative, and judicial control over activities within the boundaries of their respective lands, the FWS indicated that the tribes and pueblos had natural resource programs and staff, and that flycatcher conservation activities had been ongoing on many tribal lands included in the proposed critical habitat designation. On other lands, tribal natural resource management, while not specific to the flycatcher, had been consistent with management of its habitat. Once again, tribal management activities were key to the exclusion of tribal lands from the final rule.

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61. See Designation of Critical Habitat for the Southwestern Willow Flycatcher, 70 Fed. Reg. 60,886 (Oct. 19, 2005).

## The Bull Trout

The final rules for the bull trout provide a clear example of the difference a tribe can make to help ensure that its lands are not included in a designation of critical habitat. Again the product of litigation brought on by an environmental group, the bull trout final habitat designation potentially affected lands within or adjacent to twenty tribes in the Klamath and Columbia Rivers region in the Pacific Northwest.<sup>62</sup> Lands within or adjacent to the Yakama, Umatilla, Coeur d'Alene, Colville, Kalispell, and Nez Perce reservations, and portions of the Confederated Salish and Kootenai Tribes (CSKT) on the Flathead reservation were included in the designation. The reason? With the exception of CSKT, which made an agreement with FWS to include a portion of habitat, those tribes did not have resource management plans that provided protection or conservation for the bull trout and its habitat.<sup>63</sup>

Other tribal lands were excluded from the designation. Specifically, lands of the Confederated Tribes of Warm Springs (CTWS), the Blackfeet Nation, Swinomish Tribe, Quinault Indian Nation, Muckleshoot Tribe, Jamestown S'Klallam Tribe, Hoh Tribe, and Skokomish Tribe Reservations, and tribal lands within the Puget Sound-Coastal population were excluded. Those tribes had played a significant role in the development of HCPs, local watershed plans and other habitat plans, or had conducted numerous habitat restoration and research projects designed to protect or improve habitat for listed species.

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62. See Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout, 69 Fed. Reg. 59,996 (Oct. 6, 2004) and Designation of Critical Habitat for the Bull Trout, 70 Fed. Reg. 56,212 (Sep. 26, 2005).

63. CSKT had a resource management plan addressing bull trout conservation that was being applied in the Jocko River watershed, however, CSKT and the FWS mutually agreed to include habitat within the Jocko River watershed in the designation. 70 Fed. Reg. 56,212, 56,264 (Sep. 26, 2005).

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In particular, the FWS singled out the efforts of the CTWS. The CTWS provided the FWS with documents pertaining to the tribe's conservation activities that benefited the bull trout. Over the course of the past several decades, CTWS had implemented many conservation measures on their lands that benefited the species. The Water Resource Inventory and Water Management Plan for the Warm Springs Indian Reservation was authorized by Tribal Council in 1967 and incorporated into the CTWS official Water Code in 1968. Additionally, the CTWS published a field guide in 1992 detailing best management practices for forest activities, riparian areas, threatened and endangered species, fire management, forage management, transportation systems, and aquatic resources. The CTWS had been actively involved in bull trout monitoring, research, and conservation efforts since 1998.

In excluding CTWS lands, the FWS stated that the CTWS had a long history of carrying out proactive conservation actions on their lands and that the bull trout would substantially benefit from the CTWS's voluntary management actions due to their long-standing and broad application to tribal management decisions. "We believe it is essential for the recovery of bull trout to build on continued conservation activities with a proven partner such as the CTWS, to provide positive incentives implementing voluntary conservation activities, and to respect CTWS concerns about incurring incidental regulatory or economic impacts."<sup>64</sup> This final rule lived up to the SO 3206 promise of improved government-to-government relations and greater control over ESA application to Indian lands. The CTWS's proactive or de facto conservation activities helped to maintain their sovereign authority over their lands, while at the same time their capable natural resource management institutions were seen as legitimate and essential to the survival of the bull trout by the service.

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64. 70 Fed. Reg. 56,212, 56,243 (Sep. 26, 2005).

**Table 2: Chronological List of Selected Final Rules**

<b>Date</b>	<b>Final Rule</b>
July 27, 1997	Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39,129.
May 5, 1999	Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049.
July 6, 1999	Final Designation of Critical Habitat for the Rio Grande Silvery Minnow. 64 Fed. Reg. 36,274.
Feb. 16, 2000	Critical Habitat for 19 Evolutionarily Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho, and California, 65 Fed. Reg. 7,764.
Apr. 25, 2000	Final Designation of Critical Habitat for the Spikedace and the Loach Minnow. 65 Fed. Reg. 24,328.
Feb. 1, 2001	Final Determination of Critical Habitat for Peninsular Bighorn Sheep, 66 Fed. Reg. 8,650.
Feb. 1, 2001	Final Designation of Critical Habitat for the Mexican Spotted Owl, 66 Fed. Reg. 8,530.
Feb. 7, 2001	Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9,414.
Mar. 13, 2001	Final Determination of Critical Habitat for the California Red-legged Frog, 66 Fed. Reg. 14,626.
Apr. 4, 2001	Final Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner, 66 Fed. Reg. 18,002.
May 7, 2001	Final Determination of Critical Habitat for the Great Lakes Breeding Population of the Piping Plover, 66 Fed. Reg. 22,938.
Apr. 15, 2002	Designation of Critical Habitat for the Quino Checkerspot Butterfly, 67 Fed. Reg. 18,356.
Apr. 23, 2002	Final Designation of Critical Habitat for the San Bernardino Kangaroo Rat, 67 Fed. Reg. 19,812.

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Date	Final Rule
Sep. 11, 2002	Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover, 67 Fed. Reg. 57,638.
Sep. 27, 2002	Designation of Critical Habitat for the Appalachian Elktoe, 67 Fed. Reg. 61,016.
Feb. 19, 2003	Designation of Critical Habitat for the Rio Grande Silvery Minnow, 68 Fed. Reg. 8,088.
Aug. 6, 2003	Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46,684.
Aug. 31, 2004	Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. 53,182.
Oct. 6, 2004	Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout, 69 Fed. Reg. 59,996.
Mar. 8, 2005	Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Re-evaluation of Non-Economic Exclusions From August 2003 Final Designation, 70 Fed. Reg. 11,140.
Apr. 12, 2005	Designation of Critical Habitat for the Riverside Fairy Shrimp, 70 Fed. Reg. 19,154.
Apr. 13, 2005	Final Designation of Critical Habitat for the Arroyo Toad, 70 Fed. Reg. 19,562.
Aug. 11, 2005	Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Evaluation of Economic Exclusions From August 2003 Final Designation, 70 Fed. Reg. 46,924.
Sep. 2, 2005	Designation of Critical Habitat for 12 Evolutionarily Significant Units of West Coast Salmon and Steelhead in Washington, Oregon, and Idaho, 70 Fed. Reg. 52,630.

Date	Final Rule
Sep. 2, 2005	Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon and Steelhead in California, 70 Fed. Reg. 52,488.
Sep. 26, 2005	Designation of Critical Habitat for the Bull Trout, 70 Fed. Reg. 56,212.
Oct. 13, 2005	Final Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner, 70 Fed. Reg. 59,808.
Oct. 19, 2005	Designation of Critical Habitat for the Southwestern Willow Flycatcher, 70 Fed. Reg. 60,886.
Nov. 2, 2005	Listing Gila Chub as Endangered With Critical Habitat, 70 Fed. Reg. 66,664.

## CONCLUSIONS AND IMPLICATIONS FOR INDIAN COUNTRY

It has been ten years since the issuance of Secretarial Order 3206, and it does not appear that the order has yet lived up to its full promise of true bilateralism between the United States and sovereign tribal governments. This initial conclusion is supported by the fact that of the twenty-seven designations of critical habitat involving tribal lands examined by the author, almost half included these lands in the designation.

What becomes apparent from a closer examination of these designations, however, is that, in spite of not being fully realized, SO 3206 *is* making a difference. The difference does not seem to result from the FWS and NMFS carrying out federal Indian policy by fulfilling the fiduciary responsibility to Indian tribes to protect their lands and resources. Rather, a difference in outcomes after SO 3206 seems to result when tribes take conservation of protected species into their own hands by creating and implementing habitat management plans that are being accepted

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by the services as alternatives to the designation of critical habitat on Indian lands.

In the path-breaking Seattle meeting and follow-up working group sessions that conceived SO 3206, tribes took a stand on the ESA, drafted an initiative, and presented it to the federal government. Together, the departments and the tribes crafted SO 3206 to harmonize the ESA process with tribal rights. In every examined final rule that excluded tribal lands from designation as critical habitat, the tribes involved had habitat management plans in place that were accepted by the FWS or had partnered with the FWS for the management of the protected species. These are examples to which other tribes might look in forming their own natural resources policies and programs.

In addition, part of the value of SO 3206 lies in its explicit statement that the departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species and the health of ecosystems upon which they depend. Palmer, et al., suggest that procedural knowledge and communication skills are critical to building relationships between federal land managers and sovereign tribal governments.<sup>65</sup> For federal land managers, that means not only understanding the requirements of the laws but also the preferred mechanisms and protocols for communicating, consulting, and decision-making with the tribes. For tribes involved in federal land actions, that means being familiar with the relevant federal laws and having knowledge of federal agency protocols for information-sharing and decision-making. To build strong working relationships, Palmer, et al., maintain that the parties must “go slow to go fast.”<sup>66</sup>

For example, under SO 3206, the services have “started slowly” in demonstrating respect for tribal concerns about critical habitat

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65. Sarah Palmer et al, *Strategies for Addressing Native Traditional Cultural Properties*, 20-FALL Nat. Resources & Env't 45 (2005).

66. *Id.* at 48.

designation and the ESA, while many tribes have “started slowly” in taking control of and developing their own habitat management plans. Over time, the working relationships between the tribes and services have improved, just as SO 3206 directed. This resulted in the FWS, in 2005, considering the CTWS a proven partner in conservation activities and excluding CTWS lands as critical habitat for the bull trout. As Wilkinson states, SO 3206 “is no dramatic breakthrough, no Olympian moment in federal Indian policy. It is just a sensible, fair approach to a thorny area of policy developed by people who took the time to listen, negotiate, open up their minds, and take some chances.”<sup>67</sup>

It is interesting to recall that SO 3206 was based in part on ideas from the earlier White Mountain Apache agreement with the FWS.<sup>68</sup> This agreement was reached through a series of negotiations between the Apache tribal chairman and the director of FWS. Rather than litigate, the two agreed to put aside their legal concerns regarding the enforcement of the ESA on Apache lands and worked together for an improved, cooperative relationship regarding species and ecosystem management. In this example of a government-to-government relationship, the White Mountain Apache were considered and treated as a sovereign people, and it was acknowledged that they retained power over ecosystem management in their territory. They participated fully at all levels of decision-making and exercised their right to maintain and strengthen their distinctive spiritual and material relationship with the land. This agreement promoted understanding and good relations and at the same time showed the FWS that the Apache had the capacity to manage their lands for the benefit endangered and threatened species. Perhaps, in the end, this prior example demonstrates the true spirit and value of SO 3206: through mutual understanding and respect, tribes and federal agencies are able to work together and lay the foundation for a brighter future for tribes and wildlife.

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67. *Wilkinson*, 72 Wash. L. Rev. at 1088.

68. See *Getches, et al.*, Thomson West (2005).

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## **ABBREVIATIONS**

BIA	Bureau of Indian Affairs
CSKT	Confederated Salish and Kootenai Tribes
CTWS	Confederated Tribes of Warm Springs
EIS	Environmental Impact Statement
EO	Executive order
EPA	Environmental Protection Agency
ESA	Endangered Species Act
ESU	Evolutionarily Significant Units
FWS	U.S. Fish and Wildlife Service
HCP	Habitat Conservation Plan
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SO	Secretarial order



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ISBN: 978-1-931143-34-9



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