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Endangered Species, Endangered Treaties: Protecting Treaty Rights, Economic Development, and Tribal Consultation Under Secretarial Order 3206

Jeremy Wood
University of Washington School of Law

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Endangered Species, Endangered Treaties: Protecting Treaty Rights, Economic Development, and Tribal Consultation Under Secretarial Order 3206

Cover Page Footnote

Jeremy Wood is a 2016 J.D. Candidate at the University of Washington School of Law. He extends special thanks to Tom Schlosser for suggesting the topic of this article, to Professors Robert Anderson and Sanne Knudsen for their assistance in editing, and to the American Indian Law Journal editors for their helpful edits and hard work.

ENDANGERED SPECIES, ENDANGERED TREATIES:
PROTECTING TREATY RIGHTS, ECONOMIC DEVELOPMENT,
AND TRIBAL CONSULTATION UNDER SECRETARIAL ORDER
3206

Jeremy Wood^{*}

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INTRODUCTION

For decades, the enforcement of the Endangered Species Act (ESA) has raised protests in Indian Country when conservation restrictions threaten treaty rights and tribes' sovereign use and management of trust resources. In 1997, the Departments of the Interior and Commerce (the "Departments") sought to accommodate those concerns and issued Secretarial Order 3206 ("SO 3206," or "Order") to ensure enforcement would not violate the United States's trust responsibility toward tribal nations. The Order provided non-binding guidance to the Departments in their consultations with tribes and urged them to more thoroughly consider of the impact of species listing and habitat designation on tribal interests. A decade and a half later, SO 3206's legacy is lukewarm. Agencies continue to treat consultation as an empty formality without effect on their discretion. Their actions remain unbound by the trust duty and sacred treaty protections.¹ Therefore, SO 3206's commitments should be reviewed,

¹ The federal trust duty is a distinctive obligation incumbent upon the United States to act fairly in its dealings with Indian nations. Its contours originate in the specific terms of treaties, statutes, and regulations. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983). Certain lower courts have ended their analysis there and held that any duty is discharged by mere compliance with such general positive law; *see Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) ("[The trust obligation] does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."); The Supreme Court's approach has not been so parochial. As the Court powerfully enunciated in *Seminole v. United States*, the trust duty goes beyond mere statutory compliance and represents a "moral obligation [] of the highest responsibility and trust." *Seminole v. United States*, 316 U.S. 286, 297 (1942); It is "overriding," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974), and necessary for the "fulfillment of . . . the national honor," *Heckman v. United States*, 224 U.S. 413, 437 (1912). *See also Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word."). Thus, it extends beyond the words of the statute or regulation that gives it life, and like any instrument establishing a trust "many of the duties and powers are implied, . . . aris[ing] from the nature of

and its failures in application held to criticism. Old roads must be repaved and new ones mapped.

Part I of this Article charts the history of tribal opposition to ESA enforcement and the government response in issuing SO 3206. Species listing and habitat designation threaten to impair treaty rights and restrict tribal nations in the sovereign use of their land. The issuance of incidental take permits threatens to allow non-Indians to destroy treaty resources. Against this background, tribes advocated for a rule that would mitigate these concerns. What they received was a non-binding policy order. Part I concludes with a discussion of that order.

Part II takes up the criticisms levied against SO 3206 and identifies two major modifications to improve the operation of the ESA in Indian Country. First, the Fish and Wildlife Service and the National Marine Fisheries Service should institutionalize the Order's consultation guidance by systematically requiring federal negotiators to be committed, qualified, and able to affect project decisions. Second, the implicated agencies should revise SO 3206 to legally bind their discretion. The first modification draws upon tribal comments made on Department of the Interior ("Interior") consultation policy while the second applies court precedent interpreting consultation documents and trust responsibilities as applicable law binding agency discretion.

the relationship established." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001). The nature of that relationship is commonly analogized to the trust at common law and courts have presumed that when the federal government holds Indian property, it must do so in accordance with "more stringent standards demanded of a fiduciary." *Id.*; see *Mitchell*, 463 U.S. 206 at 225 (recognizing that when the federal government assumes "elaborate control" over Indian property, "[a]ll the elements of a common-law trust are present"). Though such a property arrangement certainly gives rise to a trust duty, it is not essential. Even when no property under federal title is involved, courts have required that federal agencies interpret their mandates and other law in a manner favorable to Indian peoples. See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (declining to defer to the Department of the Interior's interpretation of the Oklahoma Indian Welfare Act when the Department failed to heed the Indian canons of construction). Thus, for the purposes of this Article, the trust duty may not always command a result in the Indians' favor but rarely ceases to bind the Services. When dealing with Indian property rights or acting in a way that affects Indian nations, that must strive after the Indian welfare.

I. THE BACKGROUND OF SECRETARIAL ORDER 3206

On December 28, 1973, President Nixon signed the ESA into law. The ESA's mandate was broad and substantive, expressing Congress's "plain intent . . . to halt and reverse the trend toward species extinction, whatever the cost."² Those costs, however, have been disproportionately borne by tribes in the exercise of their treaty rights to hunt and fish as well as in their efforts to manage and responsibly develop their land.

The following traces the impact of the ESA in Indian Country and the burdens imposed by its provisions on species listing, habitat designation, and the issuance of incidental take permits. Against this background, it traces the response from tribal advocates, attorneys, and resource managers, leading to the drafting of SO 3206.

A. Statutory Background: The Endangered Species Act in Indian Country

The ESA threatens tribal interests by authorizing the Departments of the Interior and Commerce—through the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively “the Services”)—to infringe upon treaty rights to take listed species and freely use tribal lands that have been designated as critical habitat, while conversely permitting non-Indians to incidentally take treaty protected species they would not otherwise be entitled to.

By listing endangered species, the ESA may unduly impair treaty rights to hunt and fish those same species.³ Tribes fought for centuries to protect these rights, ultimately securing their recognition by the United States in exchange for the massive land concessions that allowed American expansion. Improper enforcement of the ESA's take prohibition threatens to abrogate those sacred rights without the express statutory language such abrogation requires.⁴ Indian treaty rights can only be abrogated when Congress's language demonstrates

² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

³ See 16 U.S.C. § 1533 (2003) (authorizing the Services to identify species in imminent danger of extinction or under threat to become endangered in the near future).

⁴ The ESA defines “take” as conduct that serves to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” members of a listed species. 16 U.S.C. § 1532(19) (2003). This broad category embraces both hunting and fishing under treaty as well as the harms of wildlife through project development subject to an Incidental Take Permit discussed below.

the intent to abrogate after a careful consideration of the conflict with extant rights.⁵ These limitations are particularly significant in the context of natural resources where “tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”⁶ Absent such language, the Supreme Court has been “extremely reluctant to find congressional abrogation of treaty rights.”⁷ Under such circumstances, statutes will not be held to abrogate treaty rights in “a backhanded way.”⁸

The Supreme Court famously avoided determining whether the ESA abrogated treaty rights in *United States v. Dion*.⁹ In that case, the FWS arrested several enrolled Yankton Sioux Tribe members for hunting eagles on their reservation in alleged violation of the Eagle Protection Act and the ESA. The Indian arrestees defended their actions based on an implied hunting right under the 1858 Treaty signed with the Yankton Sioux.¹⁰ Sitting en banc, the Eighth Circuit recognized the right and refused to hold it abrogated, finding no “express reference” to abrogation “in *either* the Act[s themselves] *or* in the legislative history of the Act[s].”¹¹ The court rejected the United

⁵ See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 353 (1941) (congressional intent to abrogate tribal property rights must be “plain and unambiguous”); See also *Cobell v. Norton*, 240 F.3d 1081, 1103 (D.C. Cir. 2001) (holding the Indian canons to trump agency deference); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461–62 (10th Cir. 1997).

⁶ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02(1) (2012 ed.) (internal citations omitted); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. There must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”) (internal citations omitted).

⁷ *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979).

⁸ *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968).

⁹ *United States v. Dion*, 476 U.S. 734 (1986).

¹⁰ *Id.* at 734.

¹¹ Admittedly, the conservation of endangered species may justify state regulation of Indian treaty fisheries shared “in common” with non-Indians under the relevant treaty. *United States v. Dion*, 752 F.2d 1261, 1267 (8th Cir. 1985) (emphasis in original); The *Puyallup* Court however recognized this conservation exception in dicta and notably limited the regulatory power to resources in which the state shares a property interest, and only when under threat of the species’ extinction. When regulation would impair a treaty right, the State must provide sufficient justification for its exercise. See *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) (“[T]he police power of the

States's argument that Congress's rejection of a treaty right exemption in an earlier version of the ESA indicated the intent to abrogate.¹²

Upon review, the Supreme Court reversed, focusing on the Eagle Protection Act rather than the ESA. An exemption for Indians to take eagles for religious purposes in the Eagle Protection Act showed the intent to abrogate implicated hunting rights.¹³ Congress had considered Indian religious concerns and responded not by exempting treaty rights, but by creating "a regime in which the Secretary of the Interior had control over Indian hunting" through a permitting process.¹⁴ With the matter settled under the Eagle Protection Act, the Court declined to answer whether the ESA independently abrogated the petitioner's treaty rights.¹⁵ The Supreme Court has never had another opportunity to answer that question. While in the Eighth Circuit the ESA does not abrogate treaty rights, such rights remain at risk everywhere else in Indian Country.¹⁶

By listing a species, the Services may not only infringe upon a tribe's sacred treaty right to take the species, but may also impose arduous conservation restrictions upon Indian lands by designating them "critical habitats" when occupied by the species or essential for its conservation.¹⁷ The Services must, during the classification process, consider scientific, economic, and "any other relevant impact[s]," and exclude otherwise suitable areas if the "benefits of exclusion outweigh

State is adequate to prevent the steelhead from following the fate of the passenger pigeon; the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.").

¹² *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

¹³ *United States v. Dion*, 476 U.S. 734, 740 (1986).

¹⁴ *Id.* at 743–44.

¹⁵ *Id.* at 746.

¹⁶ Only one federal jurisdiction has held the ESA to abrogate treaty rights, finding the Act's Alaskan Native subsistence exemption, and statutory language extending the ESA to "all persons" to sufficiently meet criteria. *United States v. Billie*, 667 F. Supp. 1485, 1488 (S.D. Fla. 1987). This decision has met extensive criticism. The Alaska Native Claims Settlement Act protects Alaskan native rights, whereas treaty rights are protected, of course, by treaty. Secondly, while in other circumstances, a law of general applicability may extend to Indians; this presumption can be defeated by an *en point* treaty guarantee. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

¹⁷ *See* 16 U.S.C. § 1533(b)(2) (2003).

the benefits of designation.”¹⁸ Those benefits are left undefined. It has nevertheless forced tribes to shoulder an unfair and disproportionate responsibility for conservation in environments largely degraded by non-Indian development, while ignoring tribal sovereign resource management rights.¹⁹

Because tribal action so often includes a federal action ingredient, and since state, local, and private action²⁰ in the vicinity of Indian lands will often be included in a Biological Opinion (“BiOp”) baseline, “a jeopardy determination is almost preordained to impose a heavier burden on Indian lands.”²¹ Because of this burden, ESA enforcement can disproportionately “delay, curtail[] or prohibit[] . . . development activities” in tribal construction and resource extraction, compared with non-tribal activities.²² The inclusion of tribal lands within designated critical habitats is “particularly offensive, in that it effectively imposes a federal zoning system on Indian lands by creating a wildlife ‘district’ zoned for habitat uses, while incompatible uses, such as [tribal] oil and gas development, must be undertaken

¹⁸ *Id.*

¹⁹ Because tribal development often takes place on trust land and never is uniquely subject to federal permitting jurisdiction, it is highly vulnerable to a jeopardy determination. The permitting agencies are required “in consultation with and with the assistance of the Secretary, [to] insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. 16 U.S.C. § 1536(a)(2) (2003). A jeopardy determination therefore can obstruct tribal management and development far more than state or private equivalents undertaken off federal land.

²⁰ The ESA is triggered whenever there is an “ingredient” of federal involvement in the action. That ingredient is present in all “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies Actions do not include funding assistance solely in the form of general revenue sharing funds . . . with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.” 40 C.F.R. § 1508.18 (2010). The federal jurisdiction over trust land, for example, will trigger a requirement for federal approval and thus present a federal ingredient. It is the federal action of permitting, rather than the tribal action requiring approval, which is directly subject to the ESA.

²¹ Sandi B. Zellmer, *Conserving Ecosystems Through the Secretarial Order on Tribal Rights*, NAT. RESOURCES & ENV'T, 162–63 (Winter 2000) (calling tribal development proposals the “straw that . . . break[s] the camel’s back”).

²² 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, 398 (1998).

elsewhere.”²³ Such “zoning” ignores the widespread development of competent and professional tribal management programs that seek to address conservation issues more holistically than the ESA’s single species approach.²⁴ In this context, meaningful consultation becomes ever more necessary to ensure that tribal resources are maintained, the trust responsibility upheld, and conflict mitigated.

The ESA infringes upon tribal taking rights not only by protecting species and habitat but also by opening them to non-Indian incidental take. If a non-federal actor proposes an action that will incidentally harm a listed species, she must apply for an Incidental Take Permit (ITP).²⁵ The application must include a Habitat Conservation Plan (HCP), noting the likely environmental impact of the incidental takes, as well as proposed steps for mitigation. The ITP is revocable if the permittee acts out of compliance with the permit, the associated HCP, or other applicable law.²⁶ If either of the Services determines that the action will affect a listed species or critical habitat, formal consultation will be required, ending with the issuance of a BiOp, including consideration of the ITP.²⁷

Notably, the ESA does not require consideration of the impact on treaty rights or call for tribal involvement in the permit issuing process. For example, when hydroelectric giant PacifiCorp applied in the late 2000s for an ITP to continue dam operations in the Klamath Basin, a region blanketed with Indian fishing rights, it submitted an HCP to NMFS.²⁸ The application noted that such operations would take endangered and evolutionarily significant Coho salmon by lowering

²³ While such zoning is justified when protecting critical habitat from such development generally, tribal sovereignty, treaty rights, and the competence of tribal resource management programs demand a different approach and greater reluctance to infringe on tribal enterprises. *Id.* at 418.

²⁴ Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1068 (1997).

²⁵ 16 U.S.C. § 1539(a) (2010).

²⁶ 16 U.S.C. § 1539 (2010); 50 C.F.R. § 13.27-28 (2001).

²⁷ As discretionary actions, the issuing of a permit and the accompanying Biological Opinion (“BiOp”) can be set aside if found to be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A) (1996).

²⁸ U.S. FISH & WILDLIFE SERV., 08ECLA00-2013-F-0014, EFFECTS OF PROPOSED KLAMATH PROJECT OPERATIONS FROM MAY 31, 2013, THROUGH MARCH 31, 2023, ON FIVE FEDERALLY LISTED THREATENED AND ENDANGERED SPECIES (May 2013).

oxygen and raising temperature in the water, while filling it with disease.²⁹ As a result, tribal harvest quotas would shrink in relation to the smaller fishery. NMFS subsequently approved the ITP and issued a 270 page BiOp in 2013, noting no serious consideration of treaty rights of local tribes or that in issuing the ITP, the United States had just given away the tribes's fish.³⁰

B. Tribal Response to Endangered Species Act Enforcement

Under the shadow of the ESA's looming 1994 reauthorization, tribal resource managers and lawyers began to organize around the aforementioned concerns and examine legislative and administrative solutions, eventually deciding to pursue a Joint Secretarial Order.³¹ Their inspiration was the 1994 Statement of Relationship negotiated by the FWS and the White Mountain Apache Tribe, which had pointed toward possible cooperative intergovernmental management based on the Tribe's "institutional capacity to self manage its lands."³² White Mountain Apache Chairman Ronnie Lupe, who had negotiated the Statement, joined the call for a secretarial order.

In response, Interior Secretary Babbitt and Commerce Secretary Daley agreed to consult with tribal representatives to develop such an order.³³ Prominent representatives present at the negotiations included the FWS Deputy Assistant Secretary, the General Counsel for NOAA, treaty rights champion Billy Frank Jr., and Chairman Lupe.³⁴ Federal negotiators received relevant and culturally competent education in advance and both parties developed comprehensive consultation protocols.³⁵ Professor Charles Wilkinson described the federal party as an "informed, high-level team[—]in consultation with a fully involved Solicitor[—]. . . [and with] broad authority [to] report directly to the Secretary."³⁶ Secretary Babbitt called the resulting Secretarial Order 3206 "the equivalent of a treaty," born out of mutuality between

²⁹ *Id.* at 210.

³⁰ *Id.*

³¹ Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1074 (1997).

³² *Id.*

³³ *Id.* at 1076.

³⁴ *Id.* at 1077.

³⁵ *Id.* at 1078.

³⁶ *Id.* at 1081.

sovereign governments.³⁷ He expressed the hope that it would “banish forever the traditional treaty process that ha[d] been one sided, overbearing, and not infrequently unfair.”³⁸

C. Secretarial Order 3206: History and Substance

The Secretaries signed SO 3206 “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.”³⁹ Under the Order therefore, agencies must “consult with, and seek the participation of, the affected tribes to the maximum extent practicable” when an action may affect trust resources, tribal rights, or Indian lands (defined to include both trust and tribally held fee lands).⁴⁰ Such participation may result in formal intergovernmental agreements on species management, delegations of conservation law enforcement, and the development of guidelines to accommodate tribal access to, and traditional use of, protected species or habitats.⁴¹ In recovery actions, the Services commit to ensure “tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian land . . . affected tribal trust resources, or affects the exercise of tribal rights.”⁴²

The Services must not only invite participation but must “*give deference* to tribal conservation and management plans” when action will affect resources on Indian lands and listed species.⁴³ This requires training and sensitivity to tribal cultures,⁴⁴ and to the unique legal

³⁷ *Id.* at 1086.

³⁸ *Id.*

³⁹ SECRETARIAL ORDER NO. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act), at § 1 (1997).

⁴⁰ *Id.* § 5(1).

⁴¹ *Id.* § 6.

⁴² *Id.* at Appendix § 3(E). Recovery Teams, as utilized by the Services, include representatives of all “appropriate agencies and affected interests in a mutually-developed strategy to implement one or more recovery actions.” Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34272-01 (July 1, 1994). That mutual development allows the Services’ effort to benefit from the members’ unique knowledge and expertise regarding the species, the factors affecting it, and the appropriate course of recovery. *Id.*

⁴³ *Id.* § 5(3)(B) (emphasis in original).

⁴⁴ *Id.* § 5(4).

status of Indian lands.⁴⁵ In developing Reasonable and Prudent Alternatives (RPAs), the Services must also consider “information on, but not limited to, tribal cultural value, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development.”⁴⁶

In order to minimize adverse impacts on tribal lands and resources, the Services may only apply conservation restrictions to Indian lands under the following narrow circumstances, when:

- i) The restrictions are reasonably necessary for conservation.⁴⁷ Tribal lands can only be designated as critical habitat if necessary for conserving a listed species “after evaluating the possibility of excluding such lands.”⁴⁸
- ii) Their purpose cannot be achieved through the exclusive regulation of non-Indian actions.⁴⁹
- iii) They are the least restrictive option in their impact upon tribal management, economic development, and treaty rights.⁵⁰
- iv) They do not discriminate against Indians, as stated or applied.⁵¹
- v) Voluntary tribal measures are inadequate.⁵²

In the Habitat Conservation Planning context, the Services must request consultation with tribes. When other parties are involved in the action, the Services must “encourage [them] to recognize the benefits of working cooperatively with affected tribes” and advocate for tribal participation in HCP development.⁵³ If other parties refuse to invite tribes into negotiation, the Services themselves shall consult with the affected tribes.⁵⁴ The product of these consultations must be considered in the development of RPAs and the Services must “[a]dvocate the incorporation of measures . . . that will restore or

⁴⁵ *Id.* § 5(2).

⁴⁶ *Id.* at Appendix § 3(B)(3).

⁴⁷ *Id.* § 5(3)(C)(i).

⁴⁸ *Id.* at Appendix § 3(B)(4).

⁴⁹ *Id.* § 5(3)(C)(ii).

⁵⁰ *Id.* § 5(3)(C)(iii).

⁵¹ *Id.* § 5(3)(C)(iv).

⁵² *Id.* § 5(3)(C)(v).

⁵³ *Id.* Appendix § 3(D)(2).

⁵⁴ *Id.*

enhance tribal trust resources.”⁵⁵ Subsequent decisions must explain how the trust responsibility has been addressed and accounted for.⁵⁶

II. CRITICISMS OF SO 3206 AND SUGGESTED MODIFICATION IN TEXT AND APPLICATION

For all its potential, SO 3206 bears a fatal flaw, stamped upon the Order by federal unwillingness to make the trust duty binding. Section 2(B) disclaims that the Order “shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law.” It only provides internal, non-binding, guidance.⁵⁷ Unless this changes, SO 3206 will have more value for its rhetoric than for its reality.

Because of the above disclaimer, SO 3206 has failed to alleviate many tribal concerns with ESA enforcement. Meaningful consultation remains elusive due to lack of federal investment in the process and any legal recourse for tribes. This Part of the Article presents two modifications to bolster the force of the Order. First, as tribes have advocated, the Services must institutionally ensure the negotiators they send to consultation are committed to the process. Second, the Departments of the Interior and Commerce must promulgate SO 3206 as a binding regulation upon their agencies, clarifying that the tribal rights must be considered when implicated in any ESA analysis.

A. The United States Must Ensure Service Negotiators are Committed to Meaningful Section 7 Consultation with Tribes

The Services must invest time and resources to ensure meaningful consultation, if they expect tribes to do likewise. Currently SO 3206 applies a higher level of commitment in consultation to actions within the Bureau of Indian Affairs’s (BIA) jurisdiction. This high standard must be 1) applied to any Service action implicating tribal concerns. In meeting these high standards, the Services should ensure their consultation negotiators have 2) received sufficient training regarding

⁵⁵ *Id.* Appendix § 3(D)(3).

⁵⁶ *Id.* Appendix § 3(D)(2) (After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility).

⁵⁷ *Id.* § 2(B).

tribal concerns. Such negotiators should 3) inform tribes throughout the decision-making process and detail their consideration of their trust duties in writing. They must have 4) sufficient institutional power to make the decisions at issue. Interior's current consultation policy, shaped by 2011's Secretarial Order 3317, takes steps in this direction and will be referenced where appropriate.⁵⁸

1. The Services Should Treat Consultation with the Same High Commitment SO 3206 Imposes on the BIA

Currently, the BIA is held to a uniquely high consultation duty under SO 3206. The Order should be modified to bind all acting agencies within Interior and the Department of Commerce ("Commerce") to an identical level of commitment. Under SO 3206 Appendix § 3(C)(3), the Services are required to engage in far deeper consultation on BIA actions than on those proposed by other agencies. This consultation includes inviting tribes to meetings between the Services and BIA, as well as giving the tribes and outside experts the opportunity to provide pertinent scientific data, to review data in the administrative record, and to review biological assessments and draft BiOps.⁵⁹ Conversely, in working with other action agencies, the Services are merely required to "notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process," and "encourage the action agency to invite the affected tribe(s) . . . to participate."⁶⁰ Further, in the more involved BIA consultation process, the Services are required to use tribal management plans "as the basis for developing any reasonable and prudent alternatives, to the extent practicable,"⁶¹ while in other contexts, they are merely required to "give full consideration to all [tribal] comments . . . and shall strive to ensure that any alternative selected does not discriminate against such tribe(s)."⁶² The former practice properly treats tribes as sovereigns

⁵⁸ Policy on Consultation With Indian Tribes, 76 Fed. Reg. 28446-01 (May 17, 2011) (hereinafter Interior Policy); *See* SECRETARIAL ORDER NO. 3317 (Department of the Interior Policy on Consultation with Indian Tribes) (Dec. 01, 2011).

⁵⁹ SECRETARIAL ORDER NO. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act), at Appendix § 3(C)(3)(a) (1997).

⁶⁰ *Id.* at Appendix § 3(C)(3)(b).

⁶¹ *Id.* at Appendix § 3(C)(3)(a).

⁶² *Id.* at Appendix § 3(C)(3)(d).

entitled to a government-to-government process while the latter merely allows them to file comments like other citizens.⁶³

Contrary to SO 3206's distinction between the responsibilities of the BIA and those of the Services, all agencies of the "United States bear[] a trust responsibility toward Indian Tribes, [when dealing with Indians] which, in essence consists of acting in the interests of the tribes."⁶⁴ This responsibility necessarily includes responsible consultation by all applicable Departments. Interior Secretary Sally Jewell recently affirmed this principle in Secretarial Order 3335, noting that "[a]s instruments of the United States that make policy affecting Indian tribes . . . the Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, and the Department's other Bureaus and offices share the same general federal trust responsibility toward tribes."⁶⁵ As such, Appendix § 3(C)(3) should be collapsed to apply the high standard elucidated for the BIA context to Services consultation with all Interior and Commerce agencies. Once the Services are held to that standard, they can deepen their commitment to consultation by improving the training, commitment, and capacity of their representatives.

2. The Services Should Work with Tribes to Ensure Representatives are Better Trained to Engage with Treaty Rights and Tribal Concerns

Representatives must be better trained to meet the high standard embodied in SO 3206. Under § 5(2) of the Order, the

⁶³ The Quechan Indian Tribe has argued that the mere consideration of tribal comments neglects the "difference between [public NEPA] comments and consultation." Thane D. Somerville, Attorney for the Quechan Indian Tribe, et al., *Re: Comments of Quechan Indian Tribe on Proposed Policy on Consultation with Indian Tribes*, 76 Fed. Reg. 28446, II(J) (July 12, 2011) (hereinafter Quechan Comment).

⁶⁴ *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Countless other cases have recognized the trust responsibility borne at every point in the federal government. *See, e.g.*, *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) *amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (regarding the Bureau of Reclamation's duty); *Nance v. EPA*, 645 F.2d 701, 710 (9th Cir. 1981); *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999).

⁶⁵ SECRETARIAL ORDER NO. 3335 (Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries), at § 3(d) (Aug. 20, 2014).

Services recognized the unique legal status of tribes. Such recognition, however, requires ongoing education and training of federal representatives. Wilkinson notes that it was critical during SO 3206 negotiations to reserve “ample time for presentations on, and understanding of, the cultural, historical, and legal background . . . [as well as] the real world problems faced by field level federal and tribal administrators.”⁶⁶ Only then were “the federal negotiators, most of whom had previously spent little time on Indian matters, able to understand the true distinctiveness of Indian policy: the depth of the commitment of Indian people to preserve and protect tribal sovereignty, their homelands, the trust relationship, and Indian culture.”⁶⁷ In order to develop this understanding, tribes must be invited to develop and implement this training in order to ensure its efficacy.⁶⁸ The Interior Policy outlines a training model to be facilitated Department-wide through the Department of the Interior University.⁶⁹ This model, developed “in collaboration with . . . tribal colleges,” “promotes consultation,” “[o]utline[s] . . . duties concerning tribal interests,” and “[d]escribe[s] the legal trust obligation of the Federal-Tribal relationship,” all “with attention to the unique distinctions within Indian Country.”⁷⁰ SO 3206 should be modified to include development of such a model and make its immediate implementation mandatory.⁷¹

A proper training model, such as the one outlined by the Interior, will enable federal negotiators to develop truly bilateral consultation protocols and intergovernmental agreements.⁷² It will

⁶⁶ Wilkinson, *supra* note 32 at 1078; See McCoy Oatman, Chairman, Nez Perce Tribal Executive Committee, *Comments on Department of Interior Policy on Consultation with Indian Tribes* (Mar. 14, 2011) (such education must extend to “federal Indian law, jurisdictional issues[,] treaty rights”) (hereinafter Nez Perce Comment).

⁶⁷ *Id.* at 1079.

⁶⁸ See Nez Perce Comment *supra* note 67.

⁶⁹ Interior Policy, *supra* note 59, § V.

⁷⁰ *Id.*

⁷¹ NAT’L OCEANIC & ATMOSPHERIC ADMINISTRATION, U.S. DEPT’ OF COMMERCE, NOAA 13175 POLICY, NOAA PROCEDURES FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH FEDERALLY RECOGNIZED INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS § III (A) (Nov. 12, 2013) (hereinafter NOAA PROCEDURES).

⁷² SECRETARIAL ORDER NO. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act), at Appendix § 5(2) (1997).

also allow federal decision makers to maintain a proper scope of consultation that ensures that input from affected tribes is heard and considered rather than overshadowed by the concerns of those without a stake. Such meaningful attention requires that agencies not “cast[] the net of consulting tribes too broadly, in a given action, thus unnecessarily increasing the burdens associated with consultation and simultaneously diminishing the effectiveness of consultation with Indian nations who are the most affected.”⁷³ The Quechan Tribe has noted that agencies will often invite all tribes in their home state of Arizona to consult on a matter simply because the action will take place somewhere in Arizona.⁷⁴ In the SO 3206 context, overbroad consultation can allow unaffected tribes to influence the conservation management of resources and lands upon which directly affected tribes may depend. Tribal lands should not be put at risk of critical habitat designation because of the views of parties without interest.

3. Services Representatives Should Inform Tribes Consistently Throughout the Decision-Making Process and Document their Consideration of their Trust Duties

Under Appendix § 3(C)(2) of SO 3206, the Services must “[p]rovide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.” In reality, however, the Services have impeded tribal access to such documents under the guise of federal disclosure laws. When they recommended improvements to the National Commission on Indian Trust Administration and Reform, the Hoopa Valley Tribal Council contrasted the standard set forth in the Order to the current state of affairs wherein tribes are left, like any other party, “to the Bureaucratic Black Hole of the Freedom of Information Act.”⁷⁵ Requiring tribes to officially request this information “leaves much to be desired” and is “applied grudgingly and responses are long delayed.”⁷⁶ The Quechan

⁷³ Quechan Comment, *supra* note 64.

⁷⁴ *Id.*

⁷⁵ Leonard Masten, Chairman, Hoopa Valley Tribal Council, *Commission Recommendations* § 9 (Draft Nov. 1, 2012), <http://www.law.seattleu.edu/Documents/cle/Materials%20-%20The%20Future%20of%20Trust%20Administration%20-%2010-03-2014.pdf>.

⁷⁶ *Id.*

Tribe has noted the difference between allowing tribes the same rights as any American to request information, and insuring the Services inform them based on comity owed sovereign nations in a government-to-government relationship.⁷⁷

The commitment to keep tribes informed also requires that the Services respond more fully, after adequate consideration, to tribal concerns raised in consultation. As former Navajo President Ben Shelly noted, SO 3206 should be modified to require the agencies and Services to give “detailed explanation how each consulting tribe’s comments and recommendations were considered and incorporated into the decision, and if not, why not, and finally, how the decision is fully consistent with the Department’s trust responsibility.”⁷⁸

The failure to meet this standard is exemplified in the aforementioned 2013 Klamath Project Operations BiOp. The NMFS stated there that it had not had “sufficient resources to do more than a cursory evaluation” of tribal management plans and had not invested resources to evaluate it with involved agencies.⁷⁹ Consideration of tribal plans too often stops at a “cursory look” as the Services wait until litigation to address the requirements for meaningful consultation or the possible exclusion of tribal lands.⁸⁰

Courts have long recognized that the trust responsibility requires a deeper and more sincere investment. In *Pyramid Lake Paiute Tribe of Indians v. Morton*,⁸¹ the District Court for the District of Columbia set aside an Interior rule delivering water from the Truckee Dam to a local district that would otherwise have flown into the Tribe’s lake, pushing the lake’s Indian fish towards extinction.⁸² Because the lake was “the Tribe’s principal source of

⁷⁷ Quechan Comment, *supra* note 64.

⁷⁸ Ben Shelly, President, The Navajo Nation, Re: Proposed Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28446 (July 15, 2011) (hereinafter Navajo Comment).

⁷⁹ U.S. FISH & WILDLIFE SERV., 08ECLA00-2013-F-0014, EFFECTS OF PROPOSED KLAMATH PROJECT OPERATIONS FROM MAY 31, 2013, THROUGH MARCH 31, 2023, ON FIVE FEDERALLY LISTED THREATENED AND ENDANGERED SPECIES, 204 (May 2013).

⁸⁰ Marren Sanders, *Implementing the Endangered Species Act in Indian Country: The Promise and Reality of Secretarial Order 3206*, JOPNA No. 2007-1, 28 (2007),

http://nni.arizona.edu/resources/pubs/jopna%202007_01_endangered.pdf.

⁸¹ *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

⁸² *Id.* at 252.

livelihood,”⁸³ the Interior had a trust duty to maintain its level for the Tribe’s use.⁸⁴ Without further comment, the Secretary called his decision a “judgement [sic] call.”⁸⁵ The court instead found that he had failed to show that call was “anything but arbitrary.”⁸⁶ The trust duty, a “moral obligation of the highest responsibility and trust,” could not be abandoned to accommodate non-Indian interests.⁸⁷ Rather, “[i]n order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.”⁸⁸ The Departments should continue to heed this notion and prioritize fulfillment of the trust duty whenever possible without waiting for a court to order such decisions. To do so, they must enter consultation with the assumption that tribal concerns will actually affect decision-making.

4. The Services Representatives Should be Vested with Sufficient Institutional Power to Make or Strongly Influence the Decisions at Issue

Federal representatives must not only be trained and committed to consultation, but must have the clear authority to make decisions or “present tribal views to the . . . decision maker.”⁸⁹ As noted by the Quechan Tribe, “[t]oo often, Interior has attempted to meet its consultation obligations by sending low-level staff members to meet with the Tribal Council.”⁹⁰ The Services should rather strive to emulate what Professor Wilkinson called the “informed high level team in consultation with a fully involved solicitor . . . [and] broad authority [to] report directly to the Secretary” that negotiated SO 3206.⁹¹ Modifying SO 3206 to specify this requirement will empower

⁸³ *Id.*

⁸⁴ *Id.* at 255.

⁸⁵ *Id.* at 256.

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

⁸⁸ *Id.*

⁸⁹ *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

⁹⁰ Quechan Comment, *supra* note 64.

⁹¹ Wilkinson, *supra* note 32, at 1081. To ensure that appropriate representatives are chosen, it may be necessary that “[t]ribes should be afforded the opportunity to comment on potential candidates.” Mel R. Sheldon Jr., Chairman, The Tulalip Tribes, *Comments from the Tulalip Tribes of Washington at DOI request*;

tribes to impact final decisions. Interior Policy takes the proper steps in this direction by instructing the Departments to designate a Tribal Governance Officer with access to the Secretary, who will monitor compliance with the policy, promote consultation, and supervise similar Bureau level Tribal Liaison Officers.⁹² As with training, the designation of such dedicated personnel remains discretionary within Commerce and SO 3206 should be modified to require that it be mandatory.⁹³

The goals of SO 3206 will remain merely aspirational so long as the Services fail to embed them in their consultation procedures. The rule currently imposes a higher consultation standard on the BIA. This should be amended to apply equally to the Services. In implementing rigorous frameworks of consultation, the Services should work with tribes to devise training requirements to ensure negotiators have the requisite education on tribal concerns before entering consultation. Once consultation begins, the negotiators should insure tribes are kept informed throughout the decision making process. The negotiators should have sufficient institutional power to ultimately integrate tribal concerns into the decision reached. While such steps would improve consultation, they remain tenuous so long as they remain discretionary. Therefore, SO 3206 should be promulgated as a binding rule.

B. Interior and Commerce Must Promulgate SO 3206 as a Regulatory Rule, Requiring Consideration of Tribal Interests and Binding Agency Discretion by the Legal Force of Treaty Rights

Tribes challenging a failure to consult have been told repeatedly that SO 3206 has little substantive force of law.⁹⁴ Until tribes have

Department of the Interior DRAFT Policy on Consultation with Indian Tribes (Mar. 11, 2011).

⁹² SECRETARIAL ORDER NO. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act), at § VII(B) (1997).

⁹³ NOAA PROCEDURES, *supra* note 72, § III(B).

⁹⁴ Two district courts have recognized the Order's failure to bind Government action. *Miccosukee Tribe of Indians of Fla. v. United States*, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006). The Miccosukee Tribe of Indians challenged the failure of FWS and Army Corps of Engineers to consult in order to avoid jeopardizing an endangered sparrow. *Id.* Count VI of their complaint alleged that the federal defendants had "violated the Indian Trust Doctrine as reflected in . . . Department of the Interior Secretarial Order # 3206." *Id.* The court held that his argument failed to assert a claim because the Order was "for guidance within the Department only," and does not create a substantive trust obligation. *Id.* Similarly in *Center for Biological Diversity*, the plaintiffs, including two

“legal recourse to guarantee that the . . . agencies comply with their [consultation] duty,” the commitments in SO 3206 will remain “disingenuous.”⁹⁵ The Order should therefore be promulgated as a binding rule acquiring the force of law through integration into the meaning of the statute, by clarifying: 1) the “other relevant impact[s]” that must be considered in a BiOp include impacts on tribal interests; and 2) federal discretion remains subject to tribal rights as relevant “applicable law.” Through rulemaking, tribes will gain their legal recourse to sue under the APA when the Services act arbitrarily and capriciously without regard to their own regulations.⁹⁶

tribes, asked the court to set aside an FWS finding that the desert eagle, an important trust resource, was not a bald eagle population entitled to ESA protection. Center for Biological Diversity v. Salazar, No. 10–2130–PHX–DGC, 2011 WL 6000497 (D. Ariz. 2011). While finding that the Service had engaged in some mediocre consultation that “undoubtedly [could] have been more meaningful to and respectful of the tribe, the court did not find SO 3206 to “carr[y] with it specific, measurable consultation requirements that have the force of law in the ESA context.” *Id.* at *11, 13.

⁹⁵ Navajo Comment, *supra* note 79.

⁹⁶ The Eighth Circuit has also recognized that discretionary policy directives may acquire the force of law when they create a justified expectation of tribal consultation. In *Oglala Sioux Tribe of Indians v. Andrus*, the court found that the BIA was bound by its internal Personnel Management policy to consult the affected tribe. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717 (8th Cir. 1979). The policy had created a “justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made.” *Id.* at 721. In failing to afford that opportunity, the BIA “not only violate[d] those general principles which govern administrative decision-making, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” *Id.* (citations and internal quotations omitted) (finding “that the two meetings of the tribal delegates with Washington officials” did not constitute meaningful). See *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (C.D. S.D. 1995); *Fort Berthold Land and Livestock Assoc. v. Great Plains Regional Dir.*, 35 IBIA 266 (2000) (holding that even if tribal consultation guidelines did not establish “a right enforceable in Federal court,” they may nevertheless establish such a right before “the Board, which speaks for the Secretary of the Interior”⁹⁶). *Contra* *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986) (noting that unlike in *Oglala Sioux Tribe of Indians*, the BIA did not concede the Personnel policy to be binding. This distinction was expressly rejected in *Lower Brule Sioux Tribe*).

1. As a Rule, SO 3206 Should Include the Impact on Treaty Rights in its Consideration of the “Other Relevant Impacts” the Services Must Consider in the BiOp Process

In order to make SO 3206 binding, the Services should clarify that consideration of tribal concerns constitutes a vital component of Section 7 consultation. They can do so by including “information on, but not limited to, tribal cultural value, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development” referenced in SO 3206 in their ESA-required consideration of the “other relevant impact[s]” of federal actions.⁹⁷ With such a hook in the statute, SO 3206 allows tribal factors to shape the required analysis of when the “benefits of exclusion outweigh the benefits of designation.”⁹⁸

The Ninth Circuit has found that otherwise non-binding internal directives may create a consultation requirement when such a statutory hook is found. Within the last few years, the Te-Moak Tribe of Western Shoshone Indians has repeatedly challenged BLM authorizations for mining at the tribe’s holy site, Mount Tenabo, in Nevada.⁹⁹ The tribe has argued that the authorizations violated Executive Order 13007 because they failed to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and . . . avoid adversely affecting the physical integrity of such sacred sites.”¹⁰⁰ Like SO 3206, Executive Order 13007 was non-binding.¹⁰¹ Consequently, the court found that Executive Order 13007 had “no force and effect on its own.”¹⁰² However, “its requirements were incorporated into [the Federal Land Policy Management Act (FLPMA)] by virtue of FLPMA’s prohibition on

⁹⁷ SECRETARIAL ORDER NO. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act), at Appendix § 3(B)(3) (1997).

⁹⁸ 16 U.S.C. § 1533(b)(2) (2003).

⁹⁹ *Te-Moak Tribe of W. Shoshone Indians of Nevada v. U.S. Dep’t of the Interior*, 565 F. App’x 665 (9th Cir. 2014); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718 (9th Cir. 2009).

¹⁰⁰ *Id.* (citing *Indian Sacred Sites*, 61 Fed. Reg. 26771 § 2(a) (May 4, 2006)).

¹⁰¹ *Indian Sacred Sites*, 61 Fed. Reg. 26771 § 4 (May 4, 2006) (stating the order “intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person”).

¹⁰² *Te-Moak Tribe of W. Shoshone Indians of Nev. v. U.S. DOI*, 565 F. App’x 665, 667 (9th Cir. 2014).

unnecessary or undue degradation of the lands,”¹⁰³ and the BLM was thus required to comply with the Executive Order.¹⁰⁴ As a promulgated rule, SO 3206 should emulate the Ninth Circuit’s interpretation and explain that consideration of impacts on tribal interests form an integral component ESA analysis.¹⁰⁵

2. The Departments Should Promulgate Rules Recognizing that Treaty Rights are “Applicable Law” Constraining Service Discretion

SO 3206 should also be modified to clarify that tribal rights are “applicable law” requiring compliance in the federal permitting process. This is especially true in the Incidental Take Permit context where permitted take may cut into tribal property interests.¹⁰⁶ According to ITP regulations, a permit may be suspended or revoked at any time if the permittee “is not in compliance with the conditions of the permit or with any applicable laws or regulations governing the conduct of the permitted activity.”¹⁰⁷ Tribal rights have already been recognized

¹⁰³ *Id.* (citing 43 U.S.C. § 1732(b) (1988)).

¹⁰⁴ *S. Fork Band Council Of W. Shoshone of Nev. v. U.S. DOI*, 588 F.3d 718, 724 (9th Cir. 2009).

¹⁰⁵ The ESA statutorily requires such a consideration when species listing or critical habitat designation will impair Alaskan Native take for “primarily . . . subsistence purposes.” 16 U.S.C. § 1539(e)(1) (2010). The prohibitions that would otherwise flow from listing or designation do not apply under such circumstances. Instead the statute requires the relevant department engage in formal rulemaking to “regulat[e] . . . the taking of such species by any such [Alaskan] Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village.” *Id.* § 1539(e)(4). Such rulemaking must satisfy the APA and only “be prescribed after a notice and hearings in the affected judicial districts of Alaska . . . and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.” *Id.*; *See* SECRETARIAL ORDER NO. 3225 (Endangered Species Act and Subsistence Uses in Alaska), at § 3 (Jan. 19, 2000) (requiring extensive consultation with the Native community as a component of the rulemaking process). This process requires a recorded hearing by the Secretary before an administrative law judge showing that “such regulation, assessment, determination, or finding is supported by substantial evidence.” *Id.* § 1371(b)(3). Arguably treaty guaranteed take deserves even further protection, lest an “impotent outcome” result from “negotiations and a convention, which seemed to promise more and give the word of the Nation for more.” *United States v. Winans*, 198 U.S. 371, 380 (1905).

¹⁰⁶ *See Winans*, 198 U.S. at 382 (“the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees”).

¹⁰⁷ 50 C.F.R. § 13.27–28 (2001).

as “applicable law” in general fishery management, and should be similarly recognized in the ESA context.¹⁰⁸

In *Parravano v. Babbitt*, the District Court for the Northern District of California looked to the Department’s trust responsibility in the context of managing “a chinook population too small to satisfy the needs of all who have a stake in the Klamath salmon.”¹⁰⁹ Facing such scarcity, non-Indian fishermen challenged the Commerce’s Klamath Chinook ocean harvest rate that had been calculated in order to protect the Yurok and Hoopa tribal fisheries. The court upheld the harvest rate, explaining that under a Commerce rule, “the federally reserved fishing rights of the Yurok and Hoopa Valley Tribes . . . are applicable law for the purposes of the Magnuson Act.”¹¹⁰

The Commerce rule was promulgated pursuant to a 1991 Solicitor’s opinion, which did not restrict its analysis to the Magnuson Stevens Fishery Management context, but rather recognized that “all parties that manage the fishery, or whose actions affect the fishery, have a responsibility to act in accordance with the fishing rights of the Tribes.”¹¹¹ That responsibility of all parties required the United States to ensure that other users of the fishery “not interfere with the Tribes’ right to have the opportunity to catch their share,”¹¹² regardless of the purpose for which the fish

¹⁰⁸ *Parravano v. Babbitt*, 861 F.Supp. 914 (N.D. Cal. 1994), *aff’d*, 70 F.3d 539 (9th Cir. 1995).

¹⁰⁹ *Id.* at 914.

¹¹⁰ *Id.* at 920–21 (citing Final Rule, 58 Fed. Reg. 68063 (Dec. 23, 1993)); *see* *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975) (holding fishing rights to be “express federal law”).

¹¹¹ John. D. Leshy, *Fishing Rights of the Yurok and Hoopa Valley Tribes*, M-36979, 30 (1993).

¹¹² *Id.* at 28. This property is protected against interference by non-Indian overharvest, catch limitation, exclusion, and wrongful environmental harm. The first three have been recognized in case law on the protection of treaty fishing rights. The last is a longstanding principle of the common law that “[w]here a person’s fishery rights are wrongfully interrupted or interfered with by another, he or she may maintain an action of trespass or action for damages for the injury caused thereby.” 36A C.J.S. Fish § 20. *See Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) *aff’d in part, rev’d in part*, 694 F.2d 1374 (9th Cir. 1982) *on reh’g*, 759 F.2d 1353 (9th Cir. 1985) (“[T]he Supreme Court all but resolved the environmental issue when it expressly rejected the State’s contention . . . that the treaty right is but an equal opportunity to try to catch fish.”).

were taken.¹¹³ The Solicitor considered the seniority of tribal rights and further noted, “an argument could be made that the tribal moderate standard of living needs should be satisfied first, before other user groups can be afforded fishing privileges.”¹¹⁴

Ultimately, such an approach best conforms to the Indian canons of construction that demand treaties be read as the Indians would have understood them. The Indian leaders who negotiated those treaties would surely find it an “impotent outcome to negotiations . . . which seemed to promise more” to see their protected rights gutted by uncompensated take of the species upon which they depended.¹¹⁵ They understood the protection of those rights to stand with the force of law, rather than to bend in the unfettered winds of agency discretion. Court precedent in other statutory contexts urges consideration of the impact on tribal interests and the recognition of treaty rights in listed species as part of binding “applicable law,” barring the Services from permitting non-Indian take of those species unless founded upon an express congressional abrogation of those rights.¹¹⁶

¹¹³ *Id.* at 21 (noting that the tribes’ rights were based “the degree of dependence on the fishery resource at the time the reservation was created or expanded, rather than on what the particular uses were made of the fish”).

¹¹⁴ *Id.* at 26.

¹¹⁵ *United States v. Winans*, 198 U.S. 371, 380 (1905).

¹¹⁶ *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Ultimately many treaty rights constitute not only “applicable law” but also extant property rights that cannot be taken without just compensation. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In *Fishing Vessel Ass’n*, the Supreme Court recognized that treaty language “secur[ing]” a tribal right to “take” salmon in a “relatively predictabl[e] . . . harvest” guaranteed more than “merely the opportunity to try to catch” fish. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 678 (1979) (internal citations omitted). Such an expectation property interest has substance. As recognized long ago, “the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it.” *Brennan v. United Hatters of N. Am. etc.*, 73 N.J.L. 729, 742–43 (1906). Tribes with such rights hold them in co-tenancy with non-Indian fishermen and entitles the tribe to 50 percent of the fishery “[a]bsent a judicial determination that a fifty percent share is no longer needed.” Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 162 n.57 (1996) (citing *Fishing Vessel*, 443 U.S. at 685). This allowance for reduction does not invalidate the property interest. Water rights acquired by prior appropriation are treated no differently. Furthermore when the federal government sets land aside for an Indian reservation, it implies a reservation of necessary waters. *Winters v. United States*, 207 U.S. 564, 565 (1908). Similarly when the United States

SO 3206 sets an admirable standard but it is one that will not be met until Services personnel are qualified to meaningfully engage tribal involvement in ESA matters. While not exhaustive, this Article has urged two steps forward to that goal. First, the Services can engrain the Order's purpose more deeply in their consultation procedures. The services can do so by ensuring its negotiators are committed to the consultation process, sufficiently educated to do their duty, and empowered to integrate tribal concerns into the decision making process. Second, the Services can promulgate the Order as a binding rule rather than a mere policy suggestion. Federal courts have shown the way, interpreting the Departments's statutory responsibility to impliedly incorporate tribal concerns and policy documents on tribal involvement. As an interpretive rule, SO 3206 should clarify that those concerns and the treaty rights they rest upon are applicable law restricting the Services's actions under the ESA.

CONCLUSION

3206 was, in its time, an admirable step forward. In order to respond to tribal concerns, two departments committed the time and resources necessary to negotiate through educated and empowered representatives. Their commitment produced a document that seeks to ensure a central place for tribal concerns in ESA Consultation and Habitat Conservation Planning, to urge a reluctance to designate critical habitat, and a willingness to defer to tribal management. The legacy of that commitment, however, has been lukewarm. The Order should thus be modified to ensure that agencies do not treat consultation as an empty ritual but as a sacred duty demanding the involvement of committed and educated decision makers. Ultimately, its uneven impact will only be improved if SO 3206 is modified to bind the relevant agencies to legally require consideration of tribal rights before federal action is taken. Only then can the ESA be reconciled with the United States's trust duty. Only then will the federal government have to recognize that Indian lands are critical habitats primarily for tribal nations, and that endangered treaty rights deserve as much protection as the species upon which they depend.

recognizes a right to take fish, it reserves a portion of that fish stock itself that should be equally recoverable in damages.