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Balancing Species Protection with Tribal Sovereignty: What Does the Tribal Rights-Endangered Species Order Accomplish

Carl H. Johnson

Note

Balancing Species Protection with Tribal Sovereignty: What Does the Tribal Rights-Endangered Species Order Accomplish?

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In a time when natural resources continue to dwindle,[1] conflicting ideas over their productive use can often lead to confrontation and animosity.[2] Disagreements over the use of natu-

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1. By the beginning of this decade, over 90% of the conifer forests in the United States had been felled. *See* GEOFFREY LEAN ET AL., ATLAS OF THE ENVIRONMENT 81 (1990). These forests contain the oldest and largest trees on the North American continent, hosting twice as much plant material as the most productive rainforest. *Id.* The current rate of wetlands destruction is 117,000 acres on average per annum. *See Wetlands Status and Trends, 1985-1995* (visited April 7, 1998) <http://www.nwf.org/wetlands/facts/statfcts.html> (citing Fish and Wildlife Service statistics). There is currently an epidemic of "mass biological extinction" underway, occurring at an alarming rate. Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 U. COLO. L. REV. 513, 516-17 (1993). The average total loss of wetlands varies from state to state. Nearly one of three plant species in the United States, and one of eight in the world, are under the threat of extinction. *See* William K. Stevens, *One in Every 8 Plant Species Is Imperiled, a Survey Finds*, N.Y. TIMES, April 9, 1998, at A1. There are currently 635 species of plants and 447 species of animals listed as threatened or endangered, while only 124 species enjoy designated critical habitat under the Endangered Species Act. *See Endangered Species General Statistics* (updated May 31, 1997) <http://www.fws.gov/r9endspp/esastats.html>.

2. *See, e.g.*, United States v. Dion, 752 F.2d 1261, 1270 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) ("The plaudible [sic] purpose behind conservation statutes gives rise to strong emotions."). For a comprehensive examination of the conflicts between the ideals of preserving wilderness and the demands of economic and recreational activity in the Boundary Waters Canoe Area Wilderness, see KEVIN PROESCHOLDT ET AL., TROUBLED WATERS: THE FIGHT FOR THE BOUNDARY WATERS CANOE AREA WILDERNESS (1995). For a discussion of the conflict between private property rights and mainstream environmentalism, see Tarso Ramos, *Wise Use in the West: The Case of the*

ral resources are exacerbated when the sovereignty of Indian tribes is challenged.[3] Such disputes have led to discord between mainstream environmentalists and Indian tribes over the protection of species' habitat.[4]

Northwest Timber Industry, *in* LET THE PEOPLE JUDGE: WISE USE AND THE PROPERTY RIGHTS MOVEMENT 82 (John D. Echeverria & Raymond Booth Eby eds., 1995); *see also* THOMAS LAMBERT & ROBERT J. SMITH, THE ENDANGERED SPECIES ACT: TIME FOR A CHANGE 49 (1994) (stating that "individuals can stop any development project of which they disapprove by petitioning to have some vaguely defined group of organisms listed as endangered or threatened"); WILLIAM PERRY PENDLEY, WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA'S GREAT FRONTIER 88 (1995) (asserting that the "purpose of the Endangered Species Act has become the stopping of all activities of which environmental extremists disapprove").

3. Indian tribes are "distinct, independent political communities, retaining their original natural rights" regarding self-governance. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Indian tribes are a "separate people," possessing "the power of regulating their internal and social relations." United States v. Kagama, 118 U.S. 375, 381-82 (1886); *see also* United States v. Mazurie, 419 U.S. 544, 557 (1975) (refuting a Court of Appeals decision that was premised on the notion that Indian tribes were not sovereign entities, but "private, voluntary organizations"). The powers of Indian tribes are generally "inherent powers of a limited sovereignty which has never been extinguished." United States v. Wheeler, 435 U.S. 313, 322-23 (1978). These powers are inherent to the tribes, derived from the original self-governing sovereign powers that Indian tribes enjoyed prior to European colonization. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). Without sovereignty, tribes "have no unique standing to protect their culture, their traditions, their unique way of life, and their political relationship with [the United States]." *All Things Considered: Native American Sovereignty* (NPR radio broadcast, Sept. 2, 1997) (statement by Ron Allen, President, National Congress of American Indians). *But see* Cohen v. Little Six, Inc., 543 N.W.2d 376, 382-83 (Minn. Ct. App. 1996), *cert. denied*, 118 S. Ct. 2059 (1998) (referring to the notion that tribes are sovereign as a "ridiculous pretense," and observing that tribes cannot be sovereign because they are contained within the borders of the United States).

Tribes see the intrusion of non-Indians into Indian Country to preserve threatened and endangered species as invasions of tribal sovereignty. *See, e.g.*, Testimony of Ronnie Lupe, Chairman of the White Mountain Apache Tribe, Prepared for the U.S. Senate Committee on Environment and Public Works Subcommittee on Drinking Water, Fisheries and Wildlife (July 13, 1995) (noting that the "goals of tribal self-governance, tribal self-determination and economic self-sufficiency [were] paralyzed by third parties filing lawsuits . . . to declare critical habitat on our reservation") (written copy on file with the author).

4. *See, e.g.*, Alma Soongi Beck, *The Makah's Decision to Reinstate Whaling: When Conservationists Clash With Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359, 362 (1996) (observing concern of conservationists over Makah Nation's decision to reinstate gray whale hunting, to the point of absolute opposition despite tribal reasons). *Cf.* Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 574 (1991) (suggesting that al-

Numerous species of plants and animals are spiritually and culturally significant for Indian tribes.[5] Several tribal constitutions declare that the preservation of those resources is of fundamental importance and authorize tribal councils to protect them.[6] Non-Indian-initiated litigation[7] has disrupted tribal water rights,[8] hunting and fishing rights,[9] and religious expression.[10]

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though the government has a responsibility to protect salmon runs, it also should protect Indian tribes and cultures from extinction).

5. *See, e.g.*, United States v. Bresette, 761 F. Supp. 658, 659 (D. Minn. 1991) (reflecting on the spiritual significance of dreams and their relation to the eagle in Chippewa culture); United States v. Abeyta, 632 F. Supp. 1301, 1303 (D.N.M. 1986) (observing that the eagle is considered by the Isleta Pueblo to be the primary messenger of the spirit world and the "embodiment of the overseer of life"); Dennis Martinez, *First People, Firsthand Knowledge*, SIERRA, Nov.-Dec. 1996, at 50 (positing that Native peoples possess thousands of years' worth of experience and wisdom regarding the care and preservation of the earth). Peter Wenz has proposed that indigenous peoples' views in general are nature-friendly, making five observations to support that proposal: (1) they lack motivation to seek increased power over nature; (2) their sense of personal security, individuality, and sense of meaning foster environmentally sound practices; (3) their populations are usually stable; (4) they possess a strong land ethic; and (5) they tend to view nature as sacred. *See* PETER S. WENZ, NATURE'S KEEPER 146-48 (1996). *But see, e.g.*, Fergus M. Bordewich, *Revolution in Indian Country*, AMERICAN HERITAGE, July-Aug. 1996, at 42-43 (debunking what he refers to as myths about the "white man's Indian" being stewards of the earth).

6. *See* CONST. OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION MONTANA art. VI; CONST. OF THE MINNESOTA CHIPPEWA TRIBE art. I, § 3; CONST. OF THE MESCALERO APACHE TRIBE OF THE MESCALERO RESERVATION NEW MEXICO art. V, § 1(e).

7. Non-Indian individuals or entities initiate the vast majority of litigation brought against Indian tribes. This pattern greatly contributes to animosity between tribes and environmental groups. *See, e.g.*, Silver v. Babbitt, 924 F. Supp. 976 (D. Ariz. 1995) (environmentalists challenging timber harvest plan initiated by the Bureau of Indian Affairs for the Navajo Nation). Typically when a tribe initiates litigation against another tribe, it is due to a political struggle over which tribe represents the governing authority over a reservation where several tribes share territory. *See, e.g.*, Confederated Tribes of the Chehalis Reservation v. Lujan, 129 F.R.D. 171 (W.D. Wash. 1990). These intertribal disputes sometimes involve disputes over the allocation of limited resources. *See, e.g.*, Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355 (9th Cir. 1998).

8. *See, e.g.*, Adrian N. Hansen, *The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River*, 37 ARIZ. L. REV. 1305 (1995) (declaring that non-Indian economic development off-reservation caused drastic reductions in native fish populations, leading to ESA action which curtailed Indian water rights); Tim Vollmann, *The Endangered Species Act and Indian Water Rights*, NAT. RESOURCES & ENV'T, Fall 1996, at 39 (referring to the ESA as the principal obstacle to Indians' exercise of their water rights).

In recent years, the Endangered Species Act (ESA)[11] has contributed its fair share to the quagmire of resource disputes and infringement upon tribal rights.[12] ESA litigation has evolved into a de facto abrogation of treaty rights.[13] Recently the Interior and Commerce Secretaries, who are charged with administration of the ESA, signed an order (the Order)[14] which finally takes a significant step toward making sense out of an otherwise chaotic area of federal law.[15] The Order does not ad-

9. *See, e.g.*, Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 2295 (1998) (suit in which the State of Minnesota sought to enjoin various bands of Chippewa from exercising fishing rights under an 1837 Treaty, despite conservation plan in effect that would mitigate potential for overfishing).

10. *See, e.g.*, United States v. Lundquist, 932 F. Supp. 1237, 1243 (D. Or. 1996) (holding that an Indian's conviction under Bald and Golden Eagle Protection Act for possessing eagle parts did not violate his religious or privacy rights); United States v. Thirty Eight Golden Eagles or Eagle Parts, 649 F. Supp. 269, 281 (D. Nev. 1986) (holding that a conviction under Eagle Protection Act did not violate Chippewa's religious or treaty rights because Indian was not residing on land covered in treaty with his tribe).

11. 16 U.S.C. §§ 1531-1544 (1994).

12. *See, e.g.*, Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho, 42 F.3d 1278 (9th Cir. 1994) (involving a tribe challenging the commission's decision to prohibit fishing for Spring Chinook Salmon after the species was recommended for listing); United States v. Nuesca, 945 F.2d 254 (9th Cir. 1991) (upholding conviction of Native Hawaiians under ESA for fishing sea turtles and Hawaiian monk seal); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984) (holding that the Secretary of Interior could give priority to the preservation of fish species over federal trust responsibilities to Indian tribes); Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978) (upholding the Secretary of Interior's decision to not challenge a ruling by the International Whaling Commission that interfered with Eskimo communities' ability to exercise subsistence exemption to hunt bowhead whales).

13. *See* United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) (upholding the conviction of a Seminole chief under the ESA for killing a Florida panther, and declaring that the ESA had abrogated his treaty rights, while constructing a narrow legislative intent analysis as a basis for the decision).

14. Sec. Order No. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (Interior and Commerce Departments, 1997) [hereinafter Sec. Order 3206]. While not published in the Federal Register, the Order is available on the Internet at <http://www.fws.gov/r9endspp/esatribe.html> (visited April 7, 1998).

15. Ranging from issues over tribal sovereign immunity to the abrogation of treaty rights by statutes of general application, most practitioners in the field would agree that federal Indian law is chaotic or incoherent at best. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 33-34 (1996) [hereinafter Frickey, *Domesticating Federal Indian Law*] (asserting that "federal Indian law is a snarl of doctrinal complications," a quality which is perhaps the "single thing most commonly known about it").

dress whether the ESA abrogates Indian treaty rights, but marks the potential for building trust and dialogue between the federal government and Indian tribes. While the Order goes far in improving relations, it falls short in providing real legal protections.

This Note outlines the legal implications of the Order and examines whether, under the ESA and the Administrative Procedure Act (APA),[16] the Secretaries acted within their legal authority. This Note also proposes that the value of the Order in its current form can best be understood by moving beyond traditional legal analysis.[17] Part I illustrates the relevant portions of the ESA, the administrative authority of the Secretaries under the ESA, and the interaction between the ESA and Indian law. Part II outlines the principal language of the Order. Part III examines the legal ramifications of the Order. It discusses how traditional legal analysis is perhaps not very useful in understanding the Order and sometimes counterproductive in resolving disputes in Indian law.[18] This Note asserts

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As an alternative to litigating Indian law issues, several authors have promoted negotiation and alternative dispute resolution as a means of untangling Indian law. *See, e.g.*, Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1757-68 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (outlining the shortcomings of traditional legal analysis in dealing with Indian law issues); Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 309-320 (1996) (using a case study to support the hypothesis that mediation is indeed a viable option for resolving complicated resource allocation disputes, even sometimes preferable to litigation); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 382 (1994) (urging the creation of tribal-state negotiation entities to resolve disputes over full faith and credit issues).

16. 5 U.S.C. §§ 701-706 (1994). Judicial review guidelines for the ESA are outlined in 16 U.S.C. § 1536(n).

17. "Traditional legal analysis" refers to a standard model of statutory interpretation in Indian law. This analysis considers the traditional or Indian law canons, whether the action taken was within the delegated authority of the interpreting agency, whether any new rights were conferred or existing ones taken away from affected parties, whether the Order allows the taking of a species, and whether the action is reviewable.

18. *See, e.g.*, Frickey, *Adjudication and Its Discontents*, *supra* note 15, at 1757 (warning that "formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions"). *See also* George Cameron Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 415-19 (1979) (suggesting that reviewing courts should shift away from the standard treaty abrogation analysis and more towards applying an eminent domain and tak-

that, despite recent congressional attempts to weaken the ESA,[19] the Order creates a necessary partnership with Indian tribes that fulfills the ESA's mission of protecting threatened and endangered species. Moreover, this Note contends that the Order reflects recent developments in federal Indian policy[20] and the plain language of the ESA. This Note also asserts that negotiation may produce a more useful means to build relationships between Indian tribes and federal officials. While concluding that the Order is not legally binding, this Note lays a foundation for permitting the Secretaries to issue an interpretive order that will give this gesture the legal teeth it needs.

I. THE ESA AND INDIAN TRIBES

A. APPLICABLE FRAMEWORK OF THE ENDANGERED SPECIES ACT

Rolling on a wave of statutes indicating a significant shift in national policy,[21] Congress enacted the Endangered Species Act in 1973.[22] Concerned with the plight of threatened spe-

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ings analysis).

19. Since the 104th Congress convened, senators and representatives have made several attempts to modify and weaken the ESA to make it more private-property-friendly. *See* discussion *infra* note 179 (noting several congressional attempts to amend the ESA to make it more friendly to private property owners); *see also* Secretary of Interior Bruce Babbitt, Leading America Closer to the Promise of God's Covenant, Address at the Associated Church Press 1996 Annual Convention (Apr. 11, 1996) (transcript available at <http://www.doi.gov/churchpr.html> (visited April 11, 1998)) (warning that Congress was not only "hostile to God's creation," but determined to dismantle the legal means to protect it—the ESA).

20. *See infra* note 150 (illustrating recent Presidential actions which promote a stronger government-to-government relationship between Indian tribes and the federal government).

21. *See, e.g.*, National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 (1994)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. § 7401 (1994)); National Marine Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1061 (1972) (codified at 33 U.S.C. § 1401 (1994)).

22. Pub. L. No. 93-205, 81 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)). The ESA was preceded by the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, and the Endangered Species Conservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926. In his Environmental Message of February 8, 1972, President Nixon cautioned that these laws "simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species." S. REP. NO. 93-307, at 3 (1973).

cies,[23] Congress enacted the ESA to create greater responsibility toward the "beasts of the earth."[24] The Supreme Court touted the ESA as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[25]

The ESA makes it unlawful for any person subject to the jurisdiction of the United States to "take" endangered or threatened species.[26] Given dual responsibility in interpreting the ESA,[27] the Interior and Commerce Secretaries (the Secretaries) must list appropriate species as endangered or threatened.[28] The Secretaries may consider several criteria when listing a species.[29] The ESA requires considerable collabora-

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23. *See* S. REP. NO. 93-307, at 3 (1973) (cautioning that it has "become increasingly apparent that some sort of protective measures must be taken to prevent the further extinction of many of the world's animal species").

24. *Genesis* 1:24-25. Judeo-Christian cultures traditionally have used the biblical command by God to "subdue" the earth and "have dominion" over it and all its creatures as justification for the consumption of the earth's natural resources. *Genesis* 1:28. *But see* Oliver A. Houck, *Reflections on the Endangered Species* Act, 25 ENVTL. L. 689, 698-702 (1995) (mocking the belief that God gave the earth to man, "not to snail darters," and the underlying mythology of our supremacy over other life on this planet). Only in recent years have Evangelical Christians argued that because the earth is God's creation it should be treated with respect, not abused. *See, e.g.*, Marcia Bunge, *Biblical Views of Nature: Foundations for an Environmental Ethic, in* CARE OF THE EARTH: AN ENVIRONMENTAL RESOURCE MANUAL FOR CHURCH LEADERS 19, 19-21 (Tina B. Krause ed., 1994) (using specific passages from scripture and philosophical approaches to promote conservationism); Babbitt, *supra* note 19 (transcript at 2) (reflecting on church leaders' efforts to instill in Congress a sense of moral responsibility to protect God's creation).

25. TVA v. Hill, 437 U.S. 153, 180 (1978).

26. 16 U.S.C. § 1538(a)(1)(B) (1994). The Act defines "take" to include "harass, harm, pursue . . . wound . . . or kill." 16 U.S.C. § 1532 (19). The Secretary of the Interior later interpreted the word "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3 (1997). The Supreme Court upheld this interpretation of the ESA in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

27. 16 U.S.C. § 1533. The ESA also provides administrative authority to the Secretary of Agriculture. *See id.* § 1532(15).

28. *See id.* § 1533(a)(1). Listing of threatened and endangered species and their critical habitats is an administrative proceeding, subject to notice and comment rule-making procedures. *See id.* § 1533(b)-(c).

29. *See id.* These include: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) diseases or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." *Id.* Section 1533(b)(1) sets forth the standards to which the Secretary must adhere when

tion between the Secretaries,[30] an arrangement that has resulted in several joint orders on interpreting and administering the ESA.[31]

Upon determining the need to list a species, the Secretaries must designate critical habitat[32] for the species, using the "best scientific data available and after taking into consideration the economic impact" on the area considered.[33] The Secretaries may also consider the efforts of State or foreign governments to protect listed species.[34] The Secretaries develop and implement recovery plans for the conservation and survival of threatened and endangered species in those cases where success is most likely.[35] In developing and implementing these plans, the Secretaries may seek the assistance of private and public agencies and organizations.[36]

The ESA also outlines policies and procedures for interagency and state cooperation with its administration. The Secretaries may enter into agreements with any state "for the administration and management of any area established for the conservation of endangered species or threatened species."[37] The Secretaries may also engage in cooperative agreements with any State for implementing state conservation pro-

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making determinations for listing purposes.

30. *See, e.g., id.* § 1533(a)(2)(C) ("[T]he Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.").

31. *See* 50 C.F.R. § 424 (1997).

32. "Critical habitat" is the specific geographical area occupied by a listed species that is "essential to the conservation of the species" and may require special management or protection. 16 U.S.C. § 1532(5)(A)(i). Critical habitat may also include any areas outside of that geographical zone which the Secretary may designate as necessary for the survival of the species. *See id.* § 1532(5)(A)(ii).

33. *Id.* § 1533(b)(2). Under section (a)(3), the Secretaries designate critical habitat concurrently with the listing process. *See also* Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 625 (W.D. Wash. 1991) (citing legislative history to support the notion that the listing process and designation of critical habitat are to take place concurrently, subject to rare exceptions).

34. *See* 16 U.S.C. § 1533(b)(1)(A). These methods may include predator control, protection of habitat, or any "other conservation practices." *Id.*

35. *See id.* § 1533(f)(1)(A). Species that are most likely to conflict with construction, development, or other similar economic projects should be given high priority. *See id.*

36. *See id.* § 1533(f)(2).

37. *Id.* § 1535(b).

grams.[38] For states to form cooperative agreements with agencies, they must show that (1) the implementing state agency is authorized to conserve listed species; (2) the agency has established and provided details for an "acceptable" conservation plan; (3) the agency is authorized to investigate and determine what is needed to ensure the survival of listed species; (4) the agency is authorized to acquire land to further conservation plans; and (5) the agency has provided for public participation in designating resident species as endangered or threatened.[39]

The ESA authorizes other federal agencies to use their resources to further the conservation objectives.[40] Each agency must ensure that its actions do not "jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat" of listed species.[41] Agencies must consult and confer with the Secretaries regarding any proposed project that may adversely affect threatened species.[42]

The ESA also outlines time requirements for parties to consult with the Secretaries[43] and establish biological assessments in the event a proposed project adversely affects a species.[44] The Endangered Species Committee, commonly known as the "God Squad,"[45] may grant takings exemptions to projects despite potential adverse impact upon a listed species.[46] A

38. *See id.* § 1535(c)(1)-(2).
39. *See id.* § 1535(c)(1)(A)-(E).
40. *See id.* § 1536(a)(1).
41. *Id.* § 1536(a)(2).
42. *See id.* § 1536(a)(3)-(4).
43. *See id.* § 1536(b).
44. *See id.* § 1536(c).
45. The term "God Squad" or "God Committee" was derived from the perceived power of the committee to make decisions regarding the survival or extinction of potentially affected species. *See* Kathie Durbin, *Industry, Agencies Await Ruling; Some Environmentalists Say There Is No Doubt the Spotted Owl Will Be Listed as an Endangered Species*, PORTLAND OREGONIAN, May 28, 1990, at D1, *available in* 1990 WL 8397584.
46. The committee structure, guidelines, and directives are outlined in section 7(e) of the ESA, 16 U.S.C. § 1536(e). The "God Squad" may exempt a proposed project from ESA prohibitions on takings when it determines, by no less than five of its seven members, that (1) no reasonable or prudent alternatives exist to the proposed action, (2) the proposed action is of significant public interest or national or regional significance, (3) there are mitigation or enhancement measures in effect, and (4) the agency concerned refrained from over-committing resources toward the project. *See* 16 U.S.C. § 1536(g)(5)(A)-(D).

takings exemption allows a project to go forward despite its adverse impact upon a species' habitat.

The ESA is a formidable and infamous conservation scheme.[47] Property rights activists believe that the ESA unjustifiably burdens private landowners,[48] while ESA proponents claim it does not go far enough in protecting endangered or threatened species.[49] Although various interested groups assert that there is room for improvement,[50] studies indicate that species are better off with the ESA than without it.[51]

While environmentalists and private property advocates have been arguing over the ESA's application to their interests, one party has been virtually ignored in the dialogue.[52] It is

47. *See supra* text accompanying note 25; *see also* STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 13 (1982) (asserting that the ESA was "one of the most sweeping pieces of prohibitive policy to be enacted"); Matthew J. Rizzo, *The Endangered Species Act and Federal Agency Inaction*, 13 ST. LOUIS U. PUB. L. REV. 855, 855 (1994) (suggesting that the ESA may be the "most stringent environmental law in the United States").

48. *See supra* note 2 (referring to sources discussing the Wise Use movement).

49. *See, e.g.*, John F. Turner & Jason C. Rylander, *Conserving Endangered Species on Private Lands*, 32 LAND & WATER L. REV. 571, 613 (1997) (arguing that the ESA is unable to keep pace with the rate of species' extinction, and merely acts as an "emergency room" for the most desperate cases); Shauna Marie Whidden, *The Hanford Reach: Protecting Columbia's Last Safe Haven For Salmon*, 26 ENVTL. L. 265, 268-69 (1996) (discussing the obstacles to protecting Pacific Northwest salmon runs); Murray D. Feldman, *Snake River Salmon and the National Forests: The Struggle for Habitat Conservation, Resource Development, and Ecosystem Management in the Pacific Northwest*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 273, 277-78 (1996) (illustrating the extreme difficulties with protecting listed species in the face of multiple economic and developmental interests, including commercial fishing and logging).

50. *See, e.g.*, YAFFEE, *supra* note 47, at 13 (arguing that there is no room for negotiation or balancing other social goals with the ESA's preservation objectives); Rizzo, *supra* note 47, at 860-69 (specifically addressing the shortcomings of Sections 4, 7, and 9 of the ESA). Environmentalists assert that the ESA could be improved to provide further protection and more efficient listing of endangered species, while property owners and commercial interests assert that the ESA could be improved by lessening their share of the burden in protecting habitat.

51. *See, e.g.*, Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356, 383 (1997) (relying on a variety of data to illustrate that "endangered and threatened species are better off with the Act than they would be without it").

52. In virtually all of the mainstream environmental debates on the problems with the ESA, no mention is made of its effect on Indian tribes, their treaty rights, or their cultures. *See, e.g.*, LAMBERT & SMITH, *supra* note 2, at

only when Indian tribal rights directly conflict with listed species that Indian tribes are brought into the discussion, and rarely are their rights considered.[53] This general failure to consider how the ESA affects the sovereignty and cultural survival of Indian tribes has created the groundwork for ensuing conflict.

B. EVALUATING SECRETARIAL AUTHORITY UNDER THE ESA

In enacting the ESA, Congress delegated broad administrative and interpretive authority to the Secretaries.[54] The Secretaries are subject to the judicial review provisions of the APA[55] while administering the ESA. When reviewing the decisions of an agency to which broad authority has been delegated, a court should be "especially reluctant" to substitute its views for those of the agency.[56] *Chevron U.S.A., Inc. v. NRDC, Inc.*[57] guides reviewing courts when they examine a specific interpretive rule or action. *Chevron* requires a court to determine "whether Congress has directly spoken to the precise question at issue."[58] If Congress has not spoken directly to the issue, *Chevron* dictates that a reviewing court defer significantly to the agency's interpretation of the act in question.[59]

43-53 (making six recommendations for change, none of which addresses Indian concerns).

53. Most environmental organizations who challenge either Bureau of Indian Affairs (BIA) or Fish and Wildlife Service (FWS) action on Indian reservation lands are so focused on species preservation that they fail to discuss possible alternatives with the tribe before initiating litigation.

54. *See* 16 U.S.C. §§ 1533, 1540(f) (1994).

55. 5 U.S.C. §§ 701-706 (1994).

56. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 708 (1995) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984)).

57. 467 U.S. 837 (1984).

58. *Id.* at 842.

59. In such a case, the only question for the reviewing court is whether the agency's answer to the ambiguity was based on a permissible construction of the statute. *See id.* at 842-45. To ascertain congressional intent, the court must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (citing Bethesda Hosp. Ass'n. v. Bowen, 485 U.S. 399, 403-05 (1988)). A court must also "employ traditional tools of statutory construction, including, where appropriate, legislative history." Natural Resources Defense Council, Inc. v. EPA, 907 F.2d 1146, 1153 (1990) (citing Ohio v. United States Dep't of Interior, 880 F.2d 432, 441 (D.C. Cir. 1989)).

In the Supreme Court's first ESA decision, it brought to a halt construction of a nearly completed dam.[60] Courts have since given *Chevron*-like deference to administrative actions under the ESA.[61] In the Supreme Court's most recent ESA decision,[62] it upheld the Secretary's definition of "harm" under the ESA to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[63]

Courts have also given *Chevron*-style deference to the Secretaries when determining whether an activity would "significantly impair" a species' behavioral patterns. When the Secretary of the Interior entered into a lease sale of federal properties off the coast of Alaska for oil and gas extraction, a citizen group brought suit under the ESA and the National Environmental Policy Act (NEPA)[64] because the site was a primary migratory channel for the Bowhead whale, a listed species.[65] Distinguishing the snail darter case,[66] the court held

60. *See* TVA v. Hill, 437 U.S. 153 (1978) (affirming an injunction against the Tellico Dam project because its completion and proposed use would destroy the habitat of the snail darter, a rare species of perch). The *Hill* case eventually did not create as much controversy as the spotted owl cases have because Congress later passed amendments to the ESA allowing completion of the dam, overriding the Endangered Species Committee's denial of an exemption. *See also* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 772-73 (4th ed. 1995). The spotted owl has become the rallying symbol for those opposed to the ESA's restrictions on economic development. For some recent spotted owl litigation, see Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992); Marbled Murrelet v. Babbitt, 111 F.3d 1447 (9th Cir. 1997); Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996). The 1978 amendments creating the Endangered Species Committee, were Congress's first indication that, despite the plain language of the original ESA (which indicates that no economic factors may be considered in the listing process), it was unwilling to allow some of the "lesser" species bring to a halt "important" pork-barrel projects. *See* John D. Dingell, *The Endangered Species Act: Legislative Perspectives on Living Law, in* BALANCING ON THE BRINK OF EXTINCTION 26 (Kathryn A. Kohn ed., 1991).

61. *See, e.g., Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. at 699 (upholding Secretary of Interior's definition of "harm" to include damage to habitat).

62. *See id.*

63. 50 C.F.R. § 17.3 (1997).

64. 42 U.S.C. § 4321-4370e (1994).

65. *See* North Slope Borough v. Andrus, 642 F.2d 589 (1980).

66. TVA v. Hill, 437 U.S. 153 (1978).

that because the extraction would not completely destroy the whales' habitat, the lease did not violate the ESA.[67]

Courts also defer to other federal agencies in interpreting environmental statutes.[68] An overwhelming majority of development plans adopted or approved by agencies have continued despite environmental challenges under the ESA.[69]

C. TREATY RIGHTS AND FEDERAL LAWS

From early in the colonial history of North America, Indian tribes were recognized as sovereign nations with which the colonial powers could trade and develop treaties.[70] For America's first hundred years, negotiating treaties with Indian tribes remained the standard practice.[71] Treaties were considered the "supreme law of the land" regarding tribes.[72] In addition to formalizing the relationships between the tribes and the federal government, these treaties often bestowed upon the President broad administrative power.[73] Even after the formal treaty-making process was terminated in 1871,[74] the federal

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67. *North Slope Borough*, 642 F.2d at 607.

68. *See, e.g.*, Sierra Club v. United States Dep't of Agric., 116 F.3d 1482 (7th Cir. 1997) (unpublished table decision) (deferring to Forest Service decisions under the National Forest Management Act, 16 U.S.C. § 1604 (1994), to adopt an Amended Land and Resource Management Plan for the Shawnee National Forest that some environmental groups felt would adversely impact the environment); Save the Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988) (permitting the United States Forest Service to continue with paving operations that an environmental group felt would negatively impact the Yaak River in Montana).

69. *See* Rachlinski, *supra* note 51, at 360 (observing that only eighteen federal projects were terminated as a result of the ESA, despite the fact that 73,560 consultations were performed, and concluding that the ESA essentially only restricts "wasteful" activities). *But see* PENDLEY, *supra* note 2, at 87 (arguing that the ESA erects "regulatory roadblocks to economic activity and the use of private property").

70. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 42-43 (1982) (outlining the President's administrative powers).

71. The practice of treaty-making ended in 1871. *See infra* note 74.

72. U.S. CONST. art. VI, cl. 2.

73. *See* COHEN, *supra* note 70, at 42.

74. Congress formally ended the process through the Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1994)). This shift in policy did not originate in the belief that Indian tribes were no longer sovereign entities, but in institutional jealousy. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 147 (3d ed. 1983) (remarking that the House of Representatives had long grown jealous of and dissatisfied with the Senate's control over shaping Indian policy through its treaty power). The House of Representatives sought to impose its will over federal Indian

government continued to engage in treaty-like relationships with tribes through formal "agreements" ratified by the full Congress.[75] Once the agreements were ratified, they could be modified as could a treaty, but rights created by carrying the agreement into effect could not be impaired.[76]

As with international treaties, Congress can abrogate Indian treaties at any time.[77] There are, however, some limitations to this perceived plenary power[78] of Congress.[79] In general, Indians retain exclusive hunting and fishing rights on lands reserved to them, unless these rights were clearly relinquished by treaty or modified by Congress.[80] These treaty

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policy by cutting off funds for treaty negotiations as early as 1867. *See id.* at 148 (citing several statutes enacted for this purpose). Despite the termination of the treaty process, Congress fully intended that previously-existing treaties would remain in effect and would be honored. *See* COHEN, *supra* note 70, at v.

75. *See, e.g.*, Antoine v. Washington, 420 U.S. 194, 201 (1975) (acknowledging that a legislated ratification of an agreement between the executive branch and an Indian tribe possessed the strength of a treaty and was binding upon the states under the Supremacy Clause); COHEN *supra* note 70, at 67 (illustrating that, in substance, a treaty "was an agreement between the Federal Government and an Indian tribe").

76. *See, e.g.*, Marlin v. Lewallen, 276 U.S. 58, 67-68 (1928).

77. *See* Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) (warning that Congress's clear and explicit abrogation of a treaty must be upheld by the courts, "even in contravention of express stipulations in an earlier treaty" with a foreign power); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (asserting that Congress has the power to "abrogate the provisions of an Indian treaty," and presuming that Congress would only do so sparingly and in the best interests of the tribes themselves and the country as a whole). *But see* Miller, *supra* note 4, at 578-81 (1991) (arguing that Indian treaties are international treaties which cannot legally be quietly abrogated by acts like the ESA after those treaties have been ratified).

78. The "plenary power" of Congress has been used to justify numerous infractions on tribal sovereignty and treaty rights, including, to name just a few, the General Allotment Act of 1887, 25 U.S.C. §§ 331-358 (1994); the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1994); the Indian Claims Act of 1946, 28 U.S.C. § 1505 (1994); and the policy of Termination. *Cf.* Frickey, *Domesticating Federal Indian Law*, *supra* note 15, at 35 (asserting that the fundamental reasoning underlying the finding of congressional plenary power over Indian affairs was an "embarrassment of logic," leading to a holding in the *Lone Wolf* case, 187 U.S. 553 (1903), that was an "embarrassment of humanity").

79. *See* Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (using the Indian Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, to declare that Congress possessed broad powers to enact special legislation to "deal with the special problems of Indians").

80. A "treaty [is] not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). This notion of reserved rights is referred to as the "Reserved Rights Doctrine." *See also* Winters v. United States, 207 U.S. 564,

rights typically extend to land beyond reservation boundaries, as most treaties allow tribes to hunt and fish in their "usual and accustomed places."[81]

Another limitation is the "clear statement rule" governing putative abrogations of treaty provisions. The Supreme Court requires Congress to abrogate treaty rights explicitly if it chooses to do so.[82] Congress must make an "express declaration" of its intent to abrogate treaty rights.[83] In the absence of an explicit statement, courts will not construe statutes to abrogate treaty rights in a "backhanded way."[84] In *United States v. Dion*,[85] the Supreme Court held that unless there is "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,"[86] the statute will not apply.

Courts have also fashioned other interpretive canons to address the unique nature of Indian legal issues.[87] An intention to abrogate treaty rights is "not to be lightly imputed" to

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576-77 (1908); COHEN, *supra* note 70, at 449.

81. *See, e.g., Winans*, 198 U.S. at 381; Mille Lacs Band of Chippewa v. Minnesota, 124 F. 3d. 904 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 2295 (1998).

82. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 442 U.S. 658, 690 (1979) (declaring that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353 (1941) (noting that the Court could not find "any clear and plain indication that Congress . . . by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home"). *But see* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) (declaring in dictum that "general Acts of Congress apply to all Indians as well as to others in the absence of a clear expression to the contrary").

83. Leavenworth, Lawrence, & Galveston R.R. Co. v. United States, 92 U.S. 733, 741-42 (1875).

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

85. 476 U.S. 734 (1986).

86. *Id.* at 740. This principle is commonly referred to as the *Dion* "actual consideration and choice" test and is the standing law on treaty abrogation, particularly as such abrogation applies to conservation statutes. *See* Tina L. Morin, Note, *Indians, Non-Indians, and the Endangered Panther; Will the Indian/Non-Indian Conflict Be Resolved Before the Panther Disappears?*, 13 PUB. LAND L. REV. 167, 173 (1992).

87. *See generally* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975) (summarizing the traditional Indian law statutory interpretation and treaty abrogation canons).

Congress.[88] Courts are to construe statutes liberally in favor of Indian tribal treaty rights.[89] Any ambiguities in language are to be interpreted in favor of Indian tribes.[90]

While these rules might seem to be a substantial limitation on Congress's power, in practice they have not impeded Congress's ability to modify or abolish treaties over time.[91] Courts have often been willing to examine legislative history in order to clarify uncertainties, thus softening the blow of the interpretive canons. A court examining a statute may consider the "face of the Act," the "surrounding circumstances," and legislative history to determine congressional intent.[92] Rather than "rigidly stand by and demand a per se rule on clear statutory statement," the Court will "consider clear and reliable evidence in the legislative history of a statute."[93]

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88. *See* Pigeon River Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934).

89. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

90. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); *Alaska Pac. Fisheries*, 248 U.S. at 89. In some instances, treaties specifically require the language to be interpreted in this manner. *See, e.g., Choctaw Nation*, 397 U.S. at 631 ("[T]he Treaty of Dancing Rabbit Creek itself provides that 'in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.'"). Courts should interpret treaty language in the manner in which the Indian tribes would have understood the language at the time they entered into the treaties. *See id.*; United States v. Winans, 198 U.S. 371, 381 (1905); Jones v. Meehan, 175 U.S. 1, 11 (1899); United States v. Bresette, 761 F. Supp. 658, 662 (D. Minn. 1991).

91. While several entire treaties or elements of treaties have been abolished or rescinded, the theft of the Black Hills of South Dakota from the Sioux Nation is particularly illustrative. Although guaranteed to the Sioux Nation by the Treaty of Fort Laramie in 1868, the Black Hills were later taken away from the Sioux by Congress in 1877, a mere three years after gold was discovered. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 41 (2d. ed. 1992). In *United States v. Sioux Nation*, 518 F.2d 1298, 1302 (Ct. Cl. 1975), the court declared the taking of the Black Hills illegal, stating that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found [in the history of our nation]."

92. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977) (quoting Mattz v. Arnett, 412 U.S. 481, 505 (1973)); *see also* United States v. Fryberg, 622 F.2d 1010, 1013 (9th Cir. 1980) (upholding an Indian's conviction under the Bald and Golden Eagle Protection Act using congressional intent, although neither the statutory language nor the legislative history expressly abrogated his treaty rights).

93. United States v. Dion, 476 U.S. 734, 739 (1986).

D. TREATY ABROGATION AND THE ENDANGERED SPECIES ACT

Under the *Dion* test and its precedent, Congress must specifically address the abrogation issue in the statute.[94] With the ESA, this approach presents some difficulties. Only one provision in the ESA specifically mentions Native Americans. An exemption in the ESA permits Alaskan Natives or non-Native permanent residents of an Alaskan village to take a threatened or endangered species for subsistence purposes.[95] This exception, however, is inapplicable to the broader ESA treaty abrogation issue since Alaska Natives did not sign any treaties with the United States.[96]

The Supreme Court has never decided whether Congress abrogated treaty rights with the ESA. In *Dion*, the Court specifically declined to review the issue.[97] Rather than uphold a conviction of an Indian under the ESA for killing four bald eagles, the Court based its decision on the language of the Bald Eagle Protection Act.[98] In its holding, the Court did not address the Eighth Circuit's holding that the ESA did not abro-

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94. *See supra* note 82 (citing cases that require Congress to expressly abrogate treaties in a statute).

95. *See* 16 U.S.C. § 1539(e) (1994). Any "Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" qualifies for the subsistence exception. *Id.* § 1539(e)(1)(A). "Subsistence" includes the selling of "any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns." *Id.* § 1539(e)(3)(i). The Act also allows non-edible portions of species taken for subsistence purposes to be sold in interstate commerce when made into authentic native artifacts or clothing. *See id.* § 1539(e)(1)(B). In its brief report on this subsistence exception, the Senate Commerce Committee notes that the exception is necessary not only for sustenance but as a means of preserving social unity. *See* S. REP. NO. 93-307, at 5 (1973). The report further adds that takings for subsistence purposes were not the principal threat to the species targeted by the Act. *See id.*

96. *See* Atkinson v. Haldane, 569 P.2d 151, 154 (Alaska 1977) ("[T]he government never attempted to enter into treaties with Alaskan Natives."); DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 911 (3d ed. 1993) ("Alaska Natives . . . did not enter into the special treaty relationships with the United States that had secured a unique legal and political status for tribes in the 'lower 48.'"); *cf.* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SPECIES IN A MODERN CONSTITUTIONAL DEMOCRACY 8 (1987) (referring to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1609 (1994), as a "treaty substitute").

97. *See Dion*, 476 U.S. at 745.

98. *See* 16 U.S.C. § 668 (1994). The *Dion* court indicated that the ESA was a harder case to prove treaty abrogation, particularly noting that the ESA and its legislative history were silent on the issue. *See* Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 869 (1991).

gate treaty rights as applied to non-commercial hunting on the reservation. Since then, only one federal court has found that the ESA abrogates treaty rights while applying the *Dion* "actual consideration and choice" test.[99]

II. SECRETARIAL ORDER NO. 3206

On June 5, 1997, Interior Secretary Bruce Babbitt and Commerce Secretary William Daly signed a joint order[100] designed to clarify the responsibilities of each department when any actions taken under the ESA involve tribal trust land.[101] Secretarial Order No. 3206 was based on over a year's worth of meetings and negotiations between dozens of tribal leaders and federal officials, including Secretary Babbitt himself.[102] To promote a government-to-government relationship with the tribes, the Order acknowledges the federal trust relationship and treaty obligations of the federal government toward Indian tribes.[103] The Order declares that tribes should not bear a "disproportionate burden" for the conservation of listed species, thus reducing the likelihood of confrontation over ESA issues.[104] The Order is an internal departmental order[105] clari-

99. *See* United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987). For criticism of the *Billie* holding and analysis, see Morin, *supra* note 86, at 174-78.

100. An "order," as defined by the APA, is the whole or part of a final agency disposition, "whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6) (1996). The form and purpose of the Order more closely represents a rule, which is defined as an agency statement designed to "implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *See id.* §551(4). Since there was no notice-and-comment or rule making process involved, *see* 5 U.S.C. § 553, the Order is not a "rule."

101. *See* Department of the Interior Fish and Wildlife Service, *New Endangered Species Policy is Designed to Enhance Native American Participation*, June 5, 1997, *available in* 1997 WL 302434.

102. *See* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1067-81 (1997). The Order was modeled after a prior negotiation between the White Mountain Apache Tribe and the Fish and Wildlife Service. *See* Statement of the Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (Dec. 6, 1994) (copy on file with the author).

103. *See* Sec. Order 3206, *supra* note 14, § 1.

104. *Id.*

105. *See id.* § 2(A) (indicating that the Order is for "guidance within the Departments only"); *see also id.* § 1 (explaining that the Order clarifies the responsibilities of relevant agencies within the Interior and Commerce de-

fying policy and is not subject to the notice-and-comment procedures of the APA.[106]

While defining the application of federal public land laws to the tribes, the Order reaffirms the relationship between the federal government and Indian tribes in three ways. First, it reiterates that the unique trust relationship between the federal government and Indian tribes has created a responsibility obliging the federal government to exercise due care in the management of tribal land and resources.[107]

Second, the Order recognizes the sovereignty of Indian tribes.[108] The Order reiterates that Indian tribes hold the power to make and enforce laws and to administer justice within their territories.[109] In addition, tribes are free to manage and control Indian lands, to exercise their tribal rights, and to protect tribal trust resources.[110] In recognizing and evaluating a tribe's exercise of its sovereign powers, the Interior and Commerce Departments are to remain sensitive to the many Indian cultures and religions and their associated practices and ceremonies.[111]

Third, the Order reaffirms the importance of tribal self-government and self-determination.[112] It recognizes that long-

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partments).

106. *See* 5 U.S.C. § 553 (a)(2) (1994). This component of the APA indicates that matters relating to agency management do not require the rulemaking or notice and comment procedures, which are outlined in 5 U.S.C. § 553. Under the notice-and-comment process, an agency is required to publish a proposed rule in the Federal Register and to provide for public comment proceedings. Exceptions are made, however, for statements of policy or rules of agency organization. *See* 5 U.S.C. § 553 (b)(3)(A), (d)(2).

107. *See* Sec. Order 3206, *supra* note 14, § 4.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* The essential difference between "sovereignty" and "self-government" is subtle, but distinct. "Self-government" essentially refers to the tribe's power to regulate and control its internal relations. "Sovereignty" in the sense referred to in the Order relates to the tribe's power over its "external relations," that is, involving relations between the tribe and non-members of the tribe. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 409-10 (1989) (citing Montana v. United States, 450 U.S. 544, 564 (1981)); *cf.* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 136 (1980) (citing the Indian Financing Act of 1974 and the Indian Self-Determination and Education Assistance Act of 1975 as examples of congressional concern with fostering tribal self-government).

standing congressional and administrative procedures support the fundamental rights of tribes to set their own priorities and make decisions regarding their limited resources and their ways of life.[113] In addition, the Order requires the Departments to recognize and consider the expertise that tribes bring to decisions regarding the disposition of natural resources.[114]

Before identifying five fundamental principles, the Order establishes its scope and limitations. It first clarifies that the Order does not "grant, expand, create, or diminish" any enforceable rights or responsibilities.[115] Nor does it alter or modify tribal sovereignty or in any way affect existing tribal rights.[116] The Order ensures that the Secretaries' statutory duties remain unaffected and that no grant has been given to "take" any threatened or endangered species.[117] For any departmental actions already "substantially completed," the Order does not impose any additional procedural requirements.[118] The Order ensures that existing agreements between the Departments or their agencies remain unaffected, unless mutually changed by the signatory parties.[119] While the Order does not apply to Alaskan Natives, it allows Native Alaskan communities to implement strategies with the Departments to improve the efficiency of the Order.[120]

The first of the five outlined principles stresses that the Departments, while dealing with Indian tribes on a government-to-government basis, are to promote an ecosystem approach to critical habitat management.[121] Agencies should view tribal governments as having the authority and responsibility for the health and welfare of ecosystems on Indian

113. *See* Sec. Order 3206, *supra* note 14, § 4; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (observing that "traditional notions of Indian self government are so deeply engrained in our jurisprudence" that they provide an important foundation from which courts may begin to address issues of sovereignty).

114. *See* Sec. Order 3206, *supra* note 14, § 4.

115. *Id.* § 2(B).

116. *See id.*

117. *See id.* § 2(C), (D).

118. *See id.* § 2(E).

119. *See id.* § 2(H).

120. *See id.* § 7. The Order directs the Departments to make recommendations to the Secretaries within one year of the effective date of the Order to guide the administration of the ESA in Alaska in light of the government-to-government relationship. *See id.*

121. *See id.* § 5, Principle 1.

lands.[122] Agencies are to consult with and seek participation of Indian tribes whenever any actions planned under the ESA may affect tribal trust lands.[123] While consulting with a tribe, agency officials may coordinate discussions with a representative selected by the affected tribe.[124] This process of coordination may also include tribal participation in data collection, consensus seeking, and associated processes.[125] Departmental officials are expected to obtain permission from a tribe before knowingly entering a reservation or any tribally-owned trust land.[126]

The second principle of the Order clarifies the relationship between tribal trust lands and public land laws of the United States. In the Order, both Departments acknowledge that Indian lands[127] are not subject to the public land laws of the United States and are not federal public lands or part of the public domain.[128] Indian lands are set aside for the exclusive use and benefit of the tribes, allowing them to manage the

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122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.* Recognizing the role of consensus-seeking in the process reflects traditional tribal methods of decision-making, where decisions are not made by one individual, but by consensus of the tribe. *See* Tracy Becker, Traditional American Indian Leadership: A Comparison with U.S. Governance 6-7 (American Indian Research and Policy Institute, 1997) (unpublished manuscript, on file with the author).

126. *See* Becker, *supra* note 125, at 6-7. The only exceptions to this rule are for investigative or prosecutorial law enforcement purposes, or for purposes otherwise outlined in a federal-tribal agreement. Tribal officials cite these exceptions as shortcomings in the Order. *See* Wilkinson, *supra* note 102, at 1085.

127. The Order defines Indian lands as any land held in trust by the United States for the benefit of any Indian tribe or individual, or land held by any Indian tribe or individual subject to restrictions by the United States against alienation. *See* Sec. Order 3206, *supra* note 14, § 3(D). The Order does not use the term "Indian country" as defined by 18 U.S.C. § 1151 (1994) as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent . . . including rights-of-way running through the reservation," any dependent Indian community within the borders of the United States, and all Indian allotments that have not been extinguished. Thus, the term "Indian country" provides a more expansive territory for a tribe to exercise authority than the term "Indian lands" as defined in the Order.

128. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 2; *see also* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (stating that the plenary power of Congress "certainly . . . would not justify . . . treating the lands of these . . . Indians as public lands of the United States, and disposing of the same under the Public Land Laws").

lands in accordance with tribal goals and objectives within the bounds of existing laws.[129]

The third principle directs affected departments and agencies to limit unnecessary conservation restrictions on Indian tribes and to assist tribes in promoting healthy ecosystems.[130] Agencies should offer scientific and technical assistance as necessary to foster the dual goals of Indian self-government and healthy ecosystem management.[131] Departments must also respect and recognize the exercise of tribal sovereignty over the management of tribal lands and tribal trust resources.[132] In particular, departments should defer to tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including tribally-owned fee lands,[133] and address the conservation needs of listed species.[134] Whenever a federal conservation measure is being considered for any species on Indian land, departments and agencies should consult with the affected tribes and assist them in developing conservation plans of their own.[135]

Noting that it is preferable to avoid interference with tribal self-government, the Order directs departments to consult with tribes when any tribal activities might raise the potential issue of a *direct* take[136] under the ESA.[137] This consultation is to be accompanied by written notice to the tribes of any intended restrictions as far in advance as possible in order to

129. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 2.

130. *See id.* at Principle 3.

131. *See id.*

132. *See id.*

133. The Order refers to "tribally-owned fee lands" in addition to the territories covered under the definition of "Indian lands." The term "tribally-owned" would most likely include lands that the tribe or its members purchased pursuant to the allotment process or those lands formerly owned in fee by non-Indians and later purchased by the tribe. *See generally* D. S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973) (discussing the Allotment Act, its policy motivations, and its impact on tribal communities).

134. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 3.

135. *See id.*

136. *See* 16 U.S.C. § 1532(19) (1994) (defining "take" to include "harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"). A *direct* take, therefore, involves actual physical injury to the protected species. *See, e.g.*, Southwest Center for Biological Diversity v. United States Bureau of Reclamation, 143 F.3d 515, 517 (9th Cir. 1998); Pacific Northwest Generating Coop. v. Aluminum Co. of America, 822 F. Supp. 1479, 1498 (D. Or. 1993).

137. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 3(C).

foster cooperative arrangements.[138] The consultation should strive to "harmonize" any potential conflicts between the principles of tribal self-government, the federal trust responsibility, and the departmental responsibilities under the ESA.[139]

In cases that may involve an *incidental* take[140] under the ESA, notice shall include an analysis and determination that five conservation standards have been met: (1) the restriction proposed is reasonable and necessary for the conservation of the species; (2) the conservation purpose of the restriction cannot be achieved through reasonable regulation of non-Indian activities; (3) the measure is the least restrictive means available to achieve the conservation goals; (4) the restriction does not in any way discriminate against Indian activities; and (5) voluntary tribal measures, such as habitat management plans, are inadequate to achieve the stated conservation goals.[141]

The two remaining principles further promote respect and the protection of information shared between tribes and the Departments. Departments are to consider the impact of agency actions and ESA policy upon Indian cultural and spiritual uses of listed species.[142] In attempting to minimize or avoid interference with noncommercial uses[143] of listed sacred plants and animals, departments may issue guidelines that accommodate Indian access to and traditional uses of those plants and animals.[144]

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138. *See id.*

139. *Id.*

140. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 707 (1995) (using the House Committee reports on the 1982 ESA amendments as support for a definition of "incidental" takings to include harm to habitat: "By use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R. REP. No. 97-567, at 31 (1982)). For cases discussing the incidental take of protected species, see Loggerhead Turtle v. County Council, 148 F.3d 1231 (11th Cir. 1998); United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

141. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 3(C).

142. *See id.* at Principle 4.

143. *See, e.g.*, United States v. Dion, 752 F.2d 1261, 1262 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) (limiting its holding to noncommercial uses); United States v. Bresette, 761 F. Supp. 658, 662-64 (D. Minn. 1991) (affirming Indian's treaty right to sell migratory bird feathers because the migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994), did not abrogate that right).

144. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 4.

Consistent with provisions of the Freedom of Information Act (FOIA)[145] and the Privacy Act,[146] departments are to make available to Indian tribes all information related to Indian lands and tribal trust resources.[147] During this mutual exchange of information, departments are to protect tribal information that has been disclosed to departmental officials.[148] Departments are encouraged to notify Indian tribes of requests for tribal information related to the administration of the ESA.[149]

In addition to interacting in a government-to-government[150] relationship and sharing information, Indian tribes may en-

145. 5 U.S.C. § 552 (1994).

146. 5 U.S.C. § 552a (1994)

147. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 5.

148. *See id.* Tribal information should be protected to "the maximum extent practicable." *Id.*

149. *See id.*

150. Principles of a government-to-government relationship between Indian tribes and the federal government are not foreign to federal Indian policy and have experienced a long yet inconsistent history. For over a century, building this relationship involved treaty-making and establishing agreements. *See supra* notes 70-76 and accompanying text. In the last few decades, however, executive pronouncements have outlined this relationship. In 1970, President Richard Nixon informed Congress that he intended to significantly alter federal Indian policy to strengthen tribal sovereignty, transfer control of programs from federal to tribal governments, protect Indian land resources, and put an end to the policy of involuntary termination. *See* CLINTON ET AL., *supra* note 74, at 160. This pronouncement represented the "single strongest statement to date by the federal government supporting the strengthening of tribal sovereignty and control while advocating protection of [Indian resources]." *Id.*

President Bill Clinton issued a Memorandum reasserting this relationship. *See* Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951 (April 29, 1994). The purpose of the Memorandum was to "ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes." *Id.* The Memorandum directed executive departments to consult with tribal governments prior to taking any action that might affect federally recognized tribal governance. *See id.* More specifically, the Memorandum directed federal agencies to apply the requirements of Executive Orders 12875 (*Enhancing the Intergovernmental Partnership*) and 12866 (*Regulatory Planning and Review*) to create solutions and tailor federal programs to address the "specific or unique needs of tribal communities," and clarified that its intent was to improve internal management of the executive branch and not to create any rights to administrative or judicial review. 59 Fed. Reg. at 22,951.

The value of this ongoing government-to-government relationship is immeasurable. Because tribes are not actually states, they are not represented in the United States Congress. There are no seats in the House or the Senate for the Navajo Nation, but there are seats for the State of Arizona. While

gage in more formalized cooperative agreements.[151] These intergovernmental agreements may be pursued to solidify agreements involving sensitive species.[152] Such agreements may include land and resource management schemes, multijurisdictional partnerships, cooperative law enforcement, and other guidelines designed to facilitate Indian access to and use of natural products.[153]

III. BALANCING THE GOALS OF ECOSYSTEM PROTECTION WITH THE REALITY OF TRIBAL SOVEREIGNTY

The purpose of this Note is to examine whether this Order on the sovereign-to-sovereign relationship between the federal government and recognized Indian tribes[154] is in harmony with the ESA. Examination of an agency action must always begin with the plain language of the applicable statute.[155] However, with federal Indian law, this examination must be conducted while considering treaties,[156] tripartite federalism,[157] and the

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tribal members as individual American citizens are in theory represented by the duly elected officials from their state, they are not represented at the national level as tribal members. This lack of tribal representation is evident from historical and recent congressional assaults on tribal sovereignty.

151. *See* Sec. Order 3206, *supra* note 14, § 6.

152. "Sensitive species" include candidate, proposed, and listed species. *See id.*

153. *See id.*

154. *See id.* § 3(A).

155. If the statutory language is plain and clear, that language is ordinarily regarded as conclusive. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).

156. It is impossible to construct an analytical model that applies fairly to all U.S.-Indian treaties. While there are 555 federally recognized Indian tribes, *see Questions & Answers—American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (visited April 7, 1998) <http://www.fws.gov/r9endspp/esatrqa.html>, not all of those tribes share a treaty with the United States. *See* sources cited *infra* note 159 (noting that Alaskan Natives are not the same as Indian tribes and do not share a treaty relationship with the United States). Some tribes, such as the Katka, only share one treaty with the United States, while others, such as the Chippewa, share as many as thirty. *See generally* 2 INDIAN AFFAIRS, LAWS, AND TREATIES (Charles J. Kappler ed., 1904). In addition, not all treaties are alike. Most treaties share common elements (such as ceding land, establishing reservations, maintaining hunting and fishing rights, and establishing educational systems). *See id.* Others address specific concerns between the tribe and the United States. For example, the Treaty with the Apache, signed in 1853, contains several provisions that reflect the militarily confrontational history between that Tribe and the U.S. Army. These components call for

federal trust responsibility to Indian tribes.[158] Aside from the unique relationships created in treaties, not all native communities are alike. Indian tribes in the lower forty-eight differ from Alaskan Natives, and Alaskan Natives differ from Hawaiian Natives.[159] Finally, a legal analysis in Indian law must consider the traditional Indian statute and treaty canons.[160]

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guarantees from the Apache to neither encourage nor engage in hostilities with the United States, and establish a military post on the reservation. *See* Treaty With the Apache, Mar. 25 1853, U.S.-Apache, art. 2, 8, 10 Stat. 979.

157. In contrast to common perceptions of federalism, there are three sets of governmental entities in the United States: the federal government, state governments, and tribal governments. *See, e.g.*, Greg Overstreet, *Reempowering the Native American: A Conservative Proposal to Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy*, 14 HAMLINE J. PUB. L. & POL'Y 1, 29 (1993) (indicating that tribes could represent an invaluable check on the powers of the federal and state governments); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 60 (1991) ("Ours is not a federal system comprising only state and national governments, but a tripartite order. Native American tribes constitute a unique, third category within our federal system."); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841, 873 (1989) (indicating that while tribes fit better into a transnational model than one centering around federalism, they have in practice been incorporated into the federal union); *cf.* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 (1993) (arguing that the U.S. Constitution performs the same function between states and the federal government as do treaties between tribes and the federal government). With the advent of Public Law 280, civil and criminal jurisdiction in Indian country can be split up between state, federal, and tribal jurisdiction.

158. Not following a traditional trust model, the federal trust relationship with Indian tribes dates back to *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where Chief Justice Marshall described the relationship between those two governmental entities as "resembl[ing] that of a ward to his guardian." *Id.* at 17. The application of this trust relationship "suggests an affirmative federal duty, especially by the Department of the Interior, to protect Indian trust property from injury by other federal projects . . . unless . . . Congress had . . . specifically authorized the injury" and compensated the tribe for the injury. CLINTON ET AL., *supra* note 74, at 236. Most litigation surrounding management of tribal resources involves a claim against the federal government for mismanagement of those resources. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935) (affirming a monetary damages award to Tribe for the taking of lands, applying a trust responsibility model); Oglala Sioux Tribe v. United States, 21 Cl. Ct. 176 (1990) (holding that federal government's authority and control over tribal resources was sufficient to create trust responsibility and establish fiduciary responsibility).

159. *See* United States v. Nuesca, 945 F.2d 254, 257 (9th Cir. 1991) (drawing legal and cultural distinctions between Hawaiian Natives and Alaskan Natives); *see also* Miller, *supra* note 4, at 568 (observing that Alaskan Natives are not necessarily Indians); Sally J. Johnson, *Honoring Treaty Rights and Conserving Endangered Species after* United States v. Dion, 13 PUB.

A. APPROACHING THE ORDER FROM A TRADITIONAL STANDPOINT

On the surface, it would seem that the Order does not actually accomplish anything legally binding. But digging below the surface, one finds that the Order, if implemented properly, accomplishes two very important tasks: it lays the foundation for the Secretaries to issue an interpretive order, and it offers a model for negotiation and dialogue between federal agencies and Indian tribes. Before exploring that second possibility, let us examine the Order through standard legal analysis. To begin that process, I will highlight its fundamental failings.

First, the Order does not resolve the ESA-treaty abrogation issue in a concrete form. While creating a format through which Indian tribes may have more authority in exercising their rights, it merely states matters of policy that are long on platitudes but short on solutions. Unlike Secretary Babbitt's interpretation and expansion of the meaning of "harm" under the ESA,[161] the Order is not an interpretive ruling. As a result, it will not enjoy the *Chevron* deference that interpretive orders enjoy.[162] The Order also fails to address directly the Supreme

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LAND L. REV. 179, 186 & nn.71-75 (noting that, unlike Indian tribes protected by treaty, Alaskan Natives are protected primarily by statutes); *cf.* Morin, *supra* note 86, at 174-78 (discussing the *Billie* court's analogizing of Alaskan Natives to Indian tribes as one of the fundamental flaws in the decision).

160. *See* United States v. Dion, 476 U.S. 734, 739 (1986) (clarifying that the rule requiring that Congress explicitly declare its intent to abrogate treaty rights is not a per se rule); Laurence, *supra* note 98, at 862 (1991) (assuring that the Indian canons are less than "Indians always win" guidelines); *see also supra* notes 82-90 and accompanying text (summarizing the canons that guide treaty interpretation).

161. *See supra* note 63 and accompanying text (highlighting the interpretive order which expands the meaning of "harm" to include habitat modification or destruction).

162. *Chevron* only applies to interpretive rules or actions. Under the *Chevron* doctrine, the reviewing court conducts a two-step process: (1) Determine if Congress has spoken precisely to the question at issue; (2) if Congress has not spoken directly, a court may defer to the agency's determination if the agency interpretation was not unreasonable. A court may conduct its own review of congressional intent by looking at the language of the statute and its design as a whole, and in doing so, may employ the traditional canons of construction. *See supra* notes 57-59 and accompanying text. Under the APA, an agency action can only be overturned by the reviewing court if it is arbitrary and capricious or in excess of statutory authority. *See* 5 U.S.C. § 706 (2) (A), (C) (1994).

Court's ruling in *Dion* and its implications for treaty rights under the ESA.[163]

In addition, the Order fails to establish firmly what sort of procedures tribes and federal agencies will need to follow in order to apply its language to future ESA confrontations. The Order does not specify what level of control tribes will exercise in managing their critical habitat. Nor does it provide a solid mechanism for tribes to obtain redress in the event that federal agencies fail to carry out their instructions. The Order does not bind the Fish and Wildlife Service or the National Marine Fisheries Service to act in the best interests of tribes; instead, it merely provides a guide for agency behavior toward tribes.

The Order also fails to establish how the government-to-government relationship will be implemented.[164] Essentially, the Order leaves tribes subject to the good graces of the administering agency. The ESA in its current form contains no provision under which tribes can sue; and pursuing litigation via the trust doctrine would most likely be unsuccessful. It would be difficult for a tribe to argue that the government was failing in its trust capacity by prohibiting tribes from pursuing resource development and managing their own critical habitat on tribal lands.

Conversely, federal agencies have no substantial authority on which to fall back in the event that environmental groups seek to use the ESA to enjoin a tribal habitat management plan. While groups may not enjoin a general statement of policy,[165] they can enjoin its implementation.[166]

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163. *See supra* notes 97-99 and accompanying text (discussing the *Dion* holding and the subsequent *Billie* decision, which applied the *Dion* standards).

164. Those who have practiced in Indian Country are repeatedly faced with federal officials who are not at all familiar with guiding policy directives such as President Clinton's Memorandum on the government-to-government relationship, *see supra* note 150. Interview with Charles Stringer, former attorney with the White Mountain Apache Tribe, in Minneapolis, Minn. (March 19, 1998). Absent any knowledge of guiding federal policy, it is inherently difficult for tribes to engage in a government-to-government relationship with federal officials who do not know that such a relationship with Indian tribes even exists.

165. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that parties must have an actual injury to bring suit under the ESA and cannot merely allege some general grievance against a federal agency and its guiding policy).

166. Under both the ESA and the APA, environmental groups can challenge any agency action that could result in an unauthorized taking of a listed

Finally, the Order fails to address the problem of ESA noncompliance by non-Indian neighbors. There is a growing movement of private property owners who fiercely despise the ESA and its restrictions upon their liberties.[167] If the Order truly grants special privileges to Indians over non-Indians, as Senator Gorton suggests,[168] then it could possibly exacerbate the ill will that property rights activists feel towards the federal government in its administration of the ESA. Given this opposition, the Order may contribute to more fear and animosity toward Indian tribes.

The fears and warnings issued by opponents to the Order are quite simply unfounded, resembling more the ramblings of Chicken Little about the falling sky than any real danger about tribal abuses and racial discrimination. The Order does not permit tribes to hunt or fish an animal to extinction.[169] It does not permit tribes to "take" a species without complying with the standards already established in the ESA.[170] It does not allow Indian tribes to control the activities of non-Indians on

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species. Any implementation of a cooperative agreement between tribal and federal officials over a habitat management plan would likely constitute an "action." If environmental groups felt that such a plan violated the ESA, there would be no legal support to stop them from suing the federal agency.

167. *See supra* note 2 (discussing the perceived burden the ESA places upon private property owners and the animosity that the ESA generates).

168. *See infra* note 172 and accompanying text (recording remarks made by the Senator during an appropriations bill hearing). Senator Gorton's concerns about racial discrimination expressed in this report are only a small part of his ongoing quest to eliminate tribal sovereignty and destroy any authority of tribal governments to protect their people and their lands. *See, e.g.*, American Indian Equal Justice Act, S. 1691, 105th Cong. § 3 (1998) (proposing to eliminate tribal sovereign immunity and allow states to tax tribes). Ironically, this bill was introduced on the 25th anniversary of the first day of the American Indian Movement's occupation of Wounded Knee (February 27, 1973). *See also* Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, March 9, 1998, at A16 (noting that Senator Gorton has "clashed with tribes" for three decades and is known to be openly hostile to tribal interests).

169. Tribes have considerable reasons to protect their resources despite Justice Douglas's dictum in *Puyallup Tribe v. Washington*, 414 U.S. 44, 49 (1973), which states that treaty rights to fish do not extend "down to the very last steelhead in the river." The Eighth Circuit recognized the fallacy of relying upon this language to extinguish treaty rights. *See* United States v. Dion, 752 F.2d 1261, 1270 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986). The court noted that the *Puyallup* dicta referred to "in-common" rights, not exclusive rights. *Id.* The court also noted that, in the *Dion* case, the government had not established that the bald eagle would become extinct if the Indians exercised their treaty rights. *See id.*

170. Sec. Order 3206, *supra* note 14, § 2(D).

fee land,[171] nor does it grant a special privilege based on race over those non-Indian neighbors.[172] Finally, the Order does not allow unchecked economic development to destroy critical habitat.[173] Given these protections, opponents of the Order have no reason to fear it.

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In order for the Interior and Commerce Departments to remedy these failings and to truly accomplish what the Order envisions, an interpretive order must be issued. The interpretive order should read as follows: "*Under the Endangered Species Act, the term 'State' includes Indian tribes for the purpose of critical habitat management.*" Bolstered by a formal interpretive order, the Order would have binding authority and enjoy *Chevron* deference. The following analysis sets forth the legal foundation upon which the Secretaries might stand if they issued such an order.

1. The Plain Language of the ESA Would Permit Tribes To Be Treated as States: A Closer Look at the ESA, Treaty Rights, and Tribal Habitat Management

When analyzing legislative intent, the essential starting point is the plain language of the text.[174] Particularly, when

171. *See id.* § 3(D); *id.* § 5, Principle 3(B). The Order limits its application to Indian lands (trust or held in fee), excluding non-Indian lands within the reservation. *But see infra* note 184 (listing several environmental regulatory statutes in which Congress has permitted Indian tribes to exercise civil authority over non-Indians within reservation borders).

172. *See* S. REP. NO. 105-56, at 24 (1997). Commenting on the Order, Senator Gorton expressed his fear that the departments would grant some sort of "preferential treatment" to tribes when designating critical habitat. He asserted that nothing in the ESA allows Indian lands to be treated any differently than non-Indian lands. Senator Gorton misses the point, though: the Order does not treat Indian *lands* differently, but treats Indian tribal governments differently than private citizens. *Cf.* Morton v. Mancari, 417 U.S. 535, 550-54 (1974) (holding that benefits to tribal members in BIA hiring practices did not reflect racial preferences but a political relationship).

173. Tribes remain subject to the supervision and administrative authority of the Interior and Commerce Departments. *See* Sec. Order 3206, *supra* note 14, §§ 1-2(B), (C), (D); *see also Questions & Answers—American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, No. 11 (visited April 7, 1998) <http://www.fws.gov/r9endspp/esatrqa.html> (reaffirming that the Order neither grants special rights nor supersedes the Secretaries' statutory duties).

174. A well known axiom of interpretation tells us that "[although] we may not end with the words in construing a disputed statute, one certainly begins

conducting a *Chevron* analysis, one must first examine whether Congress has spoken directly to the issue at hand.[175] Only one section of the ESA specifically addresses native concerns. It permits Alaskan Natives to hunt and fish listed species for subsistence purposes.[176] A strict textualist would read that language and conclude that the ESA only permitted Alaskan Natives to hunt and fish listed species, thereby ignoring the treaty rights of Indian tribes.[177] To so conclude would ignore over one hundred and sixty years of jurisprudence and would violate the most basic principles of federal Indian law.[178]

Congress has not abrogated Indian treaty rights through the ESA, despite numerous opportunities[179] and suggestions[180] to do so. Most recently, Congress has been more concerned

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there." FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 16 (1947).

175. *See supra* notes 57-58 and accompanying text.

176. 16 U.S.C. § 1539(e) (1994). *See supra* notes 95-96 and accompanying text (discussing the language and statutory history of the Alaskan Native subsistence exception).

177. The incorrect application of the textualist approach, that is, failing to understand the distinctions between Native Alaskans and Indian tribes, was the result in the *Billie* decision. *See* United States v. Billie, 667 F. Supp. 1485, 1490-92 (S.D. Fla. 1987).

178. The Supreme Court, however, is increasingly destroying or radically changing the most common principles of federal Indian law. *See infra* note 203 (commenting on three unanimous decisions issued by the Supreme Court in the last year that defy long-held standards of Indian law).

179. The ESA is continually up for reauthorization, but rarely do members of Congress propose amendments dealing with the Indian issue. More amendments are designed to alleviate conflicts with the ESA and industry or private landowners. *See* Miller, *supra* note 4, at 576; *see also* Tanya L. Godfrey, *The Reauthorization of the Endangered Species Act: A Hotly Contested Debate*, 98 W. VA. L. REV. 979, 1013-16 (1996) (discussing various proposed amendments addressing private property rights concerns); J. B. Ruhl, *Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1153-60 (1995) (addressing several House and Senate proposed ESA amendments in the 104th Congress); Donald J. Barry, *Amending the Endangered Species Act, the Ransom of Red Chief, and Other Related Topics*, 21 ENVTL. L. 587, 589-94 (1991) (discussing various amendments and the overall difficulty of amending the ESA).

180. *See, e.g.*, United States v. Dion, 752 F.2d 1261, 1268 n.14 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) (stating that in order to resolve the dispute between the ESA and Indian treaty rights, "Congress may . . . act if it chooses to do so"); Laurence, *supra* note 98, at 881 (reflecting on evidence in the legislative history that the 92nd Congress had been warned that, without a treaty abrogation clause, Indian treaty rights would survive). Nothing in the legislative history for the ESA suggests that the 93rd Congress considered the question of treaty abrogation.

with providing relief to private property owners than with Indian concerns.[181] Given the complexity and diversity of Indian tribes and the treaties that forge their relationships with the federal government, it is most likely preferable to Indian interests that Congress has not amended the ESA to address treaty rights. A single enactment would be inadequate to address the concerns of over five hundred distinct and unique communities. In fact, such action might be disastrous because of the diverse and unique needs of each tribe. What might benefit one tribe could seriously impair the opportunities for another. Furthermore, aside from the treaty rights issue, Congress has also not spoken to the issue of treating tribes as states under the ESA. Rather than a new enactment, therefore, what tribal communities need is the flexibility to work within the existing ESA to forge agreements and develop habitat management practices that address their unique needs.

The second step in the *Chevron* analysis is to determine whether an agency interpretation was a permissible construction of the statute.[182] A sufficient legal foundation exists to support an interpretive order giving habitat management authority to tribes. Although not specifically named in the ESA, Indian tribes and tribal communities could be included in several statutory provisions that allow state or other governmental entities to cooperate in administering the ESA.[183] Though tribes are not equal to states as a general rule, Congress has treated tribes as states for the purpose of assisting in administering environmental regulations.[184] Though chal-

181. The vast majority of discussions in Congress regarding ways to improve the ESA revolve around improving the listing process, allowing more opportunities for incidental takings, and easing the burden on private property owners and economic development. *See supra* note 179.

182. *See supra* note 59.

183. The ESA outlines procedures and policies for state cooperation in its administration. *See supra* notes 37-39 and accompanying text.

184. *See* Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k) (1994); Amendments to the Clean Air Act, 33 U.S.C. § 1377(a) (West Supp. 1998); Superfund Act, 42 U.S.C. § 9626(a) (1994); Safe Drinking Water Act, *id.* § 300j-11(a) (1994). *See generally* Teresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 AM. INDIAN L. REV. 269 (1992) (providing further analysis of these provisions and their application). An amendment was introduced in the current congressional session that would formally include tribes in ESA provisions related to recovery efforts and cooperative agreements. *See* H.R. 2351, 105th Cong. (1998).

lenged in the courts, these treatment-as-state provisions have been upheld if they followed statutory guidelines.[185]

An agency interpretation allowing tribes to behave similarly to states in managing critical habitat under the ESA would not be impermissible. Agencies are given wide discretion to fill in statutory gaps, so long as the promulgated rules are a "permissible construction of the statute."[186] In assigning full administrative authority to the Interior and Commerce Departments, the ESA language plainly suggests that those Departments should be allowed to seek assistance in administering the act from other governmental entities.[187] The Act specifically authorizes the Secretaries to "utilize their authorities in the furtherance of" the ESA and its goals of conservation.[188] The Order has taken the logical step of applying this language to Indian tribes to assist in the daunting task of conserving threatened and endangered species.[189]

The language of the Order suggests that Indian tribes are to follow the same procedures and requirements as States in managing critical habitat.[190] The only difference in the ar-

185. *See, e.g.*, Albuquerque v. Browner, 97 F.3d 415 (1996) (defeating challenge to EPA's recognition of the Pueblo of Isleta as a state for the purposes of administering the Clean Water Act); Montana v. EPA, 941 F. Supp. 945 (1996), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 29, 1998) (No. 97-1929) (upholding EPA's granting of treatment-as-state designation to the Confederated Salish and Kootenai Tribes under the Clean Water Act).

186. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

187. The ESA permits the Secretaries to collaborate with States, foreign governments, federal agencies, and private entities in protecting threatened and endangered species. *See supra* notes 34-42 and accompanying text. In addition, the FWS and National Fisheries and Marine Service (NMFS) have recently increased efforts to incorporate private landowners into the "partnership" of species protection. *See* Ruhl, *supra* note 179, at 1144.

188. 16 U.S.C. § 1531(c)(1) (1994).

189. The Secretaries possess the discretion to make responsible decisions as they balance the public and social concerns involved in administering the ESA. *See* North Slope Borough v. Andrus, 642 F.2d 589, 613 (D.C. Cir. 1980). Insufficient budget and personnel inhibits responsible agencies from carrying out their statutory duties and administering the ESA in a timely manner. *See* Rudy Abramson, *Wildlife Act: Sword or Shield?*, L.A. TIMES, Dec. 14, 1990, at A1. From 1980 to 1990, the inspector general of the Interior Department designated 34 species as extinct but failed to take steps to protect them. *See id.*; *see also* Rachlinski, *supra* note 51, at 364 (stating that the FWS does not have the necessary funds to implement recovery efforts for the numerous species awaiting listing).

190. The ESA authorizes the Secretaries to engage in cooperative agreements with states that establish and maintain adequate and active programs

rangement between tribes and the Departments compared with that between the States and the Departments is the language regarding the sharing of information.[191] This information protection, however, does not give tribes more freedom to violate the act, but merely reflects a desire to respect tribal sovereignty as long as tribal activities do not violate the Act.[192] Existing statutory language would ensure that tribes do not violate the ESA while managing critical habitat. If agencies were to apply the language requiring periodic review of state programs to the tribes, this would ensure that tribes maintain successful and compliant programs.[193] Given the language and purpose of the ESA and the deference given to the Secretaries when interpreting the Act,[194] the Order's creation of cooperative agreements and relationships with Indian tribes was a permissible act of delegated authority.

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for the conservation of endangered and threatened species, provided those states meet certain criteria. For selected criteria, see *supra* text accompanying note 39. Section 5, Principle 3 of the Order outlines the types of ecosystem management programs that affected departments should assist tribes in formulating. Although deferring significantly to tribes in managing critical habitat on tribal trust land, the Order does not preclude the Secretaries from interceding if tribal management plans violate the conservation goals of the ESA. Similar to the way in which States are treated under the ESA, tribes are free to manage critical habitat subject to the approval of the Secretaries as long as those management practices do not violate the Act.

191. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 5. This portion of the Order guides agencies to protect any information that tribes have disclosed to agency officials. No provision in the ESA provides such protection to the exchange of information between states and the federal government.

192. *Cf.* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 (1983) (suggesting that the Mescalero Apache Tribe could exercise substantial control over its land resources on the reservation as long as its conservation standards met statutory requirements, citing *Montana v. United States*, 450 U.S. 544 (1981), as support for a general proposition that such a standard could apply to all tribes). Tribal governments are as capable as states or federal agencies in conserving and regulating scarce resources. *See* Miller, *supra* note 4, at 581-82.

193. *See* 16 U.S.C. § 1535(e). This subsection requires annual review by the Secretary, subject to comment from interested persons. Such review, however, would be subject to tribal permission for federal officials to enter the reservation and to the agreement regarding sharing of information as outlined in the Order. *See* Sec. Order 3206, *supra* note 14, § 5, Principles 1 & 5.

194. *See supra* Part I.A-B.

2. Fulfilling the ESA's Purpose of Ecosystem Management and Protection While Reflecting Tribal Needs to Protect Resources

In providing Indian tribes more autonomy in managing critical habitat on Indian lands, the Order furthers the purpose of ecosystem protection and reflects tribal motivations to preserve fragile ecosystems.[195] Congress intended for the ESA to consider ecosystems and the threatened or endangered species that depend on them.[196] Recently the focus on single species protection has shifted more towards promoting healthy biodiversity and ecosystem protection as a matter of law and sound science.[197]

Congress intended the ESA to address the two primary causes of species extinction: destruction of natural habitat and hunting.[198] For example, commercial logging operations ignore the impact on ecosystems and contribute greatly to habitat destruction.[199] The vast majority of commercial logging, though, is conducted on private land pursuant to timber leases.[200] Indians who reside on the reservation on Indian trust land have strong motivations to preserve threatened or endangered spe-

195. *See* Ruhl, *supra* note 179, at 1137 (remarking that the FWS and NMFS have "led the charge for a more 'ecosystem minded' ESA implementation").

196. *See* 16 U.S.C. § 1531(b); *see also* S. REP. NO. 93-307, at 2 (1973) (asserting the need to maintain a "balance of nature" within environments and to preserve biodiversity).

197. *See, e.g.*, Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 877-79, 974-75 (1997) (observing that science supports an ecosystem management approach, but concluding that conservation efforts should involve both a single-species and ecosystem management approach); Babbitt, *supra* note 1, at 518 (referring to the ESA as one of two laws in this country that provide legal support for promoting biodiversity); Richard J. Blaustein, *Convention on Biodiversity Draws Attacks*, NAT'L L.J., Oct. 28, 1996, at C39 (discussing elements of the CBD Treaty and the Convention on Biological Diversity, June 5, 1992).

198. *See* S. REP. NO. 93-307, at 2 (1973).

199. *See* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 129 (1987) (cautioning that clearcutting "can cause serious erosion" and that selective cutting can have long-term impact on the soil, wildlife, and an ecosystem); James A. Leach, *Too Many Trees Are Falling*, N.Y. TIMES, November 19, 1997, at A31 (asserting that logging in national forests "worsens soil erosion, lake and stream sedimentation, and air and water quality," jeopardizing the nation's habitats); *see also* Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991) (holding that the Forest Service's even-aged management practices violated the ESA).

200. *See* Leach, *supra* note 199, at A31 (noting that less than four percent of wood products in the United States come from public lands).

cies. Not only are these species an important part of a tribe's culture and spirituality, they are also sometimes vital to survival.[201] Many Indian tribes place great value on the preservation and protection of resources for future generations.[202] Given tribal beliefs and the limited resources on Indian reservations, tribes are more motivated to protect habitat and represent a smaller threat to threatened and endangered species than do many non-Indian activities.

Tribes are also motivated to protect threatened and endangered species as a means of averting non-Indian interference in tribal affairs. Tribal sovereignty interests can only be preserved through successful critical habitat management through an ecosystem approach. Operating cooperatively with federal agencies, tribes could be protected from outside interference and spend resources on habitat management rather than litigious challenges to sovereignty.

3. Federal Policy Supports Allowing Tribes Greater Control over Critical Habitat Management on Indian Lands

Federal policy increasingly indicates that Indian tribes and tribal communities should be treated as sovereigns on a government-to-government basis.[203] In addition, tribal self-

201. Some Native Alaskan villages are so dependent upon fishing and hunting for subsistence that their need was written into an exemption in the ESA. *See supra* note 176 and accompanying text. For those tribes that do not have any gaming operations, careful resource management may sometimes be the only option for economic development.

202. *See, e.g.*, CONST. AND BY-LAWS OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION ARIZONA preamble (stating that one of the purposes for forming a tribal government was to "conserve and develop our tribal lands and resources for ourselves and our children"); Winona LaDuke, A Seventh Generation Amendment 3-4 (unpublished manuscript, on file with the author) (reflecting on the Iroquois Confederacy's philosophy "[t]hat we must consider the impact of a decision made today on the impact on the Seventh Generation from now").

203. *See* Sec. Order 3206, *supra* note 14, §§ 4-6 (discussing the importance of the "government-to-government relationship with the Indian tribes" and the policies implemented to support the relationship). However, this federal policy of treating Indian tribes on a government-to-government basis, as well as Justice John Marshall's legacy, has escaped the jurisprudence of the Rehnquist Court. *See, e.g.*, Alaska v. Native Village of Venetie Tribal Gov't, 118 S. Ct. 948 (1998) (declaring that Alaskan Native lands are not "Indian country," thus denying the tribal government the authority to tax business activities conducted on its land); South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998) (holding that the reservation had been diminished to prevent the Yankton Sioux tribe from exercising environmental regulatory authority over hazardous waste sites on the reservation); Strate v. A-1 Contractors, 520

determination and self-governance are greatly encouraged.[204] Allowing tribes greater control over critical habitat management furthers the federal policy of self-government. More importantly, dealing with tribes on a government-to-government basis respects their inherent sovereignty. Some tribes have already developed successful and respected habitat management regimes.[205] Data collection and trust between tribes and federal officials have contributed greatly to that success.[206] The Order encourages that process and goes farther in creating mechanisms for other tribes to improve or create their own habitat management plans by promoting respect between federal agencies and tribes and providing the framework for data and resource sharing.[207]

Granting additional authority to tribes would not violate the ESA or the *Dion* decision. As a matter of respecting tribal sovereignty, tribal councils should be permitted to design and execute resource management plans to preserve and protect critical habitat. The Order takes significant steps toward granting tribal councils habitat management authority without removing tribes from ultimate liability under the Act.[208] The Order only applies to tribes or tribal communities, not to indi-

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U.S. 438 (1997) (denying a tribal court the power to maintain jurisdiction over an automobile accident occurring between two non-Indians on a state highway located on the reservation, despite statutory language defining "Indian country" to include rights-of-way). While Justice Marshall had his "Trilogy," *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823), the Rehnquist Court has managed to produce an "Unholy Trinity," manifested in the separate persons of Justices Thomas, O'Connor, and Ginsburg.

204. Promoting tribal self-determination is one of the primary policy goals of the Order. *See* Sec. Order 3206, *supra* note 14, app. § 2(A).

205. *See* DAN SIEMANN, OVERCOMING CONFLICTS WITH THE ENDANGERED SPECIES ACT: BUILDING TRIBAL ENDANGERED SPECIES MANAGEMENT CAPACITY 4-5 (1995) (acknowledging the strong listed species management capacity and assembled expertise of the Yakima, Navajo, and Salish and Kootenai Tribes).

206. These Tribes, in compiling data on species located within the reservation's boundaries, are more aware of how projected activities will affect habitat. *See id.* In planning timber sales and other development with listed species in mind, these Tribes have established themselves as responsible managers of critical habitat. *See id.* at 5. Withholding information from federal officials in order to protect tribal development has been a common practice, yet has created some mistrust between tribal and federal officials. *See id.* at 4.

207. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 5.

208. *See id.* § 2(B)-(D).

vidual Indians.[209] Such individuals are still subject to the ESA and to prosecution.[210] In fact, the *Dion* test is not implicated because the Order does not even address the issue of hunting or fishing rights, but merely the role of tribes in managing habitat. Therefore, the Order reflects not only federal policy, but federal law as well.

4. Ramifications of the Order

In addition to the legal and policy reasons for treating tribes as states under the Order, the likely practical ramifications of the Order also favor such an arrangement. In restricting the application of the Order to "Indian lands"[211] and deferring to tribal authority in the management of critical habitat,[212] the Order creates some potential problems for tribes. By choosing not to use the term "Indian country"[213] in defining the scope of the Order, the Secretaries placed severe limits upon tribal authority within the reservation.[214] Although some reservations consist of almost exclusively "Indian lands," others are heavily fragmented as the result of allotment.[215] Lim-

209. *See id.* §§ 1-2, 5.

210. Although they may be members of a tribe, as Indians individually exercise their rights, they are individually liable. *See, e.g.*, Puyallup Tribe, Inc. v. Washington Game Dep't, 433 U.S. 165, 171 (1977) (citing Puyallup v. Washington Game Dep't, 391 U.S. 392, 398 (1967)).

211. *See supra* note 127.

212. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 3(B).

213. *See supra* note 127 (distinguishing "Indian Lands" from "Indian country").

214. Presently, a tribe may not exercise civil jurisdiction over nonmembers within the reservation unless one of the two narrow *Montana* exceptions are met. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981) (assuring that a tribe may still exercise jurisdiction over nonmembers who enter into consensual relationships, such as contracts or leases with members, *or* if the conduct of the nonmember has a negative and direct effect "on the political integrity, economic security, or health and welfare of the tribe"). The Court added that regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe did not bear a significantly close relationship to tribal self-government. *See id.* at 564. Without the restrictive "Indian lands" language in place, a tribe might have at least attempted to argue that nonmember activities within the reservation that adversely affected habitat enjoyed by candidate, proposed, or listed species had an adverse effect on the tribe's economic security or health and welfare, thus bringing the matter under the second *Montana* exception. By being restricted to exercising habitat management authority over only tribal trust lands, tribal officials must rely upon federal agencies to address concerns on fee land within the reservation.

215. The allotment process was designed to break up the reservation sys-

iting the application of the Order to "Indian lands" prevents tribes from regulating activities on nonmember fee land that may adversely affect critical habitat. In such cases, tribes are dependent upon the Interior or Commerce Departments to take action against non-Indian parties who may be violating the ESA. Considering the overwhelming task facing federal agencies of enforcing the ESA off reservations,[216] it seems likely that Indian tribes will be in a vulnerable position and virtually on their own to protect their resources.

While the Order may present some difficulties, it also presents some positive possibilities. A benefit of granting tribes greater control over information may lie in tribal development of more cooperative and trusting relationships with mainstream environmentalists. Rather than challenging tribes in court, it may be better for environmental groups to meet with tribes at the bargaining table. In working collectively and cooperatively with Indian tribes, environmentalists may find another ally in the joint effort to protect dwindling resources and vanishing species.[217] Moreover, environmental organizations, in developing cooperative relationships with tribes, might be able to share in the expertise and resources that many tribes possess.[218] Respecting and recognizing tribal expertise and sovereignty could go a long way in promoting shared conservationist goals. The alternative for environmental groups is to increase litigation against tribes and to create a foe where they would otherwise find a friend. Considering the history of animosity between tribes and environmental groups, this aspect of the Order may be one of its greater hidden benefits.

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tem and communal village life and replace it with a European-American system of individual land ownership. *See* CLINTON ET AL., *supra* note 74, at 148-50. A tribe's ability to exercise sovereignty within its borders will often reflect the Court's analysis of the demographics of the reservation. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (declining to allow an Indian tribe to exercise criminal authority over a non-Indian, even though crime was committed against tribal member within the reservation).

216. *See supra* notes 49, 189 (discussing the inability of the FWS and NFMS to fulfill their statutory responsibilities due to the enormity of the task).

217. *See supra* note 1 and accompanying text (discussing the threat of extinction currently facing various species of trees and other plants).

218. Given the inherent mistrust that tribes often have for environmental organizations, this road may be a long and difficult one to travel. As with federal agencies like the BIA, who share a long and dark history with Indian tribes, environmental groups will have to work diligently to earn the trust of Indian tribes if they choose to become partners in the preservation of listed species.

There is significant legal support for the Interior and Commerce Secretaries to issue an interpretive order. Other federal statutes allow tribes to be treated as states to assist in administration of environmental regulations. Federal policy seeks to promote greater tribal self-determination and tribes have a sovereign interest in successfully managing critical habitat. Moreover, there are many similarities in the language of the Order and the language in the ESA regarding state management of critical habitat. Unfortunately, the Order does not provide the necessary legal foundation on its own. The Order also presents other difficulties that tribes will need to address, but also opens up other possibilities. Only an interpretive order can provide tribes the legal protection they need to develop successful habitat management plans. The Interior and Commerce Secretaries would be well within their authority to issue such an order.

B. MOVING BEYOND THE TRADITIONAL APPROACH TOWARDS PRODUCTIVE DIALOGUE

Since the Order did not create new law or resolve any prior disputes, perhaps it is more useful to evaluate the Order based on what it accomplished beyond its legal standards. Rather than viewing the legal issues in a zero-sum game approach, the Order begins a process geared toward building stronger relationships between Indian tribes and the federal government.

First, the Order takes an important and sorely needed step of creating or improving dialogue between tribes and the federal government. As noted in the White Mountain Apache example, past mistrust between the Tribe and the federal government led tribal officials to withhold information from the FWS regarding threatened and endangered species on the reservation.[219] In the long run, creating a system which fosters trust instead of animosity between tribes and the federal government will be far more beneficial to threatened and endangered species on Indian lands than any legally binding precedent or amendment from Congress.

In addition, this dialogue could potentially do more than develop trust between tribes and federal officials. It could set the standard for a new way of viewing federal-tribal relationships—one closer to the traditional diplomatic model of sover-

219. *See supra* note 206.

eign-sovereign relationships.[220] Resolving disputes between Indian tribes has become so habitually litigious in nature that the diplomatic approach is rarely viewed as the first option. The Order and the negotiations leading to it provide a framework in which diplomatic dialogue can not only be the first option, but often the best.

Second, the Order offers the opportunity for tribes and federal agencies to move beyond the traditional notions of sovereignty and build systems of shared power. Rather than viewing the federal government as the superior and administering agency, the Order attempts to place tribes and federal officials on an equal level with regard to critical habitat. While still maintaining a supervisory position and full enforcing power over the ESA, federal agencies are encouraged to share that power with Indian tribes and solicit their assistance in administering the ESA. Rather than recognizing a tribe's authority based on its land base, the Order allows each tribe to be treated equally relative to other tribes.[221] This notion of an equal sovereignty among tribes has escaped Indian law jurisprudence for most of its history.[222] Certainly not all tribes at the outset will have the experience and expertise of such tribes as the Yakima and the Salish,[223] but the Order at least creates the opportunity for tribes to develop such expertise.[224] Once tribes are in a better position to manage their own habitat, they will be more able to share in this administrative power with federal agencies.

Finally, the Order establishes what could be a successful model for future dealings between Indian tribes and the federal government.[225] Certainly, the model will not work in all situa-

220. For example, if the United States government wished to resolve a dispute with a foreign government over treaty stipulations, federal officials of the State Department, not the Justice Department, would most likely begin the dialogue.

221. This will not be the case, however, for those tribes with reservations that hold a relatively small percentage of tribal trust land. These tribes will continue to be more vulnerable and susceptible to the effects of habitat modification on listed species.

222. *See supra* note 215 and accompanying text (discussing the result in the *Oliphant* case). Compare the success of the Suquamish Tribe with that of the Navajo Nation, a relatively intact and "sophisticated" tribal entity. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); United States v. Wheeler, 435 U.S. 313 (1978).

223. *See supra* note 205 and accompanying text.

224. *See* Sec. Order 3206, *supra* note 14, § 5, Principle 3.

225. *See* Wilkinson, *supra* note 102, at 1086-88 (suggesting that although

tions due to the diverse and complicated nature of the Indian communities in the United States. The model may also not be useful in all areas of controversy. The negotiations leading to the Order illustrate a process that goes beyond the standard practice in resolving disputes between federal law and Indian treaty rights. The negotiation process utilized in creating this Order demonstrates how high-level, person-to-person contact between tribes and federal agencies can make progress beyond what twenty years of environmentally-related litigation has done to exacerbate the persistent problems in the tribal-federal relationship.

CONCLUSION

In enacting the ESA, Congress stressed the goal of protecting ecosystems as a means of preserving threatened and endangered species. Congress charged the Interior and Commerce Departments with administering the ESA, giving them wide deference to seek the help of states, governments, and agencies in promoting the goal of listed species' conservation. Through the years, however, this has proven to be a daunting task. By eliciting the assistance of Indian tribes in achieving these goals, the Secretaries acted well within their congressional mandate. In addition, the Secretaries, in enacting the Order, have furthered the federal government's goals of promoting tribal self-determination and respecting tribal sovereignty. Moreover, since the ESA did not abrogate Indian treaty rights, the Order diminishes the likelihood of further interferences with tribal sovereignty and recognizes the supremacy of Indian treaties. In accomplishing these goals, the Secretaries did not diminish the power of the ESA, but created a greater opportunity for promoting ecosystem management and protecting and preserving threatened and endangered species. A tribal ecosystem management approach honors the plain language, intent, and purpose of the ESA.

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the approach employed in creating the Order might be useful in other areas of federal Indian law, "[s]trong headwinds will have to be faced" if such an approach is to be sought in the future).