Buffalo Environmental Law Journal

Volume 9 | Number 2 Article 1

4-1-2002

American Indian Perspectives on the Endangered Species Act

Steven K. Albert
Pueblo of Zuni Fish and Wildlife Department

AMERICAN INDIAN PERSPECTIVES ON THE ENDANGERED SPECIES ACT

Steven K. Albert*

> Indian Nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil. . . The very term "Nation" so generally applied to them means "a people distinct from others."[1]
>
> - John C. Marshall, Chief Justice of the United States Supreme Court, 1832

Introduction

Indian Tribes own or control vast amounts of land in the United States, particularly in the West. The total land base under tribal jurisdiction excluding Alaska encompasses approximately twenty-two million hectares (ha) (54 million acres). The largest Indian reservation, the Navajo, covers 5.7 million ha. (14 million acres) in three states and is approximately the size of the state of West Virginia. It is larger than nine other states. Much of this land is undeveloped and provides ideal habitat for rare, threatened or endangered species. Over the years, there has been considerable debate, not always amicable, over the respective roles of the federal government and Tribes concerning endangered species management. Many Tribes view the Endangered Species Act (ESA), and its implementation on tribal lands, as a direct affront to tribal

---

* Steven Albert received his B.A. from Colby College in 1983 and his M.S. in Wildlife and Fisheries Science from the University of Arizona in 1992. He has worked for a variety of state, federal, and tribal wildlife management organizations in the Western U.S. Since 1994 he has been the Director of the Pueblo of Zuni Fish and Wildlife Department in Zuni, New Mexico.

[1] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

sovereignty.[2] Recently, a new dialogue has arisen among some Tribes and the U.S. Fish and Wildlife Service (Service) that may lead to better cooperation between these entities and, ultimately, be more effective at protecting endangered species.

Background: Tribal Sovereignty and Trust Responsibility

The foundation of the federal/tribal relationship is built on several principles that have been refined through many court decisions and the directives of several Presidential administrations. By far, the most important and pervasive of these concepts are Tribal Sovereignty and Trust Responsibility.

Tribal Sovereignty:

The inherent sovereignty of Indian Tribes and nations has long been recognized by the United States Government and is even mentioned in the United States Constitution, where the power to negotiate with Indian Tribes is specifically given to the United States Government,[3] paralleling the power to negotiate with foreign sovereigns. Yet the implementation of tribal sovereignty has been carried out unevenly over the course of the last two centuries. In the early part of the 20th century several Indian Tribes were either terminated (i.e. had recognition of their federal status as distinct Tribes unilaterally revoked), or had their land parceled out to non-Indians under the auspices of the Dawes Act[4]. However, the last few decades, beginning with the Nixon administration, have seen a resurgence in recognition of sovereignty. The policy outlined under Nixon was, succinctly put, to enhance Indian "sense of autonomy without

---

[2] Ronnie Lupe, Chairman of the White Mountain Apache Tribe, Address at the Twentieth Annual National Indian Timber Symposium 1 (May 13-17, 1996) (on file with author).

[3] U.S. CONST. art. I, § 8.

[4] Brian Czech, *American Indians and Wildlife Conservation,* 23 WILDLIFE SOCIETY BULLETIN 568-573 (1995).

threatening [tribal] sense of community."[5] Within the context of natural resource management, tribal sovereignty has been strengthened in recent years, especially under the Clinton Administration, with the issuance of several Executive Department directives (see below).

As sovereign nations, Tribes and the land they administer are not subject to the same public laws that govern other lands within the United States, public or private. In the courts, it has been well-established that Tribes may regulate hunting and fishing on their lands, rights conferred either by treaties or by the fact of aboriginal occupancy.[6] However, the courts have also generally ruled that U.S. Legislature maintains some power over governmental relations with Tribes that affect these rights. For example, Congress has the power to cancel treaties—including those with Indian Tribes—and the power to make certain categories of laws affecting tribal rights. Absent clear congressional intent, however, hunting and fishing rights are not extinguished and may even be upheld for off-reservation lands (including both public and private land) where a Tribe has a strong enough treaty claim. In fact, many Tribes have relatively small reservations, but very large areas in which they have maintained treaty hunting and fishing rights and, consequently, an active stake in the management of these lands. This concept was affirmed by United States v. Winans[7], which restated the proposition that, concurrent with the establishment of a reservation, Tribes retain all rights that are not specifically given up through treaties or otherwise. Put another way, tribal rights pre-existed the treaty or the reservation and were not something created concurrently. Treaty rights may even take precedence over state laws or serve to preempt inconsistent state

---

[5] J.R. WUNDER, RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 160 (1994).

[6] *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); United States v. Adair, 723 F. 2d 1394 (9th Cir. 1983), cert denied 467 U.S. 1252 (1984); Washington v. Washington State Commercial Passenger Fishing Vessel Assn, 443 U.S. 658 (1979).

[7] 198 U.S. 371 (1905).

laws[8]. In general, however, Congress has not used its authority extensively to regulate Indian hunting and fishing and the matter has been left to tribal regulation or for Tribes and states to work out.

Trust Responsibility:

While Indian Tribes in the United States are (quasi) sovereign nations, the U.S. is legally required to act as a fiduciary for Indian interests, including the protection of the health, welfare, and land resources of Indian people. In other words, Indian land and resources are held "in trust" by the U.S. Government, a policy known as the government's trust responsibility. In managing trust resources or assisting Tribes to do so the Government must act for the exclusive benefit of Tribes, and ensure that Indian reservations are protected and used for the purposes for which they are intended, i.e. to provide for the physical, economic, social, and spiritual well-being of Tribal members. Reservations were not set aside as parks or, for that matter, the protection of wildlife or other natural resources, except as this will directly benefit the Tribe for which the reservation was created. Ironically, this stringent obligation on the federal government to protect tribal interests has also led in practice to some of the most restrictive regulations on Tribes concerning development, a situation that often leads to conflicts with the practice of tribal sovereignty.[9]

The interaction of the concepts and practices of tribal sovereignty and trust responsibility are often complex and occasionally contradictory: Tribal Sovereignty tends toward greater autonomy, while Trust Responsibility tends toward more federal control.

---

[8] Bruce Davies, *Treaty Rights and the Endangered Species Act* (undated) (unpublished paper on file with author).

[9] Gary Morishima, *Indian Tribes and Endangered Species*, Proceedings of the Twenty-First National Indian Timber Symposium (June 1-6, 1997) (on file with author).

Executive Directives

In the matter of natural resource or wildlife law several other Executive Branch administrative directives also bear directly on the relationship of the U.S. Fish and Wildlife Service and other Interior Department Agencies to Tribes:

Secretarial Order 3175 (November 8, 1993) and Interior Departmental Manual 512 DM 2. These documents require all Interior Department agencies to identify potential effects from their activities on Indian trust resources and to have meaningful consultation with Tribes where Department activities affect tribal resources, either directly or indirectly. This Order also directs Interior Agencies to remove procedural impediments to working effectively with tribal governments, to consult with Tribes on a government-to-government basis where trust resources are affected, and to identify potential effects on Indian trust resources of Department plans, projects, programs, and activities.

Presidential Memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments) This document reminds all Executive Branch departments and agencies of the government-to-government relationship between Tribes and the United States and requires these Departments to consult with tribal governments to "the greatest extent practicable" prior to taking actions that affect tribal governments; to assess the impact of federal activities on tribal trust resources; and to ensure tribal rights and concerns are taken into account during plan development and program implementation.

The Native American Policy of the U.S. Fish and Wildlife Service, June 28, 1994. This policy reiterates the government-to-government relationship and establishes a framework for joint projects and formal agreements. It also directs the Service to assist Tribes in identifying federal and non-federal funding sources for wildlife management activities, and provides a framework for the

Service to give technical assistance to Tribes, where requested. While the Service has been helpful to Tribes from a technical standpoint, many Tribes feel that funding has been hard to get[10].

Secretarial Order 3206, June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act). This is the most far-reaching of the Executive Branch directives and has been very well-received by most Tribes. It also has potentially the greatest impact on how Tribes and the federal government manage endangered species. While some have suggested that the Secretarial Order gives Tribes special preference in managing endangered species[11], this is far from true. The Order specifically states that it "shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities . . . under existing law" nor does it preempt or modify the Service's statutory authorities (e.g. enforcement of the ESA). What the Order does is re-acknowledge the trust and treaty responsibilities of the U.S. Government; instruct federal agencies to be sensitive to Indian culture, religion, and spirituality, the basis for which often relies on the use resources; and instruct the Service to support tribal measures that preclude the need for federal laws governing the conservation of natural resources. It also reminds Interior Departments that Indian lands are not subject to the same controls as federal public lands, nor are they subject to the same regulations. It also reaffirms that Tribes themselves are the appropriate governmental entities to manage their lands. At the same time, the Order strives to harmonize tribal concerns about the ESA

---

[10] While some Tribes, especially those with funding from casinos or oil and gas leases, have well-developed natural resource departments, others struggle to fund even the most basic inventories of their own resources. One stumbling block has been the prohibition of allowing Tribes access to Dingell-Johnson, Pittman-Robertson funding, a large source of revenue for states to fund wildlife related projects. This money comes from a tax on sporting arms and ammunition that even tribal members pay.

[11] Scott Sonner, *Feds Waive Species Act on Indian Lands*, Albuquerque Journal, at A6 (June 8, 1997).

with federal mandates to enforce it and it makes allowances for Tribes to develop their own conservation plans for federally listed species that are more responsive to tribal needs. If a Tribe develops a viable conservation plan, the Service is directed to defer to it. Presumably the Service and the Tribe will cooperatively agree on what is viable.

Executive Order No. 13084, May 14, 1998 (Consultation and Coordination With Indian Tribal Governments). This Presidential Order instructs all executive branch agencies to establish a process whereby elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. Interestingly, it also instructs agencies, to the extent practicable and permitted by law, to consider any application by a tribal government for a waiver of statutory or regulatory requirements with a general view toward increasing opportunities for flexible policy approaches. This opportunity for administrative flexibility has the potential to play a key role in how the Service implements endangered species recovery on tribal land.

Unique Status of Indian Tribes in Regard to Natural Resource Management the ESA

Because of their status as trustees, Indian Tribes are very dependent on federal funding; thus, a wide array of activities on Indian lands can trigger Section 7 consultation (the process by which the Service determines what effects, if any, a federal action may have on an endangered species)—many more than on private land where the federal presence and the connection to federal activities is not so extensive. While the intent of these regulations is to protect Indian resources, the occasional side effect can be an excessive bureaucracy that slows even the most benign types of projects. This pervasive federal influence has made many Tribes wary of the potential impacts of the ESA. Many Tribes feel that they have been excellent land stewards and consequently have a high proportion of rare and

endangered species on their land. In addition, most Indian reservations are far less developed (i.e. have a higher proportion of rangelands, forests, or de facto wilderness) than surrounding private land. This means that tribal lands have the potential to act as a safe haven for species that are driven off surrounding private land as it gets developed. Tribes feel penalized for this good stewardship by having restrictions placed on development activities in what are already some of the most impoverished communities in the country. While most Tribes do want to keep vast areas of undeveloped land on their reservations, they don't want to be restricted from pursuing a level of economic development closer to that of the rest of the United States. Just as importantly, they don't want to be restricted from carrying out cultural and religious activities that might be restricted by federal laws. Perhaps the most contentious and news-worthy of these have been the cases regarding the use of eagles, where Congress has occasionally used its authority to restrict some practices. Such was the case when it stipulated under the Eagle Protection Act that Indians were prohibited from hunting eagles for certain uses[12]. Though Tribes have taken relatively small numbers of eagles for ceremonial uses for millennia, it was only when the bald eagle (*Haliaeetus leucocephalus*) became endangered from non-Indian activities, especially the widespread use of the pesticide DDT, that it became a conflict.

Still, it is not entirely clear whether the Service has authority to enforce the ESA on tribal land, as there have been few significant court cases that have specifically tested the question. At the heart of the matter is the question of what was Congress' intent when it passed the law. The ESA does not specifically mention Indian

---

[12] This ban may not extend to ceremonial purposes, however. In U.S. v. Abeita, 632 F. Supp. 1301 (1986), the Federal District Court of New Mexico ruled that the Bald and Golden Eagle Protection Act did not negate the Treaty of Guadalupe Hidalgo and therefore, the Indian defendant in the case had the right to hunt eagles for ceremonial purposes. In United States v. Abeita, the court found no congressional intent to cancel treaty rights to take for ceremonial use.

Tribes[13], and other court cases have upheld the concept that, unless tribal treaty and other rights are specifically abrogated by an act of Congress or a particular piece of legislation, they remain in force[14]. In the case that came the closest to testing this question, United States v. Dion, a tribal member was convicted of taking of a bald eagle. The statute under which the case was prosecuted, however, was not the ESA, but the Eagle Protection Act. The ESA question was unanswered by the Supreme Court, though the Circuit Court ruled that the eagle was taken for commercial use and was thus prohibited.[15] These issues can become quite emotional as they intersect with aspects of religious freedom and conflict with laws that protect Native American Religions such as the Indian Religious Freedom Act. A recent court case involving the use of eagle parts for religious purposes, Saenz, No. 99-21M, U.S. District Court of New Mexico, has brought into question the Service's handling of the eagle permitting process.

For its part, the federal government maintains that, although Tribes are not mentioned in the ESA, "laws of general applicability", including the ESA and other environmental laws such as the Clean Water, Clean Air Act, the National Environmental Policy Act and others, are validly enforceable on Indian lands and they have proceeded under this assumption.

Interestingly, not all Tribes have fought against applying the ESA on tribal land. Indeed, some Tribes have benefitted from implementation of the ESA, especially in regard to protection of fisheries. In the Pacific Northwest, for example, off-reservation treaty fishing rights for salmon or other species are often protected by

---

[13] Sylvia Cates, *Endangered Species and Tribal Lands: Approaches to Addressing Endangered Species Issues on Indian Lands and Meeting Tribal Resource Management Priorities* (1999) (unpublished paper on file with author).

[14] Charles Wilkinson, *Symposium: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: the Tribal Rights- Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063-1107 (1997).

[15] 476 U.S. 734 (1986).

mandatory conservation measures that are backed with the strong arm of the ESA.

In addition to the legal aspects of jurisdiction, conflict has also arisen over administrative aspects of the ESA. When a species has been declared endangered the law mandates the development of a recovery plan. Previous recovery efforts have not always utilized tribal input to the greatest extent possible. While some Tribes have been included at the level of stake-holders or interested parties, their participation, comments, or suggestions were accorded the same weight as, for example, large private land-owners in the region. The Tulalip Tribes of the Northwest have charged that they were largely ignored by the Service in the Section 7 consultation during a major Habitat Conservation Plan that directly affected them. Several other Tribes in the Southwest were shocked to find that critical habitat (a designation that carries with it very stringent restrictions on land use) for the Mexican spotted owl (*Strix occidentalis lucida*) had been designated on tribal land without prior consultation. Critical habitat for the Rio Grande silvery minnow (*Hybognathus amarus*) was also declared on Pueblo Indian land in New Mexico, over the objections of tribal leaders. Instances such as these could have been better handled simply through improved communication.

Tribes are also watching closely to determine how species recovery affects tribal water rights. This is particularly true in the southwestern U.S., where water is relatively scarce and the number of water users is growing rapidly. Many Tribes along the Rio Grande are already involved in issues surrounding the Rio Grande silvery minnow and the Southwestern willow flycatcher (*Empidonax traillii extimus*), a riparian dependent species. While Tribes are supportive of protection for these species, they are also wary of shouldering a large share of the burden for recovery for fear that this will lead to restrictions on their use of water.

In all but a few instances, Indian water rights are senior to those of all other users, dating back at least to the date of the establishment (or U.S. Government recognition) of a Tribe's reservation. If a Tribe's occupancy of an area pre-dates the establishment of the Reservation, Tribes may exert a "time immemorial" water

claim. Tribal water rights are generally referred to as "federal" or "Indian reserved" water rights meaning when reservations were created, although water rights were not specifically addressed, it was clearly the intent to include them, because, Tribes maintain, any establishment of a reservation without concurrent rights to its water would have been ridiculously unfair. This concept is referred to as the "Winters doctrine" and is one of the cornerstones of Indian Water Law[16]. Recently, this doctrine has been affirmed to apply to both surface and ground water.[17]

In many cases, due to lack of funding or the very lengthy and complicated water rights litigation or negotiation processes, the water rights in a basin or a river have not been adjudicated. Yet water development has gone on apace. When the water rights are finally determined, it's possible in most cases that Tribes will have rights senior to those of all other users. The implications for the continued use of water by non-Indian parties in many instances is profound. Even in cases where the water rights have been adjudicated Tribes have not always made full use of their water rights – *yet*. It is important to remember that these water rights are not subject to forfeiture due to non-use, and thus may be exercised at any time in the future while still retaining their senior priority. This becomes problematic when, for example, a watercourse is already fully appropriated and further water use has been deemed to jeopardize a listed species. This especially nettlesome to Tribes since, in most cases, it was not Indian appropriation of water that has led to loss of habitat and listed species jeopardy.[18] In the Tribes' view, the ESA should not, and does not, re-prioritize tribal water rights and the suggestion that Tribes should be precluded from exercising their

---

[16] Winters v. United States, 207 U.S. 564 (1908).

[17] In re General Adjudication of All Rights to Use Water in the Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 (1999), cert denied, 120 S. Ct. 2705 (2000).

[18] Stanley M. Pollack, *The Endangered Species Act: A Constraint on the Development of Indian Reserved Rights in the Colorado River Basin* (undated) (unpublished paper on file with author).

reserved water rights to protect an endangered species ignores the causes of habitat deterioration that led to the species decline.

Possibilities for Federal/Tribal Cooperation on Endangered Species Protection

As we have seen, the diversity of opinion about threatened and endangered species has led to a contentious history of differing interpretations over federal/tribal jurisdiction concerning resource management. Despite this, the Service and many Tribes have expressed a willingness to work together on endangered species issues and some Tribes around the country are optimistic that they and the Service can begin to move in a new direction. While Tribes in the past have had little technical expertise and only minimal natural resource management capabilities, this is no longer the case. Within the last few years, many Tribes have gained considerable natural resource management expertise which is being recognized by many federal agencies. Doors are being opened for tribal participation on a broader level among agencies such as the Bureau of Reclamation and the Environmental Protection Agency, and many federal agencies are hiring Native American liaisons or creating entire tribal programs and sources of funding. The Service has created an office of Tribal Liaison in each of its management regions. And Tribes are becoming more involved than ever in endangered species recovery. For example, the Nez Perce Tribe in Idaho have taken an active lead in the recovery of the Rocky Mountain Wolf (*Canis lupus*), and the White Mountain Apache Tribe are involved in efforts to recover the Apache Trout (*Oncorrhynchus apache*). The Pyramid Lake Paiute Tribe continues to make significant contributions to the recovery and restoration of the Lahontan cutthroat trout (*Oncorhynchus clarki henshawi*) and the cui-ui (*Chasmistes cujus*). Overall, the Service and Tribes are currently involved in over 100 Service/Tribal partnerships to restore and recover endangered and threatened species.

Some Tribes have also moved forward in an effort to re-frame the parameters by which Tribes and the Service interact. The White Mountain Apache Tribe and the Pueblo of Zuni, among others, have established Statements of Relationship (SORs) with the Service. The SORs, developed at the regional level, reaffirm tribal sovereignty while recognizing the Service's technical expertise and the ability to assist the Tribe with complex management issues. Other Tribes have established cooperative law enforcement agreements to more effectively prosecute federal crimes on Reservations and to more easily work through conflicting legal interpretations. These documents set up a framework by which the Service and the Tribe could, while recognizing differences of opinion or interpretation, work through problems toward a common goal of protecting resources, promoting biodiversity and maintaining healthy eco-systems. These initiatives have become possible in part because Tribes have increased their technical capabilities and infrastructure, but also because of a willingness for open dialogue on both sides. Central to this approach is the Service's use of some of its "administrative flexibility" (a phrase taken from some of the Executive Branch directives) to work with Tribes to develop mutually satisfactory solutions to seemingly intransigent resource issues.

On the long contentious issue of species recovery, recent strides have been taken by both sides that are indicative of the sea change in tribal federal relations. When the initial steps were taken toward a recovery plan of the endangered southwestern willow flycatcher, for example, some Tribes expressed dismay at the relatively low level of tribal involvement. Initially, Tribes were grouped with other stake-holders, such as private land-owners (numbering in the many hundreds). Tribes believed that their voices were being unduly diluted, given the large amount of flycatcher habitat on tribal land (possibly as much as one third of the population of the species). Under Secretarial Order 3206, Tribes have considerable authority to manage endangered species on Indian land. Some Tribes have argued that each individual Tribe had more endangered species management authority than, say, the individual states that were involved in the process. For example, a Tribe, unlike

a state, can opt to develop its own conservation plan. In response, the Service established a Tribal Working Group and a position of Tribal Liaison (a tribal employee) to work directly with Tribes.

In summary, while the history of federal-tribal conflict over the ESA has been contentious and litigious, optimism exists over the possibilities for re-shaping the relationship in an extra-legal framework. Flexibility and openness on both sides is key to the success of this approach. The goal of the recovery process, of course, is not (only) higher populations of a particular species, but secure and improved habitat in general. Tribes are not advocating abandoning the ESA or non-participation in the recovery process. Instead, they are insisting on the flexibility to be able to perform these functions in a manner consistent with tribal goals and tribal sovereignty.

Acknowledgments

This paper was supported by the Zuni Tribal Council and the Zuni Heritage and Historic Preservation Office. The manuscript benefitted greatly from comments and input from Jim Cooney, Sylvia Cates, Charles Wilkinson, Norman Jojola, Bruce Finke, Les Ramirez, David Mikesic, John Nystad, and Stuart Leon.