

# Application of the Endangered Species Act to Tribal Actions: Can Ambiguity be a Good Thing?

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*White Mountain Apaches never saw themselves as separate from Mother Earth. We are one with the land. Hunting was not for sport but to provide food and clothing. We have always been taught to respect the land and living things because we have a sacred responsibility for the stewardship of the lands that the Creator has provided us.*

– Chairman Ronnie Lupe, White Mountain Apache<sup>2</sup>

*The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.*

– Department of Game v. Puyallup Tribe (Puyallup II)<sup>3</sup>

## I. INTRODUCTION

Imagine a time when fish were so abundant that you could nearly walk

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<sup>2</sup> Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1069 (1997).

<sup>3</sup> Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

across the water on their backs. Imagine a time when you could not conceivably cut down every tree, kill every wolf, or destroy every marbled murrelet. Now imagine a time when there are only a handful of gray whales left. Imagine a time where any one individual's actions, or a society's collective actions, could wipe out a species in the blink of an eye.

These scenarios underscore a fundamental tension between the sovereignty of Native American tribes in the United States and the Endangered Species Act (ESA). When most Indian treaties were signed or reservations created, most could not imagine the extinction of a species. In *United States v. Washington*, for example, the Ninth Circuit noted that "the parties to the treaties did not anticipate shortages of harvestable fish."<sup>4</sup> In contrast, numerous species have since become imperiled, a situation that led to the creation of the ESA.<sup>5</sup> Given the relatively undeveloped state of many western Indian reservations, tribal areas are focal points as enclaves of potential critical habitat. Tribal sovereignty and the ESA generally trump most competing concerns. Often, the ESA and tribal interests align. In many cases, tribes have championed the use of the ESA to curb off-reservation activities by non-Indians that might harm species.

There is a larger question of when tribal interests and the ESA come into direct conflict. For example, this may arise if a tribe seeks to promote its economic development by logging trees or taking water in a manner that impacts a listed species. The Supreme Court has never squarely decided the issue of whether the ESA applies to tribes, or what should happen in the event of a direct conflict. This article does not offer a normative critique of what the law should be, but instead reviews how courts and parties have treated the intersection of the ESA and tribal rights, and predicts how they might this issue in the future. Given the high stakes of litigating these questions and the uncertainty of the potential outcome, it is perhaps not a surprise that negotiated solutions are more often the result, and one that may offer a better opportunity for meeting both tribal needs and protection and actual recovery of endangered species.

The litigation that has taken place raises several fundamental questions. The initial question is whether Congress intended the ESA to apply to tribes at

<sup>4</sup> *United States v. Washington*, 520 F.2d 676, 689 (9th Cir. 1975).

<sup>5</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531(a) (2006).

all. There are three parts to this analysis: the scope of a tribal right; second, whether Congress had to abrogate the rights in question for the ESA to apply; and third if Congress specifically abrogated such rights in passing the ESA.<sup>6</sup> If there is no “blanket immunity” from the ESA for tribes, the next question is whether application of the ESA to tribes differs from other applications of the ESA. Although discussed by many commentators with firm positions,<sup>7</sup> the actual case law is nuanced and uncertain, with disputes generally resulting in negotiated solutions rather than complete litigation “victory” for either tribal supremacy or species predominance.

This article is divided into seven parts. Part II briefly describes the federal trust duties owed to tribes. Part III provides an overview of the Endangered Species Act. Part IV analyzes the threshold query about whether tribal activities are even subject to potential ESA restrictions. Part V explores the legal principles that inform the question of whether and how application of the ESA to restrict tribal activities may cause a breach of trust. Part VI explores how such disputes have actually played out, analyzing both Secretarial Order 3206 and its impact, and then examining actual case studies of how conflict over tribal rights and listed species have evolved. Part VII offers a brief conclusion.

## II. BRIEF DESCRIPTION OF FEDERAL TRUST DUTIES TO TRIBES

Indian tribes occupy a unique place in United States legal jurisprudence. There are three main principles underlying Indian law.<sup>8</sup> First, an Indian nation possesses all of the powers of a sovereign state; this includes “inherent powers of a limited sovereignty that has never been extinguished.”<sup>9</sup> Second, the federal government has specific roles and obligations that create a fundamental trust relationship with Indian tribes.<sup>10</sup> Third, the states have limited authority in Indian affairs.<sup>11</sup> Along with key canons of construction, each of these principles is

<sup>6</sup> See discussion *infra* Part IV.

<sup>7</sup> See discussion *infra* Part IV.

<sup>8</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter HANDBOOK].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

important in addressing how governments and courts have attempted to reconcile the rights of Indian tribes with the Endangered Species Act.

Several canons of construction are important in interpreting Indian law. First, Indian tribes retain inherent rights pre-existing the United States; such rights are “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”<sup>12</sup> Further, the text of a treaty or document establishing a reservation must be construed as the Indians would naturally have understood the text at the time it was created, with doubtful or ambiguous expressions resolved in the Indians’ favor.<sup>13</sup> The Supreme Court noted its “responsibility to see that the terms of the treaty are carried out...in a spirit which generously recognizes the full obligation of this nation to protect... [tribal] interests.”<sup>14</sup> Although tribal rights can be abrogated, congressional intent to do so must be clear before tribal sovereignty will be impaired.<sup>15</sup>

Although Indian law has often been a pendulum swinging from one extreme to another,<sup>16</sup> tribes today are recognized as sovereign nations with rights that are reserved or inherent, as well as rights set out in specific treaties, statutes, and executive orders interpreted by the courts.<sup>17</sup> The Indian Commerce and Supremacy Clauses of the Constitution provide key foundational pieces. The Commerce Clause states that “Congress shall have power...[t]o regulate commerce with foreign nations, and among the several states, *and with the Indian tribes*.”<sup>18</sup> The Supremacy Clause provides that: “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law

<sup>12</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905). Note: Indian “law” is derived from a variety of sources, including reserved rights, international law, the U.S. Constitution, treaties, executive orders, presidential decrees, and congressional action. See *Handbook*, *supra* note 8 at 116. The nuances of these various sources rights, and their intersection with the ESA, are important, but somewhat beyond the scope of this article. Unless otherwise noted, the discussion will focus, as most of the cases discussing tribal rights-ESA issues do, on Indian treaty rights.

<sup>13</sup> *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999).

<sup>14</sup> *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942).

<sup>15</sup> *United States v. Dion*, 476 U.S. 734, 739 (1986).

<sup>16</sup> See, e.g., *HANDBOOK*, *supra* note 8, at 2.

<sup>17</sup> For a general overview, see *id.* at 116.

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>19</sup> These clauses provide the foundation for subsequent judicial opinions interpreting the federal relationship with tribes.

In what has become known as the *Marshall Trilogy*, Chief Justice Marshall described the tribes as “domestic dependent nations” for which their “relations to the United States resemble that of a ward to his guardian.”<sup>20</sup> In a subsequent opinion, Marshall held that the treaty creating the Cherokee Nation “recognize[ed] the pre-existing power of the nation to govern itself.”<sup>21</sup>

A century later, the Court re-analogized the relationship,<sup>22</sup> with the government having “charged itself with moral obligations of the highest responsibility and trust” and the most exacting fiduciary standards.<sup>23</sup> As the rhetoric shifted over time, sometimes dramatically, the pendulum swung towards an era of “self-determination” after the 1960s.<sup>24</sup> Today, tribes are seeking “economic development of [their] land, better utilization of national and human resources, and protection of the tribal/reservation environment.”<sup>25</sup>

Even as tribal governments have promoted their own sovereign status, the federal government’s trust obligation has remained critical. As the Supreme Court noted, there is a “distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”<sup>26</sup> The trust relationship depends on a variety of factors. Indeed, the precise scope of the obligation and any liability for breach of that obligation must be determined in light of the relationships between the government and the particular tribe.<sup>27</sup> If a breach for a fiduciary relationship is found, monetary remedies may be

<sup>19</sup> U.S. CONST. art. VI, § 1, cl. 2.

<sup>20</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>21</sup> *Worcester v. Georgia*, 31 U.S. 515, 561–62 (1832).

<sup>22</sup> *Klamath and Modoc Tribes of Indians v. United States*, 296 U.S. 244, 254 (1935).

<sup>23</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

<sup>24</sup> ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM*, 41 (5th ed. 2007).

<sup>25</sup> HANDBOOK, *supra* note 8, at 97–113.

<sup>26</sup> *Seminole Nation*, 316 U.S. at 296.

<sup>27</sup> *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980).

possible.<sup>28</sup> The roles and responsibilities of this trust relationship between the federal government and Indian tribes can sometimes directly conflict with the federal government's ESA responsibilities.

Finally, the limited role of the states is important when dealing with states' attempts to regulate threatened or endangered species. As the Ninth Circuit noted in *United States v. Washington*, the state may not enact or enforce a state statute or regulation that conflicts with treaties in force between the United States and the Indian nations under the Supremacy Clause.<sup>29</sup>

### III. OVERVIEW OF THE ENDANGERED SPECIES ACT

By the early 1970s Congress and the American public recognized that existing law was inadequate to protect rare species from extinction.<sup>30</sup> Congress recognized that species were threatened by a variety of sources, "principally pollution, destruction of habitat and the pressures of trade."<sup>31</sup> Congress believed that "[t]he value of this genetic heritage is, quite literally, incalculable."<sup>32</sup> Congress then passed the Endangered Species Act of 1973 to safeguard the nation's fish, wildlife, and plant heritage for the benefit of all citizens.<sup>33</sup> The ESA's "stated purposes were 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation'" of such species.<sup>34</sup> As the U.S. Supreme Court observed, "the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species

<sup>28</sup> See *infra* Part V.C.

<sup>29</sup> *United States v. Washington*, 520 F.2d 676, 684 (9th Cir. 1975). See additional discussion on this issue *infra* in notes 94-96.

<sup>30</sup> Comprehensive efforts to protect endangered species began with the passage of the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669; 80 Stat. 926 (repealed 1973). See also Endangered Species Conservation Act of 1969, Pub. L. No. 91-135; 83 Stat. 275.

<sup>31</sup> H.R. REP. NO. 93-412, at 2 (1973), reprinted in SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 141 (Comm. Print 1982).

<sup>32</sup> *Id.* at 4.

<sup>33</sup> 16 U.S.C. § 1531(a)(5) (2006).

<sup>34</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (citing 16 U.S.C. § 1531(b) (1976 ed.)).

ever enacted by any nation.”<sup>35</sup> The Court also noted that the “plain intent [of] Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*.”<sup>36</sup> As the Ninth Circuit later added, “Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.”<sup>37</sup>

The ESA seeks to protect at-risk fish and wildlife by identifying threatened or endangered species and prescribing comprehensive protection and conservation measures to protect them. Under Section 4(a), the Secretary determines whether to list a species as endangered or threatened.<sup>38</sup> An endangered species is any species “which is in danger of extinction throughout all or a significant portion of its range.”<sup>39</sup> A threatened species is “any species which is likely to become an endangered species within a foreseeable future throughout all or a significant portion of its range.”<sup>40</sup> Once a species is determined to be threatened or endangered, it is unlawful to “take” or cause harm to a listed species.<sup>41</sup>

Section 9 makes it unlawful for any person to “take any [endangered fish or wildlife] within the United States or the territorial seas of the United States.”<sup>42</sup> “Take” in this context means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such activity.”<sup>43</sup> The Secretary responsible for implementing the ESA<sup>44</sup> further defines the term “harm”

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<sup>35</sup> *Id.* at 180.

<sup>36</sup> *Id.* at 184 (emphasis added). See also *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 699 (1995). For more discussion, see Sally J. Johnson, *Honoring Treaty Rights and Conserving Endangered Species after United States v. Dion*, 13 PUB. LAND L. REV. 179, 181–82 (1992).

<sup>37</sup> *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (quoting *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996)).

<sup>38</sup> 16 U.S.C. § 1533(a) (2006).

<sup>39</sup> 16 U.S.C. § 1532(6) (2006).

<sup>40</sup> 16 U.S.C. § 1532(20) (2006).

<sup>41</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 715 (1995).

<sup>42</sup> 16 U.S.C. § 1538(a)(1)(B) (2006). See also 50 C.F.R. § 17.31(a), 17.21(c) (2009) (extending Section 9(a)(1) to threatened species).

<sup>43</sup> 16 U.S.C. § 1532(19) (2006).

<sup>44</sup> 16 U.S.C. § 1532(15) (2006) (defining the Secretary as the Secretary of Commerce or the Secretary of the Interior). The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries

to include acts that injure wildlife, including “significant habitat modification or degradation” that “impair[s] essential behavioral patterns.”<sup>45</sup> The Supreme Court supports this broad definition of harm, noting, “Congress intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.”<sup>46</sup> The Court further held, “based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined ‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’”<sup>47</sup>

Several protections apply once a species has been listed as endangered or threatened. For example, section 7(a)(1) requires federal agencies to use their authority to carry out programs for the conservation of threatened and endangered species.<sup>48</sup> Section 7(a)(2) prohibits federal agencies from taking any action that is likely to “jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical.”<sup>49</sup> Section 7(a)(2) also requires federal agencies to consult with other designated federal agencies if their actions may affect a listed species to ensure that their actions will not jeopardize the species.<sup>50</sup>

Where applicable, the process of formal consultation culminates in the issuance of a Biological Opinion, an assessment that concludes whether the proposed action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of its critical habitat.<sup>51</sup>

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Service (NMFS) are both responsible for administering the ESA. See 50 C.F.R. § 402.01(b) (2009) for FWS, and 50 C.F.R. §§ 223.102, 224.101 (2009) for listed species governed by NMFS.

<sup>45</sup> 50 C.F.R. § 17.3 (2009). See also *Babbitt*, 515 U.S. at 708 (upholding this definition of “harm”).

<sup>46</sup> *Babbitt*, 515 U.S. 704.

<sup>47</sup> *Id.* at 708.

<sup>48</sup> 16 U.S.C. § 1536(a)(1) (2006).

<sup>49</sup> 16 U.S.C. § 1536(a)(2) (2006). “Jeopardize the continued existence” means “engag[ing] in an action that would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

<sup>50</sup> 50 C.F.R. § 402.14(a) (2009). However, this consultation process has been the subject of recent changes in rulemaking. See *infra* notes 59-62.

<sup>51</sup> 16 U.S.C. § 1536(b)(4) (2006); 50 C.F.R. § 402.14 (2009). Critical habitat includes “the specific areas within the geographical area occupied by the species...on which are found those physical or

If the action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat, then the government attempts to set forth a reasonable and prudent alternative to the action that would not likely jeopardize the continued existence of the species.<sup>52</sup>

If the proposed alternative would no longer jeopardize the species or adversely modify its critical habitat, the government can issue an incidental take statement, which will contain terms and conditions designed to minimize the take of any listed species.<sup>53</sup> Under Section 7(o), “any taking that is in compliance with the terms and conditions specified in [an incidental take statement] shall not be considered to be a prohibited taking of the species concerned.”<sup>54</sup> Accordingly, the protections afforded under an incidental take statement extend to private third parties who rely on a federal permit subject to consultation.

Like a federal agency, an applicant may obtain incidental take authorization through the Section 10 permitting process.<sup>55</sup> Section 10(a) protects against prosecution under Section 9’s take prohibition if the take is incidental to otherwise legal conduct, and if the take “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.”<sup>56</sup> To secure a Section 10 permit, the applicant must submit a “Habitat Conservation Plan” specifying the likely impact of the taking; steps being taken to minimize those impacts and the funding available to implement those steps; alternatives considered and the reasons they were rejected; and other measures the Secretary deems necessary or

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biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A) (2006).

<sup>52</sup> Endangered Species Act, 16 U.S.C. § 1536(b)(3)(A) (2006). As defined in 50 C.F.R. § 402.02 (2009), “reasonable and prudent alternatives” are alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

<sup>53</sup> Endangered Species Act, 16 U.S.C. § 1536(b)(4) (2006).

<sup>54</sup> 16 U.S.C. § 1536(o)(2) (2006).

<sup>55</sup> 16 U.S.C. § 1539(a)(2)(B)(i)–(v) (2006). See H.R. REP. NO. 97-567 (1982), as reprinted in 1982 U.S.C.C.A.N. 2831.

<sup>56</sup> 16 U.S.C. § 1539(a)(1)(B), (a)(2) (2006). See also *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985).

appropriate.<sup>57</sup> Thus, any taking of a listed species consistent with an incidental take permit will not violate ESA Section 9.<sup>58</sup>

Many of these provisions, particularly on consultation, are currently in a state of uncertainty because of the change in presidential administration. Just prior to leaving office, the Bush Administration sought to change the Section 7 consultation requirements. In August 2008 the Bush Administration published proposed rule changes on “Interagency Cooperation Under the Endangered Species Act” and asked for comments.<sup>59</sup> Final rules were adopted in December 2008.<sup>60</sup> These rules affected the scope and requirements for federal consultation, and effectively removed the requirement that other federal agencies must consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service prior to taking action that might affect a listed species.<sup>61</sup> However, in March 2009 the Obama Administration issued a memorandum requesting “the heads of all agencies to exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices involving the FWS and NMFS” while potential rulemaking is revisited.<sup>62</sup> This appears to have returned consultation requirements to the status quo, but the final word on the Bush Administration’s changes may not have yet been written.

#### IV. SETTING THE STAGE: DOES THE ESA APPLY TO TRIBAL ACTIVITIES?

One can see the train wreck coming. On the one hand, courts have rejected the argument that the government can simply balance competing agency

<sup>57</sup> 16 U.S.C. § 1539(a)(2)(A) (2006).

<sup>58</sup> See 16 U.S.C. § 1539(a)(1)(B) (2006).

<sup>59</sup> Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868 (Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402).

<sup>60</sup> Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).

<sup>61</sup> See, e.g., Cornelia Dean, *Bid to Undo Bush Memo on Threats to Species*, N.Y. TIMES, Mar. 4, 2009, at A14, available at [http://www.nytimes.com/2009/03/04/science/earth/04species.html?\\_r=1&emc=eta1](http://www.nytimes.com/2009/03/04/science/earth/04species.html?_r=1&emc=eta1).

<sup>62</sup> Press Release, The White House, Memorandum for the Heads of Executive Departments and Agencies, Subject: The Endangered Species Act (Mar. 3, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/) (last visited Apr. 9, 2009).

interests against conserving endangered species<sup>63</sup> and noted that “the balance of hardships always tips sharply in favor of endangered or threatened species.”<sup>64</sup> On the other hand, courts have held that the federal government owes tribes a fiduciary duty that can only be abrogated by a specific act of Congress. Hence, like its duties under the ESA, the government has a trust responsibility to protect tribal rights and resources.<sup>65</sup> Just as the balance tips in favor of endangered species, tribal rights will take precedence over the rights of private parties.<sup>66</sup> In one of the few court cases in which ESA interests directly competed with tribal interests, the court described the “unique clash of equities and priorities” presented; although the court raised, it did not answer the question of whether federal Indian law trumps the ESA and other federal environmental laws.<sup>67</sup>

Almost four decades after passage of the Endangered Species Act, neither the courts nor Congress have explicitly and firmly decided the threshold question of whether the ESA applies directly to tribes. It would certainly be a simpler world if, as one tribal representative declared, “the ESA does not and should not apply to Indian tribes,”<sup>68</sup> thus freeing the tribes from ESA restrictions. It would also be simpler if, as one Congressman adamantly stated, “there are not two classes of Americans, one entitled to take endangered species and another obligated to protect them,”<sup>69</sup> and thus the ESA restricted tribes the same as everyone else.

But that simplicity does not describe the complex interplay of tribal rights and species protection. In reality, the answer is nuanced and depends on factors such as how the tribal right in question was originally reserved or created; whether the right is exercised on or off-reservation; and whether the measure in question is a state or federal regulation. Three questions become critical to

<sup>63</sup> *House v. U.S. Forest Service*, 974 F. Supp. 1022, 1027 n.8 (E.D. Ky. 1997).

<sup>64</sup> *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (quoting *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996)).

<sup>65</sup> *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

<sup>66</sup> *Id.* at 1214.

<sup>67</sup> *S.W. Ctr. for Biological Diversity v. Babbitt*, No. Civ 95-2833, 1997 WL 817345, at \*6 (D. Ariz. Dec. 11, 1997), *rev’d on other grounds*, 150 F.3d 1152 (9th Cir. 1998).

<sup>68</sup> *Wilkinson*, *supra* note 2, at 1072 (citing tribal representative).

<sup>69</sup> 133 CONG. REC. H11,248-02 (daily ed. Dec. 11, 1987) (statement of Rep. Bosco), *cited in* Conrad A. Fjetland, *The Endangered Species Act and Indian Treaty Rights: A Fresh Look*, 13 TUL. ENVTL. L.J. 45, 64 (1999).

answer: first, is the impacted tribal right broad enough to encompass the disputed activity that would be curbed by regulation? Second, if the right is a treaty-based right, is abrogation even necessary, or does some other standard apply for state or federal species conservation measures? And third, if abrogation *is* necessary, did Congress actually abrogate treaty or tribal rights by passing the Endangered Species Act? Other commentators have considered various aspects of these questions,<sup>70</sup> but it helps to revisit some of these questions before exploring how the dynamics have actually played out in more detail.

#### A. Is the Impacted Tribal Right Broad Enough to Encompass the Disputed Activity?

A preliminary question is whether a specific right exists and is broad enough to cover an activity that might be in dispute. In the context of treaty rights, a treaty is the “reservation of [rights] not granted,”<sup>71</sup> any dispute over interpretation must be interpreted in favor of the tribe.<sup>72</sup> This canon of construction shapes the analysis of potential ambiguity over whether a right exists. For example, the analysis is similar to that employed in evaluating whether a government has taken a property right.<sup>73</sup> As a threshold matter, “the court must determine whether the

<sup>70</sup> See, e.g., Matthew G. McHenry, *The Worst Of Times: A Tale Of Two Fishes In The Klamath Basin*, 33 ENVTL. L. 1019 (2003); Fjetland, *supra* note 69, at 45; Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381 (1998); 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); Tracy A. Diekemper, *Abrogating Treaty Rights Under the Dion Test: Upholding Traditional Notions that Indian Treaties Are the Supreme Law of the Land*, 10 J. ENVTL. L. & LITIG. 473, 482 (1995); Johnson, *supra* note 36, at 186–88; Tina L. Morin, *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, 177–78 (1992); Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 883–85 (1991); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 568–71 (1991).

<sup>71</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>72</sup> See *supra* Part II.

<sup>73</sup> Outside of several narrow categories where a different analysis applies, the assessment of whether a regulation of private property is “so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment” looks at the “economic impact of the regulation on the claimant,” the regulation’s interference with “investment back expectations,” and the “character” of the government action. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 538, 538–539 (2005).

claimant has established a property interest” before even reaching the question of whether a right has been taken.<sup>74</sup> In a case involving infringement of non-tribal fishing activities, for example, the Federal Circuit determined that the plaintiff did not have a property interest in its fishing permits, and thus there was no right upon which to infringe.<sup>75</sup>

The next question is the extent or scope of a particular right. For example, the Eighth Circuit in *United States v. Dion*<sup>76</sup> found a protected tribal right to hunt eagles on the reservation but concluded that the right was not broad enough to encompass *commercial* eagle hunting.<sup>77</sup> In contrast, the district court in *United States v. Bresette* held that the treaty right was broad enough to cover even off-reservation land and to protect the disputed tribal commercial activities,<sup>78</sup> distinguishing this right from narrower treaty rights.<sup>79</sup> Finally, in *United States v. Gotchink*, the Eighth Circuit analyzed an off-reservation treaty right to hunt and fish, and concluded that the right was sufficiently broad to allow modern hunting and fishing implements, but not broad enough to allow modern modes of transportation to reach desired areas.<sup>80</sup> The use of modern transportation modes was “merely peripheral” to the underlying right.<sup>81</sup>

Other types of rights beyond hunting and fishing rights raise similar or more difficult questions. Although most documents, treaties or otherwise, that created reservations do not explicitly mention timber, tribes generally have the right to harvest timber from their reservations.<sup>82</sup> But, as one commentator noted, tribal logging activities in a reservation that includes habitat for a threatened species may be fundamentally distinct from the scenario where a tribe exercises a

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<sup>74</sup> *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

<sup>75</sup> *Id.* at 1374.

<sup>76</sup> 752 F.2d 1261 (8th Cir. 1985), *amended by* 476 U.S. 734 (1986).

<sup>77</sup> *Id.* at 1264–65.

<sup>78</sup> 761 F. Supp. 658, 660–62 (D. Minn. 1991).

<sup>79</sup> *Id.* at 664.

<sup>80</sup> *United States v. Gotchink*, 222 F.3d 506, 510 (8th Cir. 2000).

<sup>81</sup> *Id.* at 510–11.

<sup>82</sup> *See, e.g., Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (discussing the Yakama Tribe’s right to haul timber harvested from its reservation without charge over state roads).

protected right to harvest an endangered fish.<sup>83</sup> The distinction the Eighth Circuit made in *Dion* between “traditional” versus “commercial” hunting<sup>84</sup> may apply to the timber or mineral context as well. A spectrum of uses may exist, ranging from small-scale, on-reservation logging for traditional tribal uses, to off-reservation commercial timbering for off-reservation sale at a scale inconceivable at the time any particular treaty was signed or reservation created. Although a specific activity may be protected, it is not necessarily true that all related activity would fit within the scope of the tribal right.

To illustrate, in *Department of Game v. Puyallup Tribe*,<sup>85</sup> the Supreme Court found the Tribe had reserved a treaty fishing right but clarified that it was not implying that those tribal fishing rights “persist down to the very last steelhead in the river.”<sup>86</sup> However, the Court later declined the opportunity to squarely answer whether a treaty right was broad enough to protect hunting “to extinction.”<sup>87</sup> A district court subsequently read the *Puyallup* trilogy, as the series of decisions became known, as holding that in fact such “Indian treaty rights do not extend to the point of extinction.”<sup>88</sup> Observing that treaty rights are not absolute, the court determined that the right to hunt did not include the right to hunt an endangered species.<sup>89</sup>

In 1980, the U.S. Department of Interior’s Solicitor weighed in on whether a tribal right is broad enough to include the taking of an endangered species.<sup>90</sup> The thrust of the Solicitor’s opinion was that treaties *never* included the right to take endangered or threatened species, and thus there was no treaty right in the first instance that the ESA would restrict or abrogate.<sup>91</sup> When treaties

<sup>83</sup> Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: a Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 780 (1995) [hereinafter *Wood I*].

<sup>84</sup> *United States v. Dion*, 752 F.2d 1261, 1264–65 (8th Cir. 1985), *amended by* 476 U.S. 734 (1986).

<sup>85</sup> 414 U.S. 44 (1973).

<sup>86</sup> *Id.* at 49.

<sup>87</sup> *United States v. Dion*, 476 U.S. 734, 738 n.5 (1986).

<sup>88</sup> *United States v. Billie*, 667 F. Supp. 1485, 1489 (S.D. Fla. 1987).

<sup>89</sup> *Id.* at 1490, 1492.

<sup>90</sup> Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, 87 Interior Dec. 525 (1980).

<sup>91</sup> *Id.* at 527.

were signed, the parties “could not have anticipated the subsequent depletion of various species and the need to protect such species through the Endangered Species Act.”<sup>92</sup> Accordingly, the Solicitor remarked that it was “clear that neither the Indians nor the United States ever intended or even contemplated that such treaty rights extended so far as to allow Native Americans to take a species which was threatened with extinction.”<sup>93</sup>

## B. Must Congress Extinguish the Right?

The next question is whether it is necessary for Congress to specifically extinguish the right to take endangered or threatened species, assuming there is one, or if the rights can be limited by a federal conservation statute of general application such as the ESA.

In limited circumstances, courts have allowed state regulation of endangered species adverse to tribal interests. The Supreme Court has ruled that states could impose conservation regulations on Indians “equally with others [if] such restrictions [are] of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish.”<sup>94</sup> State regulations were later upheld by the *Puyallup* decisions under the “conservation necessity principle.” In these decisions, the Court observed that a state could “prevent the steelhead from following the fate of the passenger pigeon,” even though the tribes had a treaty right to fish.<sup>95</sup> However, a later Ninth Circuit decision noted that “[s]o long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed” and the state cannot extend its regulations to prevent Indians from fishing.<sup>96</sup>

A full exploration of state regulations is beyond the scope of this article, but certain courts, especially a recent decision by the Ninth Circuit, have

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<sup>92</sup> *Id.* at 532 (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 668–69, 675 (1979)).

<sup>93</sup> *Id.* at 533.

<sup>94</sup> *Tulee v. Washington*, 315 U.S. 681, 684 (1942) (holding that off-reservation rights to fish could be curtailed for conservation purposes).

<sup>95</sup> *Dep’t of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973).

<sup>96</sup> *United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975).

determined that the conservation necessity principle is not limited to state regulation, and inquired whether application of a *federal* statute to regulate treaty rights was necessary to achieve a conservation purpose.<sup>97</sup> In a decision criticized as irreconcilable with federal case law,<sup>98</sup> the Ninth Circuit applied the conservation principle to limit the Makah's tribal right to hunt whales under the federal Marine Mammal Protection Act, despite the fact that Congress had not specifically addressed tribal whaling rights in this Act.<sup>99</sup> Similarly, a district court analyzed another federal conservation statute under the *Puyallup* standards, finding that the federal act at issue did not apply to the defendant's treaty-protected conduct, but only because the species in question were not faced with extinction due to the specific acts of the defendant.<sup>100</sup> Thus, *Bresette* applied *Puyallup* to a federal conservation statute, even though the Eighth Circuit had already rejected the Ninth Circuit's test.<sup>101</sup>

It is questionable whether these contradictions can be reconciled. Can a federal statute of general applicability that furthers conservation, such as the ESA, override a treaty right, even in the absence of a showing that Congress intended to extinguish that treaty right? To answer this question requires a prediction that reliably cannot be made—whether the conservation-necessity approach will supplant an abrogation analysis<sup>102</sup> as future courts analyze ESA-related restrictions of tribal rights.

Application of the conservation necessity principle to federal tribal regulation might seem intuitively correct, given the relative omnipotence of the federal government with the unquestioned ability to abrogate treaties. However, that intuition vanishes on closer inspection, because states have no power to

<sup>97</sup> *Anderson v. Evans*, 371 F.3d 475, 498 n.21 (9th Cir. 2004) (citing *United States v. Fryberg*, 622 F.2d 1010, 1014–15 (9th Cir. 1980)). In addition, application of the federal statute would have to be in an area where the federal government has jurisdiction and the statute would have to be non-discriminatory, *see id.*, but neither of these two tests would seem to impose much of a hurdle where application of the ESA to tribes is concerned.

<sup>98</sup> HANDBOOK, *supra* note 8, at 1160.

<sup>99</sup> *Id.* at 501 n.26.

<sup>100</sup> *United States v. Bresette*, 761 F. Supp. 658, 664 (D. Minn. 1991).

<sup>101</sup> *United States v. Dion*, 752 F.2d 1261, 1269 (8th Cir. 1985) (Congress must abrogate exclusive, on-reservation treaty hunting rights before regulating them), *amended by* 476 U.S. 734 (1986).

<sup>102</sup> *See* discussion of *United States v. Dion* *infra* Part IV.C.1.

abrogate treaties.<sup>103</sup> In order to allow some select application of generally applicable, non-discriminatory state conservation statutes in the face of contrary tribal treaty rights, courts recognize a “narrow exception to the inviolability of treaty rights.”<sup>104</sup> As the term explicitly notes, the conservation necessity principle is a principle of “necessity.” But there is no parallel necessity for applying federal statutes to tribes. Congress need only express its decision to extinguish tribal rights, and the rights would be abrogated.<sup>105</sup> If Congress is frustrated that the intent of a non-abrogation statute is being undermined by tribal activities, it can amend the statute to strip tribes of their rights.<sup>106</sup> Thus, it seems unlikely that courts would countenance an end run around the abrogation requirement for federal statutes.<sup>107</sup>

However, the prediction that courts will not apply a “conservation necessity” principle to federal statutes is equally uncertain. As one commentator recognized, the Court may in fact consider state regulation cases in analyzing federal measures.<sup>108</sup> The uncertainty as to whether a statute like the ESA even *needs* to have an expressed intention to abolish tribal rights in order to actually override those rights further complicates the conflict between Indian rights and the ESA.

### C. Did Congress Actually Abrogate Tribal Rights through the ESA?

To the extent that tribal activity is clearly within the scope of a tribal right, there are a plethora of arguments over whether tribal activities should enjoy blanket immunity from the ESA. On one hand, tribes have a unique sovereignty coupled with a relationship with the natural world that is different from other land owners. For example, a member of the Yakama Nation observed that tribal

<sup>103</sup> U.S. CONST. art. VI. *See, e.g.,* *United States v. Washington*, 520 F.2d 676, 689 (9th Cir. 1975).

<sup>104</sup> *United States v. Smiskin*, 487 F.3d 1260, 1269 (9th Cir. 2007).

<sup>105</sup> *See* discussion of *United States v. Dion* *infra* Part IV.C.1.

<sup>106</sup> *Smiskin*, 487 F.3d at 1271 (As the court noted with affirmation in discussing appellants’ argument in a non-conservation case, “irresponsible overreaching” by the tribe would “likely prompt Congress to exercise its constitutional/political power to abrogate or limit the treaty right”).

<sup>107</sup> *See generally, Zachary Tomlinson, Abrogation or Regulation? How Anderson v. Evans Discards the Makah’s Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101 (2003).

<sup>108</sup> *See Johnson supra* note 36.

elders speak continuously about “the idea of knowing something about where we come from, why we are here, and the appropriate names for species, suggesting a reverence for the reasons these species exist.”<sup>109</sup> Rather than emphasize managing a single species, as the ESA does, tribes have a more “holistic management approach” that focuses on “whole natural systems.”<sup>110</sup> Put differently, “[n]on-Indian environmental management relies on written regulations and judicial enforcement while traditional tribal society achieves the same through reliance on cultural norms and spiritual mandates.”<sup>111</sup> Perhaps because of this approach and past development practices, tribal lands offer some of the best remaining habitat. As a result, they disproportionately bear the brunt of potential ESA restrictions.

On the other hand, the ESA shows clearly that Congress viewed endangered species as “incalculable.”<sup>112</sup> In furtherance of this value, tribes have pushed courts to adopt a stringent standard for ESA compliance when non-Indian uses were at stake.<sup>113</sup> This is the case even when implementing such ESA restrictions would have caused severe economic hardship and harm to non-Indian interests.<sup>114</sup> In the end, it would be ironic to grant tribes blanket immunity from ESA provisions when the tables turn and it is tribal interests that ESA restrictions would impact.

But most policy arguments are not really about *whether* Congress intended the ESA to apply to tribes. Most policy arguments are about whether Congress *should* have extended the ESA to the tribes and the proper way to remedy the resultant inequities.<sup>115</sup> The question is what Congress actually did. There is

<sup>109</sup> Wilkinson, *supra* note 2, at 1067 (quoting Ted Strong, member of the Yakama Nation).

<sup>110</sup> *Id.* at 1068.

<sup>111</sup> Marren Sanders, *Ecosystem Co-Management Agreements: A Study Of Nation Building Or A Lesson On Erosion Of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97, 104 (2008) (citing Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 373 (2001)).

<sup>112</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978).

<sup>113</sup> *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990).

<sup>114</sup> *Kandra v. United States*, 145 F. Supp. 2d 1192, 1200 (D. Or. 2001).

<sup>115</sup> *See, e.g.*, Hansen, *supra* note 70, at 1341 (“As trustee, the federal government should vigorously pursue amendment of the ESA by Congress, or revision of regulations implementing the ESA to allow a more equitable treatment of tribal interests”).

some guidance from a limited universe of case law and legislative history, but it is ultimately conflicting and inconclusive.

### 1. The Scarcity of Direct Case Law

There are only two cases that directly deal with this question. The Eighth Circuit squarely addressed the issue in *United States v. Dion*.<sup>116</sup> Defendants were convicted of violating the Eagle Protection Act<sup>117</sup> and the Endangered Species Act for taking and selling bald eagles and other protected birds.<sup>118</sup> Sitting *en banc*, the Eight Circuit sought to determine whether Congress had abrogated or modified the treaty hunting rights through the ESA and Eagle Protection Act.<sup>119</sup> The Eighth Circuit applied an “express reference requirement,” meaning that a “statutory abrogation of treaty rights can only be accomplished by an express reference to treaty rights in the statute *or in the statute’s legislative history*.”<sup>120</sup> Applying that standard, the court reiterated an earlier finding that Congress had not effectively abrogated or modified Indian treaty hunting rights through the Eagle Protection Act and also found that Congress had

failed to effectively abrogate treaty hunting rights in the Endangered Species Act. We cannot find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in either the statutory language or legislative history of this Act.... If Congress wishes to [abrogate treaty rights] it should speak accordingly.<sup>121</sup>

The Supreme Court overturned the Eighth Circuit’s reversal of the ESA

<sup>116</sup> *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985), *amended by* 476 U.S. 734 (1986).

<sup>117</sup> 16 U.S.C. § 668 (1982).

<sup>118</sup> *Dion* 752 F.2d at 1262. The defendants were also convicted of violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–11 (1982), *Dion* 752 F.2d at 1262, but the Circuit did not need to reach this issue, *id.* at 1265.

<sup>119</sup> *Id.* at 1265.

<sup>120</sup> *Id.* (emphasis in original).

<sup>121</sup> *Id.* at 1269. The Eighth Circuit did note that even if it would reach the same conclusion even if it looked for such congressional intent in “less reliable sources.” *Id.* at 1269. It surmised that, as with the Eagle Protection Act, it was “unable to discover a congressional intent in the [ESA itself], its legislative history, or the surrounding circumstances, to abrogate Indian treaty rights even if we set aside the express reference requirement.” *Id.* at 1270.

conviction.<sup>122</sup> However, it did so based on the ground that the Eagle Protection Act had abrogated Dion's treaty-protected right to hunt eagles, thus divesting Dion of a treaty right defense to the ESA charge.<sup>123</sup>

In rejecting the Eighth Circuit's "express reference" test, the Court provided guidance on how to find that Congress in fact abrogated a treaty. The Court expressed reluctance to find abrogation "[a]bsent explicit statutory language," and would not "lightly impute" a congressional intent to abrogate.<sup>124</sup> Moreover, while preferring an explicit congressional of abrogation,<sup>125</sup> the court held that the true test was whether there was "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."<sup>126</sup>

The following year, a district court picked up where the *Dion* Court left off.<sup>127</sup> In *United States v. Billie*, the tribal chairman was charged under the ESA for shooting and killing an endangered panther on-reservation.<sup>128</sup> Noting that *Dion* had left the issue of ESA abrogation of Indian hunting rights "unresolved," the *Billie* court began by finding a tribal right to hunt and fish.<sup>129</sup> The court then considered several factors and determined that the ESA abrogated the Indian right to hunt the Florida panther:

The narrow Alaskan exception [discussed below], the inclusion of Indians within the Act's definition of "person," the Act's

<sup>122</sup> *United States v. Dion*, 476 U.S. 734, 736 (1986). Procedurally, the *en banc* Eighth Circuit remanded to a panel for determination of the non-treaty issues, *United States v. Dion*, 762 F.2d 674, 678 (8th Cir. 1985), and it was from that later opinion that the Court accepted review.

<sup>123</sup> *Id.* at 746.

<sup>124</sup> *Id.* at 739 (citations omitted).

<sup>125</sup> *Id.* (citations omitted).

<sup>126</sup> *Id.* at 740 (courts should examine the treaty text and legislative history surrounding its enactment for evidence of abrogation).

<sup>127</sup> *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>128</sup> *Id.* at 1487.

<sup>129</sup> *Id.* at 1487–88. As in *Dion*, the executive order that established the reservation did not expressly mention hunting or fishing, but the trial court, following the Court in *Dion*, found that those rights were "included by implication in the setting aside of the lands as an Indian Reservation." *Id.* at 1488.

general comprehensiveness, and the evidence that the House committee desired to prohibit Indians from hunting and fishing protected species all provide “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 Indian rights.<sup>130</sup>

No other published opinion has directly tackled this issue. The text and history of the ESA provides no better guidance.

## 2. Limited Textual References and Legislative History

The actual text of the ESA has surprisingly little comment on the application of the statute to tribal rights. Section 1539(e) of the ESA exempts only Native Alaskans and non-native permanent residents of Alaska Native villages from the prohibition on taking if the taking is primarily for subsistence purposes.<sup>131</sup> In *Tennessee Valley Authority v. Hill*, the Court observed that “Congress was also aware of certain instances in which exceptions to the statute’s broad sweep would be necessary.”<sup>132</sup> It noted that the exception for Native Alaskans provided the only hardship exemption under the ESA; thus “under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only ‘hardship cases’ Congress intended to exempt.”<sup>133</sup> When the Ninth Circuit was asked to review the same question in *United States v. Nuesca*, the court declined to extend the section 1539(e) exemption to other tribes, stating that Congress could have chosen to expand this exemption but did not.<sup>134</sup>

However, hardship exemptions are not the same as treaty rights. In concluding that Congress did not abolish treaty rights with the Migratory Bird Treaty Act (MBTA), the court in *United States v. Bresette* found similar language in the MBTA that allowed indigenous inhabitants of Alaska to collect birds

<sup>130</sup> *Id.* at 1491–92 (citing *Dion*, 476 U.S. at 740). Some commentators decry this decision’s potential effect on Indian treaty rights. See, e.g., Johnson, *supra* note 36, at 181–82. Others contend that *Billie* was correct. See Fjetland, *supra* note 69.

<sup>131</sup> See 16 U.S.C. § 1539(e) (2006).

<sup>132</sup> 437 U.S. 153, 188 (1978).

<sup>133</sup> *Id.* (analyzing 16 U.S.C. § 1539).

<sup>134</sup> See *United States v. Nuesca*, 945 F.2d 254, 257–58 (9th Cir. 1991).

“irrelevant for purposes of *treaty* rights analysis because Native Alaskans do *not* have treaty rights.”<sup>135</sup> The court found it disingenuous to “treat the consideration of indigenous Alaskans’ rights as the consideration of Native American *treaty* rights nationwide.”<sup>136</sup> In fact, beyond the single reference to “Indian” in the context of the Alaskan Native exemption, the ESA is silent as to Native Americans, reservations, or tribes.<sup>137</sup>

The legislative history is also inconclusive. For example, while developing the ESA, Congress considered an exemption for Indians but then adopted a version that did not include the exemption. Some argue the omission of additional exemptions may be construed as evidence that Congress considered the issue and chose to abrogate rights.<sup>138</sup> Conversely, during those same 1972 discussions, the Interior Department explicitly advised Congress that if it wished to extinguish treaty rights, it had to do so expressly.<sup>139</sup> This is further evidence that Congress contemplated prioritizing the ESA over tribal rights, yet chose not to when the Act was formally adopted.<sup>140</sup> When Congress reauthorized the ESA in 1987, a representative noted that Congress “has always intended that there are not two classes of Americans, one entitled to take endangered species and another obligated to protect them. The court system, fortunately, has gone along with this.”<sup>141</sup> However, Congress did not clarify the ESA as it applied to Indians rights.

Even the two most relevant Interior Department documents are not definitive on this question. In the pre-*Dion* (1980) Solicitor opinion discussed above,<sup>142</sup> the Solicitor focused on why the scope of tribal treaty rights does not extend to extinguishing species, rendering it unnecessary for Congress to abrogate treaty rights for the ESA to apply to tribes.<sup>143</sup> However, the Solicitor concluded

<sup>135</sup> 761 F. Supp. 658, 663 (D. Minn. 1991).

<sup>136</sup> *Id.* at 663.

<sup>137</sup> Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006).

<sup>138</sup> Fjetland, *supra* note 69, at 55–58.

<sup>139</sup> *Id.* at 55.

<sup>140</sup> Johnson, *supra* note 36, at 184.

<sup>141</sup> 133 CONG. REC. H11,248-02 (daily ed. Dec. 11, 1987) (statement of Rep. Bosco), *cited in* Fjetland, *supra* note 69, at 64.

<sup>142</sup> *See supra* Part IV.A.

<sup>143</sup> Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing

that the ESA “may” have abrogated or modified treaty rights.<sup>144</sup> Post-*Dion*, the Department of Interior, along with the National Marine Fisheries Service, negotiated with several tribes on a comprehensive Secretarial Order regarding the application of ESA to tribes.<sup>145</sup> Discussed in greater detail in Part VI, the Order spelled out how the parties would handle ESA issues but remained neutral on the issue of ESA coverage.<sup>146</sup> While the Order did not accomplish what the tribes wanted most, “a definitive statement that the ESA does not restrict tribes,”<sup>147</sup> it was certainly not a clear congressional statement to terminate tribal rights.

#### D. Placing the Uncertainty of ESA Application to Tribes in Context

Although the question of whether the ESA applies to tribes has generated ample litigation,<sup>148</sup> it has not been definitively resolved, and it will likely continue to be the subject of dispute. Even in the relatively clear realm of traditional hunting rights, there have been contradictory outcomes. For instance, the ESA abrogated an undisputed hunting right according to the *Billie* court, but not so in the *Dion* court.<sup>149</sup> Outside the context of traditional hunting and fishing, it would be less clear that the tribal activity the ESA might otherwise restrict was protected. The tribal right defense to application of the ESA would grow remote if, for example, the ESA were exerted to curb a tribe’s attempt to site a nuclear waste depository.<sup>150</sup>

It is important to keep the debate about the application of the ESA in perspective. The defense to application of the ESA to tribes stems from the premise that federal agencies cannot impose regulatory restrictions that

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Rights, 87 Interior Dec. 525, 533–34, 1980 WL 104188 (1980).

<sup>144</sup> *Id.*

<sup>145</sup> See American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, Secretarial Order 3206 (Sec’y of the Interior & Sec’y of Commerce, 1997), available at <http://www.fws.gov/endangered/tribal/Esatribe.htm>.

<sup>146</sup> Wilkinson, *supra* note 2, at 1084.

<sup>147</sup> *Id.* at 1084.

<sup>148</sup> MARREN SANDERS, IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT IN INDIAN COUNTRY 2 (2007), [http://www.jopna.net/pubs/jopna%202007\\_01\\_web.pdf](http://www.jopna.net/pubs/jopna%202007_01_web.pdf).

<sup>149</sup> See *supra* notes 116-30 and accompanying text.

<sup>150</sup> N. States Power Co. v. United States, 78 Fed. Cl. 449, 454 (2007) (discussing project to construct spent nuclear waste storage facility on tribal lands).

impact tribal rights unless Congress expressly terminates those rights. Under the reasoning of certain cases, abrogation may not even be necessary for species conservation measures such as the ESA. Even if abrogation is required, and the conclusion of the Eighth Circuit in *Dion* is correct that Congress did not intend for the ESA to extinguish Indian treaty rights,<sup>151</sup> *Dion*'s conclusion is not a blanket exemption of any tribal activity from the reaches of the ESA. *Dion*'s holding was only that a tribe and its members could exercise *specific treaty rights* free from ESA restrictions.<sup>152</sup>

The stakes may be too high for either side to push for a conclusive decision on the question of the ESA and tribal rights. Moreover, it seems unlikely that any court, save for the Supreme Court, could provide a universally controlling decision. The following two parts of this article first look at legal principles that may inform any such legal analysis. Next, they discuss how the intersection has actually played out in disputes over these issues.

## V. LEGAL PRINCIPLES THAT INFORM ESA RESTRICTIONS ON TRIBAL ACTIVITIES

There are a number of legal principles implicated when courts wrestle with the intersection of the ESA and tribal rights. As a backdrop, the federal government owes the tribes a fiduciary duty.<sup>153</sup> However, this duty is often strained by the government's competing demands and divided loyalties, especially in the natural resource context. This section analyzes how the various legal doctrines have played and may yet play out.

### A. Background on Breach of Fiduciary Duties

The common law of trusts generally applies to the federal government's fiduciary duty to tribes.<sup>154</sup> In most trust relationships, it is a basic requirement that the trustee act solely in the interest of the beneficiary of the trust.<sup>155</sup> The key

<sup>151</sup> See discussion *supra* Part IV.C.1.

<sup>152</sup> See discussion *supra* Part IV.C.1.

<sup>153</sup> See discussion *supra* Part II.

<sup>154</sup> *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 376 (1986) ("The general rule is that defendant is held to the standards of a private fiduciary in administering Indian property.").

<sup>155</sup> GEORGE G. BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 543 (rev. 3d ed. 2008).

component of fiduciary duty is “undivided and undiluted loyalty.”<sup>156</sup> Beyond simply not engaging in self-dealing, the rule of undivided loyalty bars a trustee from activities where the interest of a third party is or becomes adverse to the interest of the beneficiary.<sup>157</sup> Without exception, a private trustee must exclude from consideration not only his own advantage or profit, but also that of third parties.<sup>158</sup>

There are some instances where the federal government’s only duty is to serve tribal interests, and the analogy of a private trustee’s duties may be appropriate. For example, in tribal trust fund accounting, courts have applied a strict private standard and expressly distinguished other cases where fiduciaries have greater discretion and thus more leeway.<sup>159</sup> In trust accounting cases, there is a “heightened duty that enjoins a trustee to act with an unswerving eye single to the interests of the beneficiaries, and with complete and undivided loyalty to them.”<sup>160</sup>

One early district court opinion applied this strict definition of trust duties to an agency balancing competing duties related to water management. The court found the Secretary of the Interior made an arbitrary and capricious judgment call in allotting water in a way that harmed tribal interests.<sup>161</sup> The court ruled that such a judgment call was not legally permissible, and it was not the Secretary’s “function to attempt an accommodation.”<sup>162</sup> Further,

[i]n order to fulfill his fiduciary duty, the Secretary must insure,

<sup>156</sup> *Gortat v. Capala Bros., Inc.*, 585 F. Supp. 2d 372, 377 (E.D.N.Y. 2008) (citing *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989)).

<sup>157</sup> BOGERT ET AL., *supra* note 155.

<sup>158</sup> *Tucker v. Brown*, 150 P.2d 604, 620 (Wash. 1944).

<sup>159</sup> *See, e.g., Minn. Chippewa Tribe v. United States*, 14 Cl. Ct. 116, 129 (1987).

<sup>160</sup> *Cobell v. Norton*, 212 F.R.D. 24, 29 (D.D.C. 2002) (citations omitted). The long-running *Cobell* case over trust funds owed to Indians from management of their lands and assets highlights the government’s trust obligations, and its difficulties in meeting them. The *Cobell* wars have raged since 1996, and only recently did the trial court estimate \$445 million in damages for a case where plaintiffs claim into the billions. *See Cobell v. Kempthorne*, 2008 WL 4151330 (D.D.C. Sep. 04, 2008) (granting motion to certify appeal).

<sup>161</sup> *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256–58 (D.D.C. 1972), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev’d in part on other grounds*, 499 F.2d 1095 (D.D.C. 1974).

<sup>162</sup> *Id.* at 256.

to the extent of his power, that all water not obligated by court decree or contract with the District goes to [tribal interests]. The United States, acting through the Secretary of Interior, “has charged itself with moral obligations of the highest responsibility and trust. Its conduct...should therefore be judged by the most exacting fiduciary standards.”<sup>163</sup>

However, the Supreme Court has subsequently clarified that the unwavering duty standards of private trust law do *not* apply where federal agencies are required by Congress to balance competing interests. In *Nevada v. United States*,<sup>164</sup> the Supreme Court noted that

[i]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects.... In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary’s consent. *The Government does not “compromise” its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.*<sup>165</sup>

Thus, *Nevada* is clear that where “Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a [competing duty], the analogy of a faithless private fiduciary cannot be controlling.”<sup>166</sup> However, *Nevada* did not explain how the executive branch should handle those situations where Congress

<sup>163</sup> *Id.* at 256 (citing *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966)).

<sup>164</sup> 463 U.S. 110 (1983).

<sup>165</sup> *Id.* at 128 (emphasis added).

<sup>166</sup> *Id.* at 142. See also *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981) (“all the rules governing the relationship between private fiduciaries and their beneficiaries do not necessarily apply in full vigor to Indian claims against the United States”), *aff’d*, 463 U.S. 206 (1983).

assigns it potentially conflicting obligations.<sup>167</sup>

There are two facets to such potentially conflicting obligations: how *should* the government handle such conflicts in ESA cases, and how *does* it handle them? The first question is largely beyond the scope of this article.<sup>168</sup> The second question, however—what has happened when there is a conflict—is addressed next in terms of how courts have handled and might be expected to handle the issue. Later, Part VI addresses how parties have bargained in the shadow of uncertain judicial pronouncements.

#### B. How the Courts Have Treated Trust Duties in the Context of the ESA

There is little case authority concerning the application of the ESA or similar federal species-conservation statutes that attempt to restrict tribal activities. Instead, most of the case law has developed in the context of attempts by a tribe to use the ESA or other environmental statutes to restrict some non-tribal activity.<sup>169</sup> Plummeting fish populations in the Columbia River Basin provide one example:

The determination as to whether any given action causes “jeopardy” to a species is, essentially, a relative determination, depending on the impact of other activities on the viability of the species.... [I]f habitat destruction, hydropower operations, and poor hatchery practices go unregulated, a fishery will inevitably fall into such a severe state of decline that harvest has a greater impact than it would in an otherwise healthy,

<sup>167</sup> Mason Morisset, *Recent Developments in Defining the Federal Trust Responsibility (The Case of the Reluctant Guardian)*, Apr. 1999, <http://www.msaj.com/papers/43099.htm>.

<sup>168</sup> Many commentators have argued that the federal government should prioritize tribal trust responsibilities before other competing interests, *see, e.g., Wood I*, *supra* note 83; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: a New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109 (1995) [hereinafter *Wood II*]; Judith Royster, *Equivocal Obligations: the Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995); Harold Shepherd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 ENVTL. L. 901, 921 (2001); Zellmer, *supra* note 69; Jennifer M. Regis-Civetta, *The Effect of the Endangered Species Act on Tribal Economic Development in Indian Country*, 50 WASH. U. J. URB. & CONTEMP. L. 303 (1996).

<sup>169</sup> *See, e.g., Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410 (9th Cir. 1990); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1200–01 (D. Or. 2001).

functioning ecosystem.<sup>170</sup>

Failing to control non-tribal causes of species destruction sets up a tribe to bear the brunt of ESA restrictions. Once the system degenerates into a biological crisis, the regulatory agency may have no other immediate, feasible option beyond restricting tribal activity.<sup>171</sup> Because of the cumulative impacts of past and ongoing non-tribal actions on a species, a proposed tribal activity may be precluded as the “straw that broke the camel’s back.”<sup>172</sup>

However, courts have not been receptive to tribal efforts to use the ESA to force restrictions on non-tribal activities that may reduce a tribe’s ability to use species. In fact, the courts have taken a “jaundiced view” of the trust responsibility in environmental cases.<sup>173</sup> For example, the D.C. Circuit held that the Secretary of the Interior met his limited federal trust obligations to the Inupiat people’s subsistence needs merely by considering the adverse impacts of proposed oil and gas leases on the endangered Bowhead whale and by complying with the ESA’s basic mandates.<sup>174</sup> The panel reasoned thus:

[t]he tension implicit in the Secretary’s required actions... cannot be transformed into a veto for any one particular set of interests which would halt the Secretary’s delegated decision making. The possibility of that frustrating outcome is sown in the irony that has the same group of plaintiffs urging the preservation of endangered whales so that Eskimoes [sic] may

<sup>170</sup> *Wood I*, *supra* note 83, at 771.

<sup>171</sup> *Id.* at 796.

<sup>172</sup> Zellmer, *supra* note 69, at 433. Interestingly, although the Solicitor’s Opinion discussed above was hardly tribe-friendly, it contained some language supporting a broad reading of the Secretary’s “special responsibility” to the tribes in this regard: “Failure to act could be deemed a dereliction of the Secretary’s special responsibilities since a treaty hunting or fishing right loses all realistic value if the game species upon which it is focused is allowed to suffer the fate of the passenger pigeon.” Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, 87 Interior Dec. 525, 530 (1980). See *supra* notes 90–93 and accompanying text.

<sup>173</sup> Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U. L. REV. 1069, 1074 (2006).

<sup>174</sup> *N. Slope Borough v. Andrus*, 642 F.2d 589, 607 (C.A.D.C. 1980). Commentators have decried cases like *North Slope Borough* for refusing to “interpret the trust duty as imposing any obligations distinct from the statutory mandates of the ESA.”

subsist on those same endangered whales.<sup>175</sup>

In a more recent example, a district court rebuffed a tribal attempt to use the ESA to curb the Army Corps of Engineers' water control projects that threatened the Cape Sable seaside sparrow.<sup>176</sup> In another case, a district court noted that the Miccosukee Tribe faced an uphill battle to meet the arbitrary and capricious or abuse of discretion standard. The court dismissed the Tribe's ESA claim on the basis of this deferential standard.<sup>177</sup>

Certainly—and not surprisingly—tribes have been more successful when the federal government has sided with them. In the recent *Culverts Case*,<sup>178</sup> where the United States worked with tribes to compel state action, the court read the Tribes' treaty rights as imposing a duty on the State of Washington to “refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.”<sup>179</sup> In *City of Albuquerque v. Browner*, the EPA approved a tribe's water quality regulations despite the fact that they were more stringent than federal standards and heavily impacted the City of Albuquerque. The court upheld the EPA's approval because the tribe's environmental regulations were in accord with powers inherent in their tribal sovereignty.<sup>180</sup> In a third example, a court confirmed that tribal treaty rights and the government's fiduciary duties to a tribe were acceptable factors for a federal agency to consider in denying a non-Indian's permit application for an aquaculture operation.<sup>181</sup>

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<sup>175</sup> *Id.* at 613.

<sup>176</sup> *Miccosukee Tribe of Indians of Fla. v. United States*, 420 F. Supp. 2d 1324 (2006).

<sup>177</sup> *Id.* at 1331, 1336. Not every court has held the United States to only an “arbitrary and capricious” standard in cases involving tribes. Some have recognized that the “arbitrary and capricious” standard is “not the highest measure of fiduciary accountability” and have been willing to find a breach involving “conduct less than arbitrary, capricious or fraudulent.” *Minn. Chippewa Tribe v. United States*, 14 Cl. Ct. 116, 130 (1987) (citing *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 163 (Ct. Cl. 1980)). But those cases espousing a less deferential standard appear to be in the minority.

<sup>178</sup> Discussed in Mason Morisset and Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation*, also in this volume.

<sup>179</sup> *United States v. Washington*, No. CV-9213-RSM, 2007 WL 2437166, at \*10 (W.D. Wash. 2007).

<sup>180</sup> 97 F.3d 415,423 (10th Cir. 1996).

<sup>181</sup> *NW Sea Farms, Inc. v. United States*, 931 F. Supp. 1515, 1519–22 (W.D. Wash. 1996).

But where tribes have tried to bring a claim against a federal agency to restrict potentially harmful activities of third parties, there are few exceptions “to the rather dismal fate of the trust responsibility in recent Indian environmental cases.”<sup>182</sup> For example, in *Miccosukee Tribe v. United States*, the district court examined the impact of agency actions to regulate floods in Everglades National Park that subsequently inundated the Tribe’s reservation.<sup>183</sup> The court held that the only duty the relevant federal agencies owed the Tribe was to uphold the Tribe’s rights insofar as they did not conflict with the National Park’s overall purpose.<sup>184</sup> Applying *Nevada*, the court held that the National Park Service’s use of its broad discretion to manage the Park did not breach a duty to the tribe.<sup>185</sup>

Even more starkly, in *Gros Ventre Tribe v. United States*, several tribes sued the Bureau of Land Management (BLM) for breaching its duty by permitting, and then not reclaiming, off-site private mines that reduced the quality and quantity of water available to the Tribe.<sup>186</sup> The Ninth Circuit held that a trust obligation alone “does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations.”<sup>187</sup> Furthermore, absent a specific duty to Indians placed on the government, the government’s general trust obligation is discharged simply by “compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”<sup>188</sup> Instead of providing any special treatment for the Tribes, the Ninth Circuit held that the Tribes’ “claim is no different from that which might be brought under the generally applicable environmental laws available to any other affected landowner.”<sup>189</sup> Even if the treaties created “a general or limited trust obligation

<sup>182</sup> Berkey, *supra* note 173, at 1076.

<sup>183</sup> 980 F. Supp. 448 (S.D. Fla. 1997), *aff’d*, 163 F.3d 1359 (11th Cir. 1998).

<sup>184</sup> *Id.* at 462.

<sup>185</sup> *Id.* at 463.

<sup>186</sup> *Gros Ventre Tribe v. United States*, 469 F.3d 801, 806 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 176 (2007).

<sup>187</sup> *Id.* at 810.

<sup>188</sup> *Id.* (citing *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

<sup>189</sup> *Id.* at 811. *See also* *Skokomish Indian Tribe v. F.E.R.C.*, 121 F.3d 1303, 1308–09 (9th Cir. 1997) (rejecting the argument that agency had to “afford Indian tribes greater rights than they would otherwise have” under the pertinent federal statute and regulations). *Contra Wood I, supra* note 85, at 745 (“In the environmental context, the trust obligation to protect tribal resources should often translate

to protect the Indians against depredations on Reservation lands,” that duty could only be measured via other generally applicable statutes or regulations.<sup>190</sup>

Thus, it is entirely reasonable to suggest that in the current legal climate, “arguments that the trust responsibility requires federal agencies to act in the best interests of tribes, independent of their statutory duties, are likely to be greeted with skepticism.”<sup>191</sup>

### C. Can Tribes Show a Breach of Trust When the ESA is Applied to Tribal Activities?

Tribes often face an uphill battle when attempting to curb non-Indian activities that may reduce species. In this scenario, some ESA-driven regulation of tribal activities may be inevitable. The question then becomes whether application of the ESA to tribal activities breaches a fiduciary duty. The Court in *Nevada* held that while the Department of Interior could represent multiple interests, a tribe would have a remedy against the government if the government violated its obligations to a tribe while carrying out those competing duties.<sup>192</sup> Similarly, while affirming a finding that the agency met ESA-mandated conservation measures, the Ninth Circuit noted that such a finding does not necessarily preclude a finding that an agency breached its fiduciary duty to a tribe.<sup>193</sup>

#### 1. A Disproportionate Burden on Tribes Would Not Necessarily Mean a Breach

Because of past non-tribal activity allowed or even encouraged by the government, tribes may bear the brunt of ESA restrictions, even if tribes contributed little to the factors that prompted the need for restrictive measures. Indeed, “lack of economic activity has left many western Indian reservations

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into a higher level of ecological protection than that which might result when solely non-Indian interests are affected.”)

<sup>190</sup> *Id.* at 812.

<sup>191</sup> Berkey, *supra* note 173, at 1079.

<sup>192</sup> *United States v. Nevada*, 463 U.S. 110, 144 n.16 (1983). *See also id.* at 145 (Brennan, J., concurring) (tribe should have remedy against the United States in case of breach of fiduciary duty).

<sup>193</sup> *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1421 (9th Cir. 1990).

poor but picturesque enclaves of critical habitat.”<sup>194</sup> Almost by definition, most critical habitats are found in larger undeveloped swaths, not in built-out areas. Such development patterns result in tribes disproportionately bearing the burden of protecting endangered species.<sup>195</sup> “Because Indian Country is typically less developed than surrounding private and state lands, it affords an island of suitable habitat in a sea of lands altered by development activities.”<sup>196</sup>

This discrepancy is most visible in the context of access to water, a necessary predicate for much economic activity, especially in the West. The doctrine of prior appropriation, some variation of which exists in all Western states,<sup>197</sup> is basically a “first in time, first in right” system where those who first put water to some use defined as “beneficial” earned the primary right to continue using it.<sup>198</sup> Much of the now-scarce water has been appropriated to non-Indians, leaving little water available for current tribal appropriation despite a reservation of these rights usually pre-dating non-Indian use.<sup>199</sup> Thus, tribes are left “shouldering the bulk of responsibility in resolving conflicts between water users and listed species.”<sup>200</sup> The burden exists despite the seemingly uncontroverted recognition that most species requiring protection under the ESA have not reached their precarious condition because of tribal action.<sup>201</sup>

Simply showing this kind of disproportionate burden is unlikely by itself to lead to a winning breach-of-trust argument. The above scenario may be different in degree, but not in kind, from general patterns of land development

<sup>194</sup> Hansen, *supra* note 70, at 1331.

<sup>195</sup> *Id.* at 1331. See also *Wood I*, *supra* note 83, at 781 (“[D]epletion of salmon stocks as a result of non-Indian activities has reached such an extreme level that there can be no doubt that the tribes are presently shouldering a vastly disproportionate conservation burden to compensate for the federal government’s failure to protect the salmon resource”).

<sup>196</sup> Zellmer, *supra* note 69, at 382–83.

<sup>197</sup> See, e.g., DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:1 (1988) (disputes over application of prior appropriation doctrine “infuses all federal-state conflicts over the allocation and use of western waters”).

<sup>198</sup> See, e.g., CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (Island Press 1993).

<sup>199</sup> See *Shepherd*, *supra* note 168, at 914–16. Indian water rights are reserved rights under *Winters v. United States*, 207 U.S. 564 (1908).

<sup>200</sup> *Shepherd*, *supra* note 168, at 940.

<sup>201</sup> *Id.* at 940–41.

and environmental restrictions (including, but not limited to the ESA) outside the context of tribal activity. There is no equal treatment in environmental conservation.<sup>202</sup> Instead, land use regulations are “invariably focused on undeveloped, as opposed to developed, parcels.”<sup>203</sup>

Consider the simple hypothetical of two owners of untouched, adjacent ten-acre parcels. Owner *A* subdivided his parcel into twenty half-acre lots and developed them before significant environmental restrictions existed. In doing so, *A* clear-cut the property, bermed or re-routed streams, filled in wetlands or floodplains, created acres of impervious surface, and destroyed any available habitat in constructing twenty residences. Conversely, *B* preserved her land and maintained it in an ecologically sound manner. Because of later regulations, enacted in response to the harms caused by *A*'s unchecked development, *B* may face clearing limits, wetland alteration restrictions or mitigation requirements, endangered species complications, stream or floodplain setbacks, and zoning restrictions that may prevent subdivision. *B* can correctly argue that through no fault of her own, *B* now bears a very disproportionate burden for preventing environmental harms and preserving public benefits.

Such a system may be difficult from a policy perspective. In the context of the ESA, one commentator laments that the current paradigm creates the perverse incentive for savvy landowners to develop and maintain their land in a manner that *prevents* the land from being occupied by endangered species and from being designated as habitat suitable for a listed endangered species.<sup>204</sup> But the concept that any landowner who defers development opens him or herself to later regulations that may restrict or even prohibit later uses is a generally applicable truism in the land use arena.<sup>205</sup>

One potential distinction between this hypothetical scenario and the situation actually faced by tribes is that the government may have not just failed to stop, but actively encouraged, the development of non-Indian

<sup>202</sup> Jonathan H. Adler, *Money or Nothing: the Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 316 (2008).

<sup>203</sup> *Id.*

<sup>204</sup> *See generally id.*

<sup>205</sup> *Id.* at 316.

projects that now limit tribal efforts.<sup>206</sup> On closer inspection, this too appears a difference of degree, not of kind. Wetlands regulation provides one example. Governments not only allowed, but actively encouraged filling or draining of such areas.<sup>207</sup> At one point, “wetlands were called swamps...their draining or filling was deemed progress, and ...their main environmental impact was in the production of noxious disease-bearing mosquitoes.”<sup>208</sup> In the hypothetical above, depending on when *A* developed, the government may have assisted *A* in destroying his wetlands, to the current detriment of *B*, who now shoulders the burden for a problem she did not create.

The overlay of the federal tribal trust relationship is a potential distinction.<sup>209</sup> But the idea that the last one to attempt development may be precluded from enjoying the same benefits as earlier exploiters is not a tribe-specific concept. Even if ESA restrictions now fall disproportionately on tribal interests, notions of distributive justice<sup>210</sup> alone will not likely lead a court to find a trust violation.

## 2. More than Simply a Violation of the Federal Government’s Fiduciary Duty is Needed.

A compensation remedy may be difficult to effectuate in cases involving application of the ESA to tribes. The United States’ basic fiduciary duty to tribes is not, by itself, sufficient such that a breach of that duty entitles tribes to monetary damages from the United States. Unless a particular duty is specified in a treaty, statute, regulation, or Executive order, no claim for damages follows a breach.<sup>211</sup>

<sup>206</sup> See Shepherd, *supra* note 168, at 914.

<sup>207</sup> See, e.g., WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2:6 (1989) (“in the mid-1800s Congress made draining and filling wetlands for reclamation a national policy”); DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 8:25 (1988) (noting that in “the nineteenth century, many states encouraged the development of...fills”).

<sup>208</sup> Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986).

<sup>209</sup> The inquiry would analyze the exercise of the fiduciary duty at time when the action was undertaken; it is too “easy after years of study to sit back and assess defendant’s practices, which in hindsight may not have been ideal.” Navajo Tribe of Indians v. United States, 9 Cl. Ct. 336, 381 (1986).

<sup>210</sup> Zellmer, *supra* note 69, at 427.

<sup>211</sup> Nat’l Wildlife Fed’n v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980) (“a trust responsibility can only arise from a statute, treaty, or executive order”); White Mountain Apache Tribe of Ariz. v. United States, 11 Cl. Ct. 614, 619 (1987), *aff’d*, 5 F.3d 1506 (Fed. Cir. 1993) (“A suit for damages

The Supreme Court examined this issue in the *Mitchell* cases. In *Mitchell I*, the congressional act in question did not establish that the United States had fiduciary responsibilities such that mismanagement of tribal resources opened up the United States to monetary liability.<sup>212</sup> In *Mitchell II*,<sup>213</sup> conversely, the Court noted that in contrast to limited or “bare” trust responsibilities, the timber statutes and regulations read together created a duty to “manage Indian resources so as to generate proceeds for the Indians.”<sup>214</sup> Failure to meet those duties made the United States “liable in damages for the breach of its fiduciary duties.”<sup>215</sup>

The Supreme Court revisited the *Mitchell* cases thirty years later in two simultaneously-published cases. In *United States v. Navajo Nation*,<sup>216</sup> the Secretary met privately with a company representative who happened to be a former aide and friend of the Secretary’s before a pending administrative appeal of a dispute between a private company and the Navajo. The Secretary subsequently intervened in the appeal on the company’s behalf.<sup>217</sup> The Court held that to receive compensation, a tribe must identify a substantive source of law that establishes specific fiduciary duties; a tribe then must show that the government failed to perform those duties.<sup>218</sup> The general trust relationship can inform the analysis, but a trust relationship alone is insufficient to support a claim for damages.<sup>219</sup>

Conversely, in *United States v. White Mountain Apache Tribe*,<sup>220</sup> the Court sustained a damages claim for breach of fiduciary duty to manage land held in trust for the Tribe but occupied by the Government.<sup>221</sup> The Court held that the relevant federal duty went “beyond a bare trust and permits a fair inference that the

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for breach of fiduciary duty to act affirmatively does not arise independent of the linchpin treaty, statute, executive order, or regulation that charges the Government with specific duties to act”).

<sup>212</sup> *United States v. Mitchell*, 445 U.S. 535, 546 (1980).

<sup>213</sup> *United States v. Mitchell*, 463 U.S. 206 (1983).

<sup>214</sup> *Id.* at 227 (emphasis added).

<sup>215</sup> *Id.* at 226.

<sup>216</sup> 537 U.S. 488 (2003).

<sup>217</sup> *Id.* at 496-500.

<sup>218</sup> *Id.* at 506.

<sup>219</sup> *Id.* at 506.

<sup>220</sup> 537 U.S. 465 (2003).

<sup>221</sup> *Id.* at 468.

Government is subject to duties as a trustee and liable in damages for breach.”<sup>222</sup> “[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”<sup>223</sup>

The Court revisited *Navajo Nation* in April 2009.<sup>224</sup> The Court rejected the argument that additional statutory provisions beyond those reviewed in the initial litigation created specific enough duties to mandate compensation for a breach of those duties.<sup>225</sup> The Court also rejected the argument that the government’s comprehensive control over Indian coal created fiduciary duties based on common-law trust principles.<sup>226</sup> The Court held that “liability cannot be premised based on control alone.”<sup>227</sup> Trust principles could only play a role at the second step of the analysis, after a specific rights-creating or duty-imposing regulatory or statutory source was identified.<sup>228</sup> Without such a specific source, “neither the Government’s ‘control’ over coal nor common-law trust principles matter.”<sup>229</sup>

Read together, the outcomes of both cases are counter-intuitive. The Secretary’s conduct in *Navajo Nation* seems nothing short of egregious, violating commonsense principles of what a fiduciary duty is. Yet because the Secretary’s actions violated no specific, statutorily-mandated duty, the government was not liable.<sup>230</sup> In *White Mountain Apache Tribe*, on the other hand, the claim was simply that the government had elected not to spend millions of taxpayer dollars to rehabilitate trust property occupied by the government in accordance with standards for historic preservation.<sup>231</sup> Despite acknowledging that the applicable statute contained no express duties, the Court nonetheless found liability based on

<sup>222</sup> *Id.* at 474.

<sup>223</sup> *Id.* at 475.

<sup>224</sup> *Navajo Nation v. United States*, \_\_ U.S. \_\_, 2009 WL 901510 (Apr. 6, 2009).

<sup>225</sup> *Id.* at \*6–9.

<sup>226</sup> *Id.* at \*9 (citing *Navajo Nation v. United States*, 501 F.3d 1327 (2007)).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at \*10.

<sup>230</sup> *Id.* at 514.

<sup>231</sup> *White Mountain Apache*, 537 U.S. at 469 (2003).

a commonsense assumption of a fiduciary duty.<sup>232</sup>

The parameters of what makes for a successful compensable trust claim remain somewhat unclear under these cases. The following sub-sections offer some predictions.

### 3. Application of the ESA to Tribal Activities would Not Always Be Immune From or Always Cause a Compensable Breach

Even under the current unpredictable standard, the answers at both extremes can be dismissed. Application of the ESA to tribal activities that restricts tribal use would not always cause, nor always be immune from, a finding of a compensable breach.

The analysis in *Mitchell II* provides a concrete example for examining this question. The government has specific statutory duties to manage “Indian forestry units on the principle of sustained-yield”<sup>233</sup> and to base management “upon a consideration of the needs and best interests of the Indian owner and his heirs.”<sup>234</sup> Where the Secretary breaches these duties, “tribes whose timber resources are mismanaged are entitled to ‘any fall-off from the income they would have received from their forests and lands’ resulting from the breach.”<sup>235</sup>

The government seemingly could not use the ESA as a trump card, justifying every failure to meet the standards contained in the timber statutes. A narrowly divided Supreme Court dealt with the intersection of the ESA and another statute in *National Ass’n of Home Builders v. Defenders of Wildlife*.<sup>236</sup> While the four-judge dissent emphasized “the primacy of the ESA’s mandate” in interpreting another statute,<sup>237</sup> the majority rejected a broad reading of the ESA that “would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to

<sup>232</sup> *Id.* at 475–76, 476 n.4.

<sup>233</sup> 25 U.S.C. § 466 (2006). *See also* 25 U.S.C. § 407 (2006).

<sup>234</sup> 25 U.S.C. § 406 (2006).

<sup>235</sup> *Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (citing *Mitchell v. United States*, 664 F.2d 265, 271 (Ct. Cl. 1981), *aff’d*, 463 U.S. 206 (1983)). In a nutshell, damages would be the “proceeds of the sales which should have been made” had the trust violation not occurred. *Id.*

<sup>236</sup> 127 S. Ct. 2518, 2532 (2007).

<sup>237</sup> *Id.* at 2546 (Stevens, J., dissenting).

endangered species.”<sup>238</sup> The Court would not presume that the ESA repealed other statutes by implication.<sup>239</sup> Thus, not every application of the ESA that hinders tribal activity would be immune from a finding of a compensable breach.

Conversely, it is unlikely that there would be strict liability for any application of the ESA that prevented what would otherwise be sustained yield, tribal-best-interest principles. First, the Court has set the federal government’s standard of responsibility in acting out its fiduciary duty as “‘such care and skill as a man of ordinary prudence would exercise in dealing with his own property.’”<sup>240</sup> The Court has accorded trustees broad discretion to deal with difficult choices and avoid being placed on the “horns” of a dilemma.<sup>241</sup>

The question would be whether government officials acted “within the realm of their acceptable discretion”<sup>242</sup> in attempting to harmonize the ESA with the timber statutes. Just as a treaty is to be interpreted as it would have been understood by tribal members at the time they signed the treaty,<sup>243</sup> a trustee’s fiduciary duty must be viewed from the standpoint of when the action was taken, as it is too “easy after years of study to sit back and assess the defendant’s practices, which in hindsight may not have been ideal.”<sup>244</sup>

There is a second reason why a court would not likely find every revenue decrease caused by application of ESA restrictions to particular tribal activities a compensable breach. As Chief Justice Oliver Wendell Holmes once noted, “[g]overnment could hardly go on” if it could not limit the use of property “without paying for every such change”; only when a restriction “reaches a certain magnitude” of impact is compensation due.<sup>245</sup> Oregon’s recent experience with Measure 37, which required compensation for certain land use restrictions regardless of a restriction’s magnitude and impact, provides an example of what

<sup>238</sup> *Id.* at 2533.

<sup>239</sup> *Id.* at 2532.

<sup>240</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (citing *United States v. Mason*, 412 U.S. 391, 398 (1973)).

<sup>241</sup> *United States v. Mason*, 412 U.S. 391, 398 (1973).

<sup>242</sup> *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 344 (1986).

<sup>243</sup> See discussion *supra* Part II.

<sup>244</sup> *Navajo Tribe of Indians*, 9 Cl. Ct. at 381.

<sup>245</sup> *Pa. Coal v. Mahon*, 260 U.S. 393, 413 (1922).

happens under a strict liability regime.<sup>246</sup> Of the 7,717 Measure 37 claims filed by property owners, only one is known to have been paid.<sup>247</sup> Instead, for the other valid claims, governments responded simply by waiving the regulations.<sup>248</sup> One would expect similar results at the federal level.

Such a regime would likely be short lived. In Oregon, the state essentially rescinded Measure 37 and replaced it with the more modest Measure 49 a short time later.<sup>249</sup> In the ESA context, there is only one known, published case where enforcement of the ESA was adjudged a taking of nontribal, private property.<sup>250</sup> Given that baseline, one would predict that the backlash to a holding that the United States was liable for *every* tribal revenue shortfall caused by the ESA would be such that Congress would amend the ESA to abrogate contrary tribal rights.<sup>251</sup>

#### 4. The Sovereign Acts Doctrine as a Harbinger of How Potential Claims Might Play Out

The manner in which courts have handled monetary claims when the application of federal law causes a breach of contract may offer some insight into future judicial treatment of claims that application of the ESA has breached the government's obligations to tribes.

Where a sovereign act is designed to target prior governmental contracts enacted for the benefit of the "government-as-contractor,"<sup>252</sup> or "tainted by a governmental object of self-relief,"<sup>253</sup> the government is liable for breaching

<sup>246</sup> JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES 32 (2008), [http://www.law.georgetown.edu/gelpi/current\\_research/documents/RT\\_Pubs\\_Policy\\_Track-Record.pdf](http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Policy_Track-Record.pdf).

<sup>247</sup> *Id.* at 33, 40.

<sup>248</sup> *Id.* at 37.

<sup>249</sup> *Id.* at 43–44.

<sup>250</sup> Meltz, *supra* note 213, at 2.

<sup>251</sup> *Cf.* United States v. Smiskin, 487 F.3d 1260, 1271 (9th Cir. 2007) (panel favorably cited "practical response" from Tribe that such "'overreaching on its part would likely prompt Congress to exercise its constitutional/ political power to abrogate or limit the treaty right'" and thus the Tribe would not be likely to advance such a claim).

<sup>252</sup> Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575 (Fed. Cir. 1997).

<sup>253</sup> United States v. Winstar Corp., 518 U.S. 839, 896 (1996).

its contractual obligations.<sup>254</sup> For example, in *United States v. Westlands Water District*,<sup>255</sup> the government had contracted with a water district to set rates for water and drainage service.<sup>256</sup> Unhappy when those contract terms later became disadvantageous to the government, Congress “abrogated” the rates and required that the government charge its “full cost” to plaintiff.<sup>257</sup> The court had little trouble rejecting the government’s defense and held that the government was liable for the breach.<sup>258</sup>

Cases like *Westlands* differ from cases in which application of the ESA caused the government to breach its contractual obligations. An ESA-based restriction is *not* a “form of governmental self-help,”<sup>259</sup> “suspect[ed]” as being in the government’s “self interest,”<sup>260</sup> or designed to accrue “economic advantage.”<sup>261</sup> Instead, the ESA is a statute “public and general in its reach.”<sup>262</sup> Thus, the government may have a valid “sovereign acts defense” to liability when the ESA prevents the United States from meeting its contractual obligations. The “sovereign acts doctrine” can provide an exception to the “traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible.”<sup>263</sup>

In *Klamath Irrigation District v. United States*,<sup>264</sup> irrigation districts and agricultural landowners, which entered into contracts for the supply of irrigation water from the Klamath Basin reclamation project, alleged that reductions by the Bureau of Reclamation in the amount of project water available for irrigation

<sup>254</sup> *Yankee Atomic*, 112 F.3d at 1575.

<sup>255</sup> 134 F. Supp. 2d 1111 (E.D. Cal. 2001).

<sup>256</sup> *Id.* at 1142.

<sup>257</sup> *Id.* at 1144.

<sup>258</sup> *Id.* at 1142.

<sup>259</sup> *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 753–54 (2006), *aff’d in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

<sup>260</sup> *Id.* at 754.

<sup>261</sup> *Id.* at 755.

<sup>262</sup> *Id.* at 753.

<sup>263</sup> *Carabetta Enters., Inc., v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996)).

<sup>264</sup> 75 Fed. Cl. 677 (2007), *question certified*, 532 F.3d 1376 (Fed. Cir. 2008), *certified question accepted*, 202 P.3d 159 (Or. 2009).

constituted a breach of contract.<sup>265</sup> The trial court rejected the argument that it should inquire whether there were other federal actions that could have obviated the need for the current ESA restriction. The court also rejected the argument that it should incrementally examine the subsidiary tasks leading up to the reductions.<sup>266</sup> For the court, the critical focus was simply “the extent to which the ESA compelled the agency to act.”<sup>267</sup>

The court arrived at a different conclusion in *Stockton East Water District v. United States*,<sup>268</sup> where rights holders’ arguments fell on more receptive ears. The court rejected the sovereign acts defense because the government did not meet its burden of proof regarding impossibility of performance.<sup>269</sup> The court expressed concern that without a “means to dampen the exuberance of the sovereign acts doctrine,” the door would be left open to wide-ranging immunity for non-performance by the government.<sup>270</sup> The doctrine of impossibility, or at least “partial impossibility,” offered such a damper.<sup>271</sup> Thus, a court should consider whether operational decisions could have been made to fulfill the ESA without impacting contractual rights,<sup>272</sup> or whether sufficient water remained to allow full allocations to the plaintiffs.<sup>273</sup>

These cases have obvious implications for disputes where application of the ESA causes the federal government to do what would otherwise create a compensable breach of its obligations. The current law favors the government. On appeal in a third ESA/water rights case, the Federal Circuit in *Casitas Municipal Water District v. United States* rejected the argument that because the agency could have chosen an alternative method to satisfy the ESA, the ESA had

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<sup>265</sup> *Id.* at 679.

<sup>266</sup> *Id.* at 687–88.

<sup>267</sup> *Klamath*, 75 Fed. Cl. at 690.

<sup>268</sup> 75 Fed. Cl. 321 (2007), *modified in part*, 76 Fed. Cl. 470 (2007), *denying recon.*, 76 Fed. Cl. 497 (2007), *appeal filed*, (Fed. Cir. 07-5142) (July 05, 2007).

<sup>269</sup> 75 Fed. Cl. at 373.

<sup>270</sup> 76 Fed. Cl. at 512.

<sup>271</sup> *Id.* at 509.

<sup>272</sup> 75 Fed. Cl. at 373.

<sup>273</sup> 76 Fed. Cl. at 510.

not made it impossible for the government to perform its contractual obligation.<sup>274</sup> However, as *Klamath* and *Stockton East* are in various stages of appeal, there may be more definition forthcoming. If a future court delves into whether the agency could have taken other operational decisions to fulfill the ESA without impacting contractual rights,<sup>275</sup> or whether there was “reasonable substitute performance” available,<sup>276</sup> the equation may yet change.

## VI. HOW APPLICATION OF THE ESA TO THE TRIBES HAS PLAYED OUT

At this point, there is no definitive ruling on what happens when there is a direct conflict between the ESA and tribal rights. Indeed, there may never be a decision providing an answer that addresses all the potential variations that come into play: on versus off-reservation rights, the numerous sources from which tribal rights are derived, impact on core sovereign principles versus incidental interference, and so on. Given recent trends in court cases limiting Indian rights and other cases favoring the ESA, it may not be in the best interests of tribes to push for an ultimate decision. Factors like these and the resulting uncertainty helped lead to Secretarial Order 3206 (SO 3206), which guides federal agencies as they address the competing demands of tribal rights and ESA mandates.<sup>277</sup> Although SO 3206 may not be a panacea, its approach toward real consultation and negotiated solutions may ultimately result in better outcomes, both for tribes and endangered species.

This Part has two sub-sections. The first sub-section explores the underpinnings of SO 3206 and examines ways it has been implemented. The second sub-section reviews actual examples of disputes where, post SO 3206, the ultimate outcome for some very contentious issues was found through negotiation, not judicial resolution.

<sup>274</sup> 543 F.3d 1276, 1287 (Fed. Cir. 2008), *reh'g and reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

<sup>275</sup> *Stockton E. Water Dist. v. United States*, 75 Fed. Cl. 373 (2007).

<sup>276</sup> *Carabetta Enters., Inc. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 270 (1981)).

<sup>277</sup> *See American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, Secretarial Order 3206 (Sec'y of the Interior & Sec'y of Commerce, 1997), *available at* <http://www.fws.gov/endangered/tribal/Esatribe.htm> [hereinafter SO 3206].

## A. Secretarial Order 3206

### 1. Background

SO 3206 resulted from high-level negotiations between Indian tribes and the federal government. During discussions about re-authorizing the ESA during the mid-1990s, tribal leaders from across the country gathered to discuss how best to engage in the potential reauthorization.<sup>278</sup> After this meeting and several follow up conversations, the tribes initiated discussions with the government. The purpose of these discussions was to “move away from... swords’ point disputes over whether or not the ESA affects tribal rights—and toward on-the-ground professional management.”<sup>279</sup>

In 1997, the United States Secretary of the Interior and the Secretary of Commerce signed SO 3206. The goal of SO 3206 “was to avoid ESA conflicts through good, cooperative tribal land management.”<sup>280</sup> In the end, Professor Charles Wilkinson, a participant in discussions, observed “[t]he Order that resulted from the tribal-federal negotiations, rather than amounting to a victory for either side, achieved what it was designed to accomplish—a sensible harmonizing of Indian law and the ESA.”<sup>281</sup> As another commentator noted, this Order was notable because it stemmed from a tribal initiative to promote tribal sovereignty and self-determination rather than a top-down government directive.<sup>282</sup>

### 2. Content of Secretarial Order 3206

While the Secretarial Order itself has several key sections, perhaps the most notable section is Section 5.<sup>283</sup> Section 5 includes five principles that govern the responsibilities of the Departments of Interior and Commerce.<sup>284</sup> These five principles state that the Departments must (1) work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems; (2) recognize

<sup>278</sup> Wilkinson, *supra* note 2, at 1066–75.

<sup>279</sup> *Id.* at 1074.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 1081.

<sup>282</sup> Zellmer, *supra* note 69, at 405.

<sup>283</sup> See SO 3206, *supra* note 280.

<sup>284</sup> *Id.* § 5.

that Indian lands are not subject to the same controls as federal public lands; (3) assist Indian tribes in developing and expanding tribal programs to promote healthy ecosystems make conservation restrictions unnecessary; (4) be sensitive to Indian culture, religion and spirituality; and (5) make information available to Indian tribes.<sup>285</sup>

Of these, the heart of the Order is Principle 3. Principle 3 requires the Departments to “take affirmative steps” to assist Indian tribes in expanding healthy ecosystem-promoting programs.<sup>286</sup> Principle 3 also requires the Departments to “give deference to tribal conservation and management plans for tribal trust resources.”<sup>287</sup> Most importantly, the Principle requires the Departments to exercise their trustee responsibilities and support tribal measures to head off later conservation restrictions.<sup>288</sup> Procedurally, this requires prompt notification when species conservation restrictions are being considered, along with technical and financial assistance to help tribes devise alternative protective measures. If restrictive measures are still necessary, this Principle requires advance notice and consultation with tribes to harmonize the federal trust duty with tribal sovereignty and departmental mission in regards to directed take of species.<sup>289</sup>

In reviewing whether something is a potential “incidental” take and before placing restrictions on tribes, the Departments must analyze and determine (i) the restriction is reasonable and necessary for conservation of the species; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate (either as stated or as applied) against Indian activities; and (v) voluntary measures are not adequate to achieve the necessary conservation purpose.<sup>290</sup>

Finally, SO 3206 contains an appendix to guide actions taken by the

<sup>285</sup> *Id.* § 5, Principles 1–5.

<sup>286</sup> *Id.* at Principle 3(A).

<sup>287</sup> *Id.* at 3(B).

<sup>288</sup> *Id.* at 3(C).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* § 5, Principle 3(C).

U.S. Fish and Wildlife Service (Department of Interior) and the National Marine Fisheries Service (Department of Commerce). Among other items, the appendix encourages meaningful tribal participation in determining which species should be considered for listing, both during the listing process itself, and in Section 7 and habitat conservation planning.<sup>291</sup> For those proposals which implicate tribal rights or trust resources, the Departments shall “recognize” tribal contributions as part of their process to designate critical habitat or evaluate economic impacts, especially when “balancing” potential exclusions from critical habitat.<sup>292</sup>

For example, critical habitat cannot be designated in areas impacting tribal resources, fee lands, or rights unless “essential to conserve a listed species, with the burden on the [Departments] to evaluate and document how such needs could be achieved on other lands.”<sup>293</sup> The Departments must avoid or minimize the negative impact of ESA Section 4(d) actions on tribal management, economic development rights, or reserved rights “to the maximum extent allowed by law.”<sup>294</sup> In addition to procedural guarantees of “full participation in the consultation process” under ESA Section 7, the Order also requires the Departments to give full consideration to tribal input on reasonable and prudent alternatives,<sup>295</sup> to ensure that selected alternatives do not discriminate against tribes, and to provide a written explanation of how its selected alternative is consistent with trust responsibilities and can incorporate tribal plans.<sup>296</sup> For Habitat Conservation Plans that may impact tribal resources or rights, the Departments “shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources” in addition to soliciting tribal input and explaining their decision.<sup>297</sup>

### 3. Analysis of the Approach Laid out in the Secretarial Order

Although SO 3206 is not a “dramatic breakthrough,” or an “Olympian

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<sup>291</sup> *Id.* app. § 3.

<sup>292</sup> *Id.* app. § 3(B)(3).

<sup>293</sup> *Id.* app. § 3(B)(4).

<sup>294</sup> *Id.* app. § 3(B)(5).

<sup>295</sup> See *supra* note 52 and accompanying text for a discussion of “reasonable and prudent alternatives.”

<sup>296</sup> SO 3206, *supra* note 280, app. § 3(C)(3)(a), (d).

<sup>297</sup> *Id.* app. §3(D)(3).

moment in federal Indian policy,<sup>298</sup> it is an important step forward in laying the groundwork for government-to-government resolution of tribal and ESA issues. Commentators have noted that it represents a “sensitive, fair approach to a thorny area of policy,”<sup>299</sup> and is “a reasoned approach to the difficult balancing act necessitated by conflicting demands to conserve species and to promote the use and enjoyment of tribal trust resources.”<sup>300</sup> It puts “tribes and listed species on at least an even playing field”<sup>301</sup> and “establishes a *special* place for tribes” relative to non-tribal actors “in all key areas” of ESA administration.<sup>302</sup>

The conservation standards invoked by the Secretarial Order offer a “middle ground between complete coverage and complete exclusion of tribes under the ESA.”<sup>303</sup> By placing the burden on the Departments to show that “the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities,”<sup>304</sup> SO 3206 addresses the argument that “[w]here equally effective habitat designation alternatives exist, the [federal government] is compelled by trust responsibility to choose the alternative that concurrently protects tribal interests.”<sup>305</sup> Similarly, the Departments’ affirmative burden to show that the measure is the least restrictive alternative available answers the assertion that “[i]f mitigation alternatives are available, the United States, as trustee, must [choose] the alternative that best protects tribal interests.”<sup>306</sup> The Appendix strengthens this requirement by placing the burden on the Departments to avoid or minimize the negative impact of ESA 4(d) actions on tribal management, economic development rights, or reserved rights “to the maximum extent allowed by law.”<sup>307</sup> Although SO 3206 may not be “directly enforceable,” one commentator noted that a court may review an agency’s failure

<sup>298</sup> Wilkinson, *supra* note 2, at 1088.

<sup>299</sup> *Id.*

<sup>300</sup> Zellmer, *supra* note 69, at 384.

<sup>301</sup> *Id.* at 415.

<sup>302</sup> Wilkinson, *supra* note 2, at 1084 (emphasis added).

<sup>303</sup> *Id.* at 1071.

<sup>304</sup> SO 3206, *supra* note 280, § 5, Principle 3(C).

<sup>305</sup> Hansen, *supra* note 70, at 1331.

<sup>306</sup> *Id.* at 1344.

<sup>307</sup> SO 3206, *supra* note 280, app. § 3(B)(5).

to comply with SO 3206's guidance as grounds for invalidation of an agency action as arbitrary and capricious under the Administrative Procedure Act, or might look at SO 3206's provisions when interpreting the government's common law trust obligation.<sup>308</sup>

Important as it is, there are several concerns with the Secretarial Order. As mentioned above, it is a policy guidance document only; it does not purport to change existing rights, benefits, or trust responsibilities, nor does it preempt or modify the statutory authorities of the relevant agencies.<sup>309</sup> In addition, Section 9 confirms that the avenue for addressing disputes over implementation of SO 3206 is not the judicial system, but rather "government-to-government discourse" and alternative dispute resolution.<sup>310</sup> Perhaps laudable in theory, some remain skeptical that this will result in "meaningful" engagement.<sup>311</sup> As Professor Wilkinson pointed out, one reason meaningful engagement might not be possible is that it takes a great deal of time to fully understand the perspectives involved. Such time is not usually provided for in a typical agency review process, and the reviewers may not have the patience necessary to fully understand the complicated context in which they are making a decision.<sup>312</sup>

The Secretarial Order also offers little in the way of relief from prohibitions against direct take. Beyond merely setting forth a nebulous goal to "harmonize" trust duties, tribal sovereignty, and departmental missions under Principle 3, SO 3206 does not "authorize direct take of listed species or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat."<sup>313</sup> Further, SO 3206 did not answer the criticisms that the government has a responsibility to go beyond the ESA's protection of species' existence to an affirmative duty to restore "resource productivity to the point where [resources] are capable of sustaining tribal

<sup>308</sup> Zellmer, *supra* note 69, at 414–15.

<sup>309</sup> There are parallel disclaimers, such as the Order not "diminish" any tribal rights nor "preempt or modify" Indian authority. SO 3206, *supra* note 278, § 2(B), (C).

<sup>310</sup> SO 3206, *supra* note 291, § 9.

<sup>311</sup> Sanders, *supra* note 111, at 122.

<sup>312</sup> Wilkinson, *supra* note 2, at 1078–79.

<sup>313</sup> SO 3206, *supra* note 280, § 2(D). As one commentator lamented, the Order applies "only in a highly attenuated fashion with respect to Section 7 consultations." Wilkinson, *supra* note 2, at 1085.

utilization.”<sup>314</sup> Outside activities may continue to exhaust a resource so that a species reaches a crisis point where tribal activities will inevitably be restricted.<sup>315</sup> Finally, the Appendix closes with a whimper that the Departments need only be “cognizant” of what it calls “tribal desires.”<sup>316</sup>

#### 4. How Secretarial Order 3206 Has Actually Function

As some commentators hope, the change will be dramatic if courts adopt the conservation principles of Secretarial Order 3206 as a binding standard for analyzing federal trust responsibilities.<sup>317</sup> In the context of court scrutiny of *state* conservation attempts to regulate tribal treaty rights (the doctrinal source of the conservation necessity principles listed in Principle 3), “courts have required that states meet a formidable burden in showing the necessity of such regulation.”<sup>318</sup> While a “state may not have to show that the species is subject to imminent extinction, it must prove substantial species peril,” and “must also show that existing tribal self-regulation, or other, less restrictive means or methods, is inadequate to achieve conservation.”<sup>319</sup>

In practice, however, courts have not applied this level of scrutiny in relation to SO 3206. Since its issuance in 1997, the Secretarial Order has been discussed in one published case.<sup>320</sup> When the Miccosukee Tribes brought a claim in part based on the Principles, the court simply responded that SO 3206 was only for Departmental guidance and did not create any substantive trust obligation or a cause of action, quickly dismissing the Tribe’s claim.<sup>321</sup>

However, it may not be helpful to measure SO 3206 against some aspirational goals for what the trust duty *should* entail or what affirmative

<sup>314</sup> Wilkinson, *supra* note 2, at 1073 (citing *Wood I*, *supra* note 83 at 778–79).

<sup>315</sup> *Wood I*, *supra* note 83, at 797 (“the conservation principles do virtually nothing to prevent the agency from narrowing its choices to the point where harvest regulation is inevitable”).

<sup>316</sup> SO 3206, *supra* note 280, app. § 3(E)(2).

<sup>317</sup> Zellmer, *supra* note 69, at 384.

<sup>318</sup> See Tomlinson, *supra* note 107, at 1111.

<sup>319</sup> *Id.*

<sup>320</sup> *Miccosukee Tribe of Indians of Florida v. United States*, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006). The court repeated its opinion the following year. *Miccosukee Tribe of Indians of Fla. v. United States*, 528 F. Supp. 2d 1317, 1328 (S.D. Fla. 2007).

<sup>321</sup> *Id.*

conservation steps the government *should* take to meet some lofty goal. The real question is whether SO 3206 better protects tribal interests than what had been previously achieved through litigation or other means. Given the “jaundiced view” of courts to the trust responsibility in environmental cases, the few exceptions “to the rather dismal fate of the trust responsibility” in modern Indian environmental cases, and “the current hostile legal climate” which greets such trust responsibility arguments with “skepticism,”<sup>322</sup> it appears SO 3206 is an improvement.

As one researcher recently noted, “while 3206 has not yet lived up to its full promise, it is making a difference.”<sup>323</sup> There have been almost 100 final rules designating critical habitat after SO 3206, and eleven designating tribal lands as habitat.<sup>324</sup> Out of these eleven, ten resulted from environmental lawsuits and one resulted from another lawsuit challenging the exclusion of tribal lands from an earlier designation.<sup>325</sup> The other rules did not include tribal lands as critical habitat. In reviewing these decisions, Sanders noted that SO 3206 may be making a difference. This impact is not necessarily occurring because the federal agencies are fulfilling their fiduciary responsibilities, but instead when “tribes take conservation of protected species into their own hands by creating and implementing habitat management plans,” those plans “are being accepted by the Services as alternatives to the designation of critical habitat on Indian lands.”<sup>326</sup>

Certainly, the Departments are not following the explicit directions of the order if SO 3206 is not actively changing federal perspectives. Yet the source of why SO 3206 may be working is particularly fitting. Because the Tribes pushed for SO 3206 to promote tribal sovereignty and environmental self-determination, and SO 3206 is “imbued with the spirit of” the same,<sup>327</sup> it seems appropriate that SO 3206 may be working specifically because of tribal efforts to move

<sup>322</sup> Berkey, *supra*, note 173, at 1074, 1076, 1079.

<sup>323</sup> MARREN SANDERS, IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT IN INDIAN COUNTRY: THE PROMISE AND REALITY OF SECRETARIAL ORDER 3206, at 3 (Joint Occasional Papers on Native Aff., 2007), [http://www.jopna.net/pubs/jopna%202007\\_01\\_web.pdf](http://www.jopna.net/pubs/jopna%202007_01_web.pdf).

<sup>324</sup> *Id.* at 24.

<sup>325</sup> *Id.* at 25.

<sup>326</sup> *Id.* at 37–38.

<sup>327</sup> Zellmer, *supra* note 69 at 414.

restoration of species and preservation of eco-systems forward.

One final caution is that even if the government and tribes see eye-to-eye, they may not be able to bilaterally enforce their shared vision in a particular case. For example, in *Center for Biological Diversity v. Norton*,<sup>328</sup> the government excluded tribal land from designation as critical habitat, arguing that the tribes' management plans adequately protected the species.<sup>329</sup> The government was sued by two groups on this exclusion, one of which was an environmental group.<sup>330</sup> The court rejected the government's argument that such adequate management allowed the areas to avoid a "critical habitat" tag;<sup>331</sup> the existence of other tribal habitat protections did not relieve the government's duty to designate.<sup>332</sup> The court attacked the government's failure to designate tribal lands as critical habitat.<sup>333</sup> After being threatened with contempt, the federal government eventually designated some tribal land as critical habitat, only to be subsequently sued by non-Indians who were concerned that too little Indian acreage was being designated.<sup>334</sup> It remains to be seen how the Obama Administration's approach to these questions may alter the equation.

## B. Case Studies

Given the importance of these issues, the uncertainty of litigating these questions, judicial deference towards federal agencies, and the movement towards real implementation of government-to-government relations, it is perhaps of little surprise that some of the recent successes in addressing endangered species and tribal needs have come not through completed litigation, but through negotiated settlements. This section provides three case studies where the disputes were eventually resolved by negotiated agreements after the adoption of SO 3206. This type of negotiated settlement provides some optimism for meaningful dialogue and real solutions to address this type of critical question.

<sup>328</sup> 240 F. Supp. 2d 1090 (D. Ariz. 2003).

<sup>329</sup> *Id.* at 1091, 1093–94.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 1097–98.

<sup>332</sup> *Id.* at 1100.

<sup>333</sup> *Id.* at 1101–02.

<sup>334</sup> *See* *Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013 (D. Ariz. 2008).

## 1. Animas-La Plata

The Animas-La Plata (“ALP”) Project in southwestern Colorado and northwestern New Mexico provides an example of a direct conflict between tribal rights to water and an endangered fish species (the squawfish, later renamed Colorado pikeminnow) leading to a solution addressing the needs of both.

In 1979, Fish and Wildlife Service (“FWS”) issued an early biological opinion discussing impacts on the already endangered squawfish.<sup>335</sup> In 1990, the FWS issued an updated draft biological opinion under the Endangered Species Act finding no “reasonable and prudent alternatives” to building the ALP because of impacts to the endangered Colorado pikeminnow.<sup>336</sup> In 1991, FWS issued a final Biological Opinion that allowed for building parts of the ALP, but limited depletions to 57,100 acre-feet of water.<sup>337</sup>

Subsequent negotiations eventually led to a compromise agreement about the project, enacted in the Colorado Ute Settlement Act Amendments of 2000.<sup>338</sup> This scaled the ALP down, but in a way that addressed tribal water rights, nontribal water uses, and the needs of the endangered species.<sup>339</sup> For example, this agreement not only provided for water for the Ute Mountain Ute and Southern Ute Indian Tribes, but also for a pipeline to supply water to the Navajo Indian Reservation and also a water supply for other nontribal interests.<sup>340</sup> In addition, this agreement expressly found that there was insufficient water available for irrigation given the competing needs.<sup>341</sup> Accordingly, the amendment removed any water used for irrigation purposes and reduced the size of the facilities. As one commentator noted, this agreement also paved the way for significant efforts

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<sup>335</sup> See U.S. Government Accountability Office, *Animas-La Plata Project: Status and Legislative History*, at 10 (Nov. 1995), <http://www.gao.gov/archive/1996/rc96001.pdf> (last visited Mar. 18, 2009).

<sup>336</sup> U.S. Fish & Wildlife Service., Draft Biological Opinion for the Animas-La Plata Project, Colorado and New Mexico 22 (May 4, 1990), cited in Stanley M. Pollack & Scott B. McElroy, *A-LP Lite: A Compromise Project That Fulfills The United States' Trust Responsibility In An Environmentally Responsible Manner*, 41 NAT. RESOURCES J. 639, 645 (2001).

<sup>337</sup> *Id.*

<sup>338</sup> Colorado Ute Settlement Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* § 302(A)(ii)(I–VII).

<sup>341</sup> *Id.* at § 4–5.

to restore habitat for the endangered Colorado pikeminnow that would not have occurred but for the project.<sup>342</sup> The ALP project is now under construction, and water may be stored as early as the spring of 2009.<sup>343</sup>

## 2. Quinault Indian Nation<sup>344</sup>

This case study comes from the potential impact of timber harvesting on the marbled murrelet in Washington State. In September 1992, the marbled murrelet was listed as threatened in Washington, Oregon, and California, primarily because of excessive harvest of late-successional and old-growth forests, the preferred nesting habitat of murrelets.<sup>345</sup> In May 1996, a final designation of marbled murrelet critical habitat in Washington, Oregon, and California was approved.<sup>346</sup> Out of deference to tribal interests, the Department of Interior did not designate habitat on tribal lands. As it noted in the final rule:

Quinault lands are considered important to the conservation of the marbled murrelet. [A portion] of the Quinault Indian Reservation contains large blocks of contiguous, old-growth habitat. Much of this habitat currently supports marbled murrelets. However, the Quinault lands were not included in the supplemental proposed rule after consideration of the [f]ederal government's trust responsibilities and the options for achieving essential conservation contributions through other alternatives.<sup>347</sup>

When the marbled murrelet was listed as threatened in 1992, the U.S. Fish

<sup>342</sup> Pollack & McElroy, *supra* note 339, at 641.

<sup>343</sup> See U.S. Bureau of Reclamation, *Animas-La Plata Project Update*, <http://www.usbr.gov/uc/project/animas/update.html> (last visited Mar. 18, 2009).

<sup>344</sup> In duty of disclosure, David Spohr notes that, while with the Justice Department, he was counsel of record for the below described litigation, *Quinault Indian Nation v. United States*, No. 01-444 L (Fed. Cl.). The discussion here does not represent the position of the United States.

<sup>345</sup> Determination of Threatened Status for the Washington, Oregon, and California Population of the Marbled Murrelet, 57 Fed. Reg. 45328 (Oct. 1, 1992).

<sup>346</sup> Final Designation of Critical Habitat for the Marbled Murrelet, 61 Fed. Reg. 26256 (May 24, 1996).

<sup>347</sup> *Id.* at 26266.

and Wildlife Service became concerned about the cumulative effects of the serial timber harvest on a portion of the Quinault Indian Nation (QIN) Reservation. The QIN consulted with the Fish and Wildlife Service, and submitted a comprehensive management plan in 1995, based on the Service's recommendation. After numerous consultations discussing possible compensation, conservation easements, a land exchange, determinations of murrelet habitat needs, and reasonable and prudent alternatives, the FWS issued a Biological Opinion in January 1998, concluding that the proposed action was likely to jeopardize the continued existence of the marbled murrelet by reducing reproduction, numbers, and distribution of the species.

The government and QIN continued working on a solution. The parties agreed to pursue certain funding sources and to begin work on a new Opinion. In July 2000, the QIN, government and the non-profit Trust for Public Lands (TPL) signed an agreement under which Interior and TPL would use their best faith efforts to seek and support funding of up to \$50 million to acquire perpetual conservation easements. When funding for the conservation easements failed to materialize, the Quinault brought breach of trust and Fifth Amendment takings claims in 2001. Among the other claims brought, the QIN sought \$100 million in compensation and raised "the issue of whether the United States can restrict, under the Endangered Species Act, the treaty rights of a tribe to use its on-reservation natural resources."<sup>348</sup>

After several years of further negotiation, and without any dispositive motions being filed in the litigation, the dispute was resolved.<sup>349</sup> The United States agreed to pay \$31 million and TPL to pay \$1.2 million in return for conservation easements restricting timber harvests and otherwise protecting the habitat on 4,207 acres of old growth forest habitat.<sup>350</sup> As one commentator recently described the result, the

QIN continues to hold fee to and manage the land subject to

<sup>348</sup> News Release, Dept. of the Interior, Quinault Indian Nation Settlement Conserves Marbled Murrelet Habitat, (Sept. 20, 2004), [http://www.doi.gov/news/04\\_News\\_Releases/040920c.htm](http://www.doi.gov/news/04_News_Releases/040920c.htm).

<sup>349</sup> William Poole, *The Quinault's Quest*, LAND & PEOPLE, Fall 2007, available at [http://www.tpl.org/tier3\\_cd.cfm?content\\_item\\_id=21966&folder\\_id=3409](http://www.tpl.org/tier3_cd.cfm?content_item_id=21966&folder_id=3409).

<sup>350</sup> See News Release, *supra* note 351.

restrictions contained in the easement. Federal payments help fund QIN's land consultation and reforestation efforts and set a foundation for ecologically viable planning. TPL provides additional assistance by helping QIN to inventory and value available lands and manage an effective land-acquisition program.<sup>351</sup>

Rather than leaving a court to resolve these differences, the uncertainty in outcome from both perspectives encouraged a settlement that helped address all perspectives.

### 3. The Klamath Basin

The Klamath Basin provides a well-known case study where negotiation is finally spurring forward progress on resolving tribal rights to fish listed Endangered Species and water rights for agriculture. In 2001, the long-simmering dispute in the Klamath Basin made headlines throughout the country as federal marshals stood at headgates to prevent farmers from diverting water to the detriment of fish during an extreme drought.<sup>352</sup> Just a year later, the issues in the Klamath Basin made headlines again after a report found that water releases would not harm fish; however, subsequent diversions lowered the Klamath River, raised the water temperature, and ultimately resulted in deadly river conditions that killed more than 77,000 fish.<sup>353</sup>

This volatile situation also involved various tribal perspectives on the proper course of action. Tribes in the Klamath Basin include the Klamath of Oregon and the Yurok and Hoopa Valley of Northern California. The Klamath Tribes historically relied on two species of fish that lived in the Upper Klamath, known as the *qapdo* and *c'wam* or the shortnose and Lost River suckers, for a

<sup>351</sup> Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 408–09 (2008).

<sup>352</sup> See, e.g., Eric Brazil, *Klamath Livelihoods Whither: Water Shut-off Along Oregon Border Takes Toll on Farmers*, S.F. CHRON. July 16, 2001, at A1.

<sup>353</sup> See, e.g., Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1, available at [http://blog.washingtonpost.com/chene/chapters/leaving\\_no\\_tracks/index.html](http://blog.washingtonpost.com/chene/chapters/leaving_no_tracks/index.html). See generally HOLLY DOREMUS & A. DAN TARLOCK, *WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS* (2008).

major source of food.<sup>354</sup> The Klamath Tribes retained the right to fish at their usual and accustomed places despite the termination of their reservation.<sup>355</sup> Due to precipitous declines in their population, these species were listed as endangered in 1988.<sup>356</sup> The Lower Klamath Basin Tribes relied on salmon as the foundation of their wealth and culture; they retained federal fishing rights for ceremonial, subsistence, and commercial purposes through creation of their reservation via executive order.<sup>357</sup> The Klamath River coho salmon were listed as endangered in 1997, leaving “[w]ater supplies for irrigators...squeezed from both ends: the sucker species seemed to require minimum lake levels, while the coho needed minimum stream flows. Maintaining both would leave little water for irrigation withdrawals.”<sup>358</sup>

After years of fighting in every conceivable forum, including the court room, it seems that a negotiated settlement to address some of the key issues raised in this “water war” may be workable.<sup>359</sup> Details of the proposed settlement include creating a council to coordinate the agreement and manage the river; removing four dams; establishing a fisheries restoration program for the endangered suckers and coho (as well as for non-listed species); announcing a formal water right for the area’s wildlife refuges; reducing the electricity rate for area farmers; and allowing the Klamath Tribes to buy 90,000 acres for a homeland.<sup>360</sup> In addition, the agreement calls for a decrease in the amount of water available to farmers and a nearly \$1 billion budget to help cover the cost of a one-time upfront payment

<sup>354</sup> See, e.g., Dan A. Tarlock & Holly D. Doremus, *Fish, Farms, And The Clash Of Cultures In The Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 289 (2003) (citing TUPPER ANSEL BLAKE ET AL., *BALANCING WATER: RESTORING THE KLAMATH BASIN* 35 (2000)).

<sup>355</sup> There is considerable case law providing significant background on the issues in the Klamath Basin. A detailed review is beyond the scope of this article, but see, for example, *United States v. Adair*, 723 F.2d 1394 (9th Cir.1983).

<sup>356</sup> Tarlock & Doremus, *supra* note 357, at 293, (citing 53 Fed. Reg. 27,130, 27,131 (July 18, 1988)).

<sup>357</sup> Tarlock & Doremus, *supra* note 357, at 297, (citing Department of Interior Solicitor’s Memorandum M-36979, *Fishing Rights of the Yurok and Hoopa Valley Tribes*, Oct. 4, 1993, at 4–5, available at <http://www.doi.gov/sol/M36979.pdf>.) See also *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir.1995) for additional background.

<sup>358</sup> Tarlock & Doremus, *supra* note 380, at 317–18.

<sup>359</sup> See, e.g., Felicity Barringer, *Deal on Dams on Klamath Advances*, N.Y. TIMES, Jan. 16, 2008, at A14, available at <http://www.nytimes.com/2008/01/16/us/16klamath.html>.

<sup>360</sup> Matt Jenkins, *Peace on the Klamath*, HIGH COUNTRY NEWS, June 23, 2008, at 17, available at <http://www.hcn.org/issues/373/17763>.

to farmers willing to fallow their land in droughts.<sup>361</sup> Although not all parties (including the Hoopa Valley Tribe) are happy with the proposed agreement,<sup>362</sup> this potential settlement represents an intriguing way forward to address otherwise seemingly intractable issues.

#### 4. Findings from Case Studies

These case studies share several commonalities. They involved lawsuits or the threat of lawsuits. Additionally, they involved tribes with identifiable rights to harvestable timber or fish, and a backdrop of other interests that may also be at play. For example, the Klamath Tribes reserved rights to water are a factor in the ESA discussion. These identifiable rights ultimately helped set the table for a more equal power dynamic, especially given the uncertainty of a litigated outcome in court. The actual agreements took time and required several steps forward and many backward to achieve their results. In the end, time will tell whether the research and investigation on how to promote ecosystem restoration will help. At the very least, the negotiated solutions in these cases provide an opportunity to meet both the tribal and Endangered Species Act interests.

## VI. CONCLUSION

It might seem odd that almost four decades after passage of the ESA, its applicability to tribal activities has not been conclusively decided. Although application of the ESA and similar statutes to tribes has been heavily litigated, most of the published case law has focused on whether a particular tribal activity is covered by a cognizable right that could have been abrogated by the ESA or similar regulation, and whether abrogation is necessary. There are impassioned views supporting a clear-cut regime where tribal activities are *per se* immune from ESA restrictions or, conversely, must simply follow the same ESA rules as anyone else. But such clarity has not been the hallmark of the case law. Instead, the analysis has been—and likely will continue to be—a more nuanced one, considering factors such as the source of established rights, the locus of the

<sup>361</sup> *Id.*

<sup>362</sup> See, e.g., Lyle Marshall, *Fish are Key to Deal on Klamath*, SACRAMENTO BEE, Feb. 10, 2008, at E3.

activity, and government regulation.

Some lessons can be drawn from the case law. Recent courts have not applied a strict definition of trust duties to an agency that must balance natural resource concerns and tribal interests, recognizing that the government often must attempt to meet multiple, competing interests. At least where the federal government has not supported their position, recent tribal attempts to use the ESA or other environmental statutes to prevent non-tribal actions that may harm species to the extent that regulation of tribal activities is inevitable have not been well-received by the courts. Modern courts have adopted a narrow reading of the trust doctrine and seem reticent to elevate tribal concerns.

Yet when the weight of the ESA falls on a tribe, and environmental restrictions directly restrict tribal activities, tribes have some argument that such restrictions breach the government's trust duties. That ESA-related restrictions will fall disproportionately on tribal lands is unlikely to amount to a breach if considered alone, given that the scenario parallels the situation for any (private or tribal) property owner of relatively undeveloped land. However, there may be situations where an ESA-caused breach of what would otherwise be the government's duty to advance tribal interests will lead to a compensable claim. For now, one would predict that the ESA will neither immunize every potential federal breach, nor lead to rampant federal liability. The Supreme Court may clarify the guiding principles later this term. In the meantime, the federal circuit may offer further insight as it handles appeals in the somewhat parallel situation of ESA-caused breaches of federal obligations to contract holders.

As we enter a new presidential administration, particularly one promoting engagement, it will be interesting to see how these issues continue to evolve. For example, tribes are stepping forward and asking that SO 3206 be more thoroughly implemented and not left by the "wayside."<sup>363</sup> In their recommendations to the Obama Administration and the 111<sup>th</sup> Congress, for example, the Columbia River Intertribal Fish Commission noted that "[t]he Obama Administration has the opportunity to reinvigorate the federal government's commitment to its trust

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<sup>363</sup> See Columbia River Inter-Tribal Fish Commission, Recommendations to the Obama Administration and the 111th Congress, <http://www.critfc.org/text/transition/transition6.html> (last visited Feb. 20, 2009).

responsibilities while implementing its other legal duties,” and asked for the Administration to fulfill its trust responsibilities by upholding SO 3206.<sup>364</sup> The opportunity for meaningful engagement and co-management of natural resources may be harder given the stretched economic times; however, the real promise offered by meaningful engagement and negotiated solutions may offer a path forward for protecting both tribal interests and endangered species.

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<sup>364</sup> *Id.*