The Endangered Species Act: Tramping on Tribal Rights?

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THE ENDANGERED SPECIES ACT:

TRAMPING ON TRIBAL RIGHTS?

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BIODIVERSITY PROTECTION
IMPLEMENTATION AND REFORM OF
THE ENDANGERED SPECIES ACT

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado
June 10-12, 1996
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I. OVERVIEW OF PROVISIONS OF THE ENDANGERED SPECIES ACT WHICH MOST AFFECT TRIBAL RIGHTS.

A. *ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1):* Authorizes the Secretary of the Interior (or Secretary of Commerce, depending on the species) to list a species as "endangered" or "threatened" based on certain statutory criteria.

B. *ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1):* Requires all federal agencies to use their programs and authorities to further the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species.

C. *ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2):* Requires each federal agency to insure that any action it authorizes, funds or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat. This section mandates consultation with the Secretary of the Interior (or the Secretary of Commerce) to insure against the likelihood of jeopardy or adverse modification of critical habitat.

D. *ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1):* Prohibits "any person subject to the jurisdiction of the United States" from importing, exporting, "taking," possessing, selling, offering for sale, delivering,

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1 Adapted from an outline presented by Robert C. Baum of the Office of the Solicitor, U.S. Department of the Interior at the 1994 Federal Bar Association Indian Law Conference.
carrying, transporting, or shipping an endangered species of fish or wildlife, or from violating any regulation applicable to endangered or threatened fish and wildlife species. (See also ESA § 9(a)(2), 16 U.S.C. § 1538(a)(2) (prohibitions applicable to listed plant species).) The "take" prohibition is extended to threatened species by regulation, unless "taking" is permitted by a special rule applicable to the species in question. 50 C.F.R. § 17.31. "Take" is broadly defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). "Harass" is defined by regulation to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." "Harm" is defined by regulation to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407 (1995); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995).

E. ESA § 10, 16 U.S.C. § 1539: Provides exceptions to the prohibitions of ESA § 9 including, inter alia, an exception whereby the Secretary may permit the taking of a protected species if such taking is incidental to an otherwise lawful activity and the permittee has submitted a conservation plan that provides for mitigation measures and funding mechanisms to implement
the conservation plan. An express exception to the take prohibition of ESA § 9 is also provided for Alaskan Natives (and non-native permanent residents of an Alaskan native village) if the taking is primarily for subsistence purposes.

II. APPLICABILITY OF ESA TO TRIBAL ECONOMIC DEVELOPMENT.

A. Direct Taking Situations: Native American hunting and fishing protected species for commercial or noncommercial purposes may be an ESA § 9 violation in some situations. See *United States v. Dion*, 752 F.2d 1261 (8th Cir.) (en banc) ("Dion I") (taking of eagles for commercial and non-commercial purposes), on remand, 762 F.2d 674 (8th Cir. 1985) ("Dion II"), rev'd in part and remanded, 476 U.S. 734 (1986) ("Dion III"); cf. *United States v. Bresette*, 761 F.Supp. 685 (D. Minn. 1991) (sale of items partially composed of feathers from birds protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.).

B. Incidental Taking Situations: economic development activities may involve the incidental take of protected species, in violation of ESA § 9. *City of Las Vegas v. Lujan*, 891 F.2d 927, 929 (D.C. Cir. 1989) ("The relocation of a listed species or the alteration of its habitat during constructing activities constitutes an 'incidental taking' that is prohibited by the [ESA] unless the Secretary grants a special permit"); Appendix A, November 19, 1993 letter to Honorable Ada Deer from Thomas W. Fredericks; *Pacific Northwest Generating Coop v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) (loss of a few endangered salmon constitutes an incidental taking where they were caught because they are visually indistinguishable from an unendangered fish which was intended to be caught). The Secretary
can grant a permit for such incidental takings under the circumstances listed in ESA § 10, 16 U.S.C. § 1539(B)(2).

C. Agency Action: federal approval of a lease or other action requires consultation under ESA § 7 if it may affect a protected species.

III. APPLICABILITY OF ESA § 9 TO NATIVE AMERICAN TAKINGS.


B. Scope of Exception: Congress provided a limited exception in the ESA for non-wasteful Native Alaskan takings of endangered or threatened species "if such taking is primarily for subsistence purposes." ESA § 10(e), 16 U.S.C. § 1539(e). Courts have concluded that the ESA's exception for Native Alaskan takings does not extend to takings by other Native Americans. Nuesca, 773 F.Supp. at 1390-91; 945 F.2d at 257.

2 Although Native Alaskans enjoy a limited right to take species that are otherwise protected by the ESA, that right may be regulated whenever the Secretary of the Interior (or, depending on the species, the Secretary of Commerce) determines that the Native Alaskan taking "materially and negatively affects the threatened or endangered species. . . ." ESA § 10(e)(4), 16 U.S.C. § 1539(e)(4).
Tribes arguably may enjoy rights to economically develop their reservations and, in the process, incidentally take protected species. See Appendix A, Fredericks letter at 9-11.

C. Limitation, Modification or Abrogation of Treaty Rights by the ESA: the Department of the Interior has concluded that the ESA’s “take” prohibition applies to hunting and fishing by all Native Americans (with the limited statutory exception for Native Alaskan subsistence uses) even where treaty rights may be implicated:

The [ESA] applies to Native Americans because treaty hunting and fishing rights simply do not include the right or power to take threatened or endangered species.

Appendix B, Martz Opinion, 87 I.D. at 529 and 535.3

Interior takes the position that the line of reasoning developed under the Puyallup decisions and their progeny (that treaty rights do not include the right to take listed species) is

3 See Antoine v. Washington, 420 U.S. 194, 207 (1975); Department of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973); Northern Arapaho Tribe v. Hodel, 808 F.2d 741, 750 (10th Cir. 1987); United States v. Eberhardt, 789 F.2d 1354, 1362 (9th Cir. 1986); Lac Courte Oreilles Band v. Wisconsin, 760 F.2d 177, 183 (7th Cir. 1985); United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983); United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980), cert. denied, 449 U.S. 1004 (1980); United States v. Billie, 667 F.Supp 1485, 1490-92 (S.D. Fla. 1987). In United States v. Dion, 476 U.S. 734, 738 n.5 and 745 (1986), the Supreme Court held that Eagle Protection Act, 16 U.S.C. §§ 668 et seq., abrogated the treaty right of the Yankton Tribe to hunt bald and golden eagles but specifically left open the issues of whether the treaty encompassed the right to take threatened or endangered species or whether the treaty right was abrogated by the Endangered Species Act. In United States v. Jim, 888 F.Supp. 1058 (D. Or. 1995), the federal court held that prosecuting an Indian exercising his treaty right for killing eagles under the Bald and Golden Eagle Protection Act and the Endangered Species Act did not violate his rights under the Religious Freedom Restoration Act of 1993.
preferable to the abrogation analysis described above:

There is a rule of construction which directs that a statute and an Indian Treaty must be construed in harmony, to the extent possible. There is another rule which states that treaties are not to be construed to the detriment of the Indians, and a third rule which states that abrogation or modification of treaty rights by Congress are not to be lightly imputed. The question of abrogation or modification need not even arise if there is no irreconcilable conflict between a treaty and the statute. It is my opinion that the [ESA] is in complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species and thus application of the Act to Indians does not restrict or abrogate their treaty rights.

Appendix B, Martz Opinion, 87 I.D. at 527 (citations omitted). The Martz Opinion goes on to state that by making treaty rights subject to regulatory control under the ESA rather than abrogating them, "[t]his approach ultimately preserves the rights of the Indians while at the same time addressing the critical wildlife problem recognized by Congress in the ESA." Id. at 530. If attempts to recover the species are successful, the treaty rights would again permit takings of that species. Id. at 530 n.6.

D. Means of Lifting the Take Prohibition.

1. Endangered species: the prohibition on the taking of species listed as "endangered" was established by statute, ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), and can only be lifted by the means described in the ESA. To permit economic development activities to go forward where the taking of endangered species may result, ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), authorizes the Secretary to permit "any taking otherwise prohibited by section 1538(a)(1)(B) of this title
if such taking is incidental to, and not the
purpose of, the carrying out of an otherwise
lawful activity." Such permits may only be issued
if the applicant submits a conservation plan that
includes certain necessary elements including,
inter alia, mitigation measures and funding. ESA

2. Threatened species: there is no statutory bar to
the taking of species as "threatened" under the
ESA, only a general regulatory bar to such takings
in the absence of a special rule. 50 C.F.R. §
17.31. ESA § 4(d), 16 U.S.C. § 1533(d),
authorizes the Secretary to "issue such
regulations as he deems necessary and advisable to
provide for the conservation of such species."
Section 4(d) provides an opportunity for
regulations that, when consistent with the
conservation of the species in question, may
exempt threatened species from the taking
prohibition in order to facilitate tribal economic
development or to enable tribal members to
exercise their fishing and hunting rights.
Otherwise, an incidental take permit may be
obtained. 50 C.F.R. § 17.32.

IV. APPLICABILITY OF ESA § 7.

A. Federal Actions Subject to Consultation Requirement:
to the extent tribal economic development activities
require action by a federal agency, that agency has a
duty, "in consultation with and with the assistance of
the Secretary [of the Interior or Commerce, depending
on the species], [to] insure that any action
authorized, funded, or carried out by such agency . . .
is not likely too jeopardize the continued existence of
any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" unless an exemption is granted. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). This requirement is triggered by a wide range of federal actions related to reservation development including providing grants or loans and approving leases or other agreements.⁴

B. Results of Consultation: the process of consultation with the Secretary of the Interior (or Commerce) results in a biological opinion on whether the proposed action will jeopardize a listed species or result in the destruction of its critical habitat. If the proposed action will not have such impacts, the action may go forward subject to any mandatory terms and conditions in the statement allowing incidental take. 50 C.F.R. § 402.14(i). The action agency may choose to implement the Secretary's nonmandatory conservation recommendations. 50 C.F.R. § 402.14(j). If, however, the Secretary believes the proposed action would result in jeopardy, the Secretary must either include "reasonable and prudent alternatives" to the proposed action or state that no such alternatives are known. 50 C.F.R. § 402.14(h)(3). The action agency has the ultimate responsibility to act on the Secretary's biological opinion in a manner that is consistent with its duty to prevent jeopardy to the protected species or adverse modification of its critical habitat.

⁴ Consultation under § 7(a)(2) is not required where the federal agency lacks any authority or discretion to influence the proposed action. Sierra Club v. Babbitt, 65 F.3d 1502, 1508-09 (9th Cir. 1995).
V. INTERPLAY BETWEEN THE ESA AND TRUST RESPONSIBILITIES.

A. General Standards.
A recent Secretarial Order clarifies the Department of the Interior's responsibilities for trust resources, requiring the component bureaus and offices of the Department, inter alia, (1) to "operate within a government to government relationship with federally recognized Indian tribes"; (2) to be "aware of the impact of their plans, projects, programs or activities on Indian trust resources"; (3) to "explicitly" address any anticipated effects on trust resources when engaged in the planning of any proposed project or action; and (4) "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may effect. . . ." Appendix C, Order of the Secretary of the Interior No. 3175 (Nov. 8, 1993). See also, Appendix D, the Native American Policy of the U.S. Fish and Wildlife Service (June 28, 1994).

The interplay between the Secretary's trust responsibility and his affirmative obligation to conserve threatened and endangered species in a context in which they support and reinforce each other is illustrated by two cases involving the Pyramid Lake Paiute Tribe's water and fish resources, Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1973), and Carson-Truckee Water Conservancy Dist. v. Watt, 537 F.Supp. 106 (D. Nev. 1982), and 549 F.Supp. 704 (D. Nev. 1982), aff'd, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083. In the Pyramid Lake case, which was decided before the enactment of the 1973 Endangered Species Act, the Secretary was ordered to utilize the full extent of his authority to fulfill his trust obligations to the Tribe by securing as much water as possible for the Pyramid
Lake fishery and by reducing diversions of water away from the Pyramid Lake to a federal reclamation project to the full extent of his authority. In Carson-Truckee, the district court held that the Secretary was affirmatively obligated under § 7(a)(1) of the Endangered Species Act, 16 U.S.C. § 1536(a)(1), to operate a federal reclamation dam and reservoir to benefit Pyramid Lake's endangered and threatened species even though the project originally was authorized for other, inconsistent purposes. The ESA was held to take precedence over the project's original purpose. On appeal, the Ninth Circuit affirmed while stating that it was not necessary to determine whether the Secretary was obligated to operate the reclamation facilities in that way because he had voluntarily decided to do so.

B. Tailoring ESA Enforcement to Promote Trust Objectives.

1. Listing of species and designation of critical habitat:

   a. One of the statutory criteria for listing a species as endangered or threatened is "the inadequacy of existing regulatory mechanisms. . . ." ESA § 4(a)(1)(D), 16 U.S.C. § 1533(a)(1)(D). The existence of adequate tribal regulatory mechanisms may obviate the need to list a species pursuant to the ESA.

   b. "Critical habitat" for a listed species includes the physical or biological features that are essential to the conservation of the species and "which may require special management considerations or protection. . . ." ESA § 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i). Information submitted by tribal governments could demonstrate that reservations lands do not contain the
physical or biological features essential to species conservation or that, due to the adequacy of existing tribal management of the lands, no special management considerations or protection are required. See Attachment E, Memorandum from Regional Director, Fish and Wildlife Service, Region 2 to Area Directors, Bureau of Indian Affairs, Albuquerque, Phoenix, and Window Rock at 2-4 (Dec. 6, 1993) ("FWS Region 2 Memorandum") (encouraging tribes to submit information pertinent to critical habitat designation).

c. Critical habitat designations take into account the economic impact of designation, and areas may be excluded from designation if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" unless failure to designate the area as critical habitat will result in the extinction of the species concerned. ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2). Tribes should "supply the [Fish and Wildlife] Service information on lands the Tribes believe should be excluded from a final critical habitat rule," including information on the economic impact of proposed critical habitat designations. Attachment E, FWS Region 2 Memorandum at 4.

2. Special regulations for threatened species: As discussed supra, ESA § 4(d), 16 U.S.C. § 1533(d), authorizes special regulations for the taking of threatened species.

a. The regulations applicable to threatened sea turtles demonstrate how ESA § 4(d) can be creatively utilized to both conserve
threatened species and provide for Native American takings. The regulations provide that the prohibition on the taking of threatened sea turtles:

shall not apply with respect to the taking of [green sea turtles] in waters seaward of mean low tide for personal consumption by residents of the Trust Territory of the Pacific Islands if such taking is customary, traditional and necessary for the sustenance of such resident and his immediate family. Sea turtles so taken cannot be transferred to non-residents or sold.

50 C.F.R. § 227.72(f) (regulation adopted by Secretary of Commerce) (adopted by reference by the Secretary of the Interior at 50 C.F.R. § 17.42(b)(1)(vi)). This special provision for indigenous subsistence takings was adopted after the Secretaries considered both the potential geographic range of subsistence turtle consumption and the health of turtle stocks within that range. 43 Fed. Reg. 32800, 32806 (1978). Subsistence taking was not allowed for residents of Puerto Rico or the Virgin Islands due to the absence of indigenous natives; native Hawaiians were not allowed subsistence taking due to fears of over-exploitation of turtle stocks and the ready availability of alternative food sources. Id. However, a subsistence exemption for residents of the Pacific trust territories was warranted both by the cultural reliance on sea turtle consumption and by the relative health of western Pacific turtle stocks. Id. This special exception

b. Special regulation such as the sea turtle exemption can be tailored to permit those resource uses which are most highly valued to a tribe as a whole. For example, the federal government has adopted regulations which allow takings of threatened species for subsistence or ceremonial purposes but not for commercial uses.

[T]he [treaty fishing right] includes fishing for ceremonial, subsistence, and commercial purposes. [The Department of the] Interior balanced the Indians' interest in fishing for these various purposes in promulgating the regulations. By according a priority to subsistence and ceremonial fishing, and imposing the moratorium on the commercial fishing, Interior sought to respond to comments reflecting the views of the majority of the Indians on the Reservation.

United States v. Eberhrdt, 789 F.2d 1354, 1359 (9th Cir. 1986).

Similarly, a 4(d) rule could provide, where consistent with the need to conserve a threatened species, for takings associated with a highly-valued tribal economic activity, while prohibiting other activities that result in takings.

3. Tribal involvement in recovery efforts: recovery plans developed pursuant to the ESA usually involve the services of a recovery team composed of public and private agencies and institutions, and other qualified persons. ESA § 4(f)(2), 16
U.S.C. § 1533(f)(2). Tribal participation in the recovery process can include representation on recovery teams, providing comments on draft recovery plans and implementation of recovery plans by tribal ordinance or code. Appendix E, FWS Region 2 Memorandum at 1-2.

4. Consultation by federal agencies on actions that may affect a listed species: when the ESA § 7 consultation process involves tribal interests, the action agency can and should directly involve affected tribes in the consultation process.
   a. Requiring that the offices of the Department of the Interior consult with tribes affected by their proposed actions, Appendix C, Order of the Secretary of the Interior No. 3175 (Nov. 8, 1993), facilitates tribal involvement in the consultation process.
   b. Tribal involvement in the consultation process can include all phases of the formal consultation process, including, but not limited to, involvement in the action agency’s development and review of biological assessments, invitations to each meeting between FWS and the federal action agency, the opportunity to provide scientific data and to review data in the FWS record, and the opportunity to review draft biological opinions and recovery plans and to provide comments on such drafts.

5. Prosecutorial discretion under ESA § 9: in appropriate circumstances, the United States may exercise its prosecutorial discretion in enforcing ESA § 9 to take account of Native American concerns. For example, in 1975 Secretary of the Interior Morton issued a “Policy Statement on
Indian Use of Bird Feathers" that allowed Native Americans to "possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers," but reiterated that "the Department of the Interior will continue to enforce against all persons those Federal laws prohibiting the killing, buying or selling of eagles, migratory birds, or endangered species, as well as those laws prohibiting the buying or selling of the parts or feathers of such birds and animals." Appendix F.

6. ESA § 10 (a)(1)(B) incidental take permits: the ESA requires that incidental take permits only be issued when the applicant submits a conservation plan that provides necessary funding for mitigation measures.\(^5\)

C. Resolving Conflicts Between ESA and Tribal Activities.

1. In its March 1995 Proposed Recovery Plan for Snake River Salmon, the National Marine Fisheries Service purported to recognize and take into account the treaty and trust responsibilities of the United States to Indian tribes. The NMFS listed five criteria which must first be satisfied before the federal government would impose restrictions on the exercise of treaty and other Indian fishing rights which result in the

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\(^5\) This same thing may happen when federal agency action is the subject of formal consultation with the Fish and Wildlife Service and the Service issues an incidental take statement permitting the action to go forward. See ESA § 7(b)(4), 16 U.S.C. § 1536(b)(4) (requiring an incidental take statement to specify the reasonable and prudent measures necessary to minimize the impact of incidental take on a listed species and the mandatory terms and conditions necessary to implement those measures).
incidental take of protected Snake River salmon stocks. The restrictions must be:

a. reasonable and necessary for the conservation of the fishery resource;
b. the least restrictive measures available to achieve the conservation purpose;
c. not discriminatory against tribal fishing activities;
d. necessary because the conservation purpose cannot be achieved through reasonable regulation of non-treaty activities; and
e. necessary because voluntary tribal conservation measures are not adequate to achieve the conservation purpose.


The most controversial and difficult to apply aspect of these criteria is determining what does or does not constitute "reasonable regulation of non-treaty activities." For example, do major changes in the operation of federal dams, or perhaps the removal of some dams, which would increase the cost of electricity to all consumers, constitute reasonable or unreasonable regulation of non-treaty activities? How much would the price of electricity have to increase over what period of time in order for the proposed regulation to be unreasonable?6 The current

6 Significantly and by way of contrast, the April 1994 Record of Decision issued by the Forest Service and the Bureau of Land Management for Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl, Appendix H states that tribal treaty rights will not be restricted unless, among other things, "the conservation purpose of the restriction cannot be achieved solely
positions of the Bureau of Indian Affairs and the Fish and Wildlife Service on this vital and apparently unresolved issue are set forth in Appendices I, J and K.

2. Another critical factor in applying Endangered Species Act restrictions to treaty and trust resources is determining "the environmental baseline." See 50 C.F.R. § 402.02. If tribal activities which may adversely affect protected species are included within the environmental baseline, then as a general matter, they will not be subject to further restriction. The federal agencies administering the ESA currently enjoy a significant amount of latitude and discretion in determining what does or does not fall within the environmental baseline. See 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 Environmental Law 733, 785-787 (1995).

3. The application of the Endangered Species Act to tribal treaty and trust resources also may present issues of environmental justice. See Appendix L, President Clinton's February 11, 1994 Executive Order No. 12898.

CONCLUSION

If applied sensitively and correctly, the Endangered Species Act is a powerful tool which can and should be used to fulfill the commitments of the United States to preserve and protect and, if necessary, restore tribal treaty and trust resources and to enable Indian tribes to achieve standards of living comparable to their non-Indian neighbors.

by regulation of non-Indian activities." (Emphasis added.)
Hon. Ada Deer
Asst. Secretary For Indian Affairs
Department of Interior
1849 C St. N.W.
Washington DC 20240

Re: Fish & Wildlife Service’s assessment of a $331,776 mitigation fee against tribal trust land development under the Endangered Species Act

Dear Ms. Deer:

This letter is written on behalf of the Fort Mojave Indian Tribe to express our objection to the Fish & Wildlife Service’s assessment of a $331,776 fee on the Tribe as a condition of developing its trust land. As you know, the Tribe has leased approximately 5,444 acres of reservation trust land for residential and commercial/resort development. Approximately 1,024 acres of the land has been designated as habitat for the desert tortoise, a threatened species under the Endangered Species Act. The FWS has issued a draft biological opinion and incidental take statement pursuant to §§ 7 and 9 of the E.S.A. assessing the effect of the development on the desert tortoise. One of the mitigation measures included in the draft opinion is the so-called mitigation fee assessed against the Tribe as a condition to developing its land. It is our opinion that this assessment is unlawful in light of the Secretary’s fiduciary obligations to the Tribe, as well as the Tribe’s treaty right to use and develop its land. Accordingly, we are requesting your assistance in getting the Department of the Interior to eliminate its practice of assessing this mitigation fee against tribal trust lands. Our reasons in support of this request are set forth more fully below.
BACKGROUND

1. The Secretary's Obligations Under The Endangered Species Act.

The purpose of the Aha Macav Development is to generate revenue for the Tribe, enhance economic development on the Reservation, and provide employment for tribal members. Inasmuch as the Tribe's lands are held in trust by the United States, the Tribe's lease of the lands is subject to the approval of the BIA pursuant to 25 U.S.C. § 415 and related regulations. This in turn triggers the BIA's obligations under the National Environmental Policy Act and, given the presence of the desert tortoise, the consultation obligations under § 7 of the Endangered Species Act. The FWS's draft biological opinion was prepared pursuant to § 7, and included an incidental take statement as required by § 9 of the E.S.A.

Section 7 of the E.S.A. requires the BIA to consult with the FWS to ensure that any agency action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. 25 U.S.C. § 1536(a)(2). After agency consultation, the FWS must provide the BIA and the Tribe with a written opinion detailing how the agency action affects an endangered or threatened species or its critical habitat. If jeopardy or adverse modification is found, the FWS is then required to suggest reasonable and prudent alternatives which the FWS believes would not violate subsection (a)(2). See generally, Pacific Northwest Generating Coop. v. Brown, 822 F.Supp. 1479, 1487 (D. Ore. 1993).

Section 9 of the E.S.A. prohibits the "taking" of an endangered species. The prohibitions of § 9 also apply to threatened species, including the desert tortoise, by Agency regulations issued pursuant to § 4 of the E.S.A. The term "take" includes harm or harassment of a threatened or endangered species. However, "incidental takings" are permitted as long as they comply with the requirements of § 7(o)(2) of the E.S.A. That provision provides that a taking which complies with the terms and conditions specified in a written statement provided under § 7(b)(4)(iv) shall not be considered a prohibited taking of the species concerned.

Section 7(b)(4)(iv) contains the requirements for the incidental take statement. It is issued as part of the § 7 biological opinion. See Mount Graham Red Squirrel v. Espy, 986 F.2d 1568, 1580 (9th Cir. 1993). Section 7(b)(4) provides in relevant part as follows:

If, after consultation under (a)(2), the Secretary concludes that --
(A) The agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; [and]

(B) The taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

The Secretary shall provide the federal agency and the applicant concerned, if any, with a written statement that --

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, [and]

(iv) sets forth the terms and conditions . . . that must be complied with by the federal agency or applicant (if any), or both, to implement the measures specified under clause . . . (ii) . . .


2. The FWS's Draft Biological Opinion.

The FWS's draft biological opinion ("B.O.") incorporates both the § 7 biological opinion; and the § 9 incidental take statement required by the above referenced provisions. Significantly, the draft B.O. concludes that development of the tribal lands will not have a significant impact on the survival of the desert tortoise:

The Service has determined that the level of impact described herein will not reduce appreciably the likelihood of survival and recovery of the Mohave population of the desert tortoise in the wild because: (1) desert tortoise densities within the project site are low, (2) the project site is near the Needles Highway and the Colorado River, (3) the project area is not within an area recommended for recovery, and (4) impacts to desert
tortoises within the project site represent a small impact to the Mohave population of the desert tortoises when total desert tortoise population numbers and geographical extent are considered.

It is our Biological Opinion that the proposed issuance of leases for construction of residential, recreational, and commercial developments on the reservation is not likely to jeopardize the continued existence of the threatened Mohave population of the desert tortoise. . . no critical habitat will be destroyed or adversely modified by the issuance of these leases.

Draft B.O., pp. 10-11.

The FWS then incorporates the incidental take statement into its Draft B.O. pursuant to § 9:

The Service anticipates that four desert tortoises may be accidentally injured or killed by vehicles or equipment during the development stage, that 20 desert tortoises may be harassed by removal from the boundaries of the development, that an unknown number of desert tortoise eggs may be destroyed during the development phase, that an unknown number of desert tortoises may be taken through predation by ravens drawn to trash on the construction site, that an unknown number of desert tortoises may be taken indirectly in the form of harm through increased noise associated with the operation of heavy equipment on the site, and that a total of 1,024 acres of desert tortoise habitat may be destroyed as a result of the development which could result in harm and/or harassment of desert tortoises.


To mitigate these potential impacts on the desert tortoise, and in order for the exemption in § 7(o)(2) to apply, the FWS has imposed eight mitigation measures with which the BIA and the Tribe must comply (Draft B.O., p. 12). Of the eight mitigation measures, the first seven are directly related to preventing or

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1 The Draft B.O. indicates that the eight mitigation measures were proposed by the BIA. However, it is our impression that the mitigation fee was a condition forced upon the BIA by the FWS, with which the BIA does not agree.
minimizing any incidental taking of a desert tortoise within the development, including:

(1) the education of all project employees as to the threatened status of the species, and the potential penalties for an unlawful taking;

(2) the construction of barriers (either a tortoise-proof fence or a 12-foot swath of leveled land around the perimeter of the lease site) and subsequent removal of tortoises from the lease site with additional measures to prevent re-entry;

(3) measures to ensure that all construction activities are confined within marked areas which have previously been cleared of desert tortoises;

(4) clearly marking all tortoise burrows along road easements/rights-of-way to prevent crushing, including measures to ensure that tortoises do not enter rights-of-way thereafter by grading a 12-foot belt along each side of the right-of-way so that tortoises entering the right-of-way can be detected by their tracks and removed by a qualified tortoise biologist on a daily basis, and the placement of qualified tortoise biologists on the construction site during all grading and construction activities to ensure that the tortoises found are not harmed;

(5) the excavation and removal of all tortoise burrows or nests found on the project site by qualified biologists;

(6) restricting storage and access of all equipment and materials within the boundaries of the project site in existing rights-of-way and access roads;

(7) the implementation of a litter control program to avoid attracting ravens.

B.O., pp. 5-7.

The eighth mitigation measure imposed, and the one to which the Tribe strongly objects, is the imposition of a so-called mitigation fee which the Tribe is required to pay into an account administered by Clark County, which the FWS says is for "off-site mitigation for the destruction of desert tortoise habitat." Draft B.O., p. 7. The fee is imposed at the rate of $324 per acre for 1,024 acres of the leased premises considered to constitute desert tortoise habitat (totaling $331,776). The expressed purpose of the mitigation fee is for "securing desert tortoise management areas (TMA), habitat enhancement, and desert tortoise research." B.O., pp. 7-8. The fee must be transferred prior to the initiation of any construction activities. The question is whether, under the
circumstances of our case, the imposition of the mitigation fee is beyond the scope of the FWS’s authority.

DISCUSSION

Initially, I note that the mitigation fee is not expressly authorized by the Endangered Species Act, or by the Secretary’s regulations promulgated thereunder. Inasmuch as the FWS is assessing the mitigation fee against trust lands within an Indian reservation which was created for the express use and occupancy of the Tribe, and because the draft B.O. expressly states that the development will not jeopardize the continued existence of the desert tortoise nor modify any critical habitat, it is my opinion that the assertion of a mitigation fee is not within the FWS’s authority under § 7(o) of the E.S.A. I seriously doubt that, in cases where no critical habitat is affected, the mitigation fee is lawful under the E.S.A. itself. Even so, when the mitigation fee is weighed against the Secretary’s fiduciary obligations to the Tribe and the purposes for which the reservation was created, it becomes clear that charging a fee as a condition of the Tribe’s development of its land is far beyond that which Congress intended when it enacted the E.S.A.

1. Legality of the Mitigation Fee Under §§ 7 and 9 of the E.S.A.

Since no critical habitat is being affected by the tribal development, and since the FWS’s biological opinion expressly states that the development is not likely to jeopardize the continued existence of the desert tortoise, there is no violation of the substantive provisions of § 7. See Pacific Northwest, 822 F.Supp. at 1487-1488. However, the FWS may require mitigation measures even if there is no violation of § 7(a)(2). Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985). Moreover, these measures may be imposed under the incidental taking provisions of § 9. Pacific Northwest, at 1488. Section 7(o) of the E.S.A. allows the agency to incidentally take a threatened species as long as it is incorporated into "terms and conditions imposed to minimize the impact along with reasonable and prudent mitigation measures." Id. at 1488.

The draft B.O. lists four reasonable and prudent measures which the FWS considers necessary and appropriate to minimize the incidental take. The mitigation fee is imposed ostensibly to implement reasonable and prudent measure No. 3 of the Draft B.O., requiring that measures be taken to "minimize destruction of desert tortoise habitat, such as soil compaction, erosion, or crushed vegetation, due to construction or maintenance activities." Draft B.O., p. 13. Although this language indicates that the measure is aimed at mitigation measures on and around the lease site to
prevent unnecessary habitat destruction, the requirement for implementing this measure states that the fee is imposed "as offsite mitigation for the destruction of 1,024 acres of desert tortoise habitat." Draft B.O., ¶ 3b, p. 15. This means the fee need not be used for on-site activities, but can be used instead to acquire tortoise management areas and habitat and hire more biologists to help the FWS subsidize its work under the E.S.A. in other areas. See Draft B.O., p. 8. In other words, the Tribe must pay the FWS in order to develop its land, money which the FWS can then use for purposes unrelated to the Tribe's own on-site mitigation. Such a practice is akin to the imposition of a tax on reservation development, which Congress has not authorized under the E.S.A. or any other statute. Further, the uses to which the FWS can put the money off-site bears no resemblance to minimizing destruction of habitat in and around the construction site, as required by reasonable and prudent measure No. 3.

Moreover, the fee is imposed despite the fact that the § 7 opinion finds no adverse modification of critical habitat. Instead, the draft B.O. purports to impose this fee under § 9 of the E.S.A., which prohibits the taking of a threatened species, without the special exemption authorized under § 7(o). Thus, the FWS has effectively expanded § 7(a)(2)'s prohibition on adverse modification of critical habitat by expanding the concept of a taking under § 9 to include harm to noncritical habitat. This is done by defining harm to include "significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns." Draft B.O., p. 12. Although the FWS's definition of harm to include significant habitat modification was upheld in Sweet Home Chapter Of Communities For A Great Oregon v. Lujan, 806 F.Supp. 279 (D. D.C. 1992), aff'd 1 F.3d 1 (D.C. Cir. 1993), not all habitat destruction or modification constitutes harm. Instead, the modification must be "significant." Id. at 286; see Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988) (habitat destruction which could drive an endangered species to extinction constitutes harm and is a taking under § 9).²

² It is interesting to note that in affirming the District Court's decision in Sweet Home the D.C. Circuit Court of Appeals had some difficulty in accepting the proposition that the Secretary's definition of harm to include habitat modification was lawful under the E.S.A. Judge Sentelle's dissent likened the Secretary's definition to one in which the FWS "would deem a congressional authorization for the erection of 'No Smoking' signs to authorize the adoption of regulations against chewing and spitting." 1 F.3d at 11. Equating the word "take" in § 9 with significant habitat modification does seem to defy common sense. As Judge Sentelle pointed out:
In *Sweet Home*, the Secretary and the FWS themselves pointed out that the determination of whether there has been harm to habitat so significant as to constitute a taking requires an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification. Applying this test here, we have a threatened (as opposed to endangered) species whose habitat spans portions of four different states, and a development which will admittedly not modify any critical habitat, nor modify a significant portion of the desert tortoises' noncritical habitat as a whole. Given this, and inasmuch as the Draft B.O. concludes that the Fort Mojave Tribe’s development is not likely to jeopardize the continued existence of the desert tortoise, the imposition of a mitigation fee in addition to the other seven reasonable and prudent measures cannot even be justified under the E.S.A.\(^3\) When the Secretary’s fiduciary obligations to the Tribe and the Tribe’s rights arising from the creation of the Reservation are considered, this conclusion becomes inescapable.


The Fort Mojave Indian Reservation was established by a series of Executive Orders in the late 1800s and early 1900s. The reservation was generally set aside for the "use and occupation" of

\[\ldots I \text{ see no reasonable way that the term "take" can be defined to include "significant habitat modification or degradation" as it is defined in 50 C.F.R. § 17.3. I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.}\]

1 F.3d at 12.

If the FWS was stretching its definition of harm in *Sweet Home*, one wonders how courts would treat the imposition of a mitigation fee for the development of noncritical habitat, an administrative leap even farther from the mandate of § 7.

\(^3\) The FWS’s practice of assessing the mitigation fee also seems to be inconsistent. We know of at least one other draft biological opinion issued in connection with activity on BLM lands which has been designated Class I habitat. No mitigation fee for the loss of this more important habitat has been imposed.

Executive Order reservations merit "the same protection as the Indian title to reservations created by treaty or statute." United States v. So. Pac. Trans. Co., 543 F.2d 676, 686 (9th Cir. 1976). Thus, the Tribe's right to use and develop the reservation in furtherance of a federal purpose may not be abrogated or modified unless Congress has made its intent to do so clear and plain. United States v. Truckee-Carson Irrigation District, et al., 649 F.2d 1286, 1298 (9th Cir. 1981), aff'd in part, rev'd in part, Nevada v. United States, 463 U.S. 110 (1983).

Courts are split on the issue of whether and to what extent the E.S.A. extinguishes tribal treaty rights. That question need not be addressed here since we do not deal with a provision of the statute itself, but rather the scope of a federal agency's authority to administer the statute. The Tribe is not asserting a treaty right to hunt desert tortoises to the point of extinction. Rather, the Tribe asserts the right to develop its land free of unnecessary constraints imposed by the FWS under the auspices of the E.S.A. The question then becomes to what extent may the FWS limit or modify the Tribe's exercise of this right.

Although Congress has the right to modify a treaty right, it does so only when circumstances arise which justify disregarding important tribal rights:

We do not construe statutes as abrogating treaty rights in a backhanded way, in the absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. Indian treaty rights are too fundamental to be easily cast aside.

Dion, 476 U.S. at 739 (citations and quotations omitted).

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Moreover, in cases where a subsequent statute comes into conflict with Indian treaty rights, the statute "should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done." United States v. Pavne, 264 U.S. 446, 448 (1924). As stated above, these rules of construction apply with equal force in determining rights arising from an Executive Order reservation, and a general statute such as the E.S.A. may not be interpreted to authorize the extinguishment of this right without a clear showing of congressional consent. Truckee-Carson, supra, 649 F.2d at 1298. Normal rules of construction of statutes of general applicability "do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue." E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989). Thus, any ambiguity as to whether the E.S.A. authorizes a mitigation fee as a condition to developing reservation land must be resolved in the Tribe's favor "in order to comport with traditional notions of sovereignty and with the federal policy of encouraging tribal independence." Id.

Applying these rules of construction it is clear that the E.S.A. may not be interpreted to authorize the imposition of a $331,776 mitigation fee on reservation development, especially where no critical habitat of an endangered species is being destroyed and where other more direct measures are being taken by the Tribe to minimize harm to the threatened desert tortoise. The E.S.A. must be interpreted consistently with the Tribe's federally protected right to use and develop the reservation. The imposition of a fee to help subsidize the FWS's programs is neither authorized by the E.S.A. nor necessary to carry out its purposes. As such, the fee unlawfully infringes on the Tribe's federally protected right to utilize its reservation lands for economic development.

Not only does the mitigation fee infringe on tribal treaty rights, it is directly contrary to the fiduciary duties owed by the United States to the Tribe. The general trust relationship between the United States and Indian tribes is undisputed, and "has long dominated the Government's dealings with Indians." Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750 (10th Cir. 1987) citing United States v. Mitchell, 463 U.S. 206 (1983). Moreover, where as here, federal statutes and a comprehensive set of regulations require the Secretary to approve tribal leases of reservation land, this general trust responsibility becomes a strict fiduciary obligation, under which the Secretary's conduct will be "judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). The FWS is charged with the same duties in its dealings affecting the Tribe. Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981); Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). Moreover, in cases such as this where the Secretary administers a statute which conflicts with its fiduciary obligations to the Tribe, the Secretary's conduct will be even more
carefully scrutinized. 


The Tribe's leases in this case were approved under 25 U.S.C. § 415 and the BIA's regulations thereunder. 25 C.F.R. Part 162. The regulatory scheme governing leases under § 415 is comprehensive, and is dominated by the federal policy of ensuring "the highest economic return to the [tribal] owner consistent with prudent management and conservation practices." Gila River Indian Community v. Waddell, 967 F.2d 1404, 1411 (9th Cir. 1992) (citing 25 C.F.R. § 162.8). Imposing a fee upon tribal trust land as a pre-condition of development is directly contrary to the Secretary's trust obligations and is not necessary to fulfill the mandate of the E.S.A. The Secretary's administration of the E.S.A. must be tempered by his fiduciary obligations to the Tribe, and I can see no way of reconciling the two with the imposition of the mitigation fee.

The Secretary has discretion to accept or reject mitigation measures recommended by the FWS. See Tribal Village of Akutan v. Hodel, 859 F.2d 651, 659 (9th Cir. 1988). In this case, inasmuch as the Tribe's leases do not cover critical habitat and are not likely to jeopardize the threatened desert tortoise, since the BIA and the Tribe have agreed to seven mitigation measures to protect against any harm to the species, and in light of the Tribe's treaty rights on the reservation and the Secretary's fiduciary obligations, I believe the imposition of the mitigation fee is unjustified. Accordingly, the Tribe respectfully requests your assistance in getting the FWS to omit the mitigation fee from the final version of the biological opinion. The fee simply may not be reconciled with the Secretary's trust responsibility or the Tribe's federally protected right to develop its land.

The Phoenix Area Office has requested a meeting with the FWS in Las Vegas during the week of November 29, 1993 to resolve outstanding issues under the draft B.O. I would appreciate it if you or someone on your staff could attend the meeting in support of the Tribe on this particular issue and other concerns raised by the BIA. I know that the FWS is proposing an even greater mitigation fee on the Las Vegas Paiute Tribe as a condition to development on their reservation, and there are probably other tribes who have been detrimentally affected by this practice. Your intervention on behalf of the tribes could help convince the FWS that the practice of imposing fees on tribes whose reservations encompass habitat of the threatened desert tortoise is contrary to the principles I have discussed in this letter, and should be discontinued.
I trust that you will give this matter your prompt attention. Please let me know if you have any questions with respect hereto.

Very truly yours,

Thomas W. Fredericks

TWF:lld

cc: Patricia Madueno, Fort Mojave Tribal Chairperson
    Bruce Babbitt, Secretary of the Interior
    Walt Mills, Phoenix Area Director
    Mike Anderson, Solicitor for Indian Affairs
    Wayne Nordwall, Field Solicitor, Phoenix
    Allen Anspach, Superintendent, Parker Agency
    David L. Harlow, Fish & Wildlife Service
    Jamie R. Clark, Chief, Division of Endangered Species