

**Conserving Endangered Species
in Indian Country:
The Success and Struggles of
Joint Secretarial Order 3206
Nineteen Years On**

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I. INTRODUCTION

In 1996, two cabinet departments and scores of tribes and tribal leaders convened to enact an Order that would enhance tribal sovereignty, streamline federal and tribal coordination, and protect dozens of threatened and endangered species with habitat in Indian country. While many have examined how this Joint Secretarial Order fits with the existing statutory framework and case law, this Note attempts to evaluate Joint Secretarial Order 3206's effect in Indian country by speaking to those who work directly with conservation and development in Indian country.

Experiences and familiarity with Joint Secretarial Order 3206 vary, as do tribal structures and relationships with the federal government. Accordingly, this Note does not attempt to establish a broad general consensus regarding the Order's overall effect in Indian country. Instead, these interviews attempt to demonstrate that relationships with the Order vary widely by geographic region, tribe, and even tribal member. Still, there are conclusions to be drawn from these relationships with the Order, and it is clear that there are areas in which the Order has made great strides, both for tribal communities and for the species themselves. In other areas the Order has fallen remarkably flat. This Note attempts to address these successes and shortcomings. It proposes that the Order's aims can best be accomplished by giving greater control and resources to those best equipped to utilize them, the tribes themselves.

This Note begins with a brief overview of conservation in Indian country. Next, it summarizes the main tenants of the Endangered Species Act and how the Joint Secretarial Order was created to address specific development and conservation-related concerns in Indian country. Next the Note examines how governments, both federal and tribal, apply the Order in four different Indian nations. Finally, this Note concludes with a proposal for agencies to give greater deference to tribal expertise and science while working to provide resources that many tribes lack, especially adequate federal funding.

II. CONSERVATION IN INDIAN COUNTRY

It is easy to overgeneralize American Indians' relationship with the natural environment. An early American notion of Indian land development was generally that none took place at all.¹ Yet different tribes and peoples have interacted with the land they inhabited in

1. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) ("To leave [Indians] in possession of their country, was to leave the country a wilderness").

radically different ways throughout their histories; from that of traditional hunting-based societies to highly complex agricultural megacities. Still, many tribes traditionally viewed their relationship with nature as one of stewardship.² The idea that tribal leaders have a responsibility to preserve the Earth for future generations is one that predates modern notions of environmentalism by centuries.³ This continues today; as the National Wildlife Federation states, “Native Americans are our nation’s original environmental stewards. . . . Because Tribes have the longest continual experience with the land, climate, wildlife and other natural resources, they have significant expertise and play an important role in helping us solve today’s conservation challenges.”⁴ However, today’s relationship between tribe and environment is also more complex than it may appear. Tribes increasingly seek to work with landowners, tribal corporations, and private industry to develop tribal land in order to provide services, employment, and entrepreneurial opportunities in their communities.

This can have a surprisingly significant effect on wildlife conservation. Tribal nations own and manage over 95 million acres of land, more than the National Park Service.⁵ These lands are largely undeveloped, but this is changing. The U.S. Department of Interior (“Interior”) estimates that 15 million acres of untapped natural resources and energy lay on tribal land.⁶ Only 2.1 million acres are in use today.⁷ While developers see untapped potential in Indian country, environmentalists also look to tribal lands as vital to preserving species whose habitat has been encroached upon elsewhere.⁸

2. 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) (“We have always been taught to respect the land and living things because we have a sacred responsibility for the stewardship of the lands the Creator has provided for us”) (quoting Chairman Ronnie Lupe, White Mountain Apache Tribe).

3. See e.g. Oren Lyons, *An Iroquois Perspective*, in AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 171, 174 (C. Vecsey, R.W. Venables ed., 1980).

4. *Native American Heritage Month: Celebrating Tribal Victories in Conservation*, WILDLIFE PROMISE (Oct. 4, 2013), <http://blog.nwf.org/2012/11/native-american-heritage-month-celebrating-tribal-victories-in-conservation/>.

5. *Id.*

6. *Key Thoughts from KeyBank: Indian Country and America’s Energy Needs*, INDIAN COUNTRY TODAY, Oct. 1, 2013, <http://indiancountrytodaymedianetwork.com/2013/10/01/key-thoughts-keybank-indian-country-and-americas-energy-needs-151500>.

7. *Id.*

8. See, e.g., Marren Sanders, *Implementing the Federal Endangered Species Act in Indian Country*, 2007-01 JOINT OCCASIONAL PAPERS ON NATIVE AFF. 24–37 (2007).

Despite competing agendas, tribes must decide whether to prioritize development, conservation, or both. Those that favor conservation point to traditional values and responsibilities toward stewardship.⁹ Those that favor development argue that the rest of the West had the opportunity to prosper from development and to bar tribes from this opportunity would be unjust.¹⁰ Indian lands are not de-facto wilderness areas, nor are they public lands held in trust for the good of the American public; as the chairman of the Northern Ute Tribe's Tribal Council recently explained, "I want environmental groups to consider our needs to the same extent that they consider their own. We have to live out here."¹¹

III. THE ENDANGERED SPECIES ACT

No matter whether tribes decide to develop or conserve a particular piece of land, federal statutes including the Endangered Species Act ("Act") have the potential to shape and influence tribal action. The Act, passed by Congress in 1973, was designed to provide a program to conserve disappearing wildlife from rapid development similar to that taking place in Indian country today.¹² Environmental scholars largely consider the Act to be the seminal piece of legislation in preventing extinction of at-risk species.¹³ Yet to label the Act a complete success (or failure) in Indian country would be too simplistic. Such a description ignores unique tribal relationships with the Act and the difficult practice of implementing sweeping federal laws on lands belonging to sovereign Indian nations.

A. *Endangered Species Act Overview*

The Act provides an opportunity for citizens to petition the federal government to list a species as endangered¹⁴ and to protect its "critical habitat."¹⁵ The Act also makes it illegal to "take" any listed species,¹⁶

9. See, e.g., *Our Work Protecting Wildlife and Habitat on Tribal Lands*, NWF, <http://www.nwf.org/what-we-do/protect-habitat/tribal-lands.aspx> (last visited Apr. 7, 2015).

10. Daniel Mccool, *Indian Reservations: Environmental Refuge or Homeland?*, HIGH COUNTRY NEWS, Apr. 10, 2000, <http://www.hcn.org/issues/176/5709>.

11. *Id.*

12. 16 U.S.C. § 1531(b) (Supp. III 1973).

13. See generally *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Hearing before the H. Comm. on Natural Resources*, 112th Cong. (2011) [hereinafter 2011 ESA Congressional Hearing].

14. 16 U.S.C. § 1533(b)(3) (2012).

15. 16 U.S.C. § 1532(5); 5 U.S.C. § 553(e) (2012).

where “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁷ To prevent the take of a listed species, all federal agencies looking to fund, authorize, or conduct any activity affecting a listed species must consult with the Fish and Wildlife Service (“FWS”) in the Department of Interior or National Oceanic and Atmospheric Administration (“NOAA”) in the Department of Commerce through the Act’s Section Seven Consultation process. This ensures that the activity produces “no more than minimal harm to protected species and will not adversely modify or destroy its critical habitat.”¹⁸ In other words, it provides agencies with the opportunity to “look before they leap” when carrying out possibly harmful activities.¹⁹

Most research shows that the Act is extremely effective in preventing the extinction of listed species.²⁰ Listed species with a designated critical habitat are twice as likely to be listed as recovering as those without designated critical habitat.²¹ In forty years, only nine of 1,445 listed species have gone extinct, seven of which were likely already extinct at the time of listing.²² Research suggests that enforcement of the Act has saved as many as 227 species from extinction.²³

B. The Endangered Species Act in Indian Country

Implementation of the Act in Indian country must take into account the special “trust relationship” that governs interactions between tribes and the federal government.²⁴ Federal trust responsibilities include holding land and resources in trust for Indian beneficiaries and help to protect tribal inherent sovereignty from outside forces through legislative

16. 16 U.S.C. § 1538(a)(1)(b).

17. 16 U.S.C. § 1532(19).

18. SARA MOTSUMOTO ET AL., EARTHJUSTICE, CITIZENS’ GUIDE TO THE ENDANGERED SPECIES ACT 1, 29 (2003), available at http://earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf

19. *Id.*

20. 2011 ESA Congressional Hearing, *supra* note 13, at 31 (quoting Kieran F. Suckling and Martin Taylor, *Critical Habitat and Recovery*, in THE ENDANGERED SPECIES ACT AT THIRTY 86 (2006)).

21. *Id.*

22. *Id.*

23. *Id.* (quoting Michael J. Scott, et al., *By the Numbers*, in THE ENDANGERED SPECIES ACT AT THIRTY 16–35 (2006)).

24. *See, e.g.*, M’Intosh, 21 U.S. at 596.

and executive action.²⁵ This relationship often can be difficult to reconcile with federal efforts to preserve endangered species in Indian country. Some tribes feel that the Act's mandates directly interfere with the trust relationship. Ronnie Lupe, tribal leader for the White Mountain Apache has remarked,

Increasingly, attempts to implement the ESA have become affronts to the federal trust responsibility and direct attacks on tribal sovereignty. When the ESA was enacted in 1973, few of us realized that it would one day threaten our right to self-governance and our right to maintain our tribal traditions and way of life.²⁶

Non-Indians have taken notice of the potential for conflict as well; because of the general rural nature of Indian reservations, tribal lands are often at the forefront of endangered species conservation efforts.²⁷ If management of endangered species in Indian country is ineffective, there are often serious consequences for the species' survival as a whole.

While the Supreme Court has never specifically addressed whether the Act applies to tribes²⁸ nor explored what would happen should a conflict arise between Act and trust responsibility, it has found limitations to Indian takings on reservation lands.²⁹ Generally, the federal government may control tribal rights in order to protect a species. In one oft-cited example, the Supreme Court found that the government was within its right to regulate the Puyallup tribe's treaty-negotiated taking of steelhead by explaining that treaty rights to fish do not persist "to the very last steelhead in the river."³⁰ Lower court decisions also suggest that on-reservation hunting rights are not absolute when a species nears extinction.³¹ Furthermore, when an act of Congress bars the taking of a species, tribal members cannot assert that they may continue to engage in the take because the Act did not specifically divest tribal

25. *The U.S. Government's Trust Responsibilities to American Indians*, MILLE LACS BAND OF OJIBWE INDIANS, <http://millelacsband.com/mille-lacs-band-objibwe/economy/businesses-and-economic-impact-home/u-s-government-trust-responsibility-to-american-indians/> (last visited Apr. 7, 2015).

26. Gary Morishima, Address at the 2012 Intertribal Timber Council Symposium (2012).

27. David Spohr & Lara B Fowler, *Application of the Endangered Species Act to Tribal Actions: Can Ambiguity Be a Good Thing?*, SEATTLE U. L. REV. 64, 65 (2009).

28. *Id.* Indeed, the widely accepted canon of construction that statutes do not apply to Indian tribes if they inherently limit tribal right to self-government suggests that the ESA may not apply to tribes.

29. *Id.*

30. *Puyallup Tribe, Inc. v. Wash. Dep't of Game*, 422 U.S. 165, 175 (1977).

31. *United States. v. Billie*, 667 F.Supp. 1485, 1492 (D. Fla. 1981) (providing for protection of the Florida Panther).

members the right to hunt or fish.³² Additionally, tribal development activities using federal funding or requiring federal approval are subject to sections of the Act regulating agency action, specifically the often-lengthy Section Seven Consultation process.³³ Designating critical habitat through this process has been of special concern; finding critical habitat on tribal land can delay, curtail, or disallow economic or resource development.³⁴

IV. JOINT SECRETARIAL ORDER 3206

What we do to the land, we do to ourselves – Joe DeLaCruz,
President, Quinault Indian Nation³⁵

In 1996 and 1997, federal and tribal officials drafted Joint Secretarial Order 3206 (“Order”)³⁶, a document that could act as “a sensible harmonizing of Indian law and the ESA.”³⁷ This statement of policy by Interior and Commerce attempted to clarify the Act’s role in Indian country and the tribes’ relationship with the federal government in enforcing it. Specifically, it sought to establish integrated systems for resource management that reach all tribes and reservations.³⁸ The drafters accomplished this by establishing and reinforcing general principles that define the federal-tribal relationship as it pertains to managing endangered species.

32. See *United States v. Dion*, 476 U.S. 734 (1986). This is despite the often-employed canon of construction that Congress must include explicit language in an Act to divest a tribe of a retained right.

33. Sanders, *supra* note 8, at 1, 7.

34. Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 398 (1998).

35. WILLIAM E. SCHLOSSER, WILLIAM E. ARMSTRONG & BIRGIT R. SCHLOSSER, QUINULT INDIAN NATION, UPPER QUINULT RIVER SALMON HABITAT RESTORATION NEPA COMPLIANCE: FINAL ENVIRONMENTAL ASSESSMENT, (2011), available at http://www.resource-analysis.com/Documents/NEPA/NEPA_EA_Final_20110722.pdf.

36. Joint Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (issued by the Departments of Interior and Commerce), available at <http://www.fws.gov/nativeamerican/pdf/tek-secretarial-order-3206.pdf> [hereinafter Joint Secretarial Order 3206].

37. Wilkinson, *supra* note 2, at 1081.

38. *Id.* at 1068.

A. *The Order's Provisions*

The Order characterizes management of endangered species on tribal lands as a government-to-government relationship³⁹ between the federal government and sovereign Indian tribes.⁴⁰ This means that whenever federal agencies expect actions to affect tribal resources or lands, the government shall consult with and seek the participation of tribes.⁴¹ By categorizing the relationship between the federal government and Indian tribes as government-to government, the Order seeks to promote self-determination, self-government, and self-sufficiency throughout Indian country.⁴² To do this, the Order requires the federal government to assist tribes in establishing their own practices for conserving endangered species,⁴³ often by recognizing the value in “tribal traditional knowledge” as opposed to conventional FWS scientific analysis.⁴⁴ When tribal measures are sufficient, as defined by the Order, federal agencies will not implement federal conservation restrictions.⁴⁵

The Order also attempts to rectify two other sources of confusion regarding the Act in Indian country: designating critical habitat and allocating the burden to conserve listed species. Because listing tribal lands as critical habitat can also greatly impede tribal economic development, the Order provides that the federal government will not designate critical habitat on tribal lands unless doing so is essential to conserve a listed species.⁴⁶ Secondly, the Order requires that tribes do not bear a disproportionate burden of conserving endangered species on tribal land.⁴⁷

B. *Possible Sources of Conflict with the Order*

Despite the Order's aims to clarify government-tribal relations, it has also raised concerns regarding its enforceability, and therefore

39. Though tribes are inherently sovereign, much existing law does not treat the relationship between the U.S. and tribes (whether by statutory language or in practice) as government-to-government. *See, e.g.,* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief against Federal Agencies*, 39 TULSA L. REV. 355 (2003) for further discussion in the context of land trust rights.

40. Joint Secretarial Order 3206, § 1.

41. *Id.* § 5.

42. *Id.* § 4.

43. *Id.* § 5(3)(A).

44. Morishima, *supra* note 26.

45. Joint Secretarial Order 3206(5)(3)(C).

46. *See Id.* app. at (B)(4).

47. *Id.* § 1.

overall effectiveness. Because the Order is merely an executive statement of policy, it is unlikely to be judicially enforceable.⁴⁸ Therefore tribes could lack legal avenues to enforce its provisions should the government simply ignore them.⁴⁹ Though it may be possible for a tribe to challenge an agency's actions as arbitrary and capricious under the Administrative Procedure Act, the Order itself does not provide any avenue for tribes to sue the government specifically for departing from the Order.⁵⁰

Furthermore, the Order creates no explicit fiduciary relationship between tribes and the federal government under the Endangered Species Act. Though a trust relationship generally exists between the federal government and tribes, courts look to the specific applicable statute's or regulation's language in establishing that a governmental fiduciary duty exists and that a breach of such a duty is remediable.⁵¹ Traditionally courts have determined that fiduciary responsibilities exist when the government assumes "elaborate control over forests and property belonging to Indians."⁵²

Joint Secretarial Order 3206 does not assume elaborate control over Indian property, but seeks to enhance tribal self-determination by transferring this administrative control to the tribes. Without finding such a fiduciary responsibility by the government, at least one district court has found that no actual injury to tribes takes place when an agency's actions depart from the provisions of the Order.⁵³ Because the Order is only meant as a guide to agency action, it does not create any specific obligation upon which relief may be granted.⁵⁴

Finally, because the Order is merely a statement of policy—and its flexible language reflects this—implementation can be uneven. The only case that has explicitly evaluated the Order described it as "for guidance within the Department only."⁵⁵ This agency-centric approach gives tribes little guidance in understanding how to implement the Order. The Order seeks to give tribes greater control in developing and executing management plans in Indian country, yet it is ultimately up to the federal agencies to implement the Order.

48. Zellmer, *supra* note 34, at 410.

49. *Id.*

50. See 5 U.S.C. § 7062(a); Spohr & Fowler, *supra* note 27.

51. See *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

52. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

53. *Micosukee Tribe of Indians v. United States*, 430 F. Supp. 2d 1328, 1336 (S. D. Fla. 2006).

54. *Id.*

55. *Id.*

C. Existing Academic Evaluations of the Order

Because such little case law exists interpreting the Order following its publication in 1997, scholarly interpretation has become a leading avenue to understand the Order and shape its implementation in Indian country. Some scholars point to the dearth of litigation regarding the Order as a sign of its success in Indian country.⁵⁶ Most applaud that the Order seeks particularized solutions by emphasizing individual agreements with tribes.⁵⁷ This allows for each tribe to adopt specialized practices of establishing timelines, monitoring and sharing data, and enforcement on its lands.⁵⁸ Yet much of the existing interpretation and evaluation of the Order is largely theoretical and does not include the views of those that the Order most directly impacts: Indian tribes and tribal members.

The opinions below attempt to represent a diverse set of experiences with the Order, coming from tribal wildlife managers, biologists, drafters, and government agents.⁵⁹ These experts work around the country with many different tribes and endangered species. Each experience firsthand the extent to which the Order's various provisions are ultimately carried out in Indian country. Yet there are undoubtedly interpretations and evaluations of the Order that are not captured below. It should also be noted that none of the following opinions should be read to represent the official position or policy of the agencies or organizations that employ these experts. Instead, the following material attempts to capture experiences with, and reactions to, the Order that existing interpretations largely gloss over.⁶⁰

56. Mary Gray Holt, *Indian Rights and the Endangered Species Act*, in 2 ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, 127, 135 (Donald C. Baur & William Robert Irvin eds., 2010).

57. Zellmer, *supra* note 34, at 413.

58. *Id.*

59. Though various BIA officials generously volunteered their time to speak with me regarding their work with the Order, each wished not to have his or her opinions included in this Note.

60. Furthermore, this Note focuses primarily on Interior agencies' (US Fish and Wildlife Service and Bureau of Indian Affairs) relationships with the Order, rather than those in Commerce. This is due to the fact that the tribes surveyed in this note deal overwhelmingly with Interior in managing endangered species on their tribal lands.

V. BACKGROUND REGARDING VARIOUS TRIBES' ENDANGERED SPECIES MANAGEMENT UNDER JOINT SECRETARIAL ORDER 3206

The evaluations below reflect the efforts of four tribes—Quinault Nation in Washington, Navajo Nation in the Southwest, and the Lower Brule and Cheyenne River in South Dakota—in managing endangered species with guidance from Joint Secretarial Order 3206. These four tribes vary greatly by geographic region, reservation size, tribal structure, land title held, wildlife management programs, and endangered species that they protect. Accordingly, each tribe's relationship with the Order is unique.

A. *Quinault Nation*

The Quinault Indian Nation on Washington's Olympic Peninsula has developed a complex set of environmental management agreements with federal agencies while adopting and utilizing the Order's provisions and goals. FWS lists seven species as endangered or threatened within Grays Harbor County, the county in which the Quinault Indian Reservation ("Quinault") almost entirely resides.⁶¹ Conservation of four of these species (bull trout, marbled murrelet, northern spotted owl, and the western snowy plover) required a designation of critical habitat on lands within the county.⁶² On the reservation, federal agencies have worked to avoid designating critical habitat and to develop a government-to-government relationship with Quinault, citing the Order in doing so.⁶³ These plans include a mandate to uphold Quinault's treaty rights, a commitment to protect Indian wildlife assets on federal land, and a recognition that tribal priorities are to take precedence over those of the general public.⁶⁴ In 2004, as a result of litigation concerning the government's right to restrict tribal treaty rights to use on-reservation natural resources, the Secretary of the Interior and the President of the Quinault Indian signed an agreement creating two conservation

61. U.S. ENVTL. PROT. AGENCY, FACT SHEET: THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA) PLANS TO REISSUE A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO: THE QUINAULT INDIAN NATION 1, 26 (2009), available at [http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821/\\$FILE/wa0026603_fs.pdf](http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821/$FILE/wa0026603_fs.pdf).

62. *Id.* at 27.

63. See Letter from Fawn Sharp, President, Nat'l Park Serv., regarding the Quinault Indian Nation Second Comments on Draft Olympic National Park General Management Plan (Sept. 29, 2006).

64. *Id.*

easements, preserving 4,207 acres of forest reservation habitat.⁶⁵ Three years later, Quinault Nation implemented a Long-term Restoration Plan for salmon habitats in the Upper Quinault River Valley, a measure that the tribe expects to also improve populations of the listed species northern spotted owl, marbled murrelet, and bull trout.⁶⁶ This included coordination in drafting an Environmental Assessment with the Bureau of Indian Affairs (“BIA”) and consultation through the Section Seven Process.⁶⁷

B. Navajo Nation

Navajo Nation’s extensive coordination with federal agencies on endangered species issues reflects the tribe’s extensive tribal governmental structure, complex wildlife management divisions, and geographical enormity of the reservation itself (which is of similar size to West Virginia).⁶⁸ Navajo Nation’s Division of Natural Resources⁶⁹ has increased tribal control and management of at-risk species by creating a Navajo Endangered Species List, autonomous from the list created under the federal Endangered Species Act.⁷⁰ The Division works extensively with state and federal agencies in submitting sensitive species management plans and consulting on when and where to designate critical habitat.⁷¹ Within the Division of Natural Resources, the Navajo Natural Heritage Program (“Program”) manages rare, threatened and endangered species occurring on the reservation.⁷² The Program’s purpose is to “collect, manage and disseminate biological and ecological information for land use planning to promote the conservation of

65. Press Release, Dep’t of Interior, Quinault Indian Nation Settlement Conserves Marbled Murrelet Habitat (Sept. 20, 2004).

66. *Bringing Back the Blueback*, WILD SALMON CENTER, (Winter 2011), http://www.wildsalmoncenter.org/press/wsc_news_winter_2011.php#nftf.

67. See generally SCHLOSSER ET AL., *supra* note 35.

68. *Navajo Nation*, INDIAN HEALTH SERVICE, http://www.ihs.gov/navajo/index.cfm?module=nao_navajo_nation (last visited Mar. 26, 2015).

69. This is a division of the tribe’s Department of Fish and Wildlife.

70. NAVAJO NATION, DIV. OF NAT’L RESOURCES, DEP’T OF FISH AND WILDLIFE, NAVAJO ENDANGERED SPECIES LIST: RESOURCES COMMITTEE RESOLUTION NO. RCS-41-08 (2008).

71. See, e.g., Endangered and Threatened Wildlife and Plants; Listing as Endangered and Designation of Critical Habitat for Acuña Cactus and the Fickeisen Plains Cactus, 78 Fed. Reg. 18,938 (proposed Mar. 28, 2013) (to be codified at 50 C.F.R. pt. 17).

72. NAVAJO NATURAL HERITAGE PROGRAM, <http://nnhp.nndfw.org/> (last visited Mar. 1, 2015).

biological diversity on the Navajo Nation.”⁷³ The Program relies on funding from BIA through the Indian Self Determination Act.⁷⁴

Such coordination and management is complicated by Navajo Nation’s extensive resource development projects occurring on tribal lands. In particular, tribal leases to operate coal mines on tribal lands have the potential to be a major source of revenue for Navajo Nation but also pose potential threats to listed species habitat. The tribe can earn close to forty million dollars annually—a quarter of the Nation’s annual internal budget—from a single lease of the tribally owned Navajo Mine.⁷⁵ Jobs with Navajo Mine account for over seven percent of total income, salary, and benefits earned on the reservation.⁷⁶ Still, resource development must comply with tribal procedural and environmental requirements; those seeking to develop tribal land must undergo multi-step biological evaluations done by the tribe.⁷⁷ These include an assessment of “any potential effects of the project upon biological resources, particularly upon legally protected species” and are part of the documentation required for project approval by the tribal government.⁷⁸

Lower Brule and Cheyenne River Reservations

Both the Lower Brule and Cheyenne River’s wildlife management programs are best known for their efforts in reintroducing the endangered black-footed ferret.⁷⁹ The black-footed ferret is one of the rarest species in North America. Indeed, it was actually classified as extinct for over four years.⁸⁰ With guidance from the National Wildlife Federation, Cheyenne River introduced ferrets onto reservation lands in 2000.⁸¹ The tribe developed this reintroduction plan and designed it to follow the

73. *Id.*

74. *Id.*

75. *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225 (D. Colo. 2012).

76. *Id.* at 226.

77. NAVAJO NATION NATURAL HERITAGE PROGRAM, Biological Evaluations, available at http://www.nndfw.org/nnhp/docs_reps/Biological%20Evaluations.pdf (last accessed Apr. 7, 2015).

78. *Id.*

79. See, e.g., Meg Dickey-Griffith, *Tribal Collaboration Advances Black-footed Ferret Recovery in South Dakota*, USFWS, http://www.fws.gov/endangered/map/ESA_success_stories/SD/SD_story2/index.html (last updated December 16, 2013).

80. *Timeline*, BLACK-FOOTED FERRET RECOVERY PROGRAM, <http://www.blackfootedferret.org/timeline> (last visited Mar. 26, 2015).

81. Michael Lipske, *A Culture of Coexistence: With Guidance from NWF, the Lakotas Have Established a Self-Sustaining Population of Endangered Black-Footed Ferrets on Their Tribal Lands in South Dakota*, NAT’L WILDLIFE FED’N, Jan. 19, 2011, <https://www.nwf.org/News-and-Magazines/National-Wildlife/Animals/Archives/2011/Black-Footed-Ferrets-on-Tribal-Lands.aspx>.

provisions set forth in the Order.⁸² Lower Brule followed with its own introduction plan in 2006.⁸³ Now, in large part due to reintroduction efforts on these two reservations, the International Union for Conservation of Nature estimates that up to five hundred breeding adults now live in the wild.⁸⁴ Six of twenty release sites in the United States are on reservation lands, leading some to question whether tribes must disproportionately bear the burden of reintroduction, in violation of the Order.⁸⁵

VI. PERSPECTIVES REGARDING THE EFFECT OF JOINT SECRETARIAL ORDER 3206 IN INDIAN COUNTRY

The following section addresses four major aspects of the Order's effect in Indian country: 1) establishing government-to-government relations between tribes and agencies and fostering tribal self-determination, 2) sharing scientific data and resources with tribal programs, 3) establishing critical habitat on tribal lands, and 4) providing funding to implement the order in Indian country.

Establishing Government-to-Government Relations and Fostering Tribal Self-Determination

The Order's Purpose and Authority section establishes that the federal government will uphold a government-to-government relationship in dealing with tribes.⁸⁶ Accordingly, the Order emphasizes that "Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments."⁸⁷ In this, there appears to be no clear consensus as to whether the Order has been successful. Gary Morishima, a Natural Resources Technical Advisor to the President of Quinault Nation who helped to draft the Order, stresses the importance of establishing and maintaining working relationships between tribes and federal agencies when addressing species

82. See News Release, U.S. Fish & Wildlife Service, Black-Footed Ferrets to be Reintroduced on Cheyenne River Sioux Reservation, Oct. 2000, *available at* <http://www.fws.gov/mountain-prairie/pressrel/00-29.htm>.

83. *Timeline*, *supra* note 80.

84. J. Belant, P. Gober, & D. Biggins, *Mustela Nigripes*, INT'L UNION FOR CONSERVATION OF NATURE [IUCN] RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/details/14020/0> (last visited Mar. 26, 2015).

85. Jack McNeel, *Tribes Pull Black-Footed Ferrets Back from the Brink*, INDIAN COUNTRY TODAY, Aug. 23, 2013, <http://indiancountrytodaymedianetwork.com/2013/08/23/tribes-pull-black-footed-ferrets-back-brink-150922>.

86. Joint Secretarial Order 3206, § 1.

87. *Id.*

conservation and resource management. “If you are in a situation where a federal agency can essentially impose its will on the tribes, that’s not self-determination,” he says.⁸⁸ To gain an accurate understanding of the relationship, it is necessary to look at the Order not as creating new rights for tribes, but instead as authority that tribal nations have always had.⁸⁹ The Order seeks to facilitate a tribe’s ability to propose and develop its own management and conservation plans for ESA listed species. This eliminates the necessity for agencies such as FWS to try to impose restrictions on tribal land and resource management, including those resources held in trust for the benefit of individuals.⁹⁰

Agency officials reinforce the importance of shifting this responsibility to tribes. Steve Simpson, an attorney in Interior’s Office of the Solicitor, Division of Indian Affairs, also recognizes the need to distinguish between tribal lands and public lands.⁹¹ When managing endangered species on tribal lands, there is a “special need for consultation and sensitivity” for tribal religion and culture.⁹²

Morishima believes that the Order has affected agency approaches to administration of the ESA in Indian country. “Prior to the Order, we essentially had a situation where [FWS] was actually requiring us to go out and expend scarce resources conducting lengthy surveys according to [FWS] protocols,” he explains.⁹³ On Quinault, the Order has allowed the Nation to develop its own management plans that self-limit operation of tribal fisheries and other activities, minimizing adverse impacts on tribal activities while still protecting listed species.⁹⁴ These long-term plans allow for certain kinds of takings, expedited permitting processes, and programmatic reviews of all activities under these plans.⁹⁵ Morishima explains that whereas before, federal agency staff did not understand their different obligations in dealing with Indian lands and public lands, the Order has helped to make this distinction clear.⁹⁶

Elsewhere, despite the language included in the Order, relationships between agencies and tribes when regulating endangered species are not as well defined. Shaun Grassel, wildlife biologist for the Lower Brule

88. Telephone Interview with Gary Morishima, Natural Resources Technical Advisor to the President of Quinault Nation (Oct. 11, 2013).

89. *Id.*

90. *Id.*

91. Telephone Interview with Steve Simpson, Office of the Solicitor, Div. of Indian Affairs (Oct. 17, 2013).

92. *Id.*

93. Telephone Interview with Gary Morishima, *supra* note 88.

94. *Id.*

95. *Id.*

96. *Id.*

Tribe in South Dakota, has learned not to put too much credence in Orders such as Joint Secretarial Order 3206. “When things do happen, it’s more because of individuals and the people on the ground and not because of the Order,” he remarks.⁹⁷ Despite the aims of the Order, Grassel does not believe that FWS recognizes tribes as a true partner in managing endangered species. “We are not at that level of a true partnership,” he says.⁹⁸ “We are viewed as more of a project proponent or a project sponsor. . .not as part of a government-to-government partnership.”⁹⁹ Mike Claymore, Director of Cheyenne River’s Prairie Management Program, agrees. Despite Interior’s good intentions, he says, there is no specific mandate to enforce the Order, unlike more successful programs promoting tribal autonomy such as the Indian Self-Determination Act of 1975.¹⁰⁰ Accordingly tribes do end up bearing a disproportionate burden of conserving endangered species on tribal land; the Cheyenne River Tribe’s success in reintroducing the black-footed ferret has come directly from the Tribe utilizing its own resources.¹⁰¹ Without the Order, Claymore explains, “we probably would have done it anyway because of the Lakota philosophy . . . of protecting and promoting all creatures.”¹⁰²

Interior attorney Simpson offers the idea that rewording the Order could strengthen the relationship between agencies and tribes.¹⁰³ This is because recent case law has shaped the manner in which agencies understand the nature of the trust relationship.¹⁰⁴ Simpson recognizes that it is difficult for tribes not to bear a disproportionate burden in species management. “I think tribes do end up doing a lot of it,” he explains, at least in part because development of their resources and protection of their species hits closer to home.¹⁰⁵ However, Simpson points to an even more recent push by tribes and those in Washington D.C.¹⁰⁶ to move proposed tribal actions away from the restrictions of federal bureaucracy.¹⁰⁷ Still, it can be difficult to reconcile tribal

97. Telephone Interview with Shaun Grassel, Wildlife Biologist, Lower Brule Tribe (Oct. 11, 2013).

98. *Id.*

99. *Id.*

100. Telephone Interview with Mike Claymore, Director of Prairie Management, Cheyenne River Tribe (Oct. 11, 2013).

101. *Id.*

102. *Id.*

103. Telephone Interview with Steve Simpson, *supra* note 91.

104. *Id.*

105. *Id.*

106. *See, e.g.*, Helping Expedite and Advance Responsible Tribal Homeownership [HEARTH] Act, 25 U.S.C. § 415 (2012).

107. Telephone Interview with Steve Simpson, *supra* note 91.

sovereignty and self-determination with the protection offered by the federal trust relationship; tribes have also expressed their interest “to come back and have this special consultation relationship” created by the Order.¹⁰⁸ Simpson believes that this movement shows that consultation under the Order has been less of an obstacle as compared to coordination under many federal statutes; this is evidence that “the Order has worked pretty well.”¹⁰⁹

Sharing Scientific Data and Resources with Tribal Programs

Opinions likewise differ as to whether the federal government has upheld its stated responsibility in the Order to “consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable . . . includ[ing] providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes.”¹¹⁰ Jeff Cole, a Wildlife Manager for the Navajo Fish and Wildlife Department, sees communication as a keystone to making the Order successful.¹¹¹ Cole explains that when a federal program may affect tribal resources, FWS now sends letters to the affected parties in the Tribe, such as the Tribal President, Department of Fish and Wildlife, and if there are any cultural concerns, to the Historic Preservation Bureau.¹¹² FWS regularly seeks tribal comment before proposing to list, delist, or upgrade protection for local species.¹¹³ This consultation helps to ensure meaningful tribal participation for federal actions that most affect tribal lands.

Lower Brule biologist Grassel believes that despite any heightened communication federal agencies may provide under the Order, agency and tribal goals still are not always aligned on matters of endangered species protection and land development. “BIA’s mandate is to maximize income off of tribal and allotted lands . . . so they typically aren’t interested in endangered species recovery because of the perception that it might hamper their objectives,”¹¹⁴ he adds. This can leave both ranchers and wildlife managers uncertain of how to keep both FWS and BIA content. As Lower Brule’s program was moving forward with ferret recovery, there was no real pushback, but Grassel did note some concern expressed by BIA regarding the effect reintroduction would have on the

108. *Id.*

109. *Id.*

110. Joint Secretarial Order 3206, § 1.

111. Telephone Interview with Jeff Cole, Wildlife Manager, Navajo Department of Fish and Wildlife (Oct. 2013).

112. *Id.*

113. *Id.*

114. Telephone Interview with Shaun Grassel, *supra* note 97.

agency's goals as well as those of tribal land owners.¹¹⁵ However Grassel believes that at a regional level, BIA is generally very supportive of tribal efforts at species restoration. This support has even been expressed through funding so that when it comes time for the agency to do Section Seven consultation, the regional office ensures that the tribe has the necessary information to later share with the local BIA office.¹¹⁶ This allows BIA to make informed decisions on any projects that might affect black-footed ferrets.¹¹⁷

Quinault Technical Advisor Morishima recognizes that agencies should rededicate themselves to ensure that agency officials understand their obligations under the Order, including those regarding sharing agency resources and data. He points to the great measures tribes have taken to make sure that FWS is aware of the obligations and the principles set forth in the Secretarial Order. On Quinault Nation, this has allowed the tribe to execute effective Forest Management Plans.¹¹⁸ Still, Morishima believes that there is a need to reaffirm principles and relationships as defined by the Order to educate agency staff as to the best ways to do business with Indian tribes while performing their administrative duties under the ESA.¹¹⁹ This can be difficult; the turnover in federal staff is often so great that tribes must constantly retrain and reeducate.¹²⁰ Training may be burdensome for tribes, especially for those that already struggle to stretch thin resources. Interior attorney Simpson likewise recognizes the need to reeducate agency officials and points to specific efforts across the country to do so.¹²¹ Agency offices in the Midwest provide training programs specifically designed to educate officials on the trust responsibility.¹²² FWS is coordinating with the Hopi Tribe and Navajo—two tribes for whom coordination and reconciliation has often been difficult—over eagle take.¹²³ “There have been instances in the past of FWS not working with tribes on listing decisions. I’m hearing much less of that now,” he explains.¹²⁴

115. *Id.*

116. *Id.*

117. *Id.*

118. Telephone Interview with Gary Morishima, *supra* note 88.

119. *Id.*

120. *Id.*

121. Telephone Interview with Steve Simpson, *supra* note 91 (“Training is always an issue, especially in terms of the way this trust works and the responsibilities the federal government has”).

122. *Id.*

123. *Id.*

124. *Id.*

A. Designating Critical Habitat on Tribal Lands

One area of focus in which the Order has helped various tribal conservation and development interests is by allowing tribes to designate their own areas as sensitive habitat. The Order seeks to protect tribal sovereignty and foster economic development on tribal lands by establishing that the government will “consult with affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species.”¹²⁵ Quinault Advisor Morishima explains that under the Order, designating critical habitat to satisfy federal conservation principles is “a last resort.”¹²⁶ Now, “instead of tribes having to prove that activities could be conducted . . . without harming the species of concern, the burden essentially shifted.”¹²⁷ The burden now rests on the federal government to show that tribal activity will harm the species and that voluntary conservation actions undertaken by the tribe would be insufficient to protect ESA listed species.¹²⁸

Those working with the endangered species on tribal lands can see the effects of this shift. Navajo wildlife manager Cole explains that, generally, when his department makes a comment, especially on a proposal to list critical habitat, it cites the Order with the position that FWS should not designate critical habitat on the Navajo Nation.¹²⁹ By citing the Order, tribal entities can provide FWS with evidence of what tribes are doing to protect the species on a local level, thus making federal protection unnecessary.¹³⁰ “I think that we have been effective in keeping critical habitat from being designated for several species,” he explains.¹³¹ This can aid development; tribal project planning is generally more feasible when there is no automatic consultation with FWS.¹³²

Lower Brule biologist Grassel highlights how tribes at times desire agencies to designate certain tribal lands as critical habitat for endangered species. Though no critical habitat for ferrets exists on Lower Brule, FWS did propose certain lands as critical habitat for

125. Joint Secretarial Order 3206, § 3(b).

126. Telephone Interview with Gary Morishima, *supra* note 88.

127. *Id.*

128. *Id.*

129. Telephone Interview with Jeff Cole, *supra* note 111.

130. *Id.*

131. *Id.*

132. *Id.*

various shorebirds listed under the Act.¹³³ However, these lands did not include two reservoirs on the Lower Brule reservation.¹³⁴ Grassel explains that tribal officials “actually thought that it would be beneficial . . . for all the shorelines on the reservoirs to be included in the critical habitat designation because we thought that it might help us secure grant dollars or funding to do something for those species.”¹³⁵

B. Providing Funding

Among the four major issues addressed in this Note, the clearest consensus regarding the effectiveness of the Order is over the matter of funding. “Whatever funding we are getting isn’t enough,” explains Navajo wildlife manager Cole.¹³⁶ Prairie Management Director Claymore agrees, “We are doing this without federal support but this is a federal issue. There should be specific money set aside for . . . tribes to do endangered species work. In particular, something that has the highest priority, like work with the black-footed ferret.”¹³⁷ Claymore notes that tribes receive little money for staffing, equipment (such as GPS and computers), and managing fragile lands, especially prairie dog habitats—vital to the survival of the ferret.¹³⁸ The little money tribes do receive must support the entire tribal government. “We just can’t take food or housing funding or resources and stick it into building dams [to comply with the ESA],” Claymore explains. “There’s a tradeoff there that is not one our Tribe is willing to take.”¹³⁹ The Cheyenne River Tribe must continue to lease its lands at stagnant rates because federal regulations do not permit improvements on much of the land.¹⁴⁰ Each acre the Tribe sets aside for prairie dogs is an acre unusable for horse and cattle grazing.¹⁴¹ Because there is no grass to eat on a prairie dog town, the recovery area is deducted from the overall acreage of the lease.¹⁴² Therefore, Claymore thinks ferret reintroduction would be more successful if agencies provided financial incentives to ranchers.¹⁴³ “Recovery is kind of stalling out,” Claymore explains.¹⁴⁴ “Nobody wants

133. Telephone Interview with Shaun Grassel, *supra* note 97.

134. *Id.*

135. *Id.*

136. Telephone Interview with Jeff Cole, *supra* note 111.

137. Telephone Interview with Mike Claymore, *supra* note 100.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Telephone Interview with Mike Claymore, *supra* note 100.

143. *Id.*

144. *Id.*

to raise prairie dogs because out here in the West . . . [they are] pests.”¹⁴⁵ Should the government provide adequate financial support, Claymore believes that tribes would need no further assistance from the federal government.¹⁴⁶ Without this support, tribal efforts may be unsustainable. Lack of funding has led Rosebud Sioux in South Dakota to discontinue their ferret reintroduction programs completely.¹⁴⁷

The lack of funding can create substantial uncertainty in both endangered species management and land development on tribal lands. Grassel explains that Lower Brule’s only source of funding from FWS is from competitive grant programs.¹⁴⁸ The grants do not fund programs, just short, discrete projects like a reintroduction.¹⁴⁹ Grassel explains that once a tribe receives grant money, it is then precluded from receiving any more funding.¹⁵⁰ This means that for conservation efforts to continue, tribes like Lower Brule must rely on funding from other sources, such as Defenders of Wildlife, World Wildlife Fund, and the Prairie Dog Coalition.¹⁵¹ Funding can also be uneven from region to region or from species to species. “The Mexican wolf recovery program had tribes written right into the [reintroduction] program so FWS had cooperative agreements with the San Carlos Apache Tribe and White Mountain Apache [Tribe],” says Grassel.¹⁵² “Those tribes received funding on an annual basis to monitor wolves that may or may not come onto tribal property. We are managing ferrets on tribal lands on our reservation and we are not funded.”¹⁵³ Like Claymore, Grassel does not think that this funding should come at the expense of tribal sovereignty in managing its own lands, “We will do the work and work with tribal landowners, but the FWS should meet us halfway,” he says.¹⁵⁴ “We have the capacity to do whatever we need to do in terms of wildlife but what we struggle with is funding. When a tribe assumes the responsibility of a federal agency in recovering listed species, we should receive some funding for that.”¹⁵⁵

Agencies largely recognize the need to provide adequate funding, yet practically this is often impossible. “Generally where [tribes] will

145. *Id.*

146. *Id.*

147. Telephone Interview with Mike Claymore, *supra* note 100.

148. Telephone Interview with Shaun Grassel, *supra* note 97.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Telephone Interview with Shaun Grassel, *supra* note 97.

154. *Id.*

155. *Id.*

come when they don't have the resources to do something is BIA," explains Simpson.¹⁵⁶ "And that's fine; BIA will do what it can. And there's a fairly broad authority for BIA from a budget point of view."¹⁵⁷ Still, there are practical constraints to how much funding BIA can provide. BIA exercises jurisdiction over 566 tribes, half of which have trust lands that BIA also administers.¹⁵⁸ FWS works not only with these tribes, but also with other federal lands around the country. This invariably stretches agency budgets, often leaving tribes to work out funding issues.¹⁵⁹ This begs the question as to why Congress has not built in more funding to make the Order or tribal endangered species management more effective. Morishima places much of the blame on the Senate, which agreed to a rider that blocked use of federal appropriations to implement the Order.¹⁶⁰ Tribal and agency officials implementing the Order in the field feel these effects directly.

VII. ANALYSIS BASED ON INTERVIEWS REGARDING JOINT SECRETARIAL ORDER 3206

The experiences described in the previous section, while not a complete representation of the Order's effectiveness in Indian country, demonstrate how the Order has helped to foster tribal self-determination, share scientific data and resources with tribal programs, establish critical habitat on tribal lands, and provide funding to implement the Order in Indian country—or how it has failed to do so. Statements in the Order concerning self-determination, self-government, and government-to-government relationships are promising. However, there are undoubtedly areas in which these aims fall short in practice and must be improved: especially in recognizing tribal conservation expertise, coordinating localized data, aligning tribal action to the Order, and providing sources of funding to ensure that its goals are carried out.

A. Recognizing Tribal Conservation Expertise

First, the Order would better accomplish its goal of facilitating species conservation in Indian country by simply recognizing tribes as sovereigns capable of producing accurate scientific findings and effective wildlife management programs. The past few decades have seen a

156. Telephone Interview with Steve Simpson, *supra* note 91.

157. *Id.*

158. *Id.*

159. *Id.*

160. Telephone Interview with Gary Morishima, *supra* note 88.

nationwide proliferation in the quantity and expertise of tribal wildlife management staff. Proliferation has not necessarily occurred as a result of the Order, but instead from recognition that tribes are often in the best position to address wildlife issues occurring on their reservations. Nowhere was this preference more evident than during the highly celebrated “Boldt decision” that affirmed treaty-protected fishing rights to tribes forty years ago. There, a federal district judge gave a presumption to the veracity of tribal findings over those of the State of Washington in ultimately establishing that tribes had the right to take up to fifty percent of the harvestable fish.¹⁶¹ Today, tribal biologists and wildlife managers are widely recognized among the best-qualified experts at managing local fish, wildlife, and other natural resources. By further emphasizing this expertise, the Order could help to further establish tribal programs’ credibility in the eyes of federal agencies while also providing a clearer directive to incorporate this expertise into tribal and federal management plans.

Recognizing tribal management, co-management capability, and authority also allows for implementation designed explicitly for specific regions, species, and tribal structures. The Order provides guidance in the form of overarching goals and principles, yet agencies must work constructively and affirmatively to adapt these goals to the specific needs of a region or a tribe. For example, while many tribes find the Order’s efforts to avoid designating critical habitat on reservations agreeable, some tribes such as Lower Brule wish to have critical habitat areas when such a designation would be beneficial to certain species. Incorporating tribal expertise into federal conservation policy not only aligns localized science with localized policy, but can also reduce tribal uneasiness that the government is still leaving them out of the process. Finally, the Order should further encourage use of tribal traditional knowledge to augment tribal scientific data and intimate knowledge of the land to create comprehensive plans sensitive to community values and customs.

B. Coordinating Localized Data

Listed species management in Indian country would also benefit from increased efforts to coordinate and share data-collecting resources and findings. Though the Order does reference this goal, oftentimes federal involvement amounts to little more than federal interference into tribal departmental responsibilities.¹⁶² Yet there are times in which these tribal departments could benefit from agency reports, studies, guidance, and expertise. Even in this period of relative austerity, federal agencies

161. *United States v. Washington*, 384 F.Supp 312, 343 (W.D. Wash. 1974).

162. *See supra* Part VI(d).

have resources that even the most developed tribal programs do not. It should not be mandatory for tribal programs to receive and incorporate agency knowledge, but it should be available if needed. For this to be effective, regional agency offices must continue to train staff members regarding the government's trust responsibility to tribes and its obligations under the Order.

Improved coordination between federal agencies would also allow for more meaningful tribal participation in conserving endangered species in Indian country. Modern Indian law calls for complex interactions not only between tribe and federal government, but also between myriad federal agencies.¹⁶³ However, the support or guidance a tribe receives from one agency often is undercut or contradicted by another.¹⁶⁴ Even when done unintentionally, these contradictions can make it difficult for tribes to anticipate which federal law or regulation will be applied and for tribal wildlife managers to share data with the appropriate parties. Requiring agencies to consult with one another and reconcile inconsistent policies prior to meeting with tribal governments may be seen as more red tape at the outset of a program. However, it is also likely to ultimately limit costly incongruent federal efforts and to streamline communications with tribes.

This coordination cannot happen if departments or regional agency offices do not buy into achieving the Order's goals. Many federal agencies that interact with tribes have a multitude of mandates and regulations that require actions often inconsistent with tribal goals. The BIA in particular works to lease and develop tribal lands in order to maximize economic productivity, which may or may not be in accordance with tribal priorities. To many agencies, the Order, tribal, and federal species management programs may appear as hurdles rather than allies in fulfilling statutorily mandated directives. The fact that these agencies have broad decision-making authority can undercut maintaining the government-to-government relationship emphasized in the Order. Agencies such as the BIA that commonly regulate development in Indian country should attempt to amend regulations that conflict with this relationship and other goals stated in the Order.

163. See, e.g., B.J. Jones, *A Primer on Tribal Court Civil Practice*, THE GAVEL (Sept. 1998), available at http://www.ndcourts.gov/court/resource/tribal.htm#*; Tribal Court Clearinghouse,

General Guide to Criminal Jurisdiction in Indian Country, TRIBAL LAW AND POLICY INSTITUTE, <http://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Mar. 26, 2015) (for a simplified discussion of tribal, state, and federal jurisdiction for civil, criminal actions in Indian country).

164. See *supra* Part VI(b).

Finally, both tribes and federal agencies must recognize that species' habitats do not stop at reservation boundaries. Oftentimes coordination between tribes and the federal government may not be sufficient without the cooperation of state agencies and non-Indian landowners that live and develop both on and off the reservation. This may create a complex patchwork of jurisdictional and political interests, yet conservation in Indian country is incomplete without cooperation and willingness to occasionally surrender given powers for the preservation of the species.

Aligning Tribal Action with the Order

Tribes are by no means completely reliant on federal reform to better realize both developmental and conservation goals. While the few instances in which tribes have attempted to assert legal rights established by the Order have been unsuccessful,¹⁶⁵ tribes may still wish to provide the Order as justification for pursuing the Order's goals. Though it may not be judicially enforceable, Department of Interior and Department of Commerce drafted the rule for a reason; the departments should theoretically wish to see their individual agencies uphold the general aims of the Order that the departments chose to draft. Because the Order is largely abstract and principle-driven, there are few specific goals that a tribe can point to in order to justify its actions related to conservation.¹⁶⁶ Yet tribal rules and policies may draw less controversy and resistance should tribes be able to link them directly to the Order's aims.

C. *Providing Sources of Funding*

Finally, Congress must provide adequate funding to execute the Order's goals. Tribal governments must work through a quagmire of federal statutes, regulations, and orders to perform almost any task on their own lands and yet receive almost no money to aid them in doing so. The effects of recent federal austerity measures have been felt especially hard in Indian country; tribes must run justice, health, education, and other essential services with even less money than they received before.¹⁶⁷

Should congressional funding continue to ebb, tribes may have to turn increasingly to alternative sources to fund wildlife management

165. *Micosukee Tribe of Indians*, 430 F. Supp. 2d at 1336.

166. Though, as described above, Navajo Nation has had some success justifying tribal actions by citing the provision to designate critical habitat on reservation lands only as last resort.

167. See *Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. 353 (2013) (statement of Ken Washburn, Assistant Sec'y for Indian Affairs, United States Dep't of the Interior).

programs. Tribes may choose to levy higher taxes on businesses operating on tribal lands. This approach would likely draw support from environmental organizations, as it would require companies that often compromise species' habitat to effectively put money into tribal programs tasked with conserving the habitat. Yet, higher taxes may undermine tribal efforts to establish themselves as business-friendly and could ultimately discourage outside corporations from doing business on tribal lands. Increasingly, tribes rely on such development for revenue and to provide essential jobs and services to their members.¹⁶⁸ Tribes may also turn to environmental organizations as a greater source of funding. This would allow tribal governments to increase wildlife staff, conduct more research, and apply new technology to expand conservation efforts. However there are potential drawbacks to this approach as well. Though tribal conservation priorities and initiatives may appear to align with those of environmental organizations, by accepting their money and support tribes necessarily sacrifice autonomy and decision-making power and place it instead in the hands of nontribal organizations. As tribes continue to assert self-determination as a cornerstone of tribal sovereignty, many tribes may find this sacrifice unacceptable.

These concerns only reinforce that continued federal funding and support is essential to the success of tribal management programs, and ultimately to endangered species' survival in Indian country. Naturally, the federal government may bristle at the idea of relinquishing more control to tribes while allocating more money to do so. Yet the issue of species and natural resource conservation is central to tribal cultures and economies across the country, and tribes must be provided the opportunity to exercise their sovereign rights and responsibilities in pursuing this conservation. Only then will they be in a position to convey the values and philosophies of their people as first stewards.

168. See Press Release, U.S. Department of the Interior, Interior Distributes \$13.4 Billion in FY14 Energy Revenues to Benefit Federal, State, Local and Tribal Governments (Dec. 2, 2014), available at <http://www.doi.gov/news/pressreleases/interior-disburses-13-4-billion-in-fy14-energy-revenues-to-benefit-federal-state-local-and-tribal-governments.cfm> (including over \$1 billion to tribes and Individual Indian mineral owners).

VIII. CONCLUSION

Only human beings have the power to unbalance the earth, and when they unbalance the earth they unbalance themselves.¹⁶⁹ – Fools Crow, Sioux

Indian tribes in the United States are independent sovereigns with diverse cultures, economies, values, and experiences. Still, there are few, if any, that do not consider the need to protect the natural world as of the utmost importance to their future wellbeing. For better or for worse, a disproportionate amount of the country's remaining undeveloped land and resources lie in Indian country. This often places tribes at the forefront both of large-scale conservation and land development projects.

Despite its nationwide success in preventing extinction, the Endangered Species Act often fails to reconcile efforts to conserve and develop. Its effect in Indian country is no different. Though tribes and tribal members value species conservation, they often struggle to see why the conservation must come from sweeping federal statutes. Continued uncertainty as to how these statutes affect both traditional hunting and fishing rights, as well as new resource development projects, does not facilitate either conservation or development.

Joint Secretarial Order 3206 attempts to alleviate this uncertainty and provide administrative guidance to federal agencies when working with tribes to conserve endangered species in Indian country. The Order is broad and of questionable judicial enforceability, yet it establishes a framework for harmonizing obligations to conserve endangered species, protect tribal sovereignty, and uphold federal trust responsibilities toward Indians. Though reactions in Indian country to the Order's purpose have been mostly positive, those that work with the Order view its on-the-ground effectiveness very differently.

Still, these differing experiences provide important clues as to how to improve the Order and its execution. To begin, the Order itself should place stronger emphasis on the value of many tribes' scientific expertise regarding localized species conservation. This, combined with traditional knowledge, allows tribes to develop comprehensive management plans, often with the support and partnership of the federal government. Secondly, though the Order seeks to improve the sharing of governmental resources, often agencies fail to coordinate with tribes or other federal agencies, leaving tribes unsure of law and policy. Improving coordination will help tribes establish more streamlined relations with federal agencies and plan for future development. Next,

169. THOMAS E. MAILS, FOOLS CROW: WISDOM AND POWER 54 (Tri S Foundation ed., 2010).

tribes should work to tie tribal goals directly to relevant provisions from the Order. This can encourage agency approval and limit federal roadblocks. Finally, despite growing tribal governmental infrastructure, there are occasions when tribes will require resources from the federal government to successfully conserve endangered species in Indian country. The requested assistance is often monetary. Despite current economic conditions, Congress will need to provide funding to support increased tribal management capacity and increased agency awareness to ensure that despite its grand designs, Joint Secretarial Order 3206 does not become just words on a page.