

# **Questions & Answers**

## **American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act\***

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### **1. What is the purpose of this new Secretarial Order for implementing the Endangered Species Act (ESA)?**

This Secretarial Order clarifies responsibilities of the Departments of Commerce and the Interior when the implementation of the ESA affects (or may affect) Indian lands, tribal trust resources, or the exercise of tribal rights.

### **2. What is the Federal trust responsibility to Indian tribes?**

The Federal government maintains a special trust relationship with Indian tribes pursuant to treaties, statutes, Executive Orders, judicial decisions and other legal instruments. Inherent in this relationship is an enforceable fiduciary responsibility to Indian tribes to protect their lands and resources, unless otherwise unencumbered through mutual agreement.

### **3. How much land does the Federal government hold in trust for Indian people?**

95 million acres are held in trust by the Federal government.

### **4. The Secretarial Order applies only to Federally-recognized tribes. How many Federally-recognized tribes are there?**

The Secretary of the Interior has recognized 555 tribes for special status with the Department of the Interior.

### **5. What is meant by a government-to-government relationship?**

The President's executive memorandum of April 29, 1994, requires the Federal government to recognize tribal governments as the governments of separate, sovereign nations. This relationship is unique as the Federal government does not owe any other entity, state or private, a trust responsibility.

### **6. What role did the Indian community have in the development of this Order?**

Various representatives were designated by the Indian community to be part of the tribal negotiation team that developed the final Order. While it was impossible to include all tribes in the negotiation process, both the Federal and tribal participants felt that the Indian community was well represented in this process. In addition, the Fish & Wildlife Service included its Native American Liaison and the Bureau of Indian

Affairs was represented by its Deputy Assistant Secretary for Indian Affairs in these negotiations.

**7. By their participation in the development of this Order, are the tribes now acknowledging that the ESA applies to them?**

No. The tribes acknowledge that the ESA is administered by the Fish & Wildlife Service and NMFS. In their administration of the Act, the Services must, on occasion, deal with Indian tribes. By participating in the development of this Order, the tribes were seeking to ensure that tribal sovereignty, tribal rights and the Federal trust responsibility to Indian people receive full and fair recognition in the implementation of the ESA. Both the Federal team and the tribal acknowledged that species conservation could be best achieved through government-to-government collaboration and communication rather than through litigation.

**8. If tribal governments and the Services still have different views regarding the affect of the ESA upon tribal rights, what really has been accomplished by this Secretarial Order?**

The long-standing legal disagreement regarding the application of the ESA to treaty rights has often created a barrier to closer cooperation between the Federal government and tribes on endangered species conservation. By agreeing to set aside their legal differences and focus on the mutual goals of maintaining and restoring healthy ecosystems and promoting species conservation, the Services and tribal governments have forged a new conservation partnership that will ultimately benefit both endangered trust resources and the exercise of treaty rights.

**9. Isn't there an inherent conflict between the Services' trust responsibility to the tribes and their statutory responsibility to administer the ESA?**

As trustees, the Services are obligated to ensure that tribal trust resources and tribal lands are protected to the maximum extent practicable within the law. Some of those same trust resources may be afforded protection under the ESA. Thus, the Services view their responsibilities under the ESA to restore and conserve endangered species as supportive of, and consistent with, their responsibilities as trustees to Indian people.

**10. The Order, in its Purpose, states that the Departments will ensure that "Indian tribes do not bear a disproportionate burden for the conservation of listed species . . ." Does that imply that someone else will share a "disproportionate burden?"**

No. The Order implies that no one should carry a disproportionate burden and that the Act should be implemented fairly and consistently for all Americans, including Native Americans.

**11. Will this Order somehow circumvent the requirements of the Act in favor of Indian tribes?**

No. The Order plainly states that it shall not be construed to grant, expand, create or diminish any legally enforceable rights, benefits or trust responsibilities not otherwise granted or created under existing law. The Order also states that it does not preempt or modify the Department's statutory authorities and is consistent with existing law.

**12. Will government-to-government consultation always require that the Departments consult with each individual tribe whenever an ESA activity impacts, or may impact, tribal lands or resources?**

Not necessarily. The Order allows Indian tribes to use intertribal organizations to speak for tribes, at the tribes' behest, in certain matters. For instance, the NW Indian Fisheries Commission may speak for a number of tribes in the northwest.

**13. Why aren't "Indian lands" considered part of the Federal land base---doesn't the Federal government have responsibility for these lands?**

Indian lands are designated as such by virtue of Indian treaties, statutes, court orders, Executive Orders, judicial decisions or other agreements. They are not considered part of the Federal land base because the Federal government only holds these lands in trust for Indian tribes and Indian individuals. They are, rather, considered part of the "Indian land base" over which the Federal government maintains a fiduciary responsibility of protection.

**14. What is meant by "deference" to tribal conservation management plans for Indian lands?**

The Departments recognize that Indian tribes value and take responsibility for the management of their lands and resources. Deference will be given to those tribal conservation plans that a) speak to those activities on Indian lands (including tribally-owned fee lands) and b) address the conservation needs of the listed species. In other words, if the tribe has a conservation plan that addresses the concerns of the Departments for a particular listed species---even if it was not specifically developed for that species---the plan will be given deference. There would be no expectation or requirement for the tribe to develop an alternative plan.

**15. Will this same "deference" apply to tribal trust resources management plans for off-reservation resources?**

The degree of deference to tribal management plans for off-reservation tribal trust resources will depend upon the extent to which such plans address the Departments' concerns. This will be ascertained through a government-to-government consultation where all concerns and plans are "put on the table" for review.

**16. Does this Order authorize the "direct take" of listed species by Indian tribes?**

No. the Order does not override the statutory provisions of the Act, including the prohibition against direct take. Whenever a situation arises that may raise the possible issue of direct take, a government-to-government consultation will occur to ascertain the appropriate action to take given the statutory mission of the Departments, the Federal trust responsibility and the role of sovereignty.

**17. Under what circumstances will the "incidental" take of listed species be allowed?**

A series of Supreme Court decisions in the 1960's and 1970's established a 5-prong test that needed to be satisfied before state conservation measures could be applied to restrict treaty hunting and fishing rights. Eventually known as the "5 conservation necessity principles", this 5-prong test was adopted as Federal policy for applying incidental take restrictions under the ESA to tribal treaty rights and was cited in the settlement of U.S. v. Oregon, 699 F.Supp. 1456 (1988). The Secretarial Order restates this Federal enforcement policy as applied to incidental take of listed species. Accordingly, an analysis and determination must be made that all the following standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose. Therefore, conservation restrictions may be imposed on Indian tribes only when all 5 standards have been met.

**18. Will the implementation of this Order in any way disturb the intergovernmental agreements already in place or those nearing completion after (sometimes) years of negotiation?**

No. The Order specifically states that it will not supersede, amend, or otherwise modify or affect the implementation of agreements or understandings already in place unless both parties agree otherwise.

**19. Alaska Natives are not included in the Order. What accommodations are being for Alaska Natives?**

Alaska Natives were not included in the Order because there was a concern that their subsistence exemption under 10(e) of the Act might be otherwise impacted. However, the Departments have agreed to make an independent study of the Alaska Native situation within one year of the signing of the Order.

**20. Will this Order make access to eagle feather any easier for Native American religious practitioners?**

The Departments recognized the tribal concerns for better and quicker access to eagle feathers and other species that may be sacred to them. The Order, therefore, makes a commitment to convene another Federal/tribal working group to address the issue in some detail and make recommendations to the Secretaries of the Interior and Commerce accordingly. It was felt that this issue was of sufficient importance on its own to warrant an independent study of the matter, rather than try to address it specifically in the body of the Order.

**21. Are the Departments setting aside monies to fund the effort to consult with Indian tribes on ESA matters?**

Until such time as funds may be appropriated for Federal consultation efforts, including efforts on other Indian-related issues, the Departments will encourage their Regional and field offices to provide on-the-ground technical assistance to the tribes in the form of personnel, machinery, research tools and information exchanges. It is anticipated that the tribes will contribute to this effort in similar fashion to forge effective consultations.

**22. Does the Order provide for any proactive ESA related activities with Indian tribes?**

Upon the tribes' request, the Services may review and assess tribal conservation plans and other measures for conserving sensitive species. This type of proactive consultation will allow the Services to become better acquainted with tribal positions and sensitivities and, consequently, allow the tribes a greater presence in the ESA activities of the Services.

**23. The Appendix of the Order goes to some length to state that Indian tribes will be given prompt notification of petitions, opportunities to participate in the ESA activity, ability to provide information, etc. How is this any different from the opportunities that are afforded the general public in this process?**

Through government-to-government protocols, the Services will make a special effort to include the affected tribes in significant ways in the ESA process. Face-to-face meetings would be standard protocol---not notices in the newspapers or other postings. The Services would solicit tribal information not only on the species at issue but on tribal cultural values, hunting, fishing, and gathering rights, a review of treaty obligations, and impacts on tribal economy.

**24. Will there be any change in the way the Services designate critical habitat with respect to Indian lands?**

Critical habitat shall not be designated on Indian lands unless it is determined essential to conserve a listed species. The Services believe that this is consistent with the special trust responsibility the Federal government has to Indian people to preserve and protect their lands and resources.

**25. Does tribal involvement in the Section 7 consultation process have any impact on the development of reasonable and prudent alternatives?**

The development of reasonable and prudent alternatives will be scientifically based. However, the affected tribes will be allowed to provide pertinent information and viewpoints that would enable the Services to develop informed reasonable and prudent alternatives.

**26. With respect to Section 7 consultations, explain the various mechanisms the Services would employ to elicit pertinent information from the affected tribes.**

When the consultation is with the BIA, the affected tribes will be considered as license or permit applicants and participate in the consultation as such. When the consultation is with some other Interior or Commerce agency, the Departments will provide for the participation of the BIA. With the participation of the BIA, the tribes at least have a spokesperson to represent their interests, even though they may not be "at the table." When the consultation is with an outside agency, the tribes will be notified of such consultation and the outside agency will be encouraged to include the BIA and affected tribes in the process.

**27. In soliciting the tribes for information in the various ESA processes, mention is made of "traditional knowledge." To what extent will this traditional knowledge be used in developing recommendations, plans of action, or opinions that should be based on the best scientific evidence available?**

The use of the best scientific evidence available does not preclude the consideration of other factors that would shed light on the scientific evidence at hand. For instance, the scientific data available might refer generally to a particular behavior pattern of a species. Traditional knowledge might inform the Services on the times, seasons, conditions, etc., of such behavior pattern which has been observed since time immemorial by an Indian tribe. The Services would find this information useful in evaluating their scientific evidence.

**28. Will Indian tribes have any input into the habitat conservation plans (HCPs) that are developed by private landowners or local governments?**

The Order allows for the use of information provided by the affected tribes in HCPs. While this will not require that HCP applicants include the tribes in actual negotiations, the Services will take full advantage of the information provided by the tribes through formal submissions and during the public comment process. The Services will share

this information with the HCP applicants and advocate incorporation of measures into HCPs that will restore or enhance tribal trust resources.

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\*The above questions /answers were obtained from the following:

[http://www.citizensalliance.org/links/pages/frames/federal\\_indian\\_policy.htm](http://www.citizensalliance.org/links/pages/frames/federal_indian_policy.htm)