Appendix F.

Tribal Coordination Documents

Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

Executive Order: Consultation and Coordination With Indian Tribal Governments

Executive Order 13007: Indian Sacred Sites

Presidential Memorandum of April 29, 1994: Government-to-Government Relations With Native American Tribal Governments

American Indian and Alaska Native Policy of the U.S. Department of Commerce

SECRETARIAL ORDER

American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act
Issued by the
Department of the Interior
&
The Department of Commerce

Sec. 1. Purpose and Authority. This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to- government relationship in dealing with tribes. Accordingly, the 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, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Sec. 2. Scope and Limitations.

(A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

Sec. 3. Definitions. For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Sec. 4. Background. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special

federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

Sec. 5. Responsibilities. To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.

(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government

relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an

incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation 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.

Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

Sec. 6. Federal-Tribal Intergovernmental Agreements. The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to

accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

Sec. 7. Alaska. The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

Sec. 8. Special Study on Cultural and Religious Use of Natural Products. The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

Sec. 9. Dispute Resolution. (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

Sec. 10. Implementation. This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

Sec. 11. Effective Date. This Order, issued within the Department of the Interior as

Order No. _____, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this fifth day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No. _____

Sec. 1. Purpose. The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

Sec. 2. General Policy. (A) Goals. The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) Government-to-Government Communication. It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) Agency Coordination. The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) Technical Assistance. In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed

species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

(E) Tribal Conservation Measures. The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

(A) Candidate Conservation.

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

(B) The Listing Process.

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the 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. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to

threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

(C) ESA 7 Consultation.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal

conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

(D) Habitat Conservation Planning.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

(E) Recovery.

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally- owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions

that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally- designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of Endangered and Threatened Wildlife and Plants occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

(F) Law Enforcement.

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

Questions & Answers

Secretarial Order No.3206

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-rec:ognized tribes are there?**

The Secretary of'the Interior has recognized 555 tribes for special status with the Departnnent 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, lboth 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 A.ffa.irs 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 gove:rnment-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 Secretariat1 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 adlminister 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, bene'fits 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 trilbally--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 of affect the implementation of agreements or understandings already in place unless both parties agree otherwise.

19. **Alaslka 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 arty 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 <u>proactive</u> 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 57 consultation process have any impact; on the development of reasonable and prudent ialternatives?**

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

26. **With respect to 57 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 out-side 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 o:n 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. Tlhe Services will share this information with the HCP applicants and advocate incorporation of measures into HCPs that will restore o:r enhance tribal trust resources.

EXECUTIVE ORDER

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CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers

over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials,

a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons

therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal

implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

WILLIAM J. CLINTON

THE WHITE HOUSE,

November 6, 2000.

# # #

Presidential Documents

Executive Order 13007 of May 24, 1996

Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. *Accommodation of Sacred Sites.* (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) ''Federal lands'' means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) ''Indian tribe'' means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and ''Indian'' refers to a member of such an Indian tribe; and

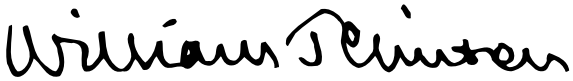
(iii) ''Sacred site'' means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. *Procedures.* (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments.''

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, ''agency action'' has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.



THE WHITE HOUSE,
May 24, 1996.

[FR Doc. 96–13597
Filed 5–27–96; 8:45 am]
Billing code 3195–01–P

[Federal Register: May 4, 1994]

Presidential Documents

Federal Register
Vol. 59, No. 85
Wednesday, May 4, 1994

Title 3--
The President

Memorandum of April 29, 1994

Government-to-Government Relations With Native American Tribal Governments

Memorandum for the Heads of Executive Departments and Agencies

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to- government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 (``Enhancing the Intergovernmental Partnership") and 12866 (``Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

(Presidential Sig.)<Clinton1><<Clinton2>

THE WHITE HOUSE,

Washington, April 29, 1994.

[FR Doc. 94-10877
Filed 5-2-94; 3:49 pm]
Billing code 3110-01-M

3/30/95

AMERICAN INDIAN AND ALASKA NATIVE POLICY
OF THE
U.S. DEPARTMENT OF COMMERCE

"All men were made by the Great Spirit Chief. They are all brothers. The earth is the mother of all people, and all people should have equal rights upon it....Let me be a free man-free to travel, free to stop, free to work, free to trade, where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to think and talk and act for myself and I will obey every law, or submit to the penalty."
Chief Joseph, Nez Perce Nation

From the Secretary of Commerce:

In the great mosaic of our country, we all know it takes work, cooperation, and knowledge to make our dreams reality. This policy offers cooperation, access to information, which is knowledge, and my pledge to create an environment that will foster dreams, free will, and productivity. It is time for our nations to realize that we are interdependent. With. that wisdom, we must work together to build a strong future for all of us.

Ronald H. Brown

RONALD H. BROWN,
Secretary of Commerce

Date: March 30, 1995

AMERICAN INDIAN AND ALASKA NATIVE POLICY
of the
U.S. DEPARTMENT OF COMMERCE

INTRODUCTION

In recognition of the unique status of American Indian and Alaska Native tribal governments, the Department of Commerce hereby proclaims its American Indian and Alaska Native Policy. This policy outlines the principles to be followed in all Department of Commerce interactions with American Indian and Alaska Native tribal governments. This policy is based on the United States Constitution, Federal treaties, policy, law, court decisions, and the ongoing political relationship among the tribes and the Federal government.

Acknowledging the government wide fiduciary obligations to American Indian and Alaska Native tribes but also supporting tribal autonomy, the Department of Commerce espouses a government-to,-government relationship between the Federal government and American Indian and Alaska Native tribes.

This policy pertains to Federally recognized tribes and provides guidance to Commerce personnel for issues affecting American Indians and Alaska Natives. This policy does not apply to Commerce interactions with state recognized tribes, Indians, or Alaska Natives who are not members of tribes with respect to matters provided for by statute or regulation.

This policy is for internal management only and shall not be construed to grant or vest any right to any party in respect to any federal action not otherw'ise granted or vested by existing law or regulations.

DEFINITIONS

Indian tribe (or tribe). Any Indian tribe, band, nation, Pueblo, or other organized group or community, including any Alaska Native village (as defined in, or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is acknowledged by the Federal government to constitute a tribe with a government-to-government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for Indians because of their status as Indians and tribes.

Tribal government. The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that has been determined eligible for specific services by Congress or officially recognized by inclusion in 25 CFR part 83, "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," as printed in the Federal Register.

POLICY PRINCIPLES

The following policy statements provide general guidance to U.S. Department of Commerce employees for actions dealing with American Indian and Alaska Native governments.

1. THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENTS.

   Commerce recognizes that the tribal right of self-government flows from the inherent sovereignty of tribes and nations and that Federally recognized tribes have a unique and direct relationship with the Federal government. Commerce further recognizes the rights of each tribal government to set its own priorities and goals for the welfare of its membership and that Commerce will deal with each tribal government, when appropriate, to meet that tribe's needs.

2. THE DEPARTMENT ACKNOWLEDGES THE POLICY COMMITMENTS OF THE U.S. CONGRESS AND THE CHIEF EXECUTIVE AS PRECEDENCE.

   Commerce recognizes the U.S. Congress passed House Concurrent Resolution #331, in 1988, declaring the Policy "To Acknowledge the Contribution of the Iroquois Confederacy of Nations to Reaffirm the Continuing Government-to-Government Relationship between Indian Tribes and the United States Established in the Constitution." And, additionally, incorporates the Policy Memorandum of the White House, issued April 29, herein, as so much guides the Executive Departments and Agencies in the "Government-to-Government relations with Native American tribal Governments."

3. THE DEPARTMENT ACKNOWLEDGES THE TRUST RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND AMERICAN INDIAN AND ALASKA NATIVE TRIBES AS ESTABLISHED BY SPECIFIC STATUTES, TREATIES, COURT DECISIONS, EXECUTIVE; ORDERS, REGULATIONS, AND POLICIES.

   Commerce, in keeping with the fiduciary relationship, recognizes its trust responsibility and will consult and work with tribal governments prior to implementing any action when developing legislation, regulations, and/or policies that will affect tribal governments, their development efforts, and their lands and resources.

4. THE DEPARTMENT ACKNOWLEDGES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS ALSO KNOWN AS THE "'INDIAN COMMERCE CLAUSE."

   Commerce recognizes the "Commerce Clause" of the United States Constitution (Article I, Section 8, Clause 3) is also known as the "Indian Commerce Clause" and states: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;". Commerce

understands that trade and commerce were the original building blocks that established government-to-government relationships with the Indian Tribes. Commerce pledges to honor the constitutional protections secured to Indian Commerce.

5. THE DEPARTMENT WILL CONSULT AND WORK WITH TRIBAL **GOVERNMENTS** BEFORE MAKING DECISIONS OR IMPLEMENTING **POLICY,** RULE!: OR PROGRAMS THAT :MAY AFFECT TRIBES TO ENSURE THAT TRIBAL **RIGHTS** AND CONCERNS ARE ADDRESSED.

   Commerce recognizes that as a sovereign government, the tribe is responsible for the welfare and rights of its membership and has the right to regulate commerce within its tribal boundaries. Therefore, Commerce will involve tribes and seek tribal input at the appropriate level on policies, rules, programs, and issues that may affect a tribe.

6. THE DEPARTMENT WILL IDENTIFY AND TAKE APPROPRIATE STEPS **TO** REMOVE ANY **IMPEDIMENTS** TO WORKING DIRECTLY AND EF:FECTIVElLY WITH **TRIBAL** GOVERNMENTS.

   Commerce recognizes there may be legal, procedural, organizational, and other impediments that affect its working relationship with tribes. Commerce will apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") and the "Regulatory Flexibility Act" to design solutions and tailor Federal programs, when appropriate, to address specific or unique needs of tribal communities. Commerce will use the National Performance Review and government reorganization to implement effective means for direct cooperation with tribal governments.

7. THE DEPARTMENT WILL WORK COOPERATIVELY WITH OTHER FEDERAL DEPARTMENTS **AND** AGENCIES, WHERE APPROPRIATE, TO FURTHER THE GOALS OF THIS POLICY.

   Commerce recognizes the importance of interagency cooperation. Therefore, Commerce will encourage and strive for communication, coordination, and cooperation among all governmental agencies to ensure that the rights of tribal governments are fully recognized and upheld.

8. THE DEPARTMENT WILL WORK WITH TRIBES TO AC'HIEVE THEIR GOAL OF ECONOMIC SELF-SUFFICIENCY.

   Commerce recognizes the importance of economic independence to tribal self--determination and tribal self-sufficiency and pledges to assist tribes; with developing strong and stable economies to participate in today's national and global marketplace. Therefore, Commerce will make every effort to ensure that eligible tribes have access to Commerce programs that will. help them meet their economic goals.

9. THE DEPARTMENT WILL INTERNALIZE THIS POLICY TO THE EXTENT THAT IT WILL BE INCORPORATED INTO ONGOING AND LONG-TERM PLANNING AND MANAGEMENT PROCESSES, AS WELL AS DAE!-TO-DAY OPERATIONS.

   Commerce recognizes that policies are not relevant or successful unless they are acted upon and properly implemented. Commerce will effectively and fully incorporate all of the principles of this policy into all operations and basic tenets of its mission. Commerce will identify the office or individual to coordinate this policy and act as liaison with American 'Indian and Alaska Native tribes in implementing and working with the policy and principles.

10. THE EFFECTIVE DATE OF THIS DEPARTMENTAL POLICY IS UPON SIGNING BY THE DEPARTMENT OF COMMERCE AFTER CONSULTATION WITH TRIBAL GOVERNMENTS.

Therefore, the Secretary of the Department of Commerce hereby directs all Commerce agencies, bureaus, and their components to implement this policy by incorporating all the above principles in their planning and management activities, their legislative and regulatory initiatives, as well as their policy development.

Appendix G.

Recovery Team Subgroups

Scientific and Implementation Subgroups

Depending on the nature and complexity of the threats facing the species and the number of stakeholders involved on the recovery team, there may be common-sense organizational schemes/structures that will aid the team in organizing and analyzing information pertinent to the recovery planning process. For instance, in many cases, there is a clear distinction between the scientific questions that need to be answered by the team (e.g., does habitat fragmentation affect the species? how?) and the more socio-policitical questions that arise (will more roads needed in this area in the future to deal with increasing human population?). It may, therefore be beneficial to divide the team into subgroups to tackle these different issues. A scientific subgroup of scientific experts on the species and its habitat would be tasked with determining what recovery means for the species, and an implementation subgroup composed of policy, management, and conservation experts would be tasked with exploring different ways to achieve recovery.

The responsibilities of the scientific subgroup might include:

- development of the background data on the species/ecosystem (Introduction data),
- identification of factors and activities affecting the species and its recovery (Recovery analysis), and
- development of the preliminary Implementation Schedule.

The responsibilities of the implementation subgroup might include:

- development of a participation plan, and
- assistance to the Secretary in implementing the recovery plan.

The two groups may work independently or collaboratively at different stages of the planning process depending on their preferences and current objectives. For instance, the scientific subgroup could work independently to develop a Population Viability Analysis, but the groups may work together to incorporate comments from the public review into the draft/approved plan. In cases of dispute between or within the subgroups, a moderator may be brought in to resolve differences and keep the project on track.

PACIFIC ISLANDS ECOREGION RECOVERY ADVISORY NETWORK

In early 1992, the National Academy of Sciences' National Research Council released a report entitled "The Scientific Bases for the Preservation of the Hawaiian Crow." Contained within this report was a recommendation that the U.S. Fish and Wildlife Service (Service) reestablish a Hawaiian crow (or 'alala) recovery team to offer the necessary knowledge and skills for joint management of the wild and captive populations of this critically endangered species, monitor the progress of the species' recovery, and identify research priorities. Thus, in May 1992, the Service's Pacific Islands Office (PIO) sought and received the Regional Director's approval to establish a new 'Alala Recovery Team. Soon thereafter, in July 1992, it became apparent that this same approach was needed for the more than 40 listed bird species under the PIO's jurisdiction, and approval was sought and received again from the Regional Director to establish a Recovery Network, made up of a central Pacific Avifauna Recovery Coordinating Committee (PARCC) with several recovery teams working in close association with this central Committee (reference the attached July 1992 memorandum).

The 'Alala Recovery Team was officially appointed by the Regional Director in November 1992, and the PARCC was appointed in December 1992. During their first meeting, which was held in January 1993, the PARCC reviewed the proposed recovery network schematic put together by the Pacific Islands Office and recommended the priority in which recovery teams should be established. It was suggested that a Hawaii Forest Birds Recovery Team (HFBRT) be established as the first priority, immediately followed by a Mariana Islands (or Western Pacific) Recovery Team. The PARCC met again in April 1993 and, following that meeting, submitted formal recommendations to the Regional Director.

In their formal recommendations, the PARCC advised the Regional Director to immediately establish two recovery teams and two working groups, or task forces. The first recovery team recommended was the HFBRT, to guide recovery efforts for the forest birds on all of the main Hawaiian islands, with the exception of the 'alala, which already had its own recovery team. As the second highest priority, PARCC recommended that the Regional Director appoint a Western Pacific Recovery Team to guide recovery efforts for all listed birds and fruit bats in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau. And, finally, the PARCC recommended the immediate establishment of two working groups, or task forces: the Captive Breeding Task Force (now called the Captive Propagation Recovery Working Group (CPRWG)) and the Avian Disease Recovery Working Group (ADRWG).

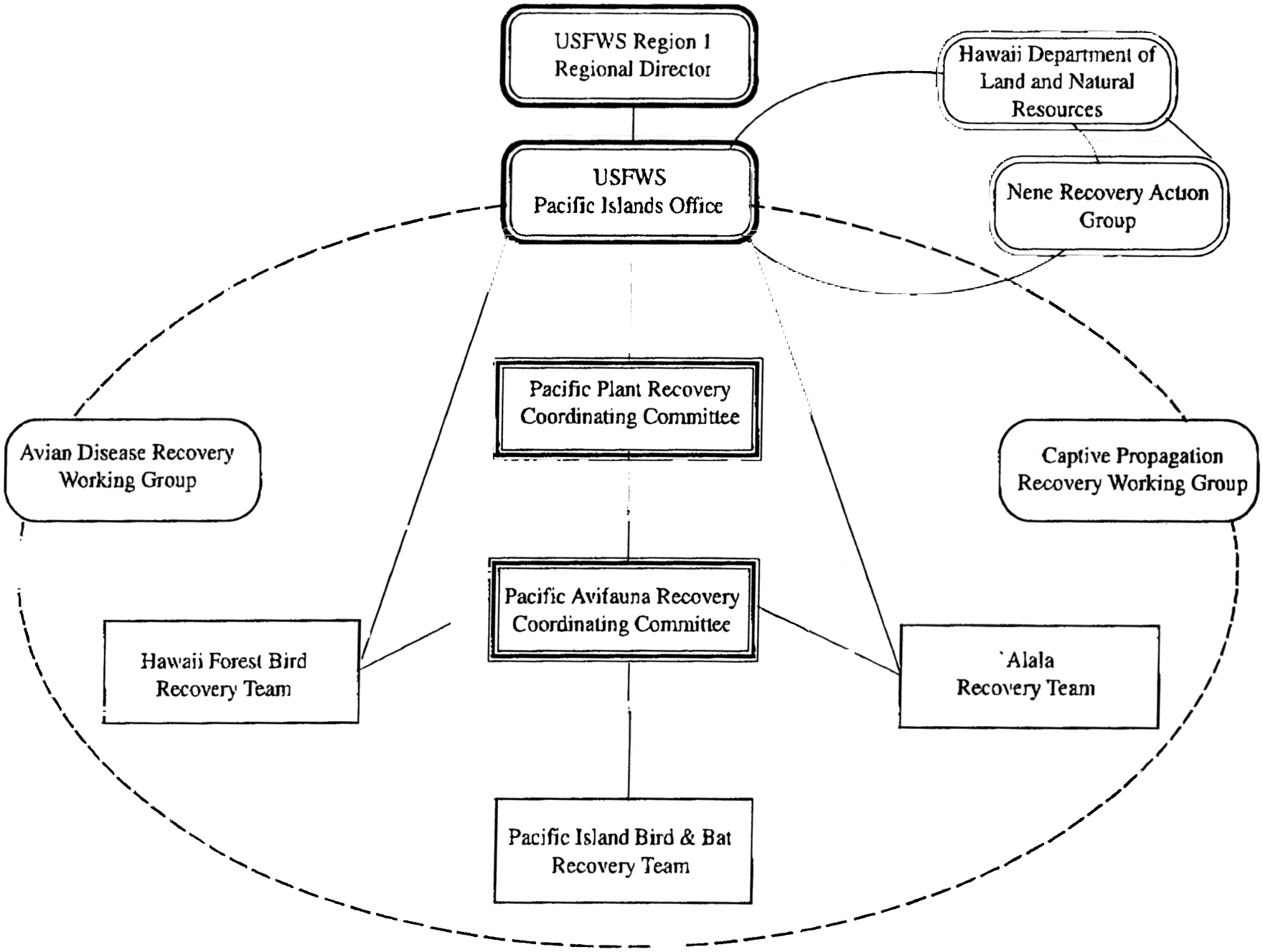
The CPRWG was established in December 1993 to advise the Service on all aspects of captive propagation as a recovery tool for Hawaii and Pacific Island birds, including: 1) evaluation of captive propagation facility options; 2) development of protocols for capturing, handling, transporting, and maintaining birds from the wild; 3) preparation of husbandry and veterinary protocols; 4) prioritization of species for captive propagation; 5) evaluation of the progress of captive propagation efforts for Pacific Island birds; and, 6) advising the PARCC on captive propagation issues. The ADRWG was established in May 1994 to guide research in avian disease and evaluate its impacts on Hawaii and Pacific Island birds.

In the meantime, the Service's Pacific Islands Office quickly realized that, with the listing of over 200 species of plants in the Hawaiian Islands and the concurrent requirement that recovery plans be written for such taxa, a recovery coordinating committee, similar to the PARCC, needed to be established for Hawaii and Pacific Plants. Due to the interdependcy of recovery of the flora and fauna of the Pacific Islands, it was envisioned that this committee would be a sister committee to the PARCC and would serve a similar function with respect to guiding the Service in Ecoregion-wide plant recovery actions. Thus, in April 1993, the Regional Director appointed the Hawaii and Pacific Plant Recovery Coordinating Committee (HPPRCC) to guide all aspects of recovery for the listed, proposed, and candidate plants of the Hawaiian and other Pacific Islands.

In addition to the above-listed, Service-appointed recovery teams, coordinating committees, and working groups, the Pacific Islands Recovery Network includes a State-initiated recovery group called the Nene Recovery Action Group (NRAG). The Pacific Islands Ecoregion assists the State of Hawaii's Division of Forestry and Wildlife in coordinating the functioning of this group. It is made up of land managers from all of the 5 main Hawaiian Islands, as well as researchers, administrators, and aviculturists. This group is now working on revising the Nene Recovery Plan.

With over 200 listed and proposed plant species, over 40 listed and proposed birds, innumerable candidate invertebrates, and several bat species either listed or candidates for listing, the Pacific Islands Ecoregion's need for recovery teams to assist in guiding and implementing recovery efforts continues to increase. It is anticipated that within the next couple of years the Recovery Advisory Network for the Pacific Islands will need to be expanded to include island-by-island recovery teams for listed Hawaiian plants, as well as at least one recovery coordinating committee, or team, for invertebrate species.

Prepared by Karen Rosa (03/01/95)



Pacific Island Advisory Recovery Network

Appendix H.

Sample Technical Consultant Invitation Letter

Sample Recovery Team Appointment Letter

Sample Letter for Disbanding a Recovery Team

Sample Technical Consultant Invitation Letter

Note: When the prospective team consultant is employed by a public agency, the letter requesting the services of the employee should be addressed to either the head of the agency or the potential team consultant's supervisor. Minor wording changes will be necessary. Verbal concurrences from the prospective team consultant should be obtained before the letter is sent. Discussion of travel expenses should be tailored to the specific situation.

Dear _____ :

As you know, the [common name, followed by scientific name] was recently listed by the [U.S. Fish and Wildlife Service/National Marine Fisheries Service] as [threatened or endangered] under the Endangered Species Act of 1973, as amended. This [Regional Office/Assistant Administrator's Office] has the responsibility for developing the recovery plan for this species. To accomplish this task, we are forming a recovery team comprised of persons who have expertise regarding this or similar species, the threats it faces, and habitat management [refer to the final listing rule to specifically identify the type of expertise needed to address the threats, such as karst topography, cave systems, avian diseases, short/long-lived plant species, etc.].

We are also inviting individuals to be consultants to the recovery team. Consultants may attend recovery team meetings to provide information regarding their specific areas of expertise. You have expressed and interest in participating in the recovery process in an advisory capacity. You may participate as much, or as little, as you have the time and inclination to do so. However, only recovery team members appointed by the [Regional Director/Assistant Administrator] may exercise voting rights for the purposes of the tasks at hand.

I would like to invite you to be a consultant to the [name of recovery team]. We are also inviting [list the individuals, and their affiliations, if any] to participate as consultants to the team.

Prospective recovery team members are: [list the individuals, and their affiliations]

The recovery team is expected to complete the draft recovery plan, which will be available for public review and comment, by [state date]; the preliminary initial recovery plan will be completed by approximately [state date]. I anticipate that [state estimated number of meeting needed during the 2 ½ year period) and duration (usually 2-3 days)] team meetings will be necessary to prepare the plan during preparation 2 ½ year period. The time and location of such meetings will be decided by the team. Once the recovery plan has been approved, the team may be asked to advise me on various matters regarding the recovery of the [name of species] until it can be removed from the list of *Endangered and Threatened Species*.

The first meeting of the recovery team will be [provide date (month/year)]. The Service's recovery team liaison is [state name of liaison and telephone number], who will contact you about the meeting. Please call [name of liaison] or me if you have any questions.

Please confirm your acceptance as a consultant to the [name of the recovery team] to [name of liaison] via telephone, or e-mail to [provide liaison's e-mail address]. I hope you will be able to make this contribution to the preservation of our Nation's biological heritage.

Sincerely,

Regional Director/Assistant Administrator

F1SH AND WILDLIFE SERVICE
Bishop Henry Whipple Federal Building
1 Federal Drive
Fort SneI1ing. MN 55111

Mr. Eric Carey
Conservation Unit Botanic Garden
Department of Agriculture
Chippingham Road
P. 0. Box N3704
Nassau, Bahamas

Dear Mr. Carey:

I am pleased to accept Director of Agriculture Carl F. Smith's May 11,2000, nomination of you as a member of the Kirtland's Warbler Recovery Team. On behalf of the Secretary of the Interior, I appoint you to the team. Your membership will help maintain and improve international cooperation for the conservation of the Kirtland's warbler *(Dendroica kirtlandii).* Your unique knowledge of the bird's wintering grounds in your country will help assure that the Secretary, through the U.S. Fish and Wildlife Service (Service), will continue to receive the best scientific advice and guidance from the team for the recovery and protection of the warbler.

The recovery team meets twice yearly and includes the following biologists and foresters employed by our state and Federal agencies: Kenneth R. Ennis (Recovery Team Leader, U.S. Forest SeIvice), Carol I. Bocetti (U.S. Geological Survey), Michael DeCapita (U.S. Fish and Wildlife Service), Donald Hennig (Michigan Department of Natural Resources), Philip W. Huber (U.S. Forest Service), John R. Probst (U.S. Forest Service), Ray Rustem (Michigan Department of Natural Resources), Michael Tansy (U.S. Fish and Wildlife Service), and Jerry Weinrich (Michigan Department of Natural Resources). With regards to expenses for your travel to team meetings and other related activities, we understand that our private cooperators are attempting to finance your travel needs. The U.S. Fish and Wildlife Service will attempt to assist in this effort, provided funds are available. The next recovery team meeting will be held July 10-11, 2000, in Mio, Michigan. You will receive more specific information from Mr. Ennis regarding that meeting.

The Service's liaison to the team is Mr. Michael DeCapita. Please confirm your acceptance by contacting Mr. DeCapita at 517-351-6274 or e-mail to: mike-decapita@fws.gov. Please contact Mr. DeCapita or me if you have questions.

I extend my thanks and congratulations to you for consenting to serve as a team member and wish you success in meeting the challenges that lie ahead.

Sincerely,

Regional Director

FWS/AES/ESO-TE

Memorandum

To: (See Distribution)

From: Regional Director, Region 3

Subject: Disbanding of the Great Lakes and Northern Great Plains Piping Plover Recovery Team

Over the past year, the Service has made several Regional Office responsibility modifications pertinent to the inland piping plover (*Charadrius melodus*) populations. The recovery implementation lead was divided between Regions 3 and 6 in June 1996, and the recovery plan development lead was divided between the two Regions in February 1997. Dividing the lead responsibilities for the populations was necessary to address each populations' specific biological concerns and recovery plan issues.

As a means to enhance coordination with those affected by, interested, and knowledgeable about plover recovery activities and issues, Region 6 established the Piping Plover Recovery Implementation Team earlier this year, which will provide advice and address recovery and management issues pertaining to the Northern Great Plains plover population. Region 3 has been working with a group of experts and the Recovery Team for the State of Michigan to address issues specific to the Great Lakes population. These actions will assist Regions 6 and 3 Ecological Services Field Office staffs in developing revised recovery plans for each population. Additionally, both Regions will also utilize the expertise of the recently formed International Piping Plover Coordination Group.

In view of the Service's reorganization of its inland piping plover recovery activities, a joint Great Lakes and Northern Great Plains Piping Plover Recovery Team is no longer appropriate or necessary. Therefore, this letter constitutes my decision to disband the Great Lakes and Northern Great Plains Piping Plover Recovery Team. This action does not diminish nor discredit those persons who served as Recovery Team members. They all made monumental contributions to the two piping plover populations, and their dedication, commitment, and contributions toward plover recovery issues in the Midwest and throughout the country are certainly appreciated. Instead, it reflects a greater commitment on the part of the Service to move piping plover recovery planning and implementation to field stations, where we believe additional resources can

be brought to bear on the problems the species faces. We look forward to their continued interest in participating in this new approach to piping plover recovery.

Distribution: FWS, R6, Pierre, SD, Field Office (Attn.: Field Supervisor)
FWS, R5, Great Meadows NWR (Attn.: Anne Hecht)
FWS, R1, 2, 4, 5, 6 ES Regional Office TE, Chiefs
FWS, R3, ARD ARW/GEO-1
FWS, R3, ARD AES/GEO-2
FWS, R3, ARD AF/GEO-3

Appendix I.

DRAFT 8/23/01
Hawaiian Monk Seal Recovery Team
Terms of Reference - 2001

Introduction

The Hawaiian monk seal (*Monachus schauinslandi*) is the only endangered marine mammal that is found completely within U. S. jurisdiction. The National Marine Fisheries Service (NMFS) is responsible for its conservation and recovery. NMFS is also responsible for the development of a Recovery Plan (RP) through the establishment of the Hawaiian Monk Seal Recovery Team (HMSRT), which also provides guidance for the implementation of actions designed to enhance the recovery of the species.

Within NMFS, the SW Region[1] has lead responsibility for activities related to recovery planning and implementation. The Office of Protected Resources provides assistance as needed, concurs on the terms of reference and membership of the HMSRT, concurs on draft and final RPs and collaborates with regional and center staff on annual or periodic oversight of the recovery effort.

A major role of the HMSRT will be to provide a draft revised recovery plan, with a strong emphasis on management measures. The RP may require modification when new information is obtained or unexpected conservation issues arise. Under the Endangered Species Act, an RP includes, at minimum, a description of the site specific management actions needed for conservation and recovery; objective and measurable criteria defining recovery; and estimates of the time and cost required to implement the recovery measures. One of the NMFS policies that affects the recovery planning process is the requirement that recovery plans are to be developed and implemented in a manner that will minimize the social and economic impacts consistent with timely recovery of listed species and/or critical habitat (59 FR 34272).

Purpose and Objectives

The purpose of the Terms of Reference is to provide guidelines for developing, coordinating and implementing a plan for the recovery of the endangered Hawaiian monk seal. The objectives of the Terms of Reference are to: 1) Define the roles and composition of the HMSRT, 2) Describe

[1]The FY2002 Senate appropriation bill would direct funds to the Pacific Islands Area Office from the Southwest Region to address administrative costs associated with the transition of the Pacific Islands Area Office to become the Western Pacific Regional Office. If and when that transition occurs, responsibility for Hawaiian monk seals would transfer from the Southwest Region to the Western Pacific Region. Accordingly, references to the Southwest Region, Southwest Regional Administrator, and Pacific Islands Area Office in this document would be changed to Western Pacific Region or Western Pacific Regional Administrator, as appropriate.

the formation and duties of sub-committees, 3) Define the roles and responsibilities a Recovery Plan Coordinator (RPC), and 4) Detail the responsibilities of NMFS.

Hawaiian Monk Seal Recovery Team

1. Description of role

The role of the HMSRT is to advise the Southwest Regional Administrator (SWRA) on issues concerning the conservation and recovery of the endangered Hawaiian monk seal, in particular, developing and overseeing the implementation of a revised RP. The SWRA identifies specific functions of the HMSRT and determines the schedule for completing assigned tasks. HMSRT responsibilities include reviewing, updating, and revising the RP; prioritizing RP activities; and providing guidance for and overseeing the implementation of recovery actions. HMSRT input may involve evaluating research and management programs, assessing the efficacy of specific recovery efforts, evaluating species status and listing classification when appropriate, and recommending new or emergency actions needed to enhance the recovery of the species. A revised RP will be submitted to the SWRA for approval and adoption. All HMSRT input and recommendations to the SWRA do not necessarily represent the views of NMFS and are independent of the Service.

The HMSRT is expected to be convened indefinitely and will periodically review the RP and supplemental work plans to advise NMFS if revisions are required. The HMSRT will also receive and review status reports on the progress made by NMFS and other collaborators involved in the implementation of the RP.

HMSRT meetings will be conducted annually and are generally open to the public when facilities allow; however, private working sessions of the HMSRT or its sub-committees may occur at the discretion of the Chair.

2. HMSRT Composition

The HMSRT is to be composed of experts in science and resource management and may include local, State, Federal, and non-government entities interested in the recovery of the endangered Hawaiian monk seal. HMSRT membership will consist of individuals appropriately divided between those with expertise in science and management. Total team membership will consist of approximately 10 individuals.

The HMSRT science members may include individuals with experience in the following appropriate areas of scientific expertise: (1) research experience with Hawaiian monk seals or closely related species, (2) knowledge of the Hawaiian monk seal ecosystem, (3) knowledge of threats to the Hawaiian monk seal, and (4) knowledge of related disciplines involving the conservation, management, and recovery of endangered species.

The HMSRT management members will consist of individuals selected on the basis of knowledge essential for developing recovery actions and schedules, and for formulating plans that maximize the compatibility of recovery actions and social/economic interests. The management members may come from pertinent entities such as conservation organizations, fisheries, and federal, state, or local government agencies and will emphasize site-specific management measures in the RP.

The HMSRT will meet annually to review the status of the Hawaiian monk seal, review progress in the implementation of the RP and to evaluate efforts to recover the species. Additional meetings may be held in emergency situations. The HMSRT may choose to meet more frequently to address issues of concern or to complete tasks identified by the SWRA (e.g., revise RP). The final draft of the RP will be submitted to the SWRA for NMFS approval. The SWRA may request the HMSRT to provide periodic input on the impact of Hawaiian monk seal recovery actions on all stakeholders.

The SWRA may disband the team or replace or reappoint members of the HMSRT at any time.

Subcommittees

The HMSRT, in coordination with the RPC, may establish subcommittees to advise the Team on specific issues (e.g., scientific questions, implementation of the RP, institutional relations, local/State planning, etc). A qualified member of the HMSRT will lead each of these subcommittees to ensure their input is consistent with the goals and objectives of the RP.

Recovery teams are specifically exempted from the requirements of the Federal Advisory Committee Act (FACA). Subcommittees are also exempt from FACA requirements as long as they report to the HMSRT.

3. Terms of Service

HMSRT members are advised to avoid conflicts of interest and other ethical problems in accordance with the following guidelines (April 2, 1992, Dept. of Commerce, Office of General Council).

> "Members should disqualify themselves from advising on a matter which has direct and predictable affect on their personal financial matters, those of a client, or those of a company by which they are employed, apart from matters which are inherent in their employment or outside affiliation.
>
> Members should not solicit business for themselves or their firms or seek an economic advantage based on their position on the HMSRT.
>
> Members should hold any non-public information obtained as a result of their services on the HMSRT in confidence and ensure that it is used exclusively for official purposes.

Members should not use or permit the use of such information for their own private gain or the gain of another person.

Members should not use the resources available to the HMSRT for the purposes of assisting a political campaign, or for any campaign business."

Members will have a fixed term of 3 years, which will be staggered. Initially members will be offered 3, 4 or 5 year terms so that one-third of each sub-discipline (science, management) will be reappointed annually.

4. NMFS Responsibilities

NMFS will oversee and coordinate all HMSRT activities and will be responsible for: 1) establishing and disbanding the HMRST, and subcommittees; 2) defining Team functions (including the revision of Terms of Reference for the HMRST) and establishing schedules for completing products;3) approving, adopting, and amending recovery plans; 4) transmitting Team recommendations to other agencies and organizations, as appropriate; and 5) overseeing team logistics and approving meeting/travel requests.

Recovery Plan Coordinator

The SWRA will appoint the RPC to serve as a liaison between NMFS/SWRA and the HMSRT. The RPC is responsible for coordinating the development of the draft and final RP. The RPC also monitors and promotes implementation of the RP and serves as the point of contact between the HMSRT and the SWRA or designee(s). Summaries of all HMSRT meetings will be sent by the RPC to HMSRT members, the SWRA, and the Director of the Office of Protected Resources, and others as appropriate. The RPC will also distribute summaries of research and management actions taken to implement the RP.

The selection of a permanent RPC is a high priority action for NMFS. Until an appropriate individual can be identified and selected the SWRA has appointed a 90-day interim RPC (Mr. Alan Everson NMFS, PIAO) to initiate this process and complete the following tasks:

1. Revise and finalize RT Terms of Reference
2. Complete membership list, contact prospective members, draft letters of invitation for the SWRA
3. Formulate a strategic view on the process from formation of the team to implementation of the RP
4. Develop an outreach program related to updating/revising the RP and obtaining participation of local affected groups in recovery efforts and planning.
5. Plan and schedule the first meeting of the team

Funding

NMFS will provide funds for HMSRT member travel expenses for meetings and other administrative costs as appropriate; however, NMFS will not pay salaries to members or advisors. NMFS will provide administrative assistance such as photocopying, procurement of supplies, and expenses related to the printing and distribution of materials. In addition, NMFS may contract for services to the HMSRT or outside experts to facilitate the drafting and the assembling of the RP and/or other HMSRT documents.

Appendix J.

FWS Policies on

Assembling an Administrative Record

United States Department of the Interior
FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

IN REPLY REFER TO:
FWS/PDM

Memorandum

To: All Fish and Wildlife Service Employees

From: Director /s/ Jamie Rapport Clark FEB 14, 2000

Subject: Compiling an Administrative Record

An administrative record is the paper trail that documents our decision-making process and the basis for our decisions. An incomplete record may affect our ability to defend our decisions if we are challenged in court.

All managers as well as any employee who could be involved in establishing an administrative record must read and follow the attached guidance from the Solicitor's Office and the Department of Justice. If you have questions about administrative record requirements, contact your Solicitor's Office.

We will incorporate the attached guidance into the Fish and Wildlife Service Manual.

Attachment

MEMORANDUM JAN 7, 2000

To: Director, U.S. Fish and Wildlife Service

From: Assistant Solicitor, Fish Wildlife and Environmental Protection Branch
/s/ Pete Raynor

Subject: Guidance on Compiling an Administrative Record

The first, and sometimes most difficult, part of a lawsuit is assembling the administrative record - the collection of documents that reflects the Service's decision-making process. These are the documents that a judge will review to determine whether that process and the Service's final decision were proper. This memo explains what the administrative record is, summarizes major points to consider when assembling the record, and explains why an accurate and thorough record is crucial. Attached is guidance provided by the Department of Justice, which gives more detailed advice on how to compile an administrative record.

The requirement to provide an administrative record in the course of litigation comes from the Administrative Procedure Act, which states that judges must review agency actions based on the "whole record." As explained further in the attached guidance, this has been interpreted to mean all documents and materials directly or indirectly considered by persons involved in the decision- making process. Thus, the record should include:

★ All documents and materials that were before or available to persons involved in the decision at the time the decision was made.

★ All documents that were considered or relied upon by persons involved in the decision.

★ Documents that relate to both the substance and procedure of making the decision.

★ All pertinent documents regardless of whether they favor the decision that was finally made, favor alternatives other than the final decision, or express criticism of the final decision. Documents should never be withheld just because they reflect negatively on the decision that was finally made.

★ Documents that may end up later being redacted or removed from the record on the basis of privilege.

The record should <u>not</u> include:

- ★ Documents associated with, but not part of, the decision-making process, such as fax cover sheets.

- ★ Various versions of a document where the differences among the drafts reflect minor editing changes. Include drafts, however, where hand-written notes or changes from one version to the next reflect the evolving process.

- ★ E-mails and other correspondence that discuss the agency action generally but do not reflect decision-making considerations by staff (for example, communications between biologists whose work may be affected by the outcome of the decision-making process but who are not involved in the decision itself).

Providing a thorough and accurate record to the court allows the Service to show a judge that it fully considered all relevant factors during the decision-making process. While a judge may allow the Service to later supplement a record with documents that were overlooked during the initial compilation, we lose credibility when we have to add documents that should have been included from the beginning. At worst, an incomplete record may affect the Service's ability to defend its final decision by signaling to the court that the agency's decision was not based on a reasoned consideration of all important information.

The importance of a complete and accurate record underscores the need not to wait until a lawsuit is filed before collecting all documents before the Service during the decision-making process. Any and all documents that are considered should be collected and organized as the decision-making process evolves. In the new world of e-mail and the Internet, correspondence that reflects the decision-making process should be printed out and stored with memos, research papers, and other documents. Where options are weighed or decisions made during meetings and conference calls, a document such as a memo to the file will memorialize how the decision was reached and show that the agency fully considered all aspects of the situation before making the decision. Finally, the person assigned the responsibility of compiling and organizing the administrative record should remember to check with all other persons and offices - including the Washington office - that may have documents that should be included in the record.

Putting together a good administrative record is complicated, and questions will always arise over whether or not a particular document belongs in the record. We strongly recommend that managers and anyone who could be involved in assembling an administrative record read this memo and the attached guidance from the Department of Justice. That guidance was put together specifically because of the importance of building a good administrative record when defending agencies such as the Service. It is imperative that Service staff understand and follow this guidance. Any Service staff that have questions about administrative record requirements in general or any document in particular should contact the Solicitor's Office for assistance.

cc: Regional Solicitors

Dated: January 1999

Guidance to Federal Agencies on Compiling

The Administrative Record

Introduction

Under the Administrative Procedure Act (APA), a court reviews an agency's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S.C. § 706(2) (A). In making this determination, a court evaluates the agency's whole administrative record. The administrative record is the paper trail that documents the agency's decision-making process and the basis for the agency's decision.

The APA governs judicial review of a challenged agency decision. However, several statutes specify what documents and materials constitute an administrative record, e.g., 42 U.S.C. § 7607(d)(7)(A) (provision states what materials will constitute the record for the purpose of judicial review of certain enumerated types of rulemaking issued under the Clean Air Act); 42 U.S. C. § 9613(j) and (k) (CERCLA). At the outset, be sure to determine whether a statute other than the APA applies in the case. In addition, regulations may govern how to assemble a record. See, e.g. , 40 C.F.R. 300.800 -300.825 (CERCLA); 40 C.F.R. Part 24 (RCRA Corrective Action). See also FRAP Rules 16 and 17 (record on review or enforcement and filing of the record).

The purpose of this memorandum is to provide guidance to agencies in compiling the administrative record of agency decisions other than a formal rulemaking or an administrative adjudication. Optimally, an agency will compile the administrative record as documents and materials are generated or received in the course of the agency decision-making process. The record may be a contemporaneous record of the action. However, the administrative record may be compiled by the agency after litigation has been initiated. An agency employee should be designated to be responsible for compiling the administrative record. That individual will be responsible for certifying the administrative record to the court. S/he may keep a record of where s/he searched for the documents and materials and who was consulted in the process of compiling the administrative record.

It is critical for the agency to take great care in compiling a complete administrative record. If the agency fails to compile the whole administrative record, it may significantly impact our ability to defend and the court's ability to review a challenged agency decision.

1. General Principles for Compiling the Administrative Record

The administrative record consists of all documents and materials directly or indirectly

considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision.

- Include documents and materials whether they support or do not support the final agency decision.

- Include documents and materials which were before or available to the decision-making office at the time the decision was made.

- Include documents and materials that were considered by or relied upon by the agency.

- Include documents and materials that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decision-maker.

- Include privileged and non-privileged documents and materials. (See section 4).

2. Where To Find The Documents and Materials That Comprise The Administrative Record

The agency should identify an agency employee to be responsible for compiling the administrative record. The identified agency person should be responsible, careful, and prepared to provide an affidavit. S/he should keep a record of where s/he searched for documents and who was consulted in the process. S/he should conduct a thorough search for the purpose of compiling the whole record, including the following:

- Contact all agency people, including program personnel and attorneys, involved in the final agency action and ask them to search their files and agency files for documents and materials related to the final agency action. Include agency people in field offices.

- Contact agency units other than program personnel, such as congressional and correspondence components.

- Where personnel involved in the final agency action are no longer employed by the agency, search the archives for documents and materials related to the final agency action. A former employee may be contacted for guidance as to where

to search.

Determine whether there are agency files relating to the final agency action. If there are such files, search those files.

If more than one agency was involved in the decision- making process, the lead agency should contact the other agencies to be sure the record contains all the documents and materials that were considered or relied on by the lead agency.

Search a public docket room to determine whether there are relevant documents or materials.

3 . What Documents and Materials To Include In The Administrative Record

a) Types of materials:

Documents that are to be included in the administrative record should not be limited to paper but should include other means of communication or ways of storing or presenting information, including e-mail, computer tapes and discs, microfilm and microfiche. See 36 C.F.R. Chapter XII, subchapter B (electronic records). The term should include data files, graphs, charts and handwritten notes. Do not include personal notes, meaning an individual's notes taken at a meeting or journals maintained by an individual, unless they are included in an agency file. An agency file is determined by agency control, possession and maintenance.

b) Kinds of Information:

Include all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials.

Include policies, guidelines, directives and manuals.

Include articles and books. Be sensitive to copyright laws governing duplication.

Include factual information or data.

- Include communications the agency received from other agencies and from the public, and any responses to those communications. Be aware that documents concerning meetings between an agency and OMB should be included but may qualify, either partially or fully, for the deliberative process privilege.

- Include documents and materials that contain information that support <u>or</u> oppose the challenged agency decision.

- Exclude documents and materials that were not inexistence at the time of the agency decision.

- As a general rule, do not include internal “working” drafts of documents that were or were not superseded by a more complete, edited version of the same document. Generally, include all draft documents that were circulated for comment either outside the agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision-making process. Drafts, excluding "working" drafts, should be flagged for advice from the DOJ attorney or the Assistant United States Attorney (AUSA) on whether: 1) the draft was not an internal “working” draft; and 2) the draft reflects significant input into the decision-making process.

- Include technical information, sampling results, survey information, engineering reports or studies.

- Include decision documents.

- Include minutes of meetings or transcripts thereof.

- Include memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes, unless they are personal notes.

4. How To Handle Privileged Documents and Materials

Generally, the administrative record includes privileged documents and materials and documents and materials that contain protected information. However, once the record is compiled privileged or protected documents and materials are redacted or removed from the record.

The agency should consult with the agency counsel and the DOJ attorney or the AUSA as to the type and the extent of the privilege(s) asserted. Be sensitive to the relevant privileges and prohibitions against disclosure, including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidential business information.

If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.

5. How to Organize the Administrative Record

- Organize the documents and materials in a logical and accessible way.

- Organize the documents and materials in chronological order and/or by topic.

- Documents and materials that do not fit into a chronological order may be separated by category, e.g., internal policies, guidelines or manuals.

- After a DOJ attorney or an AUSA has had the opportunity to review the administrative record for completeness and organization, it may be useful to bates stamp or to number each item. A DOJ attorney or an AUSA may review the documents and materials the agency decided were not contained in the administrative record.

- Prepare an index to the administrative record.

- Index should identify each document and material by the bates stamp number or document number and a brief description of the document or material, e.g., "memorandum dated June 5, 1997 from Mary Smith to EPA Administrator Jones regarding June 6, 1997 meeting agenda." If a document or material is being withheld based on a privilege or prohibition, state the privilege or prohibition.

- The agency must certify the administrative record.[1] Certificate language should reflect how the agency person who was responsible for compiling the record has personal knowledge of the assembly of the administrative record. Attached are sample certificates. Neither a DOJ attorney nor an AUSA should certify the record to avoid having them be a possible witness in the case.

- The DOJ attorney or the AUSA must consult the local rules of the court in which the matter is pending to determine how to file the administrative record with the court. If the local rules are silent on this issue, the DOJ attorney or the AUSA can address the issue with the parties and the court. For example, it may be appropriate to file only the index with the court and to provide the

parties with copies of the index and the opportunity to review the record or to file the parts of the record that the parties will rely on as grounds for their motions for summary judgment. The U.S. Attorney's Office in the jurisdiction in which the matter is pending should always be consulted.

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[1] If the agency fails to certify the record, the government may not be able to file a motion for summary judgment.

6. Important For Court To Have The Whole Administrative Record

- # A court reviews the agency action based on the whole administrative record before the agency at the time the decision was made.

- # The whole administrative record allows the court to determine whether the agency's decision complied with the appropriate APA standard of review.

- # All agency findings and conclusion and the basis must appear in the record.

- # The administrative record is the agency's evidence that its decision and its decision-making comply with relevant statutory and regulatory requirements.

- # A court may remand the matter where the agency's reasoning for its decision is not contained in the administrative record,

7. Consequences of Incomplete Administrative Record

- # If record is incomplete, government may be permitted to complete the record but, by doing so, you also may raise questions about the completeness of the entire record.

- # If the court decides the record is not complete, it should remand the matter to the agency. However, it may allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel.

- # Generally, although it may vary from circuit to circuit, courts will allow discovery when a party has proffered sufficient evidence suggesting:

  -- bad faith;

  -- improprieties may have influenced the decision-maker; or

  -- agency relied on substantial materials not included in the record.

  A party must make a strong showing that one of these exceptions applies before a court will allow extra-record inquiry.

8. Supplementation of the record

- When the administrative record fails to explain the agency's action, effectively frustrating judicial review, the court may allow the agency to supplement the record with affidavits or testimony.

- Be aware once the government supplements with affidavits or testimony, opposing party might depose your witnesses and/or submit additional affidavits or testimony.

- Be aware if agency counsel becomes a potential witness, it may be appropriate to screen the agency counsel from participation in the litigation. ABA Model Rule of Professional Responsibility 3.7.

Conclusion

When an agency must defend a final agency action before a court, it should take great care in preparing the administrative record for that decision. It is worth the effort and may avoid unnecessary and/or unfortunate litigation issues later on.

This memorandum provides only internal Department of Justice guidance. It does not create any rights, substantive or procedural, which are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Department of Justice or any other federal agency.

Attachments