

*Note: The Tribal Working Group of the Southwestern Willow Flycatcher Recovery Team developed the following issue paper for purposes of identifying issues relative to recovery of the flycatcher on Tribal lands, promoting a more thorough understanding of these issues and potential resolutions, and engaging the Service in a collaborative approach to recovery. As such, the ideas and opinions expressed herein are those of the Tribal Working Group, and are not necessarily representative of the views of the Service or the Department of the Interior.*

## **Appendix N.**

### **Tribal Perspectives on Southwestern Willow Flycatcher Management and the Endangered Species Act**

#### ***A. Introduction***

To speak with one voice for all the Indian Tribes in the Southwest Region that have a stake in willow flycatcher management and the recovery of endangered species is not possible. There are probably as many approaches to this issue as there are Tribes. It is possible that many Tribes, beyond disagreeing with the notion of acceptance of and cooperation with the Endangered Species Act (ESA), would be hesitant to even participate in this dialogue. Therefore, this paper in no way intends to speak for every Tribe in the United States or even the Southwest Region. Instead, the ideas presented here represent a consensus among some Tribes that believe there is room for dialogue with the U.S. Fish and Wildlife Service on ways of improving the Federal/Tribal relationship as it relates to endangered species management. While many of the problems surrounding this issue remain extremely sensitive and contentious, some Tribes have established the basis for a new type of relationship with the Service, based on mutual respect for each other's goals, and the desire to move beyond a structured legal relationship to a more problem-solving approach.

#### ***B. Background***

Before we explore aspects of willow flycatcher recovery, it is important to provide some background on the Endangered Species Act as it relates to Tribal interests. Before this is possible, however, some history of the Federal/Tribal affiliation is necessary. This relationship is built on the foundations of several principles which have been refined through many court decisions and the directives of several Presidential administrations. By far, the most important and pervasive of these are concepts are Tribal Sovereignty and Trust Responsibility.

#### **Tribal Sovereignty**

The inherent sovereignty of Indian Tribes and nations has long been recognized by the United States Government and has been reiterated extensively in recent years within the context of natural resource management. As sovereign nations, Tribes and Tribal lands are not subject to the same public laws which govern other lands

within the United States, either public or private. It has been legally well-established that inherent in the establishment of a reservation is the right of Indians to hunt and fish on reservation lands free from state regulation. Cases such as the *Menominee Tribe v. The United States* (1968), *Washington v. Passenger Vessel Association* (1979), *New Mexico v. Mescalero Apache Tribe* (1983), *Arapahoe Tribe v. Hodel* (1990), and *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999), have cemented this precept. Some of these rights are based on treaty rights, but many follow from the mere establishment of a reservation and the rights inherent therein. Congress can, if it specifies, deny a hunting or fishing treaty right, as it did when it prohibited Indians from hunting eagles under the Eagle Protection Act. Absent this clear congressional intent, however, hunting and fishing rights are not extinguished and may even be upheld for off-reservation lands (including both public and private land) where a Tribe has a strong enough treaty claim. This concept was established by *United States v. Winans* (1905). In general, however, Congress has not used its authority extensively to regulate Indian hunting and fishing and the matter has been left to Tribal regulation.

Although Congress does have authority to restrict some Tribal wildlife practices, it is unclear whether or not the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the two agencies responsible for enforcing the Act) have authority to enforce the ESA on Tribal land, as there has never been a court case which has specifically tested the issue. At the heart of the matter is the question of what was Congress' intent when it established the ESA. The ESA does not specifically mention Tribes, and other court cases have upheld the concept that, unless Tribal treaty and other rights are specifically abnegated by an act of Congress or a particular piece of legislation, that they remain in force. In the case that came the closest to testing this question, *United States v. Dion*, a Tribal member was convicted of taking a bald eagle for ceremonial use. The statute under which the case was prosecuted, however, was not the ESA, but the Eagle Protection Act. The ESA question was left unanswered.

Given this ambiguity (not to mention the potential for costly and lengthy litigation), many Tribal leaders and natural resource managers would just as soon work out these conflicts with cooperative agreements with Federal and State officials, rather than in the courts.

All of the above is not to imply that Indian Tribes are unwilling to work with the ESA or even see it as a burden. In fact, some Tribes would like the ESA to apply on Tribal land, and application of the Act has brought benefit to some Tribes, especially in regard to protection of dwindling fish stocks in the Pacific Northwest and the Great Lakes region. For example, the Pyramid Lake Paiute Tribe in Nevada and other entities used the ESA to achieve listing of the cui-ui fish in Pyramid Lake, and to protect water resources and reduce diversions from the Truckee River. In the Pacific Northwest off-reservation treaty fishing rights are often protected by mandatory conservation measures which are backed with the strong arm of the ESA.

All this legal maneuvering, of course, does little to help endangered species themselves. Consequently, a dialogue has arisen between some Tribes and the Fish and Wildlife Service about whether it is possible to set aside

differences over interpretation of the ESA and other laws and instead concentrate on cooperative policies that can be adopted to help endangered species and their habitat.

### **Trust Responsibility**

While it has been well-established that Indian Tribes in the United States are sovereign nations, the U.S. is legally required to act as caretaker for Indian interests, including the protection of the health, welfare, and land resources of Indian people. In other words, Indian land and resources are held “in trust” by the U.S. Government, a policy known as the government’s trust responsibility. In managing trust lands or assisting Tribes to do so the Government must act for the exclusive benefit of Tribes, and ensure that Indian reservations are protected and used for the purposes for which they are intended: to provide for the physical, economic, social, and spiritual well-being of Tribes. Reservations were not set aside as parks, critical habitat for endangered species, or even, for that matter, for protection of wildlife, except as this will directly benefit the Tribe for which the reservation was created. Tribal lands do harbor some of the most wild and scenic places on the continent and Tribal lands in many cases harbor far greater biological diversity than the surrounding public or private land. Nevertheless, reservation lands are primarily the *home* to the people who live and work there and were created for the safe haven, ecological, social, and economic benefit of the Indian people.

The interaction of the concepts and practices of Tribal sovereignty and trust responsibility are often complex and occasionally contradictory as Tribes and the government struggle to protect Indian interests while at the same time allowing Tribes as much leeway as possible to manage their own affairs.

In the matter of natural resource or wildlife law several other Executive Branch administrative directives also bear directly on the relationship of the U.S. Fish and Wildlife Service and other Interior Department Agencies to Tribes:

#### Secretarial Order 3175 (November 8, 1993) and Interior Departmental Manual 512 DM 2.

These documents require all Interior Department agencies to identify potential effects from their activities on Indian trust resources and to have meaningful consultation with Tribes where Department activities effect Tribal resources, either directly or indirectly. This Order also directs Interior Agencies to remove procedural impediments to working effectively with Tribal governments, to consult with Tribes on a government-to-government basis where trust resources are affected, and to identify potential effects on Indian trust resources of Department plans, projects, programs, and activities.

#### Presidential Memorandum of April 29, 1994.

This document reminds all Executive Branch Departments and Agencies of the government-to-government

relationship between Indian Tribes and the United States and requires these Departments to consult with Tribal governments to the greatest extent practicable prior to taking actions that affect Tribal governments; to assess the impact of Federal activities on Tribal trust resources; and to ensure Tribal rights and concerns are taken into account during plan development and program implementation.

The Native American Policy of the U.S. Fish and Wildlife Service, June 28, 1994.

This policy reiterates the government-to-government relationship and establishes a framework for joint projects and formal agreements. It also directs the Service to assist Tribes in identifying Federal and non-Federal funding sources for wildlife management activities, and provides a framework for the Service to give technical assistance to Tribes, where requested. While the Service has been helpful to Tribes from a technical standpoint, many Tribes feel that funding has been hard to get. The “Partners for Fish and Wildlife” program has provided some funds, but these are often for small-scale projects.

Secretarial Order 3206, June 5, 1997.

This is perhaps the most far-reaching of the Executive Branch Directives and has been very well-received by most Tribes. It also has potentially the greatest impact on how Tribes and the Federal government manage endangered species. While some have suggested that the Secretarial Order gives Tribes the rights to manage endangered species on their own land, this is far from true. The Order specifically states that it “shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities . . . under existing law.” and it “does not preempt or modify the [Service’s] statutory authorities.” It actually re-acknowledges the trust and treaty responsibilities of the U.S. Government and instructs Federal agencies to “be sensitive to Indian culture, religion, and spirituality”, the basis for which often relies on the use of natural resources. It also reminds Interior Departments that Indian lands are not subject to the same controls as Federal public lands; instructs them to recognize that Tribes are the appropriate governmental entities to manage their lands and resources; and instructs them to support Tribal measures that preclude the need for conservation restrictions. At the same time, the Order strives to harmonize Tribal concerns and interests about the ESA with Federal mandates to enforce it; and it allows for Tribes to develop their own conservation plans for listed species that are more responsive to Tribal needs.

Executive Order No. 13084, May 14, 1998.

This Presidential Order instructs all executive branch agencies to establish a process whereby elected officials and other representatives of Indian Tribal governments may provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. Interestingly, it

also instructs agencies, to the extent practicable and permitted by law, to consider any application by a Tribal government for a waiver of statutory or regulatory requirements with a general view toward increasing opportunities for flexible policy approaches. This opportunity for administrative flexibility has the potential to play a key role in how the Service implements endangered species recovery on Tribal land.

### ***C. Tribal Concerns About the Endangered Species Act***

Because Indian Tribes as Federal trustees are so dependent on Federal funding, a wide array of activities on Indian lands can trigger Section 7 consultation -- many more so than on private land where the Federal presence and the connection to Federal activities is not so extensive. Approvals for nearly every type of development project require Federal procedure or consultation of one sort or another. While the intent of these regulations is to protect Indian resources, the occasional side effect can be an excessive bureaucracy which slows even the most benign types of projects.

In recent years many Indian Tribes in the United States have become wary of the intent of the Endangered Species Act and the manner in which it is applied on Tribal lands. Many Tribes feel that they have been far better land stewards than the vast majority of private land owners and even some Federal land management agencies, and consequently have a higher proportion of endangered species on their land. In addition, most Indian reservations are far less "developed" (i.e., have a higher proportion of rangelands, forests, or de facto wilderness) than surrounding private or public land. This means that Tribal lands have the potential to act as a safe haven for some endangered or rare species which are driven off surrounding private land as it is developed. Tribes feel that they have been penalized for this good stewardship by having restrictions placed on development activities, and being told what they can and cannot do on their own land, which is viewed as a direct affront to Tribal sovereignty. While Tribes want to keep vast areas of resource use on their reservations, they don't want to be penalized for not having "urbanized" yet.

A more far-reaching concern of Tribes is the use of some species for religious, cultural, or ceremonial purposes. Considerable conflict has arisen in the past about Indian use of eagles and eagle feathers. Some of the cases have ended up in Federal courts and even the U.S. Supreme Court. Nearly all Indian Tribes in the United States revere bald and golden eagles and use the birds' feathers or other parts in ceremonies or dances. The fact that this bird has become endangered has led to severe restrictions on its take. Currently individual Tribal members must apply to the Service through the National Eagle Repository to obtain eagle carcasses and feathers, a process which can take as long as 3-4 years. While many Tribal members understand the need for this process, many view it as a direct affront to religious freedom and feel frustrated by the delays entailed in applying for an eagle.

While some latitude has in the past been given to Tribes to take such species, any take may be considered a violation of the ESA, The Migratory Bird Treaty Act, The Lacey Act, or other Federal or state wildlife laws. Again, court cases have led to conflicting interpretations about under what circumstances a Tribe or an individual Tribal

member can “take” a species for cultural or religious purposes, and what types of permits are needed. Some Tribes are working cooperatively with the Service to permit some of these activities.

Within the context of the ESA, previous endangered species recovery plans have done a poor job of integrating Tribal concerns. While some Tribes were included at the level of “stakeholders” or “interested parties”, their participation, comments, or suggestions carried no more weight than if they were a large private land owner in the region. For example, the Tulalip Tribes of the Northwest have charged that they were largely ignored in the Section 7 consultation during a major Habitat Conservation Plan. Several other Tribes in the Southwest were shocked to find that critical habitat for the Mexican Spotted Owl had been designated on Tribal land without prior consultation. Tribal leaders and land managers from one Tribe found out by reading about it in the Federal Register. Critical habitat for the Rio Grande silvery minnow was also declared on Pueblo Indian land in New Mexico, over the objections of Tribal leaders. Many other instances exist where Tribes were inadequately brought into the process of Section 7 consultation, despite the fact that species recovery plans had the potential for major impacts to Tribal resources, particularly water rights. For example, recovery plans for endangered San Juan River and Colorado River fishes were driven by court-ordered deadlines which did not leave time for adequate consultation with Tribes. Many instances such as these could easily have been better handled simply through better communication, and many Tribes hope to alleviate some of these misunderstandings through increased cooperation.

### ***1. Endangered Species and Tribal Water Rights***

Tribes are watching closely to determine whether or not species recovery means a change in the status of water rights, water availability, and water use. Like many private land owners, Tribes make active use of the region’s critical water supplies for farming, ranching, drinking water, and recreation. In a region where water is depended upon by so many entities, battles over who controls how much water are inevitable. Many Tribes along the Rio Grande are already involved in issues surrounding another endangered species, the Rio Grande silvery minnow, and while they are generally supportive of protection for the minnow, they are wary of shouldering a large share of the burden for this species’ recovery.

For Tribes, the issue of recovery of many riparian species and talk of protection of riparian habitat is inextricably linked to water rights. In all but a few instances in the Southwest, Indian water rights are senior to those of nearly all other users, dating back at least to the date of the establishment or U.S. Government recognition of a Tribe’s reservation (many Tribes justifiably believe that their water rights extend much further back than this). These water rights are generally “Federal reserve water rights” meaning when Indian reservations were created, although water rights were not specifically addressed, it was clearly the intent to include them, because any establishment of a reservation without concurrent rights to its water would have been ridiculously unfair, since the reservations were created for the “beneficial use” of the Indian people. This concept is referred to as the “Winters

Doctrine” and is one of the cornerstones of Indian Water Law. Recently, this doctrine has been affirmed to apply to both surface and ground water.

In some cases due to lack of funding or the very slow water rights process, the rights in a basin or a river have been adjudicated or otherwise fully determined. Despite this, water development has gone on apace, with dams, diversions, and other uses. When the water rights in an area are finally determined, it is quite likely in most cases that Tribes will have rights senior to all other users. In other cases the water rights have already been adjudicated, though Tribes for whatever reason (normally lack of capital) have not made full use of their water rights.

In addition -- and this is the key point -- these water rights are not subject to forfeiture due to non-use, and thus may be exercised at any time in the future, while still retaining their senior priority. This becomes problematic, however, when a watercourse is already fully appropriated and further water use has been deemed to jeopardize a listed species. This is a very difficult question: how to protect species while at the same time preserving water rights. The issue is especially nettlesome to Tribes since, in most cases, it was not Indian appropriation of water that has led to loss of habitat and listed species jeopardy. Now that the species are declining and restrictions are being put on water use, Tribes are wary of not being able to fully exercise their water rights. Tribes become very uncomfortable with the assumption that, by exercising a Federal reserve water right, they are going to jeopardize a threatened or endangered species.

## ***2. Federal/Tribal Cooperation on Endangered Species***

The diversity of opinion about Federal/Tribal relations has led to a contentious history of differing interpretations over Federal/Tribal resource jurisdiction. Nevertheless, the Service and many Tribes have expressed a willingness to work together on endangered species issues. Some Tribes in the Southwest region are optimistic that, beginning with this willow flycatcher recovery plan, the Service and affected Tribes can begin to move in a new direction. Within the last few years, many Tribes have gained considerable natural resource management expertise and this experience is being recognized by the Service and other Federal agencies. Doors are being opened for Tribal participation on a broader level among agencies such as the Bureau of Reclamation and the Environmental Protection Agency, and many Federal agencies are hiring Native American Liaisons or offering entire Tribal programs. The intent of the above-listed Federal directives is to establish policies whereby input from concerned Tribes can become a regular and critical part of resource planning initiatives, and to cement the process for Tribal participation. Tribes welcome these changes and are beginning to take full advantage of them.

Some Tribes have moved forward in an effort to establish new parameters to the way Indian Tribes and the Service interact. The White Mountain Apache Tribe and the Pueblo of Zuni have established “Statements of Relationship” (SORs) with the Service. These documents set up a framework by which the Service and the Tribe

could, while recognizing differences of opinion or interpretation, work through problems toward a common goal of promoting biodiversity and healthy ecosystems. The SORs reaffirm Tribal sovereignty, while recognizing the Service's technical expertise and the ability to assist the Tribe with complex management issues. This has become possible in part because Tribes have increased their technical capabilities and infrastructure, but also because a new framework for open dialogue has been developing whereby Tribes feel that many of the issues they have been long advocating are being taken seriously. Central to this approach is the Service's use of some of its administrative flexibility to work with Tribes to come up with mutually satisfactory solutions to seemingly intransigent wildlife and resource issues.

One example is the Pueblo of Zuni's recent initiative to alleviate the wait for eagle feathers for Tribal members by constructing the only Native American-owned eagle aviary in the country. With the close cooperation and assistance of the Service and several private foundations, Zuni has received permits and constructed a facility to care for non-releasable (e.g., from permanent injuries or due to human imprinting) bald and golden eagles. The molted feathers from these birds are distributed to Tribal members, and the Tribe is looking into expanding the facility to include a captive breeding facility. This is a good example of how the Service used some of its administrative flexibility to assist the Tribe in adopting a unique and innovative solution to a vexing problem.

Tribes have also been lobbying for more of a voice in endangered species recovery. When the initial steps were taken toward a recovery plan of the southwestern willow flycatcher, some Tribes expressed dismay at the relatively low level of Tribal involvement. Initially, Tribes were grouped with other "stakeholders" (numbering in the many hundreds). Tribes believed that their voices were being unduly diluted, given the large amount of flycatcher habitat on Tribal land. Under Secretarial Order 3206, Tribes have considerable authority to begin to manage endangered species on Indian land. Under the auspices of Tribal sovereignty, each individual Tribe had more endangered species management authority than, say, the individual states that were involved in the process. If a Tribe is unhappy with the process, it can opt not to participate and develop its own plan. In deciding whether or not to sign on to this process, most Tribes need to ask what benefits it could provide them.

Given the tentative nature with which Tribal leaders and land managers have approached endangered species issues, there were several reasons why the southwestern willow flycatcher recovery gives us cause for optimism. The goal of the recovery process, of course, is not only higher populations of this particular bird, but improved riparian areas in general. For many Tribes in the Southwest, the rivers and streams that cross their land provide critical areas for plant and animal collection, recreation, and cultural and religious use. Tribes see riparian protection as an excellent long-term goal. In only a few generations Tribes have seen these areas severely degraded, mainly from human induced changes, some of these changes have unquestionably provided benefits to Tribes, but many of which Tribes had no say in implementing. To restore riparian and wetland habitat and to improve these critical ecosystems is a goal that all Tribes in the region can support.



### ***D. Where Do We Go From Here?***

The current climate presents opportunities for significant improvement over what has been a contentious history. The Service and other Interior agencies have considerable administrative flexibility to work cooperatively with Tribes and more actively seek their input and guidance when dealing with endangered species and other region-wide initiatives. Some of the Executive Directives instruct agencies to use this flexibility. It should be remembered that even if a project or consultation may not appear to affect a Tribe's resources, there may be aspects of the situation which are not immediately apparent (such as off-reservation treaty rights, water rights, or the presence of traditional cultural properties that may give a Tribe a stake in the management of certain resources).

The Service has taken great strides to achieve concrete results. Tribes applaud the appointment of several Tribal members to serve as "Native American Liaisons" within the Service, and the creation of Interior Department directives which are favorable to a more cooperative environment. Tribes have also been offered more meaningful participation on regional planning initiatives all over the country, from the operations of the Glen Canyon Dam, to recovery of Northwest salmon stocks and dozens of other issues.

#### ***1. Suggestions for Meaningful Tribal Participation***

In order to further the blossoming cooperation between Tribes and the Service, the following suggestions are offered:

1. **Increased Communication.** Many of the past problems outlined in this paper could be avoided with open, honest communication, which may necessitate a massive re-structuring in which way consultation is carried out. Tribes must be kept involved at a meaningful level and treated as equal partners. This does not mean informing Tribes post-facto about management or listing plans that have already been developed. Tribes need to be involved in the earliest stages of planning. Differences in the capabilities of Tribes present challenges to this type of cooperation. Some Tribes already have well-developed natural resource departments but many do not; the rates of communication within a Tribe may work at a different rate than in the Federal government, and adequate time for full consultation must be planned. This is already being done by some Interior Agencies which have used their administrative flexibility to allow Tribes to participate at a higher level than in previous years.
2. **Remove Disincentives for Conservation.** Vast areas of Tribal land have remained deliberately undeveloped and provide considerable habitat for both endangered and common species. Tribes and other land owners should not be penalized for having maintained good habitat, which might harbor a listed species, or providing improved habitat which brings willow flycatchers or other listed species onto their land. On June 17, 1999 the Fish and Wildlife Service issued its "Safe Harbors" policy, which is gaining

recognition within the Service as a way to encourage private land owners and Indian Tribes to restore and protect wildlife habitat without fearing the repercussions of having endangered species use that habitat. “Safe Harbors” works with Tribes (or other non-Federal land owner) to develop a “time zero baseline” which determines (1) the current population level of a listed species on a particular piece of property; and (2) how long it might take to improve the habitat to provide a net conservation benefit to the species. The Service assures the land owner that, at the end of that time they can, if they wish, return the land to the state in which it was at time zero (the baseline) without worrying that they may be altering habitat for a listed species that may have since moved onto their land. In other words, they will not be penalized under the ESA for any habitat destruction as long as it is at least as good as it was at time zero.

3. Protect Tribal Water Rights. Any discussion of water resources and any recovery plans which dictate or imply a change in water use should be done taking full account of Tribal water rights and water resources. Specifically, when developing an “environmental baseline” by which to gauge the status or trends in a species’ population, Tribal reserved water rights (even those not yet developed) need to be factored in. Where a species is affected by a Federal water project, the courts have held that the projects must be consistent with the protection of senior Indian water rights. Before Indian water rights are affected, junior users should bear the brunt of the restrictions. Before *any* users are affected, however, detailed and thorough consideration should be given to water conservation measures which would make more water available to all users. However, given the lengthy and complicated nature of water rights negotiations or adjudication, parties should not let unresolved water rights issues hold up conservation planning.

4. Do Not Declare Critical Habitat on Tribal Land Without Consent. Even with consent, before critical habitat is declared, the impacts of this designation on Tribal economies and natural resource management operations should be evaluated. If an alternative to critical habitat designation would be equally effective in preserving and recovering a species, this alternative should be implemented in lieu of critical habitat designation on Tribal lands.

Where designations of critical habitat are essential and where Tribes want to fully participate in the recovery process, one approach might be for the Service, in cooperation with Tribal biologists, to designate a target of a certain amount of habitat which should be maintained in a certain condition, and then let the Tribe decide which areas to protect. In other words, the Service and a Tribe could agree on a “big circle” of potential range or habitat for a species, and within this big circle, identify a set amount of habitat targeted for a certain condition. For example, for a riparian species, the Service and the Tribe might agree that 2

miles of stream on a reach of 8 miles needs to have stable banks, vegetation at  $x$  feet high, and an average canopy cover of  $y$  percent. It would then be up to the Tribe to identify the areas it wishes to manage towards these conditions.

5. Provide Funding. Some Tribes have well-developed natural resource management departments which have made considerable strides in rehabilitating riparian areas and wetlands. Some of these projects have received national recognition and praise. However, this work is technically complex and very expensive. The Fish and Wildlife Service should, through every mechanism available, seek funding for Tribal initiatives which foster the recovery of the willow flycatcher. Recovery is a Federal responsibility and the Federal government has an obligation, since it is they who list species, to assist Tribal and State governments seek funding and assistance for recovery. Both Secretarial Order 3206 and the U.S. Fish and Wildlife Service's Native American Policy direct the Service to seek funding for Indian projects. Tribes, of course, should also seek their own sources of funding which will complement Federal sources.

6. Continue implementing Secretarial Order 3206. This directive was very positive in defining the Tribal/Federal relationship over endangered and sensitive species and should be upheld and referred to as a positive model for open dialogue.

7. Respect for Cultural Values. Many Tribal religious, social, and cultural beliefs are based on the concept of reverence for the earth and all its creatures. In conducting business with Tribes and in dealing with Tribes, land managers from Federal and State agencies should be aware of and sensitive to these values. In addition, many Tribal cultural practices use wildlife in a way to which the Service may not be accustomed. Where they impact wildlife, either endangered or common, care must be taken in discussing alterations of any cultural practices. These values may often be at odds with Federal concepts of conservation.

8. Manage for multiple uses. While caring for and protecting the environment is paramount to Tribal land managers, most Tribes want control over the way they use their own land, and this often means more than one use for the land. Woven into the culture are activities such as hunting, fishing, ranching, farming, and collecting which are just as much a part of the value systems and way of life as environmental protection. As stated above, many Tribes feel that they have been unfairly treated by laws such as the ESA which have allowed extensive development on non-Indian lands, leaving Tribal lands as a refuge for rare and endangered species, which are now illegal to make economic use of. Tribes are not in favor of developing land which will lead to the loss of species or the depaupering of the biological diversity on their lands; yet

some development is necessary in order for Tribes to maintain sovereignty and a level of economic independence which even begins to approach that of the non-Indian society in the United States.

9. Confidentiality of Tribal information. All Tribes have serious concerns about what will happen with any information that is gathered concerning the location and numbers of endangered species, habitat, or water quantities. Unfortunately, this often acts as a large stumbling block which inhibits Federal-Tribal cooperation. Tribes need to be assured that information collected during the course of research, inventories, or other management activities will not be subject to disclosure to the general public. This is definitely true for information which the Tribe gathers on its own, but also includes information which may be gathered when public employees and resources are involved. The issue goes far beyond natural resource management, and the confidentiality of information is a cornerstone of a Tribe's sovereignty, self-governance, and spiritual and religious power. This will no doubt be a very difficult precept to implement. Recent case law, such as a 9th Circuit Court decision involving the Klamath Tribes (1999) have held that if any Federal employees, such as Fish and Wildlife Service personnel, were involved in a project, the public has a right to petition for disclosure of information. Ultimately the Tribes had to turn over sensitive information for public review despite initial assurances from the Service that would not have to do so. The Service, apparently, did not have the power on its own to provide that assurance.

## **2. Specific Recommendations for Implementing Willow Flycatcher Recovery**

While the above recommendations speak to implementing the ESA on Tribal lands in general, we have several more specific recommendations for implementing willow flycatcher recovery.

1. A Tribal representative should be placed on the willow flycatcher technical team as a liaison or voting member. While the technical team at present represents the best ecologists in the fields of willow flycatcher ecology, riparian systems, grazing, and other biological aspects of recovery, there may be some points of view or aspects of the physical recovery process that are not represented on the team. Many Tribes working with flycatchers on their land have natural resource specialists who can be brought up to speed on many of the crucial issues concerning the recovery process, and can add significantly to the recovery discussion. Having a representative with Tribal interests in the forefront will also alleviate some of the discomfort Tribes feel in dealing directly with the Service. Thereafter Tribes can work directly with the Technical Subgroup as an extension of the Regional Director.

2. Tribal natural resource personnel should be fully trained in the willow flycatcher survey protocol and

should devote significant personnel to planning and implementing surveys. This may present a significant change in direction for some Tribal wildlife departments, and some Tribes may not have sufficient resources to carry out surveys. In that case, Tribes should seek the assistance of either the Bureau of Indian Affairs or the Fish and Wildlife Service in carrying out surveys. Like states, many Tribes rely on big game as a source of revenue to fund their operations. A shift toward non-game wildlife management might mean allocating resources toward species which will raise no revenue for the Tribe. Nevertheless, if Tribes want to be viewed as equal partners in this process, they need to allocate technical and financial resources to non-game programs, including willow flycatcher monitoring and management.

3. Information collected by Tribes should remain in the custody of Tribes, but Tribes will share summaries of the information, or provide Service or Technical Team personnel access to files on Tribal land with the understanding that the files or photocopies will not be released. This may be difficult in cases where Tribes need to have outside agencies such as the Service perform the surveys. This is a very sensitive issue and potentially one which could lead Tribes away from cooperating in flycatcher surveys, which would work against the conservation of the resource and recovery of the flycatcher. Written agreements should be made with the Service concerning the collection and storage of data.

4. If a Tribe has a riparian restoration plan or is thinking about developing one, it should strongly consider implementing a Safe Harbors Agreement with the Service.

5. The Service, at the request of Tribes, should offer to do an assessment of Tribal riparian habitat, to delineate which areas are likely to provide the best habitat. Perhaps an even better approach would be to provide direct funding to Tribes to enable them to carry out this type of evaluation on their own (under the technical guidance of the Service). Tribes realize that the Service, like many Federal agencies, is under a tight budget. However, Tribes cannot reasonably be expected to take on the additional burden of endangered species management or willow flycatcher habitat assessments without additional funds.

6. Include suggestions for region-wide water conservation in any recovery plan. Protection of endangered species does not always automatically mean a total abandonment of all forms of development or severe impacts to Tribal and non-Tribal water rights. If species can be protected through conservation measures, this is always preferable to other alternatives and there may be relatively little change in the way sustainable development is carried out. In the case of riparian obligate species such as the flycatcher, water conservation could play a big role in assuring that Tribes and other private land owners can continue to use

water to their advantage while still offering a means of protection to listed species.

7. For their part, Tribes should be as open as possible and as committed as practicable to the recovery process. This may mean divulging information or allowing Federal land managers onto Tribal land so an evaluation of populations or habitat can be conducted.

We believe that if the above recommendations are implemented, they will go a long way toward alleviating Tribal concerns, and will allow Tribes to willingly participate at a level which has heretofore not been achieved. Given the positive atmosphere that is emerging in the Service and among many Tribal leaders and resource managers, now is the time to form the foundations of a solid cooperative working relationship. This will only serve to foster increased conservation, a healthier environment, and more harmonious Federal/Tribal relationships.