NO. 14-35553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS, OREGON WILD, and UMPQUA WATERSHEDS, Oregon non-profit corporations,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, an agency of the Department of the Interior,

Defendant-Appellee,

and

THE COQUILLE INDIAN TRIBE, a federally recognized Indian tribe,

Intervenor-Appellee.

On Appeal from the United States District Court,
District of Oregon

Case No. 6:13-cv-1559-TC
The Honorable Michael J. McShane, United States District Court Judge

Answering Brief of Intervenor-Appellee

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the Coquille Tribe hereby states that it does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The Coquille Tribe concurs with items I and II in the jurisdictional statement by Appellants Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds.

STATEMENT OF THE ISSUES

1. Did the District Court correctly hold that the Middle Fork Kokwel Timber Sale Environmental Assessment satisfied NEPA because it incorporated the impacts of reasonably foreseeable future actions into the baseline condition of the environment being analyzed, thus disclosing the cumulative impacts of adding the Middle Fork Kokwel Timber Sale to those activities?
2. Did the District Court correctly hold that the Coquille Forest Act does not require the Coquille Forest to be managed subject to the discretionary recommendations of an ESA Biological Opinion and Recovery Plan because such recommendations do not constitute the "standards and guidelines" referred to in the Act?

STATEMENT REGARDING ADDENDUM

An addendum containing pertinent statutes, excerpts of pertinent legislative materials, and other pertinent documents is bound with this brief.

STATEMENT OF THE CASE

In a 1996 amendment to the Coquille Restoration Act, Congress restored to the Coquille Tribe a small portion of its ancestral lands. Congress intended the Coquille Forest Act (as the amendment is known) to remedy the harms visited upon the Coquille Tribe through 150 years of federal policy that dispossessed the Tribe of its ancestral lands and "terminated" the Tribe's very recognition. The Coquille Forest Act has modest goals. Congress adopted it to restore a fraction of the Tribe's lost ancestral lands, to generate a stable source of Tribal revenue through sustainable timber harvest, and to create opportunities to exercise Tribal self-determination through management of these lands.

Pursuant to the authority granted by the Coquille Forest Act, the Tribe (along with BIA) planned and analyzed the Middle Fork Kokwel timber sale. The revenue from the sale will be used to support critical Tribal services such as health care, education, housing, and social services. The Tribe and BIA complied with the requirements of the Coquille Forest Act, other federal environmental laws, and the applicable standards and guidelines for managing the Coquille Forest lands. The Tribe's management of the Coquille Forest, including the development of the Middle Fork Kokwel timber sale, has earned the Coquille Forest the highly-prized certification of the Forest Stewardship Council, which recognizes responsible and environmentally sound forest management practices.

Appellants Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds ("Cascadia") filed suit to prevent the Tribe from moving forward with the Middle Fork Kokwel timber sale. Cascadia inappropriately seeks to impose restrictions upon the Tribe's management of the Coquille Forest that exceed any requirement of federal law, and that would deny the Tribe the flexibility enjoyed by federal agencies managing adjacent lands. Cascadia seeks to impose cumulative impacts analysis requirements nowhere to be found in NEPA or its extensive case law. Cascadia also seeks to impose restrictions on the Tribe's management of its lands that would undermine the very purpose and intent of the Coquille Forest Act. Two separate District Court judges properly rejected Cascadia's far-reaching and unsupported theories, and the Tribe urges this Court to affirm the District Court's order and judgment.

I. Relevant Facts

The Coquille Restoration Act and Coquille Forest Act were developed in a specific historical context. Understanding the history of the Coquille Tribe, and the remedial intent and function of these statutes, is essential to resolving the questions presented by Cascadia's attempt to block the Tribe from carrying out timber sales on its modest restored land base.

A. Brief History of the Coquille Indian Tribe

The Coquille Tribe has inhabited Southwestern Oregon, including the lands that comprise the Middle Fork Kokwel Timber Sale, since time immemorial. SER 26 (Decl. of B. Meade (January 23, 2014)); SER 182, 219–21. Tribal members hunted, fished, and gathered the resources of these lands and waters to sustain their lives, their Tribe, and their culture. SER 26, 219.

The Coquille people and their way of life irreparably changed when Europeans appeared in this area in the early 19th Century. SER 27, 221–22. Coquilles were subjected to massacre and dislocation, and, through the deliberate policy of the United States, forced off the lands they had lived on for thousands of years. 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield concerning background for Coquille Forest Act) (describing the "atrocities" committed by the United States against the Coquille and other coastal Indian peoples by the United States, including having the Army "round up the southwestern Oregon tribes like cattle and march them hundreds of miles to government-created Indian reservations" and comparing such actions with "ethnic cleansing") (Add. 35).

A number of Coquille families, however, resisted relocation. S. Rep. No. 101-50, at 2 (1989) (Add. 24); SER 27. Yet the aboriginal homelands they returned to were in the process of irrevocable alteration. SER 27, 222. Tribal members were not able to use or even to access many of the resources they had subsisted upon for

food, shelter, cultural and spiritual sustenance since time immemorial. SER 27, 221–22.

The ultimate insult and injury remained. In 1954, the United States unilaterally "terminated" the federal recognition of the Coquille Indian Tribe. *See* Oregon Indians, Termination of Federal Supervision, 68 Stat. 724 (codified at 25 U.S.C. § 691); S. Rep. No. 101-50, at 1 (1989) (Add. 23); SER 28, 222. The Tribe and its members were deemed no longer to be Indians by the United States. *See* 25 U.S.C. § 691; SER 28. Their few remaining lands were removed from trust status and sold to settlers and commercial interests, and their ability to access health care, social services, and other resources was abruptly cut off. *See* 25 U.S.C. § 691; SER 28. As Senator Hatfield subsequently noted:

> As quickly became apparent, the Termination Act was a mistake of immense proportions that did serious damage to those tribes affected. At the very time these tribes were struggling to integrate themselves into this country's developing economic system, tribal members were stripped of needed health services and educational benefits. In addition, many lost their land because they were not able to pay the property taxes for which they were suddenly liable. The Coquilles were no exception.

135 Cong. Rec. S2257 (1989) (statement of Sen. Hatfield) (Add. 21).

B. Coquille Restoration Act and the Coquille Forest Act were Adopted Expressly to Remedy the Harms of Termination

Like their ancestors who remained on their ancestral lands during the reservation era, the Coquille people refused to accept the federal government's

word that they no longer existed. SER 28. They managed to stay organized and, after years of effort, successfully obtained their restoration to federal recognition in 1989 through the Coquille Restoration Act. Pub. L. No. 101-42, 103 Stat. 91 (1989) (codified as amended at 25 U.S.C. §§ 715–715g) (Add. 1–12). The Act was meant to remedy the "historic injustice" of the Tribe's termination. S. Rep. No. 101-50, at 2 (1989) (Add. 24); *see also* 135 Cong. Rec. S2257 (1989) (statement of Sen. Hatfield) (restoration an "opportunity to right this wrong by once again federally recognizing the Coquille Tribe") (Add. 22).

Passage of the Coquille Restoration Act was but the first step in remedying the damage done. The Restoration Act directed the development of a Tribal economic self-sufficiency plan, which was to focus on generating a sustainable economic development strategy to fund the provision of jobs, services, and programs to a growing membership over the long term. 25 U.S.C. § 715b (Add. 3); SER 29. The "centerpiece" of the Tribe's economic self-sufficiency plan was the prospective restoration of 59,000 acres of the Tribe's aboriginal lands. 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield) (Add. 35). However, in response to political pressures and to "accommodate a diversity of interests," the Tribe "made some very substantial concessions" to its proposal, including a reduction in the land base to less than 10% of that called for in the self-sufficiency plan. 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield) (Add. 36); *see also* SER 29.

As a result, in 1996 Congress amended the Coquille Restoration Act to provide for the restoration of 5,410 forested acres of the Tribe's ancestral lands. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. B, Title V, § 501, 110 Stat. 3009-537, 3009-537–41 (1996) (codified at 25 U.S.C. § 715c) (Add. 4–8) (the "Coquille Forest Act"). An express purpose of the Coquille Forest Act was to achieve some of the goals described in the Congressionally-mandated self-sufficiency plan. "The overall goal and plan of the [Coquille] forest are to move the standard of living for the members of the Coquille Tribe closer to that of the people of Oregon overall and to provide for the cultural restoration of the Coquille people." 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield) (Add. 35). The Coquille Forest Act was also Congress' attempt:

> [T]o provide a measure of restitution to the Coquille Tribe . . . . The restoration of 5400 acres could never atone for the hardships imposed on the Coquille people. It can, however, restore some semblance of culture and a tie to the land that our Federal Government attempted to destroy over 150 years ago.

Id. The Coquille Forest Act was to provide economic support to a developing Tribal government, to assist that government to provide basic services to its members, and to provide a locus for Tribal members to find subsistence and to facilitate the Tribe's cultural restoration. *Id.*

The Coquille Forest Act envisions a forest managed by the Tribe under a Tribally-developed forest plan and management standards. 25 U.S.C. §

715c(d)(4)(A), (5), (6) (Add. 4–5). "Federal law and policies fostering Indian self-determination are recognized by providing opportunity for the tribe to assume some or all of the management of the Coquille Forest." 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield) (Add. 37). The Coquille Forest Act calls for a sustainable timber harvest, *id*., that is, in the language relevant to the present case, "subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands," 25 U.S.C. § 715c(d)(5) (Add. 5).

C. Standards and Guidelines for Management of Adjacent Federal Forest Lands

The federal lands nearby or adjacent to the Coquille Forest are former Oregon and California Railroad lands ("O&C lands") managed by the Coos Bay District of the United States Bureau of Land Management. SER 183. The standards and guidelines for managing those lands are found in two key planning documents: the 1994 Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("Northwest Forest Plan"), SER 44–62; and a portion of the 1995 Bureau of Land Management Coos Bay District Resource Management Plan, ("Coos Bay District RMP"), SER 145–71.

1. Northwest Forest Plan

Development of the Northwest Forest Plan arose from significant debate concerning the protection of federal forest land habitat for the northern spotted

owl, listed in 1990 as "threatened" under the Federal Endangered Species Act ("ESA"), and the adverse economic consequences of such listing and litigation. *See* SER 47, 58–59; *EPIC v. U.S. Forest Service*, 451 F.3d 1005, 1009–10 (9th Cir. 2006). At President Clinton's direction, an interagency, interdisciplinary team was assembled to craft a balanced and long-term policy for the management of over 24 million acres of public land, SER 46, 56–57, culminating in "a comprehensive forest management plan for the entire range of the spotted owl." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059, 1063 (9th Cir. 2004).

There were two functional components of the Northwest Forest Plan. First was the identification and mapping of seven distinct categories of land use allocations, including designation of approximately 7.4 million acres of forest land as "late successional reserves" ("LSRs"), which, due to their overlap with northern spotted owl habitat, are generally off-limits to timber harvest. SER 51–53; *see also Gifford Pinchot Task Force*, 378 F.3d at 1064. However, to meet the Northwest Forest Plan's goal of producing "a predictable and sustainable level of timber sales and nontimber resources that will not degrade or destroy the environment," SER 48, the Plan also allocated 3,975,300 acres (16% of the acreage of federal land within range of the northern spotted owl) as "matrix" lands, SER 52. Matrix lands are outside the "reserves" established by the Plan's land use allocations and comprise "the area in which most timber harvest and other silvicultural activities

will be conducted." SER 52; *see also* SER 55 ("Most of the timber harvest will occur on matrix lands."). Matrix lands are a key piece of the Plan's global northern spotted owl recovery strategy, and even though some matrix lands comprise northern spotted owl habitat, the Plan expressly contemplates timber harvest in such habitat:

> Approximately two and one-half percent of the extant amount of spotted owl habitat likely will be harvested per decade under our decision. Some have opined that even this level of harvest of owl habitat ought not be permitted. We have considered carefully such views, and the data upon which they are based. *While the results of some recent research call for a certain amount of caution, they do not compel a moratorium on all further harvest of suitable owl habitat* (Final SEIS at 3&4-229 to 235). Our decision today, while not risk-free, *reflects a conservative approach*, allowing for a limited amount of harvest of owl habitat in matrix lands while protecting large reserve areas from programmed timber harvest.

SER 60 (emphases added).

The second functional component of the Plan, set out in a discrete section,[1] is the establishment of "Standards and Guidelines for Management of Habitat for Late-Successional and Old Growth Forest Related Species Within the Range of the Northern Spotted Owl." SER 63–144. These standards and guidelines set out "detailed requirements" for treating forest lands within the range of the northern spotted owl. SER 52–53. The document establishes standards and guidelines specific to each of the land use allocations. SER 85–139. The standards and

[1] Attachment A of the Record of Decision.

guidelines for matrix lands recognize that these lands will be used for timber harvest, and prescribe management consistent with such use, including providing specified amounts of coarse woody debris and green-tree and snag retention requirements. SER 117–22. The standards and guidelines establish specific management direction for Bureau of Land Management ("BLM") lands in the Coos Bay District. SER 120.

Finally, the Northwest Forest Plan recognizes that unique consideration must be given when the requirements of the Plan might impact Indian tribal trust resources, with consultation and collaboration required when the Plan conflicts with tribal rights. SER 61–62, 144.

The Northwest Forest Plan survived a legal challenge. *See Seattle Audubon Soc'y v. Moseley,* 80 F.3d 1401 (9th Cir. 1996). The Ninth Circuit expressly rejected the argument by plaintiff environmental groups that a larger amount of "old-growth" habitat should have been set aside for the northern spotted owl viability, agreeing with the District Court that "selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the [Northwest Forest Management Act]." *Id*. at 1404. The Northwest Forest Plan currently establishes the relevant "standards and guidelines" for the federal lands adjacent to or nearby the Coquille Forest.

2. Coos Bay District Resource Management Plan

The Coos Bay District RMP was approved in 1995. SER 145. It incorporates the land use allocations and standards and guidelines of the Northwest Forest Plan, including the designation and standards and guidelines for managing matrix lands. SER 147–48, 150–51, 156–57, 161. The Coos Bay District RMP not only incorporates the standards and guidelines of the Northwest Forest Plan by reference, SER 171, it also sets out relevant provisions of those standards and guidelines in the section of the Coos Bay District RMP entitled "Management Action/Directions." For example, the Coos Bay District RMP section on special status species (such as northern spotted owl), SER 162–67, sets out those measures called for in the standards and guidelines of the Northwest Forest Plan, SER 86–89. Moreover, the Coos Bay District RMP consistently and exclusively uses the term "standards and guidelines" to refer to the Northwest Forest Plan Standards and Guidelines. SER 147, 163.

D. The Coquille Forest Resource Management Plan

After restoration of the Coquille Forest land, the Tribe developed and the BIA approved the Coquille Forest Resources Management Plan ("Coquille Forest RMP") in accordance with NEPA, the Coquille Forest Act, and the National Indian Forest Resources Management Act, Pub. L. No 101-630, Title III, § 304, 104 Stat. 4533 (1990) (codified as amended at 25 U.S.C. §§ 3101–3119), which authorizes

the management of tribal forests in accordance with tribal forest management plans that are approved by the Bureau of Indian Affairs. *Id*. at §§ 3103, 3104 (Add. 13–20); *see also* SER 184. The goals of the Coquille Forest RMP include sustainable revenue generation, sustainable harvests, and protection of fish, wildlife, and Tribal cultural resources. SER 172–81, 185–86.

The Coquille Forest RMP is based on the Tribe's desire to forge a sustainable forest management paradigm balancing economic and non-economic values. SER 176, 183, 185. To meet the Coquille Forest Act's requirements regarding "standards and guidelines of Federal forest plans on adjacent lands," 25 U.S.C. § 715c(d)(5) (Add. 5), the Coquille Forest RMP went through a planning process that involved adoption of the Coos Bay District RMP—with certain modifications, SER 184–89 (Coos Bay District RMP was subject to "modification and scoping down . . . to fit the Coquille Forest situation of 5,410 acres of matrix lands."). The end result of the Coquille Forest planning process was "a stand-alone RMP for the Coquille Forest." SER 187.

The Coquille Forest RMP addresses the recovery of threatened and endangered species as follows: "In management of Coquille Forest lands, the Tribe will either contribute to the recovery of threatened/endangered species at a scale which is not disproportionately burdensome and/or will not hinder the recovery of a species." SER 186; *see also* SER 216 ("Actions proposed to implement this RMP

will undergo consultation, either formal or informal, as appropriate. Consultation for the northern spotted owl on activities that are consistent with the standards and guidelines of the SEIS ROD [for the Northwest Forest Plan] . . . .”). Nothing in the Coquille Forest RMP mandates compliance with any ESA Recovery Plan.

E. Management of the Coquille Forest

The Coquille Forest is not a wilderness area or wildlife refuge. One of the primary goals of the Coquille Forest RMP, consistent with the remedial purposes of the Coquille Forest Act, is developing a stable source of revenue for the Tribe through a sustainable harvest. SER 183, 188–189, 203–04, 212–14. Approximately half of its 5,410 acres are set aside for riparian reserves and protection of the late successional species within the range of the northern spotted owl. ER 168.[2] These lands are not set aside for commercial timber production. The remaining area of the Coquille Forest includes predominantly “matrix” areas that the Tribe plans to harvest for much-needed revenues and economic self-sufficiency. SER 183, 188–89. The Tribe and BIA manage these lands according to the Northwest Forest Plan standards and guidelines governing matrix lands. SER 156, 199–200.

[2] “There are approximately 28,108 acres of current NRF habitat, and 15,377 acres of dispersal habitat in the [Middle Fork Coquille] watershed. The Tribe manages 1,553 acres (6 percent) of NRF and 242 acres (1.5 percent) of the dispersal habitat within the watershed.” ER 174.

The Tribe's work in developing an ecologically and economically sustainable timber management plan for the Coquille Forest was recently recognized and "certified" by the Forest Stewardship Council. SER 291–94. The Forest Stewardship Council certification exists "to promote environmentally sound, socially beneficial and economically prosperous management of the world's forests," and is envisioned to meet "current needs for forest products without compromising the health of the world's forests for future generations." *Mission and Visions*, Forest Stewardship Council, http://www.us.fsc.org/mission-and-vision.187.htm (last viewed October 9, 2014); *see, e.g.*, SER 253–90 (Forest Stewardship Council Certification Standards). Forest Stewardship Council certification is granted only to those forest managers that demonstrate compliance with ten stringent management criteria.[3] *Id.*

F. Middle Fork Kokwel Timber Sale

1. Objectives of Middle Fork Kokwel Timber Sale

The Middle Fork Kokwel project activities are designed to meet the objectives of the Coquille Forest Act and the Coquille Forest RMP. ER 38. Specifically, the Middle Fork Kokwel EA authorizes timber sales that will

[3] The Tribe's Forest Stewardship Council certification was a public process in which Appellant Cascadia Wildlands participated, unsuccessfully opposing certification by raising issues similar to the allegations put forward in this litigation. SER 39–41 (Decl. of G. Smith (January 29, 2014)).

"provide vital funding to enable the Tribe to maintain services as described in the Five Year Strategic Plan (CIT 2006) [SER 246–52] in addition to providing much needed jobs and revenues to the Coos County economy." *Id.* It will produce estimated revenue of $8,150,000 over ten years, and is estimated to provide temporary employment of approximately 242 direct jobs and 532 indirect jobs. *Id*. The Tribal programs those revenues will fund include social services, community center services, education, housing, and health services. SER 30–31.

Most of the timber generated by the Middle Fork Kokwel sale will come from regeneration harvest on the designated "matrix" lands. ER 28–30. The Middle Fork Kokwel timber sale authorizes projects over a 10 year period, including thinning prescriptions on 293 acres and regeneration harvest on 268 acres. ER 28. Contrary to Cascadia's characterization, there will be no "clear cut logging"[4]; regeneration harvest will retain 10-15% of the original basal area, ER 38–39, approximately 6–8 trees per acre and 1600 trees overall will be retained after harvest. This approach is consistent with the standards and guidelines established by the Northwest Forest Plan for matrix lands. SER 117–26. The timber harvest activities will not take place on these acres in a single year, but will be spread out over a 10 year period. ER 28. Further, the design of this sale in fact goes beyond

[4] *See* Cascadia Br. at 12 (conflating "regeneration harvest" with "clear cut logging").

the Northwest Forest Plan standards and guidelines in order to meet Forest Stewardship Council certification requirements: regeneration harvests units will not exceed 60 acres in size, and will be spread out in 8 irregularly shaped parcels between 13.4 and 56 acres in size across the landscape. ER 38–39.

2. Middle Fork Kokwel Environmental Assessment: Cumulative Effects Analysis

The Middle Fork Kokwel EA, prepared by the Tribe and approved by the BIA, takes a conservative approach to cumulative effects analysis by establishing a baseline condition that both incorporates all past and present activities and assumes that all the Alder (Lost 40)/Rasler timber sales have already taken place. ER 49 ("For the cumulative effects analysis the description of the potential resulting impacts is the cumulative effect of all past, present and reasonably foreseeable actions."). The cumulative effect of those sales in conjunction with the Middle Fork Kokwel activities is therefore represented and analyzed throughout the Middle Fork Kokwel EA (and the Biological Assessment as well), because the impact of those sales is described throughout as part of the baseline condition for each resource considered. *See* ER 55–58, 60–64, 66–67, 172–78, 217–19 (treating Alder (Lost 40)/Rasler sales as having already occurred for purposes of representing impacts on northern spotted owl habitat); ER 59–60, 64–67, 179–80, 214–16 (same for marbled murrelet habitat); ER 69–70, 79–80, 104–05, 165–67

(including all proposed and previously constructed roads from Alder (Lost 40)/Rasler in the road density analysis).

Cascadia incorrectly asserts that the Alder (Lost 40)/Rasler and Middle Fork Kokwel timber sales are "interconnected," and refers to them as "overlapping" and "interspersed," insinuating that they were essentially planned together and improperly segregated for purposes of environmental analysis. Cascadia Br. at 16, 22–23. As required by the Coquille Forest RMP, the Tribe engages in adaptive management of its forest lands, carrying out reevaluations and remeasurements periodically (over a ten year planning horizon). SER 217–18. The Alder (Lost 40)/Rasler sales were planned toward the end of the prior planning and evaluation period, relying on the inventory and analysis from 2001. *See* SER 223–45. The Middle Fork Kokwel sales were developed at the front end of the next ten year period, *see* ER 240 (Middle Fork Kokwel Scoping Notice, dated 12/12/2011), relying on updated data and taking into account the specific requirements of Forest Stewardship Council certification, ER 2; *see also* SER 253–90 (Forest Stewardship Council Certification Standards). The physical proximity of both sales should not be surprising: the Tribe's forest lands comprise only 5,410 acres, and based on its silvicultural practice of harvesting more mature stands first (to allow the younger stands time to mature to more valuable timber), the Tribe had to focus on those stands that the reevaluation demonstrated to be more mature. Those stands were in

the vicinity of the Alder (Lost 40)/Rasler sales, because both are located in those few sections of the Coquille Forest with the more mature stands. *See* SER 228–45.

3. Allowable Sale Quantity

Cascadia asserts (incorrectly) that by planning to harvest the Alder (Lost 40)/Rasler and the Middle Fork Kokwel timber sales the Tribe will exceed its Allowable Sale Quantity (ASQ) on the Coquille Forest by over 20%. Cascadia Br. at 17–18. Cascadia's assertion is based on an outdated ASQ of 2.0 mmbf, since the Tribe, based on the ongoing evaluation process established by the Coquille Forest RMP (SER 302), amended its ASQ to 3.6 mmbf. ER 156; SER 228–29. Taking the Alder (Lost 40) sale and the Middle Fork Kokwel together, the Tribe's average annual harvest over the next ten years[5] will be the 3.6 mmbf ASQ established by the Tribe. *See* ER 28 (Middle Fork Kokwel to harvest 13.9 mmbf); ER 725 (Alder (Lost 40) sale to harvest 22.44 mmbf). The ASQ itself is only an estimate, and can vary by 20%. SER 212–13. Moreover, Cascadia does not challenge the legality of the Tribe's ASQ, nor does it allege that exceeding the ASQ would violate any applicable law. Cascadia therefore appears to make assertions based on an old

[5] The ASQ does not fix an annual limit on timber harvest, but is merely a planning tool setting out an annual average for the time period specified by the plan. *See, e.g.,* Forest Service Handbook, 2409.13 – Timber Resource Planning Handbook, WO Amendment 2409.13-92-1 (effective August 3, 1992), *available at* http://www.fs.fed.us/im/directives/fsh/2409.13/2409.13,0_code.txt.

ASQ estimate to insinuate—incorrectly—that the Tribe is doing something inappropriate.

4. Middle Fork Kokwel Environmental Assessment: Northern Spotted Owl

The Middle Fork Kokwel EA recognizes the potential for impacts to northern spotted owl, but notes that the Tribe manages a very small percentage of northern spotted owl habitat in the Middle Fork Kokwel area. ER 55–56 (Tribe manages 1,553 acres (6%) of nesting, roosting, and forage habitat and 242 acres (1.5%) of dispersal habitat within the watershed). Removal of 268 acres of habitat would result in a reduction of less than 1% of the total northern spotted owl habitat removed in the Middle Fork Coquille watershed. ER 174–78. Moreover, there is "[n]o spotted owl designated critical habitat occur[ing] within the analysis area." ER 56.

The Middle Fork Kokwel EA lands are located within the BLM Oregon Coast Province and the BLM Klamath Province. ER 172. Population trends for the northern spotted owl within the Klamath Province are reported as stationary. ER 173. The EA discloses that the Middle Fork Kokwel sale is taking place in the midst of private, state, and federally managed lands where northern spotted owl habitat is "currently below management thresholds," and that the Middle Fork Kokwel regeneration harvest "may affect, is likely to adversely affect (LAA) [northern spotted owls] as a result of habitat removal." ER 60.

5. Middle Fork Kokwel ESA Compliance

As a result of this finding, the BIA followed the requirements of the Endangered Species Act: it prepared a Biological Assessment, ER 150–220, and it entered into Section 7 consultations with the United States Fish and Wildlife Service (FWS), ER 248. The U.S. Fish and Wildlife Service prepared a Biological Opinion. ER 244–330. Both the Biological Assessment and the Biological Opinion concluded that the Middle Fork Kokwel sale will not remove any "nest patch or core-use area" habitat for northern spotted owls. ER 291 (Biological Opinion); *accord* ER 187 (Biological Assessment). The Fish and Wildlife Service found that the projected habitat loss from the Middle Fork Kokwel sale "will not significantly impact the provincial habitat conditions that provide for spotted owls, at least at this time of the analysis, due to the aforementioned reasons." ER 299. As a result, the Biological Opinion concluded that "the Tribe's proposed action, is *not likely to jeopardize* the continued existence of the spotted owl," ER 298 (emphasis in original), and authorized the incidental take of northern spotted owl. ER 299–300.

The Biological Opinion does provide certain "recommendations" concerning Northern Spotted Owl Recovery Actions 10 and 32, repeatedly noting, however, that these are "discretionary agency activities." ER 300–01. Moreover, with respect to implementing these discretionary management recommendations, which would be at odds with the Tribe's need to generate revenues from these matrix lands, the

Biological Opinion points to Secretarial Order 3206 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act) (Add. 40–49), noting that the Order "places the burden of endangered species recovery primarily on federal and state governments . . . ." ER 301. BIA ultimately did not agree to adopt the FWS discretionary recommendations on these matrix lands. ER 1–5.

II. Procedural History

The BIA issued a Finding of No Significant Impact and Decision Notice authorizing the Middle Fork Kokwel Timber Sale dated February 25, 2013. ER 1–5. Cascadia filed a Complaint for Injunctive and Declaratory Relief in the United States District Court for the District of Oregon (Eugene Division) dated August 4, 2013, against the United States Bureau of Indian Affairs, seeking to enjoin the Middle Fork Kokwel Timber Sale on two grounds: (1) that the BIA's and Tribe's analysis of cumulative effects—using an aggregated baseline incorporating the impacts of past, present, and reasonably foreseen future actions—did not meet NEPA requirements; and (2) that the Coquille Forest Act required the BIA and the Tribe to incorporate and follow the discretionary recommendations of the Northern Spotted Owl Recovery Plan. ER 118–33. The case was assigned to Magistrate Judge Thomas Coffin.

The Coquille Tribe moved for and was granted permission to intervene as a defendant. SER 1–41. The parties agreed to an expedited summary judgment briefing and oral argument schedule, arguing the case before Judge Coffin on March 17, 2014. Judge Coffin issued his Findings and Recommendations on March 19, 2014, finding that the Middle Fork Kokwel EA was consistent with the cumulative effects analysis requirements of NEPA, and that the Coquille Forest Act did not require the BIA and the Tribe to adopt the discretionary recommendations in the Northern Spotted Owl Recovery Plan. ER 6–21. Cascadia filed objections to the Findings and Recommendations, to which the BIA and the Tribe responded. On June 24, 2014, Judge Michael J. McShane adopted Judge Coffin's Findings and Recommendations in full, granting the Tribe's and BIA's motions for summary judgment and denying Cascadia's motion for summary judgment. ER 22–23. Cascadia filed a Notice of Appeal on June 30, 2014.

III. Ruling Presented For Review

The ruling under review is Judge McShane's June 24, 2014, Order granting summary judgment to the Tribe and BIA, and denying Cascadia's motion for summary judgment. ER 22–23.

SUMMARY OF ARGUMENT

The Middle Fork Kokwel Timber Sale Environmental Assessment complies with NEPA because the Tribe's and BIA's aggregate representation of past,

present, and future activities for the cumulative effects analysis is permitted under NEPA. The EA's cumulative effects analysis assumes as a baseline that every acre that might be impacted by the Alder (Lost 40)/Rasler sales has already been impacted for purposes of considering the additional impacts of the Middle Fork Kokwel sale. Thus, the percentage and amount of habitat remaining for northern spotted owls and marbled murrelets after both sales is accurately represented, and the complete road mileage developed and the soils impacted by both sales combined is set out in the Middle Fork Kokwel EA.

The Middle Fork Kokwel Timber Sale is also consistent with the requirements of the Coquille Forest Act. In enacting the Coquille Forest Act provisions concerning land management requirements, Congress required the Tribe to follow the standards and guidelines of federal forest plans governing adjacent lands. 25 U.S.C. § 715c(d)(5) (Add. 5). The specific term used by Congress—"standards and guidelines"—has a precise and well-understood meaning in this context: Attachment A to the 1994 Northwest Forest Plan, entitled "Standards and Guidelines for Management of Habitat for Late-Successional and Old Growth Forest Related Species Within the Range of the northern spotted owl." SER 63–144. There is no dispute that the Middle Fork Kokwel Sale complies with the Northwest Forest Plan "Standards and Guidelines."

Without addressing the plain language of the statute and its implications here, Cascadia inappropriately seeks to redefine the term "standards and guidelines" to require the Tribe and BIA to follow the otherwise discretionary recommendations of the Northern Spotted Owl Recovery Plan, because the Coos Bay District RMP included compliance with such recommendations as an "objective." Congress, however, required nothing of the sort, and instead left the Tribe the same flexibility that the BLM had in adopting the Coos Bay District RMP (including the discretion to adopt or reject the recommendations of ESA recovery plans). Allowing the Tribe the same flexibility as other federal land managers is consistent with the Coquille Forest Act, the intent of which was to further the Tribe's economic self-sufficiency and self-determination, and to remedy the harms inflicted by 150 years of Federal policy that vacillated between heavy-handed paternalism and outright hostility.

ARGUMENT

I. The Middle Fork Kokwel Cumulative Effects Analysis Complies with NEPA

As correctly recognized by the District Court, the Middle Fork Kokwel EA complies with all applicable NEPA requirements. ER 16–21.[6] The Middle Fork Kokwel EA, prepared by the Tribe and approved by the BIA, takes a cautious and

[6] The Tribe adopts and incorporates by reference the NEPA arguments of Defendant-Appellee United States Bureau of Indian Affairs in the brief that it will be filing on this same date, but adds these few additional, Tribal-specific points.

prudential approach to cumulative effects analysis by incorporating into the baseline condition not only all past and present activities, but also by assuming that all the Alder (Lost 40)/Rasler timber sales *have already taken place*. ER 49 ("For the cumulative effects analysis the description of the potential resulting impacts is the cumulative effect of all past, present and reasonably foreseeable actions."). Table 8 of the Middle Fork Kokwel EA "lists treatments proposed for the foreseeable future on [Coquille Indian Tribe] lands in the analysis area that will be considered in the following resource-specific cumulative impact discussions"—specifically, the harvest type and acreage involved in the Alder (Lost 40)/Rasler timber sales. ER 49–50. Tables 10–13 include the impacts to northern spotted owl habitat from the projected Alder (Lost 40)/Rasler timber sales as if those sales had already been completely harvested. ER 57–58, 62, 64.

The cumulative effect of those sales in conjunction with the Middle Fork Kokwel activities is therefore represented and analyzed throughout the Middle Fork Kokwel EA (and the Biological Assessment as well), because the impact of those sales is represented throughout as part of the baseline condition for each resource considered. *See* ER 55–58, 60–64, 66–67, 172–78, 217–19 (treating Alder (Lost 40)/Rasler sales as having already occurred for purposes of representing impacts on northern spotted owl habitat); ER 59–60, 64–67, 179–80, 214–16 (same for marbled murrelet habitat); ER 69–70, 79–80, 104–05, 165–67 (including all

proposed and previously constructed roads from Alder (Lost 40)/Rasler in the road density analysis).

Cascadia acknowledges that it is appropriate to demonstrate cumulative impacts of past actions by representing the impacts of those actions as part of the baseline condition, to which the impacts of the analyzed action will be added. Cascadia Br. at 38–40. The crux of Cascadia's argument on this issue is that there is something so fundamentally different about the impact of reasonably foreseeable future actions that it prevents demonstrating and analyzing those impacts in the same aggregate, baseline manner.

The relevant regulation, however, makes no such distinction. It requires showing "the incremental impact of the action *when added to* other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (emphasis added). Cascadia in fact repeatedly cites to cases that authorize the use of this aggregate, baseline approach, Cascadia Br. at 38–49 (citing *Ecology Center v. Castaneda,* 574 F.3d 652 (9th Cir. 2009); *League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Serv.,* 549 F.3d 1211 (9th Cir. 2008); *Bark v. Bureau of Land Management,* 643 F.Supp.2d 1214 (D. Or. 2009)), but it argues that because those cases speak to using such an approach with regard to past projects they therefore prohibit use of such an approach with current or future projects, *id*. at 45–46. Yet the cases contain no such prohibition.

Nor do these cases support Cascadia's attempt to draw such a distinction. Rather, these cases expressly authorize the use of such an aggregate, baseline analysis, particularly in the context of an EA, because by doing so such analysis shows the incremental impact of the new action "when added to" other actions in the analysis area, whether past, present, or reasonably foreseeable. This approach permits the agency to determine whether the incremental impacts of the action, when considered in relation to other present projects, are "collectively significant." 40 C.F.R. § 1508.7. This approach also results in a conservative analysis by "assum[ing] ultimate completion of the related projects." *Coal. for Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 71 (D.C. Cir. 1987) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 415 n.26 (1976)). Finally, this approach avoids unnecessary duplication (*i.e.*, "restating the results of prior [NEPA] studies") while "alert[ing] interested members of the public to any arguable cumulative impacts involving these other [present] projects." *Id*. at 70–71. Thus, for the same reasons that the aggregate approach is appropriate for past projects, *Ecology Center*, 574 F.3d at 667, so too is it appropriate for approved projects that have been analyzed under NEPA and assumed complete.

In fact the Tribe's approach is meant to capture the broadest possible representation of cumulative effects, by assuming—for all Alder (Lost 40)/Rasler lands—that every acre of habitat that might be lost will be lost, that every square

inch of soil that might be compacted will be compacted, and that every road that might be built will be built. When one looks at the Middle Fork Kokwel representation of cumulative effects, one sees the broadest scenario of cumulative effects aggregated from the combined Alder (Lost 40)/Rasler and Middle Fork Kokwel timber sales. Doing so meets the NEPA cumulative effects analysis requirement.

Cascadia is asking this Court to impose a novel rule restricting the aggregate approach to past projects. The Court should decline Cascadia's request to forge new law in this case. *See Lands Council v. Powell*, 537 F.3d 981, 993 (9th Cir. 2008) (courts are not "free to 'impose on the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'") (citations omitted).

II. The Middle Fork Kokwel Sale Complies with the Coquille Forest Act

Cascadia's argument under their Coquille Forest Act claim boils down to the fundamentally flawed assumption that the Tribe and BIA were somehow legally required to implement the recommendations contained in the Northern Spotted Owl Recovery Plan. Given the expressly discretionary nature of such recommendations, Cascadia must find a way to convert them into legal mandates. Cascadia points to the Coquille Forest Act, reading it to impose restrictions on the

management of the Coquille Forest that do not apply to any other federal land management agencies.

Cascadia is wrong. Nothing in the Coquille Forest Act, the Coos Bay District RMP, or the Coquille Forest RMP mandates the Tribe to manage the Coquille Forest according to the Northern Spotted Owl Recovery Plan's discretionary recommendations. In developing the Coquille Forest RMP and the Middle Fork Kokwel timber sale, the Tribe (with BIA approval) adopted and followed the relevant standards and guidelines from the Northwest Forest Plan applicable to the "matrix" land use allocation where this sale will take place. As noted above, these are the "standards and guidelines of Federal forest plans on adjacent or nearby Federal lands" that the Tribe must follow. 25 U.S.C. § 715c(d)(5) (Add. 5). These "standards and guidelines" do not include, and do not require compliance with, the discretionary recommendations in the Northern Spotted Owl Recovery Plan or the FWS Biological Opinion.

A. Neither the Northern Spotted Owl Recovery Plan nor the Recommendations of the Biological Opinion are Mandatory

Cascadia asks this Court to hold that the Tribe and BIA were bound to follow the Northern Spotted Owl Recovery Plan and the recommendations of the Middle Fork Kokwel Biological Opinion regarding that Plan. However, an ESA Recovery Plan is a document that "breathes discretion at every pore," and is not a

legal mandate. *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

The National Marine Fisheries Service and the Fish and Wildlife Service, the agencies responsible for developing ESA recovery plans, expressly point out that "recovery plans are guidance documents, not regulatory documents. No agency or entity is required by the ESA to implement the recovery strategy or specific actions in a recovery plan." NMFS and FWS Interim Endangered and Threatened Species Recovery Planning Guidance - Version 1.3, at 1.1-1 (June 2010), *available at* https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf (last visited October 9, 2014). The Final Northern Spotted Owl Recovery Plan in fact describes itself as providing a series of "recommendations" for federal land managers to "consider." ER 443.

Likewise, the recommendations of a Biological Opinion are discretionary, and agencies retain the discretion to adopt or reject such recommendations. *See, e.g., National Wildlife Federation v. Coleman*, 529 F.2d 359, 371–72 (5th Cir. 1976). The Biological Opinion itself reiterates that its recommendations are discretionary. ER 300–01. Cascadia provides a misleading quotation from the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 170 (1997): "The action agency is technically free to disregard the Biological Opinion, but it does so at its own peril . . . ." Cascadia Br. at 53. The "peril" referred to in *Bennett, contra*

Cascadia's implication, arose from the specific nature of the biological opinion in that case, which—unlike here—included a "jeopardy" finding. 520 U.S. at 159. The biological opinion in *Bennett* set out the actions necessary to avoid such a finding, which, even then, the Court noted were discretionary. *Id*. at 159, 170.

B. Coos Bay District RMP Adoption of Northern Spotted Owl Recovery Plan Compliance as an "Objective" was an Exercise of BLM's Discretion

Cascadia acknowledges the discretionary nature of the Northern Spotted Owl Recovery Plan. Cascadia Br. at 54. Yet Cascadia bases its argument on BLM's choice to include the phrase "in compliance with . . . approved recovery plans" as an "objective" of a resource program in the Coos Bay District RMP. Cascadia Br. at 51 (citing ER 230). Cascadia incorrectly asserts that, in exercising its discretion to establish such an objective in its Plan, BLM turned the Recovery Plan and its recommendations into requirements for managing the Coos Bay District lands.

None of the cases Cascadia cites, however, stand for the proposition that a discretionary ESA guidance document is converted into a mandatory document by virtue of being referenced categorically as a forest plan "objective." In fact, the cases Cascadia relies on deal specifically with mandatory wildlife viability standards imposed by the National Forest Management Act, not discretionary ESA recovery plan recommendations. *See* Cascadia Br. at 53 (citing *Idaho Sporting*

Cong., Inc. v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754 (9th Cir. 1996)).

Nor do any of the cases Cascadia cites establish that a forest plan "objective" of this sort is binding on such agency. The case law, in fact, is to the contrary, as the District Court appropriately noted. ER 13; *see e.g., Norton v. S.U.W.A.,* 542 U.S. 55 (2004); *Lands Council v. McNair*, 629 F.3d 1070 (9th Cir. 2010). BLM's adoption of the "objective" of compliance with the Northern Spotted Owl Recovery Plan in the Coos Bay District RMP was an exercise of its discretion, and did not establish such compliance as a mandate.

C. The Governing Plan for the Coquille Forest Does Not Require Compliance with the Northern Spotted Owl Recovery Plan

But more to the point, even if the BLM in the exercise of its discretion had limited itself under its own governing plan, the governing plan here is the Coquille Forest RMP, not the Coos Bay District RMP. *See* 25 U.S.C. § 715c(d)(4)(A) (requiring development of a Coquille Forest plan) (Add. 5); 25 U.S.C. § 715c(d)(5) (Coquille Forest Act incorporation of National Indian Forest Resource Management Act ["NIFRMA"] planning requirements) (Add. 5); 25 U.S.C. § 3104 (NIFRMA requirement of developing a tribal-specific forest plan for tribal forest lands) (Add. 19–20). Cascadia seeks to avoid these statutory provisions by asserting, incorrectly, that the Tribe was required to adopt the Coos Bay District

RMP in its entirety and that the Tribe in fact did so. Cascadia Br. at 53, 56–57. Neither assertion is true.

First, contrary to Cascadia's assertion that the Coquille Forest Act "requires that the Bureau and Intervenor comply with the Coos Bay RMP," *id*. at 57 (citing 25 U.S.C. § 715c(d)(5)) (Add. 5), the Coquille Forest Act says nothing of the sort. Rather, the express language of the Coquille Forest Act provides that BIA and the Tribe shall manage the Coquille Forest "subject to *the standards and guidelines* of Federal forest plans on adjacent or nearby Federal lands." 25 U.S.C. § 715c(d)(5) (emphasis added) (Add. 5). If Congress had intended for the Coquille Forest to be managed under the Coos Bay District RMP *in toto*, it would not have used this more precise and limiting language. With regard to Cascadia's interpretation, therefore, "'[t]he short answer is that Congress did not write the statute that way.'" *Russello v. United States,* 464 U.S. 16, 23 (1983) (citations omitted).

Second, Cascadia's unsupported assertions that the Coquille Forest is to be managed in its entirety subject to a Forest plan developed by another agency on different lands would also undermine the Tribal self-determination component of the Coquille Forest Act. The express incorporation of the right for the Coquille Tribe to assume management of the Coquille Forest, 25 U.S.C. § 715c(d)(6) (Add. 5–6), indicates Congress' intent for the Tribe to assume the broad and discretionary responsibility to plan and manage its own forest lands, *see* 142 Cong. Rec. S9649

(1996) ("Federal law and policies fostering Indian self-determination are recognized by providing opportunity for the tribe to assume some or all of the management of the Coquille Forest.") (Add. 37).

Nor did the Tribe adopt the Coos Bay District RMP in its entirety, as Cascadia asserts. Cascadia Br. at 56. While the Tribe incorporated much of the Coos Bay District RMP into the Coquille Forest RMP, it did make certain modifications. SER 184–89 (Coos Bay District RMP was subject to "modification and scoping down . . . to fit the Coquille Forest situation of 5,410 acres of matrix lands"). The end result of the Coquille Forest planning process was "a stand-alone RMP for the Coquille Forest." SER 187.

One of the key modifications made to the Coquille Forest RMP was specific to the very section of the Coos Bay District RMP relied upon by Cascadia. In the Coos Bay District RMP, the Objectives identified in this section include:

> Protect, manage, and conserve federal listed and proposed species and their habitats to achieve their recovery in compliance with the Endangered Species Act, *approved recovery plans, and Bureau special status species policies*.

ER 230 (emphasis added). By contrast, the Objective section of the Coquille Forest RMP omits the italicized language, reading as follows:

> Protect, manage, and conserve federal listed species and their habitats in compliance with the Endangered Species Act.

SER 206. Thus, while the Coquille Forest RMP adopts those portions of the Coos Bay District RMP's standards and guidelines for protection, management and conservation of such species that are applicable to Coquille Forest matrix lands, *compare* SER 162–67, *with* SER 207–11, it did *not* adopt the "objective" of compliance with "approved recovery plans, and Bureau special status species policies."[7] ER 230. The District Court correctly recognized that the Tribe had not adopted this objective. ER 14–15.

Most critically, Cascadia's assertion that the Tribe is bound by the BLM's objectives ignores the planning framework established by the Coquille Forest Act, which expressly recognizes that the Tribe (along with BIA) will adopt the objectives specific to the Coquille Forest. The Coquille Forest Act expressly states that, beyond compliance with the mandatory standards and guidelines, the Coquille Forest is to be managed "in accordance with the laws pertaining to management of Indian trust lands." 25 U.S.C. § 715c(d)(5) (Add. 5). Primary among the laws pertaining to management of Indian trust lands is NIFRMA. 25 U.S.C. §§ 3101–3119. NIFRMA directs the development of tribal-specific forest

[7] Doing so on Tribal lands was entirely appropriate, because it is express federal policy that Indian tribes should not bear the primary burden of endangered species recovery. Secretarial Order 3206, Sec. 1 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act (June 5, 1997)) (instructing federal agencies to strive "to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species.") (Add. 40).

plans, "supported by written tribal *objectives*." 25 U.S.C. § 3104 (emphasis added) (Add. 19–20). Under Cascadia's reading, the NIFRMA requirement of a separate forest plan based on "tribal objectives" would be entirely redundant, which would be inconsistent with both NIFRMA and the Coquille Forest Act.

Even under Cascadia's argument, therefore, the Tribe and the BIA were not required to follow the discretionary Recovery Actions set out in the Northern Spotted Owl Recovery Plan and the Biological Opinion because the governing forest plan—the Coquille Forest RMP—did not require them to do so.

D. Coquille Forest Act "Standards and Guidelines" Do Not Require Compliance with Northern Spotted Owl Recovery Plan

The Coquille Forest Act calls for a sustainable timber harvest that is "subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future." 25 U.S.C. § 715c(d)(5) (Add. 5); *accord* 142 Cong. Rec. S9649 (1996) (Add. 39). Cascadia would undermine the Tribal self-determination component of the Coquille Forest Act by advancing a shifting and elusive definition of the term "standards and guidelines" that has no basis in the Coquille Forest Act or any of the relevant planning documents.

Cascadia begins by pointing to the self-referential definition of "standards and guidelines" in the only relevant document entitled as such, to wit, the Northwest Forest Plan Standards and Guidelines. Cascadia Br. at 50 (quoting ER 229). Cascadia leaps from there to point to similar, though not identical, language

used in a section of the Coos Bay District RMP that addresses management of land use allocations, because that same section talks about "objectives" as well as management actions/directions. Cascadia Br. at 51 (quoting ER 230). Cascadia ignores the fact that the only places where the Northwest Forest Plan Standards and Guidelines are incorporated into the Coos Bay District RMP are in the Management Action/Direction sections. *See, e.g.,* SER 147–48, 150–51, 156–57, 161. As the District Court recognized, such "tortured" reasoning is at odds with the Coquille Forest Act. ER 13.

1. Coquille Forest Act Refers to "Standards and Guidelines" of the Northwest Forest Plan

The District Court relied on a much simpler and more straightforward definition of the term, consistent with the statutory framework and context of the Coquille Forest Act: that it means the "*Standards and Guidelines* for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl," set out as Attachment A to the Northwest Forest Plan. SER 63–144 (emphasis added); *accord* Findings and Recommendations, ER 12. The Attachment A "Standards and Guidelines" is the only document identified by this term of art in this context, and it is repeatedly referenced as such in the body of the Northwest Forest Plan. *See, e.g.*, SER 46 ("The management direction consists of extensive standards and guidelines, including land allocations, that comprise a comprehensive ecosystem management

strategy."); SER 49 ("This decision, as spelled out in Attachment A (sometimes referred to herein as 'the Standards and Guidelines'), is to be applied to lands administered by the USDA Forest Service and the USDI Bureau of Land Management within the range of the northern spotted owl, as provided in this Record of Decision.").

Congress' use of the term "standards and guidelines" in this context is, therefore, unambiguous. Given that the Northwest Forest Plan was developed amidst a great deal of publicity and public input, including the direct involvement of the President and Vice-President, SER 46, Congress should be presumed to have been aware of that document when it enacted the Coquille Forest Act less than two years later, *see, e.g., Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 561–62 (1991) (presuming that Congress is aware of the "contemporary legal context" when enacting or amending a statute). Moreover, Congress' awareness of the Northwest Forest Plan and the applicability of its standards and guidelines to the Coquille Forest Act is no mere presumption, since the Coquille Forest Act's sponsor, Senator Hatfield, expressly referenced the Northwest Forest Plan in his remarks on the bill: "I hope this proposal, with its relatively modest acreage and *the required adherence to the most environmentally friendly forest management plan ever implemented in the Pacific Northwest—President Clinton's forest plan*—is successful and can become a model for how our Nation deals with other claims

by native American tribes." 142 Cong. Rec. S9649 (1996) (statement of Sen. Hatfield) (emphasis added) (Add. 38).

Congress deliberately used the phrase "standards and guidelines" in a context in which it was aware that there was an expressly described and defined set of "standards and guidelines" applicable to the adjacent or nearby federal forest lands, and its use of that term in this context must be respected. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198–99 (1976) (rejecting attempt to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning," and respecting Congress' use of a "term of art").

The Northwest Forest Plan "Standards and Guidelines" do not require the BLM or any other federal agency to comply with the discretionary recommendations in the Northern Spotted Owl Recovery Plan, as the Recovery Plan itself notes. ER 443, 451. Therefore, they do not require the Tribe and BIA to comply with those discretionary recommendations either.

Cascadia asserts that the qualifying phrase "now and in the future" in the applicable Coquille Forest Act provision reveals a Congressional intent to have the entire BLM Coos Bay District Resource Management Plan govern management of the Coquille Forest. Cascadia Br. at 55. To the contrary, that phrase simply acknowledges that the Northwest Forest Plan Standards and Guidelines might, at

some point in the future, be modified, superseded, or replaced by different standards and guidelines.

In fact, such an effort was made in the Western Oregon Plan Revision, a comprehensive revision of, among other things, the Northwest Forest Plan Standards and Guidelines. That Plan Revision was, however, struck down in *Pacific Rivers Council, et al., v. Shepard*, 2012 WL 950032 (D. Or., March 20, 2012), and the National Forests and BLM districts in Western Oregon, including the Coos Bay BLM District, reverted to their 1995 plans, which include the Northwest Forest Plan Standards and Guidelines, *see, e.g., Withdrawn Records of Decision Archive*, Bureau of Land Management, http://www.blm.gov/or/plans/wopr/rod/index.php (last viewed October 9, 2014) (BLM archives of withdrawn Records of Decision). To date, however, the Northwest Forest Plan Standards and Guidelines have not been revised or replaced. Those same standards and guidelines are still the only applicable standards and guidelines incorporated into the Coos Bay District RMP's Management Action/Directions sections.

Cascadia also points to the District Court's statement that "the [Coos Bay District RMP] is only applicable to the extent it incorporates the NFP's Standards and Guidelines *and other management actions/direction*," ER 12 (emphasis added), to mean that Congress meant to incorporate more than just the Northwest

Forest Plan standards and guidelines when it used the term "standards and guidelines," Cascadia Br. at 56–57. The District Court's reading does no more than reiterate the basic understanding—common to all the planning documents here—that standards and guidelines are incorporated into the Management Action/Direction provisions of the planning documents, and not, as Cascadia would have it, into the objectives as well.[8] Indeed, the District Court's point in this section is to distinguish between objectives (not binding) and management actions/direction (binding because they incorporate the standards and guidelines).

2. Coos Bay District RMP Uses Term "Standards and Guidelines" to Refer Only to the Northwest Forest Plan

Cascadia's attempt to read the Coos Bay District RMP as re-defining "standards and guidelines" to include that Plan's objectives, Cascadia Br. at 50–52, is belied by a careful reading of that document. In the Coos Bay District RMP, the BLM makes explicit reference to and expressly adopts the Northwest Forest Plan "standards and guidelines" as part of management action/direction for matrix lands, all land use allocations, and special status species. *See, e.g.,* SER 147–48, 150–51, 156–57, 161. As the District Court correctly noted, these standards and

[8] For example, the Northwest Forest Plan Standards and Guidelines include an appendix that calls for use of adaptive management to implement the standards and guidelines. SER 140–43. Such an approach would be the type of management action/direction from the Northwest Forest Plan that would be meant by the District Court's statement, and not a wholly unrelated and discretionary document such as the Northern Spotted Owl Recovery Plan.

guidelines are detailed only in the subsections of the Coos Bay District RMP entitled "Management Direction/Action," and not in the subsections entitled "Objectives." ER 14–15. *Compare* SER 156–57 (Coos Bay District RMP section on matrix lands), *with* SER 117–26 (Northwest Forest Plan Standards and Guidelines for matrix lands). In fact, whenever the Coos Bay District RMP itself uses the phrase "standards and guidelines," it is in reference to the Northwest Forest Plan Standards and Guidelines. *See, e.g.,* SER 147, 163. Thus, the document Cascadia relies on to expand the definition of standards and guidelines beyond those set out in the Northwest Forest Plan in fact does no such thing.

3. Coos Bay District RMP Does Not Define Standard and Guideline to Include Objective at Issue

Moreover, even if we accept, *arguendo*, Cascadia's convoluted parsing of the Coos Bay District RMP, the language that Cascadia quotes is not an enforceable standard or guideline. The "Objectives" language that Cascadia relies upon is from one of several "Resource Programs" in the Coos Bay District RMP. Cascadia Br. at 51 (quoting ER 230). Cascadia neglects to note that each of the Resource Programs contains various "objectives" that potentially conflict with one another. For example, the objectives language in the Special Status Species section that Cascadia relies upon: "compliance with . . . applicable recovery plans," ER 230, is in tension with the objectives language in the Socioeconomic Conditions section, which calls for "[c]ontribut[ing] to local, state, national and international

economies through sustainable use of BLM-managed lands and resources and use of innovative contracting and other implementation strategies," SER 168, and the objectives of the Timber Resources section, which calls for "[p]rovid[ing] a sustainable supply of timber and other forest products," SER 169.

The Coos Bay District RMP does not establish a hierarchy among these potentially competing objectives. Rather, BLM will analyze and modify these objectives over time, on a project-by-project basis, through adaptive management. SER 170 ("Adaptive management is a continuing process of action-based monitoring, researching, evaluating and adjusting with the objective of improving the implementation and achieving the goals of the RMP."); *accord* SER 148. The Coos Bay District RMP thus incorporates the very flexibility to balance or even modify competing "objectives" that Cascadia would deny to the Tribe. The Coos Bay District RMP does not require rigid adherence to the objective of one particular Resource Program over all others, as Cascadia would have it.

Moreover, Cascadia's selective definition of standards and guidelines from the Coos Bay District RMP does *not* include the objective upon which they base their argument. By its own terms, that definition includes only those objectives that are found in the Land Use Allocation sections of the Coos Bay District RMP: "*[e]ach land use allocation* will be managed according to specific objectives *and* management actions/direction." SER 148–49 (emphases added).

The Coos Bay District RMP expressly distinguishes between "Land Use Allocations" and "Resource Programs," which play distinct roles in the overall land management framework. SER 150–51. The only "objectives" in the Coos Bay District RMP that fall under the definition proffered by Cascadia are objectives set out in the sections of the Coos Bay District RMP labeled "Land Use Allocations." The objective at issue here ("compliance with recovery plans"), however, is not found in any of the Coos Bay District RMP's Land Use Allocation sections, but is rather within one of the "Resource Program" sections. SER 162. This objective does not, therefore, fall under the language Cascadia itself quotes to define "standards and guidelines."

Finally, Cascadia's reliance on the Coos Bay District RMP language that reads "'[b]ased on the results of consultation/conferencing [with FWS on ESA issues], modify, relocate, or abandon the proposed action,'" is likewise inapposite. Cascadia Br. at 51 (quoting ER 230). The "result" of the consultation at issue was a "no jeopardy" finding, which did not require modification, relocation, or abandonment. ER 300. The ancillary "conservation recommendations" are not legal requirements, as expressly and repeatedly noted in the Biological Opinion. ER 300–01.

4. Applicability of Indian and Remedial Canon of Construction Requires the Court to Reject Cascadia's Convoluted Definition

Cascadia asserts that its position is based on the "plain language" of the Coos Bay District RMP. Cascadia Br. at 51. The language that is controlling here, however, is not the language of the Coos Bay District RMP, but the language that Congress used in the Coquille Forest Act. That language *is* plain, and the phrase used ("standards and guidelines") is a term of art with a specific meaning in this context and, as explained above and by the District Court, means the Northwest Forest Plan Standards and Guidelines. To get to any other reading of that plain language (as Cascadia seeks) means there is some ambiguity in the phrase "standards and guidelines" that requires further interpretation.

But if there is that kind of ambiguity present, then both the Indian and remedial canons of construction would command the interpretation most favorable to the Tribe. As this Court has noted:

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. Rather, because of the unique legal status of Indians in American jurisprudence, legal doctrines often must be viewed from a different perspective from that which would obtain in other areas of the law.

Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1082 (9th Cir. 2001) (internal quotations and citations omitted); *see also County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust

relationship between the United States and the Indians . . . ."). In rejecting Cascadia's argument, the District Court appropriately invoked the longstanding principle of statutory construction that where a statute is enacted for the benefit of Indians, it is to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Quinault v. Gray's Harbor Co.,* 310 F.3d 645, 647 (9th Cir. 2002) (citations omitted); *accord U.S. v. Milner*, 583 F.3d 1174, 1185 (9th Cir. 2009); *see* Findings and Recommendations, ER 15.

Moreover, the Coquille Forest Act, as evidenced by the statements of Senator Hatfield in the legislative history quoted above, was enacted specifically to remedy the harms imposed on the Coquille people by 150 years of federal policy. When considering such a remedial statute, the court is also guided by another longstanding canon of construction: "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *accord Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987).

It is not disputed that the Coquille Forest Act was enacted to benefit the Coquille Indian Tribe and bolster its economic self-sufficiency and governmental self-determination. The Coquille Forest Act thus must be liberally construed in favor of the Tribe's ability to manage its lands in a manner that preserves its discretion and flexibility. Cascadia's interpretation would strip the Tribe of its right

to self-determination, and leave it wholly subject to the BLM's discretionary goal-setting—rendering the self-determination language and intent of the Coquille Forest Act an empty letter.

Under the Coquille Forest Act the Tribe is bound, just like other adjacent federal land management agencies, to follow the Northwest Forest Plan Standards and Guidelines. Like those other agencies, it retains the discretion and flexibility to determine what steps it may take above and beyond this mandated legal requirement. The BLM's exercise of its discretion does not restrict the ability of the Tribe to exercise its discretion in the same or in a different way.

The "objective" of recovery plan compliance in the Coos Bay District RMP simply does not apply to this sale. Neither the Tribe nor the BIA was required to adopt the discretionary recommendations of the FWS. Compliance with the Northwest Forest Plan standards and guidelines was legally sufficient.

CONCLUSION

Cascadia's arguments would undermine the Tribe's right to manage the Coquille Forest under the self-determination prerogatives of the Coquille Forest Act. Cascadia would restrict the flexibility of the Tribe in setting and adapting objectives and goals, flexibility both authorized by the Coquille Forest Act and enjoyed by the managers of adjacent federal lands. Doing so would be directly contrary to the remedial intent of the Coquille Forest Act.

The Coquille Indian Tribe respectfully requests that the Court affirm the District Court's order and judgment (1) denying Cascadia's motion for summary judgment and (2) granting the Tribe's and BIA's motions for summary judgment.

Dated this 15th day of October, 2014.

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Ninth Circuit Case No. 14-35553

Certification of Compliance Pursuant to FRAP 32(a)(7)(B) and Ninth Circuit Rule 32-1

I, Edmund Clay Goodman, do hereby certify that:

1. The foregoing brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 11,299 words, excluding those portions of the brief exempted by FRAP 32(a)(7)(B)(iii).
2. The foregoing brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word version 2010, size 14 font, in Times New Roman style type.

/s/ Edmund Clay Goodman

Attorney for Appellee-Intervenor
Coquille Indian Tribe
October 15, 2014

STATEMENT OF RELATED CASES

There are no other cases currently before the Ninth Circuit Court of Appeals that are related to this case.

Ninth Circuit Case No. 14-35553

Certificate of Service

I hereby certify that on the 15th day of October, 2014, I electronically filed the Answering Brief of Intervenor-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that Service will be accomplished by the appellate CM/ECF system.

Dated: October 15, 2014

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ADDENDUM

ADDENDUM

Statutes

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25 USCS § 715

Current through PL 113-165, approved 9/19/14

United States Code Service - Titles 1 through 52 > TITLE 25. INDIANS > CHAPTER 14. MISCELLANEOUS > COQUILLE INDIAN TRIBE OF OREGON: RESTORATION OF FEDERAL SUPERVISION

§ 715. Definitions

For the purposes of this Act [25 USCS §§ 715-715g]--

(1) ″Tribe″ means the Coquille Indian Tribe consisting of the Upper Coquille and the Lower Coquille Tribes of Indians;

(2) ″Secretary″ means the Secretary of the Interior or his designated representative;

(3) ″Interim Council″ means the governing body of the Coquille Tribe which serves pursuant to section 8 of this Act [25 USCS § 715f];

(4) ″Member″ means those persons eligible for enrollment under section 7 of this Act [25 USCS § 715e] and after the adoption of a tribal constitution, those persons added to the roll pursuant to such constitution;

(5) ″service area″ means the area composed of Coos, Curry, Douglas, Jackson, and Lane Counties in the State of Oregon;

(6) ″State″ means the State of Oregon; and

(7) ″Reservation″ means those lands subsequently acquired and held in trust by the Secretary for the benefit of the Tribe.

History

(June 28, 1989,P.L. 101-42, § 2, 103 Stat. 91.)

25 USCS § 715a

Current through PL 113-165, approved 9/19/14

§ 715a. Restoration of Federal recognition, rights, and privileges

(a) Federal recognition. Notwithstanding any provision of law, Federal recognition is hereby extended to the Coquille Indian Tribe. Except as otherwise provided herein, all laws and regulations of general application to Indians or nations, tribes, or bands of Indians that are not inconsistent with any specific provision of this Act [*25 USCS §§ 715*-*715g*] shall be applicable to the Tribe and its Members.

(b) Restoration of rights and privileges. Except as provided in subsection (d) of this section, all rights and privileges of this Tribe and of its Members under any Federal treaty, Executive order, agreement or statute or under any other authority, which were diminished or lost under the Act of August 13, 1954 (*68 Stat. 724*) [*25 USCS §§ 691* et seq.], are hereby restored and provisions of said Act shall be inapplicable to the Tribe and its Members after the date of enactment of this Act [enacted June 28, 1989].

(c) Federal services and benefits. Notwithstanding any other provision of law and without regard to the existence of a reservation, the Tribe and its Members shall be eligible, on and after the date of enactment of this Act [enacted June 28, 1989], for all Federal services and benefits furnished to federally recognized Indian tribes or their members. In the case of Federal services available to members of federally recognized tribes residing on a reservation, Members of the Tribe in the Tribe's service area shall be deemed to be residing on a reservation. Notwithstanding any other provision of law, the Tribe shall be considered an Indian tribe for the purpose of the Indian Tribal Government Tax Status Act (*26 U.S.C. 7871*).

(d) Hunting, fishing, trapping, and water rights. Nothing in this Act [*25 USCS §§ 715*-*715g*] shall expand, reduce, or affect in any manner any hunting, fishing, trapping, gathering, or water right of the Tribe and its Members.

(e) Indian Reorganization Act applicability. The Act of June 18, 1934 (*48 Stat. 984* [*25 USCS §§ 461* et seq.], as amended, shall be applicable to the Tribe and its Members.

(f) Certain rights not altered. Except as specifically provided in this Act [*25 USCS §§ 715*-*715g*], nothing in this Act [*25 USCS §§ 715*-*715g*] shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes levied.

History

(June 28, 1989,*P.L. 101-42*, § 3, *103 Stat. 91*.)

§ 715b. Economic development

(a) Plan for economic development. The Secretary shall--

(1) enter into negotiations with the governing body of the Tribe with respect to establishing a plan for economic development for this Tribe;

(2) in accordance with this section and not later than two years after the adoption of a tribal constitution as provided in section 9 [*25 USCS § 715g*], develop such a plan; and

(3) upon the approval of such plan by the governing body of the Tribe, submit such plan to the Congress.

(b) Restrictions to be contained in plan. Any proposed transfer of real property contained in the plan developed by the Secretary under subsection (a) shall be consistent with the requirements of section 5 of this Act [*25 USCS § 715c*].

History

(June 28, 1989,*P.L. 101-42*, § 4, *103 Stat. 92*.)

§ 715c. Transfer of land to be held in trust

(a) Lands to be taken in trust. The Secretary shall accept any real property located in Coos and Curry Counties not to exceed one thousand acres for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary: *Provided,* That, at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to his authority under the Act of June 18, 1934 (*48 Stat. 984*) [*25 USCS §§ 461* et seq.].

(b) Lands to be part of reservation. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the Tribe and shall be part of its reservation.

(c) Lands to be nontaxable. Any real property taken into trust for the benefit of the Tribe under this section shall be exempt from all local, State, and Federal taxation as of the date of transfer.

(d) Creation of Coquille Forest.

(1) Definitions. In this subsection:

(A) the [The] term ″Coquille Forest″ means certain lands in Coos County, Oregon, comprising approximately 5,400 acres, as generally depicted on the map entitled ″Coquille Forest Proposal″, dated July 8, 1996.

(B) the [The] term ″Secretary″ means the Secretary of the Interior.

(C) the [The] term ″the Tribe″ means the Coquille Tribe of Coos County, Oregon.

(2) Map. The map described in subparagraph (d)(1)(A), and such additional legal descriptions which are applicable, shall be placed on file at the local District Office of the Bureau of Land Management, the Agency Office of the Bureau of Indian Affairs, and with the Senate Committee on Energy and Natural Resources and the House Committee on Resources.

(3) Interim period. From the date of enactment of this subsection [enacted Sept. 30, 1996] until two years after the date of enactment of this subsection [enacted Sept. 30, 1996], the Bureau of Land Management shall:

(A) retain Federal jurisdiction for the management of lands designated under this subsection as the Coquille Forest and continue to distribute revenues from such lands in a manner consistent with existing law; and[,]

(B) prior to advertising, offering or awarding any timber sale contract on lands designated under this subsection as the Coquille Forest, obtain the approval of the Assistant Secretary for Indian Affairs, acting on behalf of and in consultation with the Tribe.

(4) Transition planning and designation.

(A) During the two year interim period provided for in paragraph (3), the Assistant Secretary for Indian Affairs, acting on behalf of and in consultation with the Tribe, is authorized to initiate development of a forest management plan for the Coquille Forest to the Assistant Secretary for Indian Affairs.

(B) Two years after the date of enactment of this subsection [enacted Sept. 30, 1996], the Secretary shall take the lands identified under subparagraph (d)(1)(A) into trust, and shall hold such lands in trust, in perpetuity, for the Coquille Tribe. Such lands shall be thereafter designated as the Coquille Forest.

(C) So as to maintain the current flow of revenue from land subject to the Act entitled ″An Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant land situated in the State of Oregon″ (the O&C Act), approved August 28, 1937 (*43 U.S.C. 1181a* et seq.), the Secretary shall redesignate, from public domain lands within the tribe's service area, as defined in this Act, certain lands to be subject to the O&C Act [*43 USCS §§ 1181a* et seq.]. Lands redesignated under this subparagraph shall not exceed lands sufficient to constitute equivalent timber value as compared to lands constituting the Coquille Forest.

(5) Management. The Secretary of [the] Interior, acting through the Assistant Secretary for Indian Affairs, shall manage the Coquille Forest under applicable State and Federal forestry and environmental protection laws, and subject to critical habitat designations under the Endangered Species Act, and subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future. The Secretary shall otherwise manage the Coquille Forest in accordance with the laws pertaining to the management of Indian Trust [trust] lands and shall distribute revenues in accord with *Public Law 101-630*, *25 U.S.C. 3107*.

(A) Unprocessed logs harvested from the Coquille Forest shall be subject to the same Federal statutory restrictions on export to foreign Nations [nations] that apply to unprocessed logs harvested from Federal lands.

(B) Notwithstanding any other provision of law, all sales of timber from land subject to this subsection shall be advertised, offered and awarded according to competitive bidding practices, with sales being awarded to the highest responsible bidder.

(6) Indian Self Determination Act agreement. No sooner than two years after the date of enactment of this subsection [enacted Sept. 30, 1996], the Secretary may, upon a satisfactory showing of management competence and pursuant to the Indian Self-Determination Act (*25 U.S.C. 450* et seq.), enter into a binding Indian self-determination agreement (agreement) with the Coquille Indian Tribe. Such agreement may provide for the tribe to carry out all or a portion of the forest management for the Coquille Forest.

(A) Prior to entering such an agreement, and as a condition of maintaining such an agreement, the Secretary must find that the Coquille Tribe has entered into a binding memorandum of agreement (MOA) with the State of Oregon, as required under paragraph 7 [(7)].

(B) The authority of the Secretary to rescind the Indian self-determination agreement shall not be encumbered.

(i) The Secretary shall rescind the agreement upon a demonstration that the tribe and the State of Oregon are no longer engaged in a memorandum of agreement as required under paragraph 7 [(7)].

(ii) The Secretary may rescind the agreement on a showing that the Tribe has managed the Coquille Forest in a manner inconsistent with this subsection, or the Tribe is no longer managing, or capable of managing, the Coquille Forest in a manner consistent with this subsection.

(7) Memorandum of agreement. The Coquille Tribe shall enter into a memorandum of agreement (MOA) with the State of Oregon relating to the establishment and management of the Coquille Forest. The MOA shall include, but not be limited to, the terms and conditions for managing the Coquille Forest in a manner consistent with paragraph (5) of this subsection, preserving public access, advancing jointly-held resource management goals, achieving tribal restoration objectives and establishing a coordinated management framework. Further, provisions set forth in the MOA shall be consistent with federal trust responsibility requirements applicable to Indian trust lands and paragraph (5) of this subsection.

(8) Public access. The Coquille Forest shall remain open to public access for purposes of hunting, fishing, recreation and transportation, except when closure is required by state [State] or federal [Federal] law, or when the Coquille Indian Tribe and the State of Oregon agree in writing that restrictions on access are necessary or appropriate to prevent harm to natural resources, cultural resources or environmental quality;[:] *Provided,* That the State of Oregon's agreement shall not be required when immediate action is necessary to protect archaeological resources.

(9) Jurisdiction.

(A) The United States District Court for the District of Oregon shall have jurisdiction over actions against the Secretary arising out of claims that this subsection has been violated. Consistent with existing precedents on standing to sue, any affected citizen may bring suit against the Secretary for violations of this subsection, except that suit may not be brought against the Secretary for claims that the MOA has been violated. The Court has the authority to hold unlawful and set aside actions pursuant to this subsection that are arbitrary and capricious, an abuse of discretion, or otherwise an abuse of law.

(B) The United States District Court for the District of Oregon shall have jurisdiction over actions between the State of Oregon and the Tribe arising out of claims of breach of the MOA.

(C) Unless otherwise provided for by law, remedies available under this subsection shall be limited to equitable relief and shall not include damages.

(10) State regulatory and civil jurisdiction. In addition to the jurisdiction described in paragraph 7 [(7)] of this subsection, the State of Oregon may exercise exclusive

regulatory civil jurisdiction, including but not limited to adoption and enforcement of administrative rules and orders, over the following subjects:

(A) management, allocation and administration of fish and wildlife resources, including but not limited to establishment and enforcement of hunting and fishing seasons, bag limits, limits on equipment and methods, issuance of permits and licenses, and approval or disapproval of hatcheries, game farms, and other breeding facilities;[:] *Provided,* That nothing herein shall be construed to permit the State of Oregon to manage fish or wildlife habitat on Coquille Forest lands;

(B) allocation and administration of water rights, appropriation of water and use of water;

(C) regulation of boating activities, including equipment and registration requirements, and protection of the public's right to use the waterways for purposes of boating or other navigation;

(D) fills and removals from waters of the State, as defined in Oregon law;

(E) protection and management of the State's proprietary interests in the beds and banks of navigable waterways;

(F) regulation of mining, mine reclamation activities, and exploration and drilling for oil and gas deposits;

(G) regulation of water quality, air quality (including smoke management), solid and hazardous waste, and remediation of releases of hazardous substances;

(H) regulation of the use of herbicides and pesticides; and

(I) enforcement of public health and safety standards, including standards for the protection of workers, well construction and codes governing the construction of bridges, buildings, and other structures.

(11) Savings clause, State authority.

(A) Nothing in this subsection shall be construed to grant tribal authority over private or State-owned lands.

(B) To the extend [extent] that the State of Oregon is regulating the foregoing areas pursuant to a delegated Federal authority or a Federal program, nothing in this subsection shall be construed to enlarge or diminish the State's authority under such law.

(C) Where both the State of Oregon and the United States are regulating, nothing herein shall be construed to alter their respective authorities.

(D) To the extent that Federal law authorizes the Coquille Indian Tribe to assume regulatory authority over an area, nothing herein shall be construed to enlarge or diminish the tribe's authority to do so under such law.

(E) Unless and except to the extent that the tribe [Tribe] has assumed jurisdiction over the Coquille Forest pursuant to Federal law, or otherwise with the consent of the State, the State of Oregon shall have jurisdiction and authority to enforce its laws

addressing the subjects listed in subparagraph 10 [paragraph (10)] of this subsection on the Coquille Forest against the Coquille Indian Tribe, its members and all other persons and entities, in the same manner and with the same remedies and protections and appeal rights as otherwise provided by general Oregon law. Where the State of Oregon and Coquille Indian Tribe agree regarding the exercise of tribal civil regulatory jurisdiction over activities on the Coquille Forest lands, the tribe [Tribe] may exercise such jurisdiction as its [is] agreed upon.

(12) In the event of a conflict between Federal and State law under this subsection, Federal law shall control.

History

(June 28, 1989,*P.L. 101-42*, § 5, *103 Stat. 92*; *Sept. 30, 1996, P.L. 104-208*, Div B, Title V, § 501, *110 Stat. 3009*-537.)

Current through PL 113-165, approved 9/19/14

§ 715d. Criminal and civil jurisdiction

The State shall exercise criminal and civil jurisdiction within the boundaries of the reservation, in accordance with *section 1162 of title 18, United States Code*, and *section 1360 of title 28, United States Code*, *respectively. Retrocession of such jurisdiction may be obtained pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 77) [25 USCS § 1323].*

History

(June 28, 1989,*P.L. 101-42*, § 6, *103 Stat. 92*.*)*

§ 715e. Membership rolls

(a) Compilation of tribal membership roll. Within one year of the enactment of this Act [enacted June 28, 1989], the Secretary shall compile a roll of the Coquille Indian Tribe.

(b) Criteria for enrollments.

(1) Until a tribal constitution is adopted, a person shall be placed on the membership roll if the individual is living, is not an enrolled member of another federally recognized tribe, is of Coquille ancestry, possesses at least one-eighth or more of Indian blood quantum and if--

(A) that individual's name was listed on the Coquille roll compiled and approved by the Bureau of Indian Affairs on August 29, 1960;

(B) that individual was not listed on but met the requirements that had to be met to be listed on the Coquille roll compiled and approved by the Bureau of Indian Affairs on August 29, 1960; or

(C) that individual is a lineal descendant of an individual, living or dead, identified by subparagraph (A) or (B).

(2) After adoption of a tribal constitution, said constitution shall govern membership in the Tribe: *Provided*, That in addition to meeting any other criteria imposed in such tribal constitution, any person added to the roll has to be of Coquille Indian ancestry and cannot be a member of another federally recognized Indian tribe.

(c) Conclusive proof of Coquille ancestry and degree of Indian blood quantum. For the purpose of subsection (b) of this section, the Secretary shall accept any available evidence establishing Coquille ancestry and the required amount of Indian blood quantum. However, the Secretary shall accept as conclusive evidence of Coquille ancestry information contained in the Coquille roll compiled by the Bureau of Indian Affairs on August 29, 1960, and as conclusive evidence of Indian blood quantum the information contained in the January 1, 1940, census roll of nonreservation Indians of the Grand Ronde-Siletz Agency.

History

(June 28, 1989,*P.L. 101-42*, § 7, *103 Stat. 93*.)

25 USCS § 715f

Current through PL 113-165, approved 9/19/14

§ 715f. Interim government

Until a new tribal constitution and bylaws are adopted and become effective under section 9 of this Act [*25 USCS § 715g*], *the Tribe's governing body shall be an Interim Council. The initial membership of the Interim Council shall consist of the members of the Tribal Council of the Coquille Tribe on the date of enactment of this Act [enacted June 28, 1989], and the Interim Council shall continue to operate in the manner prescribed for the Tribal Council under the tribal bylaws adopted on April 23, 1979. Any new members filling vacancies on the Interim Council must meet the criteria for enrollment in section 7(b) of this Act [25 USCS § 715e(b)] and be elected in the same manner as are Tribal Council members under the April 23, 1979, bylaws.*

History

(June 28, 1989,*P.L. 101-42*, § 8, *103 Stat. 93*.)

§ 715g. Tribal constitution

(a) Election; time and procedure. Upon the completion of the tribal membership roll and upon the written request of the Interim Council, the Secretary shall conduct, by secret ballot, an election for the purpose of adopting a constitution for the Tribe. Absentee balloting shall be permitted regardless of voter residence. In every other regard, the election shall be held according to section 16 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS § 476], as amended.

(b) Election of tribal officials; procedures. Not later than one hundred and twenty days after the Tribe adopts a constitution and bylaws, the Secretary shall conduct an election by secret ballot for the purpose of electing tribal officials as provided in the tribal constitution. Said election shall be conducted according to the procedures stated in paragraph [subsection] (a) of this section except to the extent that said procedures conflict with the tribal constitution.

History

(June 28, 1989, P.L. 101-42, § 9, 103 Stat. 93.)

§ 3101. Findings

The Congress finds and declares that--

(1) the forest lands of Indians are among their most valuable resources and Indian forest lands--

(A) encompass more than 15,990,000 acres, including more than 5,700,000 acres of commercial forest land and 8,700,000 acres of woodland,

(B) are a perpetually renewable and manageable resource,

(C) provide economic benefits, including income, employment, and subsistence, and

(D) provide natural benefits, including ecological, cultural, and esthetic values;

(2) the United States has a trust responsibility toward Indian forest lands;

(3) existing Federal laws do not sufficiently assure the adequate and necessary trust management of Indian forest lands;

(4) the Federal investment in, and the management of, Indian forest land is significantly below the level of investment in, and management of, National Forest Service forest land, Bureau of Land Management forest land, or private forest land;

(5) tribal governments make substantial contributions to the overall management of Indian forest land; and

(6) there is a serious threat to Indian forest lands arising from trespass and unauthorized harvesting of Indian forest land resources.

History

(Nov. 28, 1990,*P.L. 101-630*, Title III, § 302, *104 Stat. 4532*.)

25 USCS § 3102

Current through PL 113-165, approved 9/19/14

§ 3102. Purposes

The purposes of this *title [25 USCS §§ 3101* et seq.] are to--

(1) allow the Secretary of the Interior to take part in the management of Indian forest lands, with the participation of the lands' beneficial owners, in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners;

(2) clarify the authority of the Secretary to make deductions from the proceeds of sale of Indian forest products, assure the use of such deductions on the reservation from which they are derived solely for use in forest land management activities, and assure that no other deduction s shall be collected;

(3) increase the number of professional Indian foresters and related staff in forestry programs on Indian forest land; and

(4) provide for the authorization of necessary appropriations to carry out this *title [25 USCS §§ 3101* et seq.] for the protection, conservation, utilization, management, and enhancement of Indian forest lands.

History

(Nov. 28, 1990,*P.L. 101-630*, Title III, § 303, *104 Stat. 4532*.*)*

§ 3103. Definitions

For the purposes of this title [25 USCS §§ 3101 et seq.], the term--

(1) ″Alaska Native″ means Native as defined in section 3(b) of the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1604);

(2) ″forest″ means an ecosystem of at least one acre in size, including timberland and woodland, which--

(A) is characterized by a more or less dense and extensive tree cover,

(B) contains, or once contained, at least ten percent tree crown cover, and

(C) is not developed or planned for exclusive nonforest use;

(3) ″Indian forest land″ means Indian lands, including commercial and non-commercial timberland and woodland, that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover, regardless whether a formal inspection and land classification action has been taken;

(4) ″forest land management activities″ means all activities performed in the management of Indian forest lands, including--

(A) all aspects of program administration and executive direction such as--

(i) development and maintenance of policy and operational procedures, program oversight, and evaluation,

(ii) securing of legal assistance and handling of legal matters,

(iii) budget, finance, and personnel management, and

(iv) development and maintenance of necessary data bases and program reports;

(B) all aspects of the development, preparation and revision of forest inventory and management plans, including aerial photography, mapping, field management inventories and re-inventories, inventory analysis, growth studies, allowable annual cut calculations, environmental assessment, and forest history, consistent with and reflective of tribal integrated resource management plans;

(C) forest land development, including forestation, thinning, tree improvement activities, and the use of silvicultural treatments to restore or increase growth and yield to the full productive capacity of the forest environment;

(D) protection against losses from wildfire, including acquisition and maintenance of fire fighting equipment and fire detection systems, construction of firebreaks, hazard reduction, prescribed burning, and the development of cooperative wildfire management agreements;

(E) protection against insects and disease, including--

(i) all aspects of detection and evaluation,

(ii) preparation of project proposals containing project description, environmental assessments and statements, and cost-benefit analyses necessary to secure funding,

(iii) field suppression operations, and

(iv) reporting;

(F) assessment of damage caused by forest trespass, infestation or fire, including field examination and survey, damage appraisal, investigation assistance, and report, demand letter, and testimony preparation;

(G) all aspects of the preparation, administration, and supervision of timber sale contracts, paid and free use permits, and other Indian forest product harvest sale documents including--

(i) cruising, product marking, silvicultural prescription, appraisal and harvest supervision,

(ii) forest product marketing assistance, including evaluation of marketing and development opportunities related to Indian forest products and consultation and advice to tribes, tribal and Indian enterprises on maximization of return on forest products,

(iii) archeological, historical, environmental and other land management reviews, clearances, and analyses,

(iv) advertising, executing, and supervising contracts,

(v) marking and scaling of timber, and

(vi) collecting, recording and distributing receipts from sales;

(H) provision of financial assistance for the education of Indians enrolled in accredited programs of postsecondary and postgraduate forestry and forestry-related fields of study, including the provision of scholarships, internships, relocation assistance, and other forms of assistance to cover educational expenses;

(I) participation in the development and implementation of tribal integrated resource management plans, including activities to coordinate current and future multiple uses of Indian forest lands;

(J) improvement and maintenance of extended season primary and secondary Indian forest land road systems; and

(K) research activities to improve the basis for determining appropriate management measures to apply to Indian forest lands;

(5) ″forest management plan″ means the principal document, approved by the Secretary, reflecting and consistent with a tribal integrated resource management plan, which provides for the regulation of the detailed, multiple-use operation of Indian forest land by methods assuring that such lands remain in a continuously productive state while meeting the objectives of the tribe and which shall include--

(A) standards setting forth the funding and staffing requirements necessary to carry out each management plan, with a report of current forestry funding and staffing levels; and

(B) standards providing quantitative criteria to evaluate performance against the objectives set forth in the plan;

(6) ″forest product″ means--

(A) timber,

(B) a timber product, including lumber, lath, crating, ties, bolts, logs, pulpwood, fuelwood, posts, poles and split products,

(C) bark,

(D) Christmas trees, stays, branches, firewood, berries, mosses, pinyon nuts, roots, acorns, syrups, wild rice, and herbs,

(E) other marketable material, and

(F) gravel which is extracted from, and utilized on, Indian forest lands;

(7) ″forest resources″ means all the benefits derived from Indian forest lands, including forest products, soil productivity, water, fisheries, wildlife, recreation, and aesthetic or other traditional values of Indian forest lands;

(8) ″forest trespass″ means the act of illegally removing forest products from, or illegally damaging forest products on, forest lands;

(9) ″Indian″ means a member of an Indian tribe;

(10) ″Indian land″ means land title to which is held by--

(A) the United States in trust for an Indian, an individual of Indian or Alaska Native ancestry who is not a member of a federally-recognized Indian tribe, or an Indian tribe, or

(B) an Indian, an individual of Indian or Alaska Native ancestry who is not a member of a federally recognized tribe, or an Indian tribe subject to a restriction by the United States against alienation;

(11) ″Indian tribe″ or ″tribe″ means any Indian tribe, band, nation, Pueblo or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and shall mean, where appropriate, the recognized tribal government of such tribe's reservation;

(12) ″reservation″ includes Indian reservations established pursuant to treaties, Acts of Congress or Executive orders, public domain Indian allotments, and former Indian reservations in Oklahoma;

(13) ″Secretary″ means the Secretary of the Interior;

(14) ″sustained yield″ means the yield of forest products that a forest can produce continuously at a given intensity of management; and

(15) ″tribal integrated resource management plan″ means a document, approved by an Indian tribe and the Secretary, which provides coordination for the comprehensive management of such tribe's natural resources.

History

(Nov. 28, 1990,*P.L. 101-630*, Title III, § 304, *104 Stat. 4533*.)

§ 3104. Management of Indian forest land

(a) Management activities. The Secretary shall undertake forest land management activities on Indian forest land, either directly or through contracts, cooperative agreements, or grants under the Indian Self-Determination Act (*25 U.S.C. 450* et seq.).

(b) Management objectives. Indian forest land management activities undertaken by the Secretary shall be designed to achieve the following objectives--

(1) the development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield and with the standards and objectives set forth in forest management plans by providing effective management and protection through the application of sound silvicultural and economic principles to--

(A) the harvesting of forest products,

(B) forestation,

(C) timber stand improvement, and

(D) other forestry practices;

(2) the regulation of Indian forest lands through the development and implementation, with the full and active consultation and participation of the appropriate Indian tribe, of forest management plans which are supported by written tribal objectives and forest marketing programs;

(3) the regulation of Indian forest lands in a manner that will ensure the use of good method and order in harvesting so as to make possible, on a sustained yield basis, continuous productivity and a perpetual forest business;

(4) the development of Indian forest lands and associated value-added industries by Indians and Indian tribes to promote self-sustaining communities, so that Indians may receive from their Indian forest land not only stumpage value, but also the benefit of all the labor and profit that such Indian forest land is capable of yielding;

(5) the retention of Indian forest land in its natural state when an Indian tribe determines that the recreational, cultural, aesthetic, or traditional values of the Indian forest land represents the highest and best use of the land;

(6) the management and protection of forest resources to retain the beneficial effects to Indian forest lands of regulating water run-off and minimizing soil erosion; and

(7) the maintenance and improvement of timber productivity, grazing, wildlife, fisheries, recreation, aesthetic, cultural and other traditional values.

History

(Nov. 28, 1990,*P.L. 101-630*, Title III, § 305, *104 Stat. 4535*.)

By Mr. HATFIELD (for himself and Mr. Packwood):

S. 521. A bill to provide for restoration of the Federal trust relationship with, and assistance to the Coquille Tribe of Indians and the individual members consisting of the Coquille Tribe of Indians, and for other purposes; to the Select Committee on Indian Affairs.

federal recognition of coquille tribe

Mr. HATFIELD. Mr. President, today Senator Packwood and I are introducing a bill to extend Federal recognition to the Coquille Tribe of Indians.

The Coquilles were one of 63 Western Oregon tribes to have Federal recognition of their tribal status revoked by operation of the Termination Act of 1954. The tribe is originally from the southern Oregon coast. Despite both termination and the earlier forced relocation of the tribe to the Siletz Indian Reservation some 100 miles away, many of the Coquilles' 527 members still reside in Oregon's southern coastal area.

As quickly became apparent, the Termination Act was a mistake of immense proportions that did serious damage to those tribes affected. At the very time these tribes were struggling to integrate themselves into this country's developing economic system, tribal members were stripped of needed health services and educational benefits. In addition, many lost their land because they were not able to pay the property taxes for which they were suddenly liable.

The Coquilles were no exception. Despite the adversity, however, they have managed to remain a cohesive group and to preserve the customs, tradition, and language of their ancestors. Their unity in the face of tremendous obstacles is nothing short of inspirational. I am happy to report that this bill will complete the process of reinstating Federal recognition to the terminated tribes of Oregon. The Oregon tribes' progress in this area reflects a larger move in our country toward the recognition of three sovereigns in the United States: the Federal Government, State Governments, and Indian nations. It should be noted that this bill not only reestablishes basic program services for the tribe but also will help to restore the tribe's cultural identity-and to give back to the Coquille's the sense of dignity and respect they deserve as an Indian nation.

Mr. President, tremendous support for this measure exists in my State. Oregon Governor Neil Goldschmidt, the State of Oregon Commission on Indian Services, Ecumenical Ministries of Oregon, the Coos County Commissioners, and the Curry

County Commissioners all have endorsed this bill. Additional support comes from the tribe's Oregon State Senators, Bill Bradbury and Peg Jolin, numerous churches, the Coos Bay City Council, the Bandon City Council, the Port of Coos Bay, the Port of Bandon, the City of Coquille, and the other Oregon tribes.

The bill Senator Packwood and I are introducing today is identical to legislation introduced in the House of Representatives by Congressman Peter DeFazio, and it enjoys the support of the entire Oregon delegation. It is my hope that the House will soon approve the Coquille Recognition Act and that Senate introduction of this bill today will hasten the passage of this long-overdue measure into law.

Mr. PACKWOOD. Mr. President, I am pleased to join with Senator Hatfield today in introducing the Coquille Restoration Act. Passage of this bill will be a long overdue act of justice.

The Coquille Tribe is the last to seek restoration of the numerous Oregon tribes terminated by the U.S. Government by two acts of Congress in 1954. Oregon Indians suffered disproportionately under the Termination Acts of 1954. Sixty percent of all the tribes terminated nationwide were Oregon tribes. Sixty-three percent of the Indian land base affected was in Oregon. The consequences of termination were disasterous. The Western Oregon Termination Act ended Federal service to tribal members and led to the removal from trust and eventual sale of all Coquille land.

We now have an opportunity to right this wrong by once again federally recognizing the Coquille Tribe, thereby reinstating Indian health and education services now denied the Coquilles as terminated Indians. Economic development opportunities available to federally recognized Indians would be opened to the Coquilles and make way for development of tribal enterprises. These could provide employment to tribal members and non-Indians and contribute to the overall economy of the region.

The Coquille restoration effort enjoys broad support. All members of the Oregon congressional delegation support the restoration, as does the governor of the State. The effort is supported by national Indian groups as well local government, tribes, and businesses.

Mr. President, I hope we can move quickly now to federally recognize the Coquille Tribe so that we can provide its members the opportunity to overcome the adverse effects of 34 years of termination and enjoy the fruits of a government-to government relationship with the United States, a strengthened tribal identity, and economic self-sufficiency.

Calendar No. 122

101ST CONGRESS
1st Session

SENATE

REPORT
101-50

PROVIDING FOR RESTORATION OF THE FEDERAL TRUST RELATIONSHIP WITH, AND ASSISTANCE TO, THE COQUILLE TRIBE OF INDIANS AND THE INDIVIDUAL MEMBERS CONSISTING OF THE COQUILLE TRIBE OF INDIANS, AND FOR OTHER PURPOSES

JUNE 13 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 881]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 881) to provide for restoration of the Federal trust relationship with, and assistance to, the Coquille Tribe of Indians and the individual members consisting of the Coquille Tribe of Indians, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of H.R. 881 is to restore the Federal trust relationship with the Coquille Tribe of Indians in the State of Oregon, to provide for the development of an economic development plan for the tribe, and to provide for the transfer of certain lands within Coos and Curry Counties to the Secretary of the Interior in trust for the benefit for the Coquille Tribe.

In 1954 Congress enacted the Western Oregon Termination Act (68 Stat. 724, 25 U.S.C. 691 et seq.), terminating the Federal relationship with some 58 tribes in the State of Oregon. The Coquille Tribe was among the many tribes terminated under that Act. Sixty percent of all the tribes terminated nationwide were Oregon tribes; sixty-three percent of the Indian land base affected by termination Acts was in Oregon.

In 1973 the policy of termination which was monumented by Congress in 1953 by H.C.R. 108 was challenged with the restoration of recognition to the Menominee Tribe of Wisconsin, the first tribe to have been terminated by Congress in 1953. Over the course of

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the years numerous tribes have been restored to recognition, some through the legislative process, some such as small Rancherias in California through the judicial process. Tribes with little or no resilience simply passed away, either melding into the greater society or merging with other larger Indian tribes or tribal groups.

At this point it appears that every surviving tribe that was explicitly terminated has been restored to recognition except three—one, the Catawba Tribe of South Carolina that is embroiled in extensive land claim litigation; two, the Coquille Tribe of Oregon that is the subject of this legislation; and three, the Ponca Tribe of Nebraska. Restoration Acts explicit to the tribes in the State of Oregon have included the Confederated Tribes of Siletz (1977), the Cow Creek Band of Umpquas (1982), the Confederated Tribes of Grand Ronde (1983), the Confederated Tribes of Coos, Lower Umpqua and Siuslaw (1984), and the Klamath Tribe (1986).

In introducing S. 521, companion legislation to H.R. 881 in the Senate, Senator Hatfield stated that this legislation "will complete the process of reinstating Federal recognition to the terminated tribes of Oregon." (Cong. Rec., March 7, 1989, pp. 2264-65). Senator Packwood stated "The Coquille Tribe is the last to seek restoration of the numerous Oregon tribes terminated by the U.S. Government by two Acts of Congress in 1954."

In the 100th Congress, under the leadership of this Committee, the "sense of Congress" in favor of termination expressed in H.C.R. 108 in 1953 was expressly repudiated and repealed (P.L. 100-297). Restoration of the trust relationship and the government-to-government relationship with the Coquille Tribe of Oregon is the last step in the process in correcting an historic injustice and restoring to a Federal relationship a tribe whose existence and relationship to the United States was specifically extinguished by an Act of Congress.

BACKGROUND

The aboriginal homelands of the Coquille Indians are located at the mouth of the Coquille River, in the South Slough area to the north, and along the Coquille River with a primary village at the forks near Myrtle Point. These lands are located immediately south of the Coos Bay area on the Pacific coast in the southwest corner of Oregon.

The native language of the Coquille Indians appears to have been of both Pacific Coast Athapaskan and Penutian, Athapaskan being related to certain southwest tribes, including Navajo and Apache, as well as the Athabascan of Alaska, and Penutian a separate language stock related to inhabitants on the Pacific coast dating back some 6,500 years.

In 1855 the Coquille Tribe negotiated a treaty with the United States which was never ratified. In 1856 the United States attempted to remove the Coquille tribe to the Siletz Reservation. However, many Coquille members remained in the aboriginal territory and many others who had been removed returned. Today the Coquille Tribe is composed of the descendants of those Coquille Indians who stayed in the aboriginal lands or returned to the homelands after removal.

It does not appear that a separate reservation was ever established or set aside for the Coquille Indian Tribe. Section 4 of the General Allotment Act of 1887 (also known as the Dawes Act) provided that non-reservation Indians such as the Coquille could apply for allotments of land from the public domain, and that such allotments would be issued "in quantities and manner as provided in this Act (i.e., the General Allotment Act) for Indians residing upon reservations . . . and patents shall be issued to them for such lands in the manner and with the restrictions (i.e., trust or restricted deed) as herein provided." (Act of Feb. 8, 1887, c. 119, 24 Stat. 388; Vol. I, Kappler's, *Indian Affairs, Laws and Treaties,* pg. 33). At least 10 Coquilles applied for such public domain allotments within their aboriginal homeland area. Court records of the inheritance of two allottees for allotments issued in 1912 and 1914 identify the allottees as "Coquille allottees".

Dr. Roberta L. Hall, Ph.D., Professor of Anthropology at Oregon State University, conducted extensive research on the Coquille Tribe which has been submitted as evidence in the hearings on this legislation. In that portion of her paper relating to the the Coquille Tribe in the Twentieth Century she states that "In the twentieth century the Coquille Tribe has maintained a consistent cultural and political identity through informal and formal means."

Aside from the allotments and inheritance records referred to above, Dr. Hall cites the judgment of the U.S. Court of Claims in *Alcea Band of Tillamooks, et al.* v. *United States* entered on January 3, 1950, in favor of four tribal entities, one of them being the Coquille Tribe. It appears that efforts to bring such an action began in the 1920's, and the case was brought under a special jurisdictional Act enacted in 1935 (Act of August 26, 1935; 49 Stat. 801). The initial decision finding these four tribes as having standing to sue was entered in 1945 and was affirmed by the Supreme Court. (59 F. Supp. 934, 103 Ct. Cl. 494; aff'd., 329 U.S. 40).

In 1954 when the Western Oregon Termination Act was enacted, the Coquille Tribe is specifically noted in papers prepared by the Portland Area Office of the BIA as being one of the tribes over which Federal supervision is being withdrawn. In 1955 Congress enacted special legislation to provide for the use and distribution of the judgment award entered in the *Alcea Band of Tillamooks* case (P.L. 83-715). This Act refers to the Coquille as a tribe and, along with the other tribes for which judgment was entered, provided for the preparation of a tribal roll for purposes of awarding compensation on a per capita basis. A roll of 271 persons was developed and accepted by the BIA on August 29, 1960. The Department of the Interior acknowledges this roll, but only as a "list of those individuals of Coquille ancestry who successfully applied for the Coquille portion of the Western Oregon Judgment Fund." The Department contends that the roll should not be used to imply that either a tribal membership roll or a tribe exists, citing the Senate Report that accompanied the judgment fund distribution Act (S. Rep. No. 2219, 83rd Cong., 2d Sess., 1954).

In the course of her research, Dr. Hall examined 145 documents such as announcements of meetings, minutes, and correspondence dating from 1922 through 1987 that have been kept by several tribal members. These include minutes of 25 meetings, 15 an-

nouncements of meetings, 8 news letters, and 53 letters. She notes that the correspondence covers issues the Coquilles were working on, with treaty claims dominating in the early period and items such as zoning and ownership of a Coquille village/burial site and tribal restoration dominating in the latter period. A list of these documents accompanies her paper. She notes that these comprise only a "sample" of the total that have existed.

Dr. Hall notes that since 1922 five tribal chairmen have presided over the tribe. During the years the Coquille Tribe or its members have actively participated in activities of regional Indian organizations such as the Western Oregon Indians, the Southern Oregon Indian Business Council, and the Confederated Indian Tribes of Western Oregon, and have had close associations with other tribes in the region, including the Siuslaw, Lower Umpqua and Coos Tribes which were separately restored to Federally recognized status in 1984. Dr. Hall notes that in 1974 the Coquilles considered merging with the Coos Tribe but at a meeting on August 3, 1974, voted to stay separate. In 1977 the Coquille Tribe restructured their government to provide for a more formal system of organization and established a non-profit corporation to preserve and foster knowledge of the tribal cultural heritage.

The Coquille Tribe today has approximately 550 members, most of whom remain in the Coos Bay area of Oregon. The present tribal government consists of a seven member tribal council that holds regular monthly meetings. Tribal elections are held yearly. Since termination, the Tribe has maintained and up-dated its membership roll using as its base roll the roll that was initially completed in 1960 with the help of the Bureau of Indian Affairs for purposes of distribution of the judgment in the *Alcea* case.

SUPPORT OF INDIAN TRIBES, ORGANIZATIONS, AND STATE AND LOCAL GOVERNMENTS AND LOCAL BUSINESS ORGANIZATIONS

The Coquille Tribe has gathered extensive support from Indian tribes, regional and national Indian organizations, state and local governments, and endorsements from the local business community. Indian tribes and organizations supporting restoration of the Coquille Tribe include the National Congress of American Indians, the Affiliated Tribes of Northwest Indians, and numerous tribes of Oregon.

The Oregon Commission on Indian Services supports restoration, as does the Governor of the State, and the State Senator and Representative for the local legislative district. Local support includes the Coos County Commissioners, the Curry County Commissioners, the Coos Bay City Council, the City of Bandon, numerous churches, the Port of Coos Bay, and the Port of Bandon.

In all, some 46 letters or resolutions of support have been submitted by the Tribe and made a part of the record.

LEGISLATIVE HISTORY

The bill is supported by the entire Oregon Congressional delegation.

H.R. 881 was introduced in the House of Representatives by Congressman DeFazio on February 7, 1989, and was referred to the

Committee on Interior and Insular Affairs for consideration. A similar bill, H.R. 4787, was introduced by Mr. DeFazio in the House in the 100th Congress and was the subject of a hearing on August 24, 1988, in that Congress. No action was taken on the bill in the 100th Congress.

On February 28, 1989, following introduction of H.R. 881, the House Committee on Interior and Insular Affairs requested the views of the Administration. On March 9, 1989, the Committee received a communication from the Acting Assistant for Indian Affairs expressing the opposition of the Administration to the bill.

On May 23, 1989, H.R. 881 was reported by the House Committee on Interior and Insular Affairs with an amendment in the nature of a substitute. H.R. 881, as amended, was passed by the House without objection and was received in the Senate on June 2, 1989, where it was referred to the Select Committee on Indian Affairs. On June 9, 1989, H.R. 881 was considered by the Committee and ordered reported to the Senate without amendment.

A companion bill to H.R. 881, S. 521, was introduced in the Senate on March 7, 1989, by Senator Hatfield, for himself and Senator Packwood. S. 521 is identical to H.R. 881 as introduced by Mr. DeFazio. There have been no hearings on this bill in this Congress.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 9, 1989, the Select Committee on Indian Affairs, in an open business session, considered H.R. 881 and in the absence of objection the bill was ordered reported without amendment with a recommendation that the bill, as reported, be passed by the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1

This action cites this Act as the "Coquille Restoration Act".

Section 2

This section defines the following terms for the purposes of this Act: "Tribe", "Secretary", "Interim Council", "Member", "Service Area", "State", and "Reservation".

Section 3

Subsection (a) restores Federal recognition to the Coquille Indian Tribe of Oregon and provides that all laws of general application to Indians shall be applicable to the Coquille Tribe unless such laws are inconsistent with this Act.

Subsection (b) provides that except as provided in subsection (d), all rights and privileges of the Tribe and its members under any Federal law which were diminished or lost under the Western Oregon Termination Act are hereby restored.

Subsection (c) provides that nothwithstanding the existence of a reservation, the tribe and its members shall be eligible for all Federal services available to Indians because of their status as Indians.

Subsection (d) provides that nothing in this Act shall expand, reduce or affect in any manner any hunting, fishing, trapping, gathering or water rights of the Tribe and its members.

Subsection (e) provides that the Indian Reorganization Act of 1934 shall be applicable to the Tribe and its members.

Subsection (f) provides that except as specifically provided in this Act, nothing in this Act shall alter any property or contractual right or obligation, or any obligation for taxes levied.

Section 4

Subsection (a) provides for the Secretary of the Interior to enter into negotiations with the governing body of the Tribe with respect to establishing a plan for economic development for the Tribe and upon approval of such plan by the Tribe, to submit such plan to the Congress.

Subsection (b) provides that any proposed transfer of real property contained in the Plan shall be consistent with the requirement of section 5 of this Act.

Section 5

Subsection (a) provides that the Secretary shall accept in trust for the benefit of the Tribe, not to exceed 1,000 acres of land located in Coos and Curry Counties if such land is conveyed to the Secretary for such purposes. Such land has to be free of adverse legal claim at the time of such conveyance. This section also provides that the Secretary may accept any additional acreage located in the Tribe's service area pursuant to his authority under the Indian Reorganization Act of 1934.

It is the Committee's intent that if the first 1,000 acres transferred under this section meet the requirement of this section, such acreage shall be transferred in trust for the benefit of the tribe expeditiously and without undue delays.

Subsection (b) provides that the land taken in trust for the benefit of the Tribe under this section shall be made part of the tribe's reservation.

Subsection (c) provides that any real property taken into trust for the benefit of the Tribe under this section shall be exempt from all local, State, and Federal taxation as of the date of transfer. The tax treatment of such lands is to be the same as any other lands held by the United States in trust for an Indian tribe.

Section 6

This section provides that the State of Oregon shall exercise criminal and civil jurisdiction within the boundaries of the reservation in accordance with 18 U.S.C. 1162 and 28 U.S.C. 1360. This section also provides that retrocession of such jurisdiction may be obtained pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 77). Under section 403, for retrocession to become effective, the State has to ask the Secretary to accept retrocession. The Committee does not expect the Secretary to refuse the State's offer of retrocession if the Tribe is in agreement with such retrocession.

Section 7

Subsection (a) provides that within one year of enactment of this Act, the Secretary shall compile a membership roll of the Coquille Indian Tribe.

Subsection (b) paragraph (1) provides that until a tribal constitution is adopted, a person shall be placed on the membership roll if the individual is living, is not an enrolled member of another federally recognized tribe, is of Coquille ancestry, and posesses at least one eighth or more of Indian blood quantum. In addition such individual has to have been listed on the Coquille roll of August 29, 1960, or be entitled to be listed on such roll, or be a lineal descendant of an individual which was listed or could have been listed on such 1960 roll.

Regarding the prohibition against enrollment in another Indian tribe, the Committee does not intend this requirement to deprive any individual of his/her rights as an individual tribal member. Relinquishment of membership in another Tribe may occur concurrently with or as soon as possible after enrollment in the Coquille Indian Tribe.

Subsection (b) paragraph (2) provides that after the adoption of a tribal constitution, said constitution shall govern membership in the Tribe. However, in addition to any other membership requirements provided in the tribal constitution, this legislation requires that members shall be of Coquille ancestry and that they not be members of any other Federally recognized Indian tribe.

Subsection (c) provides that for the purpose of subsection (b) of this section, the Secretary shall accept any available evidence establishing Coquille ancestry and the required amount of Indian blood quantum. However, the Secretary shall accept as conclusive evidence of Coquille ancestry information contained in the Coquille roll compiled by the Bureau of Indian Affairs on August 29, 1960, and shall accept as conclusive evidence of Indian blood quantum the information contained in the January 1st, 1940, Census Roll of non-reservation Indians of the Grand Ronde-Siletz Agency.

Section 8

This section provides that until a new tribal constitution is adopted, the Tribe's governing body shall be an Interim Council. The members of this Interim Council shall be the current members of the Coquille Tribal Council.

Section 9

Subsection (a) provides that upon the completion of the tribal membership roll, and upon the written request of the Interim Council, the Secretary shall conduct an election for the purpose of adopting a constitution for the Tribe. Except as provided in this section, the election shall be conducted as provided in section 16 of the Indian Reorganization Act of 1934.

Subsection (b) provides that not later than 120 days after the Tribe adopts a constitution, the Secretary shall conduct an election for the purpose of electing tribal officials as provided in the Tribal constitution.

COST AND BUDGETARY CONSIDERATIONS

The cost and budgetary impact of H.R. 881, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 12, 1989.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 881, the Coquille Restoration Act, as ordered reported by the Senate Select Committee on Indian Affairs on June 9, 1989.

This bill would grant federal recognition to the Coquille Indian Tribe. Although the bill does not specifically authorize the appropriation of funds, it would make all members of the tribe eligible for all services and benefits available to federally recognized Indian tribes. Thus, while no additional expenditures are mandated by the bill, relevant federal agencies would be required to include members of the tribe among those eligible for benefits and may seek additional funds in order to provide such benefits. CBO estimates that the average annual cost of services and benefits provided nationally is about $3,000 per eligible Indian. If this average is applicable to the Coquille Tribe, the annual cost would be about $1.7 million.

H.R. 881 would also require that the Secretary of the Interior prepare an economic development plan in conjunction with the tribe. Based on information from the Bureau of Indian Affairs, we estimate that this will cost about $75,000 per year in fiscal years 1990 and 1991.

H.R. 881 would allow the Coquille Indian tribe to be considered an Indian tribe for purposes of the Indian Tribal Government Tax Status Act. Under federal tax law, the tribal government is given the same tax treatment as a state government with respect to certain excise taxes, tax exempt bonds, and deductible contributions to the tribe. CBO estimates that the revenue loss from this provision would be insignificant.

This bill could result in some loss of property tax revenues to state and local governments. Under H.R. 881, land may be turned over to the Secretary of the Interior to be held in trust for the tribe. Since such transfers would be voluntary, it is not possible to estimate the size of the revenue loss that would result.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

EXECUTIVE COMMUNICATIONS

The legislative report on H.R. 881 provided to the House Committee on Interior and Insular Affairs is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, May 9, 1989.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter provides the Committee with our views on H.R. 881, "To provide for restoration of the Federal trust relationship with, and assistance to the Coquille Tribe of Indians and the individual members consisting of the Coquille Tribe of Indians, and for other purposes."

We are opposed to enactment of H.R. 881. Instead, we recommend that the legislation provide those groups which were tribes or identifiable communities and that were terminated under the Western Oregon Termination Act of 1954 the opportunity to petition for Federal acknowledgment under the Bureau of Indian Affairs' (BIA) Federal acknowledgment process (25 CFR 83). We estimate that not more than two or three groups may be in this category since Congress has already restored those tribes that we know had ongoing identifiable communities.

H.R. 881 would provide for Federal recognition of the Coquille Tribe of Indians, and confer tribal membership on certain individual Indians. In addition, H.R. 881 would restore all rights and privileges of the tribe that were diminished or lost under the Western Oregon Termination Act of 1954. The bill would also provide that the tribe, and its individual members, would be eligible for all Federal services and benefits furnished to Federally recognized Indian Tribes or their members without regard to the existence of a reservation for the Coquille Tribe.

H.R. 881 would also require the Secretary to work with the Coquille Tribe to develop an economic dvelopment plan for the tribe. The Coquille roll that was established for the purposes of making a per capita distribution of judgment funds under the Western Oregon Judgment Fund would be declared open for the addition of new enrollments for a membership roll. Finally, the bill would provide for the adoption of a constitution for the tribe. Tribal government would be handled by an interim tribal council while the new government is being formed.

The Western Oregon Termination Act of 1954 (68 Stat. 724, 25 U.S.C. 691 et seq., August 13, 1954) provided for the termination of Federal services to western Oregon Indians based on their status as Indians. It also terminated the trust status of the individual and reservation lands of these Indians. Specifically, the 1954 Act terminated the "tribe, band, group or community of Indians west of the Cascade Mountains of Oregon," including the Grande Ronde and Siletz Reservations and a list of some 58 tribes and bands, including the Coquille. The tribes and bands listed in the 1954 Act were terminated because, even though there was evidence that these bands and tribes historically existed in Oregon, they were not represented as modern entities at the time of the 1954 Act. Those tribes or groups terminated by the 1954 Act, including the Coquille, are precluded from applying for Federal acknowledgment under the Department's Federal acknowledgment regulations (25 CFR

Part 83). Therefore, absent Congressional removal of that bar, the Coquille are barred from petitioning for Federal acknowledgment through administrative procedures.

The Upper and Lower Coquille are among the bands and tribes listed in the 1954 Act that were located in southwestern Oregon in 1855. At that time, the Coquille Tribe was moved to the Siletz reservation, where they took up residence with other bands and tribes from the area. Substantial doubt exists as to whether there was a federally recognized Coquille Tribe away from the Siletz reservation subsequent to 1855. The Coquille that resided on the Siletz reservation eventually assimilated into the other bands and tribes that were also living on the reservation, and the tribe ceased to exist as a separate entity.

The Administration has six criteria to be considered in determining whether to support the restoration of a terminated tribe. These criteria are:

1. There exists an ongoing, identifiable community of Indians who are members of the formerly recognized tribe or who are their descendants;
2. The tribe is located in the vicinity of the former reservation;
3. The tribe has continued to perform self-government functions either through elected representatives or in meetings of their general membership;
4. There is widespread use of their aboriginal language, customs, and culture;
5. There has been marked deterioration in their socioeconomic conditions since termination; and
6. Their conditions are more severe than in adjacent rural areas or in other comparable areas within the State.

Although the BIA has not done detailed research on the Coquille group, they have prepared a study entitled "Comments on the Coquille Reservation Act" (1988, copy enclosed). This study shows that, up to this point, the Coquille have not been able to establish that they were a continually existing tribal entity at the time of the 1954 Act. In addition, the Coquille have not been able to submit documentation sufficient to support a finding that an ongoing political tribal entity has continued to exist as required by the Department's Federal acknowledgment regulations.

While evidence has been presented to support a claim of continuing tribal existence, it is not persuasive. It is true that the Coquille "Tribe" was formed in the 1950's, at the time of the Western Oregon Judgment Fund, and that funds were awarded to this tribe. However, the Coquille "Tribe" was established solely for purposes of receiving these judgment funds, and not for purposes of showing the existence of a separate tribal entity.

In addition, 6 acres of land at Empire, Oregon, were taken in trust as tribal land in 1940 for the Coos and others. Subsequent to the 1954 Act, the land was donated to the city of Empire, Oregon. The deed refers to the Coos, Lower Umpqua, Suislaw, and Coquille. However, the listing of the name "Coquille" on a deed does not prove that the Coquille are a separate entity.

Finally, there is a roll, identified in H.R. 881 as the "Coquille Roll compiled and approved by the Bureau of Indian Affairs on

August 29, 1960." This roll is a list of those individuals of Coquille ancestry who successfully applied for the Coquille portion of the Western Oregon Judgment Fund. This roll is by no means a tribal membership roll and should not be used to imply that either a tribal membership roll or a tribe exists. See S. Rep. No. 2219, 83d Cong. 2d Sess. (1954).

For these reasons, we strongly oppose attempts to extend Federal recognition to the Coquille and restore the Federal trust relationship through this legislation. If such legislation were enacted, the Congress could be recognizing a tribe that has no legitimate claim to tribal sovereignty. Instead, we recommend that the Coquille groups which were tribes or identifiable communities and that were terminated under the 1954 Act be required to establish their claim to tribal sovereignty as all other groups must do. To that end, this legislation should provide that groups may petition for Federal acknowledgment under the established administrative process of the BIA. While we do not currently believe there is convincing evidence that a Coquille Tribe existed at the time of the 1954 Act, the Coquille should be given the opportunity to make their case. Evaluation of the claim under the six criteria discussed above will assure that the merits of their case will be fully considered.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W.P. RAGSDALE,
Acting Assistant Secretary.

CHANGES IN EXISTING LAW

There are no changes in existing law.

○

SEC. 803. AUTHORIZATION OF APPROPRIATIONS.

In furtherance of the purposes of this title, there is hereby authorized to be appropriated the sum of $2 million.

Amendment No. 5150

Mr. HATFIELD. Mr. President, I understand that there is a substitute amendment at the desk offered by myself and I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Oregon [Mr. Hatfield] proposes an amendment numbered 5150.

Mr. HATFIELD. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The text of the amendment is printed in today's Record under "Amendments Submitted.")

Mr. HATFIELD. Mr. President, as my colleagues know, at the end of this year, I will leave the Senate and return to the inviting shores of Oregon. Oregon is the State of my birth and the State that I have labored to represent for over four decades. It has never been a mystery to me why so many have been drawn to my State. The rich pioneer spirit of Oregon's citizenry is matched only by the blessings of the State's bountiful natural treasures.

I am pleased to speak today about legislation that will ensure that several of Oregon's most significant natural treasures will be protected for future generations. This legislation, the Oregon Resources Conservation Act, of which I am the proud sponsor, includes eight titles addressing a host of natural resource issues. Many of the issues within these titles have been the subject of great debate and lingered unresolved for years.

. . .

The fifth title of *S. 1662* would establish the Coquille Forest near the town of Coos Bay, OR. During my Senate career, it has been my pleasure, and I believe my obligation, to take an active role in the restoration of Federal recognition to a number of Indian tribes in the State of Oregon. One of those tribes, the Coquille Tribe from near Coos Bay, OR, was restored in 1989. In the Coquille Restoration Act, *Public Law 101-42*, which I was proud to sponsor in the Senate, a requirement was included that the Secretary of the Interior and the tribe develop and submit a plan for the tribe's pursuit of economic self-sufficiency.

The Coquille Tribe took that mandate to heart and developed and submitted an extraordinarily comprehensive plan. Wisely, I think, the plan encompassed self-sufficiency initiatives across a diverse range of projects. The centerpiece of the plan was a proposal to establish a significant forest land for the tribe within its aboriginal territory. The overall goal of the plan and the forest are to move the standard of living for the members of the Coquille Tribe closer to that of the people of Oregon overall and to provide for the cultural restoration of the Coquille people.

The Coquille Tribe's forest proposal is not, nor is this legislation, some new and novel precedent. Land bases have already been established for a number of federally recognized Oregon tribes, including the Grand Rondes, Siletz, Warm Springs, and Umatillas. These tribal land bases range from 3,600 acres to 640,000 acres. This title would establish a 5,400-acre land base for the Coquille Tribe. Hardly a precedent in either size or action.

Moreover, the Coquille proposal is quite innovative and unique. The proposal originally developed by the Coquille Tribe was a cutting-edge, scientifically based plan to manage the land. The plan would have used environmentally sensitive methods of land management to benefit not only the tribe but the surrounding communities as well. This land management approach was as innovative as any I have seen during my public career, and it prompted me to lend my support to the tribe's effort.

This provision is intended to provide a measure of restitution to the Coquille Tribe. This land was forcibly taken from its inhabitants, an act that I think anyone today would decry as unjust. In the past, atrocities have been heaped upon Oregon's native American tribes, including the Army's efforts to round up the southwestern Oregon tribes like cattle and march them hundreds of miles to government-created Indian reservations at Siletz and Klamath Falls.

To the tribes affected by these U.S. Government policies, the act of uprooting them from their homelands and herding them to far-away reservations

destroyed their culture and killed many of their people. These acts were the equivalent of the ethnic cleansing we have seen in recent years against the Muslim people in Bosnia. The restoration of 5,400 acres could never atone for the hardships imposed upon the Coquille people. It can, however, begin to help restore some semblance of culture and a tie to the land that our Federal Government attempted to destroy over 150 years ago.

I have gathered as much public input on the Coquille Tribe forest proposal as on any single legislative effort throughout my entire Senate career. I held two Senate hearings on the matter, one in Salem, OR, and one in Washington, DC. I also have received many letters and phone calls carefully analyzed related public polls, and reviewed newspaper editorials. All of these factors have contributed to the 5,400-acre proposal I have developed.

The forming of this title as it appears today in the substitute has been very challenging. The myriad interests of the Interior Department, the people of Coos County, the logging and environmental communities, the State of Oregon, and certainly the Coquille Tribe have brought together starkly divergent viewpoints.

This title reflects many of the elements from the tribe's earlier proposal, but it is also very different. To accommodate the diversity of interests, and to do so within the parameters of the current discourse regarding the Federal lands, I have fashioned a unique and scaled-down hybrid. I must say that in so doing, the Coquille Tribe has made some very substantial concessions.

First, title five creates a Coquille Forest of only approximately 5,400 acres in size. While the parcels are shown on a BLM map, referenced in the legislation, for clarity I am adding the legal descriptions in the Record. The Coquille Forest consists of the Federal portions of the following applicable State and Federal forestry and environmental laws, specifically including critical habitat descriptions:

Willamette Meridian West, Oregon

T28S R10W S. 30,33

T28S R11W S. 14,25,26

T29S R10W S. 5

T30S R11W S. 5,7,15,24,25,29,33

T29S R11W S. 23 SE\1/4\ SE\1/4\

S. 26 E\1/2\ NE\1/4\

S. 26 SW\1/4\ NE\1/4\

S. 26 N\1/2\ SE\1/4\

T29S R12W S. 26 S\1/2\ SW\1/4\

S. 35 NE\1/4\ NW\1/4\

S. 35 NW\1/4\ NE\1/4\

Second, a 2-year transition period is required prior to the Forest transferring into trust for the tribe. To preserve Federal timber revenues to the O&C Counties, the Interior Secretary is authorized to designate an appropriate amount of nearby Federal public domain land into O&C status.

Third, after the forest is transferred to the Assistant Secretary for Indian Affairs, its management must be consistent with the standards and guidelines of adjacent and nearby Federal forest plans. While this consistency requirement is to extend into the future, it should be noted that I do not anticipate that this requirement will foreclose the tribe from realizing at least some significant cultural or economic benefits from its forest.

Fourth, the Assistant Secretary for Indian Affairs is to manage the Coquille Forest pursuant to all designations under the Endangered Species Act. Federal log export restrictions will apply to logs from the Coquille Forest, and competitive bidding is specifically required on all sales.

Fifth, this statute assures continued public access and State regulation of hunting and fishing. Conversely, it is expected that tribal access is assured to all its parcels.

Sixth, Federal law and policies fostering Indian self-determination are recognized by providing opportunity for the tribe to assume some or all of the management of the Coquille Forest. As a requirement for the tribe assuming such management functions, a memorandum of agreement is required with the State of Oregon that details the State's jurisdiction and regulatory functions, and which incorporates the requirements for management consistency with surrounding plans. To assure enforceability of the MOA, both the tribe and the State are authorized to take each other to Federal court.

Finally, the title provides that any affected citizen may sue the Secretary of the Interior for violations of the title. This is not intended to expand laws or case

law related to standing to sue. The court is specifically authorized to order the Secretary to withdraw any management authority delegated to the tribe for the management of the forest.

I want to emphasize again the unique arrangement of this provision. It is intended to establish a Coquille Forest for the Coquille Tribe that will mesh into the broader forest management of Coos County. Within that context, the Coquille Forest is to provide a basis for restoring the tribe's culture as well as providing economic benefits.

I hope this proposal, with its relatively modest acreage and the required adherence to the most environmentally friendly forest management plan ever implemented in the Pacific Northwest-President Clinton's forest plan-is successful and can become a model for how our Nation deals with other claims by native American tribes.

. . .

Section-by-Section Analysis

s. 1662-oregon resources conservation act of 1996

. . .

Title V-Coquille Tribal Forest

Creates 5,400 acre Coquille Forest from BLM lands in SW Oregon.

Management of land will remain with BLM for two years, with no change in existing management structure or funding distribution. Transition plan is authorized.

After two years, title and management will be transferred to Bureau of Indian Affairs. The lands will be held in trust for Coquille Tribe (restored in 1989).

After transfer to BIA, land will be managed consistent with President's Forest Plan and applicable forestry and environmental protection laws.

All timber sales will be subject to competitive and open

bidding procedures.

. . .

The PRESIDING OFFICER. The Senator from Oregon, Mr. Wyden.

Mr. WYDEN. . . I believe that no bill is ever perfect, and we all have things that we might want in an ideal situation. The proposal to create the Coquille Tribal Forest has caused concern, has caused anxiety among a number of our citizens. I commend Senator Hatfield for his hard work in addressing many of these concerns, while at the same time remaining true to his commitment to the Coquille tribe. I believe that the provision in this legislation is improved by reducing greatly the size of the transfer. I also believe it has been improved by requiring the land to be managed under applicable State and Federal forestry and environmental protection laws.

The bill also would require that these lands be subject to critical habitat designations under the Endangered Species Act and the standards and guidelines of the Federal forest plans adjacent or nearby forest lands apply now and in the future . . . .

SECRETARIAL ORDER: *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)*

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. 3206, 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 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

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Secretary of the Interior

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Secretary of Commerce

Date: June 5, 1997

APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206

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 Section 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 pgovernments 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. i

(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.