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ESA and Tribal Rights"

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I. INTRODUCTION: The Endangered Species Act ("ESA") is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" and provides a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Tennessee Valley Authority v. Hill*, 437 U.S. 154, 180 (1978). The ESA raises a wide array of complex and vital Native American legal, cultural, religious, social and economic interests. *See, generally*, Liebesman & Peterson, *Endangered Species Deskbook* (Environmental Law Institute, Washington, D.C., 2003) at 63-70. These interests are often overlooked or marginalized by the public, agencies, scientific institutions and politicians even when they are the most significantly affected by ESA issues. It is important for these sectors to understand the unique relationships between the ESA and Native Americans.

The ESA is a two-edged sword. The ESA can: (i) curtail Native American treaty rights, abridge cultural integrity, and infringe upon religious practices when plants and animals that are depended upon by Native communities have become threatened or endangered as a result of non-Indian activity;² or (ii) be a complimentary tool for protecting fundamental tribal rights, which are otherwise ignored, neglected or un-enforced, as seen in the Klamath Basin in 2001.

Section II identifies ESA and Native American relationships. Section III explores those

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² *See*, U.S. DOI, Secretarial Order No. 3206 on ESA and tribal rights (6/5/97) (http://elips.doi.gov/elips/sec_orders/html_orders/3206.htm) This Order attempts to harmonize conflicting government ESA and Indian trust obligations.

relationships in a case study in the Klamath River Basin of Southern Oregon and Northern California.

II. ESA AND NATIVE AMERICAN RELATIONSHIPS.

A. INDIANS AND THE NATURAL WORLD.

1. Plants and Animals are Sacred. Aboriginal hunter, fisher and gatherers consider plants and animals sacred. Over millennia, spiritual ties evolved. Beliefs were enriched by teachings & power received from plants and animals. *See, e.g., Washington v. Fishing Vessel Assoc.*, 443 U.S. 658, 665 (1979) (*Fishing Vessel*) (Religious rites were intended to insure the continual return of the salmon and trout."); *Kandra v. United States*, 145 F. Supp.2d 1192, 1201 (D. Or. 2001) (*Kandra*) (Many customs and traditions revolve around the fish harvest, which is now reduced, or in the case of the suckers, non-existent."); Secretarial Order No. 3206, *supra*, Sec. 4 (Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places."). Under indigenous American ethics, man is *not* superior to plants and animals; and their extinction is a foreign, morally repugnant concept.

a. Statutes: American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. 1996 (established United States policy to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians.); AIRFA legislative history, H.R. Rep. No. 1308, 95th Cong., 2nd Session, 3, reprinted in 1978 U.S. Code Cong. & Ad. News 1262, 1263 (insensitive enforcement of the ESA and other conservation statutes have interfered severely with the culture and religion of American Indians.); AIRFA Amendments of 1994, 42 U.S.C. 1996a (religious use of peyote cactus plant protected); Marine Mammal Protection Act, 16 U.S.C. 1371(b) (exemption for taking marine mammals for subsistence or cultural handicraft purposes); Bald Eagle Protection Act, 16 U.S.C. 668a (exemption for religious purposes of Indian tribes). *See also*, Wis. Stat. Ann. 29.106 (Persons who are enrolled members of the Ho-Chunk nation and residents and who practice the traditional religion of the Ho-Chunk people may hunt deer during daylight hours for the members use in religious ceremonies without obtaining a license under this chapter.).

b. Executive Branch: Secretary Andrus, Federal Agencies Task Force, Aug.1979,

American Indian Religious Freedom Act Report (authorized by Pub. L. No. 95-341, 92 Stat. 469 (1978)) at 68 (Native traditional religions are based on the natural environment. Their practitioners rely on natural substances for their religious observances. Certain wildlife, plants and minerals – which may be worn, carried or simply present – are considered sacred and fundamental to the religious and ceremonial life.”); Secretarial Order No. 3206, *supra*, Principle 4 (The Departments shall take into consideration the impacts of their actions and policies under the [ESA] 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.)

c. Cases on religious/cultural use of animals & plants: *Fishing Vessel*, 443 U.S. at 665 (salmon & trout); *Anderson v. Evans*, 2002 WL 31856697, *4, *6 (9th Cir. 2002) (whale); *Rupert, Director, U.S. Fish & Wildlife Service*, 957 F.2d 32 (1st Cir. 1992) (eagle); *Peyote Way Church of God v. Thornberg*, 922 F.2d 1210, 1216 (5th Cir. 1991) (cactus plant); *Kandra*, 145 F. Supp.2d at 1201 (Coho & cwam) *Frank v. State*, 604 P.2d 1068 (Alaska 1978) (moose). *See also*, Miller, Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling,” 25 *American Indian Law Review* 165, 184-86 (2000-2001);³ *and compare*, the movie *Whale Rider*”(whale is a Maori ancestor). *See also*, *City of Albuquerque v. Browner*, 97 F.3d 415, 428-29 (10th Cir. 1996) (religious use of clean water).

When Native religious use of plants or wildlife is restricted or denied because of ESA protections, free exercise issues involving the human right of worship arise. *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987) (free exercise claim to hunt endangered panthers). AIRFA was largely motivated by laws such as those seeking to preserve endangered species; *Frank*, 604 P.2d at 1074 n. 9.

2. Animals and Plants are Indian subsistence, treaty, and trust resources. Native

3 Makah whaling is also steeped in spiritual, religious and ritualistic beliefs. The ritual or spiritual nature of whaling is based on the idea that humans are too insignificant to capture such enormous and powerful creatures if the whale does not want to be taken or does not cooperate in its capture. Ritual preparation for months before whaling ensures that the Makah whaler is pure in heart and deserves to take a whale. In fact, Makah and other native whalers believed that the spiritual preparation was as important as the whaling equipment and methods they used.

The Makah practice religious rituals in the woods in private with the goal of finding and securing the aid of intermediary spirits or *tamanos*, which guarded the destinies of individuals. They would bathe ritually in lakes and in the ocean and would swim imitating a whale by spouting water from their mouths. They would also purify themselves by self-flagellation with nettles or hemlock branches. Moreover, the Makah believed in human to whale transformations. . .

Once a whale was struck, the Makah used spiritually powerful family songs to turn a harpooned whale towards shore. The Makah would pray to the whale and sing to it, begging its spirit to turn toward the shore where the people stood ready to give it praise and to honor it as a guest of the village with ceremonies and rituals.

communities often depend on hunting, fishing and gathering for subsistence, cultural integrity and identity, health, and well-being. *Fishing Vessel*, 443 U.S. at 466 (Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year around use, both for themselves and for others through sale, trade, barter and employment Id., at 406. See also, 520 F.2d 676, 682 (“The Indians west of the Cascade Mountains were known as ‘fish-eaters; their diets, social customs, and religious practices centered on the capture of fish.); *Kandra*, 145 F. Supp.2d at 1201 (The Klamath and Yurok Tribes rely on the fish as a vital component of the Tribes cultures, traditions, and economic vitality.”)

a. Hunting, fishing & gathering protected by treaty, laws, executive order.

i. Statutes: Alaska National Interest Lands Conservation Act, 16 U.S.C. 3111, 3113, 3114 (Alaska Native subsistence); Marine Mammal Protection Act, 16 U.S.C. 1371(b) (1)-(3) (Alaska Native subsistence). *See, generally*, Thomas R. Berger, *Village Journey* (New York: Hill and Wang 1985) (for the meaning of subsistence” to Alaska Natives).

ii. Cases: *Fishing Vessel*, 443 U.S. at 664-669 (Stevens Treaty tribes shared a vital and unifying dependence on anadromous fish); *United States v. Adair*, 478 F. Supp. 336, 339 (D. Or. 1979) (*Adair I*) (Historically, the Klamath Indians depended on the Marsh, and its surrounding rivers, lakes and forests for food. There they fished, hunted waterfowl and game, gathered edible plants. . . Even now, hunting, fishing, and gathering in the area are important to the Klamath Indians.”), *affd*, 723 F.2d 1394, 1409 (9th Cir. 1983) (*Adair II*); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (Tribes were heavily dependent on fishing when treaty was signed); *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir. 1974) (Hunting & trapping play highly significant role in the lives of the Klamath.).

iii. Treaties: *Stevens Treaties*: Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliot, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty of Neah Bay, 12 Stat. 939 (including whaling & sealing); Treaty with the Yakama, 12 Stat. 951; Treaty of Olympia, 12 Stat. 971. *Klamath Treaty*: Treaty of 1864, 16 Stat. 707 (Article I secures the exclusive right of taking fish in the streams and lakes [of the Reservation], and gathering edible roots, seeds, and berries within its limits.

iv. Executive Orders and Statutes: *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (statute); *Parravano v. Babbitt*, 70 F.3d 539, 544-48 (9th Cir.

1995), *cert. denied*, 518 U.S. 1016 (1996) (executive order created Hoopa Valley and Yurok fishing rights in the Klamath River).

b. Endangered species can be Indian treaty and trust natural resources. When Tribes can no longer hunt, fish or gather because of federal conservation protections, vital treaty rights are diminished, restricted or abrogated. *United States v. Dion*, 476 U.S. 734 (1986) (Bald Eagle Protection Act abrogated Indian treaty); *Anderson v. Evans*, 2002 WL 31856697 (9th Cir. 2002) (Marine Mammal Protection Act regulates Makah treaty whaling right).

i. Tribes have strong interests in holding agencies accountable for protecting, conserving & restoring wildlife and critical habitat. *Kandra*, 145 F.Supp.2d at 1197 (The endangered suckers, called cwam by the Klamath Tribes, play an integral role in the Klamath Tribes customs and traditions. Prior to its closing in 1986, the Klamath Tribes maintained a cwam fishery which provided a source of food and income for tribal members.)

ii. Agencies have obligation to protect tribal trust resources such as the sucker fish and salmon” in addition to their ESA obligations. *Kandra*, at 1197 (citing *Klamath Water User Protective Association v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 44; *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016; *Adair II*, 723 F.2d at 1408-11, 1415.); *Pyramid Lake Paiute Tribe v. U.S. Dept. Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (The Secretary has a fiduciary duty to preserve and protect the Pyramid Lake fishery); *Pacific Coast Federation of Fishermans Assoc. v. U.S. Bur. Reclamation*, 138 F. Supp.2d 1228, 1230 (N.D. Ca. 2001) (The Bureau of Reclamation has an obligation to protect Tribal trust resources, including the Klamath River Coho salmon.”); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973) (where an Indian trust relation exists, the burden rests with the Secretary to justify with precision any diversion of water from the tribe; a judgment call” is simply not legally permissible.”).

3. Indigenous Habitat, Cultural Survival and Human Rights. [T]he major cause of extinction is destruction of natural habitat; ” *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985, 994-95 (D. Haw. 1979). It is also a major cause of extinction of indigenous peoples and cultures. The world’s indigenous cultures are disappearing at an alarming rate. *See*, *Lost Tribes, Lost Knowledge: When Native cultures disappear, so does a*

trove of scientific and medical wisdom," *Time Magazine* (Sept. 23, 1991) cover story at 46-56 (Since 1900, 90 of Brazils 270 Indian tribes have completely disappeared, while scores more have lost their lands or abandoned their ways. More than two-thirds of the remaining tribes have populations of fewer than 1,000. Some might disappear before anyone notices; " id. At 498).⁴ Native people are harmed by habitat destruction, since their lives and cultures are inextricably tied to plants and animals in indigenous habitats. *Klamath Tribes v. United States*, 1996 WL 924509, *2 (D. Or. 1996) (Throughout the remainder of the Nineteenth Century and into the Twentieth Century, the Tribes relied on the reservation lands and resources to provide the subsistence, cultural, and spiritual needs of Tribal members.) It is axiomatic that Native culture is threatened and endangered when aboriginal foods, medicines and habitats are destroyed. Starvation, sickness, deleterious dietary change, military subjugation and even genocide occurred in the United States from the destruction of Native American plants, animals and indigenous habitats. Habitat destruction (and resulting extinction of species) is a paramount human rights concern among the world's indigenous peoples. UN's *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/SUB.2/1992/2/Add.1 (1994), Pt. VI, Art. 28 (Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources as well as to assistance for this purpose from States and through international cooperation).⁵

a. Historical examples:

⁴ Today, with little notice . . . vast archives of knowledge and expertise are spilling into oblivion, leaving humanity in danger of losing its past and perhaps jeopardizing its future as well. Stored in the memories of elders, healers, midwives, farmers, fishermen and hunters in the estimated 15,000 cultures remaining on earth is an enormous trove of wisdom. This largely undocumented knowledge base is humanity's lifeline to a time when people accepted nature's authority and learned through trial, error and observation. But the world's tribes are dying out or being absorbed into modern civilization. As they vanish, so does their irreparable knowledge. Id. 46.

⁵ Available at: <http://www1.umn.edu/humanrts/instree/declra.htm> pending in the UN's human rights frame, this proposed international convention was drafted, and is supported, by the world's indigenous peoples.

- (i) Rainforest destruction threatens aboriginal tribes from Amazonia to Washington State.
- (ii) Buffalo slaughter brought starvation & collapse of Plains Indians, cultures, freedoms;
- (iii) Salmon decimation threatens treaty-protected way of life of all Tribes in Pacific Northwest.

Incalculable harm to indigenous people caused by destruction of aboriginal habitat is well-known in cultural anthropology. That harm can no longer be ignored, tolerated or continued by the American public, policy makers and scientific institutions.⁶

b. Tribal ethics are related to ESA goals, American social change & adaptation.

The plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinction, whatever the cost. *Tennessee Valley Authority v. Hill, supra*, 437 U.S. 153;; *Kentucky Heartwood, Ind. v. Worthington*, 20 F. Supp.2d 1076, 1083-84 (E.D. Ky. 1998). ESA goals are in harmony with Native American values. ESA goals reflect a sea-change in America.

c. Toward an environmental ethic based on ESA principles: After 500 years, our nation has matured. We are no longer colonists; and we want to become stewards of the land where we live. This is part of becoming indigenous” to place. Four ESA principles provide a foundation for an environmental ethic:

i. Animals and plants have intrinsic; incalculable value. *TVA v. Hill*, 437 U.S. at 168-69 (Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species.”) In passing the ESA, Congress viewed the value of endangered species as ‘incalculable. ” *Id.* at 187-88. *See also, Kandra*, 145 F.Supp.2d at 1201 (Threats to the continued existence of endangered and threatened species constitute *ultimate harm.*) (Emphasis supplied); *Bensman v. U.S. Forest Service*, 984 F. Supp. 1242, 1250 (W.D. Mo. 1997) (“ [D]eath is an irreparable harm and the extinction of a species is incalculable. While those individual timber companies will regrettably lose a few contracts, this harm is negligible in light of the continuing decline of the Indiana bat. The public interest lies on the side of protecting the endangered species.)

⁶ People find repugnant political and economic exploitation of indigenous peoples and habitats in the Third World but overlook similar conduct here at home.

ii. Its simplistic and ethnocentric to measure a species worth by dollars. The value of life cannot be measured by money. *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (From the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system."); *Rivers v. U.S. Army Corps of Engineers*, 2003 WL 21638223, *26 (D.D.C. 2003) (Defendants have presented primarily economic injuries that would result . . . , but the Court finds that loss of the least tern, piping plover, and pallid sturgeon cannot be translated into such simple economic terms, because as the Supreme Court has noted, the 'value of this genetic heritage is, quite literally, incalculable.); *GDF Realty Investments, Ltd. v. Norton*, 169 F. Supp.2d 648, 662 (S.D. Tex. 2001) (Quite obviously, it would be difficult for a court to balance the loss of a sum certain – even \$100 million – against a congressionally declared 'incalculable value. . .").

iii. Species importance cannot be measured by their scientific value" to man. *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (. . . with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the worlds environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants, is also irretrievably lost. S. Rep. No. 526, 91st Cong., 1st Session. (1969), *reprinted in* 1969 U.S.C.A.N. 1413, 1415, *and quoted in Roman*, 929 F. Supp. at 508. The Supreme Court has also recognized Congress concern 'about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet. *TVA v. Hill*, 437 U.S. at 178-79 . . .). *See also*, H.R. Rep. No. 412, 93rd Cong., 1st Session, at 4-5 (1973) ([T]he value of [endangered species] genetic heritage is, quite literally, incalculable . . . From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.)

iv. Endangered species are more important than projects which jeopardize their continued existence or critical habitat. Threats to the continued existence of endangered and threatened species constitute ultimate harm. *Kandra*, 145 F. Supp.2d at 1201. These species are far more important than projects which cause jeopardy to their continued existence or adversely affect their critical habitat. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003) (loss of species is irreversible and irretrievable" and this injury has an enduring and permanent nature"); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (In Congress's view, projects which threaten the continued existence of endangered species threatened incalculable harm; accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity scales to strike a different balance.");

Sierra Club v. Marsh, 816 F.2d 1376, 1383-84 (9th Cir. 1987) (Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities..."); *Palili v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985, 994-95 (D. Haw. 1979) (Congress determined that protection of any endangered species anywhere is of the utmost importance to mankind."). Endangered species have priority over the primary mission" of federal agencies. *Silvery Minnow*, 333 F.3d at 1114; *Kentucky Heartwood*, 20 F. Supp.2d at 1083-84; *Kandra* at 1200-01; *Pacific Coast Federation of Fishermen's Assoc. v. U.S. Bur. Reclamation*, 138 F. Supp.2d, 1128, 1239 (N.D. Ca. 2001) (*PCFFA I*). In particular, the rights of federal project irrigators do not override concerns protected by the ESA. *Carson-Truckee Water Cons. Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984); *PCFFA I* at 1249 n. 20 (citing, *Patterson*, 204 F.3d 1175, amended by 203 F.3d 1157, cert den., 531 U.S. 812); *Carson-Truckee Water Cons. Dist. v. Watt*, 549 F. Supp. 704 (under Endangered Species Act, Secretary was required to give lake fishery priority over all other purposes of dam above lake until species of lake fish and trout were no longer classified as endangered or threatened.)

B. COMMON ESA & NATIVE AMERICAN GOALS. Native American cultures, religions, economies, and rights depend upon healthy, harvestable animal and plant populations derived from productive habitats. The social values embedded in the ESA are ones long embraced by indigenous peoples across the world. In the United States, ESA prohibitions against activities which harm endangered species or their critical habitat also protect neglected Indian interests centered around such species. Conversely, Indian rights which require productive" habitat for such species aid the national effort to reverse the trend toward species extinction.

1. Indian Rights compliment ESA goals when they protect against activities that:

a. obstruct Indian fisheries or the exercise of treaty rights: *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87 (1918) (an extensive fish trap to catch 600,000 salmon in a single season, and . . . reduce the natural supply of fish accessible to Indians."); *Winans v. United States*, 198 U.S.371 (1908) (fishing wheel); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp.1504 (W.D. Wash. 1988) (boat marina would interfere with treaty fishing right); *Klamath Tribes v. United States*, 1996 WL 924509 (D. Or. 1996) (logging on federal land would impair treaty rights); *Confederated Tribes of the Umatilla Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (dam would inundate treaty protected fishing stations and impair treaty fishing right).

b. jeopardize wildlife, fish, or habitat: *Klamath Water User Protective Assn v.*

Patterson, supra, 204 F.3d 1206 (project operations to protect endangered fish and Indian treaty rights did not violate Reclamation water delivery contracts); *Kittias Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-35 (9th Cir. 1985)(project water released to protect salmon runs and treaty fishing rights); *Kandra*, 145 F.Supp.2d at 1197, 1198, 1204, 1210 (Reclamations decision to use project water to protect critical habitat of endangered, treaty protected fishery was upheld); *Klamath Tribes v. United States, supra*, 1996 WL 924509 at *6-7 (the federal government has a substantive duty to protect 'to the fullest extent possible the Tribes treaty rights, and the resources on which those rights depend. See, *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). . . In a written policy statement regarding management responsibilities, the Forest Service acknowledged its duty to manage 'habitat to support populations necessary to sustain Tribal use and non-Indian harvest, including 'consideration of habitat needs for any species hunted or trapped by tribal members.).

2. **Indian water rights for fishery purposes compliment ESA goals:**

a. The Winters doctrine: Water is necessary to sustain life" and essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. 546, 598-99 (1963) (*Arizona I*) Under the *Winters* doctrine, when the United States establishes an Indian reservation it intends to deal fairly with Indians and reserves sufficient water to fulfill the purposes of the reservation. *Winters v. United States*, 207 U.S. 564 (1908). The purpose & amount of the reserved water right is that which fulfills the purpose(s) of the reservation (agriculture, fishery or other purposes); and the priority date is the reservation date or, in some cases, time immemorial. *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) at 578-595. In stream flow water rights arise when necessary to fulfill an Indian fishery purpose. *Adair I and II; Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (*Walton II*).

b. Indian water rights prevent stream depletion below protected habitat levels: *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1985) (Junior irrigators may not deplete streams until after senior tribal fishing water rights are protected: To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can 'prevent other appropriators from depleting the streams (sic) water below a protected level. *Adair*, 723 F.2d at 1411; see *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985)); *Adair I and II, supra*. Compare, *Cappaert v. United States*, 426 U.S. 128 (1976) (reserved water rights of federal reservations).

c. Fish need water & habitat: Courts at all levels recognize the biological reality that low water flows can render habitat unable to support fish and can lead to their extinction.

i. Federal reserved water right cases: *Cappaert*, 426 U.S. at 134 (insufficient water level reduce[s] the ability of fish to spawn in sufficient numbers to prevent extinction"); *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410, 1413 n. 3 (9th Cir. 1990) (higher water levels are necessary to restore self-sustaining fish

population); *Carson-Truckee Water Cons. Dist. v. Clark*, 741 F.2d 257, 262-63 (9th Cir. 1984) (Fish cannot reproduce in water that warm . . . such a temperature renders it too hot for fish to reproduce successfully.); *Carson-Truckee Water Conservation Dist. v. Watt*, 549 F. Supp. 704, 707 (D. Nev. 1982) (low water causes extinction of a species);⁷ *Pyramid Lake Tribe v. Morton*, 354 F. Supp. 252, 255 (D.D.C. 1973) (decreased lake level threatens extinction and the continued utility of the lake as a useful body of water is at hazard”).

ii. Treaty fishing right cases: *Joint Board of Control v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (minimum stream flows and water levels for the Indian fishery”); *Kittitas*, 763 F.2d at 1035 (sufficient flows to protect salmon runs); *Coleville Confederated Tribes v. Walton*, 752 F.2d 397, 400, 404 (9th Cir.1985) (*Walton III*) (sufficient water ... to allow the establishment of the Omak Lake Fishery and permit natural spawning,” citing *Walton II*, 647 F.2d at 48); *United States v. Adair*, 187 F. Supp.2d 1273, 1275, 1276 (D. Or. 2002) (*Adair III*) (water levels that support productive habitat;” “[I]n order to provide the Tribe an opportunity to continue hunting and fishing on the reservation lands, it is axiomatic that there be sufficient water to support productive habitat so there may be game to hunt, fish to fish, as well as edible plants to gather.”), *vacated and remanded on other grounds sub. Nom, Braren v. United States*, __F.3d __ (9th Cir., July 21, 2003) (*Braren*); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *affd in part and revd in part on other grds.*, 736 F.2d 1358 (quantity of water sufficient to maintain suitable temperature for salmon habitat and survival) .

3. ESA provides a floor for protecting Indian rights. Since Indians are an impoverished minority,⁸ their senior rights are often un-quantified, ignored and unprotected. Non-Indians, with subservient rights, are allowed to severely deplete treaty-protected resources to the point of extinction.⁹ Only then does Society act to rescue and put them on life support” pursuant to Sec.

⁷ After the Orr-Ditch decree was entered, the government contracted with the Truckee-Carson Irrigation District (TCID) to provide water for the Newlands Project. Soon thereafter the level of the lake began to drop and a delta was exposed at the mouth of the Truckee River which in most years was too shallow for the fish to pass upstream to their spawning grounds. Another problem related to the temperature of the water. Lahonatan cutthroat trout require cooler water for spawning, available only above the Derby Dam. The Dam had a fish ladder, but it did not work well, and eventually it collapsed. By 1938, the level of the Lake dropped 40 feet. Soon thereafter the cutthroat trout became extinct. By spawning along the edges of the Lake where the fresh Truckee River water entered, the cui-ui barely survived. *Id.* 706-07.

⁸ *Reed Benson, Giving Suckers (and salmon) An Even Break: Klamath Basin Water and the Endangered Species Act*, 15 Tul. Envtl. L.J. 197, 236 (2002) (hereafter, *Benson*) (The Native American tribes [in the Klamath Basin] have been desperately poor for generations, largely deprived of their traditional sustenance lifestyle.)

⁹ *See, e.g., Benson* at 215-16 (Oregon knowingly allows junior irrigation diversions to use water in the

7 of the ESA by preventing federal actions that jeopardize their continued existence or critical habitat. 16 U.S.C. 1536(a)(2). As one commentator aptly noted:

[I]rrigators have been the primary users of Klamath Basin water for nearly a century even though they do not hold the highest legal claim to the water. The tribes, by right, should have been getting the water first, as mid-nineteenth-century water rights take priority over the 1905 right of the Klamath Project. Even after *Adair* confirmed the Klamath Tribes water rights in 1983, nothing really changed. Even after the Klamath River salmon fishery collapsed and Congress passed the Klamath River Basin Fishery Resources Restoration Act, nothing really changed in terms of water management. . . [T]he great failure of laws and institutions did not come in 2001 with the ESA [when, for the first time, irrigators did not get water because of the need to protect endangered species and tribal rights]. Rather, it was the failure of anything short of the ESA to make a meaningful difference in providing water for aquatic ecosystems that had reached the point of crisis."¹⁰

a. Agencies can limit project water use under Sec. 7 to avoid harming endangered species & their critical habitat.

i. Cases: *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109,119, 1136 (10th Cir. 2003) (Reclamation project must maintain sufficient river flows to avoid jeopardizing endangered fish). Cases often refer to twin federal ESA & Indian legal obligations: *Patterson*, 204 F.3d at 1213; *Kandra*, 145 F. Supp.2d at 1196-97; *PCFFA I*, 138 F.Supp.2d at 1230 (The Bureau of Reclamation has an obligation to protect Tribal trust resources, including the Klamath River Coho salmon. . . It also has an obligation under the ESA not to engage in any action that is likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or modification of the critical habitat of such a species.");

III. CASE STUDY - TRIBAL & ESA ISSUES IN THE KLAMATH BASIN

A. BACKGROUND: The ways of life in the Klamath Basin are dependent on water resources. Presently, communities fraught with environmental problems, endangered species and water shortage are heavily litigating over those resources. This hapless Basin is a microcosm for examining the relationship between ESA and tribal rights. *See, Benson, supra*, for an excellent

Klamath Basin -- home to numerous endangered, treaty-protected species – in derogation of unfulfilled senior Indian water rights recognized in *Adair I* and *II*.)

¹⁰ *Benson* at 237.

overview and analysis of Klamath Basin controversies (Make no mistake, the Klamath is just one of many places in the West where change comes slowly, where water demands far exceed the reliable supply, and where native people and species are still seeking an even break." id. at 238).

Here are Basin ingredients and root causes which give rise to serious water conflict.

1. The presence of Indian tribes with senior, but unprotected, rights: The Basin is the aboriginal homeland of several indigenous Indian tribes who have resided there as hunters, fishers and gatherers for thousands of years. Their aboriginal hunting, fishing, gathering and associated water rights were confirmed in United States treaties and executive orders during the Nineteenth Century when the Tribes ceded millions of acres to the United States. *Adair II*, 723 F.2d at 1414; *Parravano*, 70 F.3d at 541-42, 545.

2. The presence of failed water policy: Unfortunately, the nations promises to Indian tribes were quickly ignored by federal and state water policies encouraging non-Indians to farm arid desert land. In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects." *PCFFA I*, at 1229, quoting, *Patterson*, 15 Supp.2d 990, 991092. To carry out this policy, the ecosystem was entirely revamped in a grandiose experiment that epitomizes failed, unsustainable western water policies of the last Century: 1) scarce water was over appropriated, 2) wetlands drained, 3) lakes lowered, 4) river courses polluted, altered and re-tunneled through massive inter-basin plumbing. No other interests or uses were taken into account by this simplistic mono use" Basin water policy where all available water was committed to a single use for nearly a century.

3. The presence of endangered species and other environmental problems: Today, Basin natural resources are overtaxed and life is not sustainable. Most streams and water bodies fail to meet federal and state clean water standards.¹¹ Salmon are extinct in the upper Basin. Several fish species and eagles are threatened and endangered; and tribal economies dependent on those resources have collapsed. Farming through heavy federal subsidies prevails.¹² There is not enough water to go around.

B. OUTBREAK OF WATER WAR IN 2001:

¹¹ See, State of Oregon's Department of Environment Quality data for the Upper Klamath Lake Drainage: <http://www.deq.state.or.us/wq/TMDLs/TMDLs/htm>

¹² See, *gen.*, McCarthy, Crisis Profiteering: Inequities and Excesses of the Klamath Project Bailout (Klamath Forest Alliance, Nov. 2001), <http://www.klamathforestalliance.org>; Niemi, Fifield & Whitelaw, Coping with Competition for Water: Irrigation, Economic Growth, and the Ecosystem in the Upper Klamath Basin, (ECSNorthwest, Sept.2001).

1. At 198 Benson describes the crisis precipitated by above factors (ftnts omitted):

An extreme drought hit the Klamath River Basin . . . in 2001, and a remarkable water controversy soon followed. Hundreds of farmers, who for decades had reliably received irrigation water from the federal governments Klamath Project, were told, for the first time, that they would get none that year. Instead, the government would hold the water in Upper Klamath Lake and release it to flow down the Klamath River in an effort to ensure the survival of fish protected by the Endangered Species Act.

The irrigators and their political allies were outraged, and they complained loudly and bitterly that the Endangered Species Act had gone too far. Before long the Klamath Basin water crisis was receiving prominent coverage in the regional, national and even international media. Many stories basically portrayed a deceptively simple scenario; the federal government had abruptly broken its promise to deliver water to hard-working family farmers, wrecking their lives and communities, all for the sake of saving some endangered sucker fish that had no value to anyone.

In fact the Klamath Basin water crisis was nowhere near that simple, but the other elements of the story came out much more slowly and quietly. It was not all about farmers, suckers and the Endangered Species Act. There were also Native American tribes, commercial fishing families, conservationists, and birdwatchers. There were salmon, giant wild trout, hundreds of bald eagles, and millions of waterfowl. There were treaties, Supreme Court cases, and a host of other legal factors. The reality of the Klamath crisis is as complex and fascinating as the rich diversity of life, human and otherwise, that relies on Klamath Basin waters.

2. Competing legal interests: At the heart of the controversy lies the Klamath Project and its simplistic mono use" water policy which is at odds with a host of other legally protected, sometimes senior, water interests in the Klamath Basin. Courts have noted the impossible balancing act placed on federal water managers by their outmoded policy:

a. Cases: *Kandra*, 145 F.Supp.2d at 1196-97 (Reclamation must balance diverse, and often competing, demands for Project water. Reclamation must deliver water to Project irrigators in accordance with the rights held by the United States and the irrigators individual repayment contracts, subject to the availability of water. [Irrigation Districts] have rights to receive appropriated water pursuant to their contracts with Reclamation. Two national wildlife refuges . . . depend on the Project for water and receive large quantities of return irrigation flows and other Project waters . . . Under the ESA, Reclamation must not engage in any action that is likely to jeopardize the continued existence of an endangered species or result in the destruction or modification of the critical habitat of such a species. . . In 1998, two fish, the Lost River and short nose

suckers, were listed as endangered due to a decline in the species populations resulting from a fragmentation of aquatic habitat through damming, flow diversion, and decreased water quantity. . . The Coho salmon was listed as threatened under the ESA in 1997, in part, due to habitat degradation resulting from water diversions . . . Large numbers of bald eagles migrate into the Klamath Basin during the fall and winter. The eagles, listed as threatened under the ESA, rely heavily on the abundant waterfowl that use the [refuges] which receives water from Project operations. Finally, Reclamation must also consider the rights of Indian tribes, including . . . Klamath and Yurok Tribes, who hold fishing and water treaty rights in the Klamath River Basin. The Tribes retained these rights pursuant to treaties in which they ceded millions of acres of land to the United States. [Citing *Parravano* and *Adair*] The endangered suckers, called cwam by the Klamath Tribes, play an integral role in the Klamath Tribes customs and traditions. Prior to its closing in 1986, Klamath Tribes maintained a cwam fishery which provided a source of food for tribal members. . . The threatened Coho are equally important to the Yurok Tribe, providing a source of food, opportunities for employment and income, and the basis of Yurok customs and traditions. . . Reclamation has an obligation to protect tribal trust resources such the sucker fish and salmon. *Patterson*, 204 F.3d at 1213; *Parravano*, 70 F.3d at 547; *Adair*, 723 F.2d at 1408,-11, 1415." *Accord, Patterson, supra; PCFFA I*, 138 F. Supp.2d at 1230-31 (This need to strike a balance is particularly challenging because the Upper Klamath Lake is relatively shallow and, therefore, the Klamath Projects storage capacity is limited.)

3. The legal framework: In *Kandra* and *PCFFA*, the courts upheld Reclamations use of project water to protect endangered species and tribal rights during this crisis and enjoined all irrigation diversions whenever Klamath River flows dropped below levels recommended for endangered fish pending Reclamation compliance with the ESA.

a. The following legal guidelines were enunciated:

(i) Endangered species take precedence over Reclamations primary mission. *Kandra*, 145 F. Supp.2d at 1196, 2000; *PCFFA I*, 138 F. Supp.2d at 1240.

(ii) Reclamations first priority" is not to engage in any action that is likely to jeopardize the continued existence of an endangered species or result in the destruction or adverse modification of the critical habitat of such a species. *PCFFA I, supra*, at 1230, 1240.

(iii) Reclamations water delivery contracts for the Klamath Project are subject to the ESA and its requirements . . . override the water rights of the Irrigators." *Patterson*, 204 F.3d at 1213; *PCFFA I supra* at 1249 n. 20.

(iv) Reclamation has an obligation to protect tribal trust resources such as the sucker fish and salmon. *Patterson*, 204 F.3d at 1214 (Reclamation has a responsibility to divert the water and resources needed to fulfill the Tribes rights, rights that take precedence over

any alleged rights of the Irrigators”); *Kandra*, at 1197 (Reclamation has an obligation to protect tribal trust resources such as the sucker fish and salmon.); *PCFFA I*, at 1230 (The Bureau of Reclamation has an obligation to protect Tribal trust resources, including the Klamath River Coho salmon.)

(v) With respect to Reclamations operation and management of the Project” (203 F.3d 1175), the project irrigators rights are *subservient* to senior tribal rights. *Patterson*, 204 F.3d at 1213-14 (The district court found that the Irrigators water rights were subservient to senior tribal water rights. *See, Klamath* 15 F. Supp.2d at 996. . . We have held that water rights for the Klamath Basin Tribes ‘carry a priority date of time immemorial. *Adair*, 723 F.2d at 1414. Because Reclamation maintains control of the dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes rights, rights that take precedence over any alleged rights of the Irrigators.)

(vi) When water delivery is curtailed or severely limited, hardship to irrigators *does not outweigh* the threat to endangered species under the ESA, continued hardship of the Tribes who rely on such species, and the interests of Basin fishing communities. *Kandra*, at 1201 (Given the high priority the law places on species threatened with extinction, I cannot find that the balance of hardship tips sharply in plaintiffs favor.), 1210 (While the court sympathizes with plaintiffs and their plight, I am bound by oath to uphold the law. The law requires the protection of suckers and salmon as endangered and threatened species and as tribal trust resources, even if plaintiffs disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection.).

(vii) Reclamation will be, and was, enjoined from releasing any water for irrigation in 2001 pending procedural compliance with the ESA. *PCFFA I, supra* at 1250. *But compare, PCFFA II*, ___ F.Supp.2d ___ (N.D. Ca., Order, filed July 15, 2003) (finding multiple non-compliance with ESA procedural requirements in 2003, but interim relief remanded without enjoining water deliveries pending compliance)

C. POSTSCRIPT The Klamath Basin offers unprecedented opportunity for the United States to demonstrate that it can honor commitments to Native people and the Natural World while, at the same time, keeping commitments to provide a sustainable agricultural community. The Bush Administration is paying attention to root causes of the 2001 crisis. Unfortunately, few lessons were learned by others in denial about the existence of these problems.

Will the slide toward species extinction continue in the Klamath Basin? Following 2001, Reclamation returned to full irrigation water delivery and this resulted in a massive fish kill of 33,000, including endangered Coho, in the depleted Klamath River. That tragedy is currently in court. Senior tribal rights remain unfulfilled. Backlash” seems more important than addressing root causes. *Benson* at 228.

The *Kandra* court wisely admonished Basin interests that scarcity of water in the Klamath Basin is a situation likely to reoccur and counseled that this situation . . . demands effort and resolve on the part of all parties to create solutions that provide water for the necessary protection of fish, wildlife and tribal trust resources, as well as the agricultural needs of farmers

and their communities. 145 F. Supp.2d at 1211. The court stated:

Continued litigation is not likely to assist in such a challenging endeavor. This court hopes and expects that the parties and other entities necessary to long-term solutions will continue to pursue alternatives to meet the needs of the Klamath River Basin.

Most Basin interests are conducting business as usual. New litigation has been filed by irrigators, conservationists, and tribes. Oregon is bent on speeding divisive water rights litigation in its Klamath Basin general stream adjudication. Reclamation is bent on returning to its water policy and still walks an impossible tightrope, but nonetheless manages to increase water delivery to agriculture at the expense of Indians and endangered species.