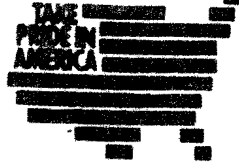




United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240



JUN 23 1994

Memorandum

To: Assistant Secretary for Fish and Wildlife and Parks

From: ^{Acting for} Ada E. Deer *Ada E. Deer*
Assistant Secretary - Indian Affairs

Subject: Indian Fish and Wildlife Policy

In recent months, personnel of this office and the Bureau of Indian Affairs have been requested to provide policy guidance for addressing the interests and concerns of tribal governments in carrying out a number of agency programs, activities and initiatives. In response to these requests, we have assisted in efforts to reauthorize the Endangered Species Act, develop a Recreational Fisheries Stewardship Initiative, and establish a Native American Policy for the U.S. Fish and Wildlife Service.

On March 18, a draft Indian Fish and Wildlife Policy developed by the Bureau and this office was forwarded for review and legal analysis. The Associate Solicitor, Division of Indian Affairs has recommended several changes to bring the policy in line with current Federal Indian law jurisprudence. We are pleased to provide the following revised policy principles and implementation guidelines for your consideration and use in future policy development and program related efforts.

Please let us know if we can be of further assistance.

POLICY PRINCIPLES

(1) Tribal Sovereignty and Jurisdiction.

- Tribes are recognized as governmental sovereigns in the Commerce Clause of the United States Constitution (Art. 1, Sec. 8), and have been referred to as quasi-sovereign domestic dependent nations (nations within a nation) by the courts.

- Tribes have the inherent power to make and enforce laws and to administer justice. Under principles of Federal Indian law, this power may extend to civil and criminal jurisdiction over individuals and corporations.

- Among the attributes of tribal sovereignty is the power to manage and control water and land resources, associated natural resources, and environmental protection. Tribal sovereignty also includes the power to regulate member and non-member hunting, fishing and gathering on-reservation, and related member uses in certain off-reservation settings. Federal recognition of these powers, whether arising from statute, executive order, or treaty, is the supreme law of the land.

- Despite their status as sovereigns, Indian tribes are subject to the plenary power of the Congress.

(2) The Government-to-Government Relationship / Consultation.

- There is a unique and distinctive political relationship existing between the United States and Indian tribes, as defined by treaties, statutes, court decisions and the United States Constitution, which differentiates tribes from other customers and constituencies, and which extends to all Federal agencies.

- The government-to-government relationship encompasses a renunciation of the old forced termination policy.

- The President of the United States, in an Executive Memorandum of April 29, 1994, charged all executive departments and agencies with the responsibility of ensuring that they operate in accordance with principles mandated by the nature of this government-to-government relationship.

- The government-to-government relationship requires working relationships and partnerships with tribal infrastructures and resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common concern, recognizing, however, that the release of tribal proprietary or consultative information may be restricted.

- Recognizing that tribes are not just another user-group or interest group requiring attention, the relationship requires going beyond simply discussing, exchanging views, or seeking tribal comment on internal policies and decisions which may affect the rights and status of tribal governments, the input from which may or may not be incorporated into decisionmaking. Direct and continuous tribal participation is required in planning, consensus seeking, and decision making processes involving line officers.

- The government-to-government relationship requires that Federal statutes and programs be administered in a manner that does not unilaterally interfere with tribal rights, and that agency missions be interpreted in a manner consistent with Federal Indian law and policy. Where an irreconcilable conflict arises, tribal rights will generally take precedence.

- Tribes, as sovereigns, are not subject to State jurisdiction, are not subordinate to State Governments, and should not be dealt with through Federal/State processes and arrangements designed to serve the interests of the general public. With respect to those Federal statutes that are inapplicable to tribes as sovereigns, tribal governments must be regarded as separate from the general public for the purpose of conducting agency review and comment gathering processes and related procedures.

- The government-to-government relationship supports issuance of an Indian policy and directive establishing objectives and line and staff duties and responsibilities for ensuring that agency policies, programs, and operations affecting Indians are appropriately and consistently applied and administered at all levels.

(3) Indian Self-Determination / Self-Sufficiency / Self Governance Policies.

- The policies under this heading call for rejection of Federal paternalism and tribal dependency on Federal programs and management in favor of empowering tribes and supporting tribal missions and objectives in assuming regulatory and program management roles and responsibilities through contracting and other mechanisms.

- The policies under this heading call for promoting the development of reservation economies and sustainable Indian lands.

by providing the tribes the opportunities to assume program management and regulatory roles through the contracting process.

(4) Trust and Rights Protection Responsibilities.

- The trust responsibility relates to the fiduciary relationship and the obligations and legal responsibilities of the United States, inherent in and arising from treaties, executive orders, statutes, and agreements between Indian tribes and the Federal Government.

- Where they are determined to exist, Indian treaty rights to fish, hunt and gather resources in off-reservation settings constitute property rights or encumbrances on land not reserved to State or local governments and, in certain circumstances, to State lands. Federal duties include harvest sharing oversight, achieving moderate standards of living, and assuring that the exercise of associated rights remains meaningful.

- Indian property rights cannot be subordinated to other interests of the Department absent overriding legal authority to do so, since the Federal Government is legally bound to protect the trust assets of Indian tribes. Moreover, in cases where inaction may cause the loss of a property right, the Secretary must take affirmative action to enforce that right and preserve Indian property.

- Primary responsibility for carrying out trust and rights protection responsibilities on tribal lands and in treaty ceded territory rests with the Bureau of Indian Affairs, but all Federal agencies share responsibility when implementing laws that may affect Indian resources.

- The trust responsibility may involve the following activities: (1) protecting and managing tribal fish, wildlife and gathering resources, and associated tribal water and land resource assets and rights, to the highest degree of fiduciary standards; (2) absent a clear expression of Congressional intent to the contrary, administering Federal fish and wildlife conservation laws in a manner consistent with the United States' obligation to honor and protect the treaty, executive order, statutory, and other reserved rights of Indian tribes; and (3) interpreting Federal statutes and regulations affecting tribal fish and wildlife resources in accordance with the trust responsibility.

- Tribal fish and wildlife resources and associated water and land resource assets and rights are reserved solely for the use of tribes and their members, not for a public purpose or to benefit non-Indian communities.

- Trust responsibility fulfillment includes protecting and managing treaty-ceded and "usual and accustomed" areas, and associated Federal lands and habitats which support the resources upon which the meaningful exercise of tribal hunting and fishing rights depend, and administering Federal projects in a manner which prevents the diminishment of associated fish and wildlife resources, and the tribal share in them. It further implies protecting tribes' property rights, including the rights of future generations, to access "usual and accustomed" grounds and stations, regardless of land ownership status, for the purpose of exercising hunting, fishing, and gathering rights.

(5) The Unique Character and Special Status of Indian Lands.

- Indian lands are not public lands or part of the public domain, and are not subject to the public land laws. The purposes for which Indian reservations were created differ from the purposes for which other national land bases and reserves were created. Indian reservations were created to provide lands where tribes could become economically self-sufficient by making the land and resources productive for Indian people. The purpose of most Federal land bases and reserves is to protect their natural resources. These different purposes demand that different rules, practices, and policies be applied to govern activities on Indian lands versus other Federal lands.

- Under Federal law, Indian lands are "private trust assets" which were set aside for exclusive Indian use, not general public benefit, pursuant to treaties, statutes, and executive orders.

- While the naked legal title to Indian lands is held by the United States, tribes retain most of the benefits of ownership as do owners of fee simple property. Such property, however, cannot currently be alienated or encumbered without the Federal Government's approval.

- Indian lands are the principal resource available for the economic and social advancement of Indian people as beneficial owners, to be managed in accordance with tribal goals and objectives, within the framework of applicable law.

(6) The Unique Character of Indian Fish, Wildlife and Natural Resources.

the recognition of cultural, religious, subsistence and economic significance of Indian resources and the superior treaty right to hunt, fish & gather

- As a result of reservations in treaties and other legal instruments, some tribes have retained rights to hunt, fish, trap, and gather Indian fish and wildlife resources both on-reservation and in off-reservation settings, for subsistence, ceremonial, and commercial purposes. In some cases, the treaty-reserved power to access Indian fish and wildlife resources in off-reservation settings actually constitutes a property right or encumbrance on lands not owned by the tribe, a power no State or local government enjoys.

- Certain fish, wildlife and plant species, including some that are listed as threatened or endangered, possess cultural, religious, subsistence, and economic value to particular Indian tribes.

- The President of the United States, in an Executive Memorandum of April 29, 1994, directed all executive departments and agencies to work cooperatively with tribal governments and accommodate Native American religious practices to the fullest extent under the law.

(7) The Status of Tribes as Resource Co-Managers.

- Along with Federal and State Governments, Indian tribes are co-managers of many fish and wildlife resources, with shared responsibilities for such resources as a function of treaties, statutes, judicial decrees and other legal instruments.

- As co-managers, tribes have a need to develop and maintain partnerships and constructive working relationships with other resource management jurisdictions and authorities.

(8) Restrictions on Tribal Use of Fish and Wildlife Resources.

- A "reasonable and necessary" principle must be applied when agencies consider actions which would result in restrictions on the use or development of tribal fish and wildlife resources or on the exercise of tribal hunting, fishing, or gathering rights, or which would result in a conservation burden being imposed on a tribe. Consistent with court rulings pertaining to the exercise of treaty fishing rights, any such restrictions may be applied only when:

- (a) They are reasonable and necessary for species preservation;
- (b) They are the least restrictive available to achieve the required conservation purpose;
- (c) They do not discriminate against Indian activities, either on their face or as applied;
- (d) When their purpose cannot be achieved solely through the regulation of non-Indian activity; and
- (e) When voluntary tribal conservation measures are not adequate to achieve the conservation purpose.

- If it is necessary to impose restrictions, this shall not be interpreted as an abrogation of treaty rights. Clear Congressional intent is required before a later-enacted statute may be construed to abrogate Indian treaty, executive order, or other reserved powers or rights.

POLICY IMPLEMENTATION GUIDELINES

- In recognition of the need to protect tribal rights and to fulfill the trust responsibility owed to Indian tribes in carrying out Federal agency missions, programs, and actions, and of tribal roles and responsibilities as governments and resource managers, the Federal Government must involve tribes to the maximum extent possible in all decisionmaking processes which may affect the status of tribal fish and wildlife resources and the exercise of associated rights, and in all planning and implementation phases of agency operations, including those inter-agency, multi-species, and ecosystem-oriented programs undertaken by the Federal Government for the public good. This policy was formalized in Secretarial Order Number 3175, "Departmental Responsibilities for Indian Trust Resources," of November 8, 1993, and in the President's Executive Memorandum of April 29, 1994, which charged all executive departments and agencies with the responsibility of ensuring that they operate in accordance with principles mandated by the nature of the government-to-government relationship.

- Departmental bureaus and offices shall, to the maximum extent provided by law, decline to take or approve any action by other parties that could adversely affect the well-being of off-reservation trust resources or the meaningful exercise of associated off-reservation hunting, fishing, and gathering rights, unless all adverse consequences of such actions on trust resources and rights are fully mitigated in a timely manner. When this cannot be done, Departmental bureaus and offices shall mitigate such actions to the extent legally authorized and acceptable to the affected tribe(s) through agreements entered into by the relevant parties providing for mitigation that constitutes fair consideration for any associated adverse effects of the action on trust resources or rights.

- In implementing laws or court orders other than those protecting trust resources and rights, some of which may conflict with related protections, Departmental bureaus and offices shall select approaches having no adverse effects, or the least adverse effects, on trust resources and rights.

- In carrying out these directives, Departmental bureaus and offices are encouraged to consult with the Assistant Secretary - Indian Affairs, the Solicitor's Office, and the Bureau of Indian Affairs in order to clearly determine the Federal Government's fiduciary duty and the approaches that might be taken to meet this duty.