

Interior Department Policies & Guidelines Protecting Tribal Reserved Treaty & Aboriginal/Ancstral Water & Land Rights

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I. Bureau of Indian Affairs – Reserved Treaty Rights Land Program

The Interior Department’s Bureau of Indian Affairs (“BIA”) “Reserved Treaty Rights Land Program”¹ provides Congressionally appropriated “Wildland Fire Management funding [...] for the purpose of treating and restoring tribal priority landscapes **within and adjacent to ancestral and reserved treaty right lands**. [...] **Ancestral rights associated with non-trust, non-reservation land** is of critical importance to many American Indians and Alaska Natives across the United States. Beginning in Fiscal Year 2015, Wildland Fire Management funding was appropriated for the purpose of treating and restoring tribal priority landscapes within and adjacent to ancestral and reserved treaty right lands. This resulted in the establishment of the RTRL program. [...] **This Memorandum and the attached plan serve as the Bureau’s established policy for RTRL program implementation**” (emphasis added).

The accompanying “Reserved Treaty Rights Land Plan”² further elaborates on this theme. It states that,

“Beginning in FY 2015, Fuels Management Funding has been appropriated for the purpose of treating and restoring tribal landscapes within and adjacent to **reserved treaty right lands**. As stated in the Fiscal Year 2015 Wildland Fire Management Budget Justification, treaties with Native American tribes establish a unique set of

¹ See United States Department of Interior Bureau of Indian Affairs, Memorandum from Acting Director BIA to All Regional Directors, Subject: *Reserved Treaty Rights Lands Implementation* (May 7, 2015), available at: <http://www.bia.gov/cs/groups/webteam/documents/document/idc1-030968.pdf>.

² See Bureau of Indian Affairs, Office of Trust Services Division of Forestry and Wildland Fire Management, Branch of Wildland Fire Management, *Bureau of Indian Affairs Fiscal Year 2015 Reserved Treaty Rights Lands Plan*, available at: <http://www.bia.gov/cs/groups/xnifc/documents/document/idc1-030969.pdf>.

rights, benefits, and conditions for Tribes. Like Other treaty obligations of the United States, Indian treaties are considered to be 'the supreme law of the land,' and are foundation upon which Federal Indian law and Federal Indian trust relationship are based.

Within the various processes utilized [to] establish tribal and native organizations' relationships with the United States government, **retention of ancestral rights** remains a common recognized connection. **Examples include but are not limited to religious and cultural use, hunting, fishing and gathering.** For many Tribes, the reserved rights areas fall under the management of other Federal agencies and in some cases Tribes share co-management rights with Federal agencies. [...] As stated earlier, **the intent of the RTRL program is to meet DOI trust responsibilities for ancestral areas** that are tribal resource management priorities at high risk to Wildland fire. [...The] intent [of] collaborati[on] agreements is to facilitate comprehensive land management treatments that are **designed to positively affect reserved treat rights resources** while moving Tribal priority landscapes to desired future conditions and long term ecological resilience to wildland fire” (emphasis added).

II. Bureau of Indian Affairs Director Michael Black’s Testimony

BIA Director Michael Black, testified before the Senate Indian Affairs Committee this past June, during an oversight hearing entitled, *Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S.3014, Tribal Forestry Participation and Protection Act of 2016*, sponsored by U.S. Senator Steve Daines (MT-R).³ In his testimony, Mr. Black noted the Interior Department’s priority initiatives as including the Reserved Treaty Rights Lands Program.

“The Department continues to make fire management a priority through a set of initiatives. **In 2015 the BIA announced the \$10 million dollar Reserved Treaty Rights Lands (RTRL) initiative that provides funding for tribal priorities** in High and Very High wildland fire risk areas outside of Interior lands” (emphasis added). (p. 2)

In his testimony, Director Black also stated how S.3014 significantly broadens the scope of lands

³ See Testimony of Mike Black, Director, Bureau of Indian Affairs, United States Department of the Interior before the Senate Committee on Indian Affairs Oversight Hearing on “*Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S.3014, A Bill to Improve the Management of Indian Forest Land*” (June 8, 2016), available at: <http://www.indian.senate.gov/sites/default/files/documents/6.8.16%20Mike%20Black%20Testimony.pdf>.

eligible for tribal forest management beyond lands bordering on or adjacent to national forests and rangelands as provided in the Tribal Forest Protection Act of 2004.

“The Department notes one change between the original 2004 Tribal Forest Protection Act and Section 3(a) of S. 3014 that relates to the geographic scope of the project area. *Under the original 2004 TFPA*, a tribe may request to carry out projects on federal land that ‘borders on or is adjacent to’ land managed by the BLM or the U.S. Forest Service, or where the Forest Service or BLM land presents a ‘feature or circumstances unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances)’. *In contrast, the bill* amends the National Indian Forest Resources Management Act **to expand the scope of federal lands eligible for tribal management to include federal forest land ceded to the United States, within the boundaries of a current or former reservation, or adjudicated by the Indian Claims Commission or a Federal court to be the tribal homeland of that Indian tribe. The amount of federal land that could be considered available under this new authority could significantly expand beyond those bordering or adjacent to federal lands.**” On September 18, 2015, the Interior Department’s Office of the Secretary issued an Office of Wildland Fire Memorandum providing preliminary DOI “Guidance for Fiscal Year (FY) 2016 Funds Execution Wildland Fire Budget Allocations” (emphasis added).⁴

The OWF memorandum explained how the Secretary would allocate budgeted funds among the Office of Wildland Fire’s various programs including the Fuels Management Program:

“Fuels Program: The Fuels Management program allocation remains at the FY 2015 percentage level for each bureau. This allocation assumes that within the Fuels Management Budget \$10 million will be directed to support fuels management activities aimed at *fulfilling trust responsibilities on reserved treaty rights land*. This portion of the allocation is directed to the BIA.” (p.2)

III. Department of Interior Office of Wildland Fires

The website of the DOI Office of Wildland Fires⁵ says the following concerning the relationship between its Fuels Management Program and tribal governments’ reserved treaty rights:

⁴ See United States Department of the Interior Office of the Secretary, OWF Policy Memorandum 2015-009, *Preliminary Guidance for Fiscal Year (FY) 2016 Funds Execution Wildland Fire Budget Allocations* (Sept. 18, 2015), available at: <http://www.bia.gov/cs/groups/xnifc/documents/text/idc1-031926.pdf>.

⁵ See United States Department of the Interior Office of Wildland Fires, *Fuels Management*, available at: <https://www.doi.gov/wildlandfire/fuels-management>.

“Funding provided for tribal resource management landscape restoration will focus fuels efforts on reserved treaty right lands. Treaties recognize and establish a unique set of rights, benefits, and conditions for Tribes who agree to cede millions of acres of their lands to the United States and accept its protection. Like other treaty obligations of the United States, Indian treaties are considered to be, “the supreme law of the land,” and are the foundation upon which Federal Indian law and Federal Indian trust relationship are based” (emphasis added).

Within the treaty making process, Tribes retained reserved rights to hunt, fish, and gather on usual and accustomed grounds, and in some cases have co-management rights with Federal agencies. For many Tribes, the reserved rights areas fall under the management of other Federal agencies. These **Federal agencies may not share the Tribes’ priorities for fuels management or may not have the funds to manage acres commensurate with tribal goals and objectives for protection of both tribal trust and reserved rights lands.** Consequently, it is essential that Tribes have the ability to participate in collaborative projects to improve the management of these lands” (emphasis added).

In its prior FY 2015 Wildland Fire Resilient Landscapes Program Report,⁶ the Interior Department’s Office of Wildland Fire U.S. Department of the Interior indicated that Congress had “provided \$10million in the [\$30 million] FY 2015 Fuels Management program to fund resilient landscape activities, as a pilot initiative. This report also described the Resilient Landscapes program as incorporating

“several key concepts for the program—integration and coordination between Interior’s four wildland fire management bureaus and their natural resource counterparts and landscape-scale activities in partnership with other Federal, tribal, state, and local governmental and nongovernmental partners” (emphasis added).

During 2015, DOI’s Office of Wildland Fire also issued a notice of Tribal Consultation Regarding the Wildland Fire Resilient Landscapes program, which includes coverage of both forests and rangelands.⁷

“The Department of the Interior (DOI), Office of Wildland Fire (OWF) is initiating government-to-government tribal consultation to obtain input from Tribes on the

⁶ See U.S. Department of the Interior Office of Wildland Fire, *FY 2015 Wildland Fire Resilient Landscapes Program*, at p. 1, available at: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/2015_06_08_FY%202015%20WFRL%20Program%20Proposals.pdf.

⁷ See U.S. Department of the Interior Office of Wildland Fire, *Tribal Consultation Regarding Wildland Fire Resilient Landscapes* (2015), available at: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/2015_TC_WFRL_FINAL_For%20Posting.pdf.

development of the Wildland Fire Resilient Landscapes (WFRL) program for FY 2016 and beyond. Funding for the WFRL program is proposed in the FY 2016 President’s Budget for \$30 million. The Wildland Fire Landscape (WFRL) pilot program is a new approach to achieve fire resiliency goals across landscapes with collaborative efforts, as defined by the *National Cohesive Wildland Fire Management Strategy* and in support of *Secretarial Order 3336 – Rangeland Fire Prevention, Management, and Suppression*. [...] The goal of the WFRL pilot program is to strengthen the Wildland Fire Management program's ability to restore and maintain landscapes across all jurisdictions, so they are resilient to fire related disturbances in accordance with management objectives” (italicized emphasis in original).

Blackfeet tribe member, Tony Harwood, who “is currently the [Division Manager for Forest Inventory and Planning for the Confederated Salish and Kootenai Tribes](#),” serves as a member of the [Western Regional Strategy Committee](#) assisting in the implementation of the [National Cohesive Wildland Fire Management Strategy](#).

A March 2015 Memorandum providing guidance for the then-piloted Resilient Landscapes Program⁸ explained the purpose of Secretarial Order 3336 addressing rangeland fire prevention and sage grouse habitat protection.

“Secretarial Order (SO) 3336, *Rangeland Fire Prevention, Management and Restoration*, January 5, 2015, establishes ‘protecting, conserving, and restoring the health of the sagebrush-steppe ecosystem and, in particular, **greater sage-grouse habitat**, while maintaining safe and efficient operations, is a critical fire is a critical fire management priority for the Department. Allocation of fire management resources and assets, before, during, and after wildland fire incidents will reflect this priority, as will investments related to restoration activities.’ Implementation of the wildland fire Resilient Landscapes pilot program will reflect the provisions of SO 3336.”

IV. White House Council on Native American Affairs Statement: Respecting Tribal Treaty Rights Helps Preserve Indian Country Progress

On October 20, 2016, Anthony “Morgan” Rodman, Executive Director, White House Council on Native American Affairs stated that,

“Over the past eight years, President Obama’s commitments to Indian Country have helped to strengthen tribal nations, bolstering the government-to-government relationship, advancing self-determination and self-government, and working with

⁸ See U.S. Department of the Interior Office of the Secretary, *OWF Policy Memorandum 2015-004 Resilient Landscapes Pilot Program Guidance* (March 23, 2015), available at: <http://elips.doi.gov/ELIPS/0/doc/4261/Electronic.aspx>.

tribal leaders to build dynamic economies and resilient communities. Now, in the remaining days of this Administration, we need to ensure that the progress we've made continues. So, **we are working to institutionalize those achievements through several initiatives, including affirming the federal government's *moral and legal responsibility to protect tribal treaty rights and similar tribal rights, especially those that concern the use of natural resources.***

[...] Under the Constitution, treaties with tribal nations are part of the supreme law of the land, establishing unique sets of rights, benefits and conditions for the treaty-making tribes who agreed to cede millions of acres of their homelands to the United States, in return for recognition of property rights in land and resources as well as federal protections.

Through treaty-making, Indian tribes granted these lands and other natural resources to the United States, ***while retaining all rights not expressly granted. These retained rights cover a wide variety of subjects, including the right to hunt, fish, and gather resources*** – including access to traditional plants and animals – ***both on land the tribes ceded, as well as on land they retained.***

[...] The federal government has an obligation to honor and respect tribal rights and resources that are protected by these numerous treaties. Integrating consideration of tribal treaty rights and similar tribal rights into agency decision-making processes is ***consistent with the federal government's trust responsibility to federally-recognized tribes. All federal agencies are legally required to recognize and give effect to treaty language*** and must ensure that federal agency actions do not conflict with tribal treaty rights.

“[...] Understanding these authorities and responsibilities, **federal agencies have signed a Memorandum of Understanding (MOU) pledging our best efforts to identify and take greater recognition of tribal treaty rights and similar tribal rights regarding natural resources** during our decision-making processes. As the MOU makes clear, **tribal treaty rights have the same legal force and effect as federal statutes** and they should be integrated into and given the fullest consideration throughout our collective work” (emphasis added).⁹

V. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Reserved Tribal Treaty Rights

⁹ See U.S. Department of Interior Blog, *Respecting Tribal Treaty Rights Helps Preserve Indian Country Progress* (Oct. 20, 2016), available at: <https://www.doi.gov/blog/respecting-tribal-treaty-rights-helps-preserve-indian-country-progress>.

On September 13, 2016, federal agencies entered into an interagency Memorandum of Understanding affirming protection of tribal treaty rights and similar tribal rights relating to natural resources when federal action is taken, that will be updated as additional federal agencies become signatories.¹⁰ The MOU states that,

“Through treaty-making, Indian tribes granted land and other natural resources to the United States, while retaining all rights not expressly granted. **Treaties with Indian tribes cover a wide variety of subjects, *including rights reserved by tribes relating to natural resources, such as the right to hunt, fish, and gather both onland ceded, or given up, by tribes, and on land retained by tribes.*** Although the treaty-making era ended in 1871, federal treaties with tribes ratified by the U.S. Senate remain the law.

Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as federal statutes. **Treaties bind both the federal government and the signing Indian tribe or tribes, and generally constitute recognition of rights to lands and resources, as well as rights to fish, hunt, and gather.** As such, the federal government has an obligation to honor and respect tribal rights and resources that are protected by treaties. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with tribal treaty rights. Integrating consideration of tribal treaty rights into agency decision-making processes is also consistent with the federal government’s trust responsibility to federally recognized tribes.

After the treaty-making era ended in 1871, agreements between tribes and the federal government were instead generally memorialized through other sources of law, including **congressional acts, such as land claims settlement acts, and in some cases through executive orders.** The Parties recognize that, like treaties, *these other sources of federal law may also protect reserved tribal rights relating to natural resources*” (emphasis added).¹¹

VI. Secretarial Order 3342 - Advancing Tribal Self-Determination & Self-Government Thru Recognition of Tribal Treaty Rights

On October 21, 2016, Interior Department Secretary Sally Jewell issued a Secretarial Order to facilitate

¹⁰ See U.S. Environmental Protection Agency, *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights*, available at: <https://www.epa.gov/tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>.

¹¹ See “Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights” (Sept. 16, 2013), available at: https://www.epa.gov/sites/production/files/2016-09/documents/13sep16_interagency_treaty_rights_mou_final.pdf.

tribal management of Interior Department lands with which Indian tribes have “connections.”¹² Section 1 of S.O. sets forth its primary purpose:

“to encourage cooperative management agreements and other collaborative partnerships between Department of the Interior [...] resource managers and tribes that will further shared interests in the management of federal lands and resources.” Such activities include “**managing vegetation, fish, wildlife, and other resources** [...] and providing recreational and educational opportunities **on Federal lands and waters**” (emphasis added).¹³

In particular, Section 1 of the S.O.

“recognizes that tribes have special geographical, historical, and **cultural connections to Federal lands and waters**, and that tribes [...] and **ensures a continued connection between tribes and Federal lands and waters**. [...] This Order articulates **the principles and legal foundation for interactions between bureau land managers and tribes** as those interactions relate to shared interests in managing, conserving, and preserving natural and cultural resources under the primary responsibility of **Federal land and water managers**.” (emphasis added).¹⁴

Section 2(b) of the S.O. states that the central mission of the Interior Department is to honor and support the “United States government-to-government relationships with tribes.” To this end, the Department intends “to better integrate tribal knowledge and concerns into the management of Federal lands and waters under the Department’s charge,”¹⁵ and to “increase the opportunity for tribes to participate in the **management of Federal lands and waters** within the Department’s jurisdiction...”¹⁶ It emphasizes the Department’s obligation

“to **uphold the Federal trust responsibility to tribes**. This trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and tribes. *The legal and trust relationship with tribal governments has been set forth in the United States Constitution, treaties, statutes, executive orders, and numerous court decisions, and serves as the foundation for the Department’s interaction with tribes*” (emphasis added).¹⁷

¹² See U.S. Department of Interior, Press Release, *Secretary Jewell Issues Secretarial Order to Encourage Tribal Role in Managing Interior Lands with Native American Connections* (Oct. 21, 2016), available at: <https://www.doi.gov/pressreleases/secretary-jewell-issues-secretarial-order-encourage-tribal-role-managing-interior>.

¹³ See U.S. Department of Interior, Secretarial Order No. 3342, *Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources* (Oct. 21, 2016), at Sec. 1, available at: https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf.

¹⁴ *Id.*

¹⁵ *Id.*, at Sec. 2(b)(1)-(2).

¹⁶ *Id.*, at Sec. 2(c)(1).

¹⁷ *Id.*, at Sec. 2(b)(1).

Sections 5 and 7 of the S.O. require Interior bureau heads to immediately “identify opportunities for cooperative management agreements and collaborative partnerships with tribes” and to ensure that steps are taken by bureau staffs to engage tribes “in the management of the natural and cultural resources over which the bureaus maintain jurisdiction and responsibility.”¹⁸

The S.O. covers all Interior Department bureaus – National Park Service, Bureau of Land Management, Fish & Wildlife Service, Bureau of Reclamation and Bureau of Ocean Energy Management. The scope of activities covered by the S.O. includes *inter alia* “[m]anagement of fish and wildlife resources,” “[i]dentification, protection, preservation, and management of culturally significant sites, landscapes and resources,” “[m]anagement of plant resources,” and “[m]anagement and implementation of maintenance activities.”¹⁹

S.O. 3342 cites several examples of the types of management activities in which the bureaus and tribes have already engaged. It references, for example, the National Park Services’

“annual funding agreement with the Yurok Tribe under which **the Tribe conducts watershed restoration and rehabilitation**, culvert replacement, cultural resources inventories and assessments, oral histories, invasive plant removal, air quality monitoring, and scientific research related to California Condor recovery” (emphasis added).²⁰

In addition, the S.O. references the Bureau of Reclamation’s Truckee River Operating Agreement entered into between BOR and the Pyramid Lake Paiute Tribe. Pursuant to the Agreement, **the PLPT is “responsible for scheduling releases of Stampede Dam project water for fish and wildlife purposes.** The BOR then makes the releases” (emphasis added).

Section 5(b) of the S.O. establishes the principle that “Tribes offer significant knowledge and experience in the management of natural resources [...] which can enhance the bureaus’ management of Federal resources,”²¹ while Section 9 states that the effect of the Order is “to improve the internal management of the Department.”²²

¹⁸ *Id.*, at Sections 5 and 7.

¹⁹ *Id.*, at Sec. 5(a).

²⁰ *Id.*, at Sec. 6(f).

²¹ *Id.*, at Sec. 5(b).

²² *Id.*, at Sec. 9.