

U.S. Forest Service Agency Policies & Guidelines Promoting Protection of Indian Treaty & Other Off-Reservation Reserved Rights In Fulfillment of USG’s “Legally Mandated Trust Responsibilities”

I. Forest Service Handbook

Section 60.3 of Chapter 60 (“Stewardship Contracting”) of *Forest Service Handbook*¹ (“FSH 2409.19”)² “Renewable Resources Handbook” (**amended, 10/21/2008**, “Amendment No. - 2409.19-2008-7”)³ states, that it is the policy of the USFS to employ stewardship contracting for purposes of managing natural resources “with a focus on restoration.”

“**Policy** 1. The intent of stewardship contracting is to accomplish resource management with a focus on restoration.” (p. 7)

Section 60.42b states that,

“It is the responsibility of the **forest supervisor** to: [...] 9. Prepare proposal response and recommendation for regional forester decision for tribal requests made under the Tribal Forest Protection Act of 2004. *The recommendation of what borders on or is adjacent to Indian forest land, rangelands, or a tribal community must be made by the district or forest line officer after consultation with the Indian tribe and consideration of the threat potential and geographic location*” (emphasis added). (p. 15)

Section 60.42c provides,

“It is the responsibility of the **district ranger** to: [...] 14. Receive and acknowledge tribal requests made under the Tribal Forest Protection Act of 2004 and make recommendations to the forest supervisor. *The recommendation of what borders on or is adjacent to Indian forest land, rangelands, or a tribal community shall be made by the district or forest line officer after consultation with the Indian tribe and consideration of the trust potential and geographic location*” (emphasis added). (p. 15)

Section 60.5 “Definitions” sets forth the definitions of “Indian forest land or rangeland” and “Indian land” found in the Tribal Forest Protection Act of 2004 (“TPFA”). It states,

“Indian Forest Land or Rangeland. *In accordance with the Tribal Forest Protection Act, land that is held in trust by, or with a restriction against alienation by, the United States for an Indian tribe or a member of an Indian tribe; and (a) is Indian forest land (as defined in section 304 of the National Indian Forest*

Resources Management Act or (c) formally had a forest cover or vegetative cover that is capable of restoration” (emphasis added).

“Indian Tribe. Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (P.L. 103-454, 25 U.S.C. 450b)” (emphasis added).

The reference to “P.L. 103-454, 25 U.S.C. 450b” is to Section 450b(e) of the Indian Self-Determination Act, the overall purpose of which, as set forth in Section 450a(b), is,

“the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in *the development of strong and stable tribal governments*, capable of administering quality programs and developing the economies of their respective communities” (emphasis added).

Section 61.17 “Project Selection Criteria Under the Tribal Forest Protection Act of 2004”⁴ discusses the criteria that should be used to evaluate Indian tribe requests for a stewardship contract, as found in the TPFSA. It provides,

“As stated in section (c) of the Act, the Forest Service may consider proposals submitted by an Indian tribe to enter into a contract or agreement to carry out a project to protect Indian forest land or rangeland that meets all the following criteria: 1. The Indian forest land or rangeland borders on or is adjacent to land under the jurisdiction of the Forest Service; 2. The Indian forest land or rangeland is under the jurisdiction of an Indian tribe or of a tribal community of a federally recognized tribe; [...] and 5. *The National Forest System land* described in the application of the Indian tribe *involves a feature or circumstance unique to that Indian tribe, including treat rights, biological, archaeological, historical, or cultural circumstances*” (emphasis added). (p. 27)

Section 62.5 – “Proposal Determination and Evaluation Factors” “**sets forth new direction**” (emphasis added – as entitled in table of contents) for stewardship project proposals submitted by federally recognized tribes pursuant to Section 2(d) [**actually 2(e)**] of the TPFSA. It provides, consistent with TPFSA Section (e)(2)(A)-(D) that,

“2. Give specific consideration to tribally-related factors in the proposal, including: a. The status of the Indian tribe as an Indian tribe; b. The trust status of the Indian forest land or rangeland of the Indian tribe; c. The cultural, traditional, and historical affiliation of the Indian tribe with the land subject to the proposal;

d. The treaty rights or other reserved rights of the Indian tribe relating to the land subject to the proposal; [...]” (emphasis added). (pp. 44-45)

Subsections 2(e)(A)-(D) address only ONE of the four criteria of TPGA Section 2(c) noted above, namely, – Section 2(c)(4): “presents or involves a feature or circumstance unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances)” (emphasis added). The remaining four factors (Section 2(e)(E)-(H)) focus on the features of the landscape, the skills of the tribe, its relationship with federal agencies and the tribe’s access to the lands. Page | 3

II. Forest Service Manual

New Section 1563.02 of Chapter 1560 (“State, Tribal, County, and Local Agencies; Public and Private Organizations”) of the *Forest Service Manual*⁵ (“FSM 1500”)⁶ (amended March 9, 2016, “Amendment No.: 1500-2016-1”)⁷ states that it is the objective of the USFS to ensure its employees

“strive to increase their understanding of tribal relations generally, and of opportunities to enter into contracts, grants, and agreements with Indian tribes and Native American-owned businesses [...] More specifically, Forest Service employees should: [...] 2. *Fulfill federal treaty obligations and uphold the Federal trust responsibility to protect the rights and interests of Indian tribes* when the Agency undertakes the formulation and implementation of policies or other actions that may affect their interests. 3. Ensure that Forest Service officials, programs, and activities: a. *Respect tribal self-governance and sovereignty and honor tribal rights and interests;* [...] 4. *Support the aspirations of the UN Declaration on the Rights of Indigenous Peoples [...] (UNDRIP)*” (emphasis added) (pp. 28-29)

New Section 1563.03 provides that it is the general policy of the USFS to

“develop, maintain, and enhance *government-to-government relationships* with federally recognized Indian tribes [...]” (emphasis added).

New Section 1563.03 also states that it is the specific policy of the USFS that

“1. **Sovereignty.** All Forest Service personnel *shall respect and uphold the sovereignty* of all federally-recognized Tribal governments. This policy *does not diminish* any Tribal governmental rights, *including treaty rights, other reserved rights, sovereign immunities or jurisdiction.* [...] Forest Service offices, units, and staffs **shall:** a. Implement Forest Service programs and activities *consistent with and respecting Indian treaty and other reserved rights* and fulfilling the Federal Government’s *legally mandated trust responsibility* with Indian Tribes” (emphasis added). (p. 30)

These USFS objectives and policies refer back to New Section 1563.01b – “Treaty Rights and the Federal Trust Responsibility.” In discussing the more than 300 treaties the United States had previously entered into with Native American tribes, this new section states that,

“Each of these treaties is unique but, generally speaking, Indian tribes *reserved* separate, isolated reservation *homelands* under the treaties and *sometimes retained certain rights to hunt, fish, graze, and gather on the lands ceded to the United States. These rights retained on ceded lands are known as “off-reservation treaty rights” or “other reserved rights”* (emphasis added). (p. 7)

Section 1563.8b.1 repeats and elaborates on this discussion by emphasizing how

“Many treaties involve ceded lands that are within the boundaries of present day National Forest System lands. The Forest Service shall administer lands subject to off-reservation treaty rights in a manner that protects Indian tribes’ rights and interests in the resources reserved under treaty. Indian Treaty rights are property rights held by the sovereign Indian tribes who signed the treaties. These rights can only be extinguished by an express and unequivocal act of Congress” (emphasis added). (p. 67)

In discussing the legally enforceable federal trust responsibility the United States bears with respect to American Indians and Alaska Native tribes and villages, new Section 1563.01b states that such obligation

“derives from the Federal Government's consistent promise, in the treaties that it signed, to protect the safety and well-being of the Indian tribes and tribal members. The federal trust responsibility is a *legally enforceable fiduciary obligation* on the part of the United States *to protect tribal treaty rights, lands, assets, and resources [...]*” (emphasis added). (p. 7) (*See also* New Section 1563.05 defining the term “federal trust obligation”) (p. 51)

New Section 1563.01(d) provides that the USFS implements the special government-to-government relationship through its implementation of several cooperative land management mechanisms, including the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712(b)), the National Forest Management Act (NFMA) of 1976 (16 U.S.C. 472a et seq.) and the National Environmental Policy Act’s (42 U.S.C. 4321 et seq.) Council on Environmental Quality regulations (40 C.F.R. 1501.7(a)(1) and 1506.6(b)(3)(ii)). (pp. 9-10)

New Section 1653.01(g) states that the **“TPFA provides the authority for a Tribe and the Forest Service to enter into an agreement or contract to carry out a project to protect Indian forest land or rangeland that meets certain criteria”** (emphasis added). (p. 12)

New Section 1563.05 defines certain terms of interest. For example, the terms “adjacent site/adjacent to” have different meanings depending on their context:

“Within the context of the Cultural and Heritage Cooperation Authority (25 U.S.C. 3051 et seq.), the term **“adjacent site”** means a site that borders a boundary line of National Forest System land (25 U.S.C. 3052(1)). *The term “adjacent site” should not*

be confused with the term “bordering or adjacent to” found in the Tribal Forest Protection Act (25 U.S.C. 3115a). This term remains undefined in the Tribal Forest Protection Act and does not necessarily mean a co-incident or contiguous boundary” (emphasis added). (p. 45)

If “bordering or adjacent to” does not mean bordering a boundary line of a National Forest System land, then HOW is it defined in the TPFPA????

New Section 1563.05 defines the term “**executive order tribe**” as “a]n Indian tribe that bases its status as a federally recognized tribe on a specific Executive Order, rather than on a treaty or congressional recognition.” (p. 46) The term “executive order tribe” arose in the Ninth Circuit ruling in [United States v. Washington](#), 235 F.3d 438, 439 (9th Cir. 2000), which addressed the off-reservation fishing rights of the Confederated Tribes of the Chehalis Reservation (“the Chehalis”), whose reservation was created by Executive Order. Citing *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), the Court found that

“[i]t is a time-honored principle that ambiguities in agreements and treaties with Native Americans are to be resolved from the native standpoint. *Winters v. United States*, 207 U.S. 564, 576 (1908). We have previously held that this canon of construction extends to executive orders, and ‘any doubtful expression in them should be resolved in the Indians’ favor.’ [...] *Parravano* stands for the simple proposition that, *for the purpose of protecting on-reservation fishing rights, there is no difference between tribes whose reservations were created by treaty, and tribes whose reservations were created by executive order* [...] We reaffirmed the special character of the treaty tribes in *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996). In that case, *we rejected the Chehalis Tribe’s claim to off-reservation fishing rights, reasoning that as a non-party the Chehalis were not entitled to any fishing rights under the Treaty of Olympia*. Id. at 340. [...] The district court properly granted summary judgment in favor of the Quinault Nation. *The Chehalis were never a party to any of the treaties underlying this litigation; consequently, they cannot be considered a treaty tribe for the purposes of equitable allocation of salmon under those treaties*” (emphasis added)).

Thus, these 9th Circuit cases treated treaty tribes and executive order tribes the same for purposes of on-reservation fishing rights. However, with respect to off-reservation fishing rights, only treaty tribes with claims to off-reservation fishing rights are entitled to an allocable share of fishing rights with a state.

According to new Section 1563.05 of the *Forest Manual*, the “government-to-government relationship” is defined as evolving “from the recognition of tribal sovereignty expressed in treaties between Tribes and the Federal Government and in the U.S. Constitution.” (p. 47)

New Section 1563.05 also defines the term “Indian Forest Land or Rangeland”, in part, as “[l]and that is held in trust by, or with a restriction against alienation by, the United States for an Indian tribe or a

member of an Indian tribe; and a. Is Indian forest land (as defined in section 304 of the National Indian Forest Resources Management Act (25 U.S.C. 3103) [...])” (emphasis added). While S.2012 does not define the term “Indian forest land,” TPFSA Section 2(a)(2) defines it by reference to section 304 of the National Indian Forest Resources Management Act (25 U.S.C. 3103).

Section 304(3) of the National Indian Forest Resources Management Act (“NIFRMA”) defines “Indian forest land” as

“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” (emphasis added).

NIFRMA Section 304(9) defines “Indian” as “a member of an Indian tribe.” NIFRMA Section 304(10) defines the term “Indian land” as

“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* [land title to which is held by] (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” (emphasis added).

NIFRMA Section 304(11) defines the term “Indian tribe” as

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” (emphasis added).

NIFRMA Section 304(12) defines “reservation” as including

“Indian reservations established pursuant to treaties, Acts of Congress *or* Executive orders, public domain Indian allotments, *and* former Indian reservations in Oklahoma.”

New Section 1563.05 defines the term “**reserved rights doctrine**” as **permitting “Indian tribes retain all rights not explicitly given up [abrogated] in treaties or other legislation.”** (p 49)

Section 1563.8b defines “**treaty rights**” as

“[t]hose **rights or interests reserved in treaties** for the use and benefit of Tribes. The nature and extent of treaty rights are defined in each treaty. Only Congress may

abolish or modify treaties or treaty rights. [...] Treaty rights may include an “easement of access” to the areas on which such treaty rights were reserved” (emphasis added). (pp. 67-68)

Section 1563.8g of the *Forest Service Manual* briefly identifies the TPFA and states that, “[t]he Forest Service policy to implement the TPFA is included in FSH 2409.19, chapter 60, Stewardship Contracting” (emphasis added). Page | 7

III. Forest Service National Resource Guide to American Indian and Alaska Native Relations

The Preface to the USFS *National Resource Guide* states that,

“This book is intended only to improve the implementation of the Forest Service’s American Indian and Alaska Native Policy; it is not intended to nor does it create enforceable rights.”

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The Introduction elaborates by emphasizing how

“The sections of this book correspond to *the tenets of the Forest Service’s four-point American Indian/Alaska Native policy (FSM 1563)*. A complete statement of this policy is in Appendix A. 1. Maintain a governmental relationship with Federally Recognized tribal governments. [...] 2. Implement Forest Service programs and activities *honoring Indian treaty rights, and fulfill legally mandated trust responsibilities to the extent that they are determined applicable to National Forest System lands*. [...] 3. Administer programs and activities to address and be sensitive to traditional Native religious beliefs and practices. [...] 4. Provide research, transfer of technology, and technical assistance to Indian governments” (emphasis added).⁹

The Introduction also describes the term “Indian Country” as “the territorial boundaries of Indian tribal governments,” and refers to its definition under Federal law:

“*Indian Country* is defined specifically by Federal statute (18 U.S.C. §1151) and includes **all land, regardless of ownership, within the exterior boundaries of Federally Recognized Indian reservations** (USDI, Office of American Indian Trust)” (italized emphasis in original; boldfaced emphasis added). (p.3)

The Introduction, furthermore, refers to the term “Indian Homelands” as varying between reservation lands held in trust by the United States for tribes (“tribal trust lands”) and individual allotments (lands) held in trust by the United States for individual allottees and their heirs (tribal members). (p. 4) Where unrestricted title to a portion of reservation lands are held by non-Indians,

“*Tribes usually have jurisdiction over “Indian Country”* (see Appendix B). **Tribal regulatory jurisdiction** may, therefore, extend to an area significantly larger than the lands actually in Indian ownership” (emphasis added). (p. 4)

Section 2 of the *National Resource Guide* entitled, “Treaty Rights and Forest Service Responsibilities”¹⁰ explains how Indian treaties must be viewed differently than they have been customarily viewed.

“American Indian treaties were not a grant of rights to tribes, but rather a grant of rights from tribes, with the Indian tribes retaining all of the powers and rights of sovereign nations granted by the tribe pursuant to the treaty or taken from the tribe by Federal statute.”

[...] In many treaties, however, Indians ceded (relinquished) title and interests to the United States Government, while reserving certain use rights to themselves [...] **Sixty tribes negotiated and reserved their treaty rights on the public domain.** After tribal representatives and U.S. officials signed treaties, they were then ratified by the U.S. Senate” (italicized emphasis in original; underlined & boldfaced emphasis added). (p.43)

Section 2 of the *National Resource Guide* addresses “**off-reservation (property) rights,**” by emphasizing reserved rights in National Forests.

“Off-reservation (property) rights reserved by treaties on National Forest System lands are very important to Indian tribes. The United States has a duty to protect these treaty rights, as these rights are agreed upon by government-to-government agreement, or as defined by statute or court decision” (emphasis added). (p. 44)

Section 2 also notes how the scope and extent of such rights differ by treaty.

“Some treaty rights occur on open and unclaimed or unoccupied lands (this refers to lands not in private ownership at the time the treaty was signed)[;] Some treaty rights extend beyond present-day boundaries of reservations or Indian trust lands[;] Some treaties express a priority right for a resource; others a proportional, or in common, right; and others indicate a share to complement subsistence provided by other sources [...] Off-reservation treaty rights that may be reserved on present-day national forests include: grazing rights, hunting and fishing rights, gathering rights and interests, water rights, and subsistence rights” (emphasis added). (p. 45)

With respect to off-reservation grazing rights, Section 2 of the *National Resource Guide* states,

“The current Forest Service Manual 2235.1 gives direction to—

*Give Indian Tribes fair and reasonable opportunity to enjoy any treaty grazing rights reserved to them by treaty on ceded lands. **Grazing rights reserved by treaty are a continuing privilege beyond that enjoyed by other citizens. The Forest Service shall not deprive Indians of treaty rights;** but the Regional Forester, acting on behalf of the Secretary of Agriculture, may regulate enjoyment of the treaty grazing right for the purpose of protecting and conserving Forest Service administered resources”*

Forest Service administered resources” (italicized emphasis in original; boldfaced emphasis added). (p. 45)

Section 2 also provides that “treaty-based term permits” for grazing can be authorized by Regional Foresters through a Memorandum of Understanding as provided for in the *Forest Service Manual - FSM 2204.2(13)*.

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In addition, Section 2 states that, “**Tribal governments have exclusive jurisdiction Fishing Rights over the right of tribal members and non-tribal people to hunt and fish within reservation boundaries**” (emphasis added). (p. 45)

Furthermore, Section 2 states the following with respect to off-reservation treaty rights:

*“Treaty rights may extend to fish and wildlife habitats, including how the Forest Service manages those habitats and how those habitats relate to national forest timber harvest, recreation, water, grazing, and minerals exploration. Some tribes believe that the U.S. Government is obligated to manage wildlife and fish habitats to protect the tribes’ treaty rights. **Court decisions have confirmed that tribes are entitled to 50 percent of harvestable salmon and steelhead in certain waterways covered by treaties as long as escapement goals are met** (U.S. v. WA, 1974, Dist Ct WA; U.S. Supreme Court, 1979; also Lac Courte Oreilles v. Wisconsin).*

*In some treaties in the Pacific Northwest, the U.S. Government is obligated to protect the tribes’ right to access ‘usual and accustomed grounds and stations’ and **must assure that Forest Service actions do not prevent tribes or their members from accessing such locations, exercising tribal rights and protecting treaty resources.** Courts have held that if either hunting or fishing rights are mentioned by treaty, both apply” (emphasis added). (p 46)*

Section 2 of the National Resource Guide, moreover discusses the treatment of “**Indian reserved water rights.**”

“Although Indian reserved water rights are not expressed in treaties, they are inherent or implied rights. Ordinarily, State law applies to water rights on Federal lands; however, **Federal law applies to American Indian water rights on reservation lands; their extent depends on the purposes for which the reservation was established.** The reserved water right as applied to Indians is derived from *Winters v. U.S.*, 1908. This landmark Supreme Court case held that ‘*sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established.*’ This ***Doctrine of Federal Reserved Rights*** established a vested right (a right so completely settled that it is not subject to be defeated or cancelled) whether or not the resource was actually put to use, **and enabled the tribe to expand its water use over time in response to changing reservation needs. The quantity of water was determined by evaluating the purposes for which the Indian reservation was**

established and applied to all uses—including irrigation of lands that were not currently serviced with a water supply. [...] The Winters Doctrine provides that **tribes have senior water rights and the national forests have junior rights. Some recent court decisions have given Indian reservations priority water rights on Federal lands, including national forests**” (italicized emphasis in original; boldfaced and underlined emphasis added). (p. 47)

Section 2 has the following to say about the federal government’s trust responsibilities:

“[...] *The trust responsibility is a legally enforceable obligation, a duty, on the part of the U.S. Government to protect the rights of Federally Recognized Indian Tribes. In several legal cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings between the U.S. Government and Indian tribes. For the Forest Service, trust responsibilities are essentially those duties that relate to the reserved rights and privileges of Federally Recognized Indian Tribes as found in treaties, executive orders, laws, and court decisions that apply to the national forests and grasslands. **For Forest Service activities, the trust responsibilities are defined primarily by the authorities listed FSM 1563.01** (a copy of which is in Appendix A), **and by treaties which may apply to specific areas of the National Forest System.** Treaty rights on National Forest System lands are interpreted and applied by the Court” (italicized emphasis in original; boldfaced and underlined emphasis added). (pp. 51-52)*

In its discussion of the application of the National Environmental Policy Act (“NEPA”) to forest lands, Section 2 of the *National Resource Guide* stated the following:

“**Reserved treaty and subsistence rights outside reservation boundaries are essentially exercised in common with non-Indian citizens. These rights may even take place on former Indian lands which are now managed by the National Forest System. Neither NEPA nor the Council on Environmental Quality (CEQ) regulations mention these preexisting rights.** A November 1993 directive signed by the Secretary of the Interior requires that environmental documents prepared by Interior agencies **include a discussion of American Indian reserved treaty rights and the effects a pending Federal decision may have on these rights.** As of yet, **USDA does not have a similar policy**” (emphasis added). (p. 54)

IV. USFS Tribal Relations Program –FY 2013 Report

On July 22, 2014, USFS’ Deputy Chief, State and Private Forestry issued to the Secretary of the Department of Agriculture the USFS FY 2013 Report on the state of the agency’s Tribal Relations Program intended to implement the Strategic Plan developed it during 2009.

The Report first acknowledges the USG’s trust responsibility “to protect the best interests of American

Indian tribes. Tribal interests include such issues as treaty rights, lands, and resources among other things.” (p. 5) It claims that the Tribal Relations Program “endorses nine core values for fulfilling agency treaty and trust obligations. These include foremost, **“recogniz[ing] the inherent sovereign status and reserved rights of tribes”** (emphasis added), “honor[ing] the federal trust responsibility,” and “excel[ling] at conducting substantive consultative processes.” (p. 6)

In further elaboration of Goal #1, the Report states as follows:

“The Tribal Relations Strategic Plan **commits the Forest Service to recognizing and protecting the treaty, reserved, and inherent rights of American Indian tribes and Alaska Native governments.** The Forest Service endeavors to fulfill Constitutional mandates, federal laws, and policy pertaining to American Indian rights by ensuring that the agency collectively understands the legal responsibilities owed to American Indian tribes under the Trust Responsibility and government-to-government relationship.

[...] On January 31, 2013, the U.S. Department of Agriculture Secretary Vilsack signed a departmental regulation establishing ‘over-arching Department-wide guidance’ on consulting and coordinating with American Indian tribes. The regulation was promulgated to ensure that American Indians and Alaska Natives have full access to programs and services offered by the Department and its agencies, including the U.S. Forest Service. [...] Among other things, the regulation directs the USDA and its agencies to ensure that the rights and interests of federally-recognized tribes are considered and that tribes have opportunities to represent their interests on a government-to-government basis. The regulation applies to all policy development and program activities which may have a direct and substantial effect on any tribe” (emphasis added). (pp. 9-10)

The FY 2013 Report also identifies several key regions where tribes have federally recognized treaty or reserved rights to lands overlapping National Forest Service lands.

- Region 1 - Northern:

“The Northern Region (Region 1) [covering parts of eastern Washington, northern Idaho, Montana, North Dakota and northwestern South Dakota] manages 25 million acres of national forest and grasslands in five states—Idaho, Wyoming, Colorado, Utah and Nevada. There are 12 national forests and one national grassland within the territory from northeastern Washington, northern Idaho, Montana, and the National Grasslands in Northern Dakota and northwestern South Dakota.”

- Region 4 – Intermountain:

“The Intermountain (Region 4) [covering parts of Idaho, Wyoming, Colorado, Utah and Nevada] manages 34 million acres of national forest land. **Collectively, there are approximately 85 tribes that reside or have interests within the Northern and Intermountain Regions. Many tribes in these regions have federally-recognized**

treaty or reserved rights to lands overlapping NFS lands. The confluence of these rights with federal resource management authority requires an actively engaged tribal relations program at the field level” (emphasis added). (p. 20)

- Region 2 – Rocky Mountain:

“The Rocky Mountain Region (Region 2) [covering most of Wyoming and South Dakota, Colorado, Nebraska and Kansas] is headquartered in Golden, Colorado [and] consists of 17 national forests and seven national grasslands. **There are 24 American Indian tribes that reside or have interests within the Rocky Mountain Region, and many of these tribes have federally-recognized treaty or reserved rights that overlay NFS lands**” (emphasis added). (p. 23)

- Region 6 – Pacific Northwest:

“The Pacific Northwest Region (Region 6) includes 17 national forests, a national scenic area, a national grassland, and two national volcanic monuments, all within the states of Oregon and Washington. Regional Forest resources provide timber for people, forage for cattle and wildlife, habitats for fish, plants, and animals, and some of the finest recreation lands in the country. **There are 39 federally-recognized American Indian tribes within the Pacific Northwest Region**” (emphasis added). (p. 31)

V. Conclusion

Clearly, the U.S. Forest Service has jumped on the Indian tribal sovereignty and self-determination bandwagon along with the other federal agencies. The *Forest Service Handbook*, *Forest Service Manual*, *National Resource Guide* and *FY 2013 Tribal Programs Report* provide clear evidence of the USFS’ newfound commitment to implement the federal government’s trust obligation to Indian tribes and Native Alaskan tribes and villages – i.e., by recognizing and protecting the treaty, reserved, and inherent on- and off-reservation rights of American Indian tribes and Alaska Native governments, incident to entering into forest stewardship, watershed and other contracts with tribal governments. As these agency rules-of-the-road show, the USFS will need to demonstrate that commitment when applying various federal statutes including, but not limited to, the Tribal Forest Protection Act of 2004 (“TPFA”), the National Forest Management Act, of 1976 (16 U.S.C. 472a et seq.), the National Environmental Policy Act’s (42 U.S.C. 4321 et seq.).

However, that is not the end of the story. Title VII – *Tribal Forestry Participation and Protection* of a proposed Senate energy bill - S.2012, the *North American Energy Security and Infrastructure Act of 2016*, which is currently in a House-Senate conference committee, contains language almost identical to that contained in the TPFA. As previously discussed in an article appearing in the [Canada Free Press](#),

“The bill’s tribal government forest management provisions are extremely harmful and could severely diminish the constitutionally protected rights of private property

owners throughout the United States, the Western States Constitutional Rights consortium emphasizes. Indeed, the pending legislation is itself unconstitutional, as explained in a [legal memorandum](#) the consortium sent to 13 members of Congress. [...] Tribal Forest Management (TFM) provisions in House/Senate S.2012 are more problematic, because they would racially discriminate in favor of Native American tribes. They would do so by using the *UN Declaration of the Rights of Indigenous Peoples* to recognize off-reservation aboriginal pre-European land and water rights—where none exist in U.S. [national federal] law—at the expense of all other Americans’ constitutionally protected private property rights.”

In light of the above analyses, it would be extremely difficult, if not impossible, for Congress to confidently delegate to the USFS the responsibility for ensuring that Indian tribes do not invoke or otherwise exercise their treaty and other reserved rights incident to their implementation of a forest stewardship contract on national forest and parklands.

¹ See United States Forest Service, *Forest Service Handbooks (FSH) - Service-wide and Field Issuances*, available at: http://www.fs.fed.us/dirindexhome/dughtml/fsh_1.html (“*Forest Service Handbooks (FSH) are the principal source of specialized guidance and instruction for carrying out the direction issued in the FSM. Specialists and technicians are the primary audience of Handbook direction. Handbooks may also incorporate external directives with related USDA and Forest Service directive supplements*”) (italicized emphasis in original; boldfaced emphasis added).

² See United States Forest Service, *Forest Service Handbook (FSH) 2409.19*, available at: http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?2409.19.

³ See United States Department of Agriculture Forest Service, *Forest Service Handbook National Headquarters (WO) Washington, DC, FSH 2409.19 – Renewable Resources Handbook Chapter 60 – Stewardship Contracting* (Amendment No.: 2409.19-2008-7, Eff. Oct. 21, 2008), available at: http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5392208.pdf.

⁴ See P.L. 108–278, *Tribal Forest Protection Act of 2004*, 108th Congress (July 22, 2004), codified at 25 USC 3101 note, available at: <http://www.fs.fed.us/restoration/documents/stewardship/tfpa/TribalForestProtectionAct2004.pdf>.

⁵ See U.S. Forest Service, *Forest Service Manual (FSM) - All Issuances (Service-wide and Field)*, available at: <http://www.fs.fed.us/dirindexhome/dughtml/fsm.html> (“*The Forest Service Manual (FSM) contains legal authorities, objectives, policies, responsibilities, instructions, and guidance needed on a continuing basis by Forest Service line officers and primary staff in more than one unit to plan and execute assigned programs and activities*” (italicized emphasis in original; boldfaced emphasis added)).

⁶ See U.S. Forest Service, *Forest Service Manual (FSM) 1500*, available at: http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?1500.

⁷ See United States Department of Agriculture Forest Service, *Forest Service Manual National Headquarters (WO) Washington, DC, FSM 1500 – External Relations, Chapter 1560 – State, Tribal, County, and Local Agencies; Public and Private Organizations* (Amendment No.: 1500-2016-1, Eff. March 9, 2016), available at: <http://www.fs.fed.us/spf/tribalrelations/documents/directives/FSM1500-Chapter1560-20160309.pdf>.

⁸ See United States Department of Agriculture Forest Service, *Forest Service National Resource Guide to American Indian and Alaska Native Relations* (1997), at Preface, available at: http://www.fs.fed.us/spf/tribalrelations/pubs_reports/preface.shtml.

⁹ *Id.*, at Introduction, p. 2, available at: <http://www.fs.fed.us/spf/tribalrelations/documents/publications/NtlResourceGuide/tribint.pdf>.

¹⁰ *Id.*, at Section 2: *Treaty Rights and Forest Service Responsibilities*, at pp. 43-47, 51-52, 54, available at: <http://www.fs.fed.us/spf/tribalrelations/documents/publications/NtlResourceGuide/trib-2.pdf>.

¹¹ See United States Department of Agriculture Forest Service, *U.S. Forest Service Tribal Relations Program – FY 2013 Report*, at pp. , available at: <http://www.fs.fed.us/spf/tribalrelations/documents/reports/USFSTribalRelationsAnnualReportFY2013.pdf>.