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Amending the Endangered Species Act as if the Native American Land Ethic Mattered

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I. INTRODUCTION

> *"When nature ceases to be an object of contemplation and admiration, it can be nothing more than material for an action that aims at transforming it."*[1]

Albert Camus' words speak to one of the most pressing issues of our day: how are the actions of humans, especially those in the modern industrial world, affecting our planet? [2] Some human "transformation" of nature is beneficial to the environment. [3] Despite this, not everyone agrees that serious changes must take place in individual

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1. VINE DELORIA JR., GOD IS RED 70 (1973).

2. *See* Edmund J. Skernolis, *America's Going to Waste*, INDUSTRY WEEK, Nov. 6, 1989, at 63 (citing statistics indicating that at the close of the 1980's America was producing trash at a rate of 160 million tons per year, or about 4 pounds per person per day with the expectation that the rate would continue to rise).

3. *See* Henry Norr, *Drowning in E-waste; Safe Disposal of Mountains of Old PC's, Monitors is a Snowballing Problem We've Only Begun to Face*, S.F. CHRON., May 27, 2001, at E1 (discussing one of the by-products of the technological revolution of the late 20th century is an environmental nightmare – specifically, hazards associated with the rapid obsolescence and disposal of an estimated 500 million PC's between 1997 and 2007. This estimate, based on a 1999 study by the National Safety Council's Environmental Health Center, does not include other consumer electronics expected to be disposed of in large numbers such as televisions, cellular phones, computer peripherals and hand-held computing units); *cf.* Patrick McMahon, *Where Does the TV Go When it Dies?*, USA TODAY, Jan. 22, 2002, at 3A.

and institutional behavior to create sustainable environments for future generations. [4]

This paper will examine how environmentalists have looked to the value structures of the Native American culture by environmentalists as a model of sustainable ecological ethics, and how this appeal has spread, into the field of environmental law. [5] Hence, we are

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4. *See* Barry E. Hill, *Chester, Pennsylvania – Was it a Classic Example of Environmental Injustice?*, 23 VT. L. REV. 479, 483-85 (1999) (claiming that the goals of the modern environmental movement are neatly ensconced within the National Environmental Policy Act [hereinafter NEPA], 42 U.S.C. §§4321-4370 (1994) (stating that it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources)); *see also* NEPA, 42 U.S.C. §§ 4331(b)-(b)(6) (1994).

5. *See generally* Catherine A. O'Neill, *Environmental Restoration: Challenges for the New Millennium: Restoration Affecting Native Resources: The Place of Native Ecological Science*, 42 ARIZ. L. REV. 343 (2000) (excoriating governmental land management agencies for their failure to recognize and accept Native American ecological science and experiential knowledge as coequals with Western science in debates that affect tribal resources).

prompted to consider the extent to which integration of the Native American ecological perspective and environmental law is desirable.

In the first part of this article, Native American attitudes and perspectives about land use are contrasted with attitudes of Americans of European origin. It will be argued that the Native American perspective offers a unique, viable alternative to more modern ecological views.

The alleged viability of the Native American perspective for contemporary policy will be developed in subsequent sections by focusing on its application to the Endangered Species Act ("ESA").[6] The ESA was chosen because of the ongoing deadlock in environmental statutes in this domain. If the Native American perspective can be useful in thinking about the ESA, then that perspective may have broad applicability to environmental law. Part IV suggests how value preferences inherent in Native American attitudes and land ethic could inform current environmental regulatory attempts, such as the ESA. Native American concepts can help illuminate value conflicts that hinder funding and enforcement of the ESA.

II. NATIVE AMERICAN ECOLOGICAL ATTITUDES CAN OFFER A DESIRABLE SET OF VALUE PREFERENCES FOR ENVIRONMENTAL LAW

A. *Perspectival Dichotomies: Native vs. Eurocentric Ecologies*

Native American ecological perspectives and attitudes are markedly different from those of European origin, and may offer a desirable model for an ecological perspective.

Although there is no singular Native American perception of the environment, it would be difficult to construct a paper comparing Native environmental views to non-Native environmental views without making certain cautious generalizations about a Native land ethic. Several specific themes arise time and again in the land ethics of many different Native American nations and these themes provide the foundation for our depicting of a Native American land ethic.

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6. 16 U.S.C. §§ 1531-1544 (1988).

1. The Relation between Humans and Earth

The idea of a "natural hierarchy" is one of the key concepts separating Native beliefs about the land from those of most non-Natives in North America. Whereas Native peoples tend to see themselves as equal to the rest of creation, non-Native peoples generally view humans as superior and therefore entitled to dominate nature. Commenting on this dichotomy, Jackie Yellow Tail, a Crow Indian, stated:

> "Life is a circle, the world is a circle. The Christian way of seeing the world is that within this circle there's a man called Jesus; on the outside is the trees, the rocks, the animals; all around the world are the different things that are on Mother Earth. In the center is man above all things. The Indian way of thinking is that there is this same circle, Mother Earth, and around her are the rocks, the trees, the grass, the birds, the four-leggeds, and man. Man is the same as all those other things, no greater, no less. I mean, it's all so simple; people make it so hard."[7]

Creation stories in Native religions reflect this idea of natural equality.

Vine Deloria Jr., a noted Native author and activist of Lakota Sioux heritage argues, "...the majority of stories of origin suggest a creation in which people are given, simultaneous with their creation, awareness that they have been created. These traditions often suggest that there was no essential spiritual/intellectual difference between people and animals."[8] All of creation, not humanity alone, has its own intelligence. Thus, nature can enrich human life and knowledge when people observe natural phenomena and the actions of other creatures in their natural habitats. [9]

The absence of natural hierarchical structure in many Native religions leads to another component of Native American thought: the belief that all life forms have rights equal to the rights of humans. [10]

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7. MARK ST. PIERRE & TILDA LONG SOLDIER, WALKING IN THE SACRED MANNER 14 (1995).

8. VINE DELORIA JR., RED EARTH, WHITE LIES 233 (1995).

9. Annie L. Booth & Harvey M. Jacobs, *Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness*, 12 ENVTL. ETHICS 27, 32 (1990).

10. WARD CHURCHILL, STRUGGLE FOR THE LAND 434 (1993).

Members of a natural environment are responsible to stay in balance with nature and no one group should dominate over the others. Thus, Native Americans see humankind as just a small piece of the natural puzzle, not a dominating force. [11]

2. Distance vs. Connection

While detachment is demanded by Western science, [12] connection to the environment is inherent in native thought. Western thinkers have been distanced from the environment by the belief that observers of phenomena should refrain from interacting with the nature they are observing.[13]

Contrary to this assumption of Western science, Native people have traditionally gained much of their knowledge about the natural world by immersing themselves in their natural environment. As Deloria states, "Indians...obtain information from birds, animals, rivers, and mountains which is inaccessible to modern science...Indians also know that human beings must participate in events, not isolate themselves from occurrences in the physical world."[14] The Native relationship with the environment is as active participant, not cool observer.

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11. J. DONALD HUGHES, AMERICAN INDIAN ECOLOGY 14 (1983).

12. DELORIA, *supra* note 1, at 55.

13. *Id.*

14. *Id.* at 56; *but see* Jeff Minerd, *Native Americans vs. Environmentalists*, THE FUTURIST, May-June 2000, at 10 (assuming that Native communities did indeed gather a wealth of ecological knowledge from their eco-philosophical perspectives, "history shows that American Indians were not always wise or harmonious managers of their environment. Many Native American hunters believed that, as long [as] they offered respect to the animals they killed, the animals would be reincarnated to be hunted again; these hunters had no concept of conservation. Historical accounts describe Native Americans driving buffalo over cliffs and killing them by the hundreds, often taking only select cuts from the animals and leaving the rest to rot. The vanished Hohokam people of Arizona may have disappeared because they destroyed the fertility of their land by over-irrigating their fields with salinated water - a mistake European farmers have made in other times and places").

Additionally, Deloria implies that Western thought patterns, focusing as they do on disconnection from nature, limit humans from fully understanding the world around them. The "outside" roles assumed by Western peoples place them away or apart from the environment, acting as an observing or dominating force, not a part of nature. From the Native American perspective, this lack of connection to the natural world has allowed non-Native people in North America to damage the earth and its ecosystems.

Many Indians also believe that people have the responsibility to take care of the earth. This feeling of duty to care for the earth leads to a true love for the land itself. As expressed by Luther Standing Bear, a Lakota chief born in 1868:

> "The Lakota was a true naturist...He loved the earth and all things of the earth, the attachment growing with age. The old people came literally to love the soil and they sat or reclined on the ground with a feeling of being close to a mothering power...He knew that man's heart away from nature becomes hard; he knew that lack of respect for growing, living things soon led to lack of respect for humans too."[15]

Some Native peoples fear that dependency on modern devices is cutting them off from nature and the land. Voicing this concern, Reuben Snake, a Winnebago, argues:

> "What does it add to the quality of life to have a TV in every room, and drive four cars, and fly across the continent in three hours? It doesn't make me a better human being to be in contact with all that...the Indian is a part of the creation, and we're supposed to fit into and be harmonious with the creation – to live in harmony with all that's going on, and not to have the thought that we can dominate any part of it."[16]

3. Objectification/Commodification vs. Identification

Perhaps one of the simplest and most direct commentaries on Native land perception comes from Paula Gunn Allen, a writer of Laguna Pueblo and Lakota heritage, "We are the land. To the best of

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15. T.C. MCLUHAN, TOUCH THE EARTH 6 (1971).

16. RUSHWORTH M. KIDDER, SHARED VALUES FOR A TROUBLED WORLD 26 (1994).

my understanding, that is the fundamental idea that permeates American Indian life; the land (Mother) and the people (mothers) are the same."[17] Not only do Native people tend to view themselves as connected to nature and on a level plane with their surroundings, the land defines an integral part of their being as independent Native nations and as a people. Thus, the land cannot be separated from their group identity.[18]

Similarly, Peter Matthissen, author of *In the Spirit of Crazy Horse*, writes, "In a proper (Indian) life there is never a sense of disconnectedness from the earth...the whole universe is sacred, man is the whole universe...Respect for nature is respect for oneself; to revere it is self respecting, since man and nature, though not the same thing, are not different..."[19]

Deloria contrasts native interrelationship, connectedness and balance with the objectification and exploitation by western peoples.[20] Deloria would argue that Europeans have allowed themselves to degrade and destroy the land because they feel distanced from it and thus can turn the earth into a commodity.

The value of land to Native Americans is reflected in their practices of ownership. Codes of land "ownership" have varied from nation to nation, but in general land was held in common by the entire group. Because of the differences between Native ideas and European ideas on land ownership, there were numerous misunderstandings between European settlers and Native groups related to the "purchase" of Native land. For instance, Miles Standish "bought" a tract of land fourteen miles square for seven coats, eight hoes, nine hatchets, ten yards of cloth, twenty knives, and four moose skins, but was confused when the local Indians kept hunting on the land after the purchase. These Indians believed that Pilgrims had paid for the use of the land that was held in common by the tribe, whereas the English believed they possessed exclusive rights to the land. The agreement the English interpreted to be a sort of deed the Indians perceived to be an agreement to share the land.[21] Massasoit (Wampanoag), the chief who sold Standish the land stated:

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17. PAULA GUNN ALLEN, THE SACRED HOOP 119 (1992).

18. *See* Booth & Jacobs, *supra* note 9, at 34.

19. Booth & Jacobs, *supra* note 9, at 40.

20. DELORIA, *supra* note 1, at 78.

21. DONALD A. GRINDE & BRUCE E. JOHNSON, ECOCIDE OF NATIVE AMERICA 31 (1995).

> "What is this you call property? It cannot be the earth. For the land is our mother, nourishing all her children, beasts, birds, fish, and all men. The woods, the streams, everything on it belongs to everybody and is for the use of all. How can one man say it belongs to him only?"[22]

Native peoples identify with their land in another important regard – in the intimate connection a particular nation's land has with its history and its dead. Because ancestors are buried in land held in common by the entire nation, selling the land is equated with selling their history as a people, selling their identity. Once again, this reluctance to part with the land demonstrates the feelings of many Native people that they are inseparable from the land, if not part of the land itself.

In one striking example of this ancestral tie to the land, a delegation of Cayuse Indians responded, when asked to sign a treaty in 1855 releasing their land to the United States government, "Why should we want a few goods in exchange for our lands? We love our country – it is composed of the bones of our people, and we will not part with it."[23] Similarly, Utes present day in the southwest were presented with an offer from the federal government to sell some of their land, a delegation responded, "The tribe doesn't want to diminish the land, but not because of money issues. You diminish us when the land is eaten away."[24]

According to Native Americans, the failure of non-Natives to identify personally with the land has led to the subsequent destruction of the North American continent. Furthermore, they argue that until non-Natives can understand the American soil, they cannot hope to understand the Native peoples. As Standing Bear says,

> "The white man does not understand the Indian for the reason that he does not understand America. He is too far removed...the roots of the tree of his life have not yet grasped the rock and soil. The white man is still troubled with primitive fears; he still has in his consciousness the perils of this frontier continent..."[25]

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22. *Id.* at 30.

23. FROM THE HEART: VOICES OF THE AMERICAN INDIAN 335 (Lee Miller ed., 1996) [hereinafter VOICES].

24. Booth & Jacobs, *supra* note 9, at 35.

25. VOICES, *supra* note 23, at 254.

Non-Native Americans, from the Native perspective, tend to fixate on money and property, rather than identification with the soil. These materialistic obsessions have dictated their actions,[26] allowing them to objectify and commodify the land to the point of blindness. Europeans have pursued profit at the expense of the earth, other people, and other creatures, thus lacking the sense of balance that Native Americans hold as crucial to their philosophy. As expressed by John Fire Lame Deer:

> "More and more animals are dying out. The animals, which the Great Spirit put here, they must go. The man-made animals are allowed to stay – at least until they are shipped out to be butchered. That terrible arrogance of the white man, making himself something more than God, more than nature, saying, "This animal must go, it brings no income, the space it occupies can be used in a better way."[27]

Native peoples were perhaps the first to point out that European peoples lacked foresight; that Eurocentric objectification and wanton disregard for the earth would lead to destruction. In identifying with the earth, Native peoples realized that there was a delicate balance inherent in nature. This balance, one that they had worked so hard to maintain, was being disrupted and if such destructive actions continued, many Native peoples realized the outcome would be disastrous.[28] This knowledge of the eventual downfall of the non-Native

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26. *But see* George Cornell, *Native American Perceptions of the Environment*, *in* BURIED ROOTS AND INDESTRUCTIBLE SEEDS: THE SURVIVAL OF AMERICAN INDIAN LIFE IN STORY, HISTORY, AND SPIRIT 21-41 (Mark A. Lindquist & Martin Zanger eds., 1993).

27. John Fire Lame Deer & Richard Erdoes, *Talking to the Owls and Butterflies, in* REREADING AMERICA 595 (Gary Colombo *et. al.* eds., 1995).

28. *But see* Thomas McIntyre, *The Conservation Myth*, 216 SPORTS AFIELD 16, 19 (1996). (While there exists ample evidence to support Native assertions that European environmental perspective has the potential for breeding ecological disaster, there also exists evidence that suggests Native practices left perceptible marks upon the environment. According to McIntyre, "Dr. Valerius Geist believes that the pre-contact Indian actually placed 'a very heavy hand' upon the continent's wildlife. Wherever he could find a steady source of plant food or fatty fish, such as salmon, big game was

land "ethic" is quite aptly put in a letter Chief Seal'th (commonly known as Chief Seattle) wrote to President Pierce in 1855. Chief Seal'th stated:

> "We know that the white man does not understand our ways. One portion of the land is the same to him as the next...The earth is not his brother but his enemy, and when he has conquered it, he moves on...The air is precious to the red man. For all things share the same breath – the beasts, the trees, the man. Like a man dying for many days, he is numb to the stench."[29]

B. *Subtracting European Influence*

Given the previous discussion, it can be argued that historically many Native nations had respect for the earth and demonstrated reverence for their lands and nature in general. Consequently, it is within the realm of possibility that if Europeans had not invaded the North American continent, the Native land ethic would have been determinative.

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scarce. Not only was big game affected, either. Kay points out that the blackening of the skies by the passenger pigeon was probably a short-lived phenomenon, the Native American probably having gathered up most of the pigeon's mast crop for himself, thereby keeping the birds' numbers at a lower level. The tremendous abundance of wildlife the settlers and explorers encountered as they ventured into North America between 1600 and 1850 was, in fact, says Geist, not a product of the Indian's 'ecologically sound concept of nature,' but rather the result of the introduced disease, warfare, and the European's relentless slaughter of the Indian population, all of which cleared the way for a resurgence of wildlife across vast areas of the land, the passenger pigeon and bison being only two of the more spectacular examples. Geist contends that the Edenic landscape and plentiful, native wildlife...were not evidence of a virgin wilderness. They were, instead, evidence of a highly manipulated and not always well-used land unbound and allowed to reclaim old boundaries").

29. Letter from Chief Seattle to President Pierce (1855) *in* THE LITTLE BROWN READER 626-27 (Marcia Stubbs & Sylvan Barnet eds., 1992).

Two major analytical strands provide evidence for such an assertion. First, an examination of historic Native land use patterns, Native economic structures, the ways in which Native societies adapted their social structures to conform to the land, and how these structures came to be altered by Europeans will prove useful to our argument. Second, remarks made by several Native people of various nations living in the modern day and their attitudes towards the current American land ethic provides evidence of a strong desire to return to a more traditional land ethic, suggesting that without European influence, Native peoples would have retained a land ethic very similar to the one exhibited by their ancestors.

1. Traditional Land Use, Native Economic Structure, and Societal Adaptations to the Land

Different Native peoples had different views of acceptable land use, contrary to popular belief, most Native groups did not live in an unaltered or pristine wilderness. [30] In fact, most Native groups were not hunter/gatherers, but agriculturally based,[31] and used the land quite extensively. Most native nations did not deplete their environment, evidenced by the great abundance of plants and animals the Europeans discovered upon coming to the North American continent. [32] As noted by Ward Churchill, "North America was invariably described as being a 'pristine wilderness' at the point of European arrival, despite the fact that it had been occupied by 15 or 20 million people enjoying a remarkably high standard of living for who knows how long: 40,000 years? 50,000 years? Longer?"[33]

How is it possible that Native peoples could attain a sustainable way of life despite intensive land use and widespread agriculture? In part, this was the result of using several farming practices that were quite different from those of their European counterparts and much more considerate of their natural surroundings. For example, Native peoples who farmed in southern New England employed the technique of using multi-crop fields. Because beans, squash, and corn were grown together, the soil did not become exhausted of nutrients rapidly as certain crops replenished the field with nutrients other

30. *See* HUGHES, *supra* note 11, at 4.
31. *See* CHURCHILL, *supra* note 10, at 16.
32. *See* GRINDE & JOHNSON, *supra* note 21, at 44.
33. CHURCHILL, *supra* note 10, at 420.

crops withdrew from the soil. Using this method of natural fertilization, the soil was exhausted in 8 to 10 years.[34] Some of these farming methods employed by Native peoples drew two to three times the nourishment from the soil as farmers do today.[35]

Besides altering the land for agricultural purposes, Native peoples burned away sections of woodland in Cape Cod and New England to create open areas for birch, pine, and other shrubs. This method of clearing resulted in a landscape that was patch-worked with many ecosystems in different stages of development. Additionally, the burning of hardwood forests expanded the boundary area between forest and grasslands, creating ideal habitats for wildlife. These boundary or "forest edge" areas promoted growth in populations of elk, deer, beaver, turkey, and quail as well as the predators which preyed on those animals such as eagles, foxes, and wolves. Thus, in burning away wooded area, the Native peoples of New England Indians consciously raised populations of game as well as destroyed the dense underbrush that would have grown too thick to pass through if left untouched.[36]

Native groups in New England and other regions of North America had an intimate knowledge of how nature worked. For example, Indians knew which animals and plants to gather and in which season; as a result, many nations simply relocated their villages to where populations were most concentrated rather than stay in one

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34. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 48 (1983).

35. JAMES D. LOEWEN, LIES MY TEACHER TOLD ME 113 (1995).

36. CRONON, *supra* note 34, at 51; b*ut see* Bruce Bartlett, *Native Americans Weren't Very Kind to the Environment*, HUMAN EVENTS 22 (2000) (citing Robert Whelan, WILD IN THE WOODS: THE MYTH OF THE NOBLE ECO-SAVAGE (1999). Bartlett and Whelan assert that one should not jump to conclusions that the fires set by Natives were necessarily ecologically friendly. "For starters, Native Americans were big forest burners. Indeed, before the white man came to this hemisphere there was virtually no virgin forest because it had all repeatedly been burned....the reason is simple: Forests had almost no value to Native Americans and interfered with hunting. Says Whelan, 'The species which the Indians most wanted to hunt, like bison, moose, elk and deer; are found most easily in areas of recently burnt forest, which is why they burnt the forests over and over again.'")

place and deplete the land.[37] Often the size of villages would change with the season as groups broke up or came together wherever it was expected the most food would be found. Many Native groups adapted their lifestyle to fit the land, rather than adapt the land to fit their lifestyle.[38] Ecological demands were minimized by moving from place to place, keeping population at a minimum, killing only animals needed to survive, and using knowledge of nature and the changing seasons to advantage.[39]

In addition, many Native peoples were traditionally quite frugal, enabling sustainable economies that did not tax the environment, and where there was little profit motive, minimal surplus production, almost no economic growth, and a reliance on a barter system.[40] Additionally, Native economies often did not produce at maximum levels and most Native groups did not use available labor, technology, or resources to the fullest potential. It would seem, then, that Native peoples preferred to have a shorter workday of three to five hours and more days off rather than extra material possessions. As a result of this reluctance to promote maximum production, Native economies did not use their environments to the fullest potential, nor did most Native nations strive to support as many people as they could have. In this way, the nations and their economies remained very sustainable.[41]

Many Native groups realized that in addition to frugality, population control was another key to a prosperous, sustainable lifestyle. Optimal population size was generally determined by evaluating the number of people that could live in a particular region without overtaking or destroying the environment. In other words, Native peoples often allowed the land to decide the maximum number of people in their particular nation.[42] In accordance with maintaining limited populations, controls were often integrated into Native religious practices. For example, sexual abstinence was a purification rite in many rituals and ceremonies. Another custom among the Cheyenne people was for a man to vow not to have another child for seven to fourteen years after his first child so that all of his energy could be

37. CRONON, *supra* note 34, at 37.
38. CRONON, *supra* note 34, at 38.
39. *Id.* at 53.
40. JERRY MANDER, IN THE ABSENCE OF THE SACRED 216 (1991).
41. *Id.* at 250.
42. CHURCHILL, *supra* note 10, at 433.

concentrated on raising the one.[43] Along with such customs and rites, Native peoples had a very developed knowledge of menstrual cycle and knew of medicines that could cause abortions if desired.[44]

Native American lifestyles can be described as more environmentally friendly than their European successors on American soil, it is inaccurate to overly romanticize the relationship of Native peoples to the earth and believe that the Natives did not manipulate their land at all.

While it is true that Plains Indians did engage in this sort of hunting method, they did so only after the Europeans had introduced the horse to the North American continent. Ultimately, the demise of the plains buffalo was due to deliberate efforts on the part of American settlers in the mid-1800's, not to actions of the Plains nations themselves.[45]

2. Modern Day Native Voices

The influence of European ecological perspectives on the North American continent is further highlighted by the current debate over "traditional" versus "assimilated" ecological behavior by modern day Native Americans. Deloria writes:

> "A good deal of the political turmoil on the reservations today is between traditional people and more assimilated people over the use of land and resources. Traditional

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43. HUGHES, *supra* note 11, at 97.

44. *Id.* at 98.

45. GRINDE & JOHNSON, *supra* note 21, at 28; *but see* John J. Miller, *Buffaloed*, NATIONAL REVIEW, Oct. 9, 2000, at 28. (The assertion that Native communities played only an ancillary role in the destruction of the buffalo is, at the very least, debatable. "Indians were remarkably efficient buffalo killers, with individual hunters dressing in skins to get close shots, and groups of them driving whole herds off cliffs. It's becoming increasingly clear that Indians inflicted an enormous amount of damage on this Edenic symbol of wild North America. In his recent book THE ECOLOGICAL INDIAN, Shepard Krech III of Brown University writes that Indian belief systems contributed to over-hunting. Many Plains Indians thought that if even a single buffalo were allowed to escape from hunters, it would alert others; as a result of this belief, the hunters would 'kill as many as possible' whether they needed the buffalo or not").

> people generally want to use the land in the same way as did their ancestors while the more assimilated people want to use it as an economic resource. The question that emerges is whether land is a "thing" to be used to generate income or a homeland on which people are supposed to live in a sacred manner."[46]

The introduction of European ideas can be seen as a barrier to tradition, without which the Native people would remain "traditional" and thus "want to use the land in the same way their ancestors did."

Traditional Native interactions with the earth based on the idea that humans and other beings were equal. Thus, Native people tended not to greatly affect or harm the surrounding ecosystems. It is true that ecological communities changed as a result of Native actions. However, most environments were able to function perfectly well while supporting both the Native groups and a wide variety of animals and plants. Native groups adapted their living patterns to fit the land, instead of adapting the land to fit their living patterns, and this lifestyle was crucial to the sustainability of their environment.[47]

The traditional Native land ethic was composed of two distinct parts. First, Native peoples had a detailed understanding of how the natural world worked. Secondly, they felt a sense of belonging and firmly believed that humans had to "fit in" with the rest of nature instead of trying to dominate it.[48]

Even today, Native peoples continue to speak against using land and nature as a "thing," and in voicing these arguments many hearken back to the traditional land ethics held by their respective nations long before the coming of Europeans. [49] For example, when asked to summarize the relationship between humans and the land at the end of the 20th century, a group of Iroquois responded:

> "The original instructions direct that we who walk about the Earth are to express a great respect, an affection and a gratitude towards all spirits who create and support Life.

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46. DELORIA, *supra* note 1, at 212.

47. Booth & Jacobs, *supra* note 9, at 31.

48. *But see* Minerd, *supra* note 14, at 10-11. (Despite the apparent strength and appeal of "traditional" Native beliefs, there is no shortage of evidence that indicates that modern Native communities have subjugated the traditional tenets of ecological equality to economic pursuits).

49. JOHN FIRE LAME DEER & ERDOES, *supra* note 27, at 595.

> When people cease to respect and express gratitude for all many things, then all life will be destroyed, and human life on this planet will come to an end."[50]

Ward Churchill also tries to summarize this Native land ethic in his book *Struggle for the Land*:

> "In simplest terms, the American Indian world view may be this: Human beings are free (indeed, encouraged) to develop their innate capabilities, but only in ways that don't infringe upon other elements...of nature. Any activity going beyond this is considered an "imbalance," a transgression, and is strictly prohibited. For example, engineering was and is permissible, but only insofar as it does not permanently alter the earth itself. Similarly, agriculture was widespread, but only within norms that did not supplant natural vegetation."[51]

Additionally, Churchill provides possibly the best outline of how the United States would change if Native peoples suddenly succeeded in their land claims. First, population would be strictly controlled. Churchill notes, "the population of indigenous nations everywhere has always been determined by the number of people who could be sustained in a given environment or bio-region without overpowering and thereby destroying that environment."[52] Second, water in arid desert regions would be controlled very tightly, used for drinking and other such necessities, but no rivers would be diverted in the interests of creating another Florida in the desert.[53] Third, on the subject of power generation, Churchill writes:

> "Adios to air conditioners in every room. Sorry about your hundred mile expanses of formerly streetlit expressway. Basic needs will be met, and that's it. Which means we can also start saying goodbye to western rivers being backed up like so many sewage lagoons behind massive dams...we can begin to experience things like a reduction in the acidity of southwestern rain water as facilities like the Four Corners Power Plant are cut back in generating time, and eventually eliminated all together."[54]

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50. GRINDE & JOHNSON, *supra* note 21, at 267.
51. CHURCHILL, *supra* note 10, at 17.
52. *Id.* at 433.
53. *Id.* at 439.
54. *Id.* at 440.

Another slightly less radical voice in modern times has come from Matthew Coon-Come, Grand Chief of the Crees of northern Quebec. Regarding the development of land that historically belonged to the Cree, Coon-Come stated, "I am not against development or all construction or economic activity...we understand that there is value in progress and advancement...but I must ask if every project, if every new structure, every new highway, if every dam is really 'development.'"[55]

Given the strong attachment many Native peoples have shown to traditional land ethics, a considerable likelihood exists that without the European invasion of North America, the tenets of the Native land ethic would remain basically the same today as they were 500 years ago. Most likely, practices similar to those discussed earlier in this section would still prevail, emphasizing balance with nature and a very different definition of "progress" than the one held by most of non-Native America.

C. *Unreasonable Expectations?*

Scholarly debate exists as to the ecological consciousness of Native American communities and the extent to which these communities actually behaved in an environmentally friendly fashion. Evidence of participation in the over-harvesting of game during the fur trade,[56] "jumping" buffalo over cliffs,[57] and sometimes uncontrolled burning of forest[58] suggests that every Native community did not

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55. GRINDE & JOHNSON, *supra* note 21, at 230-31.

56. *See generally* CALVIN MARTIN, KEEPERS OF THE GAME: INDIAN-ANIMAL RELATIONSHIPS AND THE FUR TRADE (1978).

57. Minerd, *supra* note 14.

58. *See* SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY 110-11 (1999). (Krech asserts: "It is clear that when lit at optimum times of the year, fires had a positive impact on the growth of grasses and animal forage, but in their pragmatism, Indians were not always concerned with how far, fast, or hot each and every fire burned. Objectives such as delivering signals, or killing, discomforting, or hindering one's enemies (the most commonly reported uses of fire in the Plains) were not always compatible with control. And accounts of campsite fires burning thousands of acres are legion. Whether this was 'careless' behavior, as many disapprovingly label it, depends on what, precisely, must be taken care of

possess an ecological ethic that modern environmentalism should model.

The popular romanticization of Native land ethics is also troublesome. Native American communities did not always behave in an environmentally conscious fashion. However, cannot Native communities still be considered conservationists despite occasional divergence between their ecological principles and actual behavior?

Should their sometimes ecologically unfriendly behavior dissuade conservationists and environmental lawyers from learning from the positive qualities of Native ecological perspective? The answer is an emphatic "no." Indeed, the Native American ecological ethic provides a much-needed value structure capable of guiding policy makers in environmental decision making.

III. THE ENDANGERED SPECIES ACT

The Endangered Species Act[59] of 1973 ("ESA") was hailed as one of the crowning achievements of the modern environmental movement.[60] In a high water case, the Supreme Court even interpreted the ESA as a "a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies" and to prevent the destruction of such species "whatever the cost."[61] Sub-

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and in what way. All this does not mean that Indians were not ecologically or systemically aware, only that they did not always think of the ecological consequences of all the fires they lit. The fires used aggressively to communicate were not kindled with identical considerations in mind as the fires lit to enhance the productivity of econiches").

59. 16 U.S.C. §§ 1531-1544 (1988).

60. *See* Holly Doremus, *Patching the Ark: Improving Legal Protection of Endangered Species*, 18 ECOLOGY L. Q. 265 (1991) (describing the ESA as the strongest piece of legislation ever devised to protect non-human species); *see also* Elizabeth Foley, *The Tarnishing of an Environmental Jewel: The Endangered Species Act and the Northern Spotted Owl*, 8 J. LAND USE & ENVTL. L. 253 (1992) (characterizing the ESA as an "environmental jewel").

61. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184-85 (1978).

sequent amendments to and interpretations of the act have made it clear that the latter quote is an exaggeration.[62]

The ESA has also been derided by the other side as the product of radical extremists whose value preferences are highly suspect. However, the ESA's proponents and detractors do agree on one thing: the Act could be improved. A compromise, however, has not been forthcoming and the reauthorization of a new, improved ESA has become a perennial, and largely fruitless struggle since 1993.

The normative desirability of the ESA is dependent upon the value preferences of those who participate in the debate. The Native American value preferences and attitudes toward the environment developed in the previous section suggest that if the ESA is to be strengthened and the human habitat is to be maintained long term, the preservation of the environment must take priority over the rights of property owners and resource users.

A. *Implementation of the ESA*

Key to the reauthorization debate is a basic understanding of the ESA as it was originally developed, and how the Act currently operates.[63] The fundamental purpose of the ESA is to protect species from extinction and conserve the ecosystems on which they depend.[64] Protection under the ESA depends on the formal listing process,[65] which classifies at-risk species into one of two categories: threatened[66] or endangered.[67]

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62. *See* notes 86-94 *infra*, and accompanying text, describing the designation of critical habitat, which explicitly requires the FWS to take cost into account.

63. *See generally* James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991); Daniel J. Rohlf, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 1 (1989); Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

64. Endangered Species Act § 2(b), 16 U.S.C. § 1531(b) (1973).

65. *Id.* § 1533(a)-(c).

66. *Id.* § 1532(20).

67. *Id.* § 1532(6).

Once a species is listed, the ESA provides for the designation of "critical habitat"[68] as well as development and implementation of recovery plans.[69] Any taking, possession, or sale of a listed species is expressly prohibited.[70] Additionally, the ESA charges federal agencies with a duty to ensure that their actions do not "jeopardize the continued existence of any endangered or threatened species" or adversely affect critical habitat,[71] though the ESA does provide a limited exemption process for federal projects that infringe upon the safety of listed species.[72]

1. Listing of Species

Listing authority under the ESA is bifurcated; the Secretary of the Interior, acting through the Fish and Wildlife Service (FWS), handles listings for all terrestrial species, and the Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS), lists marine species.[73] A species is classified as "endangered" when the Secretary finds a species "in danger of extinction throughout all or a significant part of its range"[74] while "threatened" is defined as likelihood to become endangered in the foreseeable future.[75] The protections of the ESA are not entirely limited to expressly listed species; even though not formally listed, a species may receive the protection of the ESA based on a similarity to an already listed species.[76]

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68. ESA § 4(b), 16 U.S.C. § 1533(b).
69. *Id.* § 1533(f).
70. *See id.* § 1538(a).
71. *Id.* § 1536(a)(2).
72. *See* ESA § 7(e)-(n), 16 U.S.C. §§ 1536(e)-(n).
73. 16 U.S.C. § 1533(a).
74. *Id.* §§ 1532(6), 1533(a).
75. *Id.* §§ 1532(20), 1533(a).
76. *See* ESA § 4(e), 16 U.S.C. § 1533(e); 50 C.F.R. § 17.52 (1992) (noting that species regulated due to similarity of appearance do not receive the extensive protection of threatened and endangered species. The taking of these similar species is allowed when proper permits are obtained).

The listing process may be initiated by the agency itself or by a private party.[77] When a private party petitions for a species to be listed[78], the appropriate agency has ninety days to determine whether the petitioners have presented "substantial information" to support listing, and if so, the agency has a year to decide how and when it will proceed.[79] Within one year following publication of the proposed regulation, the Secretary must promulgate a rule, request a one-time only six-month extension, or publish a notice of withdrawal of the proposed rule.[80]

In determining whether to list a species as threatened or endangered, the Secretary may consider only five statutory criteria:

(1) the present or threatened destruction, modification, or curtailment of its range or habitat;
(2) over-utilization for commercial, recreational, scientific, or educational purposes;
(3) disease or predation;
(4) the inadequacy of existing regulatory mechanisms; or
(5) other natural or manmade factors affecting its continued existence.[81]

It is important to note that the Secretary may not consider economic impacts of the listing; rather, his decision must be founded "solely on the basis of the best scientific and commercial data available."[82]

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77. *See* § 16 U.S.C. § 1533(a)-(b).

78. Recently, the majority of new listings have been initiated by private entities. *See* Amy Whritenour Adno, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29 (1999).

79. § 1533(b)(3). Because species are listed through the rulemaking process, petitions from interested parties may be submitted under the authority of the Administrative Procedure Act. *See* 5 U.S.C. § 553(e) (1988); 50 C.F.R. § 17.52 (1992) (The Secretary must respond to a petition within one year by making one of the following findings: (1) the petition is not warranted, which terminates the process; (2) the petition is warranted, which requires a proposed rule for listing to be published promptly; or (3) the petition is warranted but presently precluded by higher-priority listing proposals).

80. 16 U.S.C. § 1533(b)(6).

81. *Id.* § 1533(a)(1).

82. *Id.* § 1533(b)(1)(A).

As of mid-2002, there were 1,261 plants and animals listed.[83] A backlog of about 260 plants and animals await consideration for the list.[84]

2. Designation of Critical Habitat

Once a species is listed, the Secretary is charged with the duty of designating critical habitat for each endangered or threatened species, unless doing so would be impossible or imprudent.[85] In determining critical habitat, the Secretary examines an area for features essential to the species' survival such as food, shelter, and breeding.[86] Designation of critical habitat must be based upon the "best scientific data available," but unlike the listing determination, the Secretary must also consider economic impacts,[87] a requirement that has recently been the basis for a number of challenges to critical habitat designations.[88] However, if failure to designate critical habitat will result in extinction, then a critical habitat designation must be made despite economic considerations.[89]

The final rule designating the critical habitat of an endangered species should be promulgated with the final rule listing the species.[90] However, if it is not possible to determine the critical habitat within that time frame, the Secretary may have one additional year to designate a critical habitat.[91] The final designation must include a description of the designated area and an evaluation of any public or

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83. David Fleshler, *The Endangered Species Act: Does the Law Still Have Teeth?*, S. FLA. SUN-SENTINEL, Aug. 18, 2002, at 1F.

84. *Id.*

85. ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2).

86. 50 C.F.R. § 424.12(e) (1993).

87. ESA § 4(b)(92), 16 U.S.C. § 1533(b)(2).

88. *See* Tania Soussan, *N.M. Suit Sets Off Habitat Backlash*, ALBEQUERQUE J., Aug. 11, 2002, at A1 (discussing of the recent spate of litigation challenging critical habitat designations on grounds that the government did adequately taking into consideration economic impacts when making the designations).

89. *Id.*

90. 16 U.S.C. § 1533(b)(6)(C).

91. *Id.* § 1533(b)(6)(A).

private activities that might destroy or adversely impact the critical habitat.[92]

Unfortunately, the FWS seems to systematically ignore its obligation to designate critical habitat, taking the position that critical habitat designation provides little or no additional benefit to a species.[93] As of 1999, only 120 of the 1181 listed species had critical habitat designations.[94]

3. Recovery Plans

In addition to designation of critical habitat, the Secretary must develop and implement recovery plans for the "conservation and survival" of the listed species "unless he finds that such a plan will not promote conservation of the species."[95] The Secretary must establish a priority list for developing recovery plans, giving top priority to those species most likely to benefit from the listing.[96] The responsibility for drafting a recovery plan is usually delegated to both public and private sector biologists; recovery plans are technical, scientific documents that identify the specific steps needed to conserve and recover a species. Recovery teams, whose membership often include federal, state, and private actors, carry out the recovery plans.[97]

In its 1988 reauthorization of the ESA,[98] Congress directed the FWS and the NMFS, when drafting recovery plans, to provide "a

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92. ESA § 4(b)(8), 16 U.S.C. § 1533(b)(8).

93. Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25,502-3 (May 8, 1998) (to be codified at X CFR XXX).

94. U.S. FISH AND WILDLIFE SERVICE DIVISION OF ENDANGERED SPECIES, *ENDANGERED SPECIES GENERAL STATISTICS, available at* http://www/fws.gov/r9endspp/theactstats.html (last modified Mar. 31, 1999).

95. 16 U.S.C. § 1533(f)(1).

96. *Id.* §§ 1533(h)(4), (f)(1)(A) (placing particular emphasis on giving priority to recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity".)

97. *Id.* § 1533(f)(2).

98. Endangered Species Act Amendments of 1988, PUB. L. No. 100-478, 102 Stat. 2306 (1988).

description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species" and "objective, measurable criteria which, when met, would result in a determination ... that the species be removed from the list."[99]

Thus, the measurable goal of the recovery plans was to improve the health of the species to the point that it no longer needed the protections of the Act. In fact, by 1989, the FWS would state, "restoring endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of the [FWS] endangered species program."[100]

The recovery goal, however, is a long way from being met. By mid-2002, only 13 species had recovered to the point that they could be taken off the endangered species list,[101] and in 2003, the FWS is proposing to delist or downlist ten additional species.[102] Even assuming the FWS follows through on its proposals, the number of species recovered is still small. Only seven of the species listed as endangered or threatened have thus far become extinct.[103]

Part of the reason for the limited number of recoveries under the Act may lie in the fact that the plans are not directly enforceable.[104]

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99. *Id.*

100. Availability of Draft Recovery Plans for the Colorado Squawfish, Humpback Chub, and Bonytail Chub for Review and Comment, 54 Fed. Reg. 30,616 (July 21, 1989).

101. David Fleshler, *supra* note 83.

102. *Id.*

103. *Id.* According to an independent study, 190 listed species would have gone extinct without the ESA's protection. *Id.*

104. *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384 (D. Wyo. 1987) (refusing to overturn a National Park Service decision to keep the Fishing Bridge Campground in Yellowstone National Park open despite the plaintiff's argument that the terms of the Grizzly Bear Recovery Plan required the campgrounds to be closed); Nat'l Audobon Soc'y v. Hester, 801 F.2d 405 (D.C. Cir. 1986) (court of appeals refused to issue an injunction that would have required the FWS to comply with its recovery plan for the California Condor); Defenders of Wildlife v. Lujan, 792 F. Supp 834 (D.D.C. 1992) (court refused to enforce portions of the Northern Rocky Mountain wolf Recovery Plan); and Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996) (wherein the court refused to stop

In a 1996 decision that has not been overturned, the 11th Circuit Court of Appeals stated what appears to be the current interpretation that "Section 1533(f) makes it plain that recovery plans are for guidance purposes only."[105] Similarly, the courts will not require agencies to prepare and enforce recovery plans, with one court stating, "unlike other requirements under the ESA, such as the designaton of critical habitat, the statute places no time constraint on the development of recovery plans."[106]

The courts, however, will intervene if they believe a recovery plan is not adequate. The judiciary first indicated its willingness to scrutinize these recovery plans in the case of *Fund for Animals v. Babbitt*,[107] in which the court ruled that a plan for recovery for the Grizzly bear was inadequate because it did not include "objective, measurable criteria" as required by Section 4(f).[108] The court also held that the plan failed to adequately describe "site-specific management actions" required under the same section.[109]

Since the *Fund for Animals* case, the courts have continued to carefully scrutinize recovery plans. For example, in the 2001 case of *Defenders of Wildlife v. Babbitt*[110] the court rejected a recovery plan for the Sonoran pronghorn on grounds that the FWS had failed to satisfy the requirement of identifying objective measurable criteria because the criteria were simply numerical goals, rather than means for identifying the reduction of threats to the species.[111]

4. The Takings Prohibition

Under Section 9, the ESA prohibits the taking of endangered species.[112] The ESA broadly defines "take" to include "harass, harm,

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construction of a municipal landfill in wetlands within the habitat of the endangered Florida Panther, which an environmental group said violated the animal's recovery plan.)

105. *Fund for Animals,* 85 F.2d at 547.
106. Strahan v. Linnon, 967 F. Supp. 581, 597 (D. Mass. 1997).
107. 903 F. Supp. 96 (D.D.C. 1995).
108. *Id.* at 111.
109. *Id.* at 106.
110. 130 F. Supp. 121 (D.D.C. 2001).
111. *Id.* at 133.
112. ESA § 9(a)(1)(B),(C); 16 U.S.C. § 1538(a)(1)(B),(C).

pursue, hunt, shoot, wound, kill, trap, capture, or collect."[113] Agency regulations further define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[114] "Harass" encompasses "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."[115]

Governments, as well as individuals, may be liable under this provision. For example, the Hawaii Department of Natural Resources was found to have violated Section 9 by maintaining feral sheep and goats in the endangered Palila bird's critical habitat.[116] The state of Massachusetts's commercial fishing licensing program was found to be a taking of the endangered right whale because the licensing regulations made it impossible for a licensed commercial fishing operation to use gillnets or lobster pots without risk of taking a right whale.[117]

Section 11 allows the federal government to seek criminal sanctions, civil penalties, and injunctions for "takings" or other violations of the ESA.[118] Private citizens may seek only injunctions. Civil penalties of not more than $25,000 may be imposed under Section 11(a)(1) if the violation is done "knowingly" and $500 otherwise.[119] Section 11(b)(1) imposes a maximum criminal penalty of $50,000 and/or one year in jail against anyone who "knowingly" violates the ESA.[120] These penalties are increased by 18 U.S.C. § 3571 to a maximum per violation of $100,000 for individuals and $200,000 for corporations.

The ESA provides that the takings prohibitions may also be extended to threatened species if such protections are needed to conserve the species.[121] The FWS did choose to extend the prohibi-

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113. 16 U.S.C. § 1532(19).
114. 50 C.F.R. § 17.3 (1993).
115. 50 C.F.R. § 17.3 (1993).
116. Palila v. Hawaii Dep't. of Land and Natural Res., 471 F. Supp. 985 (D. Hawaii 1979).
117. Strahon v. Coxe, 127 F. 3d 155 (1st Cir. 1997).
118. 16 U.S.C. § 1540.
119. *See id.* § 1540(a)(1).
120. *See id.* § 1540(b)(1).
121. ESA § 4(d); 16 U.S.C. § 1533(d).

tion,[122] but limited the applicability of the takings prohibition when a "special rule,"[123] referred to a 4(d) rule, had been adopted.

These 4(d) rules set the conditions under which incidental takings of a threatened species will be allowed, including requirements that will minimize and mitigate the impacts of the taking and ensure that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[124] Other similarly protected threatened species include Utah prairie dogs,[125] American alligators,[126] blue-tailed mole skink and sand skink.[127]

5. Federal Agency Obligations

The ESA charges federal agencies with ensuring that their activities are "not likely to jeopardize the continued existence of any endangered species or threatened species" or adversely affect critical habitat.[128] Prior to action, the agency must ask the Secretary whether any listed species or critical habitat may be found in the proposed action area.[129] If the action area contains any listed species or critical habitat, the acting agency must prepare a biological assessment identifying any listed species likely to be affected.[130] The biological assessment contains a list of species in the action area, a review of biological or botanical material, the results of a field inspection, and sometimes statements of experts in the field.[131] If the

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122. 50 C.F.R. pt. 17.31 (a).

123. *See id.* pt. 17.31(c). *See also* 50 C.F.R. pts. 17.40-46 (special rules for mammals, birds, reptiles, amphibians, fishes, and crustaceans).

124. 50 C.F.R. pt. 17.32(b)(2).

125. *See id.* pt. 17.40(g)(2) (prairie dog may be taken on private land in accordance with state laws, subject to conditions limiting the number and time of takings.).

126. 50 C.F.R. pt. 17.42(a)(2)(ii) (alligator can be taken in accordance with state laws and regulations subject to tagging and record keeping requirements).

127. 50 C.F.R. pt. 17.42(d)(1) - (2).

128. 16 U.S.C. § 1536(a)(2).

129. *Id.* § 1536(c).

130. *Id.* § 1636(c); 50 C.F.R. § 402.12(d)(1).

131. 50 C.F.R. § 402.12.

biological assessment ends with a "no risk" finding with which the FWS concurs, the process ends.[132]

If the biological assessment reveals that a species is likely to be affected, the agency must formally consult with the Secretary.[133] Following consultation the Secretary must issue a biological opinion detailing whether the proposed action would jeopardize the species or critical habitat.[134] If the extinction of the species is a possible consequence of agency action, the biological opinion will contain a listing of "reasonable and prudent alternatives" to the proposed agency action that the Secretary feels would not jeopardize the species while allowing the project to proceed.[135] The biological opinion must include an incidental take statement, identifying whether the proposed action might incidentally result in a take, or loss of the species, as well as the extent of this take and reasonable and prudent measures to minimize the impact of such takings on the species.[136]

The ultimate responsibility for insuring that the action does not jeopardize a listed species lies with the acting agency; it may accept or reject the advice of the consulting agency.[137] Thus, the biological opinion does not necessarily preclude agency action so long as the agency takes "alternative, reasonably adequate steps to insure the continued existence" of listed species.[138] However, the agency must use the "best scientific and commercial data available" in whatever decision it ultimately makes;[139] therefore, before straying from the suggestions of the biological opinion, the agency should have some reliable basis for its action.

a. *Incidental Take Permits*

The ESA recognizes that not all takings can be prevented, and allows permits to be issued for the "incidental take" of an endangered species when the take in incidental to an otherwise lawful activity.

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132. *Id.* §§ 402.12 (j) and 402.14 (b).
133. *Id.* § 402.12(d)(2).
134. ESA § 7(b)(3)(A); 16 U.S.C. § 1536(b)(3)(A).
135. 50 C.F.R. § 402.14(h)(3) (1993).
136. 16 U.S.C. § 1536(b)(4).
137. ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2); 50 C.F.R § 402.15(b).
138. Tribal Vill. of Akutan v. Hodel, 859 F.2d 651, 660 (9th Cir. 1988).
139. ESA § 7(a)(2), 16 U.S.C. § 1636(a)(2).

When such a permit is desired, the applicant must submit a habitat conservation plan (HCP), describing any impacts likely to result from the taking, proposed measures to minimize the impacts from the taking, funding available to implement the measures and alternatives considered.[140]

The HCP will be approved only when there has been a finding that any taking is incidental; that the applicant will minimize and mitigate impacts; that adequate funding is available; and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[141] Additionally, other "necessary or appropriate" measures may be required.[142] Non-federal landowners may receive "no surprises" assurances that no additional conservation measures will be required if additional impacts on the species are caused by "unforeseen circumstances."[143]

b. Exemptions

If a proposed agency action will threaten a listed species, the agency, license applicant, or governor of the affected state may seek an exemption from the Endangered Species Committee.[144] The Endangered Species Committee consists of the Secretaries of Agriculture, Interior, and the Army; the Chair of the Council of Economic Advisors; the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration; and a seventh member from the affected state chosen by the President.[145] To grant the exemption, at least five of the seven members must find: (1) that no reasonable and prudent alternatives exist; (2) the action's benefits clearly outweigh the benefits of any alternatives; (3) the action is in the public interest; (4) the action is of national or regional significance; and (5) the applicant has not taken steps that foreclose implementation of reasonable and prudent alternatives.[146] The order granting the exemption must establish reason-

140. 16 U.S.C. § 1539.
141. 16 U.S.C. § 1539 (2)(B).
142. 16 U.S.C. §§ 1539 (2)(A)(iv) and (2)(B)(v).
143. 63 Fed. Reg. 8859-8873 (Feb. 23, 1988).
144. 16 U.S.C. § 1536(h).
145. *Id.* § 1536(e).
146. *Id.* § 1536(h)(1)(A).

able mitigation and enhancement measures necessary to minimize risks of extinction.[147]

6. Safe Harbor Agreements for Voluntary Habitat Improvements

In 1999, in an attempt to provide both private and non-federal public landowners with an incentive to maintain and enhance protected species' habitats on their property, FWS enacted a "safe harbor" policy.[148] Under this policy, landowners may enter into agreements with the FWS to carry out positive actions to benefit endangered species without incurring new or added land use restrictions on their property.[149] In other words, the landowner agrees to do something positive for an endangered species that he has no legal obligation to do, in return for which he is assured that his action will not cause any increase in the legal restrictions on the use of his land under the ESA.

If there are already restrictions on the use of the land due to the existing presence of endangered species, those restrictions become "baseline" restrictions. Where such baseline restrictions exist, the safe harbor agreement assures the landowner that he or she will not be subjected to additional restrictions under the ESA, even though the species in question may become more numerous or widespread on the property.

Safe harbor agreements are authorized under more than one section of the ESA. The first such agreement was authorized under Section 10(a)(1)(B), which authorizes the taking of listed species incidental to any "otherwise lawful activity," the same section under which habitat conservation plans have been authorized. [150] Today, most

147. 50 C.F.R. § 453.03(a)(2) (1993).

148. FWS and Nat'l Oceanic and Atmospherc Admin., "Announcement of Final Safe Harbor Policy," 64 Fed. Reg. 32717-26 (June 17, 1999).

149. Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717-26 (June 17, 1999), *available at* http://www.environmental defense.org (last visited Mar. 30, 2003).

150. Safe harbor agreements can be considered a subset of HCPs. They differ from typical HCPs, however, in that a typical HCP, involves a landowner who has immediate plans to do something harmful to a listed species and must prepare an HCP to mitigate for the proposed harmful activity, but in a safe harbor agreement, the land-

safe harbor agreements are entered into under the authority of section 10(a)(1)(A), which authorizes any otherwise prohibited action "to enhance the propagation or survival" of a listed species.[151]

B. *Problems Associated with the ESA*

Despite its characterization as an "environmental jewel"[152] and the "pit bull of environmental law,"[153] the ESA has multiple problems. Perhaps the most severe shortcoming of the ESA is the lack of sufficient funding needed to carry out species conservation. Other shortcomings include the sluggish listing process, the piecemeal and reactive structure of the statutory provisions, and the ESA's general failure to adequately protect biodiversity.

Given the characteristic disunity of American politics, unsurprisingly, a major problem with the ESA stems from its lack of financial support. For example, the average cost to list a species is $60,000;[154] yet during the early 1990s, Congress customarily allotted only $3.5 million per year for the listing process and only $30 million to $40 million for the entire endangered species program.[155] Clearly, Congress did not allocate enough money to carry out the

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owner's only immediate plan is to do something beneficial to a listed species, such as create habitat for it where currently there is none. He may or may not eventually want to do something in the future that will a permit, but if he does, the permit issued in conjunction with his safe harbor agreement gives him that future authorization. In other words, the difference between the two is that the former authorizes the immediate incidental taking of a listed species that is currently present on a property whereas the latter authorizes the future incidental taking of a species that is not now present and that would not be present in the future if the beneficial action voluntarily undertaken by the landowner were not undertaken.

151. 16 U.S.C. § 1539 (a)(1)(A).

152. Foley, *supra* note 60, at 253.

153. *See* Robert A. Thornton, *Searching for Consensus and Predictability; Habitat Conservation Planning Under The Endangered Species Act of 1973*, 21 ENVTL L. 588 n.3 (1991).

154. Rudy Abramson, *Wildlife Act: Shield or Sword*, L.A. TIMES, Dec. 14, 1990, at A1.

155. *Id.*

ESA. Lack of a sufficient budget has also contributed to the lack of enforcement.[156]

The ESA is also less effective because of its slow listing process. For example, between 1973 and 1993, an average of only twenty-six species per year were listed.[157] In 1992, the General Accounting Office (GAO) reported 105 species as being on the "warranted but precluded" list for over two years.[158] Despite Congress' mandate to designate critical habitat for listed species at the time of the listing "to the extent prudent and determinable,"[159] a 1992 GAO study showed that critical habitat had been designated for only sixteen percent of the listed species.[160] Further, of the 651 species examined, 546 had no critical habitat designated or pending.[161]

Some have criticized the piecemeal and reactive nature of the ESA.[162] The ESA affords protection only when a species nears the brink of extinction, a point when intervention is costly and often ineffective.[163] The ESA then requires drastic, expensive rescue efforts where preventive measures would probably have saved a greater number of species at a lower cost.[164] For example, in his critique of the ESA, David Blockstein compares the ESA to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

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156. *See e.g.*, Vill. of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), *aff'd* Vill. of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

157. Houck, *supra* note 63, at 285.

158. *Id.* at 292; *see* ESA § 4(b)(3)(B)(iii), 16 U.S.C. § 1533(b)(3)(B)(iii).

159. ESA § 4(a)(3), 16 U.S.C. § 1533(a)(3).

160. U.S. GENERAL ACCOUNTING OFFICE, THE ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTION 29 (1992).

161. *Id.*

162. *See e.g.*, Julie B. Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach to Protect the Nation's Biological Wealth*, 10 PACE ENVTL. L. REV. 175, 201 (1992); John C. Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. at 501 (1994).

163. *Id.*

164. *Id.*

(CERCLA).[165] Congress designed both statutes as remedial responses to specific disasters.[166] Congress eventually responded to the problem of toxic waste with preventive statutes such as the Resource Conservation and Recovery Act (RCRA)[167] and the Toxic Substances Control Act (TSCA).[168] Just as this experience suggests, it may be cheaper to prevent hazardous waste problems from developing through RCRA and TSCA, so it may be more effective to prevent species from becoming endangered in the first place.

At least one critic has noted several reasons for the failure of the ESA to protect bio-diversity.[169] First, in practice, the ESA protects high profile creatures, birds and mammals that are appealing to the public, and ignore other species important in protecting biodiversity.[170] Second, species recovery plans likewise do not reflect the importance of the species' contributions to biodiversity.[171] Third, the terms "threatened" and "endangered" cannot be objectively defined, allowing politics and economics to significantly affect the listing decision.[172] Fourth, many FWS listing decisions are made in closed-door proceedings, without sufficient input from outside scientists.[173] Fifth, the ESA does not sufficiently protect habitat reserves in order to sustain recovered populations.[174] Finally, federal agencies tend to discount the uncertainty in their decisions.[175]

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165. 42 U.S.C. §§ 9601-75 (1988).
166. *Id.*
167. 42 U.S.C. §§ 6901-92k (1988).
168. 15 U.S.C. §§ 2601-71 (1988).
169. *See* Daniel J. Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn't Work - and What to do About It*, CONSERVATION BIOLOGY, Sept. 1991, at 273.
170. *Id.* (Rohlf argues that the FWS often bases its listing decisions on the political rather than scientific importance of the species).
171. *Id.* at 275. (Rohlf indicates that the FWS has spent 50% of its funding from 1982 through 1986 on twelve species, only six of which were highly threatened. None of the species were considered keystone or indicator species, species central to the ecosystem or indicators of the system's health).
172. *Id.*
173. *Id.* at 276.
174. *Id.* at 277-78.
175. Rohlf, *supra* note 169, at 278-9.

Despite some of the ESA's shortcomings, it should not be criticized for restricting American economic growth. Section 7 of the ESA, which is the focus of many developers' ire, simply has not had much of an impact on economic development activities. While a few notable projects have been temporarily delayed or modified, with a great deal of attendant publicity, almost ninety percent of consultations are disposed of informally.[176]

Over 90% of the remaining 10% that required formal consultation resulted in findings of no jeopardy.[177] Of the remaining few where there was a jeopardy finding, reasonable and prudent alternatives allowed the project to continue in a majority of the cases.[178] For example, during the early 1990's, only eighteen projects were formally terminated, less than one percent of formal consultations.[179] These statistics seem to contradict arguments that the Act is restricting American economic growth.[180] In fact, the numbers give rise to a fear that biological agencies may be bending over backwards to find less harmful alternatives, perhaps putting some species at greater risk than Congress had intended.[181]

IV. IMPLICATIONS OF NATIVE AMERICAN ETHIC FOR THE ENDANGERED SPECIES ACT

Disagreement on how to modify the ESA may indicate a lukewarm commitment to the protection of endangered species. However, the Native American ecological ethic might provide a positive guide for Congress' consideration. With the infusion of Native perspectives on the environment, the ESA could be a useful tool to serve the needs of vanishing wildlife.[182]

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176. *Id.* at 279.

177. *Id.*

178. WORLD WILDLIFE FUND, FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT 5 (1992).

179. *Id.* at ii.

180. *See* Ted Gup, *The Stealth Secretary*, TIME, May 25, 1992, at 57-58.

181. Houck, *supra* note 63, at 319.

182. In particular, we refer to two specific Native ideas: first, that there exists no natural hierarchy and humans are co-equals with all

The numerous problems associated with the ESA can be attributed, to the divisive nature of American politics. Clearly, Congress has: (1) failed to fund the ESA to the degree necessary to carry out its mandate; (2) constructed the ESA such that its protections become available only after species are on the brink of extinction; and (3) created a politicized enforcement mechanism that apparently cedes much to economic interests. However, poor administration and lack of funding is not a phenomenon unique to the ESA.

On the other hand, some of the ESA's failures might be attributed to the conflict between conservationist ideals and the European cultural understandings dominant in the American government. Eurocentric Americans tend to commodify nature and view themselves as both separate from and existing on a higher plane than the rest of nature. While such conceptions of nature do not necessarily imply that preservation will *always* take a back seat to economic or developmental preferences, they do pose a great danger to preservation of endangered species. Indeed, the checkered history of the ESA's enforcement is indicative that a robust commitment to preservation has almost always played second fiddle to other usually economic concerns.

Attitudes of natural equality and anti-commodification held by Native Americans, however lead us to certain conclusions in the debate about environmental standards and the ESA. First, greater funding for the ESA is needed. Second, the criteria for listing species should be relaxed and redefined. Finally, political and economic concerns must play a smaller role in the listing process. With Native American assumptions about the equality of all creation, the issue at hand becomes not which human economic activities take priority over endangered species lower in the hierarchy. Instead, we would ask, how does any proposed activity affect creatures whose status as beings is equal to our own?

At present, given that Congress will not allocate funds sufficient to fully protect threatened species, choices must be made about which species will be protected and which species will receive designated critical habitat. In so choosing, some species will be consigned to extinction, an unjust fate in light of Native attitudes toward natural equality. However, if humans and wildlife were unified, human action that causes extinction would be viewed as an act of genocide.

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other creation; second, that nature should not be viewed as a commodity.

In addition, the criteria for listing a species as threatened or endangered seem to violate the principles of both Native equality and Native resistance to commodifying nature. Under the current system, waiting until a species is on the verge of extinction prior to protection suggests that before that time, the direct exploitation of the species or the indirect economic exploitation of habitat has been deemed an acceptable cost. Such a calculus would likely be unacceptable from the Native perspective.[183]

Hunting and using animals or their habitat was quite acceptable to Native Americans; they were not vegetarians. However, waiting until a species is pushed to the brink of extinction before offering protection is inconsistent with their concept of natural equality. Furthermore, the overuse of such species or their habitat is equivalent to commodifying nature.

Finally, to conform with Native American ecological attitudes, the political and economic emphasis of the ESA's enforcement process should be de-emphasized. While the ESA is supposed to consider economic factors only in the designation of critical habitat, the fact that well over 90% of projects that have required consultation for potential harm to endangered species have been informally dispensed with and that most of the remaining 10% of projects continued based on the "reasonable and prudent" alternative exception to ESA guidelines suggest that economic interests have significant influence on the enforcement process.[184] Thus, there is great concern that the ESA is being flouted in the interests of economic development.

When about 1% of projects are considered being restricted because of threats to endangered species, it is reasonable to conclude that the survival of species and goals for economic development are not equally weighted for consideration.

V. CONCLUSION

The current legislators are relatively unengaged with conservational goals. For example, as noted previously, one of the problems with the ESA is that species do not get protection until they are on the brink of extinction. Yet, incorporated in legislation proposed in

183. *See supra* notes 45-46.

184. *See supra* notes 130,139.

both 2001[185] and 2002[186] are proposals that would slow down the listing process, thereby exacerbating this problem.[187]

In a search for ecological guidance, Native Americans provide a powerful vision. That is often hard for contemporary observers to comprehend: forget the roots of our existence at our collective peril. Unless we treat our environment with respect, we will waste away in our own garbage, all the while hoping to discover a magic technological fix with which to buy a little more time.

The ESA is a fundamentally sound piece of legislation; if aligned with Native American ecological attitudes, properly funded, and more rigorously enforced, the ESA could play a vital role in achieving a long term, sustainable habitat for humans and wildlife alike.

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185. Endangered Species Listing and Delisting Process Reform Act of 2001, S. 347, 107th Cong. (2001).

186. Sound Science for Endangered Species Decisionmaking Act of 2002, S. 1912 107th Cong. (2002).

187. H.R. 1402, 107th Cong. (2001) would require an additional step in the listing process—an independent scientific peer review before implementation of a finding that any species is endangered or threatened. The amendment would further require that no species could be listed unless the Secretary had data obtained from species observation in the field. The Endangered Species Listing and Delisting Process Reform Act of 2001, S. 347, 107th Cong. (2001) would lengthen the listing process by adding the requirement of two public hearings in the state where the species is found prior to the species' listing.