

# PRINCIPLES RELATED TO FAIR SHARING OF RESOURCES (An OFAH Discussion Document)

## INTRODUCTION AND GENERAL PRINCIPLES

*The principles which follow should be read in the context of O.F.A.H. policy related to First Nations and Métis and in conjunction with the 'First Principles' document prepared by O.F.A.H. related to Algonquins of Ontario and to Métis.*

Key principles expressed in those documents include (but are not limited to):

- **Natural resources, including fish and wildlife, represent an immensely valuable public trust that belongs to the public of Ontario and Canada.** The governments of Canada and Ontario act as the public custodian of this trust, and have the responsibility to manage those resources on behalf of all Canadians.
- **All society must share, or have the opportunity to share, in the benefits accruing from this natural resource trust.** Shared benefits include the environmental, economic and social returns from the resource. They also include less easily measured returns, including quality of life, peace of mind and way of life. We believe that no use or right is or should be exclusionary.
- **Resource sharing must recognize the degree to which aboriginal and Métis community members are participating in society and are benefiting from the advantages of that society,** including land ownership, business development, social, education, health, safety and employment benefits. Resource sharing must recognize the relative sizes of the Métis, other aboriginal and non-aboriginal populations.
- **Resource sharing must recognize that hunting and fishing are an integral part of the heritage and traditions of non-aboriginal peoples in the province.** Hunting and fishing are essential to the well being of all participants regardless of ancestry or "rights."
- **The ultimate allocation among users must be the subject of negotiation and discussion, and must, at times, be flexible to recognize extraordinary and changing circumstances.**
- **All decisions regarding use of fish and wildlife must have conservation as their fundamental underpinning.**
- **The right to hunt and fish or to use any resources, as either a form of expression or as an aboriginal or treaty right, must be bound by the principles and practices of conservation, safety and public health.**
- **"Conservation" is defined as the protection, use and management of natural resources to supply benefits at optimal sustainable levels for present generations and future generations of Canadians.** "Conservation" includes maintenance, sustainable

utilization, restoration (including rehabilitation, reintroduction and enhancement) and protection of fish and wildlife.<sup>1</sup>

- **The rules (laws and regulations) that are established to achieve the principles of conservation can vary** (e.g. different rules for commercial versus non-commercial use; subsistence/ceremonial uses versus sustenance uses), providing that conservation remains paramount.
- **Where it is necessary to limit harvest of species of fish and wildlife to sustain those populations, aboriginal and non-aboriginal communities will share the reduction in use.**
- **The exercise of rights brings with it a responsibility for sound stewardship and conservation.**
- **Sound stewardship includes public accountability.**
- **All users of resources should be responsible, in measure, for the costs of stewardship.**

The Tsawwassen Agreement<sup>2</sup> confirmed a number of principles related to 'fair sharing'. Specifically, these include:

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<sup>1</sup>Although the principles of conservation are set out in the First Principles report, based upon specific recommendations by Board members and staff, there appears to be merit in repeating the principles here because of their importance.

**The fundamental principles of conservation include:**

- **Sustainability of resource stocks;**
- **Maintenance of ecosystem function and stability;**
- **Optimum supply of benefits from the resource; and**
- **Management of and provision for risk and uncertainty.**

**These fundamental principles can be further described to include:**

- **There is a limit to the amount of a resource that can be used if that resource is to be sustained;**
- **Rare, threatened, endangered or vulnerable species require protection if they are to be sustained or increased;**
- **Use of fish and wildlife stocks that are undergoing rehabilitation may delay or preclude full rehabilitation;**
- **Harvesting fish and wildlife at times and in places where they are particularly vulnerable (e.g. spawning, nesting, and winter yarding times) entails more risk, and hence requires more care if allowed (harvesting of breeding fish and wildlife may increase the risk to sustainability of those stocks);**
- **The sustainability of fish and wildlife requires protection of their habitat;**
- **Harvesting techniques and unrestricted means of access can significantly affect sustainability by their impact on reproductive success or survival of remaining non-harvested animals or fish;**
- **The provision for risk and uncertainty must be a management consideration;**
- **Ecosystem function and stability must be maintained; and**
- **Harvests must be modified to reflect natural fluctuations and factors such as introduction of exotics and habitat changes.**

<sup>2</sup> The Tsawwassen Agreement has generated considerable controversy in British Columbia. The BC Wildlife Federation has stridently opposed the details of the agreement and the enabling legislation both provincially and federally. It has sought the support and intervention of wildlife federations across Canada including the O.F.A.H. Most are supporting the BC Wildlife Federation.

- **No use or right is exclusionary – nor should any agreement have the effect of creating an exclusionary right or use should resources become more scarce or demands increase in the future;**
- **Fair sharing must respect the rights and traditional uses of all aboriginal and non-aboriginal segments of society and the associated social, cultural and economic benefits;**
- **Fair Sharing must recognize that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration<sup>3</sup>. As such, ‘Fair Sharing’ must be flexible to respect specific local circumstances. Consistent with this, discussion related to Fair Sharing in the context of the Algonquin Land Claim should:**
  - **Recognize that hunting and fishing are extremely important activities for the spiritual re-creation’ and sustenance of all participants – both native and non-native. Hunting and fishing truly represent a fundamental form of expression which is part of the shared cultural heritage of both native and non-native society in the area of the claim<sup>4</sup>.**
  - **Reflect the fact that hunting and fishing are no longer a ‘subsistence’ activity for many members of the Algonquin and Nipissing communities. Rather, their**

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O.F.A.H. has not entered the fray related to the Tsawwassen agreement because, while the specific allocations within the agreement may be questionable, there are a number of fundamental principles regarding fair sharing that have been established or re-enforced through the agreement that have significant merit.

<sup>3</sup> From “United Nations Declaration on the Rights of Indigenous Peoples, September 2007”

<sup>4</sup>Hunting and fishing are a fundamental ‘form of expression’. The statement by A. Houser from a paper “RELEVANCE AND ETHICS, A COMMENTARY AND CHALLENGE” presented to the Hunting Heritage Hunting Futures Conference in Houston, Texas December 2003 attempts to explain this.

“ I am an artist, a writer, a wildlife biologist and an ardent conservationist. I am a naturalist.... Any description of who I am, of the faith that sustains me and of the depth of my commitment to conservation, however, is inadequate and incomplete if it fails to identify that at the core of my being I am a hunter.

Hunting, for me, is a deeply emotional and spiritual experience. It is a complete immersion in the natural world as a participant –not as a spectator or interloper. It is an extremely personal experience – and yet it is an experience that brings a greater sense of camaraderie with those around me than any other activity that I know. Hunting involves a communion with nature and a depth of feeling that defies words...

Going out to a deer stand hours before day-break, every sense attuned to the world around me; watching as the moon shadows give way to gray twilight; watching the aspen on the hill catch the first glimmer of the rising sun and burst into brilliant gold; watching a pine martin run along a branch and stop suddenly just inches from me, suddenly aware of my presence; catching the pungent, spicy smell of golden rod and aster; hearing the guttural grunt of a buck - brings a sense of communion with God and his creation that, for me, even a sunrise service on Easter morning cannot capture.

I am never so alive as when I am hunting. I am never more at ease with who and what I am. Hunting, for me, brings a spiritual rebirth and renewal. It brings the deep respect for nature and for the animal I am hunting, and the sense of unity with nature...

Hunting sustains me both physically and spiritually. Being able to hunt is essential to my well being. Like my art and my writing, it is a fundamental part of who I am and how I express that.

activities are conducted in a similar manner, with a similar purpose of spiritual 're-creation' and sustenance, and as part of a shared cultural heritage with other members of society.

- Reflect the fact that, hunting and fishing as carried out by most Algonquins and Nipissings are not distinctive or distinguishing characteristic of that society.
- Fair sharing should reflect the degree to which a First Nation or Métis community is truly integrated into, and benefits from the full suite of societal benefits enjoyed by the majority of Canadians. (This is not always simply a product of geography.)
- Fair sharing must reflect the fact that there are competing claims and grievances related to the land and the use of resources. In the case of the Algonquins, any agreement should reflect the fact that the Government dealt with the possessors of the land, the Iroquois and the Ojibway who had displaced the Algonquins. (The Algonquins and the Nipissings did not occupy the area of the land claim at the time that the British Crown asserted sovereignty. They furthermore did not have "exclusive" occupation or the "the right to exclusive use and occupation of land" at the time of sovereignty nor did they have the "the intention and capacity to retain exclusive control", nor have they had continuity of occupation since the time of sovereignty. The provision of reserves for the Algonquins in the 1800's was at the discretion of the Crown and was expressly not a recognition of any right.)
- Discussions of fair sharing related to the Algonquins must recognize that the existing hunting agreement with the Algonquins is not, nor should it be, considered a benchmark document. It was a product of convenience intended to provide an interim solution related to the exercise of potential rights by the Algonquins by providing hunting opportunities within Algonquin Park. (Unfortunately, contrary to the original intent, the interim solution has had significant negative impacts on other members of society.)
- Fair sharing must reflect the fact that the exercise of aboriginal and treaty rights is not unfettered (this includes limitations related to conservation including; species biology, ecosystem integrity and other societal benefits and to access<sup>5</sup>). First Nation use and exercise of aboriginal and treaty rights must be exercised in the context of the broader society in which they occur. Within this context, the application of 'fair sharing' must include explicit recognition that the allocation to First nation is part of a larger whole and that, within the context of that larger whole, it has no special additional priority<sup>6</sup>

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<sup>5</sup> In Cote, the Court ruled that the "Regulation respecting controlled zones does not infringe the appellants' right to fish for food within the Z.E.C. Under the terms of the provincial regulation, an Algonquin person is at liberty to enter the Z.E.C. by a variety of means other than motor vehicle without fee. Although the regulation may infringe an aboriginal or treaty right under the Sparrow test by conditioning the exercise of such a right upon the payment of a user fee, the financial burden in this instance does not amount to an infringement of the appellants' ancestral right to fish for food. The fee, rather than constituting a revenue-generating tax for the provincial government or the Z.E.C. administration, represented a form of user fee dedicated to the upkeep of the facilities and roads of the Z.E.C. The access fee, by improving the means of transportation within the Z.E.C., effectively facilitates rather than restricts the constitutional rights of the appellants.

<sup>6</sup> For example, the NISGA'A FINAL FISHING AGREEMENT identified that: "Notwithstanding that Nisga'a fish entitlements are treaty rights, a Nisga'a fish allocation that is set out as a percentage of the total allowable catch has the same priority in fisheries management decisions as the remainder of the total allowable catch of that species harvested in recreational and commercial fisheries." Underlining added.

- **The development of specific shares should be developed on a priority basis with primary focus related to limited/scarce resources.** Where resources are extensive and/or demand low, stocks can effectively remain unallocated (e.g. ruffed grouse and other upland game in Ontario). However, this requires continued monitoring to ensure that harvests do not exceed resource capacity.
- **In the case of the Algonquins, therefore, in discussions of ‘fair sharing’ of resources:**
  - **Certain species should be ‘allocated’, that is a specific allocation identified. Such species would be those for which there is a very specific management regime such as the “moose tag allocation system” for non-native use. Such an allocation might also be necessary for species which are otherwise vulnerable to pressure (e.g. brook trout)**
  - **For species which are defined as “allocated” – that is species for which there is a specific share of the allowable catch allocated to a First Nation, the Agreement in Principle must provide for, and the final Agreement must include, the requirement for the preparation by the First Nation, and approval by the Ministry of a Harvest Plan.<sup>7</sup>**

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<sup>7</sup> By way of example, the WILDLIFE HARVEST PLAN the agreement with the Lheidli T’enneh identifies that:

41. The Lheidli T’enneh Government will:
  - a. develop a Wildlife Harvest Plan for the harvest of:
    - i. Wildlife species for which there is a Wildlife Harvest Level, or
    - ii. other Wildlife species agreed to by Lheidli T’enneh and British Columbia, and
  - b. submit the Wildlife Harvest Plan to the Minister for approval prior to harvesting Wildlife under paragraph 41.a.
42. A Wildlife Harvest Plan will include, as necessary, provisions in respect of:
  - a. the identification of Lheidli T’enneh harvesters;
  - b. designation of persons who may harvest in accordance with paragraph 8;
  - c. the methods, timing and locations of the Wildlife harvest;
  - d. the number, sex and age composition of the harvest of Designated Species and other species;
  - e. method of identifying harvested Wildlife;
  - f. method of reporting harvested Wildlife;
  - g. monitoring the Wildlife harvest and data collection;
  - h. possession and transportation of Wildlife or Wildlife parts;
  - i. process for approval of in-season adjustments or modifications to the Plan;
  - j. the term of the Plan; and
  - k. other matters agreed to by the Parties.
43. In considering the proposed Wildlife Harvest Plan submitted by Lheidli T’enneh Government, the Minister will take into account:
  - a. conservation requirements and availability of Wildlife resources;
  - b. Lheidli T’enneh’s preference in respect of harvest methods, timing and locations;
  - c. use of Wildlife resources by other aboriginals and non-aboriginals;
  - d. requirements for the integration and efficient management of Wildlife resources;
  - e. scientific and local information with respect to Wildlife populations, numbers, health, distribution and methods for managing Wildlife;
  - f. public health and public safety; and
  - g. other relevant considerations.
44. After reviewing the Wildlife Harvest Plan, the Minister may, in a timely manner:
  - a. advise the Lheidli T’enneh Government of any questions regarding the Plan;
  - b. give the Lheidli T’enneh Government an opportunity to respond to the questions;
  - c. consider the Lheidli T’enneh Government’s response; and
  - d. modify, adjust and make additions or deletions to the Plan.
45. The Minister will, in a timely manner, subject to the factors referred to in paragraph 43, approve, or vary and approve, the Wildlife Harvest Plan.

- The agreement must include a process to develop allocations for presently “unallocated” resources in the future, should resources become limited/scarce or demands increase. Further, this should include an arbitration process
- The Agreement must further explicitly confirm that as part of sharing of resources there will be: full disclosure, full sharing of information, enforcement, monitoring and assessment, and where appropriate co-operative management. All of these elements and their implementation are essential.
- Fair sharing involves establishing an allocation that includes:
  - A reasonable, limited allocation for social, ceremonial and where appropriate subsistence purposes;
  - A recognition that limited barter occurs within and between communities;
  - Such allocations should have both an upper limit and provision for the decrease of the allocation during periods of scarcity to reflect the needs of all society;

## **SOME FURTHER CONSIDERATIONS**

Where there are many competing demands for the use of resources - e.g. within the Algonquin land claim area where there are Algonquin, other First Nation (Iroquois, Ojibwa), Métis and non-native rights and traditions of use, it may be necessary to:

- Establish an over-arching and collective First Nation/Métis allocation and a non-native allocation as a portion of allowable harvests
- Negotiate specific community based allocations within the total First Nation/Métis allocation

Furthermore:

- Increases and decreases in the total allowable harvest/allocations would be shared on a proportional basis by both (First Nation/Métis and Non-aboriginal) communities.
- The allocation within the First Nation/Metis communities’ share should be flexible to respond to the dynamics associated with ongoing historical research.
- Any agreement must include full enforcement and mandatory reporting of harvests for all ‘allocated’ species.

The O.F.A.H. further believes that recognition of a ‘priority allocation’ for First Nation use (as directed by the courts) can be established in a variety of ways within the context of the principles identified above.

For example, for ‘unallocated fish species’, a priority allocation might take the form of:

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46. The Minister will provide written reasons to Lheidli T’enneh Government for changes between the proposed Wildlife Harvest Plan and the approved Wildlife Harvest Plan.
47. A Wildlife Harvest Plan will come into effect when it is approved by the Minister.
48. If there is a Conflict between a provision of the approved Wildlife Harvest Plan and provincial Laws, the approved Wildlife Harvest Plan will prevail to the extent of the Conflict.

- A larger ‘catch limit’ than other members of society e.g. if the catch limit is normally 2 fish, the Algonquin catch limit might be 4
- Longer seasons
- Provision for different fishing techniques
- Differing access

For an ‘allocated species’ such as moose, ‘priority allocation’ might take one of the following forms, for example:

- If Algonquins represent 1% of the total population of the claim area, the Algonquin allocation might be 2% of the total available adult validation tags.
- Algonquins receive 1% of tags – but have an extended season providing a much greater opportunity for success;
- Some variation of the preceding combined with the ability to harvest moose within Algonquin Park. This might take the form of an overall greater percentage allocation e.g. 4%, with the clear understanding that the allocation must be taken wholly within Algonquin Park.<sup>8</sup>

In some situations, there are resources that are both scarce and extremely vulnerable to exploitation. Brook trout within Algonquin Park represent such a resource. An allocation of the resource based upon simple percentages, unless allocated on an individual lake/pond basis (unenforceable and unmanageable) could still result in the systematic depletion of the entire resource.

In such circumstance, it may be necessary to:

- Apply the same conservation rules and limits on all users
- Seek a monetary settlement (“buy-out”) as part of an agreement not to exercise rights that may exist related to a specific fishery or other resource.

At the same time, as a means of both providing alternatives to the preceding (i.e. sensitive resources) and meeting both aboriginal and non-aboriginal needs, Enhanced Management of fisheries and wildlife should be considered in any negotiation of any Fair Sharing of resources.

Enhanced management, either in the form of stocking or other management can be used to direct pressure away from sensitive/vulnerable resources and to increase available harvests.

- The AIP and final Agreement should include a definition of conservation that embodies both the O.F.A.H. definition and principles

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<sup>8</sup> There is a precedent for this approach in the Tsawwassen Agreement and other Agreements. In APPENDIX J-2 of Tsawwassen Agreement: Tsawwassen Allocations for Fish and Aquatic Plants are set out. This allocation, in large measure appears to build, directly or indirectly, on the principles identified in the O.F.A.H. report. For example, while the allocation clearly respects the needs of other First Nations and of non-native society. At the same time, while the Tsawwassen represent perhaps 0.1% of the people within the area of the claim, their allocation for sockeye salmon is 1% of the total allowable catch where TAC is less than 500,000 fish. The allocation increases to 1½ % as TAC increases, to a maximum of about 15,000 fish. This translates into an allocation of a maximum of 30 fish/person/year. Smaller allocations are allowed for other types of salmon – primarily in the form of an incidental catch.

- **O.F.A.H. does not support any solution that results in exclusive use of Algonquin Park: c.f. brook trout, Clyde and Bruton...**
- **The AIP must confirm that a communities allocation/share cannot be sold commercially**

The claim area overlaps a number of existing Treaties and consists completely, or almost completely, of areas for which existing First Nations have Treaty rights to hunt and fish. Any allocation to the Algonquin First Nation impacts the use of resources by those First Nations. Further, despite interim agreements with the Metis Nation of Ontario, the Metis have grievances and believe they have rights within the area of the claim:

**“For greater certainty, the O.F.A.H. believes that, consistent with the direction in British Columbia<sup>9</sup>, to the extent that overlapping land claims or treaty rights (or, in the case of Metis, outstanding grievances) affect negotiations, it is the responsibility of First Nations to resolve them. Preparation for negotiations must include discussions with neighbouring First Nations on the issue of overlapping or shared territories, exercise of rights and the allocation of resources within the total First Nation share. A process for resolution should be in place before the conclusion of any treaty or agreement.”**

### **ELEMENTS AND ADDITIONAL PRINCIPLES RELATED TO A SUCCESSFUL CO-OPERATIVE MANAGEMENT ARRANGEMENT<sup>10</sup>**

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<sup>9</sup> Greater Vancouver Regional District Aboriginal Affairs Update Bulletin No. 8, July 2005:Treaty Issue: Overlapping Land Claims and their Resolution, and Impacts on Local Governments

<sup>10</sup> We do have an example of limited success in the form of the Croker Agreement between the Government of Ontario and the Chippewas of Croker and Nawash.

Most significantly, this agreement has provided for no public input, review or scrutiny. Further, at the insistence of the First Nations, there has been no sharing of information regarding the contents of the agreement or ongoing ‘co-operation’. As a result, it appears that:

- Decisions regarding fisheries allocations and harvests and management are occurring based upon what is best described as ‘social’ biology,
- There has been a failure to share information re biology, assessment, monitoring, harvests... not only publicly, but with the Ministry of Natural Resources;
- There has been a failure to enforce
- There has been no oversight by the Ministry
- Crown not exercising authority or fulfilling its Constitutional mandate and responsibilities
- There is unnecessary conflict amongst users.

We also have an example of questionable success in the case of the Algonquin Hunting Agreement:

While partially successful, the Agreement is flawed because:

- the agreement does not identify an equitable sharing formula with clearly defined harvest limits and, as appropriate, methods of harvest for both First Nation and non-First Nation users of fish and wildlife resources;
- the agreement process is not open and transparent with opportunity for input by the public;
- there is no assurance that compliance with the harvest limits, and where appropriate, methods should be effectively enforced by the First Nation and government.



## **Additional Principles related to Co-operative Management:**

- **Within the AIP and the final agreement itself the term “Co-operative Management” should be used rather than the term ‘Co-Management’.** This is because the term ‘co-management’ can be interpreted to mean an equal partnership or 50/50 sharing. This prejudices the final outcome of discussions re ‘fair sharing’. Equally, if not more importantly, it implies shared decision-making.
  - **Ultimate decision making authority and management responsibility and accountability must remain with the governments of Ontario and Canada. (The provincial and federal governments must retain the final decision-making and enforcement authority in the management of fish and wildlife resources, the habitats required to sustain them, and the control of access to Crown lands and waters;** This cannot be stated too many times. Further, it must be reflected in actual application on the ground.)
  - **Co-operative management should remain simply an implementation tool designed to achieve key objectives – not an objective in and of itself.**
  - **Any co-operative management agreement must include: Full disclosure; Full sharing of information; enforcement, monitoring and assessment and recognition that the Government is ultimately responsible to manage the resource on behalf of all Ontarians.**
  - **In developing the AIP and the final agreement the provincial government should involve/consult with non-First Nation citizens including anglers and hunters in all negotiations with potential impacts on conservation of resources. This consultation should occur when drafting provincial positions on various issues and before final offers are made. Further, any co-operative management agreement must include recognition of non-native third party participation.**
  - **Regardless of the form of any agreement, the M.N.R. and other provincial and federal agencies (as appropriate) must engage all resource users, including First Nations, in meaningful dialogue related to equitable sharing of resources and appropriate harvest limits (ongoing calculation of total allowable catch) to ensure that fish and wildlife resources can be enjoyed in a sustainable manner.**
  - **Any specific co-operative management arrangements set out in the AIP or final Agreement must clearly benefit resource management and wise use of resources.** (The AIP and final agreement must include wording which promotes fish, wildlife and ecosystem management, and which promotes and is dedicated to scientifically-based conservation principles including both biological and socio-economic considerations);
  - **Co-operative management boards or committees must operate under the ultimate authority of Ontario or Canada;**
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- The agreement has effectively created an exclusive use, not just in Algonquin Park but in surrounding WMU's as it relates to adult validation tags for moose.

- **The establishment of co-operative management boards, councils, committee or other administrative or operation entity should never result in the abdication of the Crown's constitutional mandate. Any such entity should act responsibly for the optimum benefit of all citizens.**
- **The establishment of co-operative management boards, councils or committees must never be construed as giving any participant implied or actual proprietary interests in the lands and resources for which they have responsibility for providing advice.**
- **The AIP and Agreement, if providing for the establishment or recognition of any co-operative management entity should clearly spell out the need for: specific objectives; scope of the entity (e.g. area, membership, issues, relationship to other management systems, etc.); management structure (including the process for decision making, authority, roles and responsibilities of all parties); implementation responsibilities (including enforcement, maintenance, funding and review); assessment of resources; and determination of harvestable yield.**
- **Evaluation criteria should be built into the final agreement.** The evaluation criteria should be carefully reviewed to determine if the objectives and goals of the agreement can be met. Targets for evaluation should be the parts of the agreement that are likely to benefit the stakeholders, and whether expected outcomes have been met. Examples of this include: the effectiveness of board management structures with measurable indicators; financial cost-effectiveness and -efficiency; time lines for completing tasks, etc. Evaluations should be undertaken periodically—perhaps every three to five years.
- **The Agreement must recognize that on all lands and waters, including band or agreement lands, the Government retains ultimate authority for decisions related to fish and wildlife management based upon both their constitutional mandate and because of the migratory nature of many fish and wildlife species, home ranges that extend beyond administrative boundaries and the need to manage fish and wildlife on an ecological basis.**