

COMING SOON:
**Bridges to a New Era, Part 2: A Report on the Past, Present, and
Potential Future of Tribal Co-Management on Federal Public Lands
in Alaska**

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EXECUTIVE SUMMARY

Building on [Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands](#), published in 2021 by the [Public Lands & Resources Law Review](#), this forthcoming article will be published soon by the [Columbia Journal of Environmental Law](#) and examines the state of—and prospects for—tribal co-management on federal public lands in Alaska.

Federal Public Lands are Failing Alaska Native Tribes

Nowhere else in the United States are tribal connections and reliance on federal public lands as deep and geographically broad-based as in what is now Alaska. The number of Tribes—229 federally recognized tribes—and the scope of the public land resource—nearly 223 million acres—are simply unparalleled. Across that massive landscape, federal public lands and the subsistence uses they provide remain, as they have been since time immemorial, “essential to Native physical, economic, traditional, and cultural existence.” Alas, the institutions, systems, and processes responsible for managing those lands, protecting those uses, and honoring those connections are failing Alaska Native Tribes.

The cases referenced in this article share a common theme: federal land officials underutilize their existing legal authorities to engage tribes in the management of federal public lands, or treat them like pro-forma “check-the-box” exercises that must be done but have no real substantive impact on decisions that are likely already made. In case after case, Alaska Native Tribes are forced to defensively react to federal land use programs, plans, and projects they had no role in substantively shaping. Though traditional methods of tribal consultation and engagement are used by federal land agencies, they are viewed for the most part as procedural hurdles that are divorced from their core missions and mandates.

This paradigm needs to change. Alaska Native Tribes are already collectively and proactively re-envisioning a new way of governing federal lands, waters, and resources—a new era of tribal leadership in resource management is on the horizon. Tribal co-management offers but one potential strategy that can be pursued by Alaska Native Tribes to challenge and fix a broken system.

Bridges to Tribal Co-Management in Alaska

Multiple legal authorities and processes could be used as “bridges” to models of tribal co-management in Alaska. Tribal consultation, federal public lands planning, the National Historic Preservation Act, self-governance contracting and compacting are all methods that could be

strategically linked to ensure that tribes are full partners in federal lands management, from cooperatively shaping desired conditions and objectives to getting work done on the ground via contract and agreement.

With the exception of the Antiquities Act, all of the potential tools and pathways available to Tribes outside of Alaska are similarly available to Alaska Native Tribes. The lack of Indian Country or a tribal land base and the absence off-reservation treaty-based use rights do not diminish or preclude opportunities for meaningful tribal co-management on federal public lands in Alaska. Most important, Alaska Native Tribes have an additional statutory-based pathway for tribal co-management as provided in Title VIII of ANILCA.

Catalysts for Change

This article recommends consideration of multiple ways to compel change in the future, from top-down actions by the President and Congress to incrementally building upon the bottom-up work and innovation already taking place throughout Alaska. Recent developments and pronouncements from the federal government suggest significant potential for reform of the existing legal and policy framework to accommodate and support those efforts.

The most effective and efficient way to enable tribal co-management on federal public lands in Alaska and beyond is through congressional lawmaking. This could happen through system-wide or place-based legislation. Those options are sketched out in the original *Bridges Report* and discussed here are more focused potential modifications to Title VIII of the Alaska National Interest Land Claims Act (ANILCA). These amendments could serve as a corrective action from Congress in response to widespread dissatisfaction with implementation of Title VIII and an administrative structure and set of regulations that fail to adequately protect and represent Natives and their ways of life.

Catalysts for change are also emerging from the bottom-up in Alaska and this article also discusses these innovations. Tribes, Tribal commissions, and collaborative organizations are formalizing new agreements and partnerships with federal land agencies that provide important foundations for continued tribal management activities. These existing partnerships and networks are critically important for continued expression and expansion of Tribal interests, even if they are currently operating in a way that is something short of co-management. Each such agreement or collaborative project offers another opportunity to learn and build mutual trust—an essential foundation for new models of cooperation and co-management to possibly emerge in the future.

On the (Sub)Delegation of Authority to Alaska Native Tribes

Background: The “subdelegation doctrine” is a legal principle that limits the ability of executive agencies to delegate to other entities the powers given to those agencies by Congress. It is the most common legal argument made to limit or oppose tribal co-management on federal public lands.

Federal land agencies too often rely upon the subdelegation doctrine as a way to decline or delay tribal initiatives and defend the status quo, often with little regard for the array of existing contract and agreement mechanisms with non-tribal partners already in place. Congress was clear in Title VIII of ANILCA that a bottom-up and participatory framework should shape and

influence regulations, policies, and management decisions pertaining to so-called subsistence uses across public lands in Alaska. This participatory framework could be used in the future to create a variety of co-management models that are within the existing legal parameters of the subdelegation doctrine.

Federal Public Lands Planning

Federal lands planning is an important platform that can be used as a bridge and strategic link to tribal co-management. A substantive forward-looking plan—informed and shaped by timely and meaningful tribal consultation and participation—could place Tribes in a more constructive and pro-active position, setting forth long-range desired conditions and objectives while providing constraints on future management. Plans could also set up the type of project-level work that could be co-managed by Tribes through various contracts and agreements.

Federal public land agencies already have the authorities and tools necessary to revise plans in Alaska that better reflect tribal participation, protect subsistence use and cultural resources, and fulfill their trust obligations in a more substantive way. Nonetheless, recent revisions of Resource Management Plans (RMPs) by the Bureau of Land Management (BLM) in Alaska demonstrate the gulf between what could be done and what is actually happening at the plan-level regarding the protection of tribal values and interests on public lands.

Planning and the National Historic Preservation Act

The typical way in which federal land agencies apply Section 106 of the NHPA places tribes in a defensive and reactive posture, as Tribes are essentially forced to use the consultation framework *after* the key threshold decisions have already been made by federal agencies. The potential of the NHPA is further stymied by the scant acreage of federal public lands in Alaska that have been inventoried for cultural resources, some of which may be eligible for designations as traditional cultural properties.

Self-Governance Contracting and Compacting Pursuant to the Indian Self-Determination and Education Assistance Act

The current era of federal Indian policy promoting tribal self-determination has been marked by the use of contracts and compacts between Tribes and the federal government pursuant to the Indian Self-Determination and Education Assistance Act ISDEAA. Tribes have taken great advantage of these “638 contracts” or compacts to assume previously federal programs, services, functions, or activities and thereby build more sophisticated governance capacity and capabilities.

But, while the use of 638 contracts and compacts is wide-spread within Indian Country, their efficacy in transferring programs, functions, services, and activities from other agencies within the Department of the Interior has been quite limited. Although legal authority exists to enable federal public land management agencies to compact with Alaska Native Tribes for some management responsibilities on federal public lands in Alaska, the use of that authority is rare and, even where utilized, has been implemented in a frustrating fashion from a tribal perspective. Nonetheless, self-governance compacts provide an avenue through which Alaska Native Tribes may take on additional authorities and activities across federal public lands and, in doing so, build their own technical and management capabilities.

Title VIII of ANILCA and Tribal Co-Management of Federal Public Lands

Title VIII of ANILCA provides an additional pathway for tribal co-management of federal public lands and resources in Alaska. The relationship between the continuing reliance upon these lands and resources by Alaska Native people, now often narrowly categorized as “subsistence activities,” and federal land use, as codified in Title VIII and associated regulations, provides broad authority and justification for expanded tribal authority across federal lands in Alaska. Furthermore, because a wide range of federal public land management activities or decisions affect subsistence activities under ANILCA and, therefore, must be analyzed at the planning level and pursuant to Section 810 of that law, there is a significant potential for extensive Tribal co-management.

ANILCA’s subsistence priority for “*rural residents* of Alaska, including both Natives and non-Natives,” in no way precludes a *Native* and subsistence-based tribal co-management framework on federal public lands in Alaska. In fact, the recognition and consideration of the federal government’s trust obligations to Alaska Native Tribes, the unique and continuing cultural connections between those Tribes and the surrounding resources and landscapes on which they’ve relied since time immemorial, and the political status of Tribes and Tribal members under federal law all support such a Native-focused option in addition to or as a subset of the broader “rural” preference explicitly authorized by ANILCA.

The regulatory and administrative structure designed to implement Title VIII—a structure that evolved largely by dint of coincidence and accident—remains the most significant impediment to the functional and widespread Tribal co-management of subsistence-based activities and resources. Fundamentally, that structure relies upon the federal government’s deference to the State of Alaska and Alaska’s antagonism to the purposes of Title VIII, both of which are contrary to and frustrate the federal government’s trust duties to Tribes. As a result, the purposes and objectives of ANILCA’s subsistence framework are diminished by this seemingly haphazard implementation of a regulatory and administrative framework that too often fails to represent and protect Natives and their subsistence ways of life.

Now is the time

Secretary of the Interior Deb Haaland and Secretary of Agriculture Thomas J. Vilsack recently issued an unprecedented [joint secretarial order](#) calling on the agencies of their Departments, including the U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service, to promote improved federal-tribal collaborative management of Federal lands and resources. That order specifically encouraged these agencies to “[m]ake agreements with Indian Tribes to collaborate in the co-stewardship of Federal lands and waters under the Departments’ jurisdiction, including for wildlife and its habitat.” Subsequent to this and other directives focused on enhancing the recognition of and respect for tribal rights and interests, the Department of the Interior is also [engaging in listening sessions](#) about Federal subsistence policies in Alaska. These developments, the increasing power of the catalysts for change described above, and the avenues available for enhancing Alaska Native rights and authorities make now the time for rethinking and reforming how the current system is failing Tribes. A new, more just, sustainable, and equitable future for the co-management of federal lands and resources in Alaska awaits.

