



BRIDGES TO A NEW ERA:

A REPORT ON THE PAST, PRESENT, AND
POTENTIAL FUTURE OF TRIBAL CO-
MANAGEMENT ON FEDERAL PUBLIC LANDS

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Blackfeet protest of oil and gas leasing in the Badger-Two Medicine area, Montana, 1986.
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Authors' Note:

The foregoing citation provides our institutional affiliations for identification purposes. In researching, writing, and producing this Report, we are writing for ourselves and not as representatives or on behalf of the Alexander Blewett III School of Law, the University of Montana, or the Montana University System.

INTRODUCTION

Fifty years ago, the United States took important but divergent steps to fundamentally reshape its relationship with Native Nations and its management of federal public lands.¹

On July 8, 1970, President Nixon delivered a Special Message to the Congress on Indian Affairs.² The President's message marked the culmination of a years-long and major shift in federal Indian policy and the longstanding federal trust obligations toward tribes. For the first time, President Nixon's message formally and expressly rejected the United States' prior approach of forced termination of those obligations in favor of tribally-defined priorities, including the promotion of tribal sovereignty. As the President's Special Message noted, this about face was justified by the "special relationship between Indians and the Federal government" and the "solemn obligations" and "specific commitments" made to the Indian people through treaties and other agreements. For their part, said the President's message, the "Indians have often surrendered claims to vast tracts of land," which helps explain why these agreements continue "to carry immense moral and legal force."

Just a month before President Nixon's message, the Public Land Law Review Commission issued its comprehensive report on the nation's public lands.³ The Commission was charged by Congress to review the then-extant laws applicable to the public lands estate and recommend revisions.⁴ The Commission's influential work laid the groundwork for much of the modern legal framework applicable to public lands and the federal agencies that manage them. Tellingly, however, neither the Commission's report nor any of its recommendations considered the rights, interests, and role of Indian tribes in the management of federal public lands or even included any reference to the federal government's trust obligations to those tribes as relevant to such management.⁵

Although those reforms ushered in a new era of federal policy recognizing tribal sovereignty and a more comprehensive and effective scheme for the federal government's management of public lands, they were mostly distinct undertakings that remained rooted in and continued the historical exclusion of tribes and their interests from public lands. Thus, despite significant advances in tribal sovereignty and self-determination over the last fifty years, the nation's obligations to Indian tribes and its approach to managing the public domain remain largely separate endeavors.

¹ Throughout this report, the terms "Native Nations," "Indian tribes," "Indians," "Native Americans," and "indigenous" are used interchangeably to refer to the groups and individuals described by federal law as "Indian tribes" and "Indians" respectively. We recognize the potential for confusion around these varying terms but have incorporated their use to expand upon the limited and sometimes disrespectful connotations of the use of "Indian" as a legal term of art.

² President Richard M. Nixon, Special Message on Indian Affairs, Pub. Papers of the President (July 8, 1970).

³ PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 158 (1970), <https://perma.cc/7R83-JWLF>.

⁴ Pub. L. 88-606, Sept. 19, 1964, 78 Stat. 982.

⁵ The Commission's rationale draws a stark line between federal Indian law and public lands law and is provided in a short footnote: "The United States holds legal title to Indian reservation lands for the benefit of the Indians. A body of law has developed for these lands wholly separate from those commonly termed public land laws. For these reasons, Indian reservations were specifically excluded from the Commission's study by the Act establishing the Commission." PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND, at x.

While various statutory, regulatory, and policy avenues now provide bases from which Indian tribes can seek to influence the federal agencies responsible for the management of public lands, none of those avenues allow—much less encourage—consistent, effective, and broad-based federal-tribal co-management partnerships.

A half-century after President Nixon’s transformative statement and the Public Land Law Review Commission’s influential report, the time has come to once again rethink public land law and meaningfully connect it to the federal government’s treaty-based and long-standing trust responsibility to uphold and promote the sovereign and cultural interests of Native Nations.

The history, law, and policy of the United States’ relationships with both Indian tribes and the public lands are intimately intertwined and historically co-dependent. But for the removal and exclusion of tribes from large swaths of their traditional territories, there would be no public lands. While the federal policies ushered in by the momentous events of 1970 largely treat these policy arenas as separate, the future of public lands management will be defined by the law’s ability to justly recognize and reconcile the historical and legal context of indigenous dispossession through a new era of reform that thoughtfully and meaningfully restores tribal management to federal public lands.

This Report intends to support and catalyze that next era of federal policy.

EXECUTIVE SUMMARY

Deep ancestral and traditional connections tie many Native Nations to the federal government's public lands. The removal of these lands from indigenous control, their acquisition by the federal government, and the federal government's approach to their management are largely premised upon the erasure or marginalization of those connections. Both physically and legally, Indian tribes have been removed from the landscapes they occupied since time immemorial. Rather than centering, honoring, and utilizing those connections, the current discussion of tribal co-management of federal public lands is mostly bereft of this full legal and historical context.

Compounding these limitations is the considerable discretion enabled by the applicable legal framework and exercised by public land management agencies. This discretion is most often used in ways that place Indian tribes in a reactive and defensive position. Furthermore, in exercising that discretion, federal public land management agencies regularly disassociate their land management activities from their interactions with tribes, viewing the former as a priority and the latter as an additional burden or only ancillary to their mission. In order to reconnect the management of public lands to the broader legal and historical context, these agencies must be compelled—through statute or Executive action—to work with tribes on a co-management basis, in the same manner as they are compelled to fulfill their other obligations and priorities in managing and protecting the lands for which they are responsible.

Furthermore, federal public land law generally provides to state governments and private interests broad powers and authorities not yet extended to Indian tribes. The intergovernmental dimensions of federal public lands management must more fully recognize the federal government's fiduciary obligations to Indian tribes and include sovereign tribal governments. The common tools used in "cooperative federalism" can help inform the design of tribal co-management legislation and/or rulemaking.

Tribal Co-Management

-The first and foundational principles of federal Indian law and the historical development of federal public lands provide a strong and unique legal basis for tribal co-management.

-The term "co-management" is subject to inconsistent interpretations, applications and politics. It is thus important to carefully scrutinize conceptions of co-management and pay more attention to how it is operationalized.

-Though definitions are important, especially for the purpose of creating mutual understanding and common expectations, what matters most are the core principles or attributes of a co-management approach. These include:

- (1) Recognition of tribes as sovereign governments,
- (2) Incorporation of the federal government's trust responsibilities to tribes,
- (3) Legitimation structures for tribal involvement,
- (4) Meaningful integration of tribes early and often in the decision-making process,
- (5) Recognition and incorporation of tribal expertise, and

(6) Dispute resolution mechanisms.

These core principles can be configured into creative and accountable ways of governing that fit unique historical and legal contexts, political realities, and landscapes.

-There is no bright line that clearly distinguishes between congressional and executive powers to authorize, compel, or encourage tribal co-management. The actions that can be taken by the President and Congress are also not mutually exclusive.

The President has considerable powers and precedent to affirm tribal sovereignty and effectuate the federal government's treaty and trust obligations through innovations in tribal co-management and shared governance.

-Tribal co-management arrangements can be designed to ensure political accountability and legal enforcement while establishing positive precedents that all parties want replicated and modified to fit unique situations and particular places. Co-management takes place in a larger statutory and regulatory context that sets forth the purposes and constraints of federal lands management.

-The "sub-delegation" doctrine limits the ability of executive agencies to delegate their final decision-making authorities to other actors. The legal limits imposed by this doctrine do not preclude the executive branch from using its powers to institutionalize variations of tribal co-management. Co-management is not defined by a complete and unqualified delegation of authority to tribes nor is it a call for tribal unilateralism. "*To share* authority and responsibility" is the most common denominator in definitions and applications of co-management.

-The Office of Solicitor in the Department of Interior should clarify how the subdelegation doctrine and "inherently governmental/federal" limitation applies more specifically to Native Nations as contrasted to state and private actors operating on federal public lands. The intermixing of federal and tribal powers is best conceived as a lawful "sovereignty-affirming subdelegation."

-The Secretaries of Interior and Agriculture should issue a Joint Order on Tribal Co-Management on Federal Public Lands. The Order will pick up where Secretarial Order No. 3342 (2016)—on "Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources"—left off. Based on first principles of federal Indian law, the Order will draw from a more complete accounting of existing authorities and more recent cases of innovation to prioritize and reward tribal co-management and other forms of cooperation and collaboration on federal lands.

-Tribal co-management on federal lands can also be enabled through congressional lawmaking, which could happen through two potential pathways: (1) place-based legislation, and (2) system-wide legislation. Each option should be premised on the same vision: to shift the reactionary tribal consultation paradigm to a more pro-active and sovereignty-affirming model in which Indian tribes envision their own approach and plans for managing their rights and interests on federal lands.

Bridges to Tribal Co-Management

The following findings and recommendations will help clarify and strengthen the bridges that could be taken to tribal co-management. In those cases where tribal co-management is not the objective, these recommendations would improve existing processes and programs and methods of engagement more generally.

-Existing legal authorities and processes—such as tribal consultation, contracting and compacting, the National Historic Preservation Act, and public lands planning—can be strategically used and serve as a bridge to variations of tribal co-management.

Tribal Consultation

-The federal government’s obligations to consult with Indian tribes on matters that may affect their interest are rooted in the United States’ trust obligations to and treaties with those Native Nations.

-Notwithstanding those firm legal bases, only in the last few decades has the duty to consult become a recognized priority of the federal government, largely implemented through executive actions aimed at improving agency consultation standards.

-Despite these developments, the practice, implementation, and effectiveness of tribal consultation vary widely across the federal government and leave many tribes and tribal leaders frustrated and disappointed.

-Consultation must evolve from the unenforceable, discretionary, and variable practice widely criticized by tribes into a meaningful, compatible, and continuing conversation between appropriate tribal and federal officials.

-Effective consultation can be facilitated through executive, legislative or judicial mandates requiring federal agencies to incorporate tribes into ongoing policy discussion, development and decision making, as well as day-to-day management; and bridge the procedural nature of consultation to more substantive results.

Contracting and Compacting

-The ability of Indian tribes to contract with the federal government to assume previously federal programs, functions, services, and activities is a core aspect of the current policy era of tribal self-determination.

-These contracts, originally referred to as “638 contracts” after the public law that authorized them, have spurred a renaissance in tribal governance and technical capacity.

-To overcome the reluctance and recalcitrance of federal agencies in contracting away their duties, Congress adopted various amendments and evolved the 638 contracting model into

broader tribal authorities, including self-governance compacts that offer much more flexibility for tribes when considering whether and how to manage previously federal programs.

-Some of these reforms have been expanded into public land management agencies, with amendments in the Tribal Forest Protection Act and the 2018 Farm Bill including reference to self-governance authorities for tribes seeking to assume some authorities from the United States Forest Service.

-Although 638 contracts, self-governance compacting, and similar authorities have opened new avenues for tribes to take on greater (and previously federal) responsibilities, these avenues are mostly limited to existing tribal lands and resources and further hamstrung by a lack of federal funding, continuing agency recalcitrance, and the uncertainty around and inability of tribes to assume so-called “inherently federal functions.” The combination of these last two factors has particular impact in public lands management, where federal agencies often view their responsibility for management activities as central to their federal responsibility and, therefore, largely unavailable for tribal assumption.

-Finally, the existing framework of federal contracting necessarily limits tribal flexibility and sovereignty in carrying out those programs, services, functions, and activities.

-Clarity and consistency around the ability of federal agencies to contract with tribes for tribes to take on broader and meaningful management programs, functions, services, and activities across all public land management agencies could help invigorate important steps toward broader tribal co-management.

-Like the success of self-determination contracting and self-governance compacting across nearly every other aspect of federal Indian policy, these practices could be an important pathway to more extensive tribal involvement in public lands management.

The National Historic Preservation Act and Native American Traditional Cultural Properties, Districts and Landscapes

-The National Historic Preservation Act (NHPA) is a procedural statute affording federal agencies considerable discretion in how rigorously it is applied to the protection of sacred places and cultural resources on public lands.

-But the designation of traditional cultural properties, districts, and landscapes pursuant to the NHPA provides an important procedural framework that can be strategically leveraged to secure more substantive protections of these places. Federal public lands planning provides one possible way to bridge the procedural nature of the NHPA to more substantive protection of traditional cultural properties, districts and landscapes.

-There are several features of the law—including the structured and statutorily-based version of tribal consultation, the principle of concurrence in resolving disputes, the important role of Tribal Historic Preservation Offices in the administration of the Act, and the external role played by the Advisory Council on Historic Preservation that serve as a check on agency discretion—that

could be replicated or modified in future place-based or system-wide legislation focused on tribal co-management.

Federal Public Lands Planning

-Federal public lands planning needs to be based on a more accurate inventory and accounting of cultural resources and the related programs within federal land agencies need to be adequately funded and prioritized.

-The executive branch should ensure that federal land planning regulations and agency-specific manuals, handbooks, and policies related to cultural resources and tribal relations comport with the first principles of federal Indian law and the core principles of tribal co-management.

-The revision of land use plans provides an important opportunity to adequately account for tribal rights and interests on public lands, to better integrate the purposes and processes of the National Historic Preservation Act, and to engage with Indian tribes on a government-to-government basis.

Bridges to a New Era

-The time has come for a more holistic and inclusive approach to public lands management. The legal framework for federal public lands must no longer be divorced from and exclude tribes and tribal interests; instead, within this statutory space exists sufficient room to work more creatively and substantively with Native Nations and to incorporate the core principles of tribal co-management into the next chapter of public lands management.

Prominent cases referenced in this Report, such as the Badger-Two Medicine and Bears Ears, among others, are collectively shaping a new, more collaborative way to better protect places that are valued by Indians and non-Indians alike. They are innovative and constructive efforts at harmonizing sometimes divergent values and interests and more effectively draw upon the long-standing tribal connections to, and knowledge of, those places.

Ultimately, enhancing opportunities for tribal co-management of federal public lands is about justice, reconciliation, healing, and sharing. While the direct benefits that would flow from an expanded tribal role would serve our shared interests by better protecting our public lands, tribal co-management also offers a path to a more equitable future that promotes and sustains those core values for *all* Americans. After a history of division between tribes and public lands, the time has come to build the bridges that connect to that path and to a new and brighter future.

REPORT OVERVIEW

This Report comes in five parts.

Part I presents an overview of the central and foundational principles of federal Indian law. This historical and legal context has mostly been isolated within that field and left out of federal public lands law and policy. As demonstrated in this opening Part, however, critical legal standards related to the United States treaties with Indian tribes and the federal trust obligations recognized by the United States Supreme Court since the earliest days of the republic are necessary for understanding the interconnectedness of tribal sovereignty and federal public lands. In addition, this initial Part relies on examples and case-studies to illustrate how those foundational legal principles can find expression through effective modern mechanisms for tribal co-management.

Part II reviews some of the most common approaches to tribal engagement on federal public lands, including tribal consultation provisions, compacting and contracting authorities, land designations and processes pursuant to the National Historic Preservation Act (NHPA), and federal land use planning. In isolation, none of these traditional methods of engagement go far enough to provide tribes a more substantive and pre-decisional role in federal public lands management. Most provide considerable discretion to federal land agencies and are most often used in ways that place tribes in a reactive and defensive position. But there is an opportunity to do much more and each section of this Part concludes by demonstrating how these methods of engagement can be strategically linked and leveraged in order to build bridges to variations of tribal co-management.

The history, law and politics of tribal co-management is the focus of Part III. This Part demystifies the term and describes its use being authorized and compelled by judicial decree, statute, treaty, and executive action. Though Congress may enable tribal co-management on federal public lands through legislation, the Executive is best positioned to quickly implement the recommendations made in this Report. The Executive is best positioned to quickly implement the precedent and authority to affirm tribal sovereignty and effectuate the federal government's treaty and trust obligations through shared governance and variations of tribal co-management. Because the term co-management is conceived of and defined so differently, in varied legal and managerial contexts, this Part focuses instead on the core principles and attributes of tribal co-management. These principles can be configured into creative and accountable ways of governing that fit unique historical and legal contexts, political realities and landscapes.

Part IV situates tribal co-management in the context of federalism and intergovernmental relations. Rarely is co-management examined in this context and this Part helps reframe the debate to show how existing principles and tools of cooperative federalism applicable in the federal-state context should be extended to Indian tribes. Most laws fail to adequately recognize tribal rights and interests on federal public lands. But this Part concludes by showing how this history of marginalization, and the vacuum left by Congress, can be filled with Executive rule and policymaking.

The Report's concluding Part, Part V, provides primary recommendations and a strategic playbook to be considered by Indian tribes, their conservation group and other partners and allies, as well as the President and Congress. This Part begins by explaining the rare opportunity provided to the President to more strategically use existing authorities and processes as a bridge to tribal co-management and variations thereof. Improving existing methods of tribal engagement on public lands will help restore trust regardless of whether co-management is the outcome. The Part concludes by charting two potential pathways for tribal co-management legislation, place-based and system-wide. Each would shift the reactionary tribal consultation paradigm to a more proactive and sovereignty-affirming model wherein tribes can creatively re-envision management of treaty rights, sacred places, and cultural resources on public lands.

PROJECT BACKGROUND

The project began as an initial conversation and inquiry with Natalie Dawson of Audubon Alaska in Spring 2020, who requested from us a research prospectus focused on tribal co-management as it applies to federal public lands and the legal context of Alaska. We were then asked to be part of additional conversations about tribal co-management organized by the Center for American Progress. A survey was sent to those participating individuals and organizations that identified important goals, related work in progress, and most urgent needs and questions related to tribal co-management.⁶ We incorporated this feedback into part of our initial scope of work and further refined points of emphasis following multiple discussions with tribal and conservation representatives.

This Report concludes phase I of the project and was expedited to ensure that there was sufficient historical context and legal background on tribal co-management and specific recommendations that can be considered as priorities are established for the next Congress and future Presidential administrations. Phase I of the project was administered as a grant agreement between National Audubon Society, Inc. and the University of Montana Foundation (the Bolle Center for People and Forests and the Margery Hunter Brown Indian Law Clinic at the University of Montana). The Agreement requested from us the political and legal context of tribal co-management in the United States with selected cases and examples, a review of existing processes and authorities relevant to tribal co-management, and identification of potential legislative and executive actions. We were provided autonomy within this framework and the analysis and conclusions are ours alone, though we benefitted greatly from the multiple discussions we had with those working in the areas and places discussed herein.

We are particularly indebted to John Echohawk, Executive Director of the Native American Rights Fund (NARF), Darren Modzelewski and Fatima Abbas from the National Congress of American Indians (NCAI), Law Professor Lawrence S. Roberts from the Sandra Day O'Connor College of Law at Arizona State University, and attorneys and advocates from Earthjustice, especially Marissa Knodel and Gussie Lord, all of whom graciously reviewed a draft of the Report and offered valuable insight, feedback, and recommendations. Each of the people we talked to and all of these reviewers provided important insights that helped shape this report but the research and perspectives expressed herein—and any errors or misstatements in doing so—are those of the authors alone.

Phase II of the project is set for 2021 and will focus more on the complexities of tribal co-management in Alaska. Though it helped inform the shape of this Report, we believe the international context of tribal co-management, especially the innovation going on with First Nations in Canada, will be particularly instructive in the Alaska phase of research. This will also

⁶ Initial participation included representatives from the Bears Ears Inter-Tribal Coalition, Conservation Colorado, Conservation Lands Foundation, Earthjustice, Montana Wilderness Association, Native American Rights Fund, National Audubon Society, National Congress of American Indians, National Parks Conservation Association, Natural Resources Defenses Council, National Wildlife Federation, Pew Charitable Trusts, Resources Legacy Fund, Sustainable Northwest, The Wilderness Society, and the Yurok Tribe.

be the point to provide more in-depth coverage of the intersection between tribal co-management and the National Wildlife Refuge System.

Not included in this phase of research is the issue of restoring federal public lands to tribal trust ownership. Tribal land restoration efforts—past, present and future—are uniquely suited to address distinct histories, circumstances and facts related to the tribal rights and interests on particular pieces of public lands. The issue deserves its own discrete analysis with a review of individual cases, such as the proposed restoration of the National Bison Range in Montana. Also not reviewed in the Report are proposals of shared management and governance taking place on Indian lands managed in trust by the United States, such as options for managing the South Unit of Badlands National Park. Instead the Report focuses on federal public lands managed by the Bureau of Land Management, U.S. Forest Service, National Park Service, and U.S. Fish and Wildlife Service.

Several cases of tribal co-management are reviewed to varying degrees in this Report. We use them for illustration but our objective was to stay mostly focused on the more technical legal and policy dimensions in order to provide a common foundation and framework. Graduate and law students enrolled in the Bolle Center and Indian Law Clinics are scheduled to provide deeper investigations into these and other cases over academic year 2020/21. We hope that more detailed case histories, shared lessons, and strategic playbooks can be presented by tribal representatives, and their conservation partners, in subsequent phases of the project and made available on a website. The website would ideally become a rich online repository of technical information to facilitate learning across cases and places. In addition to the stories of particular places and collaborative successes, this resource would offer important assistance, with anything from statutes and consultation regulations and policies to 638 contracts, assistance agreements, template MOUs, best practices in public lands planning, and frequently asked questions pertaining to tribal co-management and the tools used in the approach.

ABOUT THE AUTHORS

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I. First Principles of Federal Indian Law

Understanding the import, scope, and dimensions of tribal co-management on federal public lands demands an understanding of the history of Indian tribes, their connections to the lands that have become federal public lands, and the ways in which that history contributed to the long-standing legal principles underpinning tribal rights to engage in co-management. The history of federal Indian law and policy is intimately intertwined with the founding and establishment of America but, for reasons explained below, public land law has largely marginalized or erased tribes,⁷ leaving the current discussion of tribal co-management of federal public lands bereft of the full legal and historical context. This section aims to remedy that divergence by developing a fuller context for considering tribal claims to co-management, including the historical expropriation of tribal lands, the relationship between those lands and today's federal public lands, and the critical foundations of federal Indian law developed during that process, which remain relevant when considering modern assertions of tribal authority. Beyond simply a recitation of history, however, this section offers a different legal perspective and framework from which to consider tribal co-management. And, in view of the deep connections between tribes and the many federal public lands on which their ancestors existed for millennia, this history also provides important substantive benefits to applying that framework to support tribal involvement in managing those resources.

A. Sovereign since Time Immemorial

While population estimates vary (and have been much debated),⁸ North America has most certainly been populated by millions of indigenous people for millennia.⁹ These groups developed and maintain complex cultural and trade structures,¹⁰ including widespread land use and resource management regimes.¹¹ Although impossible to generalize about such a diverse range of cultures, languages, societies, and civilizations, many of these tribal groups, bands, clans, or families were intimately connected with the places on which they lived and across which they roamed. These long-standing, generational connections, dating back to time immemorial, remain core aspects of many modern tribal cultures and support the interests and commitments of many tribes to engage in the ongoing management and protection of the lands to which they trace their own histories and traditions.

Recent efforts to map or delineate these traditional areas help illustrate the ubiquity and diversity of indigenous presence in what is now the United States. For example, Native Land Digital, a Canadian non-profit organization, has produced an interactive internet resource showing

⁷ See, e.g., Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARVARD CIV. R.-CIV. LIB. L. REV. 213 (2018)

⁸ See Charles Mann, *1491*, THE ATLANTIC (March 2002), available at <https://www.theatlantic.com/magazine/archive/2002/03/1491/302445/>.

⁹ See, e.g., Alexander Koch, et al., *Earth System Impacts of the European Arrival and Great Dying in the Americas after 1492*, 2017 QUART. SCIENCE REVIEWS 13, 17-18 (March 2019), available at <https://doi.org/10.1016/j.quascirev.2018.12.004> (estimating a total of 60.5 million people living in the Americas as of 1492, including between 2.8-5.7 million in North America) [HEREINAFTER Koch, et al., *Earth System Impacts*].

¹⁰ Miller, *Reservation Capitalism*.

¹¹ See, e.g., Koch, et al., *Earth System Impacts*, at 19-20.

approximate traditional territories of indigenous cultural and linguistic groups across the continent.¹²

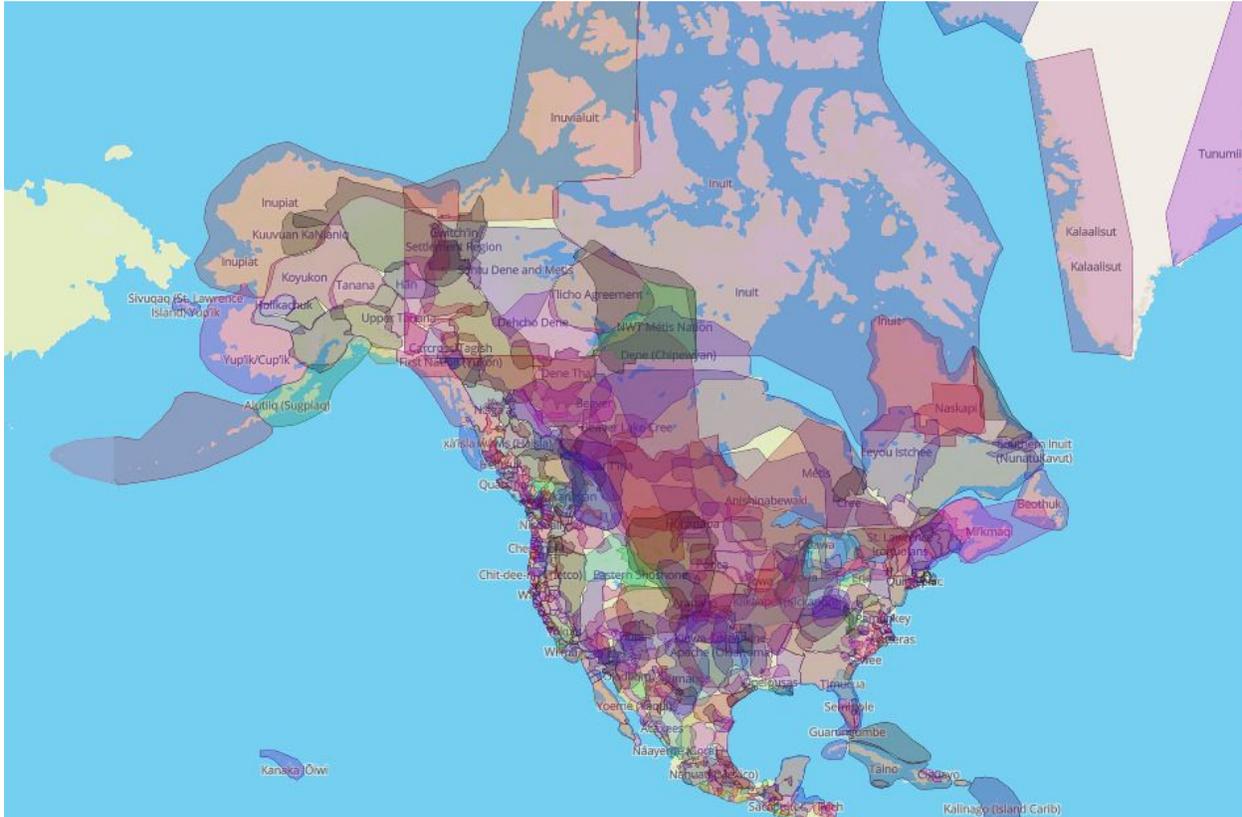


Image from www.native-land.ca

These efforts show the breadth and scope of traditional indigenous presence on the continent, with a range of cultures, governments, and societies inhabiting, traversing across, and relying upon nearly every part of what would become the United States.¹³ Importantly, that presence did not merely ground indigenous spirituality, cultural values, and lifeways; it also rooted tribal assertions of governmental power—sovereignty—in the lands upon which that power was exercised.¹⁴ Recognizing the depth and meaning of this presence is therefore critical to a complete understanding of modern tribal co-management.

¹² Native Land, <https://www.Native-Land.ca>, last visited June 12, 2020; *see also*, Tribal Connections, U.S. FOREST SERVICE, <https://www.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>, last visited June 12, 2020 (documenting tribal lands and land cessions).

¹³ These boundaries are necessarily approximate, imprecise, and historically fluid but the presence of a variety of indigenous peoples across the continent is undeniable.

¹⁴ *See, e.g.*, Rebecca Tsosie, *The Conflict between the 'Public Trust' and 'Indian Trust' Doctrines: Federal Public Land Policy and Indian Nations*, 39 TULSA L. REV. 271 (2013) (“Native people have legal, moral, political, and cultural interests in their ancestral homelands, and these multiple and complex interests should not be described as purely ‘religious’ in nature.”)

B. Sovereignty and Treaties: European Legal Foundations and Federal Indian Law

Understanding the fundamental principles of federal Indian law relevant to tribal co-management also demands historical context, although those principles often ignore the indigenous presence on the land since time immemorial and begin with the arrival of European colonists to the so-called “New World.”¹⁵ With these colonizers came legal traditions and concepts developed over centuries of conflict among nations and, although the unique states of the United States ultimately resulted in a new legal approach to the status of and relations with tribes, that approach drew heavily from these European legal traditions.¹⁶

The evolution of principles within the American context revolved around the legal standing of indigenous people and, due to the arrival of Europeans interested in claiming new territories, their rights to land.¹⁷ The natural rights of native people, most conclusively elaborated by Francisco de Vitoria in 1532, supported their fair treatment as co-equal sovereigns and the acquisition of their lands only with their consent.¹⁸ But those principles were disputed by competing theories of indigenous inferiority, on which European settlers could rely to freely confiscate land and overrun, if not exterminate, its original inhabitants.¹⁹

Although those philosophical debates would continue (and come to parallel uncertainty and debate over the rights of the federal government to reserve public lands),²⁰ the realpolitik of the colonial era demanded that European nations seek durable alliances with the powerful and numerous tribes of the continent. Therefore, in animating Vitoria’s principles of the natural rights of indigenous people, European countries negotiated agreements with tribes; an approach that necessarily “implied recognition of tribes as self-governing peoples.”²¹ Through these tools of international law, Europe’s sovereigns could ensure their colonizing interests and citizens would be protected and, more practically, secure actual claims to lands that had been claimed only in theory by colonial charters.²² More importantly, however, the use of treaties became a central part of relations with tribes that would persist well after America’s founding and, though not always adhering to the principles of respect in which those government-to-government bonds implied, the reliance by non-Indian governments on treaties ensured important tribal status and rights.²³

The international and European legal traditions that supported treaty-making mandated the sovereign-to-sovereign nature of those bonds; however, with colonial sovereigns well removed

¹⁵ See DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 47 (West Academic 7th ed. 2017) [hereinafter GETCHES, ET AL., *CASES AND MATERIALS*].

¹⁶ See *id.* at 47-71.

¹⁷ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1], 8-17 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

¹⁸ *Id.*

¹⁹ See, *id.* (summarizing conflicts between Vitoria’s theories and “[a]rguments that Indians possessed neither rights to property nor governmental status.”)

²⁰ See, e.g. Gregory Ablavsky, *The Rise of Federal Title*, 106 CAL. L. REV. 631 (2018) (summarizing debates over federal property rights and claims).

²¹ GETCHES ET AL., *CASES AND MATERIALS*, at 85.

²² *Id.*

²³ See COHEN’S HANDBOOK, § 1.02, at 12-14.

from their colonizing subjects, conflicts over sovereign promises were numerous. Land hungry British settlers pouring into tribal territories ultimately prompted King George III to restrict such migration via the Royal Proclamation of 1763.²⁴ Among other provocations, that action largely motivated the colonial resistance to ongoing British authority and sparked the Revolutionary War.²⁵

The founding of America brought a host of new challenges and legal traditions imposed upon Indian people; however, the recognition of tribes as sovereign governments, rooted in the treaty practices begun by European nations, endured. American law would soon embrace treaties and the inherent and pre-extant nature of tribal sovereignty, both of which would inform the establishment of the defining relationship between the federal government and Indian tribes.

C. The Trust Relationship: America's Founding, Tribes, and States

Having played a central role in catalyzing the American Revolution, the status of and relationship to Indian tribes would continue to animate the development of the young nation's legal traditions. The very presence of tribes—sovereign powers outside of the American system—within the boundaries of the original colonies posed challenging questions to the nature and extent of both federal and state power. The federal-state conflict over authority to manage tribal relations was a remnant of the “divided legacy” from colonial times and echoed the founders' complaints about the distant edicts of King George.²⁶ The Articles of Confederation plainly illustrated the conflict; reserving to Congress the “sole and exclusive right and power” over Indian affairs but only so long as such power did not infringe or violate “the legislative right of any State within its own limits.”²⁷ The continuing use of treaties, negotiated by representatives of the Continental Congress, further exacerbated the divide. In Georgia, for example, the 1785 Treaty of Hopewell with the Cherokee Nation, guaranteed peace to the Cherokee and protection by the United States.²⁸ But the State of Georgia refused to acknowledge this undue nationalist interference in matters that Georgia viewed as integral to state sovereignty.²⁹

In addition to treaty-making with the Cherokee and other tribes,³⁰ the early American government also sought to assume primary responsibility for protecting tribes and their properties from incursion by states through other means. The Northwest Ordinance of 1787, for example, provided for both protection and respect for tribal lands as well as limits on state authority to interfere with federal power to sell or secure title in acquired lands.³¹ That pre-constitutional enactment highlighted federal efforts to assert preeminence in both Indian affairs

²⁴ Royal Proclamation, Oct. 7, 1763, reprinted in 3 *The American Indian and the United States*, 2135–2139 (Wilcomb Washburn, ed., Greenwood Press 1973).

²⁵ GETCHES, ET AL., *CASES AND MATERIALS*, at 67–69.

²⁶ Gregory Ablavsky, *Savage Constitution*, 63 *DUKE L.J.* 999, 1011 (2014).

²⁷ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

²⁸ COHEN'S HANDBOOK, § 1.02[3], at 20–21; Treaty with the Cherokees, 1785, pmbl., 7 Stat. 18.

²⁹ See, e.g., Ablavsky, *Savage Constitution*, at 1029–30 (describing Georgia's reaction to the treaty negotiations at Hopewell).

³⁰ See COHEN'S HANDBOOK, § 1.02[3], at 19–21.

³¹ 32 J. Continental Cong. 334, 340–341 (1787).

and the control of property, both of which would become central to the eventual establishment of federal public lands.³²

These conflicts informed, if not motivated, the framing of the U.S. Constitution, which, according to Professor Gregory Ablavsky, represented a federal guarantee to reticent states to remove Indians from state boundaries.³³ The Constitution cemented the prominence of federal authority and resolved the uncertainty and confusion created by the Articles of Confederation by expressly reserving to the Congress the exclusive authority to regulate “commerce ... with the Indians” while also confirming the supremacy of treaties made by and between the United States and the tribes to state laws.³⁴ But the details of that prominence remained to be fleshed out.

In exercise of its constitutional authority to regulate commerce with tribes, many of the early actions taken by Congress sought to provide a framework for dealing with the trade of tribal lands. These trade and intercourse laws echoed the formerly reviled Proclamation of 1763 by limiting the validity of purchases of tribal lands to transactions consummated or ratified by the federal government.³⁵ Conceivably, in conjunction with treaty-making committed to respecting tribes as co-equal sovereigns, these provisions would ensure federal protection for tribes and their territories, to be forfeited only upon negotiation of an acceptable treaty. But, with the changing political dynamics, the implicit guarantees of federal deference to state interests, and the growing pressure on tribes and their territories, this arrangement quickly became significantly unilateral, with the United States acquiring vast swaths of tribal territory for little or nothing in return.³⁶

These practical acts of conquest were soon legitimized by the United States Supreme Court, which, in its 1823 decision in *Johnson v. M’Intosh*,³⁷ established an overriding and supreme federal authority over tribal lands. Relying on his view of history, Chief Justice John Marshall, who would go on to write two more foundational federal Indian law decisions,³⁸ determined that, in acceding to Britain’s colonial claims, the United States acquired the “absolute ultimate title ... , subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”³⁹ This splitting of title between the United States and tribes put the federal government in charge of acquiring, managing, and overseeing tribal territories, a relationship that would inform the establishment of the government’s trust duties to tribes and remains in place across present-day Indian reservations, which include “trust lands” held by the United States for the benefit of resident tribes.⁴⁰

³² See, e.g., John D. Leshy, *Are Federal Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 505 (2019) (describing the Northwest Ordinance’s role in “the beginning of the nation’s public lands.”)

³³ Ablavsky, *Savage Constitution*, at 1072 (explaining federal promises to provide military support and “eradicate the Indian threat.”)

³⁴ U.S. CONST. art. I, § 8, cl. 3.

³⁵ See, e.g., Act of July 22, 1790, § 4, 1 Stat. 137; Cohen’s Handbook, *supra* note XX, § 1.03[2] at XX (reviewing similar acts).

³⁶ See, e.g. COHEN’S HANDBOOK, §1.03[3], at XX (describing treaty strategies of the Jefferson administration following the Louisiana Purchase of 1803).

³⁷ 21 U.S. 543 (1823).

³⁸ See also *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

³⁹ *Johnson*, 21 U.S. at 592.

⁴⁰ See Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to*

Ongoing conflicts between the State of Georgia and the Cherokee Nation would offer additional opportunities for Chief Justice Marshall and the Supreme Court to further define the nature of that trust relationship. Georgia, like other states seeking to establish their sovereignty and claims to greater territory, ignored federal treaty promises to the Cherokee and, instead, simply sought to extend its powers over Cherokee territory.⁴¹ In considering the Cherokee's claims to protection, Chief Justice Marshall described the tribe as a "domestic, dependent nation,"⁴² which remains a descriptor of tribal status.⁴³ With regard to the federal-tribal relationship, Marshall analyzed the United States' role in agreeing to treaties like the Treaty of Hopewell to determine that the Cherokee were to be protected by the United States; like a "ward to [the United States as] guardian."⁴⁴

The next year, in *Worcester v. Georgia*,⁴⁵ Marshall again relied on treaties in upholding the exclusive federal nature of this role.⁴⁶ In doing so, the Supreme Court excluded Georgia law from applying within the Cherokee's territory as it would interfere with the treaties, which were recognized by the constitution as the supreme law of the land.⁴⁷ *Worcester* ultimately insulated the Cherokee Nation from Georgia's laws and explicitly protected the tribe's "distinct community,"⁴⁸ thereby reinforcing and protecting the tribe's sovereignty in addition to emphasizing the importance of treaties and securing the federal-tribal trust relationship.

Notwithstanding these important precedents, the Cherokee and other tribes of the southeast were forcibly removed from their homelands pursuant to a federal law authorizing exchange of tribal lands in the southeast for lands farther west.⁴⁹ The political divide over the legislation highlighted the conflict between honoring the legal principles announced by Chief Justice Marshall, including the importance of the United States' treaty guarantees, and the land hungry desires of largely slave-owning capitalists interested in expanding their commerce.⁵⁰ In a foreshadowing of the remaining decades of the 19th Century, the political power of the latter won the day and tribal concerns were ignored in service of broader national (non-Indian) interests.

Nonetheless, the three foundational legal concepts forged during this pivotal era: tribal sovereignty, the trust relationship, and treaties, became the basis for understanding federal Indian law. Their evolution and treatment by Congress, the courts, and policymakers have defined the

Democracy & Equal Opportunity, 86 INDIANA L. J. 763, 767 (2011) (noting the continuation of "conquest" represented by the "co-ownership" created by the *Johnson* decision).

⁴¹ *Cherokee Nation*, 30 U.S. at 11; see also CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY, 27-49 (2020) (discussing Georgia's incaltrance toward federal authority and tribal presence in the lead up to the 1830 Removal Act).

⁴² *Cherokee Nation*, 30 U.S. at 13.

⁴³ See, e.g., *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (citations omitted) ("Indian tribes are 'domestic dependent nations.'").

⁴⁴ *Cherokee Nation*, 30 U.S. at 13.

⁴⁵ 31 U.S. 515 (1832).

⁴⁶ *Id.* at 561 ("whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.")

⁴⁷ *Id.* at 559-60.

⁴⁸ *Id.* at 561.

⁴⁹ 4 Stat. 411 (May 28, 1830).

⁵⁰ See SAUNT, UNWORTHY REPUBLIC, at 53-83.

rights and obligations of Indian tribes ever since. In addition, like the connection between federal, tribal, and state interests in lands covered by the Northwest Ordinance or seized by Georgia citizens as the Cherokee were removed from their lands, treaties, the trust relationship, and tribal sovereignty have been central to the acquisition and establishment of the nation's public lands and, therefore, provide an important framework for analyzing tribal co-management of those resources.

D. Indian Tribes and Public Lands

Each year, the federal Bureau of Land Management (BLM) publishes a report documenting public land statistics.⁵¹ In these reports, the BLM aims to document the current state of public lands that it manages but also provides a brief history of the acquisition of that estate and its evolution over time. In each of its reports issued in the new millennium, however, the agency neglects to mention Indian tribes, their historical presence, or any role that federal Indian law and the federal government's continuing subjugation of those tribes played in acquiring the nearly 250 million surface acres now managed by the BLM.⁵² Instead, the most recent Public Land Statistics publication, like its predecessors, explains the federal government's acquisition of lands ceded by states (like those covered by the Northwest Ordinance), purchases of territory from foreign countries, like the Louisiana Purchase, and other means, like the annexation of Texas.⁵³ In doing so, the report provides an orderly historical explanation of the growth of federal ownership, amounting to a total of 1.8 billion acres in lands acquired as public domain lands, and, following the disposition of 1.3 billion of those acres by the federal government, the continuing management of those public lands by the BLM (and other agencies) "so that they are used in a manner that will best meet the present and future needs of the nation."⁵⁴

This report's erasure of any tribal interest or role in the creation of America's public lands mirrors the manner in which the federal government wielded its plenary authority over Indian affairs to largely erase tribes and tribal people from the landscapes that they had occupied since time immemorial. Although the trust relationship originally articulated by Chief Justice Marshall in the Cherokee cases envisioned a strong federal government stepping in to protect tribes, honor treaty promises, and insulate their sovereignty from state or other interference, that interpretation evolved to enable the federal government to pursue other priorities, like extinguishing Indian title in order to enable settlement and development, regardless of tribal interests. In doing so, the federal government relied on its time-honored practice of treaty-making, at least until 1871, when, in a fit of political discord over the role of the U.S. Senate in ratifying treaties, Congress passed an act prohibiting further treaties.⁵⁵ Thereafter, the federal government still negotiated agreements with tribes and further relied on Presidential orders to establish Indian reservations, thereby limiting tribes to smaller and smaller territories while unifying the United States' title to lands those tribes were induced, coerced, or forced to cede.

⁵¹ See *Public Land Statistics*, UNITED STATES BUREAU OF LAND MANAGEMENT, <https://www.blm.gov/about/data/public-land-statistics>, last visited June 12, 2020.

⁵² See, e.g., *Public Land Statistics 2018*, UNITED STATES DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., 1, 4 (Aug. 2019), available at <https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2018.pdf>.

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 1.

⁵⁵ Act of March 3, 1871, § 1, 16 Stat. 544, 566.

By the late 1800s, even those much smaller reservations were not immune from disintegration, as federal policy swung toward further breaking up tribal land bases and opening up those lands to settlement, acquisition, and ownership by non-Indians as well as the state and federal governments. Spurred on by decisions of the Supreme Court authorizing boundless plenary power to largely do as it pleased with regard to Indian affairs,⁵⁶ Congress passed the Allotment Act of 1887, a law designed to destroy the integrity of many remaining tribal lands, which it did to great effect.⁵⁷ Ultimately, the Supreme Court even went so far as to bless Congressional abrogation of treaty promises, ruling that, where Congress decides it appropriate, the promises of the United States to tribes may be rendered meaningless.⁵⁸

By twisting or setting aside the foundational principles of federal Indian law and wielding its growing military, economic, and population advantages, the United States removed Indian tribes from lands it had acquired through other means and unified its title by extinguishing tribal occupancy and possession. Those lands would become 30 of the nation's 50 states and, particularly in the western United States and Alaska, would remain in federal ownership to be managed as public lands.⁵⁹ Mapping the scope and number of those cessions (shown by the black outlines in the figure below) illustrates the patchwork process of treaty negotiation and land cession. When overlain with today's public lands (shown by the green of United States Forest Service Lands, yellow BLM lands, and purple National Parks), the direct connection between these historical practices, the loss of tribal lands, and modern public lands management is clear:

⁵⁶ See, e.g., *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (upholding Congress' extension of federal criminal jurisdiction over Indian Country because Congress' "power ... over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell [and such power] must exist in th[e federal] Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.")

⁵⁷ See COHEN'S HANDBOOK, § 1.04, at 74 (noting the loss of over 90 million acres – 1/3d of the tribal land base – during the Allotment Era from 1887 to 1934).

⁵⁸ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) ("it was never doubted that the power to abrogate existed in Congress, and that, in a contingency, such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.")

⁵⁹ See *Public Land Statistics* at 1.

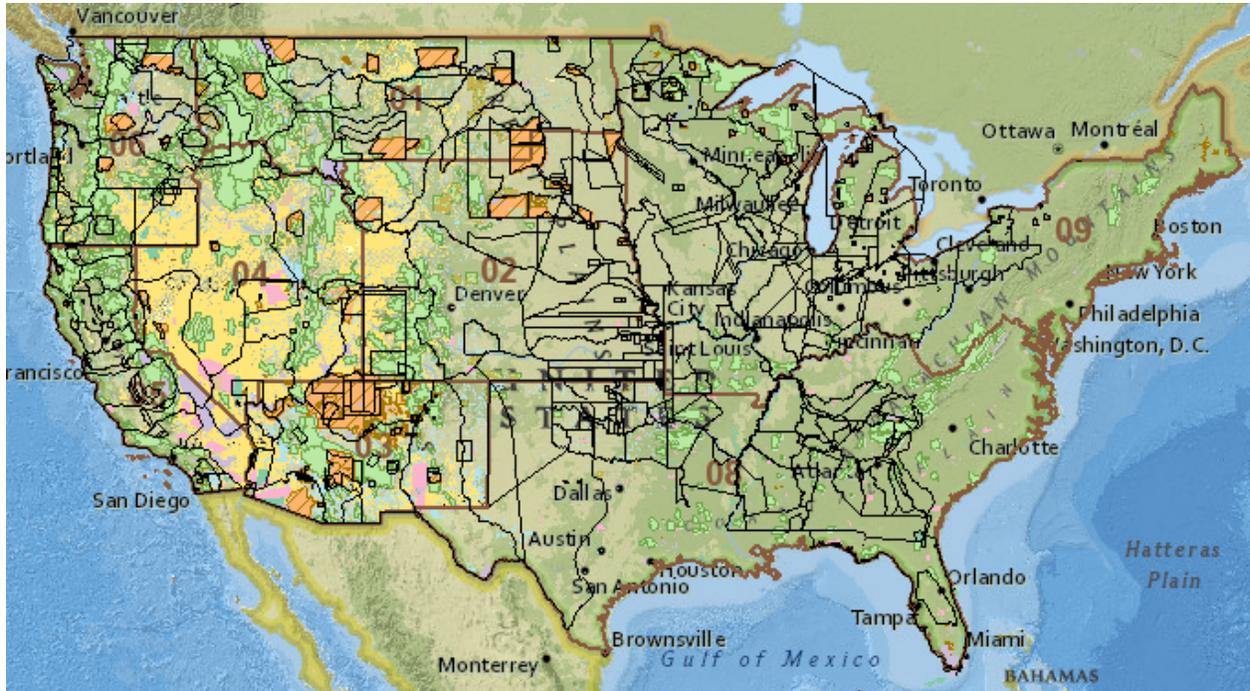


Image from U.S. Forest Service, Tribal Connections, <https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>

The examples of these interconnections are numerous. In what would become southern Oregon and northern California, for example, the Klamath people existed for generation upon generation. In 1864, the Klamath ceded claims to nearly 12 million acres and reserved a much smaller reservation in what would soon be the State of Oregon.⁶⁰ The Tribe also reserved continuing rights to hunt and fish through that treaty. Less than a century later, after the allotment of the reservation in the late 1800s, which resulted in a significant loss of land, the federal government came calling again when, in 1954, Congress passed the Klamath Termination Act, dissolving the tribe's status and effectively ending the federal government's trust obligations to the Tribe.⁶¹ As part of that Act, the federal government offered to pay tribal members for their interests in the tribe's lands and ultimately condemned other former reservation lands.⁶² The result was that 70% of the former reservation ended up in federal ownership to be managed as a refuge under the authority of the USFWS or national forest lands administered and managed by the USFS.⁶³ Although the Tribe retains important rights across its former reservation lands,⁶⁴ the ownership and management of those lands lies within federal auspices and is governed by federal laws, regulations, practices and policies in which the Tribe has little say or influence.

While important, the foundations of federal Indian law are not solely relevant for illustrating this dark history of tribal dispossession and the creation of federal public lands. Although often manipulated to serve other interests, those legal principles have endured and, in the modern era

⁶⁰ See *United States v. Adair*, 723 F.2d 1394, 1397-98 (9th Cir. 1983).

⁶¹ Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718; *Adair*, 723 F.2d at 1398.

⁶² *Adair*, 723 F.2d at 1398.

⁶³ *Id.*

⁶⁴ See *id.* at 1412-13 (holding that reserved water rights associated with the Tribe's treaty survived the termination act).

of federal policies focused on promoting tribal self-determination, treaties, the trust responsibility, and tribal sovereignty all ground important tribal rights to their traditional territories and require accommodation by the federal agencies managing public lands.

E. Legacies of History, Law, and Context

Throughout this report, we rely on case studies and particular examples to help illustrate the myriad means of tribal co-management and its varied successes, failures, and complexities. A few examples also help demonstrate the modern implications of treaties, tribal sovereignty, and the federal government’s trust responsibilities to Indian tribes.

1. The Canons of Construction and Tribal Rights on Public Lands

For at least the last ten centuries, the bands of the Ute Tribes have occupied the lands of Colorado, Utah, and the Four Corners region.⁶⁵ While different bands traditionally occupied certain parts of this vast region, collectively, the Utes’ traditional territory included most all of present-day Colorado and Utah as well as parts of New Mexico, Arizona, and Wyoming.⁶⁶ As with all tribes across the western United States, however, the rush of non-Indian migration soon brought federal officials seeking to negotiate treaties that would ultimately define and reduce this vast Ute territory. But the first treaty entered by the Ute Tribes and the United States, in 1849, paralleled other treaties of the time by establishing an exclusive federal-tribal relationship, rooted in friendship and peace while guaranteeing free passage across and seeking to define the boundaries of the then-current Ute territory.⁶⁷

Within two decades, however, the United States’ desire to close the frontier and secure limited territories reserved to tribes brought a new round of negotiators, this time as part of what would be the last round of official treaty-making done by President Grant’s Great Peace Commission of 1867 and 1868.⁶⁸ The Ute Treaty of 1868 reduced the Tribes’ traditional territory dramatically while reserving nearly the western third of what would become Colorado as a reservation.⁶⁹ Within five years, the discovery of gold and silver in the San Juan Mountains of the southern part of the Ute Reservation brought a stampede of non-Indian prospectors and federal negotiators again reached an agreement with the Ute requiring the Tribes to cede a large block of territory encompassing those lands.⁷⁰ In doing so, however, the Tribes reserved the “right to hunt upon

⁶⁵ Peter R. Decker, *The Utes Must Go! American Expansion and the Removal of a People*, 8 (2004).

⁶⁶ *Id.* at 14-15.

⁶⁷ Treaty with the Utah, 9 Stat. 984 (Dec. 30, 1849), reprinted in Kappler Vol. 2, 585-88. The treaty was entered only with the Muache Band of Utes though the United States believed it to be binding on the entire Ute Tribe. Decker, *supra* note 54 at 26-27.

⁶⁸ See An Act to Establish Peace with Certain Hostile Indian Tribes, July 20, 1867 (establishing and charging the Commission with making treaties with tribes in order to “remove all just causes of complaint on their part” while also “establish[ing] security for person and property along the lines of railroad ...[which] will most likely insure civilization for Indians and peace and security for the whites.”

⁶⁹ Treaty with the Ute, 13 Stat. 619 (May 2, 1868).

⁷⁰ An Act to Ratify an Agreement with Certain Ute Indians in Colorado and Make an Appropriation for Carrying out the Same, 18 Stat. 36 (April 29, 1874) (known as the “Brunot Agreement”) (Although technically not a treat—the agreement was made after 1871—it was ratified by Congress and has the same legal effect).

said [ceded] lands so long as the game lasts and the Indians are at peace with the white people.”⁷¹ Though political, military, social, and legal conflicts over the next generation would drive some Ute bands out of Colorado and onto reservations in Utah and reduce the Tribes’ lands in Colorado to a narrow strip of two reservations in the southwestern corner of the state, that language and the rights reserved by it would come to ensure important future opportunities for the Ute Tribes who remained in Colorado.⁷²

The United States Supreme Court has long sought to ensure that treaty promises made by the United States, like those in the so-called Brunot Agreement with the Ute Tribes, are not rendered meaningless simply by the passage of time. To do so, the Court has developed and relied upon rules for interpreting treaty language that protect the bonds of the federal-tribal relationship and help ensure balance between the nation’s constitutional structure of federalism and tribal sovereigns who exist entirely outside of that framework.⁷³ These Indian canons of construction demand that courts work to understand treaty language as the Indians would have understood it at the time it was negotiated and that the rights reserved by tribes through treaties remain intact unless Congress clearly and unambiguously abrogates those rights.⁷⁴ The canons also help emphasize that a “treaty was not a grant of rights to the Indians, but a grant of right from them[—]a reservation of those not granted.”⁷⁵

Most recently, the Court relied on the canons of construction to uphold the rights reserved by the Crow Tribe in their 1868 Treaty with the United States (a treaty also negotiated as part of the Great Peace Commission’s work) to hunt in the Bighorn National Forest of Wyoming.⁷⁶ In doing so, the Court considered Wyoming’s reliance on a Supreme Court decision from the late 1800s finding that similar treaty rights ended upon Wyoming’s statehood.⁷⁷ But, because the language of the treaty did not mention any such termination date nor would the Crow have so understood the treaty, the Court rejected Wyoming’s arguments and confirmed that the Crow’s rights to hunt

⁷¹ *Id.* at Art. II, 18 Stat. at 37.

⁷² On the removal of the Utes from Colorado, *see generally* Decker, *supra* note 54. As a result of subsequent Congressional actions and conflicting interpretations of the tribal signatories to the Brunot Agreement, the Ute bands now in Utah have not yet been able to exercise reserved rights in the area ceded by the Brunot Agreement. Associated Press, *Ute Tribe Wants Colorado Hunting Rights*, *Deseret News* (May 25, 2000), *available at* <https://www.deseret.com/2000/5/25/19508715/ute-tribe-wants-colorado-hunting-rights>. In addition, the Southern Ute Indian Tribe’s reservation was eventually opened for allotment, resulting in a checkerboard pattern of ownership, including United States Forest Service lands, within the reservation’s boundaries. *See* Brief of Amicus Curiae Southern Ute Indian Tribe and Ute Mountain Ute Tribe in Support of Petitioner, *Herrera v. Wyoming*, No. 17-532, filed Sept. 11, 2018, 11-13. On September 21, 2012, President Barack Obama proclaimed a portion of these lands as Chimney Rock National Monument, which is managed in consultation with the Southern Ute Indian Tribe. USFS, *Chimney Rock National Monument Final Management Plan*, 1, 11 (Aug. 2015) *available at* <http://www.fs.usda.gov/project/?project=42952>.

⁷³ *See* COHEN’S HANDBOOK, § 2.02[2], at 118-19.

⁷⁴ *See, e.g.,* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (*Mille Lacs*) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”); *Id.* at 202 (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”). The Supreme Court has extended these canons of interpretations beyond treaties as well, applying them to agreements, statutes, and other federal enactments in order to ensure that the federal government’s unique obligations to tribes are fulfilled. *See* COHEN’S HANDBOOK, § 2.02[1].

⁷⁵ *United States v. Winans*, 198 U.S. 371, 381(1905).

⁷⁶ *Herrera v. Wyoming*, 587 U.S. ____, 139 S.Ct. 1686 (2019).

⁷⁷ *Id.* at 1694-97.

in “unoccupied” areas of the National Forest remain valid, some 150 years after they were reserved.⁷⁸

Like the Court’s recent confirmation of the Crow’s treaty reserved rights, the rights reserved by the Ute Tribes in the Brunot Agreement could be fortified against diminution by the canons of construction; however, the Tribes faced challenges in utilizing those rights across the broad swath of area they ceded in the Brunot Agreement, much of which is federal public land, managed by the United States Forest Service (USFS).⁷⁹ Importantly, however, because the Tribes’ rights were centered on hunting, the difficulties they faced arose from attempts by the State of Colorado to prosecute tribal members for exercising those rights. In fact, as the result of one such prosecution in 1972, the Southern Ute Indian Tribe agreed not to pursue further exercise of its reserved rights so as to avoid the continuing threat of state prosecutions of its members.⁸⁰ That fact illustrates one further complexity confronting the potential for tribal co-management of federal lands, namely that the federal government has traditionally deferred to state authority over wildlife management across the public lands, rendering co-management in these situations a potentially tri-partite affair.⁸¹ So, in order to effectuate the rights that the Tribe reserved with the federal government in the 1872 Brunot Agreement, the Southern Ute Indian Tribe approached the State of Colorado to develop an agreement and process through which the Tribe’s members might again hunt in the Brunot area.

The intergovernmental agreement ultimately reached between Colorado and the Southern Ute Indian Tribe is rooted in and based on the unique status of the Tribe’s Brunot Agreement rights but also recognizes and upholds the Tribe’s sovereign rights to manage wildlife and enforce its own laws regarding that management.⁸² In negotiating that agreement, the Tribe relied on the Indian canons of construction, tribal traditional practices, and historical records, all of which supported the Tribe’s understanding that the rights it reserved in the Brunot Agreement included “trapping, fishing, and gathering” rights, even though the Agreement itself only used the word “hunt.”⁸³ Thus, the legal standing of the Tribe’s reserved rights and the long-standing rules for interpreting treaties and agreements between the United States and Indian tribes secured the actual implementation of important sovereign, cultural, and traditional rights for the Southern Ute Indian Tribe.⁸⁴

In addition to the co-management of wildlife resources with the State of Colorado, those historical understandings, the progression of treaties, and the implementation of important

⁷⁸ *Id.* at 1699-1700.

⁷⁹ See Tribal Connections website (The Brunot cession is shown as cession 566).

⁸⁰ See Memorandum of Understanding between the Southern Ute Indian Tribe and the State of Colorado Concerning Wildlife Management and Enforcement in the Brunot Area, 1 (Sept. 15, 2008) (on file with authors) [HEREINAFTER Brunot MOU].

⁸¹ See, e.g., Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENVTL. L. 797 (2017)

⁸² See Brunot MOU, at 3-5 (recognizing shared principles of management, tribal authorities, and the traditional practices of the Tribe, which included hunting species that the State may consider “non-game” as well as gathering and fishing).

⁸³ *Id.* at 1.

⁸⁴ The neighboring Ute Mountain Ute Tribe soon secured a similar agreement with the State of Colorado. See Joe Hanel, *Ute Tribe Hunting Agreement gets Approval*, DURANGO HERALD (Jan. 11, 2013), available at <https://durangoherald.com/articles/49901>.

traditional tribal reserved rights all supported and were included in the USFS's analysis of Areas of Tribal Importance within the area's national forests.⁸⁵ That assessment will help guide future forest planning and resource management, improving the USFS management and protection of tribal interests in the area over prior forest plans, which largely limited or excluded those rights from consideration.⁸⁶

2. Understanding Sovereignty and the Trust Responsibility through Alaska

Like the rest of the United States, the federal government acquired the territory that now comprises Alaska while it was already possessed and occupied by indigenous peoples. As with the Louisiana or Gadsden purchases, the United States' 1867 deal with Russia gave it the right to exclude other international sovereigns but, by the terms of that agreement, the United States expressly recognized the presence of the region's original residents.⁸⁷ The framework of federal Indian law had already been sketched out and, therefore, that treaty indicated the federal government's intent to apply that structure to Alaska's "uncivilized native tribes."⁸⁸ Although that language implies that members of "civilized" Tribes would be considered American citizens, the distinction was largely ignored for purposes of the legal status of Native Tribes in Alaska, who—with some exceptions—were considered under the same principles of federal Indian law throughout the ending decades of the 1800s.⁸⁹

This treatment vacillated through the early 1900s, particularly as it related to the United States' recognition of tribal lands and property interests, a challenge that Congress eventually sought to remedy by amending the 1934 Indian Reorganization Act (IRA) to include Alaska Natives.⁹⁰ The IRA marked a distinct shift in federal Indian policy by ending the failed allotment era and providing an avenue for tribes to acquire trust lands, adopt tribal constitutions, and unequivocally recognizing tribal sovereign authority.⁹¹ But, when it came to applying those principles to acquire and protect tribal lands in Alaska, the United States' ability to do so was ultimately "relatively limited and fragmented."⁹² Thus, while treaty relationships, the reservation system, and trust lands remain mostly foreign to the federal government's treatment of Alaska Native Tribes, the core of that sovereign relationship still resolves around the inherent sovereignty of those Tribes. Therefore, while the unique history, laws, and property status of Alaska Native Tribes might suggest that they should be considered outside of the scope of general principles of federal Indian law, their continuing exercise of tribal sovereignty provides a clearer window through which to understand the nature of tribal sovereignty, the federal government's trust

⁸⁵ See, e.g., *Grand Mesa, Uncompahgre, and Gunnison National Forests, Revised DRAFT Forest Assessments: Areas of Tribal Importance*, U.S. FOREST SERVICE (March 2018), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd573530.pdf.

⁸⁶ *Id.* at 10.

⁸⁷ Art. III, Treaty of March 30, 1867, 15 Stat. 539, 542.

⁸⁸ *Id.*

⁸⁹ See DAVID S. CASE AND DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, 55-56 (3d ed. 2012) [hereinafter CASE & VOLUCK, *ALASKA NATIVES*].

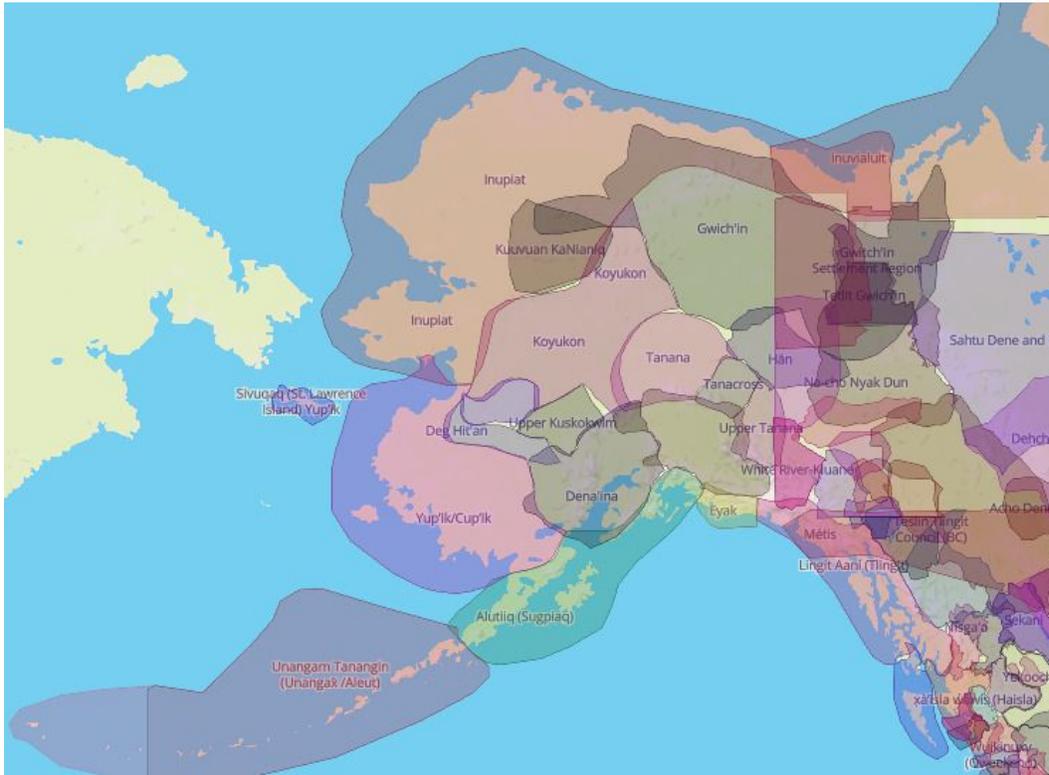
⁹⁰ Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a.

⁹¹ Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461 et seq.

⁹² See, e.g., CASE & VOLUCK, *ALASKA NATIVES*, at 60-62 (noting the subsequent practical limitations on the federal government's ability to create and protect reservation and trust lands in Alaska).

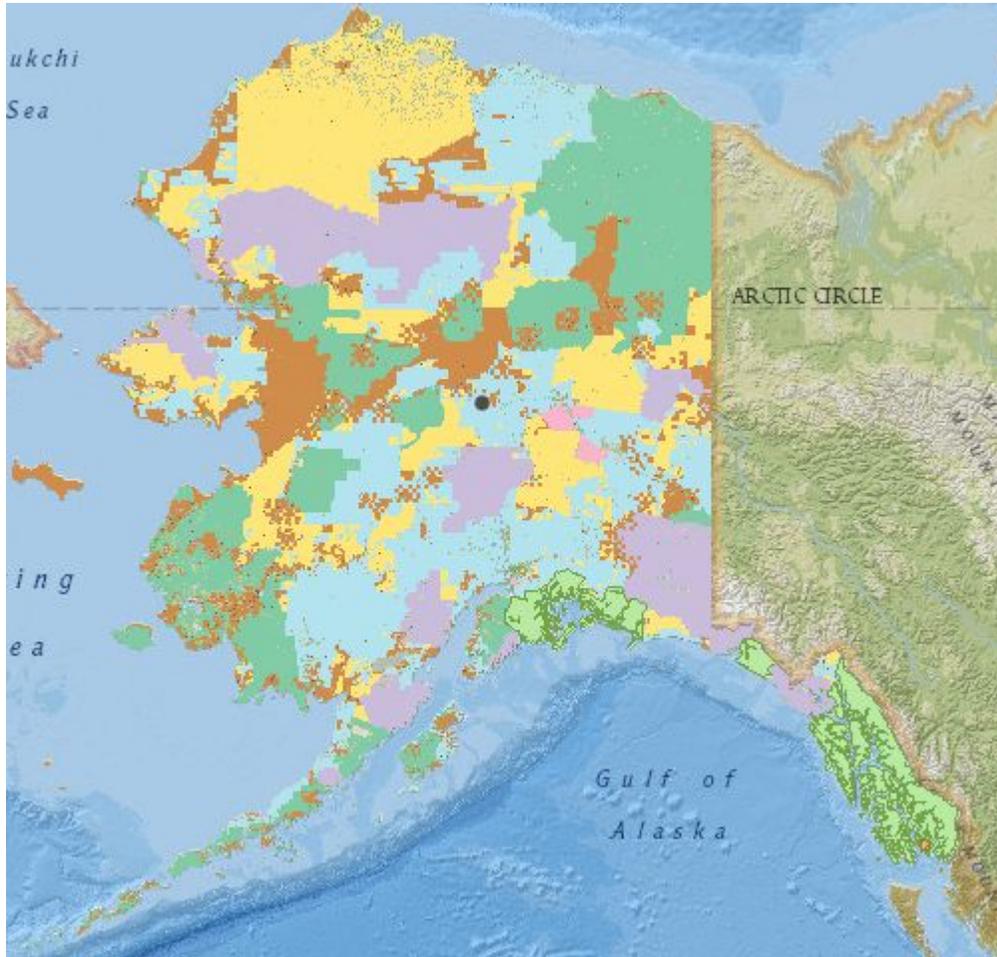
relationship, and their relevance for comprehending the potential for tribal co-management of public lands.

Like the map of the continental United States showing traditional indigenous territories (above), what is now Alaska was historically inhabited by a wide variety of indigenous cultures, languages, and societies.



While these tribal groups remain in present-day Alaska and continue their cultural and governmental traditions, their claims to the lands on which they reside have evolved quite differently than the history of treaty-making an American expansion described above.

For example, while a map of today's Alaska shows a patchwork of federal public lands much like those covering the western continental United States in the map shown in the previous section, there are no lines delineating any cession of lands by the various groups of Alaska Native peoples.



Questions and uncertainty around the status of Alaska Native claims to aboriginal title—the title recognized by Chief Justice Marshall in *Johnson v. M'Intosh* and to which the United States acquired the exclusive right to extinguish through treaties—dogged the first century of the federal-tribal relationship in the state.⁹³ While the inclusion of Alaska Natives in the IRA signaled federal recognition of their sovereign authority, their relative isolation in villages and legal challenges to tribal authority over the few reservations that were recognized posed serious questions to the “legitimacy” of such claims.⁹⁴ In 1955, the United States Supreme Court dealt a further blow to those claims, holding that, despite the language of the 1867 treaty with Russia and various Congressional actions recognizing tribal rights, the federal government was not obligated to compensate Alaska Natives for any taking of their aboriginal lands because the United States had not “recognized” such ownership.⁹⁵ Further, relying on the notions of discovery and conquest from *Johnson v. M'Intosh*, the Court excused the United States from any compensation even when terminating aboriginal title.⁹⁶

⁹³ *Id.*

⁹⁴ *Id.* at 62.

⁹⁵ Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-79 (1955).

⁹⁶ *Id.* at 284-85.

Notwithstanding that much criticized and reviled decision, however, subsequent efforts by the Tlingit and Haida Indians to pursue compensation from the Indian Claims Commission, which Congress established in 1946 to allow tribes to seek compensation for the taking of their lands in unfair treaty deals, seemed to support the rights of Alaska Native Tribes to compensation for the taking of their lands.⁹⁷ In addition, Alaska's Statehood Act, like those of other western states, disclaimed any rights to Native lands or property, like continued fishing rights, and a subsequent Supreme Court decision suggested that, perhaps, the Act's preservation of the "status quo" with regard to those aboriginal claims neither "extinguish[ed] them nor recognize[d] them as compensable."⁹⁸ The uncertainty swirling around the scope and extent of the land and property rights of Alaska Natives ran headlong into Congress' authorization for the state of Alaska to acquire a portion of public lands, prompting further conflict and an eventual freezing of that process by the Department of the Interior.⁹⁹

That conflict prompted Congress to seek a comprehensive solution that would allow the state to acquire lands and, perhaps more importantly, enable access to the region's oil reserves. Thus, where the United States had for much of the prior century relied on the treaty-making process and its own plenary power to extinguish tribal claims to the continental states and the public lands that would be created therein, the events and conflicting legal treatment of the claims of Alaska Natives over the bulk of the Twentieth Century prompted a different approach to resolving those claims.¹⁰⁰ As a result, the treaty relationships that undergirded the recognition of tribal sovereignty elsewhere were irrelevant to Alaska; however, like their continental tribal counterparts Alaska Native Tribes continued to uphold and exercise their inherent sovereign rights.

The Alaska Native Claims Settlement Act (ANCSA)¹⁰¹ was Congress' solution to the seemingly intractable quagmire that ensconced the early years of Alaska's statehood. As described by one treatise, ANCSA aimed to balance four competing interests:

First were the Alaska Natives, represented by over two hundred villages or tribes, which held the aboriginal claim to some 365 million acres of land. Under ANCSA, Native corporations would own about 45.7 million of these acres. Second was the state of Alaska, with its claim to about 103 million acres under the Statehood Act. Third was the federal government itself, which held the remaining approximately 216 million acres. Finally, there were the environmental interests that became increasingly concerned about the effect of these land settlements on wildlife, habitat, and other ecological values.¹⁰²

⁹⁷ See CASE & VOLUCK, ALASKA NATIVES, at 132-33.

⁹⁸ *Kake v. Egan*, 369 U.S. 60, 65 (1962).

⁹⁹ CASE & VOLUCK, ALASKA NATIVES, at 134-35; 276-77.

¹⁰⁰ Cases arising after Congress adopted that new solution served to confirm that the aboriginal title claims of Alaska Natives should not be distinguished from those of other tribes and, therefore, according to the leading treatise on Alaska Native law and policy, "the most tenable legal conclusion is that ... Alaska Native title had the same legal status as original Indian title elsewhere in the United States."

¹⁰¹ Act of December 18, 1971, Pub. L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601 et seq.

¹⁰² CASE & VOLUCK, ALASKA NATIVES, at 278. (Citations omitted); see also Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 28 (2007) (describing the events leading up to "the inevitable collision" of Alaska's statehood and the claims of its Native peoples).

While immensely complicated and subject to many subsequent legislative efforts to improve its implementation,¹⁰³ the core of ANCSA—like so many historical tribal treaty cessions before it—extinguished aboriginal title claims, including any claims to “aboriginal hunting or fishing rights,” upon the lands in the state of Alaska.¹⁰⁴ The law then authorized the claiming of lands and interests therein by newly created Native village, regional and urban corporations, as well as the state and federal government but, with regard to the Native lands, they would not be held in trust or otherwise treated like tribal lands in the rest of the country.¹⁰⁵

Importantly, ANCSA said nothing about its impact on the inherent sovereign authority of Alaska Native Tribes.¹⁰⁶ Nonetheless, despite the usually applicable Indian canon of construction dictating that tribal rights remain unless expressly abrogated by Congress, the United States Supreme Court soon severed any claim of Alaska Native sovereignty from those properties, holding in *Alaska v. Native Village of Venetie Tribal Govt.*, that Congress did not intend for lands conveyed to corporations under ANCSA to be considered Indian Country over which the Tribes would exercise territorial authority.¹⁰⁷ Thus, the continuing existence of tribal sovereignty in Alaska was called into significant doubt and the separation of that sovereignty from a tribal land base presented a significant distinction between Alaska Native Tribes and those to which the general principles of federal Indian law would otherwise apply.

But, as the result of subsequent litigation,¹⁰⁸ various Congressional acts recognizing Alaska Native Tribes on the same bases as other tribes,¹⁰⁹ and the inclusion of 229 Alaska Native groups in the Congressionally-mandated list of federally recognized Indian tribes,¹¹⁰ it is clear that there remains a unique form of tribal sovereignty across Alaska. Further, while a number of other laws ensure the rights of individual Alaska Natives to federal services as Indians and protect their rights to continue their traditional subsistence lifeways,¹¹¹ there are growing avenues through which this sovereignty is being exercised, particularly as the federal government continues to recognize Alaska Native Tribes on the same basis as other tribal sovereigns. Unlike those other sovereigns, however, given the unique separation of Alaska Native property and sovereignty, the exercise of that authority by Alaska Native Tribes is largely exclusive of their interests in land,

¹⁰³ See, e.g., Alaska National Interest Lands Conservation Act (ANILCA), Act of December 2, 1980, Pub. L. No. 95-487, 94 Stat. 2371, 16 U.S.C. §§ 3101 et seq. (addressing the federal conservation lands intended for reservation by section 17(d)(2) of ANCSA). See CASE & VOLUCK, ALASKA NATIVES, at 278.

¹⁰⁴ 43 U.S.C. § 1603(b) (2018).

¹⁰⁵ CASE & VOLUCK, ALASKA NATIVES, at 280-83.

¹⁰⁶ See Anderson, *Alaska Native Rights*, at 35-37.

¹⁰⁷ 522 U.S. 520, 534 (1998). Outside of one existing reservation, some limited parcels of trust land remain in Alaska. See CASE & VOLUCK, ALASKA NATIVES, at 597.

¹⁰⁸ *John v. Baker* (1999)

¹⁰⁹ CASE & VOLUCK, ALASKA NATIVES, at 598.

¹¹⁰ Dept. of the Interior, *List of Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462, 5466-67 (Jan. 30, 2020); see also 58 Fed. Reg. 54364 (Oct. 21, 1993) (explaining the initial inclusion of these entities on the list as “expressly and unequivocally acknowledging that the Department [of the Interior on behalf of the United States] has determined that the villages and regional tribes [on the list] are distinctly Native communities and have the same status as tribes in the contiguous 48 states.”)

¹¹¹ See, e.g., CASE & VOLUCK, ALASKA NATIVES, at 382-90 (describing the federal trust relationship and services to individual Alaska Natives); 454-69 (explaining the legal issues surrounding ANILCA’s protection for Native subsistence practices and its “compromises”).

although efforts have been made to allow for trust land acquisitions in Alaska.¹¹² Therefore, the federal government's obligations to these Tribes run exclusively along that sovereign-to-sovereign basis and represent a trust obligation to fulfill and protect purely sovereign interests, largely without regard to federal trust obligations to property. As such, like the tribal exercise of rights guaranteed through the government-to-government bonds established by treaties, the United States has sacred obligations to honor and abide by the sovereignty of Alaska Native Tribes.

These foundational principles of federal Indian law and their historical context help situate the claims and interests of tribes in pursuing broader co-management authorities and responsibilities on federal public lands. Rather than isolating tribal sovereignty, cultural values, and legal standing from questions of public land management, this history and the development of both the United States' treaty relationships and trust responsibilities to Indian tribes demonstrate the centrality of tribes to those questions. In addition to this important legal context, the millennia of connection between indigenous Americans and the landscape now largely managed by federal land agencies provide an additional base of ecological expertise that could be incorporated into and improve management decisions. Unfortunately, however, public land law has ignored and often severed the legal, historical, and cultural connections between the management of public lands and the original inhabitants of those areas.

¹¹² See, e.g., *Akiachak Native Community. V. United States Department of the Interior*, 827 F.3d 100 (DC Cir. 2016) (dismissing appeal regarding lawfulness of Interior's decision to take land into trust in Alaska); *Land Acquisitions in the State of Alaska*, Bureau of Indian Affairs, 79 Fed. Reg. 76,888 (Dec. 23, 2014) (publishing final rule authorizing land trust land acquisitions in Alaska; *but see* Department of Interior Solicitor Memorandum M-37053 (June 29, 2018) (withdrawing prior opinion recognizing authority to take land into trust in Alaska) *available at* <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

II. Traditional Approaches to Tribal Engagement by Federal Public Land Management Agencies

This section reviews various traditional approaches to tribal engagement in the management and oversight of federal public lands, including tribal consultation, cooperation in the evaluation of certain federal actions pursuant to the National Environmental Policy Act (NEPA), the role of the National Historic Preservation Act (NHPA), and authority for Indian tribes to contract or compact with the federal government to assume certain management responsibilities. While none of these approaches in isolation amount to tribal co-management, they provide important context for understanding the complexity of that approach and the challenges that implementing it will present. Subsections include examples and recommendations in how these traditional approaches can possibly be used as a bridge to more substantive co-management models in the future.

A. The Framework of Federal Public Lands Management

The historical exclusion of indigenous people and Native nations from lands that they traditionally occupied enabled the acquisition, disposition, and management of those areas by the federal government. The supremacy of federal authority in this regard, rooted in the constitution, was bolstered by the Supreme Court’s determination that the United States retained the exclusive right to extinguish aboriginal title across the lands purchased or seized from other non-tribal sovereigns.¹¹³ Consistent with the expansionism of the era, the federal government’s first phase of public lands policy promoted development and economic return through the sale of significant acreage to railroads, settlers, and other interests.¹¹⁴ Soon, however, a second era of public lands policy dawned and, contrary to the exploitative approach of the prior approach, this one focused on conservation and federal retention and management of those lands.¹¹⁵ As described by Professor Jedidiah Britton-Purdy, the laws supporting the conservation approach both “promoted utilitarian management of resources that were thought to be vulnerable to wasteful private extraction” and protected “certain unique and irreplaceable locations” from any economic development activities.¹¹⁶ The statutory bases for management of all federal public lands generally align with one of these two categories and either provide that federal agencies balance the demands of multiple uses across those lands or ensure the protection of particular values recognized in particular areas.

The federal agencies charged with managing public lands include the United States Forest Service (USFS), which is housed in the Department of Agriculture, and a number of agencies residing within the Department of the Interior, including the National Park Service (NPS), Bureau of Land Management (BLM), and U.S. Fish and Wildlife Service (USFWS). Generally,

¹¹³ *Johnson v. M’Intosh*, 21 U.S. 543, 592 (1823); see John D. Leshy, *Are Federal Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 517 (2019).

¹¹⁴ See, e.g., Jedidiah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public Lands Law and Trump’s National Monument Proclamations*, 45 ECOLOGY L. Q. 921, 940 (2019).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 941; see also Sarah Krakoff, *Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 568-69 (2020) (“For the Native peoples of the greater Grand Canyon region, the reservation and allotment periods coincided with two phases of public land law [disposition and conservation], both of which depended on eliminating indigenous rights to land.”)

the USFS and the BLM are tasked with managing the bulk of their lands under multiple use mandates essentially requiring “landscape-scale zoning, with very substantial agency discretion.”¹¹⁷

These laws—the Federal Land Policy and Management Act (FLPMA),¹¹⁸ which provides guidance to the BLM, and the Multiple Use Sustained Yield Act (MUSYA) and National Forest Management Act (NFMA) for the USFS¹¹⁹—emphasize the role of agency discretion and provide a general statutory framework with the practical details to be filled in by agency regulations, land use plans, manuals, and handbooks.¹²⁰ Though FLPMA at least recognizes values that might be used by tribes to protect their rights and interests on public lands, those values are characterized as “historical” and “archeological values” with little or no regard for modern tribal cultural or sovereign interests.¹²¹ No such recognition of these values or “cultural resources” whatsoever are included in the USFS’s multiple use mandate or NFMA.¹²²

The specially-designated areas managed by the NPS or the USFWS have much more focused interests and purposes that those agencies are mandated to protect.¹²³ The designation of these areas, either by Congress or—as authorized by laws like the Antiquities Act¹²⁴— the President, can include specific guidance to those agencies about the manner in which the area will be managed, which could account for tribes and tribal interests.¹²⁵ Generally, however, these designations focus on protecting the natural or scientific values inherent in the area,¹²⁶ and rely on the management agencies to develop more specific management plans to fulfill those objectives.¹²⁷

As we discuss in Part V, there are an array of additional conservation and protected land use designations used by Congress. Most notable is the Wilderness Act of 1964 which is the most restrictive and ends-oriented statute governing public lands management.¹²⁸ But this law, like

¹¹⁷ Britton-Purdy, *Whose Lands?*, at 942; *see also* 43 U.S.C. § 1702(c) (2018) (setting forth interests of public lands managed by the BLM); 16 U.S.C. § 528 (2018) (same for national forest management).

¹¹⁸ Pub. L. 94-579, 90 Stat. 2743 (Oct. 21, 1976), codified at 43 U.S.C. §§ 1701, et seq. (2018) [FLPMA].

¹¹⁹ Pub. L. 94-588, 90 Stat. 2949 (Oct. 22, 1976), codified at 16 U.S.C. §§ 1600, et seq. (2018) [NFMA].

¹²⁰ *See, e.g.*, Pub. L. 94-579, Title II (Land Use Planning; Land Acquisition and Disposition) and III (Administration) of FLPMA; 16 U.S.C. §§ 1604; 1604(g) (2018) (NFMA planning provisions); 43 C.F.R. §§ 1601, et seq.; 36 C.F.R. Part 219.

¹²¹ 43 U.S.C. §1701(a)(8)

¹²² *Contrast* FLPMA at 43 U.S.C. §1701(a)(8) and 1702(c) to MUSYA at 16 U.S.C. §528.

¹²³ *See, e.g.*, 16 U.S.C. § 668dd(a)(2) (2018) (National Wildlife Refuge System Improvement Act mandating USFWS to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”); Act of May 11, 1910, Pub. L. No. 171, 36 Stat. 354 (establishing Glacier National Park).

¹²⁴ 54 U.S.C. § 320301 (2018).

¹²⁵ *See, e.g.*, Proclamation No. 7394, 115 Stat. 2569, 2571 (Jan. 17, 2001) (establishing Kasha-Katuwe National Monument); Proclamation 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016) (establishing Bears Ears National Monument).

¹²⁶ *See, e.g.*, 16 U.S.C. §§ 221, et seq. (2018) (establishing Grand Canyon National Park “for the benefit and enjoyment of the people” and providing various enhancements and enlargements to the Park originally established in 1919).

¹²⁷ *See, e.g.*, USFS, Chimney Rock National Monument Final Management Plan, 1 (Aug. 2015) *available at* <http://www.fs.usda.gov/project/?project=42952>.

¹²⁸ Pub. L. 88-577, 78 Stat. 890 (Sept. 3, 1964), codified at 16 U.S.C. §§ 1131, et seq. (2018).

others before it, marginalized indigenous peoples, with early versions of the bill treating tribal reservation lands as public lands.¹²⁹ Though the Wilderness Act is silent on tribal rights and interests, more recent wilderness legislation at least makes reference to treaty rights and sacred lands.¹³⁰ The point here is not to diminish the value of this law, as some tribes use it to protect treaty rights and cultural resources. Rather it is to show how tribes are relegated in federal public lands law, cast as either outsiders or historical artifacts, and must resort to procedural methods of engagement that are often no match for the substantive mandates provided in these laws.

Thus, while the statutory bases for public land management vary depending upon the interests that the federal government seeks to serve or protect through that management, the agencies responsible for carrying out those mandates are all tasked with balancing federal priorities arising after and premised on the erasure of a continuing indigenous presence on those lands.¹³¹ In fact, but for a requirement to consider existing tribal land use plans on the same basis as other state and local land use plans in the course of developing public land use plans,¹³² FLPMA was silent as to tribal interests in the public lands themselves.¹³³ NFMA and the Wilderness Act do not mention Indian tribes or their interests in and historical connections to public lands at all.¹³⁴ Rarely have these interests been included, much less considered, in the designation of national parks or monuments either.¹³⁵ In fact, the silence of national park designations as to tribal rights have instead been interpreted as limitations on those interests, even where prior treaties or legislation expressly recognized their continuation.¹³⁶

¹²⁹ See Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 624-627 (2008).

¹³⁰ *Id.*

¹³¹ See, e.g., Krakoff, *Not Yet America's Best Idea*, at 562 n. 7 (noting that the history and “dark side” of public land law demands recognition of the exclusion of tribal presence and interests in what would become public lands).

¹³² 43 U.S.C. §§ 1712(b) (2018) (“In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.”); 1712(c) (2018) (requiring coordination in planning efforts with non-federal agencies, including Indian tribes and consideration of “the policies of approved State and tribal land resource management programs” and requiring the Secretary of Interior “to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands.”) (Emphasis added).

¹³³ See Pub. L. 94-579, 90 Stat. 2743 (1976).

¹³⁴ See Pub. L. 94-588, 90 Stat. 2949 (Oct. 22, 1976); Pub. L. 88-577, 78 Stat. 890 (Sept. 3, 1964).

¹³⁵ See HILLARY HOFFMANN & MONTE MILLS, *A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION*, 73-81 (2020) (reviewing designations pursuant to the Antiquities Act).

¹³⁶ See, e.g., *Ward v. Race Horse*, 163 U.S. 504, 510 (1896) (“And this view of the temporary and precarious nature of the [treaty] right reserved in the hunting districts is manifest by the act of congress creating the Yellowstone Park reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of congress on the subject.”), *repudiated by* *Herrera v. Wyoming*, 587 U.S. ___, 139 S.Ct. 1686 (2019); *U.S. v. Peterson*, 121 F.Supp.2d 1309, 1320 (D. Mont. 2000) (interpreting Congressional designation of Glacier National Park as “intended to create a game preserve in Glacier Park where the Secretary of the Interior was not authorized to allow any hunting,” even that authorized by prior agreements between the United States and the Blackfeet Tribe.)

The lack of any explicit statutory, public land law basis promoting federal agency engagement with Native nations has contributed to the continuing exclusion of tribes from public lands; albeit a formal, legal exclusion from exercising meaningful and independent authority to access, protect, or manage those lands rather than their historic actual, physical exclusion. Rooted as they are in the removal of the original inhabitants of what would become federal public lands, these traditional approaches to public lands management continue to marginalize or minimize tribal interests in those lands. While the assertion of tribal treaty rights and the modern tribal sovereignty movement have begun to reshape those approaches,¹³⁷ they remain mostly centered on federal policies borne of an era in which Native nations were erased or overlooked.¹³⁸

The bottom line is that tribal engagement with the management of federal public lands must proceed through avenues outside of traditional public land law, many of which are necessarily reactive to the prioritization of other federal interests already imbedded in these laws. The remainder of this section details those approaches.

B. Tribal Consultation: Meaningfully Implementing the Trust Responsibility...Maybe

Like definitions and applications of tribal co-management, “tribal consultation” is an “unwieldy term ... often subject to inconsistent interpretations and applications, and of course, politics.”¹³⁹ Despite the long-standing recognition of the fiduciary nature of federal government’s trust responsibilities to Native nations and the need to meaningfully engage those duties,¹⁴⁰ a series of presidential actions mandating and seeking to implement more effective consultation procedures for federal agencies,¹⁴¹ the adoption and endorsement by the United States of an influential United Nations declaration discussing consultation principles,¹⁴² and the development of numerous executive agency policies seeking to effectively define and operationalize

¹³⁷ See, e.g., Legal Roots portion of Co-management section, *infra*; on the modern sovereignty movement, see generally CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005).

¹³⁸ See, e.g., Krakoff, *Not Yet America’s Best Idea*, at 567-70 (describing the “myth of the ‘blank space’ on the map” that supported the creation of Grand Canyon National Park).

¹³⁹ See Co-management section *infra*.

¹⁴⁰ See, e.g., First Principles of Federal Indian Law section *supra*; *Seminole Nation v. United States*, 316 U.S. 286, 295-98 (1942) (recognizing the fiduciary nature of the trust responsibility).

¹⁴¹ Exec. Order 12875, Enhancing the Intergovernmental Partnership, 58 Fed. Reg. 58,093 (Oct. 26, 1993); Exec. Order 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000); President George W. Bush, Memorandum on Government-to-Government relationship with Tribal Governments, 2 Pub. Papers 2177 (Sept. 23, 2004) [hereinafter Bush Memorandum]; President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) [hereinafter Obama Memorandum].

¹⁴² Art. 19, United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 295, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/295 (2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”) [Hereinafter UNDRIP]. After initially voting against the UNDRIP, the United States announced its support on January 12, 2011. See U.S. State Dept., *Announcement of U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples* (Jan 12, 2011), available at <https://2009-2017.state.gov/s/srgia/154553.htm>.

consultation,¹⁴³ there remain as many variations and understandings of tribal consultation as there are meetings convened to engage in that relationship.¹⁴⁴ Therefore, while tribal consultation plays a central role in the engagement of Native nations and their interests in the management of public lands, the numerous and often inconsistent ways in such consultation is proposed, used, engaged in, and relied upon regularly result in confusion, disappointment, and contempt for its effectiveness on the part of both tribal and federal participants.

1. Background: A Product of the Self-Determination Era

Although the federal government’s historical interactions with Native nations, like treaty-making, could be considered early forms of tribal consultation, the term itself gained formal status only in the most recent era of federal Indian policy. This era, though originating in the Kennedy and Johnson administrations,¹⁴⁵ was formally ushered in by President Nixon’s 1970 special message to Congress, in which he called on the federal government to promote tribal self-determination and sovereignty without the threat of termination.¹⁴⁶ The Secretary of the Interior at the time, Walter J. Hickel, emphasized the need for the federal government to seek tribal input, saying “[i]t is a time we listen to what the Indians have been telling us.”¹⁴⁷

The first statutory consultation requirements appeared in the landmark Indian Self-Determination and Education Assistance Act, which Congress passed in 1975.¹⁴⁸ That law, the Self-Determination Act, sought to invigorate Nixon’s policy goals by encouraging federal agencies to contract with Indian tribes—through so-called 638 contracts—to assume responsibility for carrying out federal programs, services, functions, and activities on their own.¹⁴⁹ The Self-Determination Act included a requirement that, “to the extent practicable,” the responsible federal agency consult with tribal organizations on the development of regulations to implement the law.¹⁵⁰ This requirement, combined with further legislative actions related to education, focused the early statutory consultation obligations of the federal government on services provided to tribes but, eventually, the federal government’s duty to consult expanded to include decisions related to certain actions that might affect tribal lands, natural or cultural resources.¹⁵¹

¹⁴³ See, e.g. Govt. Accountability Office, *Tribal Consultation: Additional Federal Actions Needed for Federal Infrastructure Projects*, GAO Report 19-22, 82-86 (March 2019), available at <https://www.gao.gov/products/GAO-19-22> (cataloguing various federal consultation policies as of July 2018) [hereinafter GAO Report 19-22].

¹⁴⁴ See, e.g., *id.* at 87-92 (documenting the wide variety of definitions and coverage of tribal consultation across a multitude of federal agency policies).

¹⁴⁵ See COHEN’S HANDBOOK, § 1.07.

¹⁴⁶ President Richard M. Nixon, Special Message on Indian Affairs, Pub. Papers of the President (July 8, 1970).

¹⁴⁷ Statement by Secretary of the Interior Walter J. Hickel on President Nixon’s Special Message to Congress on Indians, U.S. DEPT. OF THE INTERIOR, July 8, 1970, <https://www.indianaffairs.gov/as-ia/opa/online-press-release/statement-secretary-interior-walter-j-hickel-president-nixons-special>.

¹⁴⁸ Pub. L. 93-638, 88 Stat. 2203 (1975), codified at 25 U.S.C. §§ 450 et seq. (2018). For a detailed review of the history of tribal consultation, see Colette Routel & Jeffery Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417 (2013).

¹⁴⁹ See, e.g., *id.* Sec. 102, 88 Stat. at 2206; 25 U.S.C. § 450f (2018). See Contracting Section *infra* for a detailed review of the role of 638 contracts in tribal engagement with public land management.

¹⁵⁰ *Id.* Sec. 107(b), 88 Stat. at 2212.

¹⁵¹ See Routel & Holth, *Toward Genuine Tribal Consultation*, at 439-41 (describing the consultation requirements of the Archaeological Resources Protection Act (ARPA) in 1979, Pub. L. 96-95, 93 Stat. 721 (1979), the Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. 101-601, 104 Stat. 3048 (1990), and the 1992 amendments to the National Historic Preservation Act (NHPA), Pub. L. 102-575, 106 Stat. 4600 (1992)).

Of these laws, and discussed in more detail below, the 1992 amendments to the National Historic Preservation Act (NHPA) provided the most relevant and potentially powerful consultation requirements, which, through NHPA's Section 106 process, require federal consultation with tribes to identify the potential effects of any federal undertaking on culturally significant properties and mitigation of those effects where feasible.¹⁵² The Section 106 consultation process remains the most broadly applicable consultation requirement across all federal land management agencies and, outside of other laws more narrowly focused on particular archaeological artifacts or Native American human remains and associated objects, is the only statutorily-mandated consultation process specific to Indian tribes.¹⁵³

Notwithstanding the narrow statutory footing for tribal consultation, its reach has been expanded through a series of executive actions and corresponding agency policies, the push for which was initiated by President William Clinton.¹⁵⁴ Following on a 1994 presidential memorandum requiring agencies to consult with tribal governments before taking actions that would affect them,¹⁵⁵ President Clinton issued the most sweeping endorsement of tribal consultation in two Executive Orders, issued in 1998 and 2000, each of which sought to implement the requirements announced in the earlier memorandum.¹⁵⁶ To do so, Executive Order 13175 set forth certain fundamental principles to guide the formulation of policies with tribal implications,¹⁵⁷ including the federal governments trust responsibilities, the importance of tribal sovereignty, the ongoing federal policy of promoting tribal self-determination.¹⁵⁸ Beyond applying those principles, agencies were also instructed to support tribal administration of federal laws by granting "tribal governments the maximum administrative discretion possible" and, when developing policies with tribal implications, agencies were encouraged to support the development of tribal policies

¹⁵² 54 U.S.C. §306108 (2018); see NHPA Section *infra*.

¹⁵³ As described in more detail *infra*, the National Environmental Policy Act (NEPA), Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970), codified at 42 U.S.C. §§ 4321-4347 (2018), requires public participation in the assessment and analysis of certain potential federal actions but does not mention tribes at all, much less the federal government's unique relationship with them. The regulations implementing NEPA require that federal agencies consult early in the NEPA process "with appropriate state and local agencies and Indian tribes and with interested private persons and organizations," 40 C.F.R. § 1501.2(d)(2) (2019), and that tribes be involved, along with other interested parties, in the NEPA scoping process, 40 C.F.R. § 1507(a)(1) (2019), but those requirements also do not take into account the unique status of the federal-tribal relationship and, instead, put tribes on par with any other group interested in the proposed federal action. As noted in a 2017 report issued by three Federal departments, "[t]his coordination should not be confused with a Federal agency's responsibility to engage in government-to-government consultation with Tribes." U.S. Dept. of the Interior, U.S. Dept. Of the Army, U.S. Dept. of Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (Jan. 2017), available at <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf> [hereinafter *Infrastructure Report*].

¹⁵⁴ See Routel & Holth, *Toward Genuine Tribal Consultation*, at 442.

¹⁵⁵ *Id.*; Government-to-Government Relations with Native American Tribal Government: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

¹⁵⁶ Exec. Order 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The latter Order (13175) expressly revoked the prior (13084) upon its issuance. Sec. 9(c), Exec. Order 13175, 65 Fed. Reg. at 67,251.

¹⁵⁷ Policies with tribal implications include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Sec. 1(a), Exec. Order 13175, 65 Fed. Reg. at 67,249.

¹⁵⁸ *Id.* at Sec. 2.

in those arenas, defer to those tribal standards, and refrain from establishing federal standards until after consulting with tribes about how and where such standards may interfere with tribal priorities.¹⁵⁹ The Order went on to require broader agency consultation on any regulatory initiatives by prohibiting the promulgation of any such rules that might have tribal implications, impose compliance costs on tribes, or preempt tribal law unless the agency had engaged in tribal consultation “early in the process of developing the proposed regulation” and provided additional information about those efforts when publishing the rule.¹⁶⁰ Executive Order 13175 prompted agencies to develop their own policies and procedures to implement its guidance,¹⁶¹ but, by its own terms, the Order did not create any enforceable legal rights.¹⁶²

Following President Clinton’s lead, Presidents George W. Bush and Barack Obama each issued their own memoranda further encouraging and reinforcing the federal government’s obligation to strengthen its relationship with Indian tribes.¹⁶³ In fact, President Obama’s 2009 Memorandum relied on the directives of President Clinton’s earlier Order and sought to further integrate them into the Executive Branch by requiring each agency to develop a plan for implementing those directives and annual progress reports on those plans thereafter.¹⁶⁴ Like its predecessors, the Obama Memorandum expressly disclaimed any legal enforceability¹⁶⁵ and, as shown by subsequent reviews of agency consultation policies, has had mixed results in prompting the development and implementation of new approaches to consultation.¹⁶⁶

Notwithstanding that criticism, the Presidential prompts of the last few decades have resulted in renewed or entirely new focus by public land management agencies on tribal consultation. The United States Department of Agriculture, which houses the USFS, for example, updated its policies on consultation in 2013 through the adoption of a Departmental Regulation,¹⁶⁷ which the USFS supplemented with its own policy in 2016.¹⁶⁸ Similarly, Secretary of the Interior Ken Salazar issued a Secretarial Order setting forth a new consultation policy for the Department of the Interior in 2011 and the Department integrated new policies and procedures on consultation into the Departmental Manual in 2015.¹⁶⁹ Both the BLM and USFWS then updated their

¹⁵⁹ *Id.* at Sec. 3, 65 Fed. Reg. at 67,249-50.

¹⁶⁰ *Id.* at Sec. 5, 65 Fed. Reg. at 67,250-51.

¹⁶¹ Routel & Holth, *Toward Genuine Tribal Consultation*, at 443-44.

¹⁶² Sec. 10, Exec. Order 13175, 65 Fed. Reg. at 67,252.

¹⁶³ See Bush Memorandum and Obama Memorandum.

¹⁶⁴ Obama Memorandum, 74 Fed. Reg. at 57,881.

¹⁶⁵ *Id.* at 57,882.

¹⁶⁶ See, e.g., National Congress of American Indians, *Consultation with Tribal Nations: An Update on Implementation of Executive Order 13175* (Jan. 2012), available at <http://www.ncai.org/resources/consultations/consultation-report-2012-update> (reviewing the status of consultation plans and policies); GAO Report 19-22, *supra* note 31 at 82-86 (reviewing same as of July 2018); see also Routel & Holth, *Toward Genuine Tribal Consultation*, at 447-48 (noting issues with implementing and enforcing the Obama Memorandum and concluding that “while well intentioned, the Obama Memorandum fell short of creating any real change to the federal-tribal relationship”).

¹⁶⁷ U.S. Dept. of Agriculture, *Regulation 1350-002: Tribal Consultation, Coordination, and Collaboration* (Jan. 18, 2013), available at https://www.fs.fed.us/spf/tribalrelations/documents/policy/consultation/Final_DR.pdf.

¹⁶⁸ Dept. of Agriculture, Forest Service, Final Directives on American Indian and Alaska Native Relations Forest Service Manual 1500, Chapter 1560, and Forest Service Handbook 1509.13, Chapter 10, 81 Fed. Reg. 12,447 (Mar. 9, 2016).

¹⁶⁹ Secretary of the Interior, Order No. 3317, *Department of the Interior Policy on Consultation with Indian Tribes* (Dec. 1, 2011), available at <https://www.doi.gov/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf>; Dept. of the

consultation policies in 2016.¹⁷⁰ Only the National Park Service, whose policies date to 2006, has not updated its consultation guidance since the Obama Memorandum.¹⁷¹

Although each of these agencies have followed Presidential directives to develop and refine their approaches to tribal consultation, those approaches, their standards and procedures—even the definition of consultation itself—vary from agency to agency.¹⁷² These varying commands are layered on top of the public land management responsibilities of each agency, which, particularly in light of the statutory basis for those missions and the more recent but less structured development of tribal consultation measures, can present practical limitations for tribal consultation as an effective means to engage with tribes in the management of federal public lands.

2. Consultation in Practice: Limitations and Promises of Potential

In September 2016, three federal executive departments, Interior, Army, and Justice, came together to convene tribal leaders in consultation on how the federal-tribal relationship could be improved with regard to the federal government’s permitting of infrastructure projects.¹⁷³ The effort came at an intense time in the battle over the Dakota Access Pipeline, to which Native nations from across the country had responded in opposition,¹⁷⁴ and, although the report that resulted from those consultations focused primarily on decisions related to infrastructure projects, the input that tribes provided during the report’s development highlighted the range of challenges posed by the current state of tribal consultation as a tool for engaging tribes in public land management.¹⁷⁵ Of particular relevance in this context were tribal concerns over the inconsistent approaches to the practice of consultation employed by various federal agencies;¹⁷⁶

Interior, Departmental Manual, 512 DM 4, *Department of the Interior Policy on Consultation with Indian Tribes and Alaska Native Corporations* (effective Nov. 9, 2015), available at https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_4_department_of_the_interior_policy_on_consultation_with_indian_tribes_and_alaska_native_corporations.docx; Dept. of the Interior, Departmental Manual, 512 DM 5, *Procedures for Consultation with Indian Tribes* (effective Nov. 9, 2015), available at https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_5_procedures_for_consultation_with_indian_tribes.docx.

¹⁷⁰ See Dept. of the Interior, Bureau of Land Management, Manual Transmittal Sheet: BLM Manual 1780 Tribal Relations (P) (Dec. 15, 2016), available at <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>; Dept. of the Interior, Bureau of Land Management, Manual Transmittal Sheet: BLM Handbook 1780-1 Improving and Sustaining BLM-Tribal Relations (P) (Dec. 15, 2016), available at https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf; U.S. Fish & Wildlife Service, *Native American Policy* (Jan. 20, 2016), available at <https://www.fws.gov/nativeamerican/pdf/native-american-policy.pdf>.

¹⁷¹ See, e.g., *The National Park Service and American Indians, Alaska Natives, and Native Hawaiians: Excerpts and Identified Sections from Management Policies 2006, The Guide to Managing the National Park System*, NATIONAL PARK SERVICE AMERICAN INDIAN LIAISON OFFICE (Oct. 2008), available at <https://www.nps.gov/history/tribes/Documents/NPSManagementPolicy.pdf>.

¹⁷² See, e.g. GAO Report 19-22, at 87-90 (providing various departmental and agency definitions of “consultation” and “meaningful consultation”).

¹⁷³ *Infrastructure Report*, at 26.

¹⁷⁴ See, e.g., Jack Healy, *North Dakota Pipeline Battle: Who’s Fighting and Why*, N.Y. TIMES (Aug. 26, 2016), available at <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html>.

¹⁷⁵ That input was collected through seven consultation sessions, a listening session, and the submission of written comments and included comments from 59 tribes and eight tribal organizations. *Infrastructure Report*, at 43.

¹⁷⁶ *Id.*

the concern that federal agencies only sought to consult when tribal lands might be affected, a practice that ignores tribal relationships with larger traditional territories;¹⁷⁷ the timing of consultation, which many tribes viewed as taking place only after the agency had made its decision;¹⁷⁸ and the manner in which tribal input provided during consultations was treated.¹⁷⁹ In addition, tribes provided specific input on the consultation required by the NHPA's Section 106 process and the ways in which their comments are solicited and considered in the review of federal actions under the National Environmental Policy Act (NEPA).¹⁸⁰ In summarizing all of these comments, the report highlighted the deeper issues undercutting the recent efforts of various executive branch officials to improve consultation:

Tribes further remarked that even the best-written agency Tribal consultation policies are often poorly implemented. Tribes noted that often agencies neither treat Tribes as sovereigns nor afford Tribes the respect they would any other governmental entity—let alone treat Tribes as those to whom the United States maintains a trust responsibility or as those who hold reserved rights through treaties that granted the United States vast amounts of territory. Tribes emphasized that the spirit with which consultation is conducted is essential, Tribes need to be consulted sooner, Federal staff need better training prior to working with Tribes, and that consultation should be more consistent across agencies.¹⁸¹

These concerns and the broadly shared tribal perspective on federal consultation efforts highlight the fundamental challenge faced by federal agencies seeking to engage Native nations through the existing legal framework for consultation related to public lands management. The management directives and structures of public land law establish agency priorities and, depending on those priorities, provide varying amounts of discretion to each agency to carry them out.¹⁸² But those laws ignored and continue to implicitly exclude a meaningful tribal voice in the setting of those priorities, their balancing and protection. Therefore, while the self-determination era of the recent generations and its corresponding focus on improving tribal involvement in federal decision-making have certainly opened new avenues for those efforts, they remain cabined within the overriding scheme of public land law and the longer standing and more rigid institutional measures designed to fulfill that scheme. Notwithstanding the NHPA's consultation command, which presents its own challenges,¹⁸³ there remains no competing statutory directive that secures the appropriate "spirit with which consultation is conducted,"¹⁸⁴ demands accountability for agency leadership in carrying out that directive, ensures the appropriate historical context for federal management decision affecting traditional tribal

¹⁷⁷ *Id.* at 44-45.

¹⁷⁸ *Id.* at 45-46.

¹⁷⁹ *Id.* at 47 (describing tribal concerns that "Federal agencies often treat consultation as a procedural 'check-the-box' exercise, in which Federal agencies come to the consultation with their minds already made up and ignore tribal input.")

¹⁸⁰ *Id.* at 52-61.

¹⁸¹ *Id.* at 3.

¹⁸² Britton-Purdy, *Whose Lands?*, at 943.

¹⁸³ See NHPA section, *infra*.

¹⁸⁴ *Infrastructure Report*, at 3.

territories,¹⁸⁵ and appropriately elevates tribal sovereign decisions within the balance of competing federal and public interests.¹⁸⁶ Those underlying conflicts often leave tribal consultation in a reactive posture, with tribal officials responding to federal projects or plans that have already been initiated and for which tribal input will be considered along with and on the same basis as that of other interested parties.¹⁸⁷

Beyond the tribal input on infrastructure projects reported in 2017, recent case studies further illustrate these shortcomings and conflicts. In January 2018, officials from the State of Alaska petitioned the Secretary of Agriculture to develop a new rule that would change the roadless status of the Tongass National Forest in the southeast part of the state.¹⁸⁸ Following on a long and litigious history,¹⁸⁹ the State sought to have the USFS repeal the roadless rule's application to the Tongass in "the interests of the socioeconomic wellbeing of [Alaska's] residents."¹⁹⁰ The USFS soon initiated a rulemaking to officially move that petition forward and, consistent with the agencies responsibilities under NEPA prepare an environmental impact statement.¹⁹¹ The agency named the State of Alaska as a cooperating agency and indicated that it had also invited interested tribes to participate on the same basis.¹⁹² Although those invitations were dated two months after the USFS was directed to start a rulemaking and only a month before the agency announced the initiation of its rulemaking,¹⁹³ a number of Tribes accepted the invitation to participate as cooperating agencies and partook in meetings leading up to the issuance of a draft environmental impact statement (DEIS).¹⁹⁴ Following the issuance of the DEIS, however, the cooperating agency Tribes sent a letter expressing extensive concerns about the USFS actions proposed in the DEIS and their treatment as cooperating agencies.¹⁹⁵

¹⁸⁵ See, e.g., Krakoff, *Not Yet America's Best Idea*, at 647 ("If we continue to think about protecting the places we love without simultaneously redressing the inequities sewn into how we have protected those places in the past, we will see increasingly extreme versions of environmental inequality amidst overall environmental devastation.")

¹⁸⁶ See, e.g., *Infrastructure Report*, at 12 ("Tribes repeatedly cited to the [UNDRIP] as authority for requiring Tribes' free, prior, and informed consent ..."); UNDRIP.

¹⁸⁷ See, e.g., *Infrastructure Report*, at 13 ("Tribes frequently commented that Federal agency leaders and staff often treat Tribes merely as stakeholders. Tribes repeatedly emphasized that they should be regarded as sovereign governmental entities who are trust beneficiaries and holders of treaty rights.")

¹⁸⁸ Letter from Andrew T. Mack to Secretary Sonny Perdue, Jan. 19, 2018, available at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5214387.pdf.

¹⁸⁹ See, e.g., *Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956 (9th Cir. 2015) (rejecting an exemption of the Tongass National Forest from the 2001 roadless rule).

¹⁹⁰ State of Alaska Petition for USDA Rulemaking, 7 (Jan 18, 2018), available as an attachment to Letter from Andrew T. Mack, at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5214387.pdf.

¹⁹¹ USDA, Forest Service, Notice of Intent to Prepare an EIS: Roadless Area Conservation; National Forest System Lands in Alaska, 83 Fed. Reg. 44,252 (Aug. 30, 2018); 40 U.S.C. § 4332 (2018).

¹⁹² Notice of Intent, 83 Fed. Reg. at 44,253; see also 40 C.F.R. § 1501.6 (authorizing cooperating agencies).

¹⁹³ See letters, http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136541.pdf.

¹⁹⁴ See, e.g., Memorandum of Understanding between Hoonah Indian Association and United States Department of Agriculture, Forest Service, available at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136119.pdf; Draft Environmental Impact Statement: Rulemaking for Alaska's Roadless Areas, 5-3 (Oct. 2019), available at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5207661.pdf (listing the six Tribes serving as cooperating agencies).

¹⁹⁵ Letter from tribal leaders to Secretary Perdue (Oct. 22, 2019), available at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136565.pdf; USDA; Forest Service, Notice of Proposed Rulemaking; Request for Comment, 84 Fed. Reg. 55,522 (Oct. 17, 2019).

Despite that status, the Tribes uniformly felt their input and expertise were being ignored in favor of other, competing interests and that, because they favored maintaining the roadless protections that the State of Alaska sought to repeal, their position made them a “‘nuisance factor’ to be ignored” in the consultation process.¹⁹⁶ Beyond their substantive disagreements, the participating Tribes also expressed concern about a compressed timeframe and inability to provide meaningful input despite their elevated status as cooperating agencies.¹⁹⁷

Thereafter, the USFS provided a draft of the final environmental impact statement for review and comment by tribal entities, but did so in the midst of the COVID19 pandemic, providing only two weeks for that process.¹⁹⁸ In addition, despite the additional burdens on their governments created by the national emergency, the USFS asked the Tribes to participate in virtual consultations so that the agency’s rulemaking could continue to move forward.¹⁹⁹

The rulemaking process for the Tongass National Forest has proceeded according to NEPA and, although the Tribes involved secured participation in that process as cooperating agencies, a status that confirmed certain protections for their input and role,²⁰⁰ the Tribes still believed their interests—and their knowledge of and values in the Tongass landscape in which they’d existed for generations—were being ignored in favor of other, competing interests.

Critically, given the amount of agency discretion enjoyed by the Forest Service, the procedural nature of NEPA’s requirements and the USFS’ consultation policies, as well as the nature of the consultation and the record of tribal involvement (albeit in frustrated opposition to the process), the Tribes are left with few legal avenues to force a different course of government-to-government relations in this matter. As described above, none of the Presidential actions focused on consultation provide any legal standing or claim for an aggrieved tribe to pursue,²⁰¹ leaving the claim-creating provisions of the Administrative Procedures Act (APA) as the only options for such a tribe.²⁰² Under the APA, a tribe would have to demonstrate that the agency’s consultation actions were unlawfully withheld,²⁰³ “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”²⁰⁴ or fail to comply with required legal procedures.²⁰⁵ In rare instances,²⁰⁶ tribes have successfully shown that agency failures in consultation meet these

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 1-2.

¹⁹⁸ See, Ben Hohenstatt, *Tribes ask feds to stop work on roadless rule plan*, JUNEAU EMPIRE (Apr. 30, 2020), available at <https://www.juneauempire.com/news/tribes-ask-feds-to-stop-work-on-roadless-rule-plan/>.

¹⁹⁹ *Id.*

²⁰⁰ See 40 C.F.R. § 1501.6.

²⁰¹ See *infra*.

²⁰² See 5 U.S.C. § 706 (2018).

²⁰³ *Id.* at §706 (1)

²⁰⁴ *Id.* at § 706(2)(A)

²⁰⁵ *Id.* at § 706(2)(D).

²⁰⁶ See, e.g., *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104 (S.D.Cal.2010); *Wyoming v. Dep’t. of the Interior*, 136 F. Supp. 3d 1317 (D.Wyo. 2015), *vacated and remanded by Wyoming v. Sierra Club*, 2016 WL 3853806 (10th Cir. 2016); but see Vanessa L. Ray-Hodge & Sarah M. Stevenson *Examining The Legal Implications Of Government-To-Government Tribal Consultation And Off-Reservation Development*, 2017 No. 4 RMMLF Spec. Inst. 11, 6-7 (2017) (reviewing cases and suggesting that “Tribal consultation is also more than a process that must be followed, federal agencies must provide a real opportunity for tribal views to be heard and considered. Agencies must substantively address and respond to tribal views in their decision-making process, even where those views are not followed or are rejected.”)

requirements; however, provided an agency reasonably fulfills its duties to engage in the process of consultation (i.e., “checks-the-box”), there is little, if any, legal basis for a tribe to challenge the agency’s resulting substantive determination due to a lack of “meaningful” consultation.²⁰⁷

3. Consultation as a Bridge to Tribal Co-Management

Despite the challenges for consultation to serve as an effective method for incorporating tribal perspectives and values into federal decision-making, it remains a critical aspect of the federal-tribal relationship that is essential when considering the possibility of tribal co-management of federal public lands. To serve that role, however, consultation must evolve from the unenforceable, discretionary, and variable practice widely criticized by tribes²⁰⁸ into a meaningful, compatible, and continuing conversation between appropriate tribal and federal officials. There are a few existing examples of such approaches, primarily arising when federal agencies are mandated to develop and maintain effective relationships or where, through a long-standing course of practice, those relationships have developed into mutually beneficial partnerships.

The necessity of effective tribal consultation can be created through executive or legislative mandates requiring federal land management agencies to incorporate tribal input into substantive management decisions. President Clinton’s 2001 designation of the Kasha-Katuwe Tent Rocks National Monument, for example, commanded that the Monument be managed in “close cooperation” with the Pueblo.²⁰⁹ Although the Pueblo and the BLM had worked together prior to the monument’s establishment, the designation of the monument created new and additional demands on both of those parties, as well as the landscape.²¹⁰ Through the development of federal-tribal agreements and an evolving relationship, the parties have successfully complied with the proclamation’s directive and consultation has been at the heart of that process.²¹¹ The required and continuing role for the Pueblo of Cochiti in the BLM’s management of the monument necessitates a workable consultation framework to ensure that mandate can be met.²¹²

Sustained and long-term federal-tribal relationships also help bridge effective consultation practices into more meaningful and practical roles for tribal partners in management. As

²⁰⁷ See, e.g., *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1292-94 (D.N.M. 2008) (rejecting claims that the BLM failed to adequately consult under NHPA in the development of a resource management plan); Routel & Holth, *Toward Genuine Tribal Consultation*, at 464-66 (reviewing enforceability issues and concluding that “failure to enforce the substantive components of the trust responsibility means that even when tribal suggestions and requests are properly solicited, they can be disregarded without the potential for any recourse.”)

²⁰⁸ See, e.g., *Infrastructure Report*.

²⁰⁹ Proclamation No. 7394, 115 Stat. 2569, 2571 (Jan. 17, 2001).

²¹⁰ See Sandra Lee Pinel, Jacob Pecos, *Generating Go-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, 49 ENVTL. MGMT. 593, 596-97 (Mar. 2012).

²¹¹ *Id.* at 600 (relating the view of a BLM official, whose “staff were engaging in extensive consultation and respecting the Pueblo’s wishes wherever possible” but retained “their federal responsibility for management of the monument.”)

²¹² President Obama’s proclamation of the Bears Ears National Monument contemplated a similar mandate for the federal agencies responsible for managing those lands and would have required the development of an effective consultation protocol to ensure that those agencies would “carefully and fully consider” tribal input in their management decisions. Proclamation 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016).

described in more detail below,²¹³ the judicial recognition and protection of treaty-reserved rights to fish and hunt across traditional territories and, in particular, the allocation of fishery resources between tribes and other interests,²¹⁴ demanded that states, tribes, and federal agencies develop ways to collaboratively address and resolve those issues.²¹⁵ The decades of work to fulfill that mandate in both the Pacific Northwest and Great Lakes regions have resulted in the establishment of meaningful, effective relationships that rely on consultation.²¹⁶ In the implementation of those relationships, the tribes and their federal partners have agreed on the scope, process, and terms of consultation as a means to serve the broader management objectives defined by the nature of tribal treaty rights.²¹⁷ These agreements help avoid the more general failings of consultation as a bridge to effective co-management described above and may be instructive when considering ways to reform those general practices to make them more effective.

Another potential bridging of existing tribal consultation practices and requirements to broader co-management relationships is being proposed to the USFS by tribes across Southeast Alaska. As described above, those tribes have been frustrated by the lack of meaningful consultation with the USFS in the context of the State of Alaska's proposal to modify the Roadless Rule for the Tongass National Forest.²¹⁸ While the tribes retain the ability and may still seek to litigate their concerns over that rulemaking process, they have also sought to pursue a new path that could reset their relationship with the USFS and presents the opportunity for a new and improved foundation of federal-tribal relations and consultation.

Relying on the APA,²¹⁹ nine tribal governments across the region recently submitted a petition to the Secretary of Agriculture requesting that the Department commence a new rulemaking "to create a traditional homelands conservation rule for the long-term management and protection of traditional and customary use areas in the Tongass National Forest."²²⁰ Importantly, the tribes are calling upon the USFS to collaboratively develop the rulemaking process and to "engage in a

²¹³ See Co-management section *infra*.

²¹⁴ See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F. 2d 676 (9th Cir. 1975).

²¹⁵ See, e.g., *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Or. 1969); Monte Mills, *Beyond the Belloni Decision: Sohappy v. Smith and the Modern Era of Tribal Treaty Rights*, 50 ENVTL. L. REV. 387, 402-403 (2020) (discussing the collaborative mandate of Judge Belloni's decision in *Sohappy*).

²¹⁶ See, e.g., Mills, *Beyond the Belloni Decision*, at n. 41.

²¹⁷ See, e.g., *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842*, 10-11 (Amended March 2012), available at <https://www.glifwc.org/Regulations/mouamd2012withappendixes.pdf>.

²¹⁸ See Letter from tribal leaders to Secretary Perdue (Oct. 22, 2019), available at http://www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5136565.pdf; USDA.

²¹⁹ 5 U.S.C. § 553(3) (2018) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.")

²²⁰ See Elizabeth Jenkins, *With a Roadless Rule decision pending, tribal governments petition for new process*, ALASKA PUBLIC MEDIA (July 21, 2020), <https://www.alaskapublic.org/2020/07/21/with-a-roadless-rule-decision-pending-tribal-governments-petition-for-new-process/>; Organized Village of Kasaan, Organized Village of Kake, Klawock Cooperative Association, Hoonah Indian Association, Ketchikan Indian Community, Skagway Traditional Council, Organized Village Of Saxman, Yakutat Tlingit Tribe, Central Council Tlingit And Haida Indian Tribes of Alaska, *Petition For USDA Rulemaking to Create a Traditional Homelands Conservation Rule for the Long-Term Management and Protection of Traditional and Customary Use Areas in the Tongass National Forest*, available at <https://s3-us-west-2.amazonaws.com/ktoo/2020/07/FINAL-Southeast-Tribes-APA-Petition-7-17-2020-Nine-Tribe-Signatures.pdf> (last visited July 31, 2020) [hereinafter *SE AK Tribal Petition*]

new and more robust and legitimate government-to-government consultation process with the Tribes on the Tongass National Forest under the principle of ‘mutual concurrence’ to identify traditional and customary use areas and design forest-wide conservation measures to protect them.”²²¹ According to the tribes, that process must “ensure culturally competent and meaningful consultation with accessible meetings that take place in local communities on a regular schedule, and mutually-agreed upon measurable processes for engaging in” such consultation.²²² Through that process, then, the tribes propose developing and implementing “appropriate, forest-wide conservation measures and management direction that is based off the principles of subsistence priority, local control, and ‘all lands, all hands’ collaborative stewardship and management in order to protect the unique traditional and subsistence values of the Tongass, its people, and its fish and wildlife populations,” which would be carried out in a collaborative partnership between the USFS and the tribes.²²³ Although the outcome of the tribes’ petition remains to be seen, their demands offer a new avenue to consider how expanded and deeper consultation requirements could enhance tribal co-management across public lands beyond the Tongass National Forest.

4. Recommendations for Consultation Reform

Reforming the general standards for tribal consultation presents its own challenges, particularly in light of the diversity of federal agencies, their mandates, interests, and capacities and the range of issues, tribes, and tribal interests with which those agencies must consult. As described above, a “one-size-fits-all” approach rarely does so and even well-written and intentioned agency-specific consultation policies are a challenge to effectively implement. Nonetheless, like the principles of co-management discussed below, efforts to reform tribal consultation procedures and requirements could be measured and guided by the lessons offered from prior shortcomings and successes.

First, as recognized by each of the executive orders and actions and a number of existing agency policies that resulted from those directives, consultation must be firmly rooted in the legal principles and responsibilities of the government-to-government relationship and the federal government’s trust responsibilities. Importantly, however, as demonstrated by the instances of effective collaboration described above, those responsibilities must also be incorporated into the guiding mandates of federal land management agencies on the same basis as their other responsibilities. Unlike the general exclusion of tribes and tribal interests from the framework of public land law, for example, effective tribal engagement through consultation could be incorporated on an equal basis with the competing management objectives described by that framework.²²⁴

Consistent with that principle, effective consultation is also largely dependent upon the development and maintenance of a long-term relationship, rather than a project-specific discussion. Therefore, federal agencies interested in enhancing the effectiveness of their consultation practices could be encouraged—through specific directives and accountability

²²¹ *SE AK Tribal Petition*, at 1.

²²² *Id.* at 6.

²²³ *Id.* at 11.

²²⁴ One example of such a reform proposal suggests adopting procedural mandate and standard for tribal consultation that could be incorporated into federal decision-making on the same basis as environmental reviews required by NEPA. Routel & Holth, *Toward Genuine Tribal Consultation*, at 466-474.

measures, including evaluation metrics that track success—to regularly engage in consultation about matters of general tribal concern without regard to a pending or proposed federal action. While such practices demand additional time and resources, both of which are in short supply for both federal and tribal officials,²²⁵ the investment of effort in relationship-building would likely avoid additional expenditures resulting from conflict over failed consultations on specific projects.²²⁶

Finally, the consultation process must provide some guarantee of accountability. As noted above, even where tribes may be afforded cooperating agency status under NEPA, the broad discretion allowed to federal agencies can excuse a disjointed or disagreeable consultation process and result in the marginalization or exclusion of tribal input. While the spirit of recent executive actions and the agency policies they spawned is important, so too is the lack of any legal basis on which that spirit and the process of consultation it envisions, can be enforced. In addition to building accountability through personnel measures like evaluations, there are additional procedural avenues for enhancing accountability around consultation. The “mutual concurrence” model suggested by Tribes in Alaska’s Tongass National Forest would help ensure that the process of tribal engagement adequately accounts for tribal perspectives while also guaranteeing some substantive control for tribes. Short of that model, the decision-making process set forth for the management of the original Bears Ears National Monument required that federal land managers provide a written explanation to interested Tribes where their management decisions did not align with tribal comments or input gathered through consultation.²²⁷ While leaving ultimate decision-making in the hands of federal agencies, this model would require additional accountability for those decisions and provide a stronger basis on which consultation and cooperative relationships could be maintained and strengthened.

Reform to accommodate these principles could be accomplished through further executive actions or legislative efforts. The work done by various federal agencies in the context of infrastructure projects provides some important first steps for executive agencies to consider;²²⁸ however, regulatory reform efforts could also be undertaken to deepen and strengthen the support for effective tribal consultation. The regulations developed by the Advisory Council on Historic Properties in the context of the NHPA’s statutorily mandated consultation process for historic or cultural properties could provide a basis for implementing a more general regulatory consultation mandate.²²⁹ Like those regulations, the involvement of an additional entity, like the ACHP in NHPA proceedings, could also provide an important check on or review of a consultation process. Importantly, however, these efforts should aim to incorporate tribal consultation as an objective on an equal basis with existing federal land management priorities in order to integrate the process of consultation with the balancing of a multiple-use, wilderness,

²²⁵ See, e.g., *Infrastructure Report*, at 23-24.

²²⁶ One example of broad-based consultation efforts can be found in the BLM’s development of the Desert Renewable Energy Conservation Plan (DRECP), which involved lengthy consultation with a number of tribes over a months-long process and served to build relationships beyond the specific project at issue. See *Record of Decision for the Land Use Plan Amendment to the California Desert Conservation Plan, Bishop resource Management Plan, and Bakersfield Resource Management Plan*, Bureau of Land Management, 89-93 (Sept. 2016) available at https://eplanning.blm.gov/public_projects/lup/66459/133460/163124/DRECP_BLM_LUPA_ROD.pdf.

²²⁷ Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016); see Co-management section, *infra*.

²²⁸ *Infrastructure Report*, at 16-25.

²²⁹ See, e.g., 36 C.F.R. §800.16(f) (2007).

refuge, or other management framework. Doing so would help overcome the historical exclusion and separation of tribes from the legal structure of public land management.

With regard to possible legislative initiatives, the National Congress of American Indians (NCAI) has called upon Congress to enact laws that would provide “uniform, effective and meaningful consultation,”²³⁰ and at least one such bill has been introduced in Congress.²³¹ That legislation would have established more particular requirements for agency consultation policies and practices and provided a cause of action under the APA for tribes to seek judicial review of an agency’s failure to comply with its terms.²³² Those concepts would remain important for any future legislative efforts to improve tribal consultation as would consideration of the need to integrate consultation with other federal land management priorities.

Ultimately, reforming tribal consultation will demand additional work beyond the formal executive or legislative actions taken to encourage a more meaningful, effective, and enforceable federal-tribal relationship. That process must originate from and be rooted in the foundational legal principles described above and effectively involve tribal voices and priorities in federal administrative and legal processes that were built without that involvement.

C. Contracting and Compacting for the Assumption by Tribes of Federal Programs, Services, Functions, and Activities

The modern era of federal law and policy regarding relations with Native nations is rooted in a commitment to tribal self-determination.²³³ That policy represented a marked shift from the prior era of termination and, for fifty years, has undergirded various federal legislative and executive actions, including the series of executive actions supporting and enhancing tribal consultation described above. Central to the development and implementation of the self-determination policies has been the enactment and evolution of the Indian Self Determination and Education Assistance Act (ISDEAA),²³⁴ which was first enacted in 1975 and subsequently amended multiple times.²³⁵ The ISDEAA serves as the backbone of federal self-determination policy through its promotion of tribal authority and the transfer of programs and services intended to benefit tribes from overarching federal domination and control to tribal supervision and management.²³⁶ This policy approach has been wildly successful, with tribes across the country

²³⁰ NCAI Resolution #MOH-17-001 (2017), *available at* www.ncai.org/attachments/Resolution_tNWJMbVBsWNZwnaUYCgwjpsJlmEmzxkuQZYPCJxjDlxJpMrqJR_MOH-17-001.pdf.

²³¹ *See* Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act, H.R. 2689, 115th Cong., 1st Sess. (May 25, 2017).

²³² *Id.* at Sec. 401.

²³³ *See* President Richard M. Nixon, Special Message on Indian Affairs, Pub. Papers of the President (July 8, 1970).

²³⁴ Pub. L. No. 93-638, 88 Stat. 2203 (1975).

²³⁵ Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711; Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250; *see generally* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Self-Governance under the Indian Self Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1 (2014).

²³⁶ *See* 25 U.S.C. §§5302(b) (2018).

taking on the responsibility for previously federal programs, receiving funding to implement them, and carrying them out according to tribal, not federal, priorities.²³⁷

To do so, the ISDEAA encourages federal agencies to negotiate agreements with tribes pursuant to which the tribes can then assume those responsibilities.²³⁸ While the process for doing so and agency recalcitrance toward the transfer of federal programs to tribes has required further congressional attention to fulfill the goals of the program,²³⁹ that attention has resulted in broader avenues for tribes to pursue such agreements. The 1994 enactment of the Tribal Self-Governance Act (TSGA),²⁴⁰ for example, authorized self-governance compacts in addition to self-determination contracts and provided federal agencies and tribes greater flexibility to negotiate and address funding, ongoing agreements and the potential for tribes to redesign their delivery of services and reallocate federal funding.²⁴¹ Thus, whether through a more focused self-determination contract or a broader self-governance compact, tribes can pursue the authority to oversee and manage aspects of the federal bureaucracy and, in doing so, expand the scope and capacity of their own governance.

While the bulk of the focus and activity under the ISDEAA has been on programs and services administered by the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) directly for the benefit of tribes and their members, the TSGA broadened the potential for tribal assumption of federal responsibilities beyond those tribally-specific areas.²⁴² Rather than only assuming responsibility for on-reservation social or health services, the TSGA authorized compacts pursuant to which tribes could take on non-BIA “programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”²⁴³ The TSGA also required that the Secretary of the Interior review which non-BIA programs may be available for such assumption and report on them annually.²⁴⁴ Additional legislation in 2018 enabled tribes to enter similar agreements with the Department of Agriculture to carry out “demonstration projects” involving the administration or management of certain national forest lands pursuant to the Tribal Forest Protection Act (TFPA),²⁴⁵ although this latter authority is

²³⁷ See, e.g., Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 48-49 (documenting the rapid growth in tribal self-governance programs from 1991 to 2013).

²³⁸ See, e.g., 25 U.S.C. § 5321 (2018).

²³⁹ Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 30 (describing congressional “outrage” over the implementation of the ISDEAA and the 1988 amendments).

²⁴⁰ Pub. L. No. 103-413.

²⁴¹ See 25 U.S.C. §§ 5361-5368 (2018); Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 37; Mary Ann King, *Co-Management or Contracting? Agreements between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 477-78 (2007); Brian Upton, *Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives*, 35 PUB. LAND & RES. L. REV. 52, 85-91 (2014).

²⁴² Pub. L. No. 103-413 at § 204 Sec. 403(c); 25 U.S.C. § 5363(b)(2) (2018).

²⁴³ 25 U.S.C. §§ 5363(b)(2); (c) (2018).

²⁴⁴ 25 U.S.C. § 5365(c) (2018); see Dept. of the Interior, Office of the Secretary, *List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2020 Programmatic Targets*, 85 Fed. Reg. 12,326 (March 2, 2020) [hereinafter 2020 List].

²⁴⁵ Enacted as part of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, title VIII, §8703, 132 Stat. 4877 (Dec. 20, 2018), codified at 25 U.S.C. § 3115b (2018).

limited to protecting tribal lands or forest lands “bordering or adjacent to” lands under tribal jurisdiction.²⁴⁶

Thus, while the ISDEAA began with the goal of transferring federal programs within the BIA and IHS to tribal control, the evolution of the self-determination policy has expanded the reach of that objective to open avenues for tribes to assume the responsibility for certain programs across the Departments of the Interior and Agriculture. These agreements may therefore provide an important bridge to expanded tribal co-management of public lands administered by agencies within those departments. As demonstrated by the few such agreements shown on the most recent annual report of the Secretary of the Interior under the TSGA, however, the utility of compacting as a means to tribal co-management may be limited.²⁴⁷

1. Limitations of Self-Governance Compacting

As noted above, the continuing barriers to promoting tribal self-determination under the ISDEAA prompted repeated congressional efforts to better implement those objectives. Agency reluctance or opposition to tribal requests for self-determination contracts and self-governance compacts were the primary motivator for many of these amendments, although disputes over funding and other matters also required judicial resolution.²⁴⁸ In addition to these more general conflicts over the implementation and promotion of the self-determination policy, the use of self-governance compacting in the context of tribal lands management presents additional issues that further hinder its utility.

First, the TSGA distinguishes between the authority and obligations of the Secretary of the Department of the Interior to compact for non-BIA programs that are “otherwise available to Indian tribes or Indians”²⁴⁹ and non-BIA programs that are not Indian focused. As one commentator explains the import of this distinction:

Programs are “otherwise available,” in the Department's interpretation, if they would be eligible to contract under Title I [of the ISDEAA]. This means that they must be programs ‘for the benefit of Indians because of their status as Indians’ under [that law]. Such programs must be included in [TSGA] agreements upon tribal request.

Non-BIA programs that are not specifically targeted to Indians may still be included in [TSGA] agreements under the discretionary authority [authorized by the TSGA], which allows inclusion of PFSAs ‘administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.’ These programs, while benefiting

²⁴⁶ 25 U.S.C. §§ 3115a(b)(1)-(3) (2018).

²⁴⁷ 2020 List, at 12,326-7 (including two agreements with the BLM, three with the NPS, and only one with USFWS).

²⁴⁸ See, e.g., *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Furthermore, With respect to the contracting authorities available to tribes under the TFPA, there is “no specific authorization of funding or right to funding.” Strommer & Osborne, *supra* note 220 at 71.

²⁴⁹ 25 U.S.C. § 5363(b)(1)(c) (2018).

a wider constituency than Indians alone, may still be awarded on a non-competitive basis in a [TSGA] agreement *at the bureau's discretion*.²⁵⁰

This interpretation of the difference between mandatory and discretionary compacting authority was upheld by the United States Court of Appeals for the Ninth Circuit, which rejected a tribal effort to force the Bureau of Reclamation to compact for the tribal assumption of non-BIA programs.²⁵¹ The TSGA's provisions therefore allow "non-BIA bureaus unchecked discretion to deny tribal proposals,"²⁵² which, as one commentator has noted in the context of public land management, allows for a myopic focus on the objectives of public lands management without consideration of the continuing evolution of the federal government's policy to support tribal self-determination.²⁵³

Similarly, the TSGA makes clear that, although it expands the window for tribes to assume previously federal authorities, it does not authorize the Secretary to allow tribes to carry out "functions that are inherently federal."²⁵⁴ What constitutes an "inherently federal function" is, however, a topic of uncertainty and one over which tribes and federal agencies have and continue to debate.²⁵⁵ When considering the TSGA on the floor of the Senate, the late Senator John McCain suggested a narrow definition of such functions, particularly in light of prior agency recalcitrance toward contracting with tribes.²⁵⁶ In a comprehensive opinion issued in 1996, the Solicitor of the Department of the Interior reviewed the TSGA with respect to its limitations on the delegation of certain functions to tribes and concluded that while the principles of federal Indian law, including tribal sovereign authority and the unique nature of the federal-tribal relationship, provide some general and helpful guidance, the TSGA's "inherently federal restriction can only be applied on a case-by-case basis."²⁵⁷ Nonetheless, the Solicitor noted that such application must consider the extent of tribal sovereignty and jurisdiction,²⁵⁸ the United States Supreme Court's recognition that delegation of federal authority to Indian tribes is not

²⁵⁰ Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 39 (citations omitted).

²⁵¹ *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005).

²⁵² Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 39.

²⁵³ King, *Co-Management or Contracting?*, at 481.

²⁵⁴ 25 U.S.C. § 5363(k) (2018).

²⁵⁵ See, e.g., Dept. of the Interior, Bureau of Indian Affairs, *Tribal Self-Governance; Proposed Rule with Request for Comments*, 63 Fed. Reg. 7,202, 7,205 (Feb. 12, 1998) (explaining differing tribal and federal views on inherently federal functions in the context of promulgating TSGA regulations and concluding that decisions about what constitutes such a function "are best made on a case-by-case basis during the government-to-government negotiation process."); Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. IND. L. J. 35, 68-69 (2017) (discussing inherently federal functions in the context of the 2005 Energy Policy Act).

²⁵⁶ *Indian Self-Determination Act Amendments of 1994*, 140 CONG. REC. S28833, 28835 (daily ed. Oct. 7, 1994) (Inherently federal functions not subject to compacting under the TSGA are "Federal responsibilities vested by the Congress in the Secretary which are determined by the Federal courts not to be delegable under the constitution.") See also 25 U.S.C. § 2021(12) (2018) (defining "inherently Federal functions" for purposes of BIA education programs largely along administrative lines but also including the somewhat ambiguous "nondelegable statutory duties of the Secretary relating to trust resources.")

²⁵⁷ Open Memo. From John Leshy, Solicitor, DOI, to Assistant Secs. & Bureau Heads, DOI, *Inherently Federal Functions under the Tribal Self-Governance Act*, 14 (May 17, 1996) [hereinafter Leshy Memo].

²⁵⁸ *Id.* at 12.

limited by the general principles of the non-delegation doctrine,²⁵⁹ and that “close calls should go in favor of inclusion [of programs for tribal control] rather than exclusion.”²⁶⁰

Notwithstanding that guidance, the uncertainty and case-specific nature of the “inherently federal function” limitation on TSGA compacting combined with the broad discretion for non-BIA agencies to deny tribal requests to compact, can present significant barriers to the TSGA (and its Dept. of Agriculture counterparts) as an effective avenue for tribal co-management. In the context of the NPS, for example, one commentator suggested that the agency has “narrowly construed the TSGA [and] framed it within the NPS’s conventional tools for sharing money and authority with non-tribal entities.”²⁶¹ This reluctance to delegate important responsibilities to a non-federal actor can best be understood in light of the statutory mandates with which these agencies are charged, all of which focus on the management and protection of public lands as a national resource.²⁶² As discussed *infra*, however, a range of authorities allow these agencies to privilege private and state interests with management and control of the public lands estate and, from the very beginning of that estate, the federal government has relied on its ability to divest and capitalize on it.²⁶³

Even where federal agencies may be interested in considering tribal proposals to assume management or other administrative functions for lands with which they have a “special geographic, historical, or cultural” connection, the federal agency’s failure to competently honor its other legal obligations may frustrate that partnership.²⁶⁴ In the case of the National Bison Range, for example, which was taken from the Confederated Salish & Kootenai Tribes (CSKT) and subsequently managed by the USFWS as a National Wildlife Refuge,²⁶⁵ the agency’s failure to conduct an adequate analysis of an agreement to delegate to the Tribes the management of the Range resulted in the judicial invalidation of that agreement.²⁶⁶ Similarly, NEPA likely requires any agency considering such an action to obtain public input and consider alternatives before making a final decision, procedural steps that may be viewed as inconsistent with the federal government’s trust obligations to tribes, the spirit of the TSGA, and may also subject the agency to further litigation.²⁶⁷

²⁵⁹ *Id.* at 7-10, 12 (citing *U.S. v. Mazurie*, 419 U.S. 544 (1975)).

²⁶⁰ *Id.* at 13. *See also* Upton, *Returning to a Tribal Self-Governance Partnership*, at 94-99 (reviewing background and development of the Leshy Memo). More recently, the Secretary of the Interior ordered the development of more specific guidance regarding the contractibility of programs (i.e., what functions are available and, therefore, not inherently federal) for oil and gas development on Indian lands. Secretarial Order 3377, *Contractibility of Federal Functions for Oil and Gas Development on Indian Lands* (Dec. 16, 2019). More recently, the Bureaus of Indian Affairs and Land Management and the Offices of Self-Governance and Natural Resource Revenue entered into a Memorandum of Agreement, which includes a list of contractible and inherently federal functions related to oil and gas development, in order to implement and operationalize the Secretary’s order. Memorandum of Agreement Between Bureau of Indian Affairs, Office of Self-Governance, Office of Natural Resources Revenue, and Bureau of Land Management (Feb. 24, 2020) (on file with authors).

²⁶¹ King, *Contracting or Compacting?*, at 481.

²⁶² *See* Public Lands section *supra*.

²⁶³ *See, e.g.*, Ablavsky, *The Rise of Federal Title*, at 680-82.

²⁶⁴ 25 U.S.C. § 5363(c) (2018).

²⁶⁵ *See generally* Upton, *Returning to a Tribal Self-Governance Partnership*.

²⁶⁶ *See* *Reed v. Salazar*, 744 F.Supp.2d 98 (D.D.C. 2010).

²⁶⁷ *See, e.g.*, Dept. of the Interior, Fish and Wildlife Service, *Notice: Fish and Wildlife Service and Council of Athabaskan Tribal Governments Sign Annual Funding Agreement*, 69 Fed. Reg. 41,838, 41,839-44 (July 12, 2004) (addressing public comments in response to a proposed TSGA compact).

Finally, although the TSGA marks important strides toward tribal self-determination, it remains a vehicle for the federal government to delegate only limited authority to tribes, particularly in the context of activities taking place on public lands. In other words, despite decades of recalcitrance toward such delegations and the continuing attempts by Congress to overcome these barriers, federal agencies remain largely in the driver's seat when it comes to authorizing broader tribal control over federal activities on federal lands. This mostly unilateral framework can severely limit the viability of self-determination contracting or self-governance compacting as a workable means of expanding tribal authority.

2. Contracting and Compacting as a Bridge to Tribal Co-Management

The ability of Indian tribes to seek, negotiate, and enter agreements with the federal government to assume previously federal programs, functions, services, and activities is a core component of the current era of tribal self-determination. Through the assumption of a variety of service programs, for example, tribes across the country have begun serving and protecting their own communities, on their own terms, without the disconnection and interference of federal oversight. These contracting and compacting authorities are, therefore, critically important avenues for building and enhancing tribal sovereignty and sovereign capacity.

Relying on the success of self-determination contracting and self-governance compacting, the expansion of these concepts to federal agencies managing public lands presents important opportunities for reshaping tribal co-management opportunities in the future. The TSGA, TFPA, and 2018 amendments all represent steps toward these reforms and, if utilized as other self-determination and self-governance agreement authorities have been used, could usher in broader tribal roles across the range of federal land management agencies. Though contracting or compacting may be more limited in scope with regard to the assumption by tribes of off-reservation management responsibilities, the successful completion of those tasks can help alleviate concerns over greater tribal authority over public resources. Similarly, like their historical treaty antecedents, contracts and compacts mark important bonds of government-to-government agreement that secure and respect co-existing sovereign authorities. And, as with the history of self-determination contracting and self-governance compacting, the federal government can ensure appropriate tribal capacity, legitimacy, and oversight through those agreements so as to avoid concerns over improper delegations of federal authorities or the mismanagement of public resources.

The continuing evolution of contracting and compacting show the promise of these avenues as bridges to a new era of expanded tribal co-management; however, as demonstrated by the limited number of agreements developed pursuant to the TSGA and TFPA, more time, attention, and potential revisions are needed to enhance their effectiveness.

3. Recommendations for Reform & TSGA Compacting as Implementation Mechanism for Tribal Co-Management

As with other existing approaches to tribal engagement, self-governance compacting could be improved through both executive and legislative actions aimed at encouraging greater balance between tribes and federal public land management agencies. With regard to executive actions,

for example, broader incorporation and application of the principles surrounding delegation of federal authorities to tribes analyzed in the 1996 Solicitor’s Memorandum could help diminish agency concerns over and reluctance to treat tribes as partners rather than contractors.

As described in detail below, the delegation of authority over federal public lands from the federal government to states and even private development interests is a well-established and long-accepted practice that pervades nearly all aspects of public land and resources management. While the legal basis for considering similar broad delegations to tribes is rooted in the foundational principles of federal Indian law described earlier and, therefore, entirely separate from the conflict over states’ rights and privatization of these federal and public interests, that basis should empower a greater recognition of the use of TSGA compacting as a means to fulfill the federal policy to promote tribal self-determination. A comprehensive executive branch review of these authorities, including further clarification of what may constitute an inherently federal function in the context of the trust relationship with Indian tribes, would be an important first step in that direction.

With regard to legislation, various recent efforts have sought further amendments to the TSGA in order to expand tribal options for compacting and decrease federal discretion over that process.²⁶⁸ An important provision for further consideration would be the elimination of the discretionary nature of compacting for non-BIA programs where there exists a “special geographic, historical, or cultural” tribal connection and, potentially, the development of additional options for tribes to pursue pilot or demonstration projects in the management of federal public lands and resources.²⁶⁹

D. The National Historic Preservation Act and Native American Traditional Cultural Properties, Districts and Landscapes

A more purposeful and structured form of tribal consultation is provided by the National Historic Preservation Act (NHPA), which serves as the basic charter and method of historic preservation in the U.S.²⁷⁰ Section 106 of the NHPA requires federal agencies with direct or indirect control over a “proposed [f]ederal or federally assisted undertaking”²⁷¹ to consider the effects of the undertaking on historic and cultural properties and to consult with interested parties as a way to “accommodate historic preservation concerns with the needs of Federal undertakings.”²⁷²

A series of complicated procedural steps are required by the law and its regulations, including a consultation process whereby agencies consult “with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to an historic property that would

²⁶⁸ See Strommer & Osborne, *The History, Status, and Future of Self-Governance*, at 61-63 (reviewing prior proposals); Department of the Interior Tribal Self Governance Act of 2015, S. 286, 114th Cong. 1st Sess. (July 22, 2015).

²⁶⁹ See, e.g., Indian Trust Asset Reform Act, Pub. L. 114-178, 130 Stat. 432 (June 22, 2016).

²⁷⁰ Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966), *codified at* 54 U.S.C. §§300301-307108 (2018).

²⁷¹ 54 U.S.C. §306108 (2018).

²⁷² 36 C.F.R. §800.1(a) (2020).

be affected by a proposed federal undertaking.²⁷³ “The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”²⁷⁴

A unique aspect of tribal consultation per Section 106 is the role played by the Advisory Council on Historic Preservation (ACHP), an independent federal agency with statutorily designated representation. The Council oversees the Section 106 process and participants within it “may seek advice, guidance and assistance from the Council” regarding specific undertakings, including the resolution of disagreements. As we return to in Part V, the NHPA’s creation of the ACHP is in itself an important development because it divides decision-making responsibilities among more than one agency; thus providing a potential check or brake on those “action agencies” proposing federal undertakings.²⁷⁵ As discussed below, although advisory in nature, the Committee’s potential to influence agency decision making, both substantively and procedurally, is a significant one.

The 1992 Amendments to the NHPA clarified that “traditional cultural properties” (TCP) could be eligible for listing in the National Register of Historic Places,²⁷⁶ which is an official list administered by the National Park Service and intended to serve as a planning tool “to be used by [f]ederal, [s]tate, and local governments, private groups and citizens to identify the Nation’s cultural resources and to indicate what properties should be considered for protection from destruction or impairment.”²⁷⁷ There is a designated “Keeper” of the National Register of Historic Places, a National Park Service official with the authority to officially designate properties as eligible for inclusion in the National Register.²⁷⁸

A traditional cultural property is defined as a property “eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”²⁷⁹ Another type of TCP covered by the Act is a traditional cultural district (TCD), which constitutes a “concentration, linkage or continuity” of

²⁷³ 16 U.S.C. §470a(d)(6) (2000). Under NHPA regulations, “[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them.” 36 C.F.R. §800.16(f) (2007).

²⁷⁴ 36 C.F.R. §800.1 (2020). “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property’s eligibility for the National Register.” 36 C.F.R. §800.5(a)(1) (2020).

²⁷⁵ See Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 *ECOLOGY L. Q.* 608 (2015) (assessing those environmental laws that divide decision-making authority among more than one agency, such as the NEPA, NHPA, ESA, CWA and the Federal Power Act (FPA)).

²⁷⁶ National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753, 4757 (codified at 54 U.S.C. §302706(b) (2020)).

²⁷⁷ 36 C.F.R. §60.2 (2020).

²⁷⁸ 30 C.F.R. §60.3(f) (2020).

²⁷⁹ NATIONAL PARK SERVICE, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990, revised 1992, 1998). [hereinafter NATIONAL REGISTER BULLETIN 38]. An example is “a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice.” *Id.*

properties.²⁸⁰ Outside of the regulatory and legal context, these terms are often used interchangeably, but they are essentially viewed as a way to move beyond the protection of discrete sites, such as a National Historic Landmark,²⁸¹ and towards the protection of “Native American Traditional Cultural Landscapes” which are “large scale properties...often comprised of multiple, linked features that form a cohesive ‘landscape.’”²⁸²

Another 1992 amendment to the NHPA authorized tribes, upon meeting specified standards, to assume the responsibilities of the State Historic Preservation Officer (SHPO), whom play an important role in administering the Act.²⁸³ The amendment established the position of a Tribal Historic Preservation Officer (THPO) that has different duties and authorities on and off tribal lands. If a proposed undertaking’s “area of potential effect” (APE) is on federal public land the THPO “may serve as the official representative designated by his/her tribe to represent its interests as a consulting party in Section 106 consultation.”²⁸⁴

Of particular relevance to tribal co-management is the NHPA’s multi-layered dispute resolution framework, which is applied at multiple decision points, including the identification of traditional properties and in the assessment of adverse effects to those properties. In resolving the latter, the THPO (or SHPO) can disagree with a finding of no adverse effects and formally consult with the parties to resolve the disagreement or to request the engagement of the ACHP.²⁸⁵ A more substantive form of consultation is called for at this stage, with the requirement that agency officials “should seek the *concurrence* of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding.”²⁸⁶ Here, again, the Council may be requested to review the finding of no adverse effects, and the resolution of the disagreement may happen through continuing consultation or the preparation of a “programmatic agreement” which documents “the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations.”²⁸⁷ Finally, there is a process regarding a failure to resolve adverse effects, leading to a termination of consultation and engagement of the ACHP.²⁸⁸

²⁸⁰ *Id.* at 11.

²⁸¹ Section 110 of the NHPA provides more protection to National Historic Landmarks than is provided in Section 106: “Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.” 54 U.S.C. §306107 (2020). *See e.g.*, *Wyoming Sawmills v. Forest Service*, 179 F. Supp. 2d 1279 (D. Wyo. 2001), *aff’d* 383 F. 3d 1241 (10th Cir. 2004) (focused on protection of the Bighorn Medicine Wheel in Wyoming’s Bighorn National Forest).

²⁸² *Native American Traditional Cultural Landscapes Action Plan*, ADVISORY COUNCIL ON HISTORIC PRESERVATION (Nov. 23, 2011), *available at* <https://www.achp.gov/sites/default/files/guidance/2018-06/NativeAmericanTCLActionPlanNovember232011.pdf>. The Action Plan was part of a “Native American traditional cultural landscapes initiative” began by the ACHP in 2011.

²⁸³ 54 U.S.C. §302702

²⁸⁴ Advisory Council on Historic Preservation, *Role of the Tribal Historic Preservation Officer in the Section 106 Process* (Nov. 22, 2013).

²⁸⁵ 36 C.F.R. §800.5 (2020).

²⁸⁶ 36 C.F.R. §800.5(C) (2020).

²⁸⁷ 36 C.F.R. §800.6; 36 C.F.R. §800.16(t) (2020).

²⁸⁸ 36 C.F.R. §800.7 (2020).

1. Section 106 in Practice

What does all of this mean in practice? The NHPA is a procedural statute affording federal agencies considerable discretion in how rigorously it is applied to the protection of sacred places and cultural resources on public lands. Section 106 encourages but does not mandate preservation.²⁸⁹ As shown below, the consultation process required by the law provides an important opportunity for tribal participation in federal agency decision making.²⁹⁰ After all, forcing agencies to consider whether their undertakings will adversely affect cultural properties and whether the actions can be avoided, minimized and mitigated is better than no consideration at all. For the same reasons that NEPA is so crucial to environmental protection, the precautionary “stop, look, and listen”²⁹¹ nature of the NHPA can provide important time, space and leverage to find possible alternative courses of actions. Furthermore, in comparison to the Executive Orders on tribal consultation, Section 106 provides a statutorily based right to consultation, though Circuit Courts are mixed as to whether it also provides a stand-alone and enforceable right of action against the federal government.²⁹²

As we discuss below, there are elements of the Section 106 framework that could be used to inform and possibly bridge to variations of tribal co-management in the future. Several features of Section 106—the structured and statutorily based version of tribal consultation, the principle of concurrence in resolving disputes, the important role of THPOs in the administration of the Act, and the exogenous roles played by the ACHP and the Keeper of the National Register that serve as a check on action agency discretion—could be replicated or modified in future place-based or system-wide legislation focused on tribal co-management.

Benefits and potential notwithstanding, all too often federal agencies view the 106 process as a procedural obstacle to be overcome; a bureaucratic check-mark on the way to making decisions that are moving forward regardless of the findings and analysis required by Section 106 consultation. Part of the problem stems from how much public land has yet to be even inventoried for cultural resources.²⁹³ Cultural resource and heritage programs within the BLM and USFS are also chronically underfunded and deprioritized within the agencies, especially when competing with revenue-generating activities like oil and gas leasing.²⁹⁴

²⁸⁹ ADVISORY COUNCIL ON HISTORIC PRESERVATION, PROTECTING HISTORIC PROPERTIES: A CITIZEN’S GUIDE TO SECTION 106 REVIEW 4 (no date).

²⁹⁰ See e.g., Dean B. Suagee, *Historic Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 NAT. RESOURCES & ENV’T 86, 88 (2002-2003) (reviewing NHPA’s consultation framework as “the right to have a seat at the table, a chance to persuade the responsible federal official to do the right thing”).

²⁹¹ *Apache Survival Coalition v. United States*, 21 F. 3d 895 (9th Cir. 1994).

²⁹² Compare *San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091 (9th Cir. 2005) (holding that NHPA claims must be pursued under the APA) with *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991) (recognizing a cause of action under the NHPA). See also Melinda Harm Benson, *Enforcing Traditional Cultural Property Protections*, 7 HUMAN GEOGRAPHY 60, 66-67 (2014); Amanda M. Marincic, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nation*, 103 IOWA L. REV. 1777, 1792-94 (2018).

²⁹³ See T. DESTRY JARVIS, NATIONAL TRUST FOR HISTORIC PRESERVATION, CULTURAL RESOURCES ON THE BUREAU OF LAND MANAGEMENT PUBLIC LANDS: AN ASSESSMENT AND NEEDS ANALYSIS (May 2006), at 6 (finding roughly 6 percent of BLM lands surveyed for cultural resources), and T. DESTRY JARVIS, NATIONAL TRUST FOR HISTORIC PRESERVATION, THE NATIONAL FOREST SYSTEM: CULTURAL RESOURCES AT RISK: AN ASSESSMENT AND NEEDS ANALYSIS (May 2008) (finding 80 percent of USFS lands not surveyed for cultural resources).

²⁹⁴ *Id.*

Some of the most well-known disputes regarding tribal sacred lands and cultural resources have a Section 106 NHPA claim associated with them. And with few exceptions,²⁹⁵ Tribes were unsuccessful in using the law and its consultation procedures as a stand-alone way to protect sacred sites and traditional cultural properties.²⁹⁶ The prominent cases—*Standing Rock Sioux v. United States Army Corps of Engineers* (Dakota Access Pipeline),²⁹⁷ *Navajo Nation v. U.S. Forest Service* (use of wastewater for snowmaking at Arizona Snowbowl),²⁹⁸ *Hoonah Indian Association v. Morrison* (timber sales on the Tongass National Forest),²⁹⁹ *Apache Survival Coalition v. United States* (construction of Mount Graham International Observatory on the Coronado National Forest)³⁰⁰—make clear the discretionary and procedural nature of the law. And more contemporary cases—such as the lack of any meaningful consultation pertaining to oil and gas development adjacent to the Chaco Canyon region of the Southwest,³⁰¹ and the acknowledged destruction of a TCP in the Oak Flat area on the Tonto National Forest that is being exchanged with a foreign-owned mining corporation³⁰²—show a continuation of this trend.

2. Case Study: The Badger-Two Medicine

The Badger-Two Medicine story demonstrates the evolution, variability and limitations of the NHPA, but also the law’s potential to serve as a possible bridge to co-management in the future.³⁰³ This section provides a very broad and incomplete snapshot of the story with a more

²⁹⁵ See e.g., *Pueblo of Sandia v. United States*, 21 F.3d 895 (9th Cir. 1994); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

²⁹⁶ See generally Jess Phelps, *The National Historic Preservation Act at Fifty: Surveying the Forest Service Experience*, 47 ENVTL. L. 471 (2017) (reviewing NHPA litigation trends on NFS lands).

²⁹⁷ 205 F. Supp. 3d 4, 7 (D.D.C. 2016)

²⁹⁸ 479 F. 3d 1024 (9th Cir. 2007, on reh’g en banc, 535 F.3d 1058 (9th Cir. 2008).

²⁹⁹ 170 F. 3d 1223 (9th Cir. 1999)

³⁰⁰ *Apache Survival Coal. v. United States (Apache Survival II)*, 118 F. 3d 663 (9th Cir. 1997)

³⁰¹ See e.g., Uncited Preliminary Brief (Deferred Appendix Appeal) of Amici Curiae All Pueblo Council of Governors and National Trust for Historic Preservation, in Support of Appellants, Dine Citizens Against Ruining Our Environment, et al. v. Ryan Zinke, et al., Civ. No. 18-2089 (10th Cir. filed Sept. 7, 2018) (describing BLM NHPA violations in failing to consult with Pueblo tribal governments when considering applications for permits to drill and how they would potentially affect traditional cultural properties in the area).

³⁰² The Oak Flat area was listed on the National Register of Historic Places as an Apache TCP in 2016. Within its boundaries include 38 archeological sites and several additional sacred places, springs and other significant locations. Section 3003 of the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015 included a mandatory land exchange and transfer of the Oak Flat area to Resolution Copper. Though the Act limits the USFS’s discretion over the transfer, and its ability to address Tribal concerns, an EIS still had to be prepared. The Draft EIS makes clear that “[c]onstruction and operation of the mine would profoundly and permanently alter” the Oak Flat TCP, potentially including human burials. It also includes a section on mitigation of adverse effects, including “data recovery” and curation strategies. *Draft Environmental Impact Statement: Resolution Copper Project and Land Exchange*, USDA FOREST SERVICE at 25, 638 (2019).

³⁰³ See generally Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RESOURCES L. REV. 205, 240 (2017) (telling the story of how it “took the Forest Service and the Blackfeet more than three decades to organically achieve a common understanding of meaningful consultation.”); and Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands* (providing an overview of the Badger-Two Medicine and how tribal co-management and a protected land use designation could be applied in the future).

technical focus on how a TCD designation for the Badger-Two Medicine is being leveraged to find more cooperative management and substantive protections for the area.

The Badger-Two Medicine area of western Montana is bounded by Glacier National Park to its north, the Bob Marshall and Great Bear Wilderness areas to its south and west, and the Blackfeet Indian Reservation to its east. Most of the Badger-Two Medicine area is designated roadless and it is a stronghold for several species of fish and wildlife that are no longer found or diminished elsewhere.³⁰⁴ It is part of an international landscape referenced as the “Crown of the Continent,” with the Badger-Two Medicine found at the northern edge of the Rocky Mountain Front, where the Great Plains meet the Rocky Mountains.

This larger geographic area has been historically governed through a succession of agreements between the Blackfeet Nation and federal government. Most important, for purposes here, is the Blackfeet Agreement of 1895/96 in which the Blackfeet reserved use rights on roughly 400,000 acres of ceded lands for \$1,500,000.³⁰⁵ Most of this ceded land is now managed by Glacier National Park, with the remaining ~130,000 acres managed by the Helena-Lewis and Clark National Forest. The Blackfeet have used and inhabited the Badger-Two Medicine since time immemorial and the area is critical to the “oral history, creation stories, and ceremonies of the Blackfeet people, as well as an important plant gathering, hunting, fishing and timbering site which continues to be vital to the religious, cultural and subsistence survival of the Blackfoot people.”³⁰⁶

The most significant set of threats facing the Badger-Two Medicine stem from fifty-one oil and gas leases issued in the area and adjacent lands in 1982.³⁰⁷ These parcels were not inventoried for cultural resources by the USFS and the “USFS and BLM failed to fully consider the effects of leasing, including all phases of oil and gas activities on cultural resources, including religious values and activities, within the Badger-Two Medicine area.”³⁰⁸ No environmental analysis was conducted prior to lease issuance, let alone consideration of how these leases would impact the Tribe’s reserved rights. Nor did the USFS comply with NHPA (or AIRFA) tribal consultation procedures before issuing the leases, mistakenly asserting that compliance would take place after lease issuance and “at the time soil disturbing activities are proposed.”³⁰⁹

³⁰⁴ See John Weaver, *Vital Lands, Sacred Lands: Innovative Conservation of Wildlife and Cultural Values, Badger-Two Medicine Area, Montana* (Wildlife Conservation Society, Working Paper No. 44, 2015)

³⁰⁵ “That said Indians shall have, and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber for agency and school purposes, and for their personal uses for houses, fences, and all other domestic purposes: *And provided further*, That the said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State of Montana.” Agreement with the Indians of the Blackfeet Indian Reservation in Montana, 29 Stat. 353 (1896), art I.

³⁰⁶ Proclamation of the Blackfoot Confederacy, Badger-Two Medicine (2004) (on file with author).

³⁰⁷ See generally U.S. Forest Service, *Environmental Assessment: Oil and Gas Leasing, Nonwilderness Lands* 61 (1981).

³⁰⁸ Letter from Aden L. Seidlitz, Acting State Dir. BLM Mont. Dakotas Office, to Solenex LLC, *Letter re Cancellation of Federal Oil and Gas Lease MTM53323 7* (Mar. 17, 2016), available as attachment in Solenex LLC v. Jewell, 156 F. Supp. 3d 83 (D.D.C. Mar. 17, 2016) (No. 13-cv-00993). [hereinafter Interior Cancellation Letter]

³⁰⁹ *Id.*

Multiple objections and protests to these controversial leases were immediate and applications for permits to drill in the area were temporarily suspended by Interior.³¹⁰ While this was playing out, the USFS's Land and Resources Management Plan (Forest Plan) in effect at the time provided no direction or restrictions specific to the Badger-Two Medicine. Several provisions used in the 1986 Forest Plan are indicative of the type of post-hoc "consultation" used by federal agencies at the time of the Plan's preparation. For example, one provision requires the Blackfoot Tribe to be "notified" of all exploration drilling and development proposals with its Treaty lands and that this was sufficient to comply with the American Indian Religious Freedom Act.³¹¹ Another requires that "any decision respecting 1895 Agreement lands will be made only after informing the Blackfoot Tribe."³¹²

The USFS's failure to protect the Badger-Two Medicine in the 1980s using its forest planning process opened the door to yet another threat, this one posed by a lack of travel management and increasing motorized use of the area. The Blackfoot saw "the proliferation of motorized use...as an increasing trend with commensurate cumulative effects to the cultural landscape and a threat to the continuance of traditional practices and associated cultural lifeways."³¹³

The threats posed to the Badger-Two Medicine, and the processes used to address them, invariably placed the Tribe in a reactive and defensive position, forcing the Blackfoot and their conservation allies to expend time and resources fighting proposals that they had no role in developing. Yet the 1992 Amendments to the NHPA provided the Blackfoot an important tool that could be used in a more pro-active and synergistic fashion. As discussed above, the Amendments broadened the type of properties that could be covered by the NHPA (to include TCP/TCD designations), and secondly, they authorized tribes to assume functions of State Historic Preservation Officers.

Ethnographic, archeological and other studies of the cultural significance of the Badger-Two Medicine resulted in the designation of 89,376 acres as a TCD in 2002. Shortly thereafter, the Blackfoot THPO initiated several collaborative projects to complete the ethnographic studies of the area.³¹⁴ This collective work led to the boundaries of the Badger-Two Medicine TCD being expanded to 165,588 acres in 2014. The Keeper of the National Register's Determination again recognized "the remote wilderness" of the Badger-Two Medicine but provided "a more holistic and inclusive view" of the region than what was provided in 2002, recognizing how it is seen "as

³¹⁰ *Id.*

³¹¹ LEWIS AND CLARK NATIONAL FOREST PLAN, U.S. FOREST SERVICE, 2-57 (1986).

³¹² *Id.* at 2-60.

³¹³ DRAFT ENVIRONMENTAL IMPACT STATEMENT: ROCKY MOUNTAIN RANGER DISTRICT TRAVEL MANAGEMENT PLAN, U.S. FOREST SERVICE, 97 (June 2005).

³¹⁴ See BLACKFEET TRIBAL HISTORIC PRESERVATION OFFICE, BLACKFEET TRIBAL BUSINESS COUNCIL, BADGER-TWO MEDICINE TRADITIONAL CULTURAL DISTRICT, HELENA-LEWIS AND CLARK NATIONAL FOREST, MONTANA: PROPOSAL TO ESTABLISH PERMANENT PROTECTIONS (Dec. 5, 2017), at 26-28 (providing a detailed assessment of these studies and how they were funded and organized to recognize tribal sovereignty). [HEREINAFTER BLACKFEET PROPOSAL TO ESTABLISH PERMANENT PROTECTIONS]. These studies include the influential collaborations between the Blackfoot THPO John Murray, Blackfoot Community College and research anthropologist Maria Nieves Zedeño at the University of Arizona. See e.g., Maria Nieves Zedeño, Principal Investigator, *Badger-Two Medicine Traditional Cultural District, Montana: Boundary Adjustment Study, Final Report* 89 (Mar. 10, 2006); and Maria Nieves Zedeño, *Blackfoot Landscape Knowledge and the Badger-Two Medicine Traditional Cultural District*, THE SAA ARCHEOLOGICAL RECORD (Mar. 2007).

an interconnected traditional landscape,” “a place of extreme power,” and “a significant region of refuge” for many tribal members.³¹⁵

Designation of the Badger-Two Medicine TCD has proven advantageous in several ways. First, the historic and cultural studies done pursuant to the NHPA provided the BLM one important rationale to reauthorize temporary suspensions of oil and gas leases in the area,³¹⁶ and for the USFS to recommend to Interior a federal mining withdrawal that happened administratively in 2001,³¹⁷ and then by Congress in 2006.³¹⁸ These moves and others provided the Blackfoot Tribe and conservationists important time to find more durable solutions to the costly leasing mistake of 1982.

These studies had an educative function as well, clearly articulating to federal agencies and political decision makers the deep history and webs connecting the Blackfoot people to the Badger-Two Medicine. In some respects, the law, regulations and policies governing TCD eligibility made the federal agency’s recognition of such values more official and legitimate, or at least safer for bureaucrats to reference. In combination with Blackfoot Treaty rights, these studies and the TCD designation provided an important basis to find legislative solutions for the area. An important moment came in 2006, with passage of a law providing tax incentives for existing leaseholders to transfer their oil and gas leases to the federal government or qualifying non-profit conservation organizations.³¹⁹ As a result of this legislation, 29 leaseholders relinquished their leases in the Badger-Two Medicine. The TCD, and the ethnographic studies and 106 consultation process done as part thereof, also factored into the USFS’s decision in 2009 to restrict motorized use and prohibit snowmobiles in the Badger-Two Medicine;³²⁰ a decision that withstood a legal challenge asserting that protection of the TCD was an unconstitutional advancement of “Native American religion.”³²¹

The last oil and gas lease to remain in the Badger-Two Medicine was acquired by the company Solenex in 2004, in the midst of this administrative and legal turmoil and two years after the initial Badger-Two Medicine TCD designation. The NHPA Section 106 process played a prominent role in the Interior Department’s decision to ultimately cancel the lease in 2016, recognizing that it was improperly issued and did not comport with “Congress’ express intent to protect this culturally significant area” and the “Executive Branch’s long standing commitment to protect Indian sacred sites and ensure that adequate and meaningful consultation occurs when federal land management decisions have significant impacts on tribal religious and cultural practices.”³²²

³¹⁵ National Park Service, Determination of Eligibility Notification: Badger-Two Medicine Traditional Cultural District (Boundary Increase) (2014) (on file with author)

³¹⁶ Interior Cancellation Letter, at 4.

³¹⁷ Public Land Order No. 7480.

³¹⁸ Tax Relief and Health Care Act of 2006, Pub. L. 109-432, 403.

³¹⁹ Tax Relief and Health Care Act, Pub. L. 109-432, §403, 120 Stat. 3050-53.

³²⁰ LEWIS AND CLARK NATIONAL FOREST, ROCKY MOUNTAIN RANGER DISTRICT TRAVEL MANAGEMENT PLAN: RECORD OF DECISION FOR BADGER-TWO MEDICINE, U.S. FOREST SERVICE, 11 (2009).

³²¹ *Fortune v. Thompson*, No. CV-09-98, 2011 WL 206164 (D. Mont. Jan. 20, 2011).

³²² Letter from Aden L. Seidlitz, Acting State Dir. BLM Mont. Dakotas Office, to Solenex LLC, *Letter re Cancellation of Federal Oil and Gas Lease MTM53323 7* (Mar. 17, 2016), available as attachment in *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Mar. 17, 2016) (No. 13-cv-00993).

In making this decision, Interior relied upon the ACHP's recommendation that the Departments of Agriculture and Interior revoke Solenex's suspended permit to drill, cancel the lease, and ensure that future mineral development does not occur in the area.³²³ The Council stated the "the Solenex exploratory well along with the reasonably foreseeable full field development would be so damaging to the [TCD] that the Blackfeet Tribe's ability to practice their religious and cultural traditions in this area as part of their community life and development would be lost."³²⁴ The Badger-Two Medicine, concluded the Council is "of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions" and "the TCD retains integrity and is a landscape virtually unmarred by modern development and intrusions," and that "the public at large is overwhelmingly in support of the preservation of the TCD."³²⁵ For these and other reasons, the Council found that "no mitigation measures would achieve an acceptable balance between historic preservation concerns and the undertaking."³²⁶

The Advisory Council's involvement in this case was itself a turning point, providing a panel of Council Members the opportunity to visit the region and hear the most compelling testimony of what the Badger-Two Medicine means to Indians and non-Indians alike. The meeting began with an unexpected powerful ceremony, set of songs and blessing by the *Crazy Dog Society*, a Blackfeet traditional group whose presence made clear to the Panel the power of this place and how far the Blackfeet will go to defend it. The meeting was bookended by Earthjustice Attorney Tim Preso, who has worked for years with the Tribe, telling members of the Council:

You've come here to an amazing place. I know your hearings are rare, but this one must be especially rare because you sit on the edge of one our country's last great undeveloped spaces; a tract of largely undeveloped public land stretching from the Canadian border to McDonald Pass, that contains almost all of its native fauna intact. And as the events we've already seen today demonstrate is the home not only to historical, but a living cultural overlay that is extremely rare in our world today. And this whole undeveloped space is an increasingly rare commodity in our crowded and developed world.³²⁷

The Section 106 process provided an official and structured platform to share these powerful stories.

The decision to cancel the lease was challenged by Solenex and the D.C. District Court ruled in its favor holding that the amount of time that had elapsed between the Lease's issuance and its cancellation in 2016 violated the Administrative Procedure Act (APA).³²⁸ That decision was vacated by the D.C. Circuit Court in 2020, with much of the opinion centered on the TCD and

³²³ COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE RELEASE FROM SUSPENSION OF THE PERMIT TO DRILL BY SOLENEX LLC IN LEWIS AND CLARK NATIONAL FOREST, MONTANA, ADVISORY COUNCIL ON HISTORIC PRESERVATION, 7 (Sept. 21, 2015). [HEREINAFTER ACHP COMMENTS ON SOLENEX].

³²⁴ *Id.* at 7.

³²⁵ *Id.* at 4-5.

³²⁶ *Id.* at 7.

³²⁷ Corin Cates-Carney, *Speakers at Choteau Meeting Overwhelmingly Oppose Badger-Two Medicine Drilling*, MONTANA PUBLIC RADIO (Sept 3, 2015).

³²⁸ *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174 (D.C. District Court, 2018).

the lack of sufficient NHPA analysis.³²⁹ Drawing on the values and attributes so clearly described in the TCD determinations, the Circuit Court begins its opinion with a vivid description of the Badger-Two Medicine and the meaning it holds in Blackfeet creation before moving into the intricacies of administrative and oil and gas law.

There is no neat and tidy way to measure the impact of the Badger-Two Medicine TCD. The designation was most often used and leveraged in concert with other laws and processes; and assessing the effects of procedural-based laws, like NHPA’s Section 106 and NEPA, is particularly difficult. Based on previous Section 106 case law, it is easy to imagine how differently things could have gone along the way. A common NHPA mitigation measure proposed, for example, is “data recovery,”³³⁰ curation or to simply document the property being destroyed by the federal agency, such as a proposal to map and photograph culturally significant land that was being exchanged between the USFS and Weyerhaeuser timber corporation.³³¹ Previous mitigation measures offered for the Badger-Two Medicine in 1991 and 1993 included the requirement that Fina (Solenex’s predecessor), prior to any construction activity, provide the Blackfeet Tribe and USFS a schedule of when oil and gas leasing work was to be performed; and another provided the option of using a gravel pad to protect a discovered archeological site.³³² These, and other mitigation scenarios, could have easily placed the Badger-Two Medicine on a different trajectory.

But in this case, the TCD has been unmistakably impactful. With vision and leadership by the Blackfeet THPO, the TCD—and the ethnographic work that went into it—changed the narrative and created a new way of thinking and talking about the Badger-Two Medicine and the Tribe’s role in safeguarding it. Based on the work of the THPO, the TCD was then successfully leveraged by the conservation allies working with the Tribe to painstakingly undo the 51 leases, one-by-one over the course of nearly forty years.

The problem remaining is that the TCD and the Section 106 process are still procedural and did not provide the Badger-Two Medicine substantive and enforceable protections or provide the Blackfeet a more pro-active and pre-decisional role in its management. The next section describes how public lands planning could potentially serve as a bridge in that regard, fully integrating the TCD and tribal consultation into the development and implementation of a National Forest plan. The focus will remain on the Badger-Two Medicine, and therefore national forest planning, but the principles and strategy could be modified and replicated in plans prepared by the BLM, NPS and USFWS.

3. Public Lands Planning as Bridge to Tribal Co-Management

For better or worse, planning is a core principle in federal public lands law, and most decisions and activities taking place on a piece of public land must be consistent with the governing land

³²⁹ Solenex LLC v. Bernhardt, No. 18-5343, U.S. Court of Appeals for the District of Columbia Circuit, 2020.

³³⁰ For a recent example see USDA FOREST SERVICE, DRAFT ENVIRONMENTAL IMPACT STATEMENT: RESOLUTION COPPER PROJECT AND LAND EXCHANGE (2019), 638 (reviewing mitigation strategies for the Oak Flat TCP on the Tonto National Forest)

³³¹ Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F. 3d 800 (9th Cir. 1999).

³³² ACHP Comments on Solenex, at 2-3.

use plans. Plans are the vehicle for taking broad statutory mandates and more detailed regulations and applying them to particular places. Planning is particularly important on lands managed by the USFS and BLM because it is at the plan level where their broad multiple use missions are operationalized and given meaning on the ground.

The National Forest Management Act (NFMA) of 1976 requires the preparation of land and resource management plans for every national forest and grassland in the National Forest System (NFS). In 2012, new planning regulations written pursuant to NFMA were promulgated by the Obama Administration and dozens of national forests across the country are now in the process of revising plans using this planning Rule.³³³ These regulations include tribal provisions that are premised on the USFS's trust responsibility, its consultation duties, the unique government-to-government relationship between the federal government and tribes, and the agency's obligation to protect treaty and reserved rights.³³⁴ New to the 2012 Planning Rule are provisions related to the management of "areas of tribal importance,"³³⁵ and the use of "native knowledge."³³⁶ The Rule also requires consultation with federally recognized tribes and encourages them to seek "cooperating agency status."³³⁷

The Blackfeet THPO engaged in the forest plan revision for the Helena-Lewis and Clark National Forest understanding the implications for the Badger-Two Medicine. John Murray and Kendall Edmo of the THPO and the Bolle Center for People and Forests collaborated in drafting and submitting to the USFS a set of recommended plan components that would provide substantive protections for the Badger-Two Medicine TCD, secure Blackfeet Treaty rights, and advance the objective of co-management. The revision process also provided an important opportunity to incorporate into the new Forest Plan the significant changes and policy developments happening since the original plan was prepared in 1986,³³⁸ including the TCD designation(s) and executive orders pertaining to Indian Sacred Sites (E.O. 13007, 1996) and consultation and coordination with Indian Tribal Governments (E.O. 13175).

The focus on plan components is because of the 2012 Rule's consistency provision: "Every project and activity must be consistent with the applicable plan components."³³⁹ They are at the heart of forest planning and if there were to be any meaningful changes to the Badger-Two Medicine they would be found in the plan components applied to the area. Each revised Forest Plan must include a set of plan components consisting of: (1) desired conditions; (2) objectives; (3) standards; (4) guidelines; and (5) suitability of lands (required for timber production, optional for other multiple uses or activities). When properly integrated, these components establish the vision of a plan, set forth the strategy to achieve it, and provide the constraints of subsequent management. Components can be applied across a national forest or to specific management or

³³³ See generally Susan Jane M. Brown & Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, 33 NATURAL RESOURCES & ENVIRONMENT 1 (2019) (providing an overview of the Rule and its early implementation).

³³⁴ 36 C.F.R. §219.4 (2020).

³³⁵ 36 C.F.R. §219.10(b)(1)) (2020).

³³⁶ 36 C.F.R. §219.19 (2020).

³³⁷ 36 C.F.R. §219.4 (2020).

³³⁸ As per the 2012 Planning Rule, these developments should have informed the "Plan Assessment" and the "need to change" the existing plan and the subsequent development of plan components. 36 C.F.R. §219.7 (2020).

³³⁹ 36 C.F.R. §219.15 (2020).

geographic areas designated in a plan, such as prohibiting types of activities that are incompatible in areas of tribal importance, protecting cultural resources and treaty-based habitat, and provisions related to traditional access, among others.

The “desired conditions” stated in a Forest Plan are particularly important to tribal co-management because they hold the potential of federal agencies working with Tribes in a more pro-active and pre-decisional manner—a way to break the pattern of consulting with Tribes after the die is cast. There is a problematic tendency to write desired condition statements in a vague and discretionary fashion, though the Rule and its Planning Directives make clear that they “must be described in terms that are specific enough to allow progress toward their achievement to be determined.”³⁴⁰

The 2020 Land Management Plan for the Helena-Lewis and Clark National Forest provides a set of plan components for the Badger-Two Medicine “emphasis area.” They are built on the explicit recognition of the TCD and Blackfeet Treaty rights reserved in the area. As provided in the 2012 Planning Rule and Directives, desired conditions are to “drive the development of the other plan components”³⁴¹ and can include “[s]ocial relationships, traditions, culture, and activities that connect people to the plan area.”³⁴² One of the desired conditions in the Plan copies the language and endorses the vision provided by the Blackfeet THPO:

[The] Badger Two Medicine is a sacred land, a cultural touchstone, a repository of heritage, a living cultural landscape, a refuge, a hunting ground, a critical ecosystem, a habitat linkage between protected lands, a wildlife sanctuary, a place of solitude, a refuge for wild nature, and an important part of both tribal and non-tribal community values. It is important to the people who rely upon it, critical to the wild nature that depends upon it, and has an inherent value and power of its own.³⁴³

This powerful desired conditions statement is a positive development even though the USFS could go further to integrate the values and attributes of the TCD (as documented in the National Register Determinations and the ethnographic studies that informed them) into specific desired conditions.

Standards in forest planning are particularly important because they serve as “a mandatory constraint on project and activity decision-making”³⁴⁴ and are generally viewed by the courts as non-discretionary and enforceable.³⁴⁵ Two standards are currently included in the Helena-Lewis and Clark Plan for the Badger-Two Medicine:

³⁴⁰ 36 C.F.R. §219.7(e)(1)(i) (2020).

³⁴¹ Forest Service Handbook [hereinafter FSH] 1902.12, 22.11).

³⁴² FSH 1909.12, 12.20.

³⁴³ U.S. FOREST SERVICE, 2020 LAND MANAGEMENT PLAN: HELENA-LEWIS AND CLARK NATIONAL FOREST, 183 (May 2020) [HEREINAFTER HLC 2020 FOREST PLAN].

³⁴⁴ 36 C.F.R. §219.7(e)(1)(iii) (2020).

³⁴⁵ See Martin Nie & Emily Schembra, *The Important Role of Standards in National Forest Planning, Law, and Management*, 44 ENVTL. L. REP. 10281 (2014).

1) Management activities in the Badger Two Medicine shall be conducted in close consultation with the Blackfeet Nation to fulfill treaty obligations, and the federal Indian trust responsibility. Project and activity authorizations shall be protected and honor Blackfeet reserved rights and sacred land. The uses of this area must be compatible with desired conditions and compatibility shall be determined through government to government consultation.³⁴⁶

2) Management activities shall accommodate Blackfeet tribal member access to the Badger Two Medicine for the exercise of reserved treaty rights, and enhance opportunities for tribal members to practice spiritual, ceremonial, and cultural activities.³⁴⁷

The second standard is not unusual and is essentially a restatement of existing rights and access/accommodation policy. But the first standard is far more substantive and will provide the Tribe a more powerful role in ensuring that uses of the area are compatible with desired conditions and that these compatibility determinations will happen through GTG consultation. Our view of this standard is that it ties the procedural nature of tribal consultation to a more substantive result and discrete decision point, which is determining compatibility with the desired conditions.

One of the standards removed by the USFS between draft and final plan is focused specifically on the TCD:

Management activities within the Badger Two Medicine area shall not pose adverse effects to the Badger Two Medicine Traditional Cultural District. Management activities shall consider scientific research and ethnographic research as they relate to Blackfeet cultural land-use identities when analyzing project effects.³⁴⁸

This standard, which will hopefully be reinstated by the USFS in the near future, similarly illustrates how innovation in forest planning could be used to translate a procedural protection (the TCD and Section 106 process) into a substantive one (no adverse effects to the TCD).

Furthermore, as discussed in Part II(C), there is existing authority for the USFS to contract with the Blackfeet Tribe to work in the Badger-Two Medicine and other NFS lands. When viewed collectively, all of these existing mechanisms, processes and authorities—the TCD, the new desired conditions reflecting pre-decisional tribal input and participation, the new compatibility and consultation procedures stated as enforceable standards, and existing contracting authorities—can be constructed into an approach that reflects the core principles of tribal co-management.

But there is so much more that could have been done in the Forest Plan for the Badger-Two Medicine, using all of the available tools and provisions provided in the 2012 Planning Rule.

³⁴⁶ HLC 2020 FOREST PLAN, at 183.

³⁴⁷ *Id.* at 184.

³⁴⁸ U.S. FOREST SERVICE, DRAFT REVISED FOREST PLAN, HELENA-LEWIS AND CLARK NATIONAL FOREST, 172 (June 2018).

Most problematic is the USFS's decision to not restrict mechanized (including mountain bikes and e-bikes) travel in the area, which the Tribal Business Council and Pikuni Traditionalists Association specifically requested and views as an incompatible use and an adverse effect on the TCD.³⁴⁹ This, once again, illustrates the reactive and defensive position that the Tribe has found itself in since ancestral lands were ceded. The Forest Plan could also have done more to facilitate the Tribe's vision (and Tribal Business Council's Proclamation) regarding the return of "Original Buffalo" to "Original Homelands." The agency could do so by taking part of the Tribe's Proclamation and turning it into a desired condition statement or making a "suitability" of use determination regarding Bison in the Badger-Two Medicine.³⁵⁰

Most importantly, the USFS could have used its authority, and embraced its federal trust responsibilities, to formalize a more cooperative management framework for the Badger-Two Medicine. *The Proposal to Establish Permanent Protections for the Badger-Two Medicine* submitted to the USFS by the Blackfeet THPO and Tribal Business Council recommends making the Badger-Two Medicine area "a model of tribally co-managed federal public lands."³⁵¹ The proposed management strategy shares some commonalities with the proposal submitted to President Obama by the Bears Ears Inter-Tribal Coalition and is based on the core principles of tribal co-management reviewed in Table 1. The Blackfeet Proposal includes establishment of a commission, dispute resolution mechanisms, provisions related to funding and capacity building, a tribal consent provision related to new uses of the area, and encouraging the use of existing contract/agreement/MOU authorities, among other core principles of tribal co-management. The management strategy also requests the integration of traditional and historical knowledge and the special expertise of the Tribe into the development and implementation of a management plan. This too could be formalized using the 2012 Rule's new provision related to "Native knowledge."³⁵²

As discussed in Part II(D)(3), the USFS's response to this carefully crafted proposal was to first muddle the meaning of co-management and to then dismiss it altogether: "The Tribe has also expressed an interest in co-management of the area. However, only Congress has the authority to change Federal land management agency jurisdiction."³⁵³ Of course, the Tribe did not ask for a change of jurisdiction and the USFS has existing authority to work in a more structured and

³⁴⁹ Letter to Supervisor Bill Avey from Chairman Timothy Davis (Feb. 20, 2020) and Letter to Supervisor Bill Avey from Pikuni Traditionalists Association (Feb 23, 2020) (on file with authors).

³⁵⁰ The 2012 Planning Rule states that "[s]pecific lands within a plan area will be identified as suitable for various multiple uses or activities based on the desired conditions applicable to those lands." 36 C.F.R. §219.7(e)(1)(v) (2020). Other than timber suitability, the USFS has discretion in making suitability determinations for other resources and uses.

³⁵¹ PROPOSAL TO ESTABLISH PERMANENT PROTECTIONS, at 2.

³⁵² 36.C.F.R. §219.4(a)(3) (2020). Native knowledge defined as: "A way of knowing or understanding the world, including traditional ecological and social knowledge of the environment derived from multiple generations of indigenous peoples' interactions, observations, and experiences with their ecological systems. Native knowledge is place-based and culture-based knowledge in which people learn to live in and adapt to their own environment through interactions, observations, and experiences with their ecological system. This knowledge is generally not solely gained, developed by, or retained by individuals, but is rather accumulated over successive generations and is expressed through oral traditions, ceremonies, stories, dances, songs, art, and other means within a cultural context." 36 C.F.R. §219.19 (2020).

³⁵³ U.S. Forest Service, *Draft Record of Decision: Helena-Lewis and Clark National Forest 2020 Land Management Plan* (2020), at 6.

cooperative framework with the Tribe, an authority that was more explicitly recognized in the 1986 Forest Plan.³⁵⁴

4. Recommendations

In the absence of tribal co-management legislation, the executive actions could facilitate this type of bridge-building or cross-walking between the NHPA and federal lands planning. NHPA’s Section 106 regulations already call for consultation to be “coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency specific legislation.”³⁵⁵ The Council on Environmental Quality and the Advisory Council on Historic Preservation provides detailed guidance on how best to integrate and coordinate Section 106 and NEPA planning, including the use of “NEPA documents to facilitate Section 106 consultation,” and using “Section 106 to inform the development and selection of alternatives in NEPA documents.”³⁵⁶ Federal public land laws require plans to be prepared in accordance with NEPA,³⁵⁷ so there exists an opportunity to use land use plans in a more pro-active and strategic fashion in the future.³⁵⁸

What is needed, however, is executive leadership to ensure that public land agencies are using their available authorities to protect cultural resources, sacred places and treaty rights on public lands—and to do so in a more cooperative and sovereignty-affirming way with tribes. The President should also ensure that federal lands planning regulations; agency-specific manuals, handbooks and policies related to cultural resources and tribal relations; and programmatic agreements done pursuant to the NHPA, comport with the first principles of federal Indian law reviewed in Part I and the core principles of tribal co-management outlined in Part III(F).

Most “first generation” plans prepared by the USFS and BLM are now decades old and fail to provide any meaningful or enforceable provisions at all related to Tribal cultural resources, sacred lands and reserved treaty rights. Nor do they reflect or incorporate any of the significant policy developments related to tribal relations, such as Secretary Jewell’s Order (3342) on identifying opportunities for cooperative and collaborative partnerships with Tribes in the

³⁵⁴ The 1986 Forest Plan include the following standard: “Establish a working group with representatives of the Blackfoot Tribe and the Bureau of Indian Affairs in order to negotiate agreements which will enable both the Forest Service and the Blackfoot Tribe to share in the management of those resources reserved by the Blackfoot Tribe. An Agreement under this guideline need not affect the legal status of those reserved rights.” U.S. FOREST SERVICE, LEWIS AND CLARK NATIONAL FOREST PLAN, 2-60 (1986).

³⁵⁵ 36 C.F.R. §800.2 (a)(4) (2020).

³⁵⁶ COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT AND ADVISORY COUNCIL ON HISTORIC PRESERVATION, NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, 5 (Mar. 2013). See also 36 C.F.R. §800.8(c) (2020) (“Use of NEPA process for section 106 purposes”).

³⁵⁷ See e.g., 16 U.S.C. §1604(g)(1) (2018); C.F.R. §1502.25 (2020).

³⁵⁸ See e.g., USDA Office of Tribal Relations and USDA Forest Service, Report to the Secretary of Agriculture: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites (2012), at 41 (recommending the forest planning process as a “proactive process for evaluating methods of protecting sacred sites.”). See also Jonathan W. Long and Frank K. Lake, *Escaping Social-Ecological Traps Through Tribal Stewardship on National Forest Lands in the Pacific Northwest, United States of America*, 23(2) ECOLOGY & SOC’Y 10 (2018) (reviewing stewardship strategies and the more than 70 federally recognized tribes having lands and ancestral territory within the boundaries of the Northwest Forest Plan, which is at early stages of plan revision).

management of federal lands and resources. The President can help ensure that every plan revision prepared by federal public land agencies effectuate these Orders and the principles on which they are based.³⁵⁹

³⁵⁹ We hope to provide more agency-specific planning modules in subsequent phases of this project. These modules will showcase how the USFS, BLM, NPS and USFWS could use their planning processes to provide substantive protections for Native American traditional cultural landscapes, sacred sites and reserved treaty rights. To be included at this stage is more strategic use of NHPA-based Programmatic Agreements. This is an important window of opportunity, with several high-profile planning endeavors now underway, such as the revision of the Northwest Forest Plan. It is crucial for Tribes to be engaged in these processes at the earliest possible stages of plan development.

III. Tribal Co-Management: History, Law and Politics

There are legal, symbolic and normative dimensions of the term co-management. Is the term just short-hand for “cooperative management” or does the use of the prefix *co-* (meaning: with, together, joint, jointly) make it something different, especially when preceded by the word tribal? This unwieldy term is often subject to inconsistent interpretations and applications, and of course, politics.

This section provides background on tribal co-management in the U.S with an emphasis on law and policy. It reviews the origins, variations, multiple definitions, and legal parameters of co-management. Reviewed are substantive cases of shared authority and responsibility among sovereigns that are officially labeled “cooperative management” or something similar, and cases referred to as “co-management” that are anything but cooperative. We therefore focus more on how co-management is operationalized and recommend that it be built on a set of core principles. We also review recent tensions between members of Congress and the executive branch regarding the authority to enable tribal co-management on public lands, including the issue of delegation-of-authority. Though legislation, either system-wide or place-based, provides the clearest and most durable pathway for tribal co-management, the President has considerable powers and precedent to affirm tribal sovereignty and effectuate the federal government’s treaty and trust obligations through innovations in shared governance. The section concludes by responding to some of the more frequent questions and concerns about tribal co-management.

A. Legal Roots

The legal roots of tribal co-management of natural resources in the U.S. can be traced to the assertion of Treaty-based fishing rights in the Pacific Northwest. As discussed above, among these reserved rights is the “the right of taking fish, at all usual and accustomed grounds and stations.” The States of Oregon and Washington took several actions to eliminate and restrict the nature and application of these treaty rights. The intensifying conflicts between States and Tribes led to several interconnected judicial decisions that essentially compelled a co-management approach to fisheries management in the Northwest.

Judicial review and close court supervision was necessary in order to ensure that the States did not continue to act in ways unfair and discriminatory.³⁶⁰ In *Sohappy v. Smith* (1969), Judge Belloni encouraged the State of Oregon and the Tribes, as sovereigns, to pursue a more “cooperative approach.”³⁶¹ Co-management between the Tribes and States resulted from the court’s continuing jurisdiction over implementation of the decree and his call for the State to

³⁶⁰ The Ninth Circuit provides background in *United States v. Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978):

The record in this case and the history set forth [in related cases] make it crystal clear that it has been [the] recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian fishing rights requiring intervention by the District Court...The state’s extraordinary machinations in resisting the [previous] decree have forced the district court to take over a large share of the management of its decree. Except for some desegregation cases...the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

³⁶¹ *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Or. 1969).

ensure that the Tribes have “meaningful participation” in the regulatory process.³⁶² Several Tribal-State co-management plans for the Columbia River resulted from these processes and similar patterns explain co-management of fish and wildlife in Washington State, with the famous “Boldt decision” serving as a catalyst in 1974.³⁶³ Co-management was also “born in the shadow of the court” in the upper Great Lakes region,³⁶⁴ with decades of litigation focused on the Ojibwe Tribes reserved rights to hunt, fish, trap and gather resources on ceded territories in Minnesota, Michigan and Wisconsin.³⁶⁵

The co-management agreements stemming from these cases are between Tribes and States. However, federal public land is an important factor because of the fish and wildlife habitat it provides and because several of the rights reserved by Tribes at “usual and accustomed places” and “open and unclaimed lands” are managed by federal land agencies.

As we discuss in Part I, off-reservation treaty rights include by implication the protection and perpetuation of the resource.³⁶⁶ In some cases, courts have enjoined activities, such as USFS timber sales, to protect treaty resources, such as deer herds reserved by treaty for Klamath Tribes.³⁶⁷ In other cases, federal agencies are more proactive and entered into a range of formal and informal agreements to more effectively administer off-reservation treaty rights. Examples include Memorandums-of-Understanding between the USFS and Nez Perce Tribe that exempt tribal members from campground fees and stay limits when they are practicing treaty rights on

³⁶² Michael C. Blumm & Cari Baermann, *The Belloni Decision and Its Legacy: United States v. Oregon and Its Far-Reaching Effects After a Half Century*, 50 ENVTL. L. 347, 382 (2020) (“The federal court thus became a central component in developing co-management plans, reworking federal-state relations along the way.”)

³⁶³ See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F. 2d 676 (9th Cir. 1975). The decision was ultimately upheld by the Supreme Court in *Washington v. Washington State Commercial Passenger Fish Vessel Ass’n*, 443 U.S. 658 (1979).

³⁶⁴ Tom Busiahn & Jonathan Gilbert, *The Role of Ojibwe Tribes in the Co-management of Natural Resources in the Upper Great Lakes Region: A Success Story*, GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, 3 (2009), available at <http://www.glifwc.org/minwaaajimo/Papers/Co-management%20Paper%20Busiahn%20%20FINAL.pdf>. *The Chippewa Intertribal Agreement Governing Resource Management and Regulation of Off-Reservation Treaty Rights in the Ceded Territory* called for “an effective intertribal mechanism for co-management of the resources subject to the treaty right” and assigned this responsibility to the Voigt Intertribal Task Force. *Id.* at 4.

³⁶⁵ See Ann McCammon-Soltis & Kekek Jason Stark, *Fulfilling Ojibwe Treaty Promises—An Overview and Compendium of Relevant Cases, Statutes and Agreements*, GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION (2009), available at <http://www.glifwc.org/minwaaajimo/Papers/Legal%20Paper%20-%20DIA.pdf>

³⁶⁶ See e.g., Jason D. Sanders, Comment, *Wolves, Lone and Pack: Ojibwe Treaty Rights and the Wisconsin Wolf Hunt*, 2013 WISC. L. REV. 1263 (recommending co-management as a way for Ojibwe Tribes to protect wolves in their ceded territory while recognizing the State of Wisconsin’s legitimate interest in wolf depredation and management).

³⁶⁷ *Klamath Tribes v. United States*, 1996 WL 924509, *8 (D. Or. Oct. 2, 1996) (the federal government has a “substantive duty to protect ‘to the fullest extent possible’ the Tribes’ treaty rights, and the resources on which those rights depend.”). See Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, at 611, for a review of the agreement between the Klamath Tribes and the Fremont-Winema National Forest. The Memorandum of Agreement mandates government-to-government coordination at the regional forester-level and quarterly meeting between Tribal program directors and forest supervisors. It also creates a special process to be used by the USFS when considering tribally-initiated proposals and recommendations, and calls for Tribal involvement with USFS interdisciplinary teams. For an update on contemporary developments, including development of a Forest Plan, see Will Hatcher et al., *Klamath Tribes: Managing Their Homeland Forests in Partnership with the USDA Forest Service*, 115(5) J. FORESTRY 447 (2017).

ceded territory³⁶⁸ and an agreement between the USFS and Yakama Tribe regarding exclusive use of an area on the Gifford Pinchot National Forest during huckleberry season.³⁶⁹

A deeper formalized agreement exists between the Leech Lake Band of Ojibwe and the Chippewa National Forest in Minnesota. The history of this agreement is more complicated than most, due partly to the fact that roughly 90 percent of the Leech Lake Indian Reservation is within the Chippewa National Forest and 45 percent of the Forest is within the Reservation.³⁷⁰ The Chippewa was also the first National Forest created by statute, with the Minnesota National Forest Act of 1908 including several provisions specifically related to the Chippewa Indians.³⁷¹ The issue of reserved treaty rights on the Chippewa “has been a knotty and vexatious one for years.”³⁷² In order to find a more cooperative path forward, a substantive MOU was entered into between the USFS and Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe in 2019.³⁷³ The agreement calls for “developing a shared decision-making model,” “utilizing Traditional Ecological Knowledge,” and “expanding the Tribal Forest Protection Act to give voice to the Band’s land management objectives.”³⁷⁴ The MOU includes specific and mutually agreeable protocols for communication, consultation, monitoring and dispute resolution, among others.

A key attribute of the agreement, and a core theme emphasized in this Report, is the importance of early and meaningful tribal engagement and coordination in USFS decision making, at the project and plan level. The MOU, for example, provides the Tribe an opportunity to review contemplated projects or activities that are not on the USFS’s formal “Schedule of Proposed Actions.”³⁷⁵ It also provides for tribal coordination—through NEPA’s cooperating agency provision, structured participation at key meetings, and/or pre-decisional quarterly updates—prior to public scoping; and a consultation framework that must precede the release of a NEPA-based categorical exclusion, environmental assessment or draft environmental impact statement.³⁷⁶ As discussed below, the MOU has several core attributes of a tribal co-management model.

³⁶⁸ See e.g., Robin Mark Stewart, *Tribal Reserved Rights on Region One National Forests and Grasslands* (Masters Thesis, University of Montana, College of Forestry and Conservation, 2011) (includes a collection of MOUs and Agreements with Tribes having reserved rights in Region 1 of the National Forest System) (on file with authors)

³⁶⁹ The “1932 Handshake Agreement” is further formalized in the 1990 Gifford Pinchot Land and Resource Management Plan (1990). For a discussion see Lauren Goschke, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of the Huckleberries in the Northwest*, COLO. NAT. RES., ENERGY & ENVTL. L. REV. 315, 341-342 (2016).

³⁷⁰ *Tribal Relations*, USDA FOREST SERVICE, CHIPPEWA NATIONAL FOREST, <https://www.fs.usda.gov/main/chippewa/workingtogether/tribalrelations> (last visited August 27, 2020).

³⁷¹ Pub. L. No. 60-137, 35 Stat. 268 (May 23, 1908).

³⁷² *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1003 (D. Minn. 1971). See also *United States v. Michael D. Brown*, 777 F. 3d 1025 (8th Cir. 2015) (providing a history of the Forest and reserved treaty rights).

³⁷³ Memorandum of Understanding Between the USDA Forest Service, Chippewa National Forest and the Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe, (Oct. 4, 2019), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd672397.pdf.

³⁷⁴ *Id.* at 1.

³⁷⁵ *Id.* at 6.

³⁷⁶ *Id.* at 7-10.

B. Tribal Co-Management by Statute and Treaty

Congress can also authorize or compel the use of tribal co-management and has done so most clearly with subsistence use in the State of Alaska. The Marine Mammal Protection Act (MMPA) of 1972 was amended in 1994 with a co-management provision now found in Section 119 of the Act: “The Secretary may enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”³⁷⁷ The Act permits grants and agreements with statutorily-established co-management bodies—Alaska Native Organizations—for purposes including: “(1) collecting and analyzing data on marine mammal populations; (2) monitoring the harvest of marine mammals for subsistence use; (3) participating in marine mammal research conducted by the Federal Government, States, academic institutions, and private organizations; and (4) developing marine mammal co-management structures with Federal and State agencies.”³⁷⁸

The term co-management is not defined in the statute or MMPA regulations. As a result, two assessments of MMPA-based co-management in Alaska, by the Marine Mammal Commission, found diverging interpretations of the term that can lead to inconsistent applications.³⁷⁹ As discussed in Part IV(A), Section 119 of the MMPA restricts the activities that are subject to co-management, especially in contrast to the Act’s provisions permitting the transfer of management authority to State Governments.

A more complicated example, including a mix of Congressional and Executive powers, is the 1995-96 “Canada Protocol” amending the Migratory Bird Treaty Act (MBTA) of 1918.³⁸⁰ The Protocol creates an exemption for “indigenous inhabitants” of Alaska and Canada to take migratory birds and their eggs during the closed season and created a management body—the Alaska Migratory Bird Co-Management Council—to develop recommendations for the management of these subsistence hunts. The body is “created to ensure an effective and meaningful role for indigenous inhabitants in the conservation of migratory birds” and includes “Native, Federal, and State of Alaska representatives as equals.”³⁸¹ The body is “intended to provide more effective conservation of migratory birds in designated subsistence harvest areas without diminishing the ultimate authority and responsibility of DOI/FWS.”³⁸²

Another Alaska example, built on a mixture of statutory and executive authorities, is the Kuskokwim River Inter-Tribal Fish Commission that was established in 2015 with the purpose

³⁷⁷ 16 U.S.C. §1388

³⁷⁸ 16 U.S.C. §1388

³⁷⁹ REPORT OF THE MARINE MAMMAL COMMISSION, REVIEW OF CO-MANAGEMENT EFFORTS IN ALASKA (Anchorage, AK: Feb., 6-8, 2008); and J.C. MALEK & V.R. CORNISH, CO-MANAGEMENT OF MARINE MAMMALS IN ALASKA: A CASE STUDY-BASED REVIEW: FINAL REPORT (Bethesda, MD: Marine Mammal Commission, 2019).

³⁸⁰ Message from the President of the United States Transmitting a Protocol Between the U.S. and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the U.S., Aug. 2, 1996, S. TREATY DOC. NO. 104-28 at viii, ix (1996). An existing statute (16 U.S.C. 712) authorizes the Department of Interior to promulgate regulations to implement the migratory bird treaties, with no additional statutory authority being required to implement the Protocol.

³⁸¹ Protocol Amending the 1916 Convention for the Protection of Migratory Birds, at x. *See also* 50 C.F.R. §92.4 (2020) (“Co-management Council means the Alaska Migratory Bird Co-Management Council consisting of Alaska Native, Federal, and State of Alaska representatives as equals.”)

³⁸² Protocol Amending the 1916 Convention for the Protection of Migratory Birds, at x.

of rebuilding declining salmon resources “to support and preserve a way of life that is vital for people’s nutritional, economical, and cultural needs,” using both “indigenous knowledge systems and scientific principles.”³⁸³ A memorandum-of-understanding (MOU) between the Commission and U.S. Fish and Wildlife Service “formalizes a management partnership that begins to address the long-standing desire of Alaska Native Tribes in the Kuskokwim Drainage to engage as co-managers of fish resources.”³⁸⁴ Several authorities are referenced to support the co-management approach, including the Subsistence Title of the Alaska National Interest Lands Conservation Act (ANILCA), but also multiple Executive and Secretarial Orders focused on tribal consultation and the Department’s Federal Trust Responsibility (as reviewed in Part I),³⁸⁵ once again demonstrating how existing authority can be used to fashion variations of tribal co-management.

C. Disputed Authority to Enable Tribal Co-Management

Congress, having plenary powers over federal public lands and Indian affairs, possesses clear authority to sanction the use of tribal co-management. Some members of Congress have recently asserted this power as a way to challenge executive actions that are perceived as authorizing tribal co-management. Jason Chaffetz (R-UT), then acting as Chairman of the House Committee on Oversight and Government Reform, challenged Secretary of Interior Sally Jewell’s Order (No. 3342) in 2016 focused on “Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources.”³⁸⁶ Order No. 3342 focused on existing statutory authorities that permit “cooperative agreements” and “collaborative partnerships” with Tribes and carefully distinguished these opportunities with co-management, which Interior defines “as a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decision-making or that makes co-management otherwise legally necessary,” such as the co-management of the salmon harvest in the Pacific Northwest.³⁸⁷ “Despite claims to the contrary,” said Representative Chaffetz, “[C]o-management of public lands requires approval by Congress” and “Some may inaccurately view your order as establishing a co-management relationship for control and use of the land. You do not have that authority.”³⁸⁸

The same assertion was made by Secretary of Interior Ryan Zinke in his review of national monuments as ordered by President Trump.³⁸⁹ The Secretary’s Monument Report recommended the President “request congressional authority to enable tribal co-management” for four existing monuments (Bears Ears, Gold Butte, Organ Mountains-Desert Peaks, and Rio Grande Del Norte) and for the Badger-Two Medicine area to be considered for designation and a candidate for tribal

³⁸³ See *History & Mission*, KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, <https://www.kuskosalmon.org/mission-history> (last visited Aug. 27, 2020).

³⁸⁴ Memorandum of Understanding Between U.S. Fish and Wildlife Service Alaska Region and Kuskokwim River Inter-Tribal Fish Commission, 1 (2016).

³⁸⁵ *Id.*, at 2.

³⁸⁶ Letter from Jason Chaffetz, Chairman, U.S. House Comm. on Oversight & Gov’t Reform, to Sally Jewell, Sec’y, U.S. Dept. of the Interior (Dec. 29, 2016).

³⁸⁷ Secretary of Interior Order No. 3342, 4 (2016).

³⁸⁸ Letter from Jason Chaffetz, Chairman, U.S. House Comm. on Oversight & Gov’t Reform, to Sally Jewell, Sec’y, U.S. Dept. of the Interior (Dec. 29, 2016).

³⁸⁹ Executive Order 13792, Review of Designations Under the Antiquities Act (Apr. 26, 2017).

co-management in the future.³⁹⁰ Though the Secretary’s Report does not define co-management, it insists that “such authority is not available to the President; it must be granted by Congress.”³⁹¹

D. Tribal Co-Management and Delegation of Authority

These challenges to the executive branch’s authority to sanction tribal co-management are in large part based on the so-called “subdelegation doctrine.” This doctrine limits the ability of executive agencies to delegate the powers it was given by Congress to other actors.³⁹² As it is most commonly understood, the subdelegation doctrine basically forbids federal agencies from delegating *final decision making authority* to another party, meaning that federal delegations of authority may be permissible so long as the federal official retains final reviewing power. This authority “must be a meaningful retention of control over the activity of the private party, through oversight, veto, or otherwise” so that the “Federal agency may ensure that the actions it takes support the national interest, and that the Federal role is not subordinated inappropriately to parochial interests.”³⁹³

Statutory authority is also important to understanding the limits of subdelegation because “the relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate the authority conferred by Congress.”³⁹⁴ Absent this statutory authority to subdelegate, the federal agency must retain final decision making authority.³⁹⁵

Closely related to the subdelegation issue is the determination of what activities are “*inherently governmental activities*,” which as a rule cannot be delegated absent congressional authority. The Office of the Solicitor, in the Department of Interior, offers as examples delegating the final decision to grant or deny a permit or application and determining to whom a parcel of federal land may be sold as violating the restriction on delegations of inherently governmental activity.³⁹⁶ This restriction, applied to tribal contracting, is also codified in the Tribal Self-Governance Act (TSGA) of 1994, which authorizes Interior Department agencies to delegate “functions” that are not “inherently federal” to participating tribes.³⁹⁷ As discussed in Part II(C), it is within this particular statutory context that the “inherently” governmental/federal issue has been most closely analyzed.

³⁹⁰ Secretary of Interior, Ryan Zinke, *Memorandum for the President: Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act*, 9 (2017).

³⁹¹ *Id.*

³⁹² Stated differently, subdelegation happens when an agency “redelegates” the authority it was delegated by Congress. Thus, the term “redelegation” is sometimes used in this context.

³⁹³ DEPT. OF INTERIOR, OFFICE OF SOLICITOR, PARTNERSHIP LEGAL PRIMER, 13 (2004).

³⁹⁴ *Nat’l Park and Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999)

³⁹⁵ *Id.* (“Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority.”)

³⁹⁶ PARTNERSHIP LEGAL PRIMER, at 13.

³⁹⁷ 25 U.S.C. § 458cc(k) (2006) (providing that annual agreements cannot include programs, services, functions, or activities that are “inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe.”) *See also* Memorandum of Agreement Between Bureau of Indian Affairs, Office of Self-Governance, Office of Natural Resources Revenue, and Bureau of Land Management (Feb. 24, 2020) (providing examples of inherently and contractible functions for oil and gas development on Indian reservations) (on file with authors).

We believe that the limits imposed by the subdelegation doctrine do not preclude the executive branch from using its powers to institutionalize variations of tribal co-management. Most of the definitions of co-management in Table 2 do not include a delegation of authority component or call for tribal unilateralism.³⁹⁸ After all, a complete and unqualified delegation to tribes, in terms of transferring ownership or decision making authority, is best characterized as tribal management and not co-management. The definitions and cases reviewed herein are instead a call to end federal unilateralism in decision making; thus, the focus on shared governance and the strategic advantages of two sovereigns working together in a more coordinated and systematic fashion. “*To share* authority and responsibility” is the most common denominator in definitions of co-management.³⁹⁹

Discussed below are two variations of “co-management” using executive authority under the Antiquities Act. Both cases successfully navigated the subdelegation issue and we discuss in Part V other leverage points the next President could use to enable tribal co-management on public lands. There, we also recommend that the next Administration clarify how the subdelegation doctrine and “inherently governmental/federal” limitation applies more specifically to Native Nations in light of recent case law and developments in tribal co-management, such as the case of Bears Ears discussed below.

We believe that a reframing of this issue is in order, to distinguish what are more properly considered “sovereignty-affirming subdelegations” that “affirm tribal sovereignty by intermingling federal and tribal power.”⁴⁰⁰ We further advise a reconsideration of the term “delegation”—which can be defined as *giving* powers and duties to another, who is often less senior—when it comes to the management of rights that were *reserved* by Tribes. Furthermore, as we discuss below, the subdelegation issue must also be considered in the larger realm of political accountability,⁴⁰¹ including the ability to seek legal redress, and we believe co-management frameworks can be constructed to hold tribes *and* federal agencies accountable.

E. Co-Management and Executive Authority

One national monument not reviewed by Secretary Zinke is Kasha-Katuwe Tent Rocks in New Mexico, established by President Clinton in 2001. The President’s proclamation emphasized the indigenous history of this area and made clear that the BLM *shall* manage the Monument “in close cooperation with the Pueblo de Cochiti.”⁴⁰² An assistance agreement is used to fulfill this mandate and applies to a range of management responsibilities of the Pueblo, from trail

³⁹⁸ Interestingly, one of the few conservation laws officially enabling tribal co-management, and administered by Interior—the Canada Protocol amending the MBTA—makes clear that co-management is intended to provide more effective conservation and subsistence management “without diminishing the ultimate authority and responsibility of DOI/FWS.”

³⁹⁹ See e.g., the collective work of Fikret Berkes, including *Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning*, 90 J. ENVTL MGMT. 1692 (2009).

⁴⁰⁰ Samuel Lazerwitz, *Sovereignty-Affirming Subdelegations: Recognizing the Executive’s Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STANFORD L. REV. 1041 (2020) (proposing a presumption that “sovereignty-affirming subdelegations” are permissible unless Congress has expressly indicated otherwise).

⁴⁰¹ See *United States Telecom Ass’n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (reviewing subdelegation and its relationship to political accountability).

⁴⁰² Proclamation No. 7394, 66 Fed. Reg. 7343 (Jan. 22, 2001).

maintenance and visitor services to coordinating law enforcement with the BLM. Though the term co-management is not used in the President’s Proclamation, Kasha Katuwe is widely regarded as an important early case study of co-management⁴⁰³ or what the Department of Interior labels “joint management.”⁴⁰⁴

The case of Kasha Katuwe demonstrates why there is no bright line that clearly distinguishes congressional and executive powers to authorize, compel or encourage Tribal co-management. In this case, the Proclamation built on previous actions by the Pueblo and BLM to share power and responsibility as permitted by law⁴⁰⁵ and the agency uses assistance agreements that are already authorized by statute.⁴⁰⁶ Final decision making power is retained by the BLM, but there is a government-to-government partnership between the BLM and Tribal Council and the Pueblo was able to participate early and substantively in shaping the area’s management plan and range of acceptable uses prior to public comment, not as another stakeholder but as a sovereign government.⁴⁰⁷

President Obama’s establishment of Bears Ears National Monument provides another example of executive authority to lawfully sanction and shape co-management.⁴⁰⁸ As in the case of Kasha Katuwe, the term co-management is not used in Obama’s Proclamation but Bears Ears nonetheless provides a truly collaborative and innovative framework of governance⁴⁰⁹—all within the authority provided by the Antiquities Act and comporting with the subdelegation principles reviewed above. On a deeper level, this tribally led proposal shows how “public land laws can become vehicles for equality and justice, even if they initially served the interests of the politically and economically powerful.”⁴¹⁰

The Proclamation ensures tribal consultation and that in developing and implementing the area’s management plan “the Secretaries shall maximize opportunities, pursuant to applicable legal authorities, for shared resources, operational efficiency, and cooperation.”⁴¹¹ Most significant, however, is the creation of a tribally based “Bears Ears Commission:”

In recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that the management decisions affecting the monument reflect tribal expertise and traditional and historical

⁴⁰³ Sandra Lee Pinel & Jacob Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, 49 J. ENVTL MGMT. 593 (2012).

⁴⁰⁴ Native American Sacred Places: Hearing Before the S. Comm. on Indian Affairs, 108th Cong. 1st Sess. (2003) (statement of William D. Bettenberg, Director, Office of Policy Analysis, Department of Interior), at 46.

⁴⁰⁵ Pinel & Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, at 598.

⁴⁰⁶ Section 307(b) of FLPMA provides that “the Secretary may enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.” 43 U.S.C. § 1737(b)

⁴⁰⁷ Pinel & Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, at 599.

⁴⁰⁸ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016)

⁴⁰⁹ See Charles Wilkinson, “At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top”: *The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317, 331 (2018).

⁴¹⁰ Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARVARD CIV. R.-CIV. LIB. L. REV. 213, 216 (2018)

⁴¹¹ Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016)

knowledge, a Bears Ears Commission is hereby established to provide guidance and recommendations on the development and implementation of management plans and on management of the monument.⁴¹²

As for delegation of authority, the Bears Ears Proclamation differs from the proposal submitted to the President by the Bears Ears Inter-Tribal Coalition. The Coalition carefully dissected the issue of what constitutes a lawful delegation of authority to Tribes and premised its proposal on the basis that a delegation of authority is permissible insofar as it is not total and remains subject to the final decision-making authority of the Secretaries of Agriculture and Interior.⁴¹³ Instead of delegating complete authority, “the Tribes and agency officials will be working together as equals to make joint decisions.”⁴¹⁴

Though a modification of the Coalition’s proposal, the Bears Ears Proclamation establishes a substantive framework for collaborative management of the Monument:

The Secretaries shall meaningfully engage the Commission or, should the Commission no longer exist, the tribal governments through some other entity composed of elected tribal government officers (comparable entity), in the development of the management plan and to inform subsequent management of the monument. To that end, in developing or revising the management plan, the Secretaries shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission or comparable entity. If the Secretaries decide not to incorporate specific recommendations submitted to them in writing by the Commission or comparable entity, they will provide the Commission or comparable entity with a written explanation of their reasoning.⁴¹⁵

Events happening after the Proclamation demonstrate how the term co-management can be politically appropriated and purposefully misused. One of the concerns expressed by Secretary Zinke in his review of national monuments, and most clearly articulated in the context of Bears Ears, was the purported lack of executive authority to enable tribal co-management. Shortly after the revocation of Bears Ears by President Trump, the Shásh Jaa’ and Indian Creek National Monument Act was introduced⁴¹⁶ and partially framed as Congress authorizing tribal co-management of the two units, and was supported as such by the Department of Interior.⁴¹⁷

The problem, however, is that the bill did no such thing as it basically relegates sovereign tribes to stakeholder status and was developed without any tribal consultation. For these and other reasons, the Bears Ears Inter-Tribal Coalition “adamantly opposes” the bill and views it as

⁴¹² *Id.*

⁴¹³ BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT, 27 (2015).

⁴¹⁴ *Id.* at 26.

⁴¹⁵ Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016)

⁴¹⁶ H.R. 4532 (115th Cong.)

⁴¹⁷ Statement of Casey Hammond, Deputy Assistant Secretary for Land and Minerals Management, U.S. Dept. of Interior, Before the Natural Resources Committee, Subcommittee on Federal Lands, U.S. House of Representatives on H.R. 4532 Shásh Jaa’ National Monument and Indian Creek National Monument Act, Jan. 30, 2018, at 6-7.

violating “basic tenets of federal Indian law and the United States’ treaty, trust and government-to-government relationship with Indian tribes.”⁴¹⁸

F. Core Principles and Attributes of Tribal Co-Management

The Bears Ears story advises that we carefully scrutinize conceptions of co-management and pay more attention to how it is operationalized. Though definitions are important, especially for the purpose of creating mutual understanding and common expectations, what matters most are the core principles or attributes of a co-management approach, regardless of whether the term is used or substituted for “cooperative management,” “collaborative management,” “joint management,” or some variation thereof.

Thinking in terms of core principles may also lead to more consistent and less defensive uses of the term co-management by federal agencies. The current situation causes unnecessary conflict and confusion. Consider, for example, Secretary Jewell’s Order 3342 which distinguishes “cooperative and collaborative opportunities” with Tribes from “co-management.”⁴¹⁹ One of the exemplary “partnerships” referenced in the Order is the Kuskokwim River Intertribal Fisheries Commission, which the Order says “functions in an advisory capacity.”⁴²⁰ But as discussed above, the MOU specifically sets up Alaska Native Tribes as *co-managers* of fish resources. Why? Because “[t]he people of the Kuskokwim River are no longer satisfied with serving in an advisory role to state and fishery managers.”⁴²¹

How the term is conceived by the USFS provides another example. The agency’s traditional line is that it has no co-management authority whatsoever because of the subdelegation principles reviewed above. For example, USFS responded to the Blackfoot Tribe’s interest in co-management of the Badger-Two Medicine by stating that “only Congress has the authority to change Federal land management agency jurisdiction.”⁴²² Of course, the Tribe never requested a change in administrative jurisdiction, just a more meaningful and pro-active role in the management of their sacred lands and reserved rights. By contrast, the agency appears much more comfortable with the term co-management when Indian tribes are not the focus. For example, a very collaborative-based forest plan in Puerto Rico “takes partnerships a step further” by embracing a “co-management approach” on the El Yunque National Forest.⁴²³ And, as

⁴¹⁸ Testimony of the Bears Ears Inter-Tribal Coalition, Before the U.S. House of Representatives, Committee on Natural Resources, Subcommittee on Federal Lands, Legislative Hearing on H.R. 4532 the Shásh Jaa’ National Monument and Indian Creek National Monument Act, Jan. 9, 2018.

⁴¹⁹ Secretary of the Interior Order No. 3342 (2016)

⁴²⁰ *Id.* at 6.

⁴²¹ *History & Mission*, KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, <https://www.kuskosalmon.org/mission-history> (last visited Aug. 27, 2020).

⁴²² U.S. FOREST SERVICE, DRAFT RECORD OF DECISION: HELENA-LEWIS AND CLARK NATIONAL FOREST 2020 LAND MANAGEMENT PLAN, 6 (2020).

⁴²³ U.S. FOREST SERVICE, DRAFT REVISED LAND AND RESOURCE MANAGEMENT PLAN, 9 (2016). The Plan provides a very thoughtful and deliberate definition of co-management and makes clear that planners and the public clearly understood that it does not mean the agency had delegated its authority. Instead, “Co-management is the strategic and site-specific engagement of FS and active partners working together in general forest operations, conservation and restoration activities with a practical sense of shared responsibilities to achieve the Mission [and] it goes one step beyond partnering by increasing capacity based actions.” *Id.*

discussed in Part IV(C), the USFS embraces the concept as a way to “co-manage” fire risk when working with State governments in an atmosphere of “shared stewardship.”

We believe that much of this confusion and inconsistency can be alleviated with a clearer focus on the core principles of tribal co-management. Here, we build on the insightful and groundbreaking work of attorney Ed Goodman who breaks co-management down into a set of fundamental principles. If applied, says Goodman, the principles could “clarify a process of shared management and decision making authority that fully incorporates the input and expertise of both parties into a mutual and participatory framework.”⁴²⁴ Though Goodman’s work focuses on reserved hunting and fishing rights, we believe that these principles can also be applied more broadly to tribal co-management on public lands. In Table 1, we describe Goodman’s principles while also providing our own observations from the cases reviewed in this Report.

⁴²⁴ Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 343 (2000).

Table 1. Fundamental Principles of a Tribal Co-Management Approach

<p>1. Recognition of Tribes as Sovereign Governments</p>	<p>-Tribal co-management regime developed in recognition of the tribes’ status as sovereigns.</p> <p>Examples: -Indian Self-Determination Act, Native American Graves Protection and Repatriation Act, Treatment-as-State provisions of the Clean Air and Clean Water Act. -Shared sovereignty as the legal basis of Treaty fishing cases in Pacific Northwest and Upper Great Lakes States, - Canada Protocol’s (MBTA) creation of co-management body: “Native, Federal, and State of Alaska representatives <i>as equals</i>.”</p>
<p>2. Incorporation of U.S. Trust Responsibility</p>	<p>-A substantive and procedural obligation to ensure that tribes are an integral part of decision making process; to include tribal institution and capacity building (and sufficient funding) to ensure that tribal participation as co-managers is effective.</p> <p>Examples: Kuskokwim River MOU authorization based on the FWS’s “government-to-government relationship and trust responsibility” and the Department’s commitment to “programs that further tribal self-determination.”</p>
<p>3. Legitimation Structures for Tribal Involvement</p>	<p>-Federal agencies and tribes must make community education regarding tribal role in decision making an integral part of co-management approach. -Ensuring that institutional arrangements are structured in a manner to address non-Indian concerns.</p> <p>Examples: -Creation of co-management bodies such as the Columbia River Inter-Tribal Fish Commission, the Alaska Migratory Bird Co-Management Council, and the Bears Ears Commission -Bears Ears’ establishment of a stakeholder-based advisory committee to advise development of management plan and management of the Monument, as one way to address non-Indian concerns</p>
<p>4. Integration of Tribes Early in the Decision-Making Process</p>	<p>-Meaningful tribal participation includes integration of tribes at earliest phases of planning and decision making, to ensure that tribes can shape the direction of management and not just reactively comment on projects and decisions already developed by agencies.</p> <p>Examples: -BLM’s early substantive engagement, via NEPA, with Pueblo de Cochiti in shaping Resource Management Plan for Kasha-Katuwe National Monument.</p>

	<ul style="list-style-type: none"> -Memorandum of Understanding (2019) between the Chippewa National Forest and Leech Lake Band of Ojibwe -USFS’s Forest Plan for Badger-Two Medicine reflecting some of the Blackfeet Nation’s proposed desired conditions and standards for area. -Badger-Two Medicine Protection Act’s provision related to consideration of tribal management proposals.
5. Recognition and Incorporation of Tribal Expertise	<ul style="list-style-type: none"> -Incorporating tribal expertise and/or traditional ecological knowledge into federal decision making; including a significant degree of deference by federal agencies and the courts in matters concerning management of reserved tribal rights. <p>Examples:</p> <ul style="list-style-type: none"> -Creation of Bears Ears Commission “to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge.”
6. Dispute Resolution Mechanisms	<ul style="list-style-type: none"> -Including mechanisms for resolving disputes among co-managers, as means to further legitimize approach and avoid situations of unilateralism and the use of veto power. <p>Examples:</p> <ul style="list-style-type: none"> -Multiple dispute resolution clauses provided in the State/Tribal Protocols and Court Orders focused on off-reservation rights in Upper Great Lakes Region. -Badger-Two Medicine Protection Act’s interconnected use of management plan for area, tribal coordination provision, consent of new uses provision, public involvement, and establishment of Badger-Two Medicine Advisory Council.

Our most substantive addition to Goodman’s set of core principles is recognition of the co-management institutions or decision-making bodies that emerged as a result of court orders, legislation, or executive actions. These institutions, as we view them, are legitimation structures, and provide a means of incorporating tribal expertise and resolving disputes. They can be traced back to the treaty fishing cases of the Northwest and Great Lakes and the formation of organizations such as the Columbia River Inter-Tribal Fish Commission and the Great Lakes Indian Fish and Wildlife Commission. Statutory-based co-management bodies include the “Alaska Native Organizations” created by the MMPA and the Alaska Migratory Bird Co-Management Council created by the amendment to the MBTA. And finally, the proposed Bears Ears Commission provides an example of a co-management-like body created by the Executive.

G. Common Questions and Concerns about Tribal Co-Management

There are several common questions and concerns about tribal co-management, especially if practiced on federal public lands. On one ugly level are the racist beliefs, bigotry, and animosity

often displayed towards Indians and tribes, especially when they assert their sovereign powers and reserved treaty rights.⁴²⁵ But setting those aside, there are reasonable concerns about co-management and it is important to address them in a more candid and constructive fashion.

Precedent is one of the most common concerns about tribal co-management and what it means for federal public lands. Hundreds of treaties, many with off-reservation use rights, precede the creation of public lands, and these systems are essentially based on aboriginal territory. Given this, the question asked is what piece of public land might not be subject to this approach in the future? Similar concerns are often raised in opposing efforts to protect native sacred sites on public lands, with some interests fearing a sort of tribal land-grab⁴²⁶ or “religious servitude” on public lands as a result.⁴²⁷ And the apprehension is most palpable when debating those rare instances when public lands are restored into tribal or trust ownership and this explains why so many of those transfer statutes included a debate over the precedent established.⁴²⁸

Our response to the precedent concern is to recommend that co-management is done right so that it establishes a positive precedent that all parties want replicated and modified to fit unique situations and particular places. Learn from the failures, practice innovation and make improvements over time. From a conservation standpoint, co-management builds on the measurable successes of indigenous-led conservation in the U.S. and internationally.⁴²⁹

Closely related to this concern are significant trends in the devolution and privatization of public lands, trends that have become only more acute since the land seizure movement was revived in 2012. A selective application of (Red) States’ Rights, coupled with environmental deregulation, is the defining feature of the Trump Administration’s approach to public lands and wildlife conservation.⁴³⁰ When viewed collectively, these executive actions make federal law subservient

⁴²⁵ See e.g., Responses of the Confederated Salish and Kootenai Tribes to Public Comments on the Tribes’ Draft “National Bison Range Transfer and Restoration Act of 2016,” at 6, available at <https://bisonrange.org/wp-content/uploads/2019/10/Public-Comment-Responses-July-2016.pdf> (responding to various sentiments towards Indians and Indian Tribes).

⁴²⁶ Acting Director of the BLM, William Perry Pendley, made this argument frequently when he served as president of the Mountain States Legal Foundation. See William Perry Pendley, *The Establishment Clause and the Closure of Sacred Public and Private Lands*, 83 DENV. U. L. REV. 1023 (2006). He viewed the protection of “purportedly sacred federal land” as a cover for land protection and restricting use and says that as long as “pantheism” is the law, “[M]illions of acres of federal land and goodness know how much private land could be declared sacred and off-limits to the public and the people who own it.” *Id.*, at 1031, 1038,

⁴²⁷ See *Navajo Nation v. U.S. Forest Service*, 408 F. Supp. 2d 866, 904 (2006)

⁴²⁸ See Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, at 638-640.

⁴²⁹ The literature is vast but see the following for references to the science of indigenous-led conservation: Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019); The Nature Conservancy, *Strong Voices, Active Choices: TNC’s Practitioner Framework to Strengthen Outcomes for People and Nature* (Arlington, VA: TNC, 2017). Comparison studies in the U.S. context are rarer but see Donald M. Waller & Nicholas J. Reo, *First Stewards: Ecological Outcomes of Forest and Wildlife Stewardship by Indigenous Peoples of Wisconsin, USA*, 23(1) ECOLOGY & SOCIETY 45 (2018) (“Lessons from tribal forestlands could help improve the sustainable management of nontribal public forestlands.”)

⁴³⁰ MARTIN NIE, *RECLAIMING THE NATIONAL INTEREST IN FEDERAL PUBLIC LANDS AND WILDLIFE CONSERVATION* (Missoula, MT: Bolle Center for People & Forests, 2020).

to more narrow state, local and economic interests; and they threaten the integrity of the federal public lands system and the national interest that serves as its unifying principle.

One of the most unfortunate consequences of pushing this version of States' rights and decentralization so aggressively is that even some moderate political interests rightfully question any effort, even if built on a different set of historical facts and legal principles, to surrender any federal authority in the future. We believe this concern can be most fairly addressed in the context of federalism and we do that in the next Part. There, we show that federal land laws generally fail to even recognize tribal rights and interests and they extend to state governments authorities and opportunities that are not provided to tribes to the same degree. That problem must be rectified and it can be done in a way that carefully balances tribal rights and interests and the national interest in public lands.

A third prevalent concern is based on the assumption that tribal co-management is by nature an open-ended and discretionary framework. Among conservation groups, Public Employees for Environmental Responsibility (PEER) is perhaps most vocal in its criticism of tribal co-management, much of it stemming from its opposition to the tribal contracting arrangements on the National Bison Range. According to PEER: "New proposals to jointly manage federal lands with local Indian tribes do not address the major practical difficulties of dealing with disputes that inevitably arise. Nor do they specify tribal powers to limit public access, harvest resources, or veto federal decisions on federal lands they would co-manage."⁴³¹ "Two sovereigns under one roof is a house divided," states PEER's Executive Director Jeff Ruch, and "if it is true co-management, then any disagreement could lead to utter impasse."⁴³² "Co-management sounds good but ignoring the details can lead to devilish complications" he says.⁴³³

PEER raises the important issue of accountability and we agree that it should be a fundamental concern in any co-management regime. But the examples of co-management reviewed above, and those elsewhere, show why it is wrong to assume that co-management must be a discretionary, open-ended, and ill-defined mandate.

The root cases of co-management—reserved fishing rights in the Pacific Northwest—provide a case-in-point. The management agreements negotiated by States and Tribes specify performance measures, commitments and assurances by both co-managers.⁴³⁴ Accountability and enforcement mechanisms are also provided in the dozens of agreements signed between Ojibwe Tribes and the States of Minnesota, Michigan and Wisconsin—building on years on successful co-management.⁴³⁵ Co-management of marine mammals and migratory birds in Alaska, as

⁴³¹ Public Employees for Environmental Responsibility, *Co-Managing Federal Lands with Tribes No Walk in the Park* (Oct. 18, 2017), available at <https://www.peer.org/co-managing-federal-lands-with-tribes-no-walk-in-the-park/>

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ See e.g., United States v. Oregon, 2008-2017 Management Agreement (May 2008), Part F. See also Columbia River Inter-Tribal Fish Commission, Regional and International Salmon Agreements (covering the Columbia Basin Fish Accords, the Pacific Salmon Treaty, and U.S. v. Oregon Agreements), available at <https://plan.critfc.org/2013/spirit-of-the-salmon-plan/about-spirit-of-the-salmon/the-accords-pacific-salmon-treaty-and-u-s-v-oregon-agreements/>

⁴³⁵ The "1854 Treaty Authority," for example, provides an inter-tribal program that manages the off-reservation hunting, fishing and gathering rights of the Grand Portage and Bois Forte bands of the Lake Superior Chippewa in the territory ceded under the Treaty of 1854. It includes an "1854 Conservation Code" that is enforced by an "1854

governed by the MMPA and MBTA, provide other examples as both laws significantly limit the scope and purposes of co-management. Even the national monument examples challenge this claim. The Bears Ears Proclamation, for example, is among the most detailed designations made pursuant to the Antiquities Act. It requires various management activities to be consistent “with the care and management of the objects identified” in the Proclamation’s poetic description of the landscape.⁴³⁶

We return to the issue of accountability, in the context of our recommendations for tribal co-management legislation in Part V.

Treaty Authority Conservation Court.” *See 1854 Treaty Authority*, <https://www.1854treatyauthority.org/> (last visited Aug. 27, 2020).

⁴³⁶ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016)

Table 2. Selected Definitions & Interpretations of Tribal Co-Management

Definitions & Interpretations	Source/Authority & Notes
<p>“The purpose of this Management Agreement is to provide a framework within which the Parties may exercise their sovereign powers in a coordinated and systematic manner in order to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-treaty fisheries.”</p>	<p>2008-2017, United States v. Oregon Management Agreement (May 2008).</p> <p>-Court-approved successor to the 1988 Columbia River Fish Management Plan, stemming from <i>Sohappy v. Smith</i>, 302 F. Supp. 899 (D. Or. 1969).</p>
<p>“Two or more entities, each having legally established management responsibility, working together to actively protect, conserve, enhance, or restore fish and wildlife resources.”</p> <p>“A partnership based on trust and respect, established between an Alaska Native Organization, as defined by the MMPA, and either NMFS or FWS, with shared responsibilities for the conservation of marine mammals and their sustainable subsistence use by Alaska Natives.”</p>	<p>Marine Mammal Commission, 2008⁴³⁷</p> <p>Marine Mammal Commission, 2019⁴³⁸</p> <p>-Reviewing implementation of co-management authority provided in §119 of Marine Mammal Protection Act (co-management not defined in Act or regulations)</p>
<p>“Management bodies will be created to ensure an effective and meaningful role for indigenous inhabitants in the conservation of migratory birds. These management bodies will include Native, Federal, and State of Alaska representatives as equals, and will develop recommendations for, among other things: seasons and bag limits; law enforcement policies, population and harvest monitoring; education programs; research and use of traditional knowledge; and habitat protection...Creation of these management bodies is intended to provide more effective conservation of migratory birds in designated subsistence harvest areas without diminishing the ultimate authority and responsibility of DOI/FWS.”</p>	<p>Canada Protocol, amending the Migratory Bird Treaty Act (1996)⁴³⁹</p> <p>-Leads to creation of the Alaska Migratory Bird Co-Management Council</p>

⁴³⁷ REPORT OF THE MARINE MAMMAL COMMISSION, REVIEW OF CO-MANAGEMENT EFFORTS IN ALASKA (Anchorage, AK: Feb., 6-8, 2008), AT 39.

⁴³⁸ J.C. MALEK & V.R. CORNISH, CO-MANAGEMENT OF MARINE MAMMALS IN ALASKA: A CASE STUDY-BASED REVIEW: FINAL REPORT (Bethesda, MD: Marine Mammal Commission, 2019), at 12 (providing a “working definition” of co-management).

⁴³⁹ Message from the President of the United States Transmitting a Protocol Between the U.S. and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the U.S., Aug. 2, 1996, S. TREATY DOC. NO. 104-28 at viii, ix (1996).

<p>“This Order focuses on developing cooperative and collaborative opportunities with tribes and does not address ‘co-management’ which the Department defines as a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decision-making or that makes co-management otherwise legally necessary. For example, in some instances, such as management of the salmon harvest in the Pacific Northwest, co-management has been established by law.”</p>	<p>Secretary of Interior, Order No. 3342: Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources (2016)</p>
<p>“Co-management—two or more entities, each having legally established management responsibilities, working collaboratively to achieve mutually agreed upon, compatible objectives to protect, conserve, use, enhance, or restore natural and cultural resources.”</p>	<p>U.S. Fish & Wildlife Service, Tribal Consultation Handbook (2018)⁴⁴⁰</p>
<p>Other</p>	
<p>“Comanagement embodies the concept and practice of two (or more) sovereigns working together to address and solve matters of critical concern to each. [It] is not a demand for a tribal veto power over federal projects, but rather a call for an end to federal unilateralism in decision making affecting tribal rights and resources. It is a call for a process that would incorporate, in a constructive manner, the policy and technical expertise of each sovereign in a mutual, participatory framework.”</p>	<p>Ed Goodman, <i>Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right</i>, 30 ENVIRONMENTAL LAW 279, 284-85 (2000)</p>

⁴⁴⁰ U.S. Fish and Wildlife Service, *Tribal Consultation Handbook*, 52 (Washington, D.C.: Department of Interior, 2018).

IV. Tribal Co-Management in the Context of Cooperative Federalism

This Part places tribal co-management in the context of federalism and intergovernmental relations and shows the different ways that Congress has reconciled federal and state interests in public lands management. Doing so helps to reframe our thinking about tribal co-management and makes clear the disadvantaged position of Indian tribes when contrasted to the often-privileged role provided to state governments in federal public lands and wildlife law. We conclude the Report by discussing how some of the most common mechanisms used in federalism could inform future tribal co-management legislation and rulemaking.

A. The Privileged Position of States and Disadvantaged Position of Tribes in Federal Public Land Laws

In 1970, the Public Land and Law Review Commission provided to Congress and the President its comprehensive review of federal public lands law and management. It was the last time such a Commission was used and its work laid the foundation for the Federal Lands and Policy Management Act (FLPMA) of 1976. The Commission's Report begins with a Chapter asking "To Whom the Public Lands Are Important," and answers the question with a review of the national public, regional public, federal government (as sovereign and proprietor), state and local governments, and users of public lands.⁴⁴¹ Entirely missing from this answer is any reference to Indian tribes and their rights and interests on federal public lands.

Most federal public land statutes enacted in the 1960s and 70s similarly treat Indian tribes as invisible. Several of these laws include "savings clauses" that disclaim a federal intention to completely displace state laws related to water, wildlife, or other resources so long as the state law does not conflict or undermine federal prerogatives. At their core, they are about accommodating state interests—or Congress instead punting on controversial issues pitting federal versus state authority. Yet most of these laws include no provisions related to Indian tribes at all.

In other cases, these laws extend to state and private actors authorities and opportunities not provided to tribes, some with great potential consequence to the cultural resources found on federal lands. FLPMA, for example, authorizes the sale of "public land tracts" to States, local governments, adjoining landowners, individuals, and "other persons."⁴⁴² But the law, among other land conveyance statutes, fails "to afford Indian tribal governments the same process to restore federal lands of legal and cultural importance to Indian Country."⁴⁴³ Fifty years later, it is time to correct this deficiency and address the intergovernmental dimensions of public lands management, this time including sovereign tribal governments.

⁴⁴¹ PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 158 (1970), <https://perma.cc/7R83-JWLF>.

⁴⁴² 43 U.S.C. §1713 (2018).

⁴⁴³ National Congress of American Indians, Resolution #DEN-18-035, Supporting Legislation to Improve Protections and Authorize the Restoration of Native Sacred Places on Federal Lands (2018).

Before turning to the particulars of federalism, it is important to recognize the complicated mosaic of different interests, both public and private, operating on public lands.⁴⁴⁴ The current situation is one where even private interests have rights that are not provided to sovereign tribal governments. Consider the extent of private interests operating on public lands: grazing lessees, timber contractors, commercial guides and outfitters, national park concessioners, and hardrock mining claimants that essentially determine what unwithdrawn public lands will be explored and possibly developed.

An irony in many contemporary threats facing tribal cultural resources on public lands is that they stem from private interests operating with federal governmental license. Thus, while some interests question the legality and purported dangers of asserting tribal rights and interests, little is said about the nature of private rights on public lands. Nowhere is the corporate footprint bigger than in the context of oil and gas leasing, with more than 22 million acres currently leased across the U.S. West.⁴⁴⁵ Private companies drive this process, starting with the power granted to them by Congress to nominate public lands to be leased for drilling through an “expression of interest.”⁴⁴⁶ Several of these leases threaten tribal rights and cultural resources, with Chaco Canyon being one prominent example. Our point here is to expose the inequity of the status quo and to make clear that there is already a sharing of management on public lands, it’s just not yet been extended to Tribes to the same degree extended to States and private interests.

B. Cooperative Federalism and Tribes-As-States in Federal Pollution Control Laws

“Federalism” refers to the distribution of power between national and state and tribal governments. Congress’s plenary power over federal lands means that “states have legal authority to manage federal lands within their borders to the extent that Congress has chosen to give them such authority.”⁴⁴⁷ “Cooperative federalism” characterizes several federal public land and wildlife laws. This means that while federal laws promote a national interest and mandates regarding the management of public lands and wildlife, they carve out a role for State governments to play in effectuating the purposes of these laws or in informing their implementation.

Cooperative federalism is most well-known in the area of federal pollution control law, such as the Clean Air and Clean Water Acts, whereby states participate in the implementation of standards established by federal law. Federal monies are provided to states but they are contingent on the development of state regulations that meet federal requirements. These laws preempt less stringent state and local requirements, referred to as “floor preemption,” but do not

⁴⁴⁴ See e.g., Sally Fairfax, et al., *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 *ECOLOGY* L. Q. 630 (1999).

⁴⁴⁵ See The Wilderness Society and Center for Western Priorities, *America’s Public Lands Giveaway*, available at <https://storymaps.arcgis.com/stories/36d517f10bb0424493e88e3d22199bb3> (providing data on oil and gas leasing on public lands)

⁴⁴⁶ See Bureau of Land Management, *Expression of Interest (EOI)*, available at <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/parcel-nominations>

⁴⁴⁷ Carol Hardy Vincent & Alexandra M. Wyatt, *State Management of Federal Lands: Frequently Asked Questions*, 5 (Washington, D.C.: Congressional Research Service, 2016).

prohibit the states from adopting requirements that are more stringent and protective than the federal government's program (a presumption against "ceiling preemption").

Although tribes were not initially considered or included in this structure of cooperative federalism, amendments to those foundational environmental laws in the late 1980s and early 1990s authorized a tribal role similar to that of states.⁴⁴⁸ Pursuant to those amendments, tribes—like states—could petition the United States Environmental Protection Agency (EPA) to assume the primary role for environmental regulation within their reservation boundaries and, therefore, the provisions authorized their "treatment as [a] state" or "tribes as states" (TAS).⁴⁴⁹ With that authority, tribes could adopt their own water quality standards pursuant to the Clean Water Act, to be enforced on their own or by EPA, to regulate and control drinking water quality, and to assume primacy under the Clean Air Act in the same ways that those original environmental laws had empowered states.⁴⁵⁰ As a result, tribes could set their own environmental regulatory standards and if they sought and received EPA's approval, enforce those standards, potentially even beyond the reservation's boundaries.⁴⁵¹ In interpreting these provisions, the EPA has recognized a distinction between inherent tribal sovereign power to exercise environmental regulatory authority and the exercise of such authority pursuant to a delegation of federal authority by the EPA to tribes.⁴⁵² Most recently, the EPA revised its interpretation of the Clean Water Act to be consistent with the Clean Air Act, both of which the agency now views as authorizing the express delegation of federal authority to eligible tribes to regulate their entire reservations without regard to land-status based jurisdictional limitations imposed upon their inherent authority by the Supreme Court.⁴⁵³

C. Cooperative Federalism in Public Lands and Wildlife Law

This type of cooperative regulatory scheme found in federal pollution control laws is not as prevalent in federal public lands law because the Property Clause of the U.S. Constitution provides for more exclusive federal authority over federal lands and resources. Nonetheless, Congress has provided multiple ways for states to participate in public lands and resources management. These are best viewed on a continuum, from laws providing no required state

⁴⁴⁸ See, e.g., 33 U.S.C. § 1377 (2018) (Clean Water Act); 42 U.S.C. § 300j-11(a) (2018) (Safe Drinking Water Act); 42 U.S.C. § 7601(d)(2)(B) (2018) (Clean Air Act); see also Hillary M. Hoffmann, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 OR. L. REV. 353, 383 (2019).

⁴⁴⁹ See *Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, ENV'T'L PROTECTION AGENCY, <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> (last visited July 12, 2020).

⁴⁵⁰ Hoffmann, *Congressional Plenary Power*, at 383.

⁴⁵¹ See *Id.* at 389; *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (holding that upstream, non-tribal municipal wastewater facility had to comply with water quality standards adopted by downstream Pueblo of Isleta).

⁴⁵² See, e.g., Environmental Protection Agency, *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30,183 (May 16, 2016) (announcing EPA's revised interpretation of the Clean Water Act tribal provisions to include an "express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations" provided tribes meet relevant eligibility criteria).

⁴⁵³ *Id.* at 30,190 (noting that "such a territorial approach that treats Indian reservations uniformly promotes rational, sound management of environmental resources that might be subjected to mobile pollutants that disperse over wide areas without regard to land ownership."); *Montana v. United States*, 450 U.S. 544 (1981).

involvement⁴⁵⁴ to those providing more substantive opportunities.⁴⁵⁵ An example of the latter is the Wild and Scenic Rivers Act (1968), which provides protection of rivers through a process of congressional designation or by state nomination to the Secretary of Interior. The latter pathway requires a river to first be designated as wild or scenic by a state legislature, the state proposal is then reviewed and possibly approved by the Secretary of Interior, and then the designated river is administered by a state agency.⁴⁵⁶ Though less than 10 percent of river designations go the state proposal route, the law provides states an opportunity to play a substantive role in the designation and management of wild and scenic rivers.⁴⁵⁷

“Coordination areas” managed by the USFWS provide “the most extreme example of [Fish and Wildlife] Service deference to state wildlife programs.”⁴⁵⁸ In contrast to National Wildlife Refuges, these areas are federally owned lands but are managed, with nearly full jurisdiction, by states under cooperative agreements or long-term leases from the USFWS.⁴⁵⁹ Most of these areas were established during the 1950s when there was no legal mechanism for the USFWS to enter into cooperative agreements with states.⁴⁶⁰ Though part of the National Wildlife Refuge System, coordination areas are excluded from provisions of the 1997 National Wildlife Refuge System Improvement Act, from planning requirements to the statute’s compatibility determination framework.⁴⁶¹

The Marine Mammal Protection Act (MMPA) provides another example. As discussed in Part III(B), Section 119 of the Act authorizes co-management between the federal government and Alaska Native Organizations for a relatively narrow set of purposes, such as collecting and analyzing data and monitoring the harvest of marine mammals for subsistence use. In contrast, Section 109 of the MMPA authorizes the federal government to transfer management authority to the States, for broadly defined species “conservation and management,” if certain criteria are met.⁴⁶² The arrangement, in short, is “much more demanding of the receiving state, but also

⁴⁵⁴ The Antiquities Act, for example, provides no mention of, or required role for states to play in the presidential designation of national monuments, as the purpose of this law was to provide Presidents an expedited way to protect by proclamation “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. §320301(a) (2018).

⁴⁵⁵ For a more nuanced view see Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL L. J. 179 (2005)

⁴⁵⁶ 16 U.S.C. §1273(a) (2018).

⁴⁵⁷ Sandra L. Johnson and Laura B. Comay, *The National Wild and Scenic Rivers System: A Brief Overview* (Washington, D.C.: Congressional Research Service, 2015), at 4.

⁴⁵⁸ ROBERT FISCHMAN, *THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW*, 88 (2003).

⁴⁵⁹ 16 U.S.C. §668ee(5) (2018). The term “Coordination Area” means a wildlife management area that is made available to a State— (A) by cooperative agreement between the United States Fish and Wildlife Service and a State agency having control over wildlife resources pursuant to section 664 of this title ; or (B) by long-term leases or agreements pursuant to title III of the Bankhead-Jones Farm Tenant Act (50 Stat. 525 ; 7 U.S.C. § 1010, et seq. (2020)).

⁴⁶⁰ *National Wildlife Refuge System, Coordination Areas*, U.S. FISH & WILDLIFE SERVICE, <https://www.fws.gov/refuges/about/coordareas.html> (last visited Aug. 27, 2020).

⁴⁶¹ 16 U.S.C. §668dd(d)(3) (2018); 50 CFR §25.12(a) (2020).

⁴⁶² 16 U.S.C. §1379(a) (2018).

provides a much greater breadth of authority” than the Act’s co-management provision.⁴⁶³ As the case with other federalism provisions in environmental law, this does not mean States get to use their transfer authorities to undermine the purposes of the statute in question, as the transfer authority must be “consistent with the purposes, policies, and goals of [the] Act and with international treaty obligations.”⁴⁶⁴ But it does provide for significant power-sharing with the States, including authorizing the Secretary to delegate to a State the “administration and enforcement” of the MMPA.⁴⁶⁵

Several federal public land and wildlife laws provide States with an opportunity to “cooperate” in management and “coordinate” with states in federal planning processes. For example, the ESA provides that federal agencies “shall cooperate to the maximum extent practicable with the States.”⁴⁶⁶ Under Section 6 of the Act, federal agencies may also enter into cooperative agreements with any State that establishes and maintains an “adequate and active” program for the conservation of listed species.⁴⁶⁷

USFS and BLM management provide two additional examples. The Forest Service’s Multiple Use Sustained Yield Act (MUSYA) of 1960 is typical of the public land statutes of that era that fail to recognize any Tribal rights and interests. In effectuating the multiple use mandate, the Act authorizes the Secretary of Agriculture “to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.”⁴⁶⁸

The National Forest Management Act (NFMA) also provides for the development of forest plans “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.”⁴⁶⁹ The provisions are limited insofar as they pertain to state engagement in forest and rangeland planning processes and they do not extend to USFS management across the board. A similar provision requires the Secretary of Agriculture to “coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.”⁴⁷⁰

The Federal Land Policy Management Act includes a similar provision encouraging the coordination and consistency of federal and state land use plans:

[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other

⁴⁶³ Julie Lurman Joly, *Tribal Management Under the MMPA: A Way Forward for Local Control*, 4 AM. IND. L. J. 200, 207 (2016).

⁴⁶⁴ 16 U.S.C. § 1379(b)(1)(A) (2018).

⁴⁶⁵ 16 U.S.C. § 1379(k) (2018).

⁴⁶⁶ 16 U.S.C. § 1535(a) (2018).

⁴⁶⁷ 16 U.S.C. § 1535(c)(1) (2018).

⁴⁶⁸ 16 U.S.C. § 530 (2018).

⁴⁶⁹ 16 U.S.C. § 1604(a) (2012); 36 C.F.R. § 219.4(b)(1) (2018).

⁴⁷⁰ 43 U.S.C. § 1712(b) (2018).

Federal departments and agencies and of the States and local governments within which the lands are located.⁴⁷¹

The section goes on to explain that “[l]and use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.”⁴⁷² These provisions provide state governors the opportunity to advise BLM of their positions on draft land use plans. BLM must consider this advice in so-called “consistency reviews.”⁴⁷³

FLPMA’s coordination and consistency provision recognizes tribal coordination but not to the same degree as provided to state and local governments. The Secretary “shall, to the extent practical, keep apprised of State, local, and tribal land use plans [and] assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans.”⁴⁷⁴ The section then provides “meaningful public involvement of State and local government officials,” with Indian tribes once again not included.⁴⁷⁵

Another common approach in cooperative federalism is authorizing non-federal actors to enter into cooperative agreements and contracts with federal land agencies. The Multiple Use Sustained Yield Act of 1960 (MUSYA), for example, allows the Secretary of Agriculture “to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons” for various purposes including pollution control and forest protection, “when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations.”⁴⁷⁶ FLPMA’s provision is more open-ended,

⁴⁷¹ 43 U.S.C. § 1712(c)(9) (2012).

⁴⁷² 43 U.S.C. §1712(c)(9) (2012).

⁴⁷³ See e.g., *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 721 (10th Cir. 2009) (“A meaningful opportunity to comment is all the regulation requires.”). This case focused on the mineral development of Otero Mesa in New Mexico, with the Governor using FLPMA’s consistency review provision. 43 C.F.R. §1610.3-2(e) (2020). Though the court found that a “meaningful opportunity to comment is all the regulation requires,” at 721, it is nonetheless an opportunity not provided to the Tribes in the area.

⁴⁷⁴ 43 U.S.C. § 1712(c)(9) (2018).

⁴⁷⁵ The section in its entirety: “[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under chapter 2003 of title 54, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.” *Id.*

⁴⁷⁶ 16 U.S.C. §565a-1 (2018).

allowing the Secretary to “enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.”⁴⁷⁷

Each agency has its own vocabulary for describing how these arrangements work on the ground, but several types of contracts, cooperative agreements, assistance agreements, and memorandums-of-understanding (MOU) are used to share some management, and even financial, responsibilities.⁴⁷⁸ In some cases, such as with Kasha-Katuwe in New Mexico, assistance agreements are used for implementing the purposes of joint management of the Monument.

In recent years, state governments have received even greater authority to “share stewardship” and “co-manage fire risk” on public lands with the USFS and BLM.⁴⁷⁹ “Good neighbor authority,” for example, permits the USFS and BLM to partner with states—via cooperative agreements with a State Governor or county—in performing a wide range of “Forest, Rangeland, and Watershed Restoration Services,” including “activities to treat insect-and disease-infected trees; activities to reduce hazardous fuels,” “activities to reduce hazardous fuels;” and “any other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat.”⁴⁸⁰ This includes permitting states to administer timber sales on federal land and for federal agencies to use the value of wood products to purchase restoration services from state agencies.⁴⁸¹

The Tribal Forest Protection Act (TFPA) of 2004 provides an example of how agreements and contracting authority could be reshaped to facilitate tribal, as opposed to state, co-management in the future. Tribes and the USFS share roughly 2,675 miles of common boundary.⁴⁸² The TFPA is designed to protect tribal forest assets by authorizing tribes to propose work and enter into agreements and contracts with the USFS and BLM to reduce threats posed by fire on federal land. The statute establishes a framework in which tribes can “propose projects that would protect their rights, lands, and resources by reducing threats from wildlife, insects, and disease.”⁴⁸³ Among other restrictions, the law requires tribal proposals to focus on USFS land that (1) is adjacent to federal land, (2) poses a fire, disease, or other threat to Indian trust land or community or is in need of restoration, and (3) involves a “feature of circumstance unique to that Indian tribe (including treaty rights or biological, archeological, historical, or cultural circumstances.”⁴⁸⁴ When evaluating tribal proposals, the Act allows the USFS to use a “best value basis” and give specific consideration to tribally-related factors, such as the cultural,

⁴⁷⁷ 43 U.S.C. §1737(b) (2000).

⁴⁷⁸ For a review with examples see Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, at 610-612.

⁴⁷⁹ U.S. Forest Service, *Toward Shared Stewardship Across Landscapes: An Outcome-Based Investment Strategy*, 3 (Washington, D.C.: USDA, August 2018).

⁴⁸⁰ 16 U.S.C. §2113a (2018).

⁴⁸¹ See Tyson Bertone-Riggs et al., *Understanding Good Neighbor Authority: Case Studies from Across the West* (Rural Voices for Conservation Coalition, 2018).

⁴⁸² *Fulfilling the Promise of The Tribal Forest Protection Act of 2004*, Vol. I: An Analysis by the Intertribal Timber Council in Collaboration with USDA Forest Service and Bureau of Indian Affairs, 2 (Apr. 2013). [hereinafter Intertribal Timber Council Report]

⁴⁸³ *Id.* at 1.

⁴⁸⁴ §2(c), Pub. L. No. 108-278, 118 Stat. 868 (July 22, 2004).

traditional, and historical affiliation of the tribe with the land, reserved treaty rights, and the indigenous knowledge of tribal members, among other factors.⁴⁸⁵

Relatively few TFPA proposals have been accepted and implemented by the USFS.⁴⁸⁶ But as we discuss in Part V, the design of this law is instructive to tribal co-management because it “sends a strong message that tribes need not wait for the federal agency to develop and consult on national forest projects,” but instead “supports tribes taking the lead in developing project proposals and requesting an agency response.”⁴⁸⁷

D. Tribal Co-Management as Next Step in Cooperative Federalism

The principles and strategies employed in cooperative federalism should be extended to Indian Tribes and modified to affirm tribal sovereignty and safeguard the cultural resources and reserved treaty rights found on federal public lands. Though more contemporary statutes include tribal participation in provisions related to federalism and collaboration, there remains a bias and privileging of state and local governments in federal public land law. This is especially problematic when we consider that Tribal, and not State governments, are the sovereigns with treaty rights, property interests and a trust relationship on federal lands.

That so many federal public land laws fail to adequately recognize tribal rights and interests provides an opening for administrative rule and policymaking. The history of TAS authority is instructive. As discussed above, Congress amended a number of environmental statutes authorizing Indian tribes to apply for TAS authority. In those cases where, because of judicial divestiture,⁴⁸⁸ tribal inherent authority might not fulfill the broad Congressional purposes of comprehensive environmental regulation, the EPA has lawfully used its rulemaking powers to interpret those statutes as delegating federal power—even over non-tribally owned lands—to tribes to do so.⁴⁸⁹

The ESA provides another example. Outside of the taking of listed species by Alaska Natives for subsistence purposes, the law is silent on its applicability to Indian tribes and treaty rights. In 1997, under President Clinton, the Secretaries of Interior and Commerce negotiated and drafted with Tribal representatives, on a government-to-government basis, a Joint Secretarial Order on “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.”⁴⁹⁰ Order 3206 attempts to harmonize “the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.”⁴⁹¹ Several principles are stated in the Order encouraging “cooperative assistance,” “consultation,” “the sharing of information,”

⁴⁸⁵ *Id.* at §2(e).

⁴⁸⁶ The Intertribal Timber Council Report, at 2-3, identified 11 projects accepted by the USFS, with 6 being successfully implemented. It is clear, says the Council, that “the TFPA authority has been scarcely used.”

⁴⁸⁷ Stephanie A. Lucero & Sonia Tamez, *Working Together to Implement the Tribal Forest Protection Act of 2004: Partnerships for Today and Tomorrow*, 115(5) J. FORESTRY 468, 469 (2017).

⁴⁸⁸ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §4.02(3)(a), at 226-27.

⁴⁸⁹ See, e.g., *Revised Interpretation*, at 424.

⁴⁹⁰ Order No., 3206 (June 5, 1997).

⁴⁹¹ *Id.*

the “creation of government-to-government partnerships to promote healthy ecosystems,” and use of the “intergovernmental agreements.”⁴⁹²

Order 3206 demonstrates the type of leadership that can be asserted by the next President. From a tribal and endangered species standpoint, the Order is far from perfect.⁴⁹³ But it did result from the Secretary of Interior initiating the process and making its bilateral negotiation a priority. As captured by law professor Charles F. Wilkinson, who participated in the process:

The Order is no dramatic breakthrough, no Olympian moment in federal Indian policy. It is just a sensible, fair approach to a thorny area of policy developed by people who took the time to listen, negotiate, open up their minds, and take some chances. But, in a complicated world, this is exactly where progress is often made—in measured, collaborative approaches to particular problems. And the worth of the process stands out in sharp relief because it was set against the long and mostly dreary canvas of federal-tribal relations. The pageantry in the Indian Treaty Room did not commemorate some epic event, but it did rightly celebrate a solid accomplishment that holds out promise for those who believe that an honest, open, and hardworking mutuality ought to serve as the foundation for Indian policy.⁴⁹⁴

This type of mutuality can also be combined with more traditional statutory and regulatory frameworks employed in cooperative federalism in crafting new tribal co-management legislation. The most important principle perhaps is to recognize the parameters and criteria provided by Congress when transferring or sharing management authority with non-federal actors. States are not delegated carte blanche discretion in these statutes, but must rather meet certain standards and criteria upon receiving federal funding and assuming management responsibilities. As discussed in Part III, the tribal co-management regimes now in place are similarly circumscribed and used to achieve the purposes set forth in judicial decrees, statutes and presidential proclamations.

⁴⁹² *Id.* at §4. “The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments’ missions under the Act with the Indian tribes own ecosystem management objectives.” *Id.* at §6.

⁴⁹³ See e.g., Drew Kraniak, *Conserving Endangered Species in Indian Country: The Success and Struggles of Joint Secretarial Order 3206 Nineteen Years on*, 26 COLO. NAT. RES. ENERGY & ENVTL L. REV. 321 (2015).

⁴⁹⁴ See Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 U. WASH. L. REV. 1063, 1088 (1997)

V. Recommendations for Enhancing Tribal Co-Management of Federal Public Lands

The history, context, and framework of federal public land law is predicated on the removal and marginalization of tribal claims to and interests in those lands. While various approaches and strategies have been developed to re-engage tribes and their historical connections to public lands and resources, none of those options has yet resulted in an equitable balance of tribal and federal management or responsibilities. To reach that objective, federal land management agencies must be compelled to more effectively work with tribes on a co-management basis, much like they are compelled to fulfill their other obligations and priorities in managing and protecting the lands for which they are responsible.

A. Executive Actions

A future Presidential Administration should use its authority to affirm tribal sovereignty and effectuate the federal government's treaty and trust obligations through innovations in tribal co-management and shared governance on federal public lands. Without new tribal co-management legislation, the clearest path for doing so is by building and strengthening those bridges to tribal co-management examined in this Report. Importantly, because the foundations for those bridges are already in place, progress can be made even without the additional actions recommended here. However, the proactive measures described below would not only reinvigorate the traditional tools of tribal engagement and implementation, but more strategically link them together as a way to harmonize federal Indian and public lands law and management. That our public land laws are generally silent about tribal rights and interests should be viewed not as an obstacle but as an opening for Presidential leadership.

1. To Issue a New Executive Order or Joint Secretarial Order on Tribal Co-Management

Such leadership can start with an Executive Order or jointly issued Order by the Secretaries of Interior and Agriculture on tribal co-management on federal public lands. The Order will pick up where Secretary's Jewell's Order No. 3342 left off. This important Order, focused on "Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources," provides a limited review of existing legal authorities for tribal cooperation and directs Interior bureaus to "identify opportunities for cooperative management arrangements and collaborative partnerships with tribes and undertake efforts, where appropriate, to prepare their respective bureau staffs to partner with tribes in the management of the natural and cultural resources over which the bureaus maintain jurisdiction and responsibility."⁴⁹⁵ As we discuss in Part III(C), Jewell's Order makes a distinction between co-management and "cooperative and collaborative partnerships" with tribes, emphasizing the limitations imposed by the delegation doctrine and the "inherently federal function" threshold. In this context, the Order calls for the development of a working group in the Office of Solicitor to advise bureaus on the relevant legal issues.

⁴⁹⁵ Secretary of Interior, Order No. 3342, §5 (2016).

As we explain in Part III(D), we believe the Solicitor should update its advice on these matters, with a clearer focus on their application to sovereign Indian tribes in contrast to State and private actors operating on federal lands. Distinguishing between what constitutes an unlawful delegation of authority and what are instead “sovereignty-affirming subdelegations” that “affirm tribal sovereignty by intermingling federal and tribal power”⁴⁹⁶ would help clarify matters and give agencies in both Departments more confidence in utilizing their existing authorities. With such clarification, agencies could then be charged to negotiate and enter a certain number of such agreements each year—a more proactive accountability measure than the annual reporting of available functions and agreements currently in place.⁴⁹⁷ The Office of the Solicitor may also wish to consider the findings in this Report, including the fact that most definitions and applications of tribal co-management do not include a total delegation of authority or call for tribal unilateralism. Solicitors should assist in identifying additional, legally-sufficient co-management options that are short of a total delegation of authority.

Secretary Jewell’s Order provides an incomplete list of legal authorities on which to base collaborative partnerships with tribes, focusing on the use of “cooperative agreement” clauses in federal land laws. It also provides a list of exemplary collaborative partnerships between Interior bureaus and Indian tribes. Needed next is an Order going deeper, drawing from first principles of federal Indian law and more recent cases of innovation, to explain how existing authorities and processes can serve as a bridge to tribal co-management. We have provided examples of how those bridges could be constructed in the future, such as more strategically linking consultation, compacting/contracting, NHPA designations and processes, and public lands planning. Federal land agencies can help identify additional bridges and opportunities in this regard.

Tribal co-management can be further prioritized and rewarded through specific performance measures for agency leadership and by evaluating a public land manager’s engagement with tribes and efforts in co-management in annual performance reviews. Such changes, coming from agency headquarters and regional offices, will help ensure that this new era of tribal relations will be institutionalized and incentivized.

2. To Provide Oversight and Ensure that Federal Land Use Plans Adequately Account for Tribal Rights and Interests and that Early and Meaningful Tribal Engagement is Used to Inform the Desired Conditions, Objectives, and Legal Constraints of Federal Lands Management

The opportunities presented by federal lands planning should be part of the joint order on tribal co-management. As we recommend in Part II(D)(3), the President should ensure that federal land planning regulations and agency-specific manuals, handbooks and policies related to cultural resources and tribal relations comport with the first principles of federal Indian law and the core principles of tribal co-management. The process for doing so must include early and substantive tribal engagement and, potentially, inter-agency consultation with the Bureau of Indian Affairs. The USFS and BLM are in the process of revising plans throughout the country, many of which

⁴⁹⁶ See Lazerwitz, *Sovereignty-Affirming Subdelegations*.

⁴⁹⁷ See Dept. of the Interior, Office of the Secretary, *List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2020 Programmatic Targets*, 85 Fed. Reg. 12,326 (March 2, 2020).

are now decades old and fail to adequately account for tribal rights and interests on federal lands. Guidance from the highest levels of the executive branch can help ensure that every plan revision is viewed as an opportunity to do things differently, to better integrate the National Historic Preservation Act, and to effectuate the purposes of the joint order.

3. Connect the Tribal Consultation Responsibilities of Federal Agencies to the Public Lands Missions of those Agencies.

Similarly, whether part of the proposed joint Secretarial order or through additional Executive Orders, further guidance and mandates for agencies to improve their approach to tribal consultation are necessary to better fulfill the promising potential for tribal co-management. These additional directives could draw on the 2017 interagency report regarding consultation on infrastructure projects (described above) but should focus specifically on linking agency consultation obligations to the public lands management missions of those agencies. The long history of separation between public land law and the federal government's trust obligations to Indian tribes has resulted in agency practices that often prioritize the former while the latter is viewed as external to those priorities. Thus, tribal consultation must be implemented as a federal objective on equal standing with existing federal land management priorities focused on multiple-use, wilderness, refuge, or other goals. In other words, executive actions should be taken to integrate tribal consultation as a fundamental objective of federal public land management agencies that promotes long-term, ongoing, and co-equal federal-tribal relations.

In conjunction with this integration, additional accountability measures should also be developed in order to ensure their workability and success. Incorporating consultation mandates into personnel evaluations, especially for agency leaders, will help incentivize and ensure accountability at the institutional and employee level. In addition, however, procedural accountability measures, such as basing decisions upon mutual concurrence with interested tribes or requiring written explanations of agency decisions that respond to tribal input during the consultation process, would help support improvements to consultation relationships and ensure more robust, timely, and meaningful federal-tribal relationships.

4. Develop Protocols for Tribal Involvement in Monument Designations under the Antiquities Act.

Consistent with executive actions to advance tribal co-management, improve public lands planning, and enhance the effectiveness of tribal consultation, further executive action could be taken to build on the promise of the Antiquities Act shown by the Bears Ears Intertribal Coalition and its work to propose and support the designation of the Bears Ears National Monument. As described above, that proposal was the first of its kind in that it represented and was developed by tribal voices and suggested using the executive authority allowed by the Antiquities Act to protect an area for its continuing tribal cultural values and connections. In addition, the Coalition's proposal included a framework for tribal co-management that, while not ultimately included in the proclamation, offered a new opportunity for enhancing that concept. While the Antiquities Act gives the President broad discretion to designate new national monuments, future exercises of that discretion should rely on the Bears Ears example to ensure that tribes with historical, cultural, or other connections to areas being considered for designation as a national

monument are involved in the review and designation process. While the Bears Ears Intertribal Coalition took it upon itself to develop and pursue a national monument proposal, future uses of the Antiquities Act should work to ensure that similar consideration is given to the protection of tribal uses and connections to national monuments and, where appropriate, that newly proclaimed national monuments include provisions calling for a tribal role in management of those monuments.

5. Hold Agencies Accountable for Supporting, Implementing, and Enhancing Tribal Contracting and Compacting Authorities to Assume Responsibilities for Public Lands Management.

As described above, since the passage of the Tribal Self Government Act (TSGA) in 1994, the Secretary of the Interior has been obligated to annually review and report on the success of agencies within Interior in compacting with tribes to transfer previously federal obligations.⁴⁹⁸ Review of these annual reports demonstrates the lackluster success of agencies in doing so, particularly with regard to the transfer of meaningful public land management responsibilities to tribes.⁴⁹⁹ In conjunction with other executive actions promoting meaningful tribal co-management opportunities, the Secretaries of Interior and Agriculture should also issue additional directives to the public land management agencies within their purview that will serve to reinvigorate the purposes and intent of the TSGA as envisioned by Congress in 1994. Rather than simply reporting on available programs and existing compacts, the Secretaries should demand and publicly report on the number of compacts entered into by their agencies, seek tribal and agency input on barriers to successful compacting for broader co-management authority, and, consistent with those findings, direct additional technical assistance, accountability, or other resources toward expanding the use and effectiveness of the TSGA (and its TFPA/2018 Farm Bill counterparts for the U.S. Forest Service) as a bridge to tribal co-management. As with improving accountability for consultation, performance metrics for agency leaders and staff could incorporate contracting and compacting to incentivize improvement of those practices.

B. Congressional Actions

The most effective and efficient way to enable tribal co-management is through congressional lawmaking. We sketch out two potential pathways in this regard: (1) tribal co-management through place-based legislation, and (2) tribal co-management through system-wide legislation. Another pathway not explored herein is by amending the suite of federal public land statutes referenced throughout the Report. Most of these statutes fail to reference, never mind protect, tribal treaty rights, sacred places or cultural resources. Each could be amended to reconcile the past and adequately account for tribal rights and interests on public lands. If our federal public land statutes were ever to be systematically reviewed again by a Commission or comparable entity this approach would be feasible and warranted. But we are aware of the political dangers

⁴⁹⁸ 25 U.S.C. § 5365(c) (2018).

⁴⁹⁹ Compare, e.g., the 2020 List, 85 Fed. Reg. 12,326 (March 2, 2020) (listing six total compacts between the three Interior agencies—BLM, NPS, USFWS) with the Department’s List of Programs Eligible for Inclusion in Fiscal Year 2000 Annual Funding Agreements to be Negotiated With Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs, 64 Fed. Reg. 11,032 (March 8, 1999) (describing two compacts entered into by the NPS).

posed by opening these statutes and believe that there are more efficient legislative approaches that can be taken.

Accountability mechanisms can be built into both legislative approaches. Laws that provide for tribal co-management will confront the fundamental questions and tensions that are baked into public lands lawmaking writ large, including: (1) how to balance the need for prescription, accountability and enforceability with administrative discretion, (2) how best to hold governments—including federal and tribal—accountable, including through appropriate dispute resolution procedures; and (3) what are the purposes and constraints of tribal co-management.

The place-based and system-wide options are premised on the same vision. Each would shift the reactionary tribal consultation paradigm to a more pro-active and affirmative model in which Indian tribes can submit their own proposals and plans and “expressions of interest” for re-envisioning management of treaty rights, sacred places and cultural resources on public lands. The cases reviewed in this Report make clear that the core principles of co-management can be configured into creative and accountable ways of governing that fit unique historical and legal contexts, political realities and landscapes.

1. Place-based Legislation

Place-based legislation could be used to codify forms of tribal co-management that are specific to a particular unit in the federal public land system. Establishment or site-specific enabling legislation specifies how one particular place or unit of public lands is managed. This individualized approach is most common in the National Park and National Wildlife Refuge Systems but is also applied to lands managed by the USFS and BLM.⁵⁰⁰ Congress has used all sorts of “conservation overlays” in the past, such as “protected area” designations with special provisions, “special management areas,” “conservation areas,” “recreation areas,” or whatever name Congress deems fit.

There is a history of using the place-based approach to protect tribal treaty rights, sacred areas, and cultural resources on public lands.⁵⁰¹ In 1987, for example, Congress used three land use designations—a national monument, national conservation area, and wilderness areas—to protect the *el malpais* (“badlands” in Spanish) region of New Mexico, a place of historical, religious, and cultural importance to the Acoma and Zuni Pueblos and other tribes.⁵⁰² The T’uf Shur Bien Preservation Trust Area Act (2003) provides another example. The law created the T’uf Shur Bien Preservation Trust Area within the Cibola National Forest and Sandia Mountain Wilderness “to preserve in perpetuity the national forest and wilderness character of the Area”⁵⁰³ and provides the Pueblo of Sandia special authorities regarding how the area will be managed.

⁵⁰⁰ See Martin Nie & Michael Fiebig, *Managing the National Forests through Place-Based Legislation*, 37 *ECOLOGICAL L. Q.* 1 (2010) (providing a history and review of the approach, from the Bull Run Watershed Management Unit in the Mount Hood National Forest to the Valles Caldera National Preserve and Trust).

⁵⁰¹ See Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, at 626-638.

⁵⁰² An Act to establish the El Malpais National Monument and the El Malpais National Conservation Area in the State of New Mexico, to authorize the Masau Trail, and for other purposes, Pub. L. No. 100-225, 101 Stat. 1539 (Dec. 31, 1987); 16 U.S.C. §460uu-21 (2006).

⁵⁰³ §404(a)(2), Pub. L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003).

To guarantee “perpetual preservation” of the area, the Act provides the Pueblo the right to consent or withhold consent—veto power—over any new use of the area that might be proposed by the U.S. Forest Service in the future.⁵⁰⁴

A more recent example is provided by proposed legislation to protect the Greater Chaco region in the Southwest from increased oil and gas development adjacent to the Chaco Culture National Historical Park. The Chaco Cultural Heritage Area Protection Act, introduced by all five members of New Mexico’s congressional delegation, would prevent leasing and development on federal lands within a ten-mile radius of the Park, which serves as a proposed Chaco protection zone.⁵⁰⁵ This place-based bill and its proposed mineral withdrawal is mostly defensive in nature and stems in large part from the BLM’s inadequate NHPA consultation and protection of sacred lands and traditional cultural properties in the area.⁵⁰⁶

The proposed “Badger-Two Medicine Protection Act,” introduced by Senator Jon Tester (D-MT) in July 2020, provides a more precedent-setting example that not only provides permanent protection of a sacred area but also a model for future governance.⁵⁰⁷ Like the Intertribal Bears Ears Proposal discussed in Part III(E), the proposal demonstrates a form of carefully crafted, innovative shared governance that could enable tribal co-management in the future. And like Bears Ears, the Badger-Two Medicine Protection Act emanates from Blackfeet values and vision for the area, most recently articulated in a 2017 *Proposal to Establish Permanent Protections* by the Blackfeet Tribal Historic Preservation Office and the Tribal Business Council.

The legislative proposal strategically builds on the existing designations and protections already afforded to the Badger-Two Medicine, from the National Forest and travel management plans for the area to the TCD designation.⁵⁰⁸ In many respects, the latter is the linchpin of the proposal because it is designed to “permanently protect the cultural values, attributes, and integrity of the Badger-Two Medicine Traditional Cultural District.”⁵⁰⁹ It also provides the purpose of the bill’s tribal coordination provision, essentially linking a procedural consultation requirement to the substantive determination of “whether management is compatible with the values and attributes of the Badger-Two Medicine [TCD].”⁵¹⁰

Though the term “co-management” is not found in the bill, it reflects the fundamental principles of a tribal co-management approach. The bill also showcases how to provide for political and legal accountability and how to reconcile the values and uses of the area by tribal and non-tribal

⁵⁰⁴ See Nie, *The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, at 629-630.

⁵⁰⁵ H.R. 2181 (116th Cong. 2019); S. 1079 (116th Cong. 2019).

⁵⁰⁶ See e.g., Uncited Preliminary Brief (Deferred Appendix Appeal) of Amici Curiae All Pueblo Council of Governors and National Trust for Historic Preservation, in Support of Appellants,” *Dine Citizens Against Ruining Our Environment, et al. v. Ryan Zinke, et al.*, Civ. No. 18-2089 (Sept. 7) (10th Cir. 2018) (describing BLM NHPA violations in failing to consult with Pueblo tribal governments when considering applications for permits to drill and how they would potentially affect traditional cultural properties in the area).

⁵⁰⁷ Badger-Two Medicine Protection Act, S. 4288, 116th Cong. (introduced July 22, 2020), available at <https://www.testersenate.gov/files/documents/Final%20Badger-Two%20Text.pdf>.

⁵⁰⁸ See Martin Nie, *Selected Law and Policy Provisions of Relevance to Permanent Protection and Management of the Badger-Two Medicine* (Missoula, MT: Bolle Center for People and Forests, 2019) (on file with authors).

⁵⁰⁹ Badger-Two Medicine Protection Act, S. 4288, §4(2).

⁵¹⁰ *Id.* at §6(a)(1).

people. It begins with a clearly defined set of management purposes, permitted uses and prohibitions, all helping to define the objectives and legal constraints of co-management. Provisions related to roadbuilding, motorized and mechanized use, vegetation management, grazing, wildfire, water resources, and Native American cultural and religious use, among others, are addressed in the bill. Not all potential problems and uses can be anticipated in legislation, so the bill creates a new mechanism for the Blackfeet Tribe to grant or deny consent for new proposed uses and authorizes the Tribe to perform management functions using self-determination contracting authorities. Representation of non-tribal values and interests are incorporated into the bill, with opportunities provided through an advisory council focused on preparation and implementation of a management plan and via existing accountability mechanisms provided by NEPA and APA-based judicial review. In short, the Badger-Two Medicine Protection Act demonstrates one way that co-management can be purposed, structured and constrained in place-based legislation.

2. System-wide Legislation

Tribal co-management on federal public lands can also be enabled through new legislation creating a structured framework that provides tribes an opportunity to submit their own proposed co-management plans for consideration by the Secretaries of Interior and Agriculture. This legislative approach is used within Federal Indian and public lands law and various features of these statutes could be modified to enable and prioritize tribal co-management. The law's findings would be based on and reaffirm the first principles of Federal Indian law, including the unique relationship between the Federal Government and the governments of Indian tribes, the federal trust responsibility, and the fiduciary responsibilities of the U.S. as found in the specific commitments made in treaties and agreements.

The law could establish a demonstration program in which tribal co-management applications and proposed plans would be submitted by governing bodies of Indian tribes and vetted through some type of review process that would hue to the specified requirements provided in the umbrella statute. The Indian Trust Asset Reform Act (ITARA) of 2016 provides an example of how a new co-management statute might be structured in this regard.⁵¹¹ Although that law applies only to trust resources already owned by the federal government for the benefit of Indian tribes or tribally owned lands,⁵¹² it authorizes a tribe to develop a trust asset management plan that, subject to approval by the Secretary of the Interior, would guide tribal management of those resources.⁵¹³ The law specifies what contents must be included in proposed Indian trust asset management plans, with technical assistance and information provided by the Secretary of Interior on receipt of a written request from an Indian tribe.⁵¹⁴

Three crux issues in negotiating and drafting this legislation will be determining: (1) the process for approval and disapproval of proposed plans; (2) determining the scope and content requirements of submitted co-management proposals, (3) securing long-term funding commitments. We discuss each in turn.

⁵¹¹ Pub. L. No. 114-178, 130 Stat. 432 (June 22, 2016), *codified at* 25 U.S.C. §§ 5601 et seq. (2018).

⁵¹² 25 U.S.C. §§5613, 5614(a) (2018).

⁵¹³ 25 U.S.C. §§ 5613-14 (2018).

⁵¹⁴ 25 U.S.C. §§5613(a)(2)-(3) (2018).

The system-wide co-management approach would encourage and facilitate tribes submitting their own proposals for co-management, which may or may not be prepared in collaboration with other interests and partners. Accountability will be a primary concern that must cut in both directions: to ensure that those implementing tribal co-management proposals are accountable for protecting public lands and to ensure that the Secretaries of Interior and Agriculture are held accountable for their decisions to approve and disapprove of proposed plans.

As we discuss in Part II(C), an important limitation on TSGA compacting and contracting is the broad discretion provided to non-BIA bureaus to deny tribal proposals without justification and methods of remedy. The Tribal Forest Protection Act (TFPA), discussed in Part IV(C), provides another example of a program not reaching its potential, in part because of the discretionary nature of the selection process. If a tribal request is denied under the Act:

[T]he Secretary may issue a notice of denial to the Indian tribe, which (1) identifies the specific factors that caused, and explains the reasons that support, the denial; (2) identifies potential courses of action for overcoming specific issues that led to the denial; and (3) proposes a schedule of consultation with the Indian tribe for the purpose of developing a strategy for protecting the Indian forest land or rangeland of the Indian tribe and interests of the Indian tribe in Federal land.⁵¹⁵

Introduced in 2016, the Tribal Forestry Participation and Protection Act (S. 3014) would amend the TFPA to ensure more prompt consideration of tribal requests with mandated timelines for Secretarial responses and completion of relevant environmental reviews.⁵¹⁶

ITARA provides a stronger mechanism to ensure tribal proposals are duly considered by the Secretary, with a presumption of approval unless specific requirements are not met in proposed plans by tribes.⁵¹⁷ A process for resubmission is also provided along with a judicial review provision, based in the APA, once the “Indian tribe has exhausted all other administrative remedies.”⁵¹⁸

Determining the scope and content requirements of submitted tribal co-management plans will be another key factor in this legislative approach. The purposes of the legislation must be stated broadly enough to cover the full array of tribal rights and interests on federal public lands and not be unduly limited and too narrowly defined.⁵¹⁹ At the same time, however, the law must provide some sideboards for tribal co-management, for the purpose of securing both tribal self-determination and the conservation of public lands.

⁵¹⁵ 25 U.S.C. §3115(d) (2018).

⁵¹⁶ S. 3014 (104th Cong. 2016).

⁵¹⁷ 25 U.S.C. §5613(b) (2018).

⁵¹⁸ 25 U.S.C. §5613(b)(4) (2018).

⁵¹⁹ For reference, Secretarial Order 3342, §5 is relatively broad in stating the scope of activities subject to tribal cooperation and collaboration: “(1) Delivery of specific programs and services, (2) Management of fish and wildlife resources, (3) Identification, protection, preservation, and management of culturally significant sites, landscapes, and resources, (4) Management of plant resources, including collection of plant material, (5) Management and implementation of maintenance activities, (6) Management of information related to tribal, cultural, and/or educational materials related to bureau units.”

The point is to avoid a situation where tribal co-management is viewed in a strict dichotomous fashion—as only a tool for conservation and protection or resource use and management. While some tribal co-management proposals may be strictly focused on conserving the integrity of sacred lands, cultural resources or protecting the habitat important to reserved treaty rights; other proposals may include some degree of resource management and use, such as the case with co-management of salmon in the Northwest and subsistence use in Alaska. Tribal representation will be crucial in negotiating and drafting this legislation and can help prevent a situation where tribal co-management is appropriated and co-opted by a particular set of interests.

We hope to return to the particulars of this legislative approach in subsequent phases of the project. At that point it will be important to address the co-management law’s intersection with NEPA and the layering of tribal co-management plans with federal public land use plans.

Funding tribal co-management must also be addressed. The most sure-fire way to doom tribal co-management, or any effective management of public lands for that matter, is through inadequate funding. One lesson from similarly structured demonstration programs in operation on public lands, such as the Collaborative Forest Landscape Restoration Program (CFLRP) is the necessity of a long-term funding commitment.⁵²⁰ The Act creating this program allocates funding through a competitive process and established a dedicated “Collaborative Forest Landscape Restoration Fund.”⁵²¹

Another possibility in this regard is to consider the types of revenue-sharing that are common in cooperative federalism and public lands law, such as the Land and Water Conservation Fund Act of 1965⁵²² and the Pittman-Robertson Wildlife Restoration Act of 1937.⁵²³ While the latter provides an important stream of wildlife funding for State governments, tribal governments have been ineligible to receive Pittman-Robertson funds for conservation on tribal lands. Federal inducements, incentives, and revenue-sharing mechanisms are common methods used to promote cooperative federalism, even though state and county governments are most often the beneficiaries.⁵²⁴ Lawmakers could use a similar approach as a way to fund and incentivize tribal co-management.

The design of CFLRP is instructive in other ways as well, including the establishment of an advisory panel that evaluates and provides recommendations on submitted landscape restoration proposals.⁵²⁵ In addition to using an advisory panel to screen and select submitted co-management proposals, the system-wide co-management law could also incorporate methods of

⁵²⁰ See Courtney Schultz et al., *Strategies for Success Under Forest Service Restoration Initiatives* (Ecosystem Workforce Program Working Paper 81, 2017); and Courtney A. Schultz, Theresa Jedd, and Ryan D. Beam, *The Collaborative Forest Landscape Restoration Program: A History and Overview of the First Projects*, 110(7) J. FORESTRY 381 (2012).

⁵²¹ Tit. IV, Pub. L. No. 111-11, 123 Stat. 991 (March 30, 2009).

⁵²² Pub. L. No. 88-578, 78 Stat. 897 (Sept. 3, 1964), *codified at* 16 U.S.C. §§ 4601-4 et. seq (2018).

⁵²³ Federal Aid in Wildlife Restoration Act, Pub. L. No. 75-415, 50 Stat. 917 (Sept. 2, 1937), *codified at* 16 U.S.C. §§ 669–669i (2018).

⁵²⁴ See Nie, *The National Interest in Federal Public Lands*.

⁵²⁵ See generally *Collaborative Forest Landscape Restoration Program*, U.S. FOREST SERVICE, <https://www.fs.fed.us/restoration/CFLRP/> (last visited August 27, 2020).

external accountability and review, such as the use of a FACA Committee or third-party evaluation of some type. The external role played by the Advisory Council on Historic Preservation, as discussed in Part II(D), demonstrates how such a body could be used to help ensure the new law is effectively implemented. There are several possible ways to design such a statute, but the goal in this regard is to ensure that ill-conceived proposals for tribal co-management do not advance and the good ones do not languish in the halls of federal bureaucracy.

CONCLUSION

In 1970, the last Public Land Law Review Commission drew a stark line between federal public lands and Indian law. The Commission viewed these bodies of law as “wholly separate,” and thus the Commission’s Report makes no reference to the historical underpinning of federal lands or to the tribal rights and interests that are tied to them.⁵²⁶ The federal public land and wildlife laws enacted before, during, and since the Commission’s Report similarly disregard the connections between many Native Nations and public lands. The cases and examples used in this Report demonstrate the ramifications of doing so and the lost potential of a more holistic and inclusive approach to public lands management. As other cases have shown, especially those resulting from the treaty-based collaborative management of fisheries in the Pacific Northwest and Great Lakes, a meaningful tribal role in resource management results in the benefit of generations of applied knowledge and, through the harmonizing of tribal self-determination and public lands management and conservation, the potential for reckoning with—and reconciliation of—the “dark side of our conservation history.”⁵²⁷

From those successes, tribal efforts to expand the avenues through which those benefits can flow have only increased. As Professor Sarah Krakoff describes in relating the history of the Bears Ears National Monument, the coalition of tribes moving that effort forward “made public land laws bend toward equality and justice, and that legacy endures even if the current Bears Ears boundaries do not.”⁵²⁸ Therein remains, in Krakoff’s words, the “enduring promise of public lands”:

For decades, public land laws, whether through policies of disposition or conservation, had similar effects on American Indian Tribes. Disposition policies, which distributed public domain lands to homesteaders, miners, railroads, and states, eroded the tribal land base and had devastating effects on tribal culture and self-governance. Conservation policies...also displaced Tribes and severed their connections to cultural practices, with enduring negative impacts. But disposition policies privatized indigenous lands, and removed them permanently (barring tribal reacquisition) from tribal access. Public lands—whether National Parks, Wilderness, National Monuments, or otherwise—remained open for contests over their use. Public lands, by remaining public, left open the space for Tribes to renegotiate their rights to their aboriginal lands, and thereby to nudge conservation policies toward justice. As long as the federal government retains one third of the Nation’s lands, there will be terrain (literally) for similar efforts.⁵²⁹

Fifty years after President Nixon’s Special Message to Congress on Indian Affairs and the Public Land Law Review Commission’s influential Report, the time has come for a broader movement in support of reckoning, reconciliation, and justice. Concurrent with the broader national dialogue on these issues, enhancing tribal co-management of federal public lands presents an opportunity to make real progress toward fulfilling those ideals. The next Presidential

⁵²⁶ PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND, at x.

⁵²⁷ Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, at 215.

⁵²⁸ *Id.* at 217.

⁵²⁹ *Id.* at 257.

administration can do so by expeditiously building on previous actions, such as Interior Secretary Jewell's Order No. 3342 and strategically linking existing authorities and strategies that would build bridges to a new era in tribal relations and public lands management. By enacting system-wide and/or place-based tribal co-management legislation, the next Congress can also affirm tribal sovereignty and effectuate the federal government's treaty and trust obligations through innovations in cooperative governance.

This Report provides a framework for putting tribal co-management in its historical and legal context. All the divergent definitions, interpretations, and applications of tribal co-management have caused a fair deal of confusion about what it means in practice and the implications for public lands and conservation more generally. A more constructive approach is to focus on the core principles of co-management; those key attributes that can be configured into different types of governing arrangements fitting particular places and connections.

For those cautious or leery of the co-management approach, we recommend it be considered in the context of more familiar questions and themes of federal public lands and wildlife law. First is the issue of accountability. Our Report makes clear that co-management is not by nature an open-ended, discretionary, and unenforceable framework that fails to hold governments—federal, state, and tribal—accountable for their actions. Finding the right balance between the level of prescription and discretion is a core tension in public lands law writ large and proposals for tribal co-management will be debated in a similar fashion. Similarly, these debates will be bounded by the framework of public land law, from the more protection-oriented statutes governing the National Parks and Wildlife Refuges to the more discretionary multiple use systems of the USFS and BLM. But this framework must no longer be divorced from and exclude tribes and tribal interests; instead, within this statutory space exists sufficient room to work more creatively and substantively with Native Nations and to incorporate the core principles of tribal co-management into the next chapter of public lands.

Situating tribal co-management in the context of federalism and intergovernmental relations also helps reframe the debate by placing it in more familiar terrain. We should first acknowledge the disadvantaged position of Indian tribes when contrasted to the often-privileged role provided to state governments in federal public lands and wildlife law. In some cases, private interests even have more influence and opportunities to operate on federal lands than do sovereign tribal nations with legal rights, interests, and cultural ties to those lands. To be sure, there is already a sharing of management on public lands, but the opportunities have not yet been extended to tribes like those offered to states and private interests.

Bridging into a new era of tribal relations does not entail surrendering the national interest in public lands and, instead, portends a future of increased engagement and enhanced protection for those resources. Prominent cases referenced in this Report, such as the Badger-Two Medicine and Bears Ears, more deeply support those interests by reframing their history and reshaping a new, more collaborative way to better protect places that are valued by Indians and non-Indians alike. They are innovative and constructive efforts at harmonizing sometimes divergent values and interests and more effectively draw upon the long-standing tribal connections to, and

knowledge of, those places.⁵³⁰ These and the many other efforts toward tribal co-management of federal public lands demonstrate the potential for tribes to engage with the federal government in new ways while enmeshing tribal values and connections into the law and management of public lands.

Ultimately, enhancing opportunities for tribal co-management of federal public lands is about justice, reconciliation, healing, and sharing.⁵³¹ Thus, beyond the direct benefits to the public lands, tribal co-management also offers a path to a more equitable future in which those core values are promoted and sustained for *all* Americans. Rather than continue the long history of division between tribes and public lands, the time has come to build bridges to that path and to a new and brighter future.

⁵³⁰ The Proclamation designating Bears Ears National Monument, for example, celebrates the cultural, ecological and recreational values of the region and makes clear that “it is in the public interest to preserve the objects of scientific and historic interest on the Bears Ears lands.” Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016). The Badger-Two Medicine Protection Act similarly celebrates the far-ranging values of the area, values that are cherished by tribal and non-tribal people: “[T]he Badger-Two Medicine is sacred land, a living cultural landscape, a hunting ground, a refuge, a wildlife sanctuary, a place of refuge for wild nature, and an important part of both tribal and non-tribal community values.” Badger-Two Medicine Protection Act, §3(1).

⁵³¹ See Tim Davis (Chair, Blackfeet Tribal Business Council), John Murray (Blackfeet Tribal Historic Preservation Officer), Terry Tatsey (Blackfeet Tribal Business Council member), Tyson Running Wolf (member of Pikuni Traditionalists Association), Darrell Hall Blackfeet Brave Dog Society), *Badger-Two Medicine Needs Permanent Protection from Development*, MISSOULIAN.COM (July 5, 2020), https://missoulian.com/opinion/columnists/badger-two-medicine-needs-permanent-protection-from-development/article_bc90325b-afeb-573c-9033-63c1f282958f.html (“The Badger-Two Medicine is, above all else, a place of healing, and our world needs it as much as it needs us.”)