

# A CASE FOR TRIBAL CO-MANAGEMENT OF FEDERAL PUBLIC LANDS

Audra Locicero\*

We are the land. To the best of my understanding, that is the fundamental idea embedded in Native American life and culture in the Southwest. More than remembered, the Earth is the mind of the people as we are the mind of the Earth. . . . It is not a means of survival. . . . It is rather part of our being, dynamic, significant, real.<sup>1</sup>

## I. INTRODUCTION

Virtually every person in the United States has visited or at least heard of one of the many parcels that comprise the Nation’s federal public lands. From landscapes as famous and awe-inspiring as the Grand Canyon and Yosemite Valley to little-trekking corners maintained by the Bureau of Land Management, the United States’ federal public lands encompass outdoor spaces of endless diversity and use. Federal public lands are areas of land and water that are owned by the Federal Government and managed by federal agencies for various public uses.<sup>2</sup> They include places cherished for their natural beauty like the National Parks, preserved to protect wildlife like National Wildlife Refuges, set aside as sanctuaries of important cultural history like National Monuments, and managed for their natural resources, like

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\* © 2024, All Rights Reserved. Juris Doctor Candidate, Stetson University College of Law, 2024. B.A. in Environmental Studies, New College of Florida, 2013. Thank you to Professor Grant Christensen for sparking my interest in Federal Indian Law and providing invaluable guidance, feedback, and support during the writing process. Additional thanks to my Notes & Comments Editor, Sasha Ledney, and the entire *Stetson Law Review* team for their hard work and editing expertise. This Article is dedicated to Indigenous advocates and activists fighting for decolonization worldwide—may Land Back be a reality in your lifetimes.

1. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 13 (2002) (quoting Laguna writer and poet PAULA GUNN ALLEN, THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS (1986)).

2. KATIE HOOVER ET AL., CONG. RSCH. SERV., IF 10585, THE FEDERAL LAND MANAGEMENT AGENCIES 11 (2021) [hereinafter FEDERAL LAND MANAGEMENT AGENCIES].

National Forests.<sup>3</sup> Encompassing 640 million acres nationwide,<sup>4</sup> public lands are primarily managed by four federal agencies: the Bureau of Land Management (“BLM”), the National Park Service (“NPS”), the United States Fish and Wildlife Service (“USFWS”), and the United States Forest Service (“USFS”).<sup>5</sup> This Article argues that the Federal Government, through its land management agencies, should actively seek co-management agreements with the Nation’s Indigenous peoples as a way to affirm its commitment to tribal self-determination and protect its magnificent natural spaces.

As places of great natural beauty and cultural significance, U.S. federal public lands are sources of pride for many Americans. Despite their central place in the hearts of many, the origin story of the United States’ federal public lands is a sordid one. Although today most Native Americans live west of the Mississippi River,<sup>6</sup> all of the Nation’s federal public lands were once the home of the continent’s Indigenous peoples.<sup>7</sup> Through war, cessation through treaty-making, treaty-breaking, forced removal, and the systematic divvying up of Native land under acts of Congress,<sup>8</sup> Native American ancestral homelands became the property of the United States Government and later the Nation’s federal public lands as we know them today.<sup>9</sup> The creation of the Nation’s federal public land system came at the enormous expense of the continent’s Native people: in total, the Federal Government has dispossessed Native Americans of an estimated 1.5 billion acres of land since the country’s founding.<sup>10</sup>

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3. *Id.* at 2.

4. CAROL VINCENT & LAURA HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020) [hereinafter FEDERAL LAND OWNERSHIP].

5. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 1–2.

6. STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1 (4th ed. 2012).

7. See MONTE MILLS & MARTIN NIE, BRIDGES TO A NEW ERA: A REPORT ON THE PAST, PRESENT, AND POTENTIAL FUTURE OF TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS 1–2 (2020).

8. See, e.g., U.S. Dep’t of State, *Indian Treaties and the Removal Act of 1830*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited Oct. 15, 2023); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 39 (Nell Jessup Newton et al., eds., 2005 ed.).

9. Rebecca Tsosie, *Conflict Between the Public Trust and Indian Trust Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 272 (2003) (“Native peoples . . . ancestral homelands [are] now designated as the ‘public lands’ of the United States.”).

10. Claudio Saunt, *The Invasion of America*, AEON (Jan. 7, 2015), <https://aeon.co/essays/how-were-1-5-billion-acres-of-land-so-rapidly-stolen>.

When European colonists arrived on the continent, North America had been populated by millions of Indigenous people for thousands of years, with an unknown and uncountable number of diverse civilizations and societies.<sup>11</sup> While there is no one worldview that can be used to describe the numerous distinct Indigenous groups at European contact, a throughline among many is the importance of land.<sup>12</sup> As Professors Mills and Nie so eloquently opine:

[M]any of [North America's Indigenous] 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.<sup>13</sup>

The land was and continues to be important to Native tribes not only for sustenance, but also as the foundation of cultural and spiritual life. As described by prominent Indian<sup>14</sup> law scholar Frank Pommersheim, land “is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.”<sup>15</sup> The impact of the loss of arguably *the* central entity of Indigenous spirituality, lifeways, and survival on the scale experienced by Native Americans cannot be understated. National pride in our federal public lands is therefore mixed with

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11. See PEVAR, *supra* note 6, at 1. Today, in the United States alone, there are 574 federally recognized Indian tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112 (Jan. 12, 2023).

12. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 268, 272–76 (1996).

13. MILLS & NIE, *supra* note 7, at 1.

14. The Author recognizes that the word “Indian,” which was given to Indigenous Americans by European conquerors and is not a self-proclaimed descriptive moniker, is in many contexts, problematic at best. The Author uses it because it is a legal term of art in the United States; it is used in the U.S. Code, the U.S. Constitution, and in federal agency rules, among other places, to refer to federally recognized tribes. See, e.g., 18 U.S.C. § 1151.

15. Tsosie, *supra* note 12, at 285 (citing Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. REV. 24, 250 (1989)).

the historical and intergenerational trauma<sup>16</sup> of settler colonialism<sup>17</sup> and loss of Native ancestral homelands.

Despite the dark history of this country's federal public lands, they are an enormous, shared asset to the American people and the world at large. As places of refuge for humans and nonhumans alike, federal public lands are the shining feather in the cap of American conservation. From desert to snow-peaked mountains and everything in between, our Nation's federal public lands encompass a diverse array of natural ecosystems, some of which, like the Everglades of Everglades National Park and Big Cypress National Preserve in Florida, are unlike any other ecosystems in the world.<sup>18</sup> They also include places that are designated specifically for land, water, and wildlife conservation, such as National Conservation Areas and Wild and Scenic Rivers.<sup>19</sup>

Federal public lands also provide numerous ecological, social, cultural, and economic benefits to the American people, whether or not they visit or use the lands themselves.<sup>20</sup> These benefits include, among many others, air and water filtration; clean water supply; wildlife habitat; recreational opportunities; nature-based educational opportunities; connection to spirituality and history; natural resources such as timber, minerals, fossil fuels, and renewable energy; and support for the multi-billion dollar outdoor recreation industry.<sup>21</sup> It is estimated that 500 million people visit the Nation's federal public lands every year to recreate, explore, and visit sites of cultural, historical, and spiritual significance.<sup>22</sup>

Unfortunately, our Nation's federal public lands, like all of Earth's natural places, have begun experiencing the negative

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16. See, e.g., Amy Bombay et al., *The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma*, 51 *TRANSCULTURAL PSYCHIATRY* 320 (2014); Renee Hoffart & Nicholas A. Jones, *Intimate Partner Violence and Intergenerational Trauma among Indigenous Women*, 28 *INT'L CRIM. JUST. REV.* 28 (2018).

17. For an in-depth exploration of the topic of settler colonialism, see generally Walter L. Hixton, *American Settler Colonialism: A History*, 100 *J. AM. HIST.* 1227 (2013).

18. *Habitats and Plant Communities*, NAT'L PARK SERV., <https://www.nps.gov/ever/learn/nature/habitats.htm> (last visited Oct. 15, 2023).

19. U.S. Dep't of the Interior, *National Conservation Lands*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands> (last visited Oct. 15, 2023).

20. THE WILDERNESS SOC'Y & THE AVARNA GRP., *PUBLIC LANDS IN THE UNITED STATES: EXAMINING THE PAST TO BUILD A MORE EQUITABLE FUTURE* 43 (2020).

21. *Id.*

22. *About America's Public Lands*, CTR. FOR BIOLOGICAL DIVERSITY, [https://www.biologicaldiversity.org/ignite\\_change/pdfs/AboutAmericasPublicLands.pdf](https://www.biologicaldiversity.org/ignite_change/pdfs/AboutAmericasPublicLands.pdf) (last visited Oct. 15, 2023).

impacts of climate change.<sup>23</sup> A 2021 report from the International Governmental Panel on Climate Change explains that scientists have observed changes to the Earth's climate due to anthropogenic forces in every region and across the climate system as a whole.<sup>24</sup> The Earth is estimated to be 1.1 degrees Celsius warmer now than it was in the late 1800s, with the last decade being the warmest one on record.<sup>25</sup> This has resulted in devastating heat waves, drought, wildfires, rising sea levels, severe storms, flooding, melting ice caps, and a decline in biodiversity.<sup>26</sup> The majority of federal public lands are located in the eleven westernmost states and Alaska;<sup>27</sup> both regions are already experiencing devastating effects. The current drought in the West is thought to be the driest 22-year stretch in 1,200 years.<sup>28</sup> Four of the largest wildfires in United States history have occurred in the past five years.<sup>29</sup> The West has also experienced numerous unprecedented and record-breaking heatwaves in the past three years alone.<sup>30</sup> Warming twice as fast as the rest of the globe on average, Alaska, like the West, is on the forefront of climate change:<sup>31</sup> the state has begun to

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23. Int'l Union for Conservation of Nature, *Climate Change Impacts on Nature*, <https://www.iucn.org/our-work/topic/climate-change-impacts-on-nature> (last visited Oct. 15, 2023); *Climate Change & Public Lands*, CTR. FOR W. PRIORITIES (Oct. 28, 2021), <https://westernpriorities.org/issue/climate-change-public-lands/>.

24. *Climate Change Widespread, Rapid, and Intensifying – IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 9, 2021), <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr> (“Many of the changes observed in the climate are unprecedented in thousands, if not hundreds of thousands of years, and some of the changes already set in motion—such as continued sea level rise—are irreversible over hundreds to thousands of years.”).

25. *What is Climate Change?*, UNITED NATIONS, <https://www.un.org/en/climatechange/what-is-climate-change> (last visited Oct. 15, 2023).

26. *Id.*

27. FEDERAL LAND OWNERSHIP, *supra* note 4.

28. Anne C. Mulkern, *Ongoing Megadrought Puts the West in ‘Uncharted Waters’*, SCI. AM. (Aug. 2, 2022), <https://www.scientificamerican.com/article/ongoing-megadrought-puts-the-west-in-uncharted-waters>.

29. *15 Largest Wildfires in US History*, EARTH.ORG (Sept. 15, 2022), <https://earth.org/worst-wildfires-in-us-history>.

30. Jason Samenow, *No September on Record in the West Has Seen a Heatwave Like This*, WASH. POST (Sept. 9, 2022), <https://www.washingtonpost.com/climate-environment/2022/09/08/western-heatwave-records-california-climate/>; Vikki Thompson et al., *The 2021 Western North America Heat Wave Among the Most Extreme Events Ever Recorded Globally*, SCI. (May 4, 2022), <https://www.science.org/doi/10.1126/sciadv.abm6860>.

31. U.S. Global Change Rsch. Program, *Fourth National Climate Assessment Chapter 2: Our Changing Climate*, FOURTH NAT'L CLIMATE ASSESSMENT, <https://nca2018.globalchange.gov/chapter/2/#key-message-7> (last visited Oct. 6, 2022).

experience the retreat of arctic sea ice, thawing permafrost, and melting glaciers.<sup>32</sup>

Federal public lands managers are faced with two pressing issues: remedy the harms of Native land dispossession,<sup>33</sup> and plan for the future of land and resource conservation under climate change. Indeed, the need for the Federal Government to take meaningful steps toward remedying the often-genocidal history of Native American subjugation and land dispossession is long overdue.<sup>34</sup> Equally as urgent is the need to thoughtfully plan for appropriate land management of the Nation's millions of acres of federal public land by incorporating the best and brightest minds in the face of a rapidly changing climate. This Article argues that tribal co-management of federal public lands, an emerging land management method based on sharing land management responsibilities between tribal governments and the Federal Government,<sup>35</sup> is a solution to these issues: both a way to reconcile the damage to tribes caused by land dispossession and a means to incorporate Native environmental expertise into public land management and conservation under climate change.

Tribal co-management of federal public lands has thus far taken various forms and been subject to different interpretations.<sup>36</sup> At its core, however, it encompasses the idea that management of federal public lands should be shared between the Federal Government and Native American tribes.<sup>37</sup> The Federal Government should prioritize tribal co-management of federal public lands because involving tribes in the management of their ancestral lands as co-equals presents an opportunity for the Government to actively acknowledge and reconcile the history of tribal land dispossession and affirm tribal self-determination, and can provide enhanced conservation of federal public lands by

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32. *Id.*

33. *See, e.g.,* Royster, *supra* note 8, at 13.

34. Carleton Bowekaty, the lieutenant governor of the Zuni Pueblo and member of the Bears Ears Inter-Tribal Coalition, on tribal co-management as restorative justice for tribes: "What could be more restorative than giving tribes the opportunity to participate in the management of lands that their ancestors were removed from[?]" *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H. Comm. On Nat. Res.*, 3, 117th Cong. 17 (Mar. 8, 2022) (statement of the Hon. Carleton Bowekaty, Lieutenant Governor, Pueblo of Zuni).

35. *See* Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 264–69 (2022).

36. *See* MILLS & NIE, *supra* note 7, at iii–iv.

37. *Id.*

bringing Indigenous land management perspectives to the conversation, like Traditional Ecological Knowledge.<sup>38</sup> This Article seeks to shed light on the injustice of Native land dispossession and argue a solution that is beneficial to tribes, the Federal Government, and the environment. Part II of this Article examines the parallel histories of Native land dispossession and the federal public land system, highlighting the ways in which tribal ancestral lands became today's federal public lands. Part III explores tribal co-management of federal public lands by defining tribal co-management, analyzing two co-management strategies, detailing an example of a co-management agreement, and arguing that the political will for tribal co-management is strong and the time for co-management is now.

## II. THE DUAL HISTORIES OF NATIVE LAND DISPOSSESSION AND THE NATION'S FEDERAL PUBLIC LANDS

### A. The History of Native Land Dispossession

To fully grasp the importance of tribal co-management of federal public lands, it is essential to first understand the history of Native land dispossession and how Native ancestral lands became the United States' federal public lands as they are known today. European colonizers of North America began occupying Indigenous lands and displacing Native Americans as soon as they arrived, through warfare, slavery, and treaties.<sup>39</sup> With their monarchs, Christianity, and the Doctrine of Discovery on their side, they justified taking Indian land as their right, to 'civilize' an unchristian people and develop 'unproductive' land into farmland.<sup>40</sup> The Doctrine of Discovery, which was later incorporated into U.S. law through the landmark Supreme Court case *Johnson v. McIntosh*, holds that the "discoverer" of an Indian tribe's land reserves the exclusive right to acquire the land from the tribe; until the land has been acquired by the discoverer, the

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38. See *infra* note 183 for a definition of and a short discussion about Traditional Ecological Knowledge.

39. THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 19.

40. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 2 (2005); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, *Johnson v. McIntosh*, and *Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 309 (1992).

tribe has the right to occupy and use the land but does not own the land in fee and thus does not have the right of alienation.<sup>41</sup> This doctrine is still good law today, and a founding doctrine of both American property law and Federal Indian law.<sup>42</sup>

Among the earliest concerted relocation of the continent's Indigenous peoples occurred as a result of the Royal Proclamation of 1763, in which the British Crown outlined the limits of the colonies and reserved the land west of the Appalachian Mountains for the Indians, designating it off limits to settlement by the colonies and individuals without the permission of the Crown.<sup>43</sup> Although the Proclamation was intended in part to protect Indian lands, it had the corollary effect of displacing the Indians whose land was located east of the line.<sup>44</sup> Additionally, the Proclamation was met with great resistance from the colonies and individual land speculators who desired to own Indian land west of the mountains.<sup>45</sup> Many colonists simply ignored the Proclamation and continued to take and settle Indian land.<sup>46</sup> By 1775, as many as 50,000 colonists had settled west of the Appalachian Mountains.<sup>47</sup>

The same settler colonialist behavior toward Indian tribes and their land endured after the Revolutionary War and the birth of the new United States. For much of U.S. history, the Federal Government's policies toward Indian tribes have been marked by white supremacist and manifest destiny ideologies, and a conscious effort to erase Native culture.<sup>48</sup> The Government's supremacist attitudes toward Native peoples, its sense of entitlement to Native land, and its desire to see tribal culture disappear are exemplified by the speech of past presidents. George Washington, in a letter to James Duane in 1783, likened forcing Native people from their lands to "driving the Wild Beasts of the

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41. See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); Miller, *supra* note 40, at 5–6.

42. Miller, *supra* note 40, at 2. For a critical discussion of the Doctrine of Discovery, see Angus Love et al., *The Supreme Court, Tribal Land Claims, and the Doctrine of Discovery*, 65 GUILD PRAC. 104, 105 (2008).

43. Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 356–58 (1989); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 19.

44. THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 19–20 ("Many Indigenous Peoples who lived east of the line, however, were ultimately forced to move west because their traditional lands were now considered to belong to the colonies.").

45. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 19.

46. PEVAR, *supra* note 6, at 5.

47. *Id.* at 22.

48. See Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 543–44 (2017).



Forest,” further stating that “the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape.”<sup>49</sup> With similar sentiment, Andrew Jackson, in his 1830 speech to Congress on Indian Removal, stated that removal of Native people from their ancestral homelands would “enable [Native people] to pursue happiness in their own way and under their own rude institutions . . . and perhaps cause them to gradually, under the protection of the Government and through the influence of good counsels, to case off their savage habits and become an interesting, civilized, and Christian community.”<sup>50</sup> These sentiments, expressed by two of the first leaders of the United States, epitomize early American attitudes toward Indians: that they were an “inferior,” “uncivilized,” “heathen,” and “savage” people, for which their lowly status justified the taking of their land through fraud and force.<sup>51</sup>

The period after the Revolutionary War was marked by treaty-making between the U.S Government and Indian tribes.<sup>52</sup> While some were treaties of peace between two governments,<sup>53</sup> many required Indian tribes to trade their land for goods and services, resulting in a reduced land-base,<sup>54</sup> or to remove from their ancestral homelands entirely.<sup>55</sup> Additionally, treaties to reserve land for the contracting Indian tribe were made and then later broken, with no consequences for the Government.<sup>56</sup> Disregarding the treaties and other statutes passed to protect Indian land, individual settlers continued to move west.<sup>57</sup> This period of early American history, therefore, resulted in great loss of land for Indian tribes.

In 1828, Andrew Jackson was elected the seventh President of the United States and quickly began advocating for “removal” of the Indians of the southeast to lands west of the Mississippi

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49. *See id.* at 544.

50. President Andrew Jackson, Message to Congress “On Indian Removal” (Dec. 6, 1830).

51. *See generally* Johnson v. M’Intosh, 21 U.S. 543 (1823).

52. PEVAR, *supra* note 6, at 6.

53. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 27.

54. *Id.* at 29.

55. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 31.

56. *See, e.g.,* Treaty of Fort Laramie (1868), NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/fort-laramie-treaty> (last visited Dec. 18, 2023).

57. PEVAR, *supra* note 6, at 6.

River.<sup>58</sup> In 1830, Congress passed the Indian Removal Act, which officially authorized the Government to relocate Indian tribes to the newly-designated “Indian Territory” west of the Mississippi in exchange for the tribes’ ancestral homelands in the southeast.<sup>59</sup> Removal of Indians in response to the Act was meant to be voluntary;<sup>60</sup> in reality, it resulted in one of the most significant acts of genocide toward Indian people in the country’s history—the Trail of Tears.<sup>61</sup> It is estimated that the forced march of the “Five Tribes”<sup>62</sup> from the Southwest to present day Oklahoma, a one thousand-plus mile walk at bayonet point, resulted in the death of approximately fifteen thousand Indians.<sup>63</sup> While removal is most often associated with the forced migration of the large tribes of the Southeast to Indian Territory, tribes from all over the continent were removed from their ancestral lands and relocated elsewhere throughout the nineteenth century.<sup>64</sup> For example, in 1851, the Indian Appropriations Act established the reservation system of the west and relocated western tribes onto designated reservation land.<sup>65</sup>

Native land dispossession, unfortunately, did not end with the removal period. In 1887, Congress passed the General Allotment Act, also known as the Dawes Act.<sup>66</sup> This legislation systematically divided up communal tribal land into individual allotments and assigned separate parcels of land to each tribe member to be held in trust by the government for twenty-five years, after which the individual tribe member would be given the deed to the land.<sup>67</sup> The

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58. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 47.

59. *Id.* at 48.

60. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 124 (7th ed. 2017) (quoting President Andrew Jackson’s First Annual Message to Congress on December 8, 1829: “This emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land”).

61. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 51–53.

62. The “Five Tribes” refers to the Cherokee, the Choctaw, Chickasaw, Creek, and Seminole tribes. PEVAR, *supra* note 6, at 6.

63. Elizabeth Prine Pauls, *Trail of Tears*, BRITANNICA, <https://www.britannica.com/event/Trail-of-Tears> (last visited Oct. 5, 2022); STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 265 (4th ed. 2012).

64. GETCHES ET AL., *supra* note 60, at 153. For a description of the Navajo Tribe’s “Long Walk,” the tribe’s forced removal of its ancestral homelands to the Bosque Redondo Reservation at Fort Sumner, see GARRICK BAILEY & ROBERTA GLENN BAILEY, A HISTORY OF THE NAVAJOS, THE RESERVATION YEARS 10 (1986).

65. THE WILDERNESS SOC’Y & THE AVARNA GRP., *supra* note 20, at 22.

66. Royster, *supra* note 8, at 7.

67. *Id.* at 10.

Government then sold the “surplus” land that remained to white settlers.<sup>68</sup> As a result, an estimated sixty million acres were either ceded or sold to white homesteaders and corporations as this so-called “surplus.”<sup>69</sup> The Allotment Act was repealed in 1934, but to enormous damage: between 1887 and 1934, Indian land holdings shrunk from 156 million acres to 48 million acres.<sup>70</sup>

After a brief interlude of reform between the mid-1920s and early 1940s, referred to as Indian Reorganization, in which the Government exhibited more respect for Indian tribes and enacted laws intended to encourage Indian self-government,<sup>71</sup> the federal Indian policy regressed and became one of complete integration of Indians into white society.<sup>72</sup> “Termination,” the name for the policy and the period following Indian Reorganization, saw the Federal Government’s termination of its relationship and responsibility to approximately 109 tribes, as well as the elimination of the terminated tribes’ reservations.<sup>73</sup> For many of the smaller tribes, their land was sold and the money gained was divided among the tribes’ members.<sup>74</sup> Termination was officially ended in the late 1960s, and replaced with a policy of Indian Self-Determination.<sup>75</sup> Its legacy, however, and that of the hundreds of years of colonial- and U.S.-Native relations preceding it, remains. It is time for the Federal Government to take action to remedy the long and tragic history of Indian land dispossession in this country.

## B. The Rise of the Public Land System

The creation of the federal public land system was facilitated by and ran parallel to the process of Indian land dispossession. Public lands, as we think of them today, began with the formation of the public domain, which is land owned exclusively by the Federal Government.<sup>76</sup> Prior to the ratification of the Articles of the Confederation in 1781, all of the land in the newly formed

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68. *Id.* at 13.

69. *Id.*; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 79.

70. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 79; PEVAR, *supra* note 6, at 9.

71. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 84.

72. PEVAR, *supra* note 6, at 11.

73. *Id.* at 12.

74. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 95.

75. PEVAR, *supra* note 6, at 12.

76. *Public Domain*, BLACK’S LAW DICTIONARY (11th ed. 2019).

United States was owned by the thirteen states themselves.<sup>77</sup> The ratification of the Articles hinged on seven of the thirteen states with claims to land west of the Appalachian Mountains agreeing to cede their western territory to the Federal Government.<sup>78</sup> After much debate, the seven states agreed to cede the land and have it become the “common property of the nation.”<sup>79</sup> Two hundred thirty million acres of land were left to the Federal Government, and the public domain was established.<sup>80</sup>

Over the next many decades of expansion, the Federal Government acquired the rest of what we now consider the continental United States through Native land dispossession, conquest, and treaty settlements with France, Mexico, Russia, Canada, England, and Spain. As it did, the public domain grew.<sup>81</sup> At its height, the public domain totaled 1.8 billion acres.<sup>82</sup> By the early 1800s, the Government began an effort to dispose of the land in the public domain.<sup>83</sup> In 1812, the General Land Office (“GLO”) was established under the Department of the Treasury to oversee the Government’s survey and disposal of the public domain.<sup>84</sup> Under the GLO, two-thirds of the 1.8 billion acres of public domain land was used to create states or was transferred to individuals and private companies.<sup>85</sup> Some of the land was given directly to veterans of the Revolutionary War and the War of 1812; other land was given to railroad companies to create railroads across the new nation.<sup>86</sup> Significantly, under the Homestead Act of 1862, the Government gave an estimated 270 million acres, or ten percent of the land of the United States at the time, to white settlers who agreed to cultivate the land in exchange for 160 acre plots.<sup>87</sup>

With the mid-1800s came a new sentiment: that wilderness was a precious cultural resource to be protected and preserved.<sup>88</sup>

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77. See John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 504–05 (2018).

78. *Id.*

79. *Id.* at 504.

80. *Id.* at 504–05.

81. PUBLIC LANDS FOUND., *AMERICA’S PUBLIC LANDS: ORIGIN, HISTORY, FUTURE* 3–4 (2014).

82. *Id.*

83. See THE WILDERNESS SOC’Y & THE AVARNA GRP., *supra* note 20, at 20.

84. PUBLIC LANDS FOUND., *supra* note 81, at 4.

85. *Id.*

86. *Id.* at 4–5.

87. THE WILDERNESS SOC’Y & THE AVARNA GRP., *supra* note 20, at 24.

88. *Id.* at 25.

Concerned that unfettered development and industrialization would harm the pristine nature of the west and deplete natural resources, an asset to the growing nation, the early conservation movement was born.<sup>89</sup> It was popularized by prominent men, such as John Muir, who is well known for his travels in the High Sierras of California and who later founded the Sierra Club; and President Theodore Roosevelt, who created what is considered the country's first conservation organization, the Boone and Crockett Club, and spearheaded the Federal Government's first conservation initiatives during his Presidency.<sup>90</sup>

In response to the newly popular environmental ethic, the Government took action to conserve the country's landscapes and natural resources. In 1872, Yellowstone National Park was established as the world's first national park.<sup>91</sup> In 1891, Congress passed the Forest Reserve Act, which allowed the President of the United States to set aside public domain land as forest reserves, later known as National Forests.<sup>92</sup> President Roosevelt's travels led to the creation of the Yellowstone Timberland Reserve in 1891, now the Shoshone National Forest, the oldest National Forest in the U.S.<sup>93</sup> Note, however, that the creation of the early National Parks and National Forests was usually at the expense of Indian tribes. For example, prior to the establishment of Yellowstone National Park, the land was important to many tribes, such as the Crow, Shoshone, Bannock, Cheyenne, and Arapaho tribes, both for subsistence and as a place of sacred cultural significance.<sup>94</sup> Once Yellowstone was established, the tribes were either removed entirely, as was the case with a band of Shoshone,<sup>95</sup> or were terrorized, marched out, and killed by local law enforcement and vigilantes, as was the case with a remaining group of Bannock people.<sup>96</sup>

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89. FEDERAL LAND OWNERSHIP, *supra* note 4, at 2; THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 24–25.

90. THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 24–25.

91. *Birth of a National Park*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> (last visited Dec. 18, 2023).

92. FEDERAL LAND OWNERSHIP, *supra* note 4, at 2; THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 266.

93. *History & Culture*, FOREST SERV., <https://www.fs.usda.gov/main/shoshone/learning/history-culture> (last visited Dec. 19, 2023).

94. Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RESOURCES L. REV. 41, 49 (2007).

95. *Id.*

96. *Id.* at 50.

By the early 1900s, the conservation ethic had taken hold in earnest, and the Government began shifting away from its many-decades pursuit of disposing of the public domain and began a campaign of retention and management of the Nation's public lands.<sup>97</sup> In 1905, under President Theodore Roosevelt, the Government established the Forest Service within the Department of Agriculture,<sup>98</sup> transferring the management of the forest reserves from the General Land Office under the Department of the Interior ("DOI"), to the USFS, under the United States Department of Agriculture ("USDA").<sup>99</sup> In 1916, the National Park Service was created to manage the country's national parks and other important landmarks.<sup>100</sup> By mid-century, the Fish and Wildlife Service (later known as the U.S. Fish and Wildlife Service) was established to manage the Nation's Wildlife Refuges,<sup>101</sup> and the Bureau of Land Management was formed, taking over the land and work of the General Land Office and the Grazing office.<sup>102</sup> In this period of land retention and management, it is estimated that the General Land Office transferred some two hundred million acres of the public domain to these newly established land management agencies.<sup>103</sup> Significantly, of the original 1.8 billion acres in the public domain, fewer than fifty million acres remained reserved by tribes or set aside for Indian peoples, which amounted to less than three percent of the land acquired by the Federal Government after 1781.<sup>104</sup> Lest this figure be lost on the reader, it bears repeating that all of the land comprising the current United States was once Native land, and Indian reservations today make up less than three percent of the ancestral homelands of Indian tribes. This figure is staggering and speaks directly to the need for tribal co-management of federal public lands.

Today, the Federal Government manages 640 million acres of public land, or 28 percent of the land in the 50 states and the District of Columbia.<sup>105</sup> Of the 640 million acres of federal public

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97. FEDERAL LAND OWNERSHIP, *supra* note 4, at 3.

98. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 1.

99. *Our History*, FOREST SERV., <https://www.fs.usda.gov/learn/our-history> (last visited Feb. 19, 2023).

100. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 2.

101. *Id.*

102. *Id.*; THE WILDERNESS SOC'Y & THE AVARNA GRP., *supra* note 20, at 28.

103. PUBLIC LANDS FOUND., *supra* note 81, at 7–8.

104. *Id.* at 8–9.

105. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 1.

land, 606 million acres (95 percent) are managed primarily by the four federal agencies mentioned above: the Bureau of Land Management, the Forest Service, the U.S. Fish and Wildlife Service, and the National Park Service.<sup>106</sup> The BLM manages the most public land of any federal agency by far, overseeing 244 million acres of forests, mountains, rangelands, arctic tundra, and deserts.<sup>107</sup> Each agency has a different charge, and the public lands held within each are managed differently depending on the agency's established purpose.<sup>108</sup> For example, per the BLM's charter legislation, the Federal Land Policy and Management Act of 1976, the agency has the dual mandate to manage public land for multiple uses, such as mineral extraction and timber harvesting, and to conserve natural, historical, and cultural resources in the land it manages.<sup>109</sup> The USFWS, on the other hand, and in contrast to the multiple-use mandate of the BLM, has a dominant-use mission: "to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people."<sup>110</sup> While other uses of USFWS land are allowed if done in a way that is compatible with the USFWS's mission, such as timber harvesting and cattle grazing, wildlife-related activities such as bird-watching and fishing are considered "priority uses" of the land and take priority over extractive uses that are otherwise allowed more widely in BLM land.<sup>111</sup>

While the United States is often considered a trailblazer in protecting and conserving land for public use and enjoyment, the history of Native land dispossession at the root of the federal public land system is one that often goes undiscussed. The dual histories of Native land dispossession and the creation of federal public lands are critical to understanding the importance of tribal participation in the management of the Federal Government's public lands. Our public lands are the ancestral homelands of millions of Native Americans, yet they are still, for the most part,

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106. *Id.* The other five percent is managed by agencies such as the Department of Defense, the Department of Energy, NASA, and the U.S. Army Corps of Engineers. *Id.*

107. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 1; U.S. Dep't of the Interior, *What We Manage*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/what-we-manage> (last visited Dec. 18, 2023).

108. FEDERAL LAND OWNERSHIP, *supra* note 4, at 3.

109. U.S. Dep't of the Interior, *National History*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/history/timeline> (last visited Dec. 18, 2023).

110. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 2; U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/> (last visited Dec. 18, 2023).

111. FEDERAL LAND MANAGEMENT AGENCIES, *supra* note 2, at 2.

managed solely by the Federal Government.<sup>112</sup> The inequity of this reality is glaring and must be remedied. Tribal co-management of federal public lands is a viable alternative to the current public land management scheme, and one that offers a real opportunity for not only reparations but a new era of championing Indigenous voices and Indigenous conservation.

### III. TRIBAL CO-MANAGEMENT OF FEDERAL PUBLIC LANDS

#### A. What is Tribal Co-Management?

Tribal co-management is a policy aspiration rather than a requirement. While Indian tribes and the Federal Government have been engaged in numerous co-management relationships of varying types since the 1970s,<sup>113</sup> there is no single legal mandate that requires federal land management agencies to share public land management oversight and responsibilities with Indian tribes. This is due to the fact that there is no explicit federal public land law that requires the government to jointly manage federal public lands with tribes (for example, none of the federal land management agencies' enabling statutes require tribal co-management).<sup>114</sup> Tribal co-management has instead been creatively and somewhat haphazardly achieved under the authority of a patchwork of pre-existing federal statutes, Executive actions, and Federal Indian law case precedent.<sup>115</sup>

Tribal co-management has, therefore, taken many different forms and has been called by various names.<sup>116</sup> At the core of the idea, however, is the conviction that Indian tribes should share in the authority and responsibilities of managing federal public lands.<sup>117</sup> Put another way:

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112. *Id.* at 1–2.

113. *See* MILLS & NIE, *supra* note 7, at 56–57.

114. *See id.* at 19–22.

115. *See id.* at 19; *see, e.g.*, Washburn, *supra* note 35; Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV'T L.J. 1 (2022); Emma Blake, Note, *Tribal Co-Management: A Monumental Undertaking?*, 48 ECOLOGY L.Q. 249 (2021).

116. *See* MILLS & NIE, *supra* note 7, at 19, 64–65. Other common names for tribal co-management-like initiatives include “cooperative management,” “collaborative management,” “joint management,” and “co-stewardship.” *Id.* at 65; *see, e.g.*, DEPARTMENT OF THE INTERIOR, FIRST ANNUAL REPORT ON TRIBAL CO-STEWARDSHIP 2 (2022).

117. *See* Washburn, *supra* note 35, at 266–69.



Comanagement embodies the concept and practice of two (or more) sovereigns working together to address and solve matters of critical concern to each. Comanagement 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.<sup>118</sup>

As expressed by Professors Monte Mills and Martin Nie in their extensive article on the history, law, and future of tribal co-management, regardless of what form the arrangement between an Indian tribe and the Federal Government takes or is titled, what is important is that co-management agreements reflect an earnest effort to include Indian tribes in the management of federal public lands.<sup>119</sup>

## B. Current Tribal Co-Management Strategies

Numerous strategies under various legal authorities have been employed to achieve the goals of tribal co-management. Examples of tribal co-management authorities range from court orders,<sup>120</sup> public land management agencies' enabling acts,<sup>121</sup> and agency rules.<sup>122</sup> In fact, in a report from November 2022, the Department of the Interior identified upwards of forty-five different legal authorities that the Department of Interior's Bureaus and Offices can rely upon to engage in tribal co-management, or what the agency calls "co-stewardship."<sup>123</sup> However, two of the methods most often used and those that the Author believes can be most easily implemented and therefore have the most promise for success, are the establishment and joint-

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118. 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'L RES. J. 585, 602 (2008) (quoting Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENV'T L. 279, 284–85 (2000)).

119. See MILLS & NIE, *supra* note 7, at 65–66.

120. *Id.* at 56–57.

121. *Id.* at 56–59; Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RES. & ENV'T 47, 49 (2012).

122. MILLS & NIE, *supra* note 7, at 31–32.

123. See generally DEPARTMENT OF THE INTERIOR, CURRENT LAND, WATER, AND WILDLIFE AUTHORITIES THAT CAN SUPPORT TRIBAL STEWARDSHIP AND CO-STEWARDSHIP FINAL REPORT (2022).

management of National Monuments by executive action under the Antiquities Act<sup>124</sup> contracting and compacting agreement to assume the responsibilities of federal public land management under the Tribal Self-Governance Act.<sup>125</sup> These authorities, therefore, will be the focus of this Section. Note, however, that many other methods of tribal co-management exist; an in-depth exploration of each of them is beyond the scope of this Article.

### 1. *Executive Action Under the Antiquities Act*

In 1906, Congress passed the Antiquities Act.<sup>126</sup> It sets out that “[t]he President may, in the President’s discretion, declare by public 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.”<sup>127</sup> It was enacted in response to the pillaging of Native American artifacts in the Southwest by settlers, and a growing concern from archaeologists and anthropologists that, due to land dispossession and forced assimilation, Native Americans were a “vanishing people” whose cultural history would soon be lost if not protected.<sup>128</sup> In practice, the Antiquities Act gives the President broad authority to establish national monuments in order to preserve important pieces of U.S. and pre-U.S. history, as well as objects of scientific interest.<sup>129</sup>

The President’s authority under the Antiquities Act also includes the authority to direct how national monuments will be managed.<sup>130</sup> Taking up only three small sections of the United States Code,<sup>131</sup> one subsection of the Act holds that “[t]he President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to

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124. 54 U.S.C. §§ 320301–03. The Antiquities Act was originally found at 16 U.S.C. § 431–33.

125. 25 U.S.C. §§ 5361–77.

126. 54 U.S.C. § 320301.

127. *Id.* § 320301(a).

128. Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 220 (2018).

129. 54 U.S.C. § 320301(a); Daniel Franz, *The Subdelegation Doctrine as a Legal Tool for Establishing Tribal Comanagement of Public Lands: Through the Lens of Bears Ears National Monument*, 32 COLO. NAT. RES. ENERGY & ENV'T L. REV. 1, 24 (2021).

130. Blake, *supra* note 115, at 275.

131. 54 U.S.C. §§ 320301–03.

be protected.”<sup>132</sup> This has been interpreted to mean that the President has the power to determine the “proper care and management” of any national monument they establish, as well as what federal land management agency will manage the monument.<sup>133</sup> Notice, that by the language of this subsection, the only thing qualifying “proper care and management” of a newly established monument is that the land designated for the monument must be “confined to the smallest area compatible” with the management of the important objects to be protected.<sup>134</sup> This very limited charge from Congress has been interpreted to give the President broad discretion to determine how national monuments should be managed.<sup>135</sup>

The President’s power under the Antiquities Act to establish national monuments and decide how they will be managed has been challenged in federal courts and by Congress, but broad Presidential discretion remains.<sup>136</sup> Because the President establishes a national monument through presidential proclamation, and presidential proclamations are part of the power granted to the President by Congress, courts have generally deferred to the authority granted to the President under the Act and upheld national monument proclamations as constitutional.<sup>137</sup> Notably, no action taken by a president under the Antiquities Act has ever been overturned by a court.<sup>138</sup> In Congress, there have been multiple attempts to limit the President’s discretion under the Antiquities Act, but to no avail; any proposed legislation to restrain the President’s power under the Act has failed.<sup>139</sup>

In view of the President’s ability under the Antiquities Act to set aside land for protection as national monuments and determine the management scheme and public land management agency responsible for the monuments, the Act is a viable option through which tribal co-management of federal public lands can be achieved. If the President can use their congressionally granted

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132. *Id.* § 320301(b).

133. Blake, *supra* note 115, at 277; CONG. RSCH. SERV., NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 8 (2022).

134. 54 U.S.C. § 320301(b).

135. Blake, *supra* note 115, at 277.

136. *Id.* at 278–79.

137. CONG. RSCH. SERV., EXECUTIVE ORDERS AND PROCLAMATIONS 23 (1999); Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RES. L. REV. 153, 164 (2011); Blake, *supra* note 115, at 278.

138. Blake, *supra* note 115, at 278.

139. *Id.* at 280.

power under the Act to shape the vision of how national monuments are managed, then by extension, they should have the power to include tribes in the management of national monuments.

2. *Contracting and Compacting Under the Indian Self-Determination and Education Assistance Act*

Another important authority for tribal co-management of federal public lands is the ability of tribes to contract with federal land management agencies for the assumption of federal programs, services, functions, and activities under the Indian Self-Determination and Education Assistance Act.<sup>140</sup> Spurred by a now-famous message from President Nixon to Congress in 1970 urging the legislative branch to reform the federal Indian policy from one of termination to one of self-determination,<sup>141</sup> the 1970s saw a drastic change in the Government's policy toward tribes. Under this new era of Indian policy, Congress passed a number of landmark laws aimed at promoting tribal sovereignty and Indian prosperity and wellbeing.<sup>142</sup> One of these laws was the Indian Self-Determination and Education Assistance Act, which was passed in 1975, and allows tribes to enter into contracts with federal agencies, like the Bureau of Indian Affairs and Indian Health Services, to administer federal programs that provide services to Indian people.<sup>143</sup> Under these contracts, tribal governments essentially assume the role of the federal agencies and provide to their people the services that the government would otherwise provide "for the benefit of Indians because of their status as Indians."<sup>144</sup> This initiative has been extremely successful: "[h]undreds of such contracts and funding agreements are signed each year, amounting to billions of dollars in value annually."<sup>145</sup>

In 1994, the Tribal Self Governance Act amended the Indian Self-Determination and Education Assistance Act to allow tribal governments to contract with other Interior Department agencies,

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140. See generally Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203.

141. Lisa Mann, "Self Determination Without Termination": President Richard M. Nixon's Approach to Native American Policy Reform, WHITE HOUSE HIST. ASS'N, <https://www.whitehousehistory.org/self-determination-without-termination> (last visited Dec. 18, 2023).

142. PEVAR, *supra* note 6, at 13.

143. Washburn, *supra* note 35, at 268.

144. *Id.* at 279 n.98; 25 U.S.C. § 5321.

145. Washburn, *supra* note 35, at 271.

such as the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service, for tribal management of federal programs that have a “special geographic, historical or cultural significance to the tribe.”<sup>146</sup> This is notable because under prior iterations of the Act, tribes were only able to contract for the management of programs that were “for the benefit of Indians because of their status as Indians.”<sup>147</sup> The Tribal Self-Governance Act therefore extended contracting opportunities from programs that are exclusively “for the benefit of Indians because of their status as Indians,” like healthcare services under Indian Health Service,<sup>148</sup> to include other programs of significance to tribes, like the management of National Park Service programs, for example,<sup>149</sup> impliedly including opportunities to co-manage federal public lands.<sup>150</sup> Additionally, in 2004, Congress passed the Tribal Forest Protection Act, which allows tribes to contract with the U.S. Forest Service under the USDA to help accomplish the Government’s land management goals on federal public lands “bordering on or adjacent to the Indian forest land or rangeland [that] . . . poses a threat of fire, disease, or other threat” or “is in need of land restoration,” or that “involves a feature or circumstance unique to [the] Indian tribe (including treaty rights or biological, archeological, historical, or cultural circumstances).”<sup>151</sup>

The opportunities for contracting under the Tribal Self-Governance Act for Bureau of Land Management, National Park Service, and Fish and Wildlife Service projects, as well as Forest Service projects under the Tribal Forest Protection Act, have huge implications for tribal co-management of federal public lands. For one, the directive under the Tribal Self-Governance Act that tribes may contract with the Department of the Interior’s public land management agencies for “programs, services, functions, and activities . . . which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a

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146. 25 U.S.C. § 5363(c); Washburn, *supra* note 35, at 279.

147. Washburn, *supra* note 35, at 279 n.98.

148. *Id.* at 272.

149. *Id.* at 279.

150. 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. ENV'T L. REV. 475, 476 (2007).

151. Washburn, *supra* note 35, at 280–81; 25 U.S.C. § 3115a.

compact,”<sup>152</sup> seems to encompass tribal participation in the management of federal public lands, as arguably all of the federal public lands are of geographic, historical, or cultural significance to at least one tribe based on the fact that all of the federal public lands were once Indian lands.<sup>153</sup> Similarly, the language of the Tribal Forest Protection Act, which holds that tribes may contract with the U.S. Forest Service to help achieve the Agency’s management goals on federal public lands that “involves a feature or circumstance unique to [the] Indian tribe (including treaty rights or biological, archeological, historical, or cultural circumstances),”<sup>154</sup> appears to give tribes great latitude to partner with the Forest Service to co-manage public lands of importance to the tribes, as much of the Nation’s federal public lands involve archaeological, historical, and cultural features unique to the many federally recognized tribes. As such, both Acts are examples of already-existing legal authority for co-management of federal public lands between the Federal Government and Indian tribes.

### C. Bears Ears National Monument: A Case Study

There is no better example of already-existing legal authority being used to facilitate tribal co-management than the cooperative agreement between the Bureau of Land Management, the Forest Service, and the Bears Ears Commission, a five-tribe coalition, to co-manage Bears Ears National Monument in Utah.<sup>155</sup> The region of southeastern Utah known as Bears Ears, named such because of its two distinct buttes that resemble the ears of a bear,<sup>156</sup> is the ancestral homeland of countless Indian tribes.<sup>157</sup> For many tribes of the Southwest, it is a place of deep cultural and spiritual importance and is visited by many Native Americans for ceremonies and other traditional purposes, like gathering

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152. 25 U.S.C. § 5363(c).

153. Washburn, *supra* note 35, at 279.

154. 25 U.S.C. § 3101(2)(A)–(H).

155. INTER-GOVERNMENTAL COOPERATIVE AGREEMENT BETWEEN THE TRIBAL NATIONS WHOSE REPRESENTATIVES COMPRISE THE BEARS EARS COMMISSION AND THE US DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE FOR THE COOPERATIVE MANAGEMENT OF THE FEDERAL LANDS AND RESOURCES OF THE BEARS EARS NATIONAL MONUMENT (2022) [hereinafter INTER-GOVERNMENTAL COOPERATIVE AGREEMENT].

156. Establishment of Bears Ears National Monument, 82 Fed. Reg. 1139 (Jan. 5, 2017).

157. THE BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 8–10 (2015).

medicine.<sup>158</sup> It is considered one of the “densest and most significant cultural landscapes in the United States,” with over one hundred thousand Native American cultural sites that range from villages, to cliff dwellings, to ceremonial sites, and includes rock art like petroglyphs and pictographs and other precious artifacts.<sup>159</sup>

In 2015, the Bears Ears Inter-Tribal Coalition, made up of representatives of the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni tribal governments, presented a proposal to President Obama asking him to declare 1.9 million acres of southeastern Utah a national monument under his authority under the Antiquities Act.<sup>160</sup> The proposal was the first of its kind; never before had a tribe petitioned the Federal Government to establish a national monument.<sup>161</sup> The written proposal itself was extensive and included, among many other things, the Coalition’s vision of shared management of the monument between the federal land management agencies and the tribes.<sup>162</sup> It stated a hope that “[t]he Agencies and the Tribes shall, from the beginning to the conclusion of all plans and projects, collaborate jointly on all procedures, decisions, and other activities except as otherwise provided in the Proclamation.”<sup>163</sup> The proposal further suggested that:

In long, focused, and well-attended deliberations over this proposal, we have concluded that this new monument must be managed under a sensible, entirely workable regime of true Federal-Tribal Collaborative Management. We know that this has never been done before. But most great breakthroughs in public policy have no direct precedent. We want to work with you on this. . . . Like you, we want to make the Bears Ears National Monument the shining example of the trust, the government-to-government relationship, and innovative, cutting-edge land management. But whatever the specific words might be, for the Bears Ears National Monument to be all it can be, the Tribes must be full partners with the United

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158. *Id.* at 1–2.

159. Establishment of Bears Ears National Monument, *supra* note 156; THE BEARS EARS INTER-TRIBAL COALITION, *supra* note 157, at 9.

160. THE BEARS EARS INTER-TRIBAL COALITION, *supra* note 157, at 2.

161. *Id.* at 1–2.

162. *Id.* at 28–34.

163. *Id.* at 22.

States in charting the vision for the monument and implementing that vision.<sup>164</sup>

On December 28, 2016, President Obama released Presidential Proclamation 9558, officially establishing 1.35 million acres of land in southeastern Utah as Bears Ears National Monument under the authority of the Antiquities Act.<sup>165</sup> It set out in broad strokes how the new monument was to be managed, and in doing so, established the Bears Ears Commission “to provide guidance and recommendations on the development and implementation of management plans and on management of the monument.”<sup>166</sup> The Commission in the proclamation mirrored the Bears Ears Inter-Tribal Coalition, requiring one elected official from each of the Hopi, Navajo, Ute Mountain Ute, Ute and Uintah Ouray, and Zuni tribes to participate in the Commission.<sup>167</sup> The Proclamation placed the management of the monument in the hands of the BLM and the USFS, but required that the Secretary of the Interior and the Secretary of Agriculture “meaningfully engage the Commission . . . in the development of the management plan” of the monument, “carefully consider integrating the traditional and historical knowledge and special expertise of the Commission,” and ensure that the management plan “set forth parameters for continued meaningful engagement with the Commission . . . in implementation of the management plan.”<sup>168</sup>

On December 4, 2017, only eleven months after it was established, President Trump issued Proclamation 9681, reducing Bears Ears National Monument by 85 percent “to the smallest area compatible with the protection of the objects of scientific or historic interest” in the area, to the dismay of the tribes and advocates who had worked tirelessly to protect the sacred landscape.<sup>169</sup> Many federal lawsuits followed Proclamation 9681, as well as uncertainty over the future of the landscape.<sup>170</sup> But with a change in President came a change for Bears Ears, and on October 8, 2021,

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164. *Id.* at 3–4.

165. Establishment of Bears Ears National Monument, *supra* note 156.

166. *Id.* at 1144.

167. *Id.*

168. *Id.*

169. Modifying the Bears Ears National Monument, 82 Fed. Reg. 58,081 (Dec. 8, 2017); Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

170. Bears Ears National Monument, 86 Fed. Reg. 57,321 (Oct. 15, 2021).



President Biden, in yet another presidential proclamation, restored the monument to its original size.<sup>171</sup> President Biden's Proclamation 10285 again asserted that the monument should be managed by the BLM and the USFS, and reestablished the Bears Ears Commission "in accordance with the terms, conditions and obligations set forth in Proclamation 9558 to provide guidance and recommendations on the development and implementation of management plans and on management of the entire monument."<sup>172</sup>

Since Bears Ears National Monument was restored to its full size in December 2021 under Proclamation 10285 and the Bears Ears Commission was reestablished, the BLM, the USFS, and the Bears Ears Commission entered into the Inter-Governmental Cooperative Agreement for the co-management of the monument.<sup>173</sup> The agreement, which was formally signed by the Director of the BLM, the USDA Undersecretary for Natural Resources and the Environment, and the tribal representatives of each of the tribes of the Bears Ears Commission on June 18, 2022,<sup>174</sup> established a framework for how the federal agencies and the Commission are to work together to co-manage Bear Ears and execute the direction in Proclamation 10285 that requires the agencies to obtain meaningful input from the Commission on the development and implementation of the monument's management plan.<sup>175</sup>

Among the agreement's many groundbreaking provisions is a commitment from the agencies and the Commission to "[c]ooperate in land use planning . . . program development, [and] resource protection . . . concerning Bears Ears,"<sup>176</sup> and to "[e]ngage on an ongoing basis in joint dialogue, knowledge-sharing and learning programs for BLM and USFS managers and professional staff, Tribal officials, and other appropriate parties to address critical resource management, Tribal and agency program priorities, and

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171. *Id.*

172. *Id.*

173. INTER-GOVERNMENTAL COOPERATIVE AGREEMENT, *supra* note 155.

174. Andrea Balles, *Federal and Tribal Leaders Formalize Agreement for Cooperative Management of Bears Ears National Monument*, BUREAU OF LAND MGMT. (June 30, 2022), <https://www.blm.gov/blog/2022-06-30/federal-and-tribal-leaders-formalize-agreement-cooperative-management-bears-ears>.

175. INTER-GOVERNMENTAL COOPERATIVE AGREEMENT, *supra* note 155, at 2.

176. *Id.* at 3.

a shared awareness of the Tribal context of the landscape,”<sup>177</sup> and a promise from the federal agencies to “[e]nsure that Federal policies reflect the needs of Tribal Nations and that Tribal leaders have a meaningful seat at the table before decisions are made that impact their communities by centering Indigenous voices, including increasing the recognition of the value of traditional Indigenous knowledge.”<sup>178</sup>

The BLM, the USFS, and the Bears Ears Commission, along with the Bears Ears Monument Advisory Committee, are currently working to develop a new Resource Management Plan for the monument.<sup>179</sup> The BLM and the USFS are “currently working on the draft management plan, in close coordination with the Bears Ears Commission.”<sup>180</sup> Until the new Resource Management Plan is approved, the BLM is providing interim guidance on the management of the monument, in compliance with President Biden’s Proclamation 10285.<sup>181</sup>

The commitments in the Inter-Governmental Cooperative Agreement, and the establishment of Bears Ears National Monument more broadly, are significant for U.S.-tribal relations and the future of public lands for a number of reasons. The proclamation establishing Bears Ears and the cooperative agreement both recognize the cultural and spiritual importance of the Bears Ears landscape to the tribes of the Bears Ears Commission and explicitly hold that the federal agencies must meaningfully engage the Commission in the management of the monument.<sup>182</sup> Likewise, both the proclamation and the cooperative agreement unequivocally affirm the value of Traditional Ecological Knowledge and the important role it can play in public land management.<sup>183</sup> In these ways, the co-management agreement is

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177. *Id.*

178. *Id.* at 5.

179. *Bears Ears National Monument Management*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument> (last visited Dec. 18, 2023).

180. *Id.*

181. *Id.*

182. Establishment of Bears Ears National Monument, *supra* note 156; INTER-GOVERNMENTAL COOPERATIVE AGREEMENT, *supra* note 155, at 1.

183. Establishment of Bears Ears National Monument, *supra* note 156; INTER-GOVERNMENTAL COOPERATIVE AGREEMENT, *supra* note 155, at 2. Sometimes called native science or indigenous knowledge, Traditional Ecological Knowledge is specialized knowledge about ecosystems acquired by indigenous people over hundreds or thousands of

both an act of reconciliation, bringing the five tribes into joint-control of their ancestral homelands and a landscape of continued significance to the tribes, and a blueprint for how Indigenous knowledge might be incorporated into public land management in future co-management agreements between the U.S. government and tribes in a way that honors the long-accumulated know-how of the people who have lived on and loved the Nation's land since time immemorial. Reflecting on the signing of the cooperative agreement, Carleton Bowekaty, co-chair of the Bears Ears Commission and lieutenant governor of the Pueblo of Zuni, put it perfectly: "Today, instead of being removed from a landscape to make way for a public park, we are being invited back to our ancestral homelands to help repair them and plan for a resilient future."<sup>184</sup>

#### IV. THE TIME FOR TRIBAL CO-MANAGEMENT IS NOW

With the legal authority to facilitate co-management already in place, what remains is the political will to turn this policy goal into a reality. Fortunately, both the Federal Government and tribes are calling for tribal co-management of federal public lands and the use of Traditional Ecological Knowledge in federal land management. On January 26, 2021, President Biden released the Memorandum on Tribal Consultation and Strengthening Nation-

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years of direct interaction with the environment. *Overview of TEK*, NAT'L PARK SERV., <https://www.nps.gov/subjects/tek/description.htm> (last visited Dec. 18, 2023). Winona LaDuke, a renowned Native American activist, has defined Traditional Ecological Knowledge as "the culturally and spiritually based way in which indigenous peoples relate to their ecosystems . . . founded on spiritual-cultural instructions from 'time immemorial' and on generations of careful observation within an ecosystem of continuous residence." Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENV'T L. & POL'Y 127, 127 (1994). Because Native peoples of this continent have lived land-based lifestyles for millennia, relying on their environment for survival, and holding it central to their cultural and spiritual lifeways, Traditional Ecological Knowledge is, in many instances, the deepest and most far-reaching knowledge of particular ecosystems and places. Tsosie, *supra* note 12, at 272–74. It was recognized by Indigenous Intergovernmental Panel on Climate Change as "an invaluable basis for developing adaptation and natural resource management strategies in response to environmental and other forms of change." DOUGLAS NAKASHIMA ET AL., WEATHERING UNCERTAINTY 6 (UNESCO, 2012). Native expertise in land management is vital to the conservation of our country's treasured and at-risk landscapes and must be included in the management of the Nation's federal public lands. Tribal co-management is a way to ensure that it is.

184. Maxine Joselow, *The Unprecedented Agreement Gives Five Tribes More Input in the Management of Bears Ears National Monument in Utah*, BEARS EARS INTER-TRIBAL COAL. (June 20, 2022, 11:41 AM), <https://www.bears earscoalition.org/coalition-to-co-manage-bears-ears/>.

to-Nation Relationships to the heads of executive departments and agencies.<sup>185</sup> In this Memorandum, President Biden reaffirmed the Federal Government's commitment to consult with tribes when developing federal policies that affect tribes, first established with Executive Order 13175 in 2000<sup>186</sup> and detailed further in a 2009 Presidential Memorandum.<sup>187</sup> The Biden Memorandum details exactly how federal executive departments and agencies must implement and achieve the goal of Executive Order 13175.<sup>188</sup> Additionally, on November 15, 2021, Secretary of the Interior Deb Haaland (the first Native American person to hold this office<sup>189</sup>) and Secretary of Agriculture Thomas J. Vilsack signed Order No. 3403, the "Joint Secretarial Order Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters."<sup>190</sup> The order recognizes the Federal Government's trust<sup>191</sup> and treaty obligations to the federally recognized tribes and calls for greater inclusion of the tribes in federal land management, through tribal consultation, collaboration, and co-stewardship.<sup>192</sup> In addition, the order specifically states that "the Departments will benefit by

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185. Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 29, 2022).

186. Consultation and Coordination with Indian Tribal Governments, 64 Fed. Reg. 67,249 (Nov. 9, 2000).

187. Presidential Memorandum on Tribal Consultation, 74 Fed. Reg. 57,879 (Nov. 9, 2009).

188. Tribal Consultation and Strengthening Nation-to-Nation Relationships, *supra* note 185.

189. *Secretary Deb Haaland*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited Oct. 4, 2022).

190. DEP'T OF THE INTERIOR & U.S DEP'T OF AGRIC., ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021).

191. Through U.S. treaties with Indian tribes, the tribes gave up some of their inherent sovereignty in exchange for peace, services, and the promise of protection from the Federal Government. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 27–29. This duty of the United States to protect Indian tribes and their interests and to fulfill its promises to tribes is known as the trust responsibility. *Id.* at 2. The trust responsibility has its roots in distant and contemporary federal Indian law. In *Cherokee Nation v. Georgia*, a Supreme Court case from 1831, and one of the foundational cases in federal Indian law, the Court described Indian tribes as "domestic, dependent nations" and that the relationship between tribes and the U.S. "resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 33 (1831). In *United States v. Mitchell*, a Supreme Court case from 1983, the Court unequivocally stated a long held Indian law principle, that there is an undisputed trust relationship between the United States and Indian people. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

192. DEP'T OF THE INTERIOR & U.S DEP'T OF AGRIC., *supra* note 190, at 1, 4.

incorporating tribal expertise and Indigenous knowledge into Federal land and resource management.”<sup>193</sup>

Furthermore, on March 8, 2022, the House Committee on Natural Resources held an oversight hearing entitled “Examining the History of Federal Lands and the Development of Tribal Co-Management.”<sup>194</sup> During this hearing, the Committee heard from seven witnesses, including prominent tribal leaders, who gave testimony about tribal co-management of federal lands and their hopes for a future where Native American tribes can work with the Federal Government as equals to steward their ancestral lands and waters, and the many resources and places of cultural significance found therein.<sup>195</sup>

In his testimony before the Committee, Dr. Doug Kiel, a citizen of the Oneida Nation and a Professor of History and the Humanities at Northwestern University, cited the history of Native land dispossession as one of “American disrespect of tribal governments,” and said that he believed that tribal co-management of federal public lands is “an innovative means of sustaining productive nation-to-nation relations rooted in principles of good faith and genuine respect.”<sup>196</sup> Likewise, speaking to the Committee about his vision for tribal co-management of federal public lands, Kevin K. Washburn, Dean of the University of Iowa College of Law and former-Assistant Secretary of Indian Affairs under the Obama Administration, explained tribal co-management as “a meaningful and constructive way to acknowledge and recognize past injustices.”<sup>197</sup> It is clear from the Natural Resources oversight hearing testimonies from tribal leaders that tribes (at least those represented at the hearing) are interested and ready for tribal co-management.<sup>198</sup> Similarly, the

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193. *Id.* at 1.

194. *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H. Comm. on Nat. Res.*, 117th Cong. (2022).

195. *See, e.g.*, Bowekaty, *supra* note 34.

196. *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H. Comm. On Nat. Res.*, *supra* note 194, at 3 (statement of Doug Kiel, Professor of History and the Humanities, Northwestern University).

197. Kevin Washburn, *Congressional Testimony on Tribal Co-Management of Federal Public Lands*, U. Iowa Legal Studies Research Paper No. 2022-072022-07 (Mar. 8, 2022), <https://ssrn.com/abstract=4052790> or <http://dx.doi.org/10.2139/ssrn.4052790>.

198. *See, e.g.*, *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H. Comm. On Nat. Res.*, *supra* note 194 (statements of the Hon. Carleton Bowekaty, Lieutenant Governor, Pueblo of Zuni; Aja DeCoteau, Executive Director, Columbia River Inter-Tribal Fish Commission; and Cody Desautel, Natural Resources Director, Confederated Tribes of the Colville Reservation).

Joint Secretarial Order shows that the Federal Government is actively seeking to meaningfully collaborate with tribes on issues of federal land management.<sup>199</sup>

Like with tribal co-management in general, both the Federal Government and various tribes have also asserted their interest in incorporating Traditional Ecological Knowledge into federal public land management. Secretaries Haaland and Vilsack in the Joint Secretarial Order stated that “the Departments will benefit from incorporating Tribal expertise and Indigenous knowledge into Federal land and resource management.”<sup>200</sup> Additionally, three of the tribal leaders who gave testimony at the hearing spoke of the value of Traditional Ecological Knowledge and their desire to incorporate it into management of public lands under tribal co-management.<sup>201</sup> Taking all of this into consideration, it is clear that the desire for tribal co-management and the integration of Traditional Ecological Knowledge into the management of federal public lands exists among policymakers and tribal leaders.

## V. CONCLUSION

The history of U.S-tribal relations is one fraught with genocide, racism, treaty-breaking, forced assimilation, and other insidious wrongs.<sup>202</sup> Native land dispossession and our Nation’s federal public lands are at the center of this history. For the continent’s many diverse Native peoples, the injustices caused by forced removal from their ancestral homelands, sources of deep cultural and spiritual meaning, by force and by fraud, have never been reconciled. An earnest effort on the part of the Federal Government to transform federal public land management into a joint-endeavor where the Federal Government and tribes manage land as co-equals, government-to-government,<sup>203</sup> could help begin to right these past injustices.

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199. DEP’T OF THE INTERIOR & U.S DEP’T OF AGRIC., *supra* note 190, at 1.

200. *Id.*

201. See *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H. Comm. On Nat. Res.*, *supra* note 194.

202. See Native Americans in Philanthropy & Candid, *History Through a Native Lens*, INVESTING IN NATIVE COMMUNITIES, <https://nativephilanthropy.candid.org/timeline/> (last visited Oct. 4, 2022).

203. Indian tribes retain sovereignty and the right to self-government over all issues other than that which Congress has expressly taken through treaty or statute or has been withdrawn from tribes “by implication as a necessary result of their dependent status.”

Tribal co-management of federal public lands has the opportunity to affirm tribal sovereignty and self-determination, give tribes the control necessary to envision and shape the future of their ancestral lands, and introduce valuable Indigenous knowledge and expertise into public land management at a time and in a context where it is desperately needed. The legal authority required to facilitate tribal co-management is already available to bring the vision of this necessary and noble work to fruition in a meaningful way. With examples such as Bears Ears National Monument as a guide, the Federal Government and many tribes have declared their desire to engage in meaningful tribal co-management arrangements, and the legal authority from which tribal co-management can be accomplished already exists; hard work and collaboration is all that is needed is to turn this policy aspiration into a reality. The time for tribal co-management is now.

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COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 8, at 206 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). This is because tribal sovereignty existed in Indian tribes before their contact with Europeans. Rather than deriving their power to self-govern from a grant from Congress or the Constitution, tribes exhibit inherent power. *Id.* On issues for which tribes retain their inherent sovereignty, they interface with the federal and state governments on a "government-to-government" basis. *See, e.g.*, Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).