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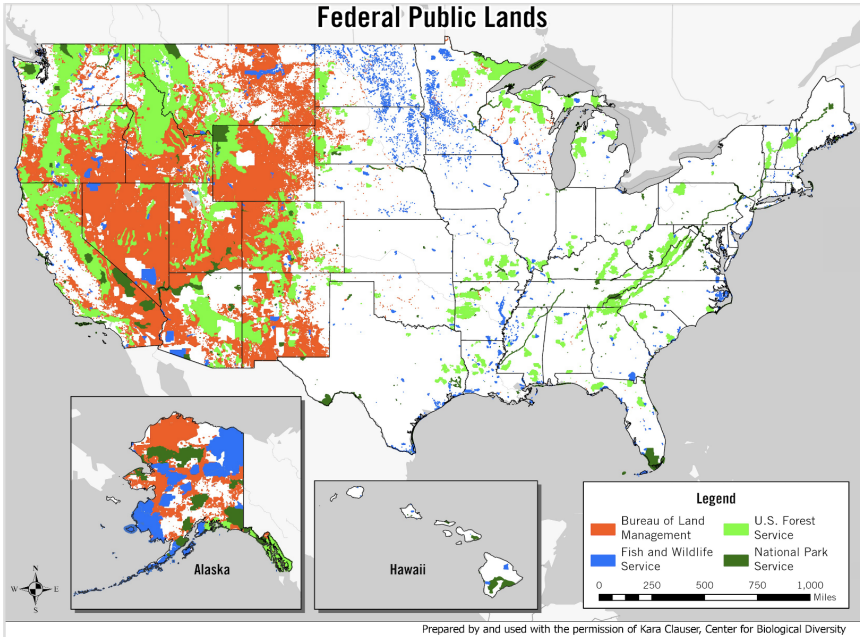
Public Lands and Native Americans: A Guide to Current Issues

John d. Leshy

PUBLIC LANDS AND NATIVE AMERICANS: A GUIDE TO CURRENT ISSUES

John D. Leshy*

I. INTRODUCTION



America's more than 600 million acres of public lands, shown on this map,[1] comprise, as a congressionally-established blue-ribbon commission titled its comprehensive report more than a half-century ago, "One-Third of the Nation's Land."[2] Almost all are in the care of four governmental agencies—the National Park Service, the U.S. Fish & Wildlife Service, the U.S. Forest Service, and the Bureau of Land

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* Emeritus Professor, University of California College of the Law San Francisco, former Solicitor, U.S. Department of the Interior, 1993-2001, and Associate Solicitor, 1977-80. I appreciate the helpful editing suggestions on earlier drafts provided by the Public Land & Resources Law Review editors Anna Belinski, Amanda Spear, Eliot Thompson, and Brian Brammer, and by Ed Cohen, former Deputy Solicitor of the Interior Department, and Heath Nero, the Wyss Foundation's Senior Program Officer for Conservation. The opinions and any errors found in this essay are my own.

1. Alaska and Hawaii are not depicted here on the same scale as the lower 48 states. In fact, Alaska is more than twice the size of Texas and is home to more than a third of all public lands.

2. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970), https://perma.cc/63GK-CH7H. The Public Land Law Review Commission was established by 78 Stat. 982 (1964). The background and the report are described in JOHN LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS at 492-97 (2022) [hereinafter OUR COMMON GROUND].

Management. These forests, deserts, plains, mountains, wetlands, and shorelines are generally open to all and managed mainly for environmental conservation, recreation, and education. Opinion polls consistently show they are revered by most Americans across the political spectrum,[3] which is why I called them a political success story in my keynote address to the 40th annual Public Land Law Conference.

Like all lands now found in the United States, they once belonged to Indigenous Peoples,[4] who were dispossessed from nearly all of them over the four centuries following Columbus's landing in the Americas in 1492.

Especially in recent years, Native entities who have maintained strong cultural ties to places on public lands have sought greater consideration of these connections.[5] This movement may be grouped into three somewhat overlapping categories. The first encompasses campaigns calling for the U.S. government to strengthen protections for particular public lands. This can be done by Congress, through legislation to establish protected areas like national parks, or by executive action, as when presidents use authority Congress provided in the Antiquities Act of 1906 to establish national monuments.[6] The second category is where Native entities seek to become directly involved in the U.S. government's administration of these lands—often called "co-

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3. *See, e.g.*, opinion polls conducted annually in several western states by Colorado College's State of the Rockies Project, which asks equal numbers of Republicans and Democrats various questions about public land policy. Lori Weigel et al., *Key Findings: The 2023 Survey of the attitudes of Voters in Eight Western States*, COLO. COLL., (Jan. 2023), https://perma.cc/PC9K-QS3N. For a national poll, *see* The Nature Conservancy, *National Survey: American Voters View Conservation as Patriotic,* WECONSERVEPA LIBRARY (2012), https://perma.cc/KEA9-DB7Q. A National Wildlife Federation-commissioned poll shows deep popular support across the country for the Land & Water Conservation Fund, which is used for government acquisition of land, PUBLIC POLICY POLLING, NATIONAL SURVEY RESULTS (2018), https://perma.cc/27UJ-5TX6.

4. Federal legislation collected in 25 U.S.C. § 1 et seq. typically uses the term "Indian" to characterize Indigenous peoples and entities in the U.S.; for convenience here, I use that and terms like Tribe, Indigenous, and Native American interchangeably. On a related matter, there is no uniform practice regarding whether Tribe or Tribal is capitalized when not referring to a specific Native entity. Here I capitalize such terms unless quoting a document where the lower case is used.

5. *See generally* OUR COMMON GROUND, *supra* note 2, at 563-74.

6. Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as 54 U.S.C. § 320301). Congress used the term "monument" to distinguish these protected areas from national "parks," a label Congress has made its prerogative to assign. In fact, about half of the 63 national parks Congress has established were first protected as monuments by presidents using the Antiquities Act.

stewardship" or "co-management." The third category is where Native entities seek to obtain a legal ownership interest in particular public lands—often called "land back." Each of these is explored in more detail below.

I have long been involved in such matters, especially while serving in the Interior Department in the Carter and Clinton Administrations.[7] My federal service, which also included a stint as special counsel to the Chair of the Natural Resources Committee of the U.S. House of Representatives in 1992-93, has allowed me to closely observe how the legislative process operates in this context. Finally, for many years I taught Federal Indian Law and Public Land Law and have co-authored several editions of a federal public land and resources law text.[8]

My objective in this essay is to draw on that experience and provide an overview of key policy issues raised by this modern political

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7. As Interior Solicitor, for example, I wrote a legal opinion concluding that a nineteenth century surveyor's error had wrongly deprived the Sandia Pueblo in New Mexico of a tract of land that ended up in a national forest. DOI Off. of the Solic., *Eastern Boundary of Sandia Pueblo Grant*, Op. No. M-37002 (Jan. 19, 2001), https://perma.cc/P984-JUJB. I later testified before Congress in support of legislation that gave the Pueblo considerable control over that land. T'uf Shur Bien Preservation Trust Area Act, Pub. L. No. 108-7, division F, title IV, 117 Stat. 279-93 (2003). I was involved in efforts to give the Confederated Salish and Kootenai Tribes (CSKT) in Montana control of the National Bison Range then managed by the U.S. Fish & Wildlife Service, which included writing a legal opinion on the meaning of a key phrase in legislation that authorized such arrangements. Memorandum from John Leshy, Solicitor, U.S. DOI, to Assistant Secretaries and Bureau Heads, Inherently Federal Functions Under the Tribal Self-Governance Act, (May 17, 1996), https://perma.cc/7HY8-R2AZ; *see generally* Mariel J. Murray, *Tribal Co-Management of Federal Lands: Overview and Selected Issues for Congress*, Cong. Rsch. Serv. Rep. No. R47563 (May 18, 2023), https://crsreports.congress.gov/product/pdf/R/R47563. This helped set in motion a series of events that eventually, more than two decades later, resulted in Congress enacting legislation transferring title to the Bison Range to the U.S. to be held in trust for the CSKT, with certain limiting conditions. The Bison Range transfer was appended to legislation approving a negotiated settlement of the CSKT water rights. Montana Water Rights Protection Act, Pub. L. No. 116- 260, Division DD, § 12, 134 Stat. 1182, 3029-32 (2020). The limiting conditions are addressed in the text accompanying *infra* note 112. I helped craft President Clinton's 1996 Executive Order on protecting sacred sites found on public lands. Exec. Order No. 13,007, 61 Fed. Reg. 26771-72 (1996). I was involved in devising a settlement ratified by Congress giving the Timbisha Shoshone Tribe rights to land and other things in Death Valley National Park. Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, 114 Stat. 1875 (2000).

8. The latest edition, co-authored with Robert L. Fischman and Sarah A. Krakoff, bears the title COGGINS AND WILKINSON'S FEDERAL PUBLIC LAND AND RESOURCES LAW (8th ed. 2022).

movement. I do not seek to suggest what a just or sound outcome should be on these issues. Instead, I focus on the process by which they will be decided and the factors that bear on their resolution. Along the way, I will address the real-world challenges the movement poses to Native entities, federal policymakers, and public land managers.

Let me begin with a caveat: the history of Indigenous peoples in relation to America's public lands is both complicated and highly variable from place to place, making generalizations about such matters somewhat hazardous.

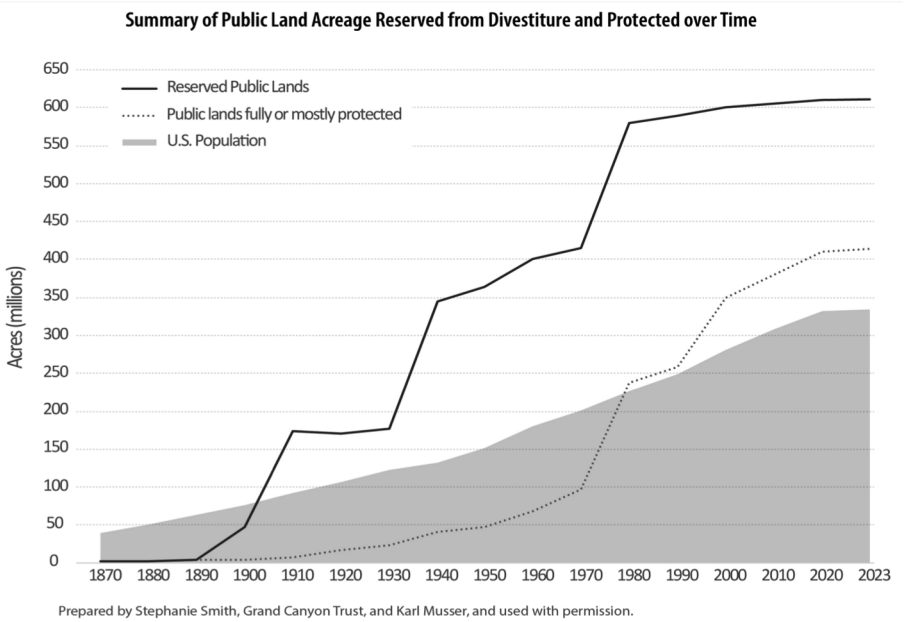
II. DISPOSSESSION HISTORY IN RELATION TO TODAY'S PUBLIC LANDS

For more than a century after the Nation's founding, Congress's general policy regarding lands the U.S. came to own was rather simple. It saw them as an engine for promoting economic development, for advancing settlement by non-Indians, and for developing infrastructure like canals and railroads that would serve these objectives as the U.S. extended its reach across the continent.[9] In service of these objectives, title to well over one billion acres was transferred to states and private owners.

As the following chart[10] shows, it was not until 1890 that the U.S. became serious about holding and conserving significant amounts of land in national ownership. The solid line shows the amount of acreage the U.S. reserved in public ownership over time instead of making available for transfer to others. The dotted line reflects the amount of reserved acreage the U.S. managed over time largely for conservation of natural and cultural resources and other broad public purposes like recreation, where industrial or other intensive uses were prohibited or strongly discouraged.

9. OUR COMMON GROUND, *supra* note 2, at 49-61.

10. The chart is explained in more detail in OUR COMMON GROUND, *supra* note 2, at 509-12.



These decisions to reserve and protect large tracts of land in public ownership were made after, and usually long after, Native Americans were dispossessed of these lands. Their dispossession was usually triggered by an evolving cast of characters—speculators, settlers, miners, and other profiteers—enforced by the military and, sometimes but not always, eventually formalized by treaties and comparable arrangements. The process was hastened by deadly microbes the invaders carried to which Indigenous populations had little immunity. One result was a dramatic reduction in Indigenous numbers—by some estimates, a 50% reduction between 1492 and the Declaration of Independence in 1776.[11]

After the U.S. government was established and took control of vast areas from foreign governments, through transactions like the Louisiana Purchase, the dispossession process continued.[12] As before, it

11. NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 4 (2023) (citing Russell Thornton, *The Demography of Colonialism and "Old" and "New" Native Americans*, in STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS (Russell Thornton ed., 1998)).

12. *See, e.g.*, RICHARD KLUGER, SEIZING DESTINY: HOW AMERICA GREW FROM SEA TO SHINING SEA (2007); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); BLACKHAWK, THE REDISCOVERY OF AMERICA, *supra* note 11; OUR COMMON GROUND, *supra* note 2, at 101, 108.

came about through "various devices ranging from wars to land rushes to fine print," as Professor Wilkinson put it.[13]

Starting in the mid-nineteenth century, the U.S. established reservations for Native Americans on tracts of formerly public lands. The following map shows the extent of these reservations as of 1890.[14]

Prior to 1890, only twice did the U.S. Congress decide to hold and protect lands permanently in public ownership for conservation, inspiration, and recreation. The first was in California. It had been quickly admitted into the Union in 1850, not long after the fabled Gold Rush began, and its state militias, following the example of the Spanish and Mexicans, had helped miners and settlers oust Native Americans from

13. Charles Wilkinson, *The Public Lands and the National Heritage,* 14 Hastings W.-Nw. J. OF ENV'T L. & POL'Y, 499, 501 (2008).

14. Off. of Indian Affairs, Map Showing Indian Reservations Within the Limits of the United States Compiled under the Direction of Hon. T.J. Morgan, Commissioner of Indian Affairs, 1892. Dispossession of Native Americans from lands did not cease altogether after 1890. For one thing, the Dawes Act of 1887, which subdivided parts of some Indian reservations into individual parcels and distributed them to individual Indians, eventually resulted in the transfer of tens of millions of acres of former reservation land into private non-Indian ownership. Pub. L. No. 49-105, 24 Stat. 388-91 (1887); *Dawes Act*, WIKIPEDIA (Jan. 4, 2024) https://perma.cc/S2W7-P3DK. Also, in the 1950s, Congress "terminated" or withdrew the protections of federal law from a handful of Tribes, which further reduced Tribal landholdings, although some of it was eventually restored to Tribes. A useful overview, with numerous references, can be found at Wikipedia, *Indian Termination Policy*, (Jan. 1, 2024) https://perma.cc/27HE-4NDN.

many lands.[15] In the early 1860s, the state's business and political leaders mounted a campaign to have Congress protect the magnificent Yosemite Valley and a nearby grove of Giant Sequoias, altogether comprising 30,000 acres. In June of 1864, while the Civil War was still raging, Abraham Lincoln signed the necessary legislation into law.[16] It gave these lands to the state, but with a federal mandate to preserve them permanently in public ownership. It also directed the state to establish a commission to manage them and ensure they remained accessible to the public.[17]

The second was in 1872, when Congress established what is generally considered the world's first national park on more than two million acres of scenic public lands at a place called Yellowstone.[18] Four years earlier, the Crow and Shoshone Tribes had signed a treaty ceding their rights to these lands as well as many other lands in the region. As at Yosemite, Congress's intent was to hold the lands permanently in public ownership, accessible to the general public. Unlike Yosemite, however, Yellowstone would be managed by the U.S. Department of the Interior.[19]

As this quick overview suggests, the dispossession of Native Americans from their traditional lands was largely complete before U.S. public land policy began to shift in 1890 to hold significant amounts of land in national forests, parks, and the like. Mostly, this involved the U.S. simply reserving lands it already owned. But beginning in 1911, Congress put in place major programs for acquiring land it did not then own, particularly in the eastern two-thirds of the nation, for such purposes.[20]

As the timeline on the chart suggests, John Muir, Theodore Roosevelt, and other prominent turn-of-the-twentieth-century advocates for establishing protected federal land areas played little or no role in the Indigenous dispossession. This is not to deny that they—like most non-Indians of that era—tended to regard Native Americans and their cultures

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15. OUR COMMON GROUND, *supra* note 2, at 100-105; *See generally* BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE (2017).

16. Pub. L. No. 159, 13 Stat. 325 (1864).

17. In 1890 Congress established a national park on more than one million acres of public land around Yosemite Valley, and in 1906 accepted California's offer to revest the U.S. with ownership of the Valley and the nearby grove of Giant Sequoias, folding it into the national park. *See* OUR COMMON GROUND, *supra* note 2, at 165-66, 265-66.

18. 17 Stat. 32 (1872); OUR COMMON GROUND, *supra* note 2, at 108-11.

19. Most of the park land was within what was then the Wyoming Territory, with small portions in the adjoining Montana and Idaho Territories. They would not become states until 1889 (Montana) and 1890 (Idaho and Wyoming).

20. OUR COMMON GROUND, *supra* note 2, at 306-14, 382-88.

as inferior.[21] It is also true that, since the 1890s, government land management agencies like the National Park Service have not always appreciated or even acknowledged Native American cultural connections to the lands they manage. Furthermore, scientists, national policymakers, and public land managers have been slow to appreciate the influence that Indigenous peoples have had on these lands through their application of what is today called traditional ecological knowledge, such as using fire as a management tool.[22] But in recent years all this has markedly changed, as discussed below.

III. MANY NATIVE AMERICANS AND NON-NATIVE PUBLIC LAND PROTECTION ADVOCATES HAVE STRONG COMMON INTERESTS

The attitudes described in the previous paragraph have tended to obscure how much the core concerns and interests of many non-Natives who support holding and protecting public lands overlap with those of many Native Americans. Both tend to regard the earth and all living things as deeply connected in sacred ways.[23] Echoes of the Indigenous worldview are, for example, prominent in John Muir's characterization of inspirational landscapes as "holy temples," and his often-quoted observation that "when we try to pick out anything by itself, we find it hitched to everything else in the Universe."[24]

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21. *See, e.g.*, Jedediah Purdy, *Environmentalism's Racist History*, THE NEW YORKER (Aug. 13, 2015), https://perma.cc/DR2F-ZJVN; cf. Richard F. Fleck, *John Muir's Evolving Attitudes Toward Native American Cultures*, 4 AMERICAN INDIAN QUARTERLY 19 (Feb. 1978).

22. For a definition, *see* Traditional Ecological Knowledge Lab, *What is TEK?*, OREGON STATE UNIVERSITY COLLEGE OF FORESTRY, https://tek.forestry.oregonstate.edu/what-tek (last visited Feb. 27, 2024). For an early recognition of this by a non-Native *see* Gordon M. Day*, The Indian as an Ecological Factor in the Northeastern Forest*, 34 ECOLOGY 329, 329-46 (1953); *see generally* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (2015); Wikipedia, *Traditional Ecological Knowledge*, (Nov. 30, 2023) https://perma.cc/VJ8M-BJG8.

23. *See, e.g.*, Angela R. Riley, *Book Review: Before Mine!: Indigenous Property Rights for Jagenagenon*, 136 HARV. L. REV. 2074, 2080-84 (2023).

24. Muir's most famous invocation of religious imagery was in his strident opposition to damming the Hetch Hetchy Valley in Yosemite National Park ("Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man"). JOHN MUIR, THE YOSEMITE, ch. 16, 262 (1912); *see generally*, STEPHEN FOX, JOHN MUIR AND HIS LEGACY, THE AMERICAN CONSERVATION MOVEMENT (1981). His statement on everything being hitched to everything else can be found in JOHN MUIR, MY FIRST

Furthermore, just as Indigenous cultures tend to be "far more collectivist and communitarian than Western cultures," as Indigenous scholar Angela Riley has noted,[25] those same values are embedded in the U.S. government's many decisions to hold and protect vast tracts of land in public ownership, open to all, and to manage them for broad public purposes.

IV. U.S. PROTECTION OF CULTURALLY IMPORTANT PUBLIC LANDS

Especially in the modern era, these common concerns have helped persuade the U.S. government to protect more public lands, including landscapes and features of cultural importance to Indigenous populations. I have already mentioned how, in the landmark Antiquities Act of 1906, Congress gave the president authority to protect "historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest that are situated upon the lands owned or controlled by" the United States.[26] Eighteen of the twenty-one chief executives who have held office since then—nine Republicans and nine Democrats—have exercised this authority to establish some 150 protected areas covering nearly 100 million acres of public land onshore.[27]

Presidents Obama and Biden have responded to requests by Native Americans to use this power to protect large tracts of public land in places like the Bears Ears in southern Utah, the Avi Kwa Ame National Monument in southern Nevada, and the Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument in Arizona.[28] Building on these successes, Native entities have undertaken

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SUMMER IN THE SIERRA 110 (1988 Sierra Club ed., 1911). In a 2020 statement, the Sierra Club's then-president, Michael Brune, apologized for and disassociated the Club from racist statements Muir had made, while acknowledging that Muir "taught generations of people to see the sacredness of nature." Michael Brune, *Pulling Down Our Monuments*, SIERRA CLUB (July 22, 2020), https://perma.cc/UM2X-E6TQ.

25. Riley, *supra* note 23, at 2081.

26. *See supra* text accompanying note 6.

27. And, beginning with President George W. Bush, the Act has been used to protect huge areas of submerged public lands off the nation's coasts. *See generally* Erin H. Ward, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress*, Cong. Rsch. Serv. R45718 (May 15, 2019), https://crsreports.congress.gov/product/pdf/R/R45718; Carol H. Vincent, *National Monuments and the Antiquities Act*, Cong. Rsch. Serv. R41330 (updated May 3, 2023), https://crsreports.congress.gov/product/pdf/R/R41330/43.

28. For example, the Interior Department's recommendation to President Biden that he reverse President Trump's decision to severely shrink the Bears Ears

several additional monument campaigns, supported by other public land protection advocates.[29]

While the Antiquities Act is the most prominent, flexible, and secure way that the executive branch can protect public lands to advance the interests of Native Americans, it does have other protective tools available.[30] In 1996, for example, President Clinton issued an executive order instructing all public land management agencies to "avoid adversely affecting the physical integrity" of Indian sacred sites on lands they managed, and to "accommodate access to and ceremonial use of" such sites by Indian religious practitioners.[31] As I noted in Our Common Ground, the Order "effectively invited" Native entities and public land management agencies to engage with each other on such matters, and "helped spur agencies to reexamine their management practices."[32] As a result of these and similar initiatives, these days federal land managers nearly everywhere are providing fuller recognition and interpretation of

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National Monument noted that its numerous intact sites evincing thousands of years of human history were "under increased threat" from mineral development. U.S. DOI, REPORT ON RESTORING NATIONAL MONUMENTS at 14-15 (2021), https://perma.cc/X726-6755. The White House noted that the monument Biden later established at the Grand Canyon contains more than three thousand known cultural and historic sites. *FACT SHEET: President Biden Designates Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument*, THE WHITE HOUSE (Aug. 8, 2023), https://perma.cc/JBK6-TJR3; *FACT SHEET: President Biden Restores Protections for Three National Monuments and Renews American Leadership to Steward Lands, Waters, and Cultural Resources*, THE WHITE HOUSE (Oct. 7, 2021), https://perma.cc/4SHF-X57S; *FACT SHEET: President Biden Designates Avi Kwa Ame National Monument*, THE WHITE HOUSE (Mar. 21, 2023) https://perma.cc/R3NX-97BW.

29. *See, e.g.*, Jessica Hill, *More National Monuments? Indigenous Leaders Call for Land Protections in the West*, LAS VEGAS REV.-J. (Nov. 30, 2023), https://perma.cc/LHC5-9KMR.

30. *See generally* Lilly Bock-Brownstein et al., *A Guide to the Tools for Protecting Land, Water, and Biodiversity on America's Public Lands,* CENTER FOR WESTERN PRIORITIES (Oct. 2023), https://perma.cc/59J2-EMGZ.

31. Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26771 (1996).

32. OUR COMMON GROUND, *supra* note 2, at 568. The protection is not absolute, as it applies "to the extent practicable, permitted by law, and not clearly inconsistent with agency functions." The Order defines "sacred site" as any "specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."

such sites, and taking many other steps to educate visitors about Indigenous legacies on public lands.

For its part, Congress has adopted numerous laws in the modern era to advance protection of features of particular concern to Native Americans, many of which are found on public lands. These include the Archeological Resources Protection Act in 1979[33] and the Native American Graves Protection and Repatriation Act in 1990.[34] In 1992 Congress extended the protections of the 1966 National Historic Preservation Act to "districts, sites, buildings, structures and objects" of "traditional religious and cultural importance" to Indian Tribes.[35]

Congress has also enacted numerous laws broadly designed to prohibit or discourage intensive industrial uses of large tracts of public lands. The most prominent example is the Wilderness Act of 1964.[36] It established the National Wilderness Preservation System, where mining, logging, and road-building are prohibited, with Congress as its gatekeeper. Since 1964, Congress has enacted dozens of pieces of legislation that have cumulatively put more than 800 areas of public land totaling more than 111 million acres in forty-four states into the Wilderness System.[37] Over the same time period Congress has enacted dozens of other laws labeling tens of millions of acres of public lands national conservation areas, recreation areas, preserves, seashores, or scenic areas. In each, Congress has made resource protection and conservation primary management objectives.[38]

In recent years, protecting Native American cultural interests has become a significantly larger factor in campaigns promoting the congressional actions described in the previous two paragraphs. But even where it was not, the wilderness and other protections Congress has put in place on hundreds of millions of acres of public land have helped safeguard areas of particular cultural importance to Native Americans, protecting their wildlife, water, air quality, and other natural values.

All this underscores the common interests of many Native Americans and non-Indian advocates for public land protection. Another indication of this commonality came recently when a consortium of international organizations announced they had accepted the invitation of

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33. Pub. L. No. 96-95, 93 Stat. 721 (1979).

34. Pub. L. No. 101-601, 104 Stat. 3048 (1990).

35. Pub. L. No. 102-575, title XL, section 4006(a)(6)(A), 106 Stat. 4757 (1992) (amending Pub L. No. 89-665, title I, section 101(a)(1), 80 Stat. 915 (1966)); *see generally* OUR COMMON GROUND, *supra* note 2, at 567-68.

36. 16 U.S.C. § 1131-36 (1964).

37. *See* OUR COMMON GROUND, *supra* note 2, at 461-76.

38. *Id.*, at 477-551; *see also* Bock-Brownstein, *supra* note 30.

Sicangu Lakota Treaty Council to hold the 12th World Wilderness Conference—which attracts people from around the world to promote wilderness and biodiversity protection—on the sacred lands of the Lakota Nation in South Dakota in August 2024.[39]

V. THE CLIMATE CHALLENGE

Addressing the challenges posed by a changing climate is another area where the concerns of Native Americans and non-Native conservation advocates significantly overlap. As Dean Kevin Washburn put it recently, "it is becoming more and more clear that federal efforts to address climate change cannot succeed without tribal governments as allies."[40] Among other things, the executive branch is increasingly recognizing the value of applying Indigenous knowledge to public land management.[41]

Using public lands to help address the climate challenge can, however, pose difficulties for Native, as well as non-Native, conservation advocates. Proposals to construct renewable energy projects like wind and solar on public lands help decarbonize the economy, now widely acknowledged as an important objective. Yet such projects (and transmission lines that must be built to serve them) sometimes attract opposition from conservation groups and Native entities alike. The usual reasons—their effects on wildlife, viewsheds, and areas of cultural importance—are commonly lumped under the NIMBY ("not in my backyard") label.[42] Yet opposing all such projects can in effect accelerate

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39. *See Wild12 Announcement*, THE WILD FOUNDATION, https://perma.cc/LK4J-JKNG (last visited Feb 27, 2024); *12th World Wilderness Congress Will Be Held on Sacred Lands of the Lakota Nation*, NATIVE NEWS ONLINE (Feb. 5, 2024), https://perma.cc/8S83-LAY8.

40. Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 284 (2022) (citing MYLES ALLEN ET AL., *Intergovernmental Panel on Climate Change, Summary for Policymakers*, *in* GLOBAL WARMING OF 1.5°C, at 3, 23 (Masson-Delmotte et al. eds., 2019)).

41. *See, e.g.*, Memorandum from the Heads of the White House's Office of Science and Technology Policy and Council on Environmental Quality to the Heads of Federal Departments and Agencies, Providing Guidance on Indigenous Knowledge, (Nov. 30, 2022), https://perma.cc/LC5B-4KTP; *see also* addition to the Interior Department Manual regarding Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research, 301 DM 7, (Dec. 5, 2023), https://perma.cc/9UQS-6B7N.

42. *See, e.g.*, J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1, 36-37 (2023)

climate change, making everyone everywhere worse off—a case of the perfect being the enemy of the good.[43] There are no easy answers in such situations.

VI. OTHER COMPLICATIONS IN ADDRESSING NATIVE CONCERNS ON PUBLIC LANDS

A. Identifying and Resolving Differences Among Native Entities

Several different Tribal entities may have deep cultural connections to specific areas of public lands. President Biden's proclamation establishing a new national monument at the Grand Canyon, for example, created a commission that could include representatives from as many as thirteen different Tribes to "provide guidance" on how the public lands in the monument should be managed.[44]

The histories, cultures, governmental structures, land status, and other characteristics of Indian entities can vary greatly. This can be captured in the quip I occasionally heard during my service in the Interior Department: "If you know one Tribe, you know one Tribe." For example, some Tribes entered into formal treaties with the U.S. that were ratified by the U.S. Senate, but many did not before the U.S. ended formal treaty-making in 1871.[45] Ever since, relations between the U.S. and Indian entities have been largely governed by a sometimes dizzying combination of legislation and executive orders or agreements.[46]

(proposed Cape Wind project in Nantucket Sound attracted opposition from some conservation groups and from the Wampanoag Tribe of Gay Head (Aquinnah)).

43. *See, e.g.*, Bill McKibben, *Yes in Our Backyards*, MOTHER JONES MAG., May-June 2023.

44. *A Proclamation on Establishment of the Baaj Nwaavjo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument*, THE WHITE HOUSE (Aug. 8, 2023), https://perma.cc/3K9J-7Y68. That national monument included nearly one million acres, but several different Native entities may have ancestral ties even to small areas of public land. This is hardly surprising, given that Indigenous peoples were here for millennia before Columbus and before the U.S. was established, and their cultures and geographic reach were far from static over that time.

45. Mark Hirsch, *1871: The End of Indian Treatymaking,* 15 Am. Indian Mag. no. 2 (Summer/Fall 2014), https://perma.cc/XH2W-GNXH. This came about because the House of Representatives objected to being cut out of the process.

46. Even where Native entities have rights spelled out in treaties, the Supreme Court has long made clear that Congress has unilateral power to nullify them. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

Another complication is that while many Native entities are "acknowledged"—that is, they have formal, government-to-government relationships with the U.S.—some Native groups lack such recognition.[47] It is also often the case that when "unacknowledged" entities seek federal recognition, they are opposed by already recognized entities.[48]

Only recently have the Secretaries of the Interior and Agriculture indicated that "non-federally recognized Tribes" should be "presumed" to be incorporated into consultation and co-stewardship efforts undertaken by public land management agencies.[49] Whether and under what circumstances such Native entities may be given stature equal to that of

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47. Currently some 574 different Indian entities are officially "acknowledged" or "recognized" by the U.S. government. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022). Nearly 350 of these are in the lower 48 states; almost all of the remainder are rural Alaska Native entities. Congress can and sometimes does provide acknowledgment through legislation. *See generally* Mainon Schwartz, *The 574 Federally Recognized Indian Tribes in the United States*, Cong. Rsch. Serv. Rep. No. R47414 (Feb. 8, 2023). https://crsreports.congress.gov/product/pdf/R/R47414. Since 1978, the Interior Department has in place an administrative, quasi-adjudicative acknowledgement process, carried out by the Office of Federal Acknowledgment in the office of the Assistant Secretary for Indian Affairs. Procedures for Establishing that an American Indian Group Exists as a Tribe, 25 C.F.R. § 54 (1978); DOI Indian Affairs, *Office of Federal Acknowledgement*, https://perma.cc/B5JZ-D6UW (last visited Jan. 16, 2024). The key criteria for acknowledgement are set out at 25 C.F.R. § 83.11 (2023). *See generally* Faith Roessel, *Federal Recognition—A Historical Twist of Fate*, 14 NATIVE AMERICAN RIGHTS FUND LEGAL REV. No. 3 (Summer 1989), https://perma.cc/M9AS-4BXN.

48. This is particularly the case when a subgroup of an already-acknowledged Tribe seeks independent acknowledgement. Because acknowledgement brings with it certain entitlements to federal benefits, already acknowledged entities often oppose acknowledgement of or extension of federal benefits to unacknowledged entities. *See, e.g.*, Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2441 (2021) (addressing a challenge by a number of federally recognized tribes to the extension of Covid relief to Alaska Native Corporations); *see also* United Indian Nations of Oklahoma, *Protecting Tribal Sovereignty*, https://perma.cc/WA8J-3D4T (last visited Jan. 16, 2024) (explaining UINO's opposition to proposed legislation to recognize the MOWA Ban of Choctaw Indians and the Lumbee Tribe).

49. Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403, at 5 (DOI & USDA, Nov. 15, 2021), https://perma.cc/9W63-Z67D, [hereinafter, Joint Secretarial Order 2021]. Earlier federal guidance on consulting with Native entities was made applicable only to "acknowledged" Tribes. *See* Consultation and Coordination with Tribal Governments, Exec. Order No. 13175 sec. 1(b) (Nov. 6, 2000), https://perma.cc/7FN6-PYCR.

acknowledged Tribes remains unsettled.[50] All this can greatly complicate efforts by Native entities and executive agencies managing public lands to collaborate.

B. Examples of Conflicts Among Native Entities Regarding Public Lands

Like all bodies politic, Native entities may lack internal consensus on issues involving public lands. Also, different Native entities may hold widely varying views on how public lands that are important to them should be managed. This is illustrated by two recent controversies involving public lands in Alaska.

One is a dispute that goes back more than three decades, when two Alaska Native Villages sought a land exchange under the landmark Alaska National Interest Lands Conservation Act of 1980 (ANILCA)[51] that would allow them to build a road through the Izembek National Wildlife Refuge in the Aleutian Islands. Although proponents usually justify the road on the ground that it would facilitate medical evacuations from one village to the Island's only airstrip located at a second village, considerable evidence suggests that road's primary objective is economic—to facilitate commercial fishing enterprises.[52] Wildlife and other non-Native conservation groups—and occasionally the Interior Department[53]—have opposed the land exchange on the ground that it significantly threatens a vital waterfowl migration through the Refuge. They also express concern that using ANILCA's land exchange authority in this way would open the

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50. Adding to the complexity, some Indigenous groups lacking federal acknowledgement may be recognized by state governments. California, for example, has adopted a pilot program for building Tribal capacity for which non-federally recognized Tribes are eligible under certain conditions. California Strategic Growth Council, *Tribal Capacity Building Pilot Program Grant Guidelines*, at 4, (Nov. 2023), https://perma.cc/76LN-Z69F; Edward Castillo*, Short Overview of California Indian History*, STATE OF CALIFORNIA NATIVE HERITAGE COMMISSION, https://perma.cc/7GM2-SUNH; Governor Edmund G. Brown, Jr. Cal. Exec. Order No. B-10-11 (Sept. 19, 2011), https://perma.cc/Q4FP-S3BY; Governor Gavin Newsom Cal. Exec. Order No. N-15-19 (June 18, 2019), https://perma.cc/62XG-S6RB.

51. Pub. L. No. 96-487, 94 Stat. 2371-2551 (1980).

52. Jane Kay, *Trump's Swap of `Irreplaceable' Wilderness Allows Millions of Dollars in Seafood Transport*, GRIST (Jan. 12, 2019), https://perma.cc/VKX9-MHAF; *see also* George Wuerthner, *Izembek Refuge and Wilderness Threatened by Road*, THE WILDLIFE NEWS (Apr. 28, 2022), https://perma.cc/B2M9-DPYZ; David Raskin, *King Cove Road About Hauling Fish, Not People*, JUNEAU EMPIRE (Jun. 23, 2017), https://perma.cc/3CVH-ULT5.

53. Interior Secretaries Babbitt (in the 1990s) and Jewell (in the 2010s) opposed the land exchange.

door for evading the protections that this law gives to more than 100 million acres of public land in the state. Significantly, ANILCA also protects the right of rural Alaskans (the vast majority of whom are Native Americans) to make subsistence use of wildlife on Alaska's public lands.[54] Indeed, that feature was a significant reason Alaska Natives strongly supported ANILCA's enactment. It is not surprising, then, that several Alaska Native entities have joined the opposition to the land exchange and the road it would enable.[55]

The second is a dispute over the Interior Department's approval of Conoco-Phillips's Willow project, which aims to extract several hundred million barrels of petroleum from decades-old leases the company holds on BLM-managed land in northwest Alaska's National Petroleum Reserve.[56] The project is opposed by climate activists because of the greenhouse gas emissions that it would unleash,[57] and by some nearby

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54. The latter led former President Jimmy Carter, who championed ANILCA while in office, and, separately, former Interior Secretary Bruce Babbitt and me, to file amicus briefs in the Ninth Circuit opposing the road. In the most recent litigation, the federal district court voided the Interior Department's approval of the exchange, but a divided three-judge panel of the Ninth Circuit reversed. Friends of Alaska Nat'l Wildlife Refuges v. Haaland, 29 F. 4th 432, 444 (9th Cir. 2022). After the Ninth Circuit agreed to rehear that decision en banc, 54 F. 4th 608 (9th Cir. 2022), Interior Secretary Haaland vacated her predecessor's approval and set in motion a process to reconsider it, Nolin Ainsworth & Lex Yelverton, *Secretary of Interior Withdraws King Cove Land Exchange*, ALASKA'S NEWS SOURCE (March 14, 2023), https://perma.cc/N6BU-AU55, which is still underway as of this writing. *See also* Denis Hayes, Opinion, *Will the Future of Alaska's Wild Lands Hang on a Dispute over a Gravel Road?*, N.Y. TIMES (March 12, 2023), https://www.nytimes.com/2023/03/12/opinion/alaska-wilderness-road-jimmy-carter.html?smid=nytcore-ios-share&referringSource=articleShare.

55. Brief of Amici Curiae Native Village of Hooper Bay Tribal Council and Sea Lion Corporation in Support of Plaintiffs-Appellees, at viii, *Friends of Alaska National Wildlife Refuges v. Haaland*, Nos. 20-35721, 20-35727, 20-35728, (9th Cir., Dec. 1, 2022) 2022 WL 17556640; *See also* an earlier op-ed by an Alaska Native official opposing the road, Myron Naneng, *Stopping Izembek Road Protects Villages and Subsistence Resources*, ANCHORAGE DAILY NEWS, (Jun. 29, 2016), https://perma.cc/NRQ8-WE2Z. Alaska Native groups were an important component of the coalition that championed ANILCA. *See* OUR COMMON GROUND, *supra* note 2, at 524-27.

56. U.S. DOI, BUREAU OF LAND MANAGEMENT, WILLOW MASTER DEVELOPMENT PLAN RECORD OF DECISION (March 2023), https://perma.cc/K8C4-4AB4.

57. *See, e.g.*, Ella Nilsen, *The Willow Project Has Been Approved: Here's What to Know About the Controversial Oil-Drilling Venture*, CNN (Mar. 14, 2023),

Alaska Native Villages because of the pollution it would cause and the disruption it would bring to their way of life.[58] Other Alaska Native groups support the project because of its economic benefits. The latter were joined by Alaska's sole House member, Mary Peltola, who recently became the first Alaska Native ever elected to Congress, and who called the approval of the Willow project her "biggest priority."[59] Some public land protection initiatives in the lower 48 states have likewise divided Native American entities.[60]

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https://perma.cc/DH9D-W6QM; Conoco-Phillips Corp., *Willow Project: Correcting the Myths and Misinformation*, https://perma.cc/LA35-KG85 (last visited Jan. 15, 2024).

58. *See, e.g.*, Comment Letter from the City of Nuiqsut & Native Village of Nuiqsut to BLM, Willow Preliminary Final Supplemental Environmental Impact Statement (Jan. 25, 2023), https://perma.cc/K7AX-NZKM; Morning Edition, *Indigenous Groups Lash Out After an Oil Drilling Project is Approved in Alaska*, NPR- KQED (March 14, 2023), https://perma.cc/36JT-VB63; Lindsey Botts, *Environmentalists and Indigenous Groups Blasts Approval of Willow Oil Project: President Biden Burns His Base as He Puts Profits Over People*, SIERRA, (Mar. 14, 2023), https://perma.cc/H4EC-TT8Z.

59. *See, e.g.*, Rep. Mary Peltola (D. AK), Opinion, *On Willow, Democrats Should Listen More*, THE HILL, (March 5, 2023), https://perma.cc/2JTN-79QS; Liz Ruskin, *Peltola, Nearing One Year in Office, Touts Her Support for Willow and Other Energy Projects*, ALASKA PUBLIC MEDIA, (Sept. 6, 2023), https://perma.cc/P7WZ-JS7C. Other projects to develop public land in Alaska have likewise divided Native communities. *See* Timothy Puko & Lillian Cunningham, *This National Park Is So Wild, It Has No Roads. Now Some Want To Mine Outside Its Gates*, WASH. POST (July 20, 2023), https://perma.cc/U234-TLRU. For an internal dispute regarding whether to lease Native land for a gold mine, *see* Lois Parshley, *An Alaska Native Tribal Council Greenlit a Gold Mine. Some Tribal Members Aren't Happy*, GRIST (Dec. 1, 2023), https://perma.cc/4SCR-WXD5.

60. President Biden's use of the Antiquities Act to protect a 54,000-acre tract of public land in Colorado as the Camp Hale-Continental Divide National Monument was supported by the Ute Mountain Ute and Colorado Ute Tribes. But the Utah Ute Tribe, which describes petroleum development on its Reservation as "big business," *see* Ute Indian Tribe, *About the Utes* (June 25, 2013), https://perma.cc/WL6X-PUUZ, was severely critical of Biden's action, with one tribal spokesperson calling the Administration's advance consultation on the monument proposal so deficient as to amount to an "act of genocide." Isabella Rosario, *Ute Indian Tribe Blasts Biden's National Monument at Camp Hale*, OUTSIDE MAG. (Oct. 14, 2022), https://perma.cc/E5HK-YFP7. Another example involved oil and gas development on public lands in New Mexico, where a proposed moratorium on issuing new petroleum leases within ten miles of the Chaco Culture National Historical Park has been supported by Pueblo Indians and opposed by the Navajo Nation. *See, e.g.*, Alice Fordham, *Not All Tribes Agree With Drilling Ban Around New Mexico's Chaco Canyon*, NPR-KUNM (Oct. 5, 2023), https://perma.cc/HEM7-536H.

It is easy to make too much of such disagreements. They are an inevitable result of the variety and complexity of both public land issues and Native entities. In many cases, differences among Native entities can be worked out so that they present a unified position to the federal agencies. When that happens, it can strengthen their case for influencing federal land management.

As suggested earlier, on many contemporary questions of public land management, the interests of many Natives and non-Native public land protection advocates are likely to align quite closely. Both can benefit from cooperating and collaborating, and in fact often do. But the examples recounted here are a reminder that such efforts sometimes fail, and even when they do not, the road to success may be bumpy.[61]

VII. DRILLING DOWN ON THE CO-STEWARDSHIP ISSUE: DETERMINING THE CONTOURS OF TRIBAL PARTICIPATION IN PUBLIC LAND MANAGEMENT

In November 2021, Interior Secretary Haaland and Agriculture Secretary Vilsack signed a Joint Secretarial Order entitled "Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters."[62] It directed the bureaus and agencies they supervise to make "agreements" with Tribes to "collaborate" in the "co-stewardship" of public lands and waters under their jurisdiction. It committed the two Departments to "endeavor to engage in" such "co-stewardship" in several circumstances, including "where requested by a federally recognized Indian Tribe."[63]

The Joint Secretarial Order did not define co-stewardship but did "affirm" several "principles."[64] One is that Tribal governments should "play an integral role" in federal land management agency decision-

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

62. Joint Secretarial Order 2021 No. 3403 at 5. It was later followed by a presidential Executive Order setting out "Uniform Standards for Tribal Consultation" applicable to all federal agencies, including land management agencies. *Memorandum on Uniform Standards for Tribal Consultation*, THE WHITE HOUSE (Nov. 30, 2022), https://perma.cc/YS7X-Y6RV. That Order built upon an Executive Order issued by President Clinton in 2000 regarding Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, (Nov. 6, 2000), and upon a directive Biden had issued in his first week in office. *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, THE WHITE HOUSE (Jan. 26, 2021), https://perma.cc/L9Z2-28PR.

63. Joint Secretarial Order 2021 No. 3403 at 4.

64. *Id.*, at 3-4.

making, "through consultation, capacity building, and other means consistent with applicable authority."[65] Another is that federal land management agencies should give Tribal recommendations "due consideration" so that Tribes "shape the direction of" public lands management.[66] Another is that the federal agencies should, "to the maximum extent practicable, incorporate Tribal" land and resource management plans into federal plans.[67] Another is that the federal agencies should "consider Tribal expertise and/or Indigenous Knowledge as part of" federal land decision-making.[68]

A. The Challenge of Giving Concrete Meaning to "Co-Stewardship"

While its overall thrust is plain, the Joint Secretarial Order leaves many issues unresolved about what co-stewardship might mean in practice. The same is true regarding the related concept of "co-management."[69]

Giving concrete meaning to these terms is challenging. As scholars have noted, they have no generally accepted definition, legal or otherwise.[70] "Members of Congress, tribes, and federal land management

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65. *Id.* at 3.
66. *Id.*
67. *Id.*
68. *Id.*
69. California Governor Gavin Newsom issued a Statement of Administration Policy that encourages "co-management of natural lands under the ownership or control of the State with California tribes with ancestral lands located in such areas," but does not define the term. Native American Ancestral Lands, Cal. Off. of the Governor, Statement of Administration Policy, (Sept. 25, 2020), https://perma.cc/TNU7-VSNX. Similarly, the National Conference of American Indians in 2021 adopted a resolution "Calling for the Advancement of Meaningful Tribal Co-Management of Federal Lands" that asked Congress to "pass legislation and direct federal agencies to include tribal nations in land management decisions at every level of the government based on incorporation of tribal co-management principles and practices." National Congress of American Indians Res. PDX-20-003, 2020 Gen. Assemb.
70. *See generally* Washburn, *supra* note 40; 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*, 44 PUB. LAND & RES. L. REV. 49, 55 (2021); *see also* U.S. DOI, Bureau of Indian Affairs, *Federal Land Cooperative and Collaborative Partnerships with Tribes Background Documents*, https://perma.cc/6S4A-RU5B (last visited Jan. 15, 2024). Professor Nie had explored these issues earlier in *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585 (2008).

agencies have interpreted and used the term [co-management] in different ways," according to a recent report by the Congressional Research Service (CRS).[71]

In November 2022, the Interior Solicitor issued a report compiling, as its title expressed, "Current Land, Water, and Wildlife Authorities That Can Support Tribal Stewardship and Co-Stewardship."[72] The report sought to distinguish "co-stewardship" from "co-management." The former, it said, "broadly refers to collaborative or cooperative arrangements between" federal agencies and tribal entities "related to shared interests in managing, conserving, and preserving Federal lands and waters."[73] "Co-management," it said, is a "distinct term" defined in a 2016 Secretarial Order that "narrowly refers to collaborative or cooperative stewardship arrangements that are undertaken pursuant to Federal authority that requires the delegation of some aspect of Federal decision-making," or where some form of joint management has been "established by law," as in "management of the salmon harvest in the Pacific Northwest." [74] That explanation draws no distinct line between broad "collaborative or cooperative arrangements" and narrower arrangements that involve "delegation of some aspect of Federal decision-making."

For convenience in what follows, I use the term co-stewardship, not in quotations, to include co-management.

B. The Variety of Decisions Potentially Subject to Co-Stewardship

A major challenge is that co-stewardship could apply to a broad spectrum of public land management decisions. This could include managing recreational use, overseeing exploitation of resources like minerals or wood, addressing how to protect wildlife and biodiversity, preparing and implementing resource management plans, crafting and

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71. Mariel J. Murray, *Tribal Co-Management of Federal Lands: Overview and Selected Issues for Congress*, Cong. Rsch. Serv. Rep. No. R47563, at 4 (May 18, 2023), https://crsreports.congress.gov/product/pdf/R/R47563 [hereinafter CRS 2023 Report].

72. U.S. DOI, OFFICE OF THE SOLICITOR, FINAL REPORT: CURRENT LAND, WATER, AND WILDLIFE AUTHORITIES THAT CAN SUPPORT TRIBAL STEWARDSHIP AND CO-STEWARDSHIP at 4, 7 (2022) https://perma.cc/P7ZS-V82J [hereinafter, INTERIOR SOLICITOR'S 2022 REPORT].

73. *Id. at 8.*

74. *Id*. at 8-9; *Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources*, Interior Sec'y Order No. 3342, 4 (U.S. DOI, Oct. 21, 2016).

enforcing regulations, interfacing with states, local governments and other federal agencies to carry out such responsibilities, or developing budget requests and working them through the executive and legislative budgetary processes. These tasks can differ a great deal and each involves a variety of different decisions. All this greatly complicates the problem of giving co-stewardship concrete meaning.

The Congressional Research Service and the legal offices of the Interior and Agriculture Departments have all noted that many different statutes and treaties may be said to authorize some form of co-stewardship.[75] But a detailed blueprint for co-stewardship has not yet emerged from Congress. Moreover, while the executive branch agencies have produced many thousands of words on the issue, considerable uncertainty remains. A recently proposed rule involving management of the National Petroleum Reserve in northern Alaska suggests the concept's flaccidity. "Co-stewardship opportunities may include co-management, collaborative and cooperative management, and Tribally-led stewardship, and can be implemented through cooperative agreements, memoranda of understanding, self-governance agreements, and other mechanisms."[76]

C. Complexities Raised by Self-Governance Legislation

Some of the challenges are illustrated by legislation that Congress enacted in 1994, which authorizes federal agencies to enter into so-called "self-governance compacts" with Tribes to allow them to administer certain programs or activities with federal funds, including public land management programs.[77] Congress also authorized funding agreements with Tribes for programs and other activities that "are of special

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75. CRS 2023 Report No. R47563 at 8-9; INTERIOR SOLICITOR'S 2022 REPORT at 22-48; USDA OFFICE OF GENERAL COUNSEL, ANNUAL REPORT ON TRIBAL CO-STEWARDSHIP at 2 (2023), https://perma.cc/CL74-2TGK [hereinafter OFFICE OF GENERAL COUNSEL REPORT].

76. Management and Protection of the National Petroleum Reserve in Alaska, 88 Fed. Reg 62,025, 62,042 (Sept. 8, 2023) (to be codified at 43 C.F.R. § 2361.60).

77. *See* 25 U.S.C. §§ 5321, 5363 (2020). *See also* 25 U.S.C. § 5372(c) (2020) (encouraging the use of such compacts in programs other than those administered by the Bureau of Indian Affairs, which would include public land management agencies); INTERIOR SOLICITOR'S 2022 REPORT at 22-25. The Agricultural Improvement Act of 2018, 25 U.S.C. § 3115b, authorizes similar agreements with the Department of Agriculture regarding some national forest lands.

geographic, historical, or cultural significance" to the particular Tribe.[78] While the CRS 2023 Report noted that Tribes have made extensive use of such agreements and assumed management responsibility for a number of federal programs, few are related to public lands.[79] Most involve health and other programs that are mostly carried out on Indian lands.[80]

The 1994 law forbade federal agencies from delegating "functions" that are "inherently Federal," or where the statute establishing the program in question "does not authorize the type of participation sought by the tribe."[81] It defined an "inherently Federal" function in a rather circular manner, as one "so intimately related to the public interest as to mandate performance only by Federal Government employees."[82] During my tenure as Interior Solicitor, I prepared a guidance memorandum concluding that these limitations "can only be applied on a case-by-case basis."[83] In 2022, both the Interior Solicitor's Office and the Office of the General Counsel in the Department of Agriculture (which advises the U.S. Forest Service) reached generally similar conclusions.[84]

D. Many Questions Will Have to Be Resolved Case-by-Case

All this strongly suggests that the only way to give the concept of co-stewardship concrete application is through negotiations, Tribe by Tribe, federal agency by agency, public land area by area, and topic by topic. The White House recently published a "Progress Report for Tribal Nations" noting, among other things, that federal agencies had entered into nearly two hundred new "co-stewardship or co-management agreements" with Native entities.[85] Examples given in the Report vary widely in subject-matter, focus and specificity.

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78. 25 U.S.C. § 5363(c). *See generally* 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'L. L. REV. 475, 475 (2007).

79. CRS 2023 Report No. R47563 at 9.

80. *Id*.

81. 25 U.S.C. § 5363(k) (2020).

82. 25 U.S.C. § 5361(6) (2020); *see also id.* § 5363(k); 31 U.S.C. § 501(5)(2)(A) note (1982).

83. Memorandum from John Leshy to Assistant Secretaries and Bureau Heads, *supra* note 7, at 14.

84. INTERIOR SOLICITOR'S 2022 REPORT at 13-18, 22-25; OFFICE OF GENERAL COUNSEL REPORT at 7.

85. DOMESTIC POLICY COUNCIL, 2023 PROGRESS REPORT FOR TRIBAL NATIONS, 18 (2023), https://perma.cc/D75D-EQGL.

Negotiating co-stewardship agreements aimed at impacting how public lands are managed can take considerable time and resources. That can exacerbate an issue identified by some champions of co-stewardship; namely, that some Indian entities lack the capacity or resources to engage meaningfully in such efforts.[86] This means that funding to build such tribal capacity, whether from the federal government or private philanthropy, may prove crucial.

Over time, one may hope that the results of such negotiations will establish patterns, practices and precedents that can guide and simplify future negotiations.[87] But here too, a note of caution might be sounded. While it has been nearly thirty years since Congress authorized self-governance compacts that could include federal funds for implementation, few such compacts have involved public lands.[88]

Another complication was alluded to earlier. The larger the area of public lands where co-stewardship is sought, the more likely it is that more than one Native entity will have an interest. Achieving consensus among Native entities in such situations may not be easy, though there are prominent examples where collaboration has been achieved in complicated circumstances. The CRS 2023 Report notes the success of regional co-stewardship by several Tribes and federal agencies of the salmon fishery resources in the Pacific Northwest, and of several Alaska Native Communities and the U.S. Fish & Wildlife Service to foster rural subsistence hunting and fishing protected by the ANILCA.[89]

Unsurprisingly, the narrow self-interest of public land management agencies and their personnel can be an impediment to reaching co-stewardship agreements. They may perceive co-stewardship mostly as a threat, leading them to lose control, jobs, funding, and influence.[90] Influential members of Congress and interest groups outside the government closely aligned with the agencies may feel the same way. On the other hand, agencies and their allies may sometimes perceive co-

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86. See, e.g., Washburn, *supra* note 40, at 319-28.

87. In this connection, an online repository of materials related to federal-tribal land co-management has recently been developed by the Native American Rights Fund in partnership with units at the University of Montana, the University of Washington, and several other organizations. *See Sovereign-to-Sovereign Cooperative Agreements*, UNIVERSITY OF WASHINGTON GALLAGHER LAW LIBRARY, https://perma.cc/666C-98Y5 (last visited Feb. 27, 2024); *see also Land Co-Management Repository*, NATIVE AMERICAN RIGHTS FUND (Nov. 29, 2023), https://perma.cc/RV3L-B4QP.

88. CRS 2023 Report No. R47563 at 9.

89. *Id*. at 11-15.

90. *E.g.*, Washburn, *supra* note 40, at 284; *see also* King, *supra* note 78 at 523-36.

stewardship as being better for the resources involved and achievable in ways that do not pose grave threats to agency prerogatives.

Resistance among career civil servants in the land management agencies can be overcome by leadership exerted by political appointees at higher levels, particularly if the incumbent Administration makes co-stewardship a priority. On the other hand, as Administrations change, the tables could be turned. A new Administration may discourage new or seek to limit or terminate existing co-stewardship arrangements.

All this suggests that co-stewardship advocates cannot turn a blind eye to the larger political context, including how their specific objectives may be regarded by public officials and opinion leaders and portrayed in the media. That suggests, in turn, that a carefully calibrated, gradual approach may gain the most traction.

VIII. THE "LAND BACK" ISSUE: WHEN MIGHT IT BE ACHIEVABLE?

As with co-stewardship, it is deceptively easy to advocate for "land back" in the abstract.[91] It offers a seemingly just solution to Native American dispossession, especially for lands that are now in public ownership. But achieving it, even on a very modest scale, is far from easy.

It should be noted, first, that "land back" does not legally mean what it seems to say; that is, an outright transfer of title to public land to Native American entities. Instead, practically every time the U.S. Congress has authorized giving "land back," the U.S. retains legal title, holding the land "in trust" for the Indian beneficiaries. (This is how the land in practically all Indian Reservations is held.) Scholars Audrey Glendenning, Martin Nie, and Monte Mills suggest that this has been done because holding land in trust for Indian beneficiaries "insulates those lands from loss" by operating as an "important backstop" against renewed dispossession.[92] But holding the land this way does limit what Indian beneficiaries can do with the land. For example, a Native entity cannot borrow money using land held in trust as collateral, where foreclosure would result in loss of title.[93]

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91. *See, e.g.*, David Treuer, *Return the National Parks to the Tribes*, THE ATL. (May 2021).

92. Audrey Glendenning, Martin Nie & Monte Mills, *(Some) Land Back … sort of: The Transfer of Federal Public Lands to Indian Tribes since 1970*, 63 NAT. RES. J. 200, 209 (2023). Taking land "in trust for," rather than conveying legal title to, Native entities has long been embodied in the Interior Department's regulations on land acquisition for the benefit of Tribes. 25 C.F.R. § 151.

93. In addition, Congress has usually attached specific limiting conditions on Tribal management when it has approved specific "land back" arrangements. *See infra* text accompanying notes 112-13.

Many of the "devil in the details" complications noted earlier with respect to co-stewardship apply to "land back." For example, several different Native entities—acknowledged and unacknowledged—may have ties to particular tracts of public land and want them "back." Forging a consensus on the details of taking "land back" and how the lands should be managed if that were to happen could be challenging.

A. Prior Efforts to Compensate Native Americans for Loss of Land

The core notion of giving public land "back"—transferring legal property interests back to Native entities—can invite close examination of the circumstances of the earlier dispossession and subsequent history and an assessment of the degree of injustice involved.

While Native American loss of land is often characterized as outright theft, the U.S. acquisition of land from Native entities after 1776 usually took the form of a "purchase," as the pioneering Indian law scholar Felix Cohen noted.[94] The purchase price often included land (to be sure, usually far less land than the Native entities were giving up) as well as cash payments and various other kinds of tangible benefits. The compensation was rarely if ever fair, especially to modern eyes. In making these transactions, Native entities usually had little bargaining power and were disadvantaged by language and cultural barriers, among other things.[95] But both these "purchases" and their subsequent reevaluation by the courts and the Congress have proved relevant when land-back proposals are made.

Starting nearly a century ago, the U.S. Congress began providing opportunities for Native American entities to seek compensation for past wrongs through the courts. As with nearly everything in federal Indian law and policy, the story here is complicated.[96] At first, Congress enacted a series of one-off laws that authorized the U.S. Court of Claims to adjudicate claims for compensation for the wrongful taking of Indian lands in particular cases, the first one involving California, in 1928.[97] For various reasons, these special laws did not work particularly well; only a fraction

94. Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-35 (1947).

95. The Supreme Court acknowledged this as far back as Worcester v. Georgia, 31 U.S. 515, 582 (1832), when Chief Justice John Marshall called for treaties to be construed as the Indians would have understood them.

96. *See* OUR COMMON GROUND, *supra* note 2, at 563-66.

97. 45 Stat. 602 (1928).

of the two hundred or so claims filed under them resulted in awards of compensation.[98]

Then, in 1941, the U.S. Supreme Court ruled for the United States in a lawsuit it filed to confirm the Hualapai Indian Tribe's claim to land in a dispute with the Santa Fe Pacific Railroad.[99] The Railroad had argued that its 1866 grant of public land from Congress entitled it to nearly half of the one-million-acre reservation that President Chester A. Arthur had established for the Tribe by executive order in 1883. The Court's unanimous decision contained principles that, as I put it in my book, "breathed new life into tribal claims of redress for land dispossessions."[100] In 1946, Congress abandoned its earlier, piecemeal approach. Instead, it established an Indian Claims Commission, and empowered it to adjudicate, after hearing evidence in judicial proceeding, all claims that the U.S. had not fairly treated Native Americans in the past. Going beyond the confines of ordinary property law, Congress made the U.S. liable if it had not engaged in "fair and honorable dealings" with Native Americans, and it waived statutes of limitations and similar defenses for pre-1946 wrongs. [101]

But in empowering the Commission to award compensation for past wrongs, Congress also included some severe limitations. It did not permit Native entities to recover ownership of lands taken in violation of this standard, even if the U.S. still owned them. Moreover, the Commission could not award interest on amounts the U.S. owed, and monetary damages it assessed could be offset by money and property the U.S had "gratuitously" given Indian claimants over the years.[102]

Nevertheless, the Claims Commission process did prove helpful for several Tribes in later making a case to Congress that they should regain some degree of ownership or at least control of some still-public lands they had previously lost. I recount in my book several instances

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98. Jessica Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, JOURNAL OF LAW, PROP., AND SOC'Y 5 (2019).

99. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 360 (1941).

100. OUR COMMON GROUND, *supra* note 2, at 564.

101. The Indian Claims Commission Act, ch. 959, 60 Stat. 1049-56 (1946) (terminated Sept. 30, 1978); Cohen, *supra* note 94, at 28-59.

102. *See, e.g.,* Cohen, *supra* note 94, at 59. These limitations meant that President Truman exaggerated when, in signing the Indian Claims Act into law, he described it as empowering "impartial tribunals" to "correct any mistakes we have made." National Archives, *Statement by the President Upon Signing Bill Creating the Indian Claims Commission*, HARRY S. TRUMAN LIBRARY & MUSEUM, https://perma.cc/QN67-8DN7 (last visited March 25, 2024). *See generally* DAVID E. WILKINS, HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES (2013).

where Commission findings of wrongdoing were influential in persuading Congress to do just that.[103] Professor Newton estimated that, as a result, between 1970 and 1990, some 500,000 acres of public land were conveyed to Tribes.[104]

"Land back" results were also facilitated by other court decisions involving centuries-old transactions where Native entities had purported to convey tribal lands to states and other parties without the approval of Congress. In 1974, the U.S. Supreme Court ruled that federal courts could adjudicate claims by Native entities that these transactions violated the so-called Nonintercourse Acts, which had since 1790 required congressional approval for such transactions to be valid.[105] This led to numerous court cases and congressionally-approved settlements reached between 1978 and 2006, mostly in the eastern part of the nation, in which the Tribes were awarded a total several hundred million dollars, and sometimes used the funds to buy land.[106]

Another variation of "land back" came in a landmark settlement of litigation brought by Native Americans challenging the government's administration of so-called allotted lands it held in trust for individual Indians. This one resulted in Congress adopting legislation in 2010 that resulted in paying $1.69 billion to more than 123,000 Native Americans.[107] As part of the settlement, the Interior Department authorized a Land Buy-

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103. *See, e.g.*, OUR COMMON GROUND, *supra* note 2, at 565-74. *See generally* HARVEY D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990); Nell Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (Winter 1994); *see also* Nell Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 753-84 (1992).

104. Newton, *supra* note 103, at 576-77; *see also* Russell Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 73 n. 358 (1982). Tribes received an estimated $800 million under the Act, according to Charles F. Wilkinson, et al., *Indian Self-Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan* at 154 (Kenneth R. Philip, ed. 1986).

105. Oneida Indian Nation of N. Y. v. Cnty. of Oneida, 414 U.S. 661, 678 (1974).

106. *See, e.g.*, Rhode Island Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978), codified at 25 U.S.C. §§ 1701-16; Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (1980), codified at 25 U.S.C. §§ 1721-35. This land was purchased from private owners; the U.S. owned almost no land in these states. *See generally Indian Land Claims Settlements*, WIKIPEDIA, https://perma.cc/5NYF-K6TG; *The Nonintercourse Act*, WIKIPEDIA https://perma.cc/BCR3-EWE7.

107. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (Dec. 8, 2010).

Back Program for Tribal Nations, which over the next decade, restored nearly three million acres in fifteen states to Tribal ownership.[108]

B. Another Complication: The Politics of the Congressional Process

As all these examples suggest, restoring lands to Native entities almost always requires action by Congress, especially when it transfers legal property interests in public lands.[109] And that creates some formidable political complications. Most important, as my book notes, is a "deeply embedded characteristic" of the congressional process nearly always requiring that bills focusing on particular tracts of public land have the support of (or at least must not be opposed by) those most directly affected—the House and Senate members of Congress representing that area.[110]

The reason is simple: members of Congress are very uncomfortable dictating the future of public lands in another member's state or congressional district over that member's opposition, for fear that the tables could be turned on them. While not an ironclad rule, it is a very powerful custom and almost always honored, regardless of party affiliation. That is, even a House or Senate controlled by one political party will seldom approve legislation focusing on public lands in an area represented by members from the other political party over their opposition. (This custom bears some resemblance to the longstanding practice regarding presidential appointment of federal judges, where Senators from the pertinent state have great influence, even when they are from another political party.[111])

This deference gives local Senators and House members where the lands are found a great deal of clout. It also means that, in deciding whether to support legislation transferring a legal interest in public lands

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108. *Ten Years of Restoring Land and Building Trust*, DOI (December 2023), https://perma.cc/WL6G-JL76 (none of this land was public land; practically all of it derived from allotments of small parcels to individual Native Americans under the Allotment Act of 1887, where ownership had become increasingly fractionated when the allottees died without wills, as was often the case).

109. A useful summary of acts of Congress that authorize conveyances of public land to Tribes under certain circumstances, including several Tribe-specific statutes, is found in the INTERIOR SOLICITOR'S 2022 REPORT at 55-60.

110. *See* OUR COMMON GROUND, *supra* note 2, at 469.

111. *See Role of Home State Senators in the Selection of Lower Federal Court Judges*, Cong. Rsch. Serv. Rep. No. RL34495, (Feb. 11, 2013), https://perma.cc/FTL7-RANY; *see also About Judicial Nominations | Historical Overview,* SENATE.GOV*,* https://perma.cc/85Y5-RFSA (last visited Feb. 27, 2024).

in the area they represent to Native entities (or anyone else, for that matter), members will take into account the views of state and local governments and non-Native users of the land in question, among many other things.

It is not surprising, then, that in those instances where Congress has approved "land back" arrangements, it has usually attached specific limiting conditions on Tribal management to protect those other interests.[112] For example, its 2020 legislation conveying the National Bison Range in northwestern Montana into trust for the Confederated Salish and Kootenai Tribes required them, among other things, to provide public access to the lands and to manage them "solely for the care and maintenance of bison, wildlife, and other natural resources."[113]

Moreover, as the most comprehensive study of "land-back" legislation over the last half-century shows, Congress has usually taken pains to make clear it did not intend to establish a general precedent for further conveyances. As this study put it, the measures "were advanced as singular events and were not tied (at least publicly or explicitly) to a broader movement."[114] As it noted, "fear over the possibility of a transfer setting a precedent has been, and remains, the most significant concern motivating opposition to the transfer of public lands to tribal trust status."[115]

These congressional-process-based political limitations go a long way toward explaining the decades-long unsuccessful campaign by the Sioux Nation to regain title to public lands in the Black Hills of South Dakota. In 1980, the U.S. Supreme Court ruled that the Nation was never adequately compensated when Congress coerced it to cede the lands to the U.S. in 1877. Twenty years later, President Cleveland put much of the ceded land into the national forest system.

Justice Blackmun's majority opinion observed that a "more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."[116] The Court's decision confirmed that the Sioux

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112. Glendenning et al., *supra* note 92, at 200 (the authors identify and discuss the limitations they found in forty-four statutes enacted by Congress between 1970 and 2020 that conveyed some ownership interest in public lands to federally recognized tribes).

113. *See* Montana Water Rights Protection Act, Pub. L. No. 116- 260, Division DD, § 12(c), 134 Stat. at 3031 (enumerating such conditions); *see also* Washburn, *supra* note 40 at 305-11 (recounting the long saga of the Tribes' effort to recover the Bison Range).The Bison Range, comprising nearly 20,000 acres, is located in the heart of the CSKT reservation.

114. Glendenning et al., *supra* note 92, at 203.

115. *Id*., at 252.

116. United States v. Sioux Nation of Indians, 448 U.S. 371, 388 (1980).

were owed more than $100 million in compensation. But the Nation refused the money (the judgment has since grown to more than $1 billion) and has instead sought the land back.[117] Similarly, some Western Shoshone Tribal members in Nevada have refused to accept federal funds in satisfaction of an Indian Claims Commission judgment compensating them for loss of their ancestral lands, but they too have made no headway in persuading Congress to give them title to tracts of public lands instead.[118]

Although the analogy is far from perfect, the tangle of issues involved in "land back" might be compared to those involved in providing monetary reparations for descendants of African American slaves.[119] Proposals to provide such reparations on a broad basis (that is, not limited to specific contexts or events) have never gained traction in Congress. The idea has, however, influenced governmental policy in some specific contexts, such as through various "affirmative action" programs.[120]

Perhaps the ultimate impact of "land back" efforts may be similar. In one respect, Native Americans have an easier path to relief, because the modern Supreme Court has found constitutional limitations that narrowly confine affirmative action in the context of race.[121] These limitations do not apply to actions to benefit Native American Tribes, assuming the Court follows its unanimous 1974 decision that considered such actions to be based not on race, but on the "unique legal status of Indian tribes under federal law and upon the plenary power of the Congress … to legislate on behalf of federally recognized Indian tribes."[122]

IX. CONCLUSION, AND A FINAL WORD OF CAUTION

The public lands offer many opportunities for broadening cross-cultural understandings, redressing past injustices, and healing societal wounds. Considered against the long sweep of history, in recent decades Native Americans have made numerous important advances to protect

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117. *See* OUR COMMON GROUND, *supra* note 2, at 572.

118. *Id.*

119. *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, ATL. MAG., June 2014; Kevin D. Williamson, *The Case Against Reparations,* NAT'L REV. (May 24, 2014) https://www.nationalreview.com/2014/05/case-against-reparations-kevin-d-williamson/; *Reparations for Slavery,* WIKIPEDIA, https://perma.cc/KUW5-LMLP.

120. *See, e.g.*, discussions of the history of affirmative action policies in the majority and dissenting opinions in Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2184, 2225-2226 (2023).

121. *Id.*

122. Morton v. Mancari, 417 U.S. 535, 551 (1974).

their interests in lands that are now in public ownership. The president's recent use of the Antiquities Act is just the most prominent example.[123]

Other such campaigns supporting more protection for more public lands, aimed at both executive and legislative branch decisionmakers, are underway. Even more are likely in the future. Co-stewardship will likely be a part of many such efforts. As all this shows, Native American influence is being felt as never before in decision-making regarding public lands. The appointment of Deb Haaland as Secretary of the Interior—the first Native American to lead a cabinet department—underscores this trend.

But progress on "land-back" and advancing co-stewardship at the ground level will likely not come as fast as many advocates want. Given the complications and complexities I have described, in many cases it could require much discussion, negotiation and deliberation. That could test the patience of advocates and tempt them to pursue swifter and more generic solutions.

In this connection, it is worth considering, as a kind of cautionary tale, what happened recently in Australia. Indigenous Australians inhabited that continent for an estimated 65,000 years before the British arrived in 1770 and thereafter dispossessed them from nearly all of the continent's land.[124] Australian law gave little recognition to Indigenous Australians until the early 1980s, when some limited progress began to be made toward redressing past injustices.[125] Today Indigenous peoples make up about 4% of Australia's population, a somewhat higher percentage than in the United States.[126]

In October 2023, a proposed constitutional amendment was put before the nation's voters that would have established a body called the Voice to address proposed policies that affect Indigenous Australians.[127] Although the role of the Voice was to be advisory only, the campaign leading up to the election revealed deep fissures in the electorate.

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123. *See supra* text accompanying note 28.

124. The story is grippingly told in ROBERT HUGHES, THE FATAL SHORE: THE EPIC OF AUSTRALIA'S FOUNDING (1986).

125. *See, e.g.*, John Leshy, *Indigenous Peoples, Land Claims, and Control of Mineral Development: Australian and U.S. Legal Systems Compared*, 8 U. N.S.W. L.J. 271, 290 (1985).

126. *Profile of First Nations people*, AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE (Sept. 7, 2023), https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians.

127. *See* Yan Zhuang, *Crushing Indigenous Hopes, Australia Rejects `Voice' Referendum*, N.Y. TIMES (Oct. 14, 2023), https://www.nytimes.com/2023/10/13/world/asia/indigenous-voice-australia-referendum.html.

Supporters, including Prime Minister Anthony Albanese, saw the measure as a step toward healing that would lead to better legislation to address the needs of Indigenous people. Opponents, who included some prominent Indigenous Australians, asserted that it would be divisive and ineffective.[128] The proposal was rejected by a 60-40 margin. Every state and territory except the National Capital Territory (comparable to our District of Columbia) voted decisively against it.[129]

While Indigenous Australians have made significant advances in recent years regarding management of specific lands,[130] the result of the national referendum was a powerful reminder that—to invert a saying often invoked by Martin Luther King, Jr.—while the arc of the moral universe bends toward justice, it can be long.[131]

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128. *Id.*

129. Nearly sixteen million total ballots were cast (voting in Australia is compulsory). *See, e.g.*, *2023 Australian Indigenous Voice Referendum*, WIKIPEDIA, https://perma.cc/ETB7-9UYD; *See also* Damien Cave, *A Measured Voice for Change Must Now Decide How To Follow Defeat*, N.Y. TIMES (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/world/australia/thomas-mayo-voice-defeat.html?smid=nytcore-ios-share&referringSource=articleShare.

130. Like the U.S., the details of Indigenous relationships to land management in Australia are complex and variable from place to place, but an overview can be found at Dr. Terri Janke et al., *Indigenous*, AUSTRALIA STATE OF THE ENVIRONMENT REPORT Key findings (2021), https://perma.cc/C7XK-MU68. That Report also includes a capsule history of Indigenous advances regarding land, including some maps. *Id*. at Management, National and international frameworks that support caring for Country, https://perma.cc/F86J-WTDS. *See also* Michelle Grady, *To Save Its Renowned Nature, Australia Invests More in Indigenous Management*, PEW (Sept. 26, 2022), https://perma.cc/67YS-B4YP**.**

131. King was echoing words from a sermon by abolitionist Unitarian minister Theodore Parker published in 1853. *The Magnet and the Iron: John Brown and George L. Stearns, The Stories Behind the Busts, Theodore Parker*, TUFTS, https://perma.cc/VU5E-3WPQ. *See generally The Arc of the Moral Universe Is Long, But It Bends Toward Justice,* QUOTE INVESTIGATOR (Nov. 15, 2012), perma.cc/TND3-8MXB.