Tribal Co-Management: A Monumental Undertaking?

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After seven years of organizing, the Bears Ears Inter-Tribal Coalition—made up of the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni Nations—secured the protection of 1.35 million acres of federal public land within the boundaries of the state of Utah. The land included the twin Bears Ears buttes, which rose to the south above Cedar Mesa, a cultural landscape sacred to these five Native Nations and many others. President Barack Obama used the Antiquities Act to designate the region as "Bears Ears National Monument" just before he left office, in December 2016. One of Donald Trump's first acts as president was to order the Department of the Interior to review the size and scope of all national monuments established under the Antiquities Act since 1996. He called these monuments, including Bears Ears, a "massive federal land grab" that "unilaterally put millions of acres of land and water under strict federal control." In reality, however, President Obama's creation of Bears Ears National Monument was a moment of unprecedented historic importance. Bears Ears was the first national monument proposed by a coalition of tribes. Before President Trump's executive order, it stood to become the first national monument co-managed by a coalition of tribes and the U.S. government. "Bears Ears is all about Indian sovereignty," said Russell Begaye, the president of the Navajo Nation. In December 2017, President Trump gutted Bears Ears National Monument by 85 percent and opened the lands to oil and gas development, including fracking and mining. In short, President Trump turned what had been an affirmative act of Native nation-building into yet another site for resource extraction. President Joe Biden has an obligation—moral and legal—to correct

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this wrong. Restoring the original boundaries and protections of Bears Ears National Monument is a necessary step but an insufficient one. President Biden must go further. The Antiquities Act can get him there. The Antiquities Act allows President Biden to protect vast swaths of the federal public lands as national monuments, co-managed by tribes and federal agencies in accordance with principles of Indigenous ecological knowledge and land stewardship. These new "Native" monuments should honor Indigenous peoples' connections to their ancestral lands and restore their authority to access, use, and make decisions about those lands. In this way, President Biden can build on President Obama's work with Bears Ears to transform the Antiquities Act—a statute with a long history of oppressing Indigenous peoples—into an instrument of Native nation-building. If President Biden expressly describes his actions as affirmative expressions of the federal Indian trust doctrine and the doctrine of inherent tribal sovereignty, he could start to set a precedent for broad interpretations of the two most foundational doctrines in federal Indian law.

"Perhaps this is what our [public lands] hold for us: stories of who we have been and who we might become – a reminder that as human beings our histories harbor both darkness and light. To live in the United States of America and tell only one story, from one point of view, diminishes all of us."[1]

"Who will find peace with the lands? The future of mankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the long-forgotten peoples . . . rise and begin to claim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is Red."[2]

INTRODUCTION

Who should control the public lands? Answering the question properly requires recognizing the fundamental injustices baked into modern U.S. public lands policy. The public lands of today are the same lands that Indigenous peoples[3] inhabited for generations before Europeans arrived on this continent,[4]

1. TERRY TEMPEST WILLIAMS, THE HOUR OF LAND 2 (2016).

2. VINE DELORIA, JR., GOD IS RED 320 (1972).

3. I use the terms "Indigenous peoples" and "Native peoples," and "Native nations" and "tribes," interchangeably in this Note. "'Native nation' is the preferred contemporary term for Indigenous political sovereigns, but 'American Indian Tribe' is entrenched in legal documents and vocabulary." Sarah Krakoff, *They Were Here First American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 494 n.3 (2017). The important point is that Indigenous peoples are not a monolith; each Native nation, or tribe, has its own history, culture, values, and norms. When I am speaking about one Native nation or tribe in particular, I will refer to them specifically by name.

4. Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands The Return of Native Peoples to the National Parks,* 56 NAT. RES. J. 55, 55 (2016) ("For centuries, native peoples inhabited and flourished in their aboriginal and cultural landscapes where creation stories formed their very being and natural world. The mountains, foothills, canyons and meadows provided shelter from winter storms and summer

the same lands that the United States has systematically stolen from tribes, often through violence, genocide, and forced removal.[5] "National parks, national monuments, and other federal public lands would not exist but for this dispossession."[6]

Consider the Antiquities Act, which grants the president of the United States expansive authority to protect public lands as national monuments for preservation purposes.[7] Ever since President Theodore Roosevelt's designation of Devil's Tower—or *Mato Tipila* ("Bear Lodge" in Lakota)—as the first national monument in 1906,[8] American presidents have used the Antiquities Act to deprive Indigenous peoples of their sacred sites and ancestral lands.[9] Today, 158 national monuments cover over 840 million acres of what was once Native land.[10]

Over the last century, the U.S. government's dispossession of Native nations from their ancestral lands has taken the form of "formal, legal exclusion from exercising meaningful and independent authority to access, protect, or manage those lands."[11] The "multiple-use" and "sustained yield" statutes that regulate the public lands are rooted in settler-colonialist ideals and, thus, continue to perpetuate injustices against Indigenous people.[12] The United States has repeatedly violated its trust obligations to Native nations in managing the public lands, including its duty to "safeguard ancestral homelands that are home to sacred and ceremonial sites and landscapes, inspiration for place-based languages, and sources of subsistence for tribes."[13] Ending these injustices and beginning to make amends will require aggressive steps. If President Biden is serious about his commitment to tribal sovereignty and Native nation-building,

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heat, sustained herds of game animals, plants and medicines, and served as places for tribal gatherings, and religious celebrations.").

5. SAHIR DOSHI, THE BIDEN ADMINISTRATION'S CONSERVATION PLAN MUST PRIORITIZE INDIGENOUS LEADERSHIP, CTR. FOR AM. PROGRESS 1 (2021), https://cdn.americanprogress.org/content/uploads/2021/01/25122457/IndigenousConservation-brief.pdf.

6. *Id.*

7. 54 U.S.C. § 320301(a).

8. *The Proclamation of National Monuments Under the Antiquities Act, 1906-1970*, NAT'L PARK SERV., https://www.nps.gov/articles/lee-story-proclamation.htm (last updated Aug. 1, 2019).

9. *See* Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 213, 245 (2018) (naming Rainbow Bridge National Monument and Canyon de Chelly National Monument as two specific instances of monument designations depriving the Navajo Nation of sacred places).

10. CONG. RSCH. SERV., NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 1 (2018), https://fas.org/sgp/crs/misc/R41330.pdf; Keith Collins, *Map Obama Established More National Monuments Than Any Other President*, QUARTZ, https://qz.com/881165/map-obama-established-more-national-monuments-than-any-other-president/ (June 25, 2019).

11. 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 22 (2020).

12. *See id.* at 20–22.

13. DOSHI, *supra* note 5, at 3.

he should explore ways to return control of the public lands to their original inhabitants.[14]

The dominant narrative around the question of control of America's public lands frames the debate as one between environmentalists and commercial interests. Environmentalists applaud the creation of new national monuments, while ranchers, developers, and resource extractors attack them as "land grabs." Far-right extremists often capture the public's attention, though their rallying cry to "return federal lands to their rightful owners"—referring to the aforementioned ranchers, developers, and resource extractors—exposes the settler-colonialism at the root of this narrative. When a group of armed far-right extremists occupied public lands within the ancestral territory of the Burns Paiute Tribe, Tribal Chair Charlotte Roderique quickly pointed out the hypocrisy of their claims when she said "This is still our land, no matter who is living on it."[15] The argument that the public lands should be "returned" to the states not only lacks any legal validity, it "rings hollow in the face of Chairwoman Roderique's resoundingly simple statement about true belonging: of people to place, rather than the other way around."[16]

The federal Indian trust doctrine imposes an affirmative duty on the president and all federal agencies to protect tribal lands and cultural resources.[17] Over the past two decades, the land-management agencies have defined their trust obligations through a series of directives and guidance documents, designed to require agency officials to consult with tribes before taking actions that might affect their lands or resources. Because the resulting framework of tribal consultation requirements is merely procedural in nature, it falls short of what the trust doctrine requires.[18] Native nations often find themselves in reactionary positions with limited access to legal mechanisms for challenging agency decisions. Worse, the agencies frequently use their considerable discretion to make decisions favoring commercial interests over tribal rights.

President Joe Biden cannot afford to perpetuate this broken system. As part of his efforts to reengage with Native nations on a government-to-government

14. *See* Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 301 (2003) (arguing that the federal government's decisions about the public lands should consider the historical dispossession of Indigenous peoples by the U.S. government and the resulting "unique" relationship between Native nations and the United States).

15. Jill Fuglister, *Indigenous Rights and Public Lands A Chat with Anna Elza Brady*, MEYER MEMORIAL TR. (Apr. 23, 2018), https://mmt.org/news/indigenous-rights-and-public-lands-chat-anna-elza-brady.

16. *Id.*

17. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 141 (1995).

18. *See* Anna V. Smith, *11 Alaska Native Tribes Offer New Way Forward on Managing the Tongass*, HIGH COUNTRY NEWS (Oct. 1, 2020), https://www.hcn.org/issues/52.10/indigenous-affairs-forests-eleven-alaska-native-tribes-offer-new-way-forward-on-managing-the-tongass (describing the inadequacy of "tribal consultation" as a "'one-way system of communication' where federal agencies use consultation to 'issue orders and give updates to the tribes about what will happen'").

basis, President Biden should work to redress the fundamental injustices embedded in federal public lands policy. He has already taken a significant first step by nominating Deb Haaland, Laguna Pueblo, to serve as his Secretary of the Interior. Secretary Haaland is not only the first Native secretary in U.S. history, but she also exercises control over "the department that has been most complicit in disenfranchising tribes of their lands and resources."[19] In 2019, Haaland sponsored a House resolution to commit the federal government to protecting 30 percent of U.S. lands and waters by 2030.[20] Notably, Haaland's resolution framed Indigenous-led conservation and respect for tribal sovereignty as cornerstones of this so-called "30x30" goal. Now that the 30x30 goal has become a key part of President Biden's plan to address climate change,[21] Indigenous-led conservation and respect for tribal sovereignty must remain at the center.

The Antiquities Act is the only mechanism through which President Biden can protect vast swaths of land efficiently, effectively, and without congressional approval. He should take advantage of this expansive authority. Rather than ceding ground, both literally and figuratively, to the ranchers, extractive interests, and far-right extremists who have opposed nearly every monument established in the last five decades, President Biden should use the Antiquities Act to create new "Native" monuments that protect tribes' ancestral lands and restore their authority to access, use, and manage those lands.[22] Further, by characterizing each new "Native" monument as an expression of his office's affirmative trust obligations to Native nations, President Biden will set the groundwork for a broad interpretation of the federal Indian trust doctrine, demonstrate deep respect for the cultural aspects of tribal sovereignty, and—perhaps—begin to make amends for centuries of settler-colonialist oppression at the hands of the U.S. government.

Part I of this Note describes the settler-colonialist legacy of the federal public lands by providing a brief background of the U.S. government's violent dispossession, removal, and exclusion of Indigenous peoples from their ancestral lands. It also examines the settler-colonialist origins of preservationist policies like the Antiquities Act, and shows how American presidents have used them as tools of oppression against Indigenous peoples for over a century.

Part II explains the origins and modern scope of the federal Indian trust doctrine, and frames it as a source of Native rights and federal obligations on the public lands. Part II also describes the statutes and directives that apply to the federal land-management agencies and shows how they violate their trust duties by favoring commercial interests over tribes' rights.

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19. DOSHI, *supra* note 5, at 3.

20. *Id.*

21. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021).

22. *See* Charles Wilkinson, *"At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top" The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317, 329 (2018) (discussing the use of the Antiquities Act to "honor[] and protect[] the Native connection to the land" of Bears Ears).

Part III details the president's expansive authority under the Antiquities Act and explains why using it is the best way for President Biden to protect vast swaths of land quickly, effectively, and without congressional approval. Part III also explains why commercial interests—ranchers and fishermen, developers, and resource extractors—have opposed nearly every national monument established in the last five decades, points out fatal flaws in their argument that the public lands should be "returned" to their "rightful owners," and redirects the reader's attention to the work of Indigenous activists whose ancestors were the true original inhabitants of today's public lands.

Part IV explains how President Biden can use the Antiquities Act to reach his administration's goal of protecting 30 percent of the land in the United States by 2030, while also expressly affirming his trust duties to Native nations and demonstrating respect for tribal sovereignty. Native nations have the right, and ought to be given the authority, to access, use, and manage their ancestral lands as they see fit. Part IV lays out how President Biden can enable true federal-tribal co-management of monuments, using Bears Ears as a paradigm case study.

I. THE SETTLER-COLONIALIST LEGACY OF AMERICA'S PUBLIC LANDS

The dispossession and removal of Indigenous peoples from their ancestral lands enabled the ownership, control, and management of those lands by the United States. This is the settler-colonialist legacy of America's public lands: they were stolen, often through military violence.

For many Indigenous people, "land constitutes cultural identity."[23] "Many tribes identify their origin at a particular geographic site, such as a river or a mountain," which often features in the tribe's creation stories and defines their "cultural worldview, traditions, and customs."[24] Today, many tribes retain connections to their ancestral lands, many of which contain—or are contained within—public lands, which are owned by the U.S. government and managed for "multiple use" and "sustained yield."[25] Because of the deep link between land and cultural identity in many Indigenous worldviews, the way federal agencies manage the public lands can impact the ability of Indigenous people to practice their religions and define their cultural identities.[26] Yet, the current legal

23. Wolfley, *supra* note 4, at 55.

24. *Id.*

25. *See* 43 U.S.C. § 1702(c) (defining multiple use as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people"); *id.* § 1702(h) (defining sustained yield as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands"); *see also infra* Subpart II.D.1.

26. Tsosie, *supra* note 14, at 284–85 ("Hydroelectric power plants or activities such as coal strip-mining can have severe impacts on sacred places, natural springs and other water sources, and fish and wildlife resources that have cultural and religious significance. For example, Hopi traditionalists have vehemently condemned coal strip-mining on Black Mesa, asserting that this activity desecrates a place that has deep spiritual significance to the Hopi people and threatens natural springs and other sites that are essential to the continuance of Hopi life.").

framework that regulates these federal land management agencies, rooted as it is in settler colonialism, excludes Native nations from exercising any "meaningful and independent authority to access, protect, or manage" their ancestral lands located within public lands.[27]

The following subparts attempt to give a brief background of the settler-colonialist history of the public lands. First, however, I borrow the words of Potawatomi scholar-activist Kyle Powys Whyte to define what I mean when I use the term "settler colonialism":

> As an injustice, *settler colonialism* refers to complex social processes in which at least one society seeks to move permanently onto the terrestrial, aquatic, and aerial places lived in by one or more other societies who already derive economic vitality, cultural flourishing, and political self-determination from the relationships they have established with the plants, animals, physical entities, and ecosystems of those places.[28]

According to Whyte, the history of settler colonialism in the United States is a history of environmental injustice, "aim[ed] directly at undermining the ecological conditions required for Indigenous peoples to exercise their cultures, economies, and political self-determination."[29] Settlers treat ecosystems "simply as open lands and waters belonging to them," rather than as complex entities that "honor Indigenous histories and stewardship responsibilities" and "support Indigenous cultural integrity, economic vitality, and political self-determination."[30]

A. The Dispossession of Native Lands by the United States Government

From the very beginning of U.S. history, Native peoples were characterized as "savage, uncivilized, and, like the animals they hunted, ultimately doomed to extinction."[31] In 1823, Chief Justice Marshall's opinion in *Johnson v. M'Intosh* established that Indigenous peoples had "incomplete title to land they had inhabited for generations."[32] Theirs was a title of occupancy only; the European "discoverers" had ultimate dominion over the land, including the power to grant

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27. Mills & Nie, *supra* note 11, at 22.

28. Kyle Powys Whyte, *The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism*, 19 RED INK 154, 158 (2017) (emphasis added).

29. *Id.* at 165.

30. *Id.*

31. Sarah Krakoff, *They Were Here First American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 543–44 (2017) (citing Letter from George Washington to James Duane (Sept. 7, 1783), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 2 (Francis Paul Prucha ed., 3d ed. 2000) (George Washington articulating the Indian policy of the Continental Congress as follows: "[P]olicy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest . . . ; when 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.")).

32. Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RES. L. REV. 41, 44 (2007) (citing Johnson v. M'Intosh, 21 U.S. 543 (1823)).

it away regardless of Native occupancy.[33] Further, the Court held that the U.S. government had exclusive authority to deal with tribes in land transactions, as well as the "burden" of managing and dispensing of the "vast public domain" created when it extinguished Native title.[34]

In 1830, following the passage of the Indian Removal Act,[35] the U.S. government forced many eastern and southern tribes from their lands to then-unoccupied lands west of the Mississippi River.[36] In the 1840s, the discovery of gold and other precious metals in the West brought thousands of settlers, miners, and businessmen who began taking the tribes' lands.[37] As historian Mark David Spence put it, "the western tribes now lived on coveted lands within the national domain."[38] The transcontinental railroad facilitated the continuing western settlement, as did Congress's enactment of the Homestead Act, which awarded 160 acres of land in the public domain to anyone (except Natives) who would "settle[] and cultivat[e]" the land.[39]

To make more of the "coveted" tribal lands available for homesteading, the federal government began entering into treaties that explicitly reserved small parcels of land for permanent tribal occupancy, freeing up large swaths of tribes' former land for homesteading, mining, and logging.[40] The United States signed over 400 treaties with tribes between 1860 and 1887.[41] Professor Jeannette Wolfley refers to this treaty-based reservation policy as "a form of removal by another name."[42] To induce massive land cessions, the U.S. government promised to respect tribes' inherent sovereignty and preserve their reservations as permanent homelands.[43]

The federal government broke many of these treaty promises almost immediately. The General Allotment Act of 1887 authorized the president to allot individual parcels of reservation land to individual tribal members, effectively breaking up large, commonly-held reservations into smaller sections of private property.[44] In so doing, "Congress hoped to eventually reduce the total

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33. *Id.* at 44–45.

34. *Id.* at 45.

35. Indian Removal Act, 4 Stat. 411 (1830).

36. Wolfley, *supra* note 4, at 58.

37. *Id.*

38. MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF NATIONAL PARKS 29 (1999).

39. Homestead Act, 12 Stat. 392, 392 (1862).

40. *See* Wolfley, *supra* note 4, at 59.

41. *Id.* at 57, 59 (identifying the dates between 1860 and 1887 as the "reservation" period of federal Indian policy).

42. *Id.* at 59. Professor Wolfley also points out one lasting benefit of the treaties: they often recognized the geographic boundaries of the aboriginal territories of tribes. *Id.*

43. *Id.*; *see also* Whyte, *supra* note 28, at 161 (noting that the federal government often "refused to engage in . . . process[es] that would allow [tribal] leaders to gain consensus among themselves according to the protocols of their Indigenous governance systems").

44. 25 U.S.C. § 331 (repealed 2000); *see also* Whyte, *supra* note 28, at 162–163 ("The U.S. eventually made it impossible for immediate or extended family groups to manage allotments cooperatively. Tribal members could not sell their allotments for 25 years unless they were deemed

[N]ative land stock."[45] Whyte described the effort as an attempt to "force Indigenous peoples to adopt farming lifestyles that would pose less resistance to settlement."[46] After issuing the allotments, the president would declare the remaining reservation land "surplus" and open the leftover parcels—usually the most arable lands—to homesteading by white settlers.[47] Meanwhile, U.S. assimilation policies removed Native children from their reservations and forced them into American boarding schools where their languages, cultures, and dress were forbidden and replaced with training in "technical skills for settler occupations."[48]

U.S. allotment and assimilation policies were rooted in settler colonialism and American imperialism, designed to shrink the tribal land base and destroy tribal self-governance.[49] The United States effectively attempted to "concentrat[e] as many Indians as possible on small patches of their former aboriginal territories, and convert[] them to a sedentary and agricultural existence."[50] Under Whyte's framework for settler colonialism, the United States "[sought] to move permanently onto the terrestrial . . . places lived in by" the tribes, who "already derive[d] economic vitality, cultural flourishing, and political self-determination from the relationships they ha[d] established with the plants, animals, physical entities, and ecosystems of those places."[51] Tribal landholdings shrunk nearly two-thirds due to allotment, from 138 million acres in 1871 to forty-eight million acres in 1928.[52] Meanwhile, Congress ended the

'competent' by the U.S. The U.S. developed many schemes to divest Indigenous persons of their allotments before 25 years. Indigenous persons, who typically had to farm arid land and received inadequate support from the U.S. to transition into farming, were often considered so incompetent that the U.S. leased their land to settlers. The U.S. required Indigenous allotments to be divided equally among the heirs, creating land with owners too numerous to make use of the land. As a result, the land was often leased to settlers. The U.S. agents exercised tax codes corruptly, making it so that Indigenous persons 'declared competent' owed more in taxes than they could afford to pay.").

45. Jeri B. K. Ezra, Comment, *The Trust Doctrine A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 713 (1989).

46. Whyte, *supra* note 28, at 162; *see also* Sarah Krakoff, *Settler Colonialism and Reclamation Where American Indian Law and Natural Resources Law Meet*, 24 COLO. NAT. RES., ENERGY & ENV'T L. REV. 261, 270–71 (2013) (describing the General Allotment Act as an attempt by the federal government to "transform the Indians into productive yeoman farmers who no longer felt allegiance to their tribes").

47. 25 U.S.C. § 331; *see also* Whyte, *supra* note 28, at 162.

48. Whyte, *supra* note 28, at 163; *see also* Krakoff, *supra* note 9, at 225–26.

49. Krakoff, *supra* note 46, at 270; *see also* Krakoff, *supra* note 31, at 544 (explaining forced assimilation as an attempt by the U.S. government to eradicate "the troublesome racial aspects of individual Native Americans" because "Indians, unlike African Americans, could become white through processes of civilization").

50. Krakoff, *supra* note 46, at 264.

51. Whyte, *supra* note 28, at 165.

52. Krakoff, *supra* note 9, at 225 (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton et al. eds., 2012), (citing OFFICE OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, 10 REPORT ON LAND PLANNING 6 (GPO 1935))).

use of treaties and "moved toward a goal of ridding America of all vestiges of tribal sovereignty."[53]

B. The Antiquities Act as a Tool of Dispossession

The Antiquities Act originated from the widespread belief that Indigenous peoples would be driven to extinction as white settlers moved west.[54] "[T]his belief carried particular poignancy in 1906," according to legal scholar Robert H. McLaughlin, "because the nation had achieved a combined physical and metaphorical sense of completeness in spanning the continent . . . [forged by] [t]he realization of manifest destiny, the establishment of a national economy, and the political integration of the nation's constituent states and territories."[55] Federal policies "designed to get tribes off of the land" had made the extinction of Indigenous peoples seem inevitable.[56]

Some settlers exploited the opportunities offered by the Homestead Act to "lay claim to troves of ruins, potsherds, arrow heads, and other [I]ndigenous artifacts" on the public lands.[57] The rampant theft and vandalism pushed a number of archaeologists, anthropologists, and historians—settlers themselves, under Whyte's framework—to draft the legislation that would eventually become the Antiquities Act.[58] The drafters and their supporters warned that the looting of Indigenous artifacts "threatened to rob the public of its cultural heritage."[59] To stop that from happening, these settler archaeologists, anthropologists, and historians pushed the federal government to act as a "steward" for Indigenous artifacts located on the public lands.[60]

The drafting of the Antiquities Act coincided with the dawn of "a second era of public lands policy," one focused on conservation and retention rather than disposition.[61] The end of the nineteenth century saw a movement to keep some natural resources under federal control for the benefit of future generations.[62] Accordingly, the U.S. government began to clear and set aside portions of the public lands in order to "save a certain version of American heritage."[63] Because most of the lands were occupied by Native peoples, "virtually every act of

53. *See* Ezra, *supra* note 45, at 713.

54. Krakoff, *supra* note 9, at 220.

55. Robert H. McLaughlin, *The Antiquities Act of 1906 Politics and the Framing of an American Anthropology & Archaeology*, 23 OKLA. CITY U. L. REV. 61, 75 (1998).

56. Krakoff, *supra* note 9, at 220; *see also supra* Subpart I.A.

57. *Id.*

58. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477 (2003); *see also* Krakoff, *supra* note 9, at 220 (explaining that the drafters were "concerned about historic and pre-historic ruins and artifacts, particularly ancient Puebloan sites in the Southwest").

59. Squillace, *supra* note 58, at 477–78.

60. Brent J. Hartman, *Extending the Scope of the Antiquities Act,* 32 PUB. LAND & RES. L. REV. 153, 157 (2011).

61. Mills & Nie, *supra* note 11, at 19.

62. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269, 280 (1980).

63. Krakoff, *supra* note 9, at 230.

conservation entailed acts of restricting or eliminating [their] presence."[64] The continued existence of Native peoples in national parks, for example, was incompatible with views of wilderness as "an uninhabited Eden that should be set aside for the benefit and pleasure of vacationing Americans."[65] In the West, "uninhabited wilderness had to be *created* before it could be preserved."[66] When Congress *created* the national parks, "it did so without consideration of the treaties . . . [the U.S. government] had entered into with many tribes who inhabited the lands."[67] Native peoples were forcibly removed, and their treaty rights erased, often without recognition or compensation.[68]

The passage of the Antiquities Act included support by conservationists who lobbied for broad language to allow for large-scale protection.[69] Though the Act was designed to protect indigenous artifacts, Indigenous people had "virtually no voice" in the drafting process.[70] Professor Sarah Krakoff of the University of Colorado School of Law—now the deputy solicitor for parks and wildlife in President Biden's Department of the Interior (DOI)—writes, "The very people whose ancestors were excavated and whose material heritage was plundered, stolen, and sold were either not consulted or overruled."[71] In this way, the Antiquities Act was a continuation of U.S. policies "aimed at erasing the image of the contemporary American Indian from the landscape in favor of the 'dead and disappearing culture' destined to exist only in museums."[72]

Within four months of signing the Antiquities Act into law, newly elected President Theodore Roosevelt used his authority under the Act to establish the first national monument at Devil's Tower.[73] Devil's Tower is sacred to several of the Northern Plains Tribes, including the Kiowa, Crow, Lakota, Northern Cheyenne, and Arapaho.[74] These Tribes shared use of the tower and its surrounding lands before the United States named it a national monument.[75] The Tribes continued to use the area for religious activities following Roosevelt's

64. *Id.*

65. SPENCE, *supra* note 38, at 4.

66. *Id.* (emphasis added).

67. Wolfley, *supra* note 4, at 61.

68. Kantor, *supra* note 32, at 42; *see also id.* ("The untold story behind our unspoiled views and virgin forests is this: these landscapes were inhabited, their features named, their forests utilized, their plants harvested and animals hunted. Native Americans have a history [on these lands] measured in millennia.").

69. Krakoff, *supra* note 9, at 214 n.11.

70. *Id.* at 223; *see also* McLaughlin, *supra* note 55, at 78 (noting the "absence of Native American voice in the language and record of the [Antiquities] Act").

71. Krakoff, *supra* note 9, at 223.

72. Joe E. Watkins, *The Antiquities Act at One Hundred Years A Native American Perspective, in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 187, 281 (David Harmon et al., eds. 2006).

73. *The Proclamation of National Monuments Under the Antiquities Act, 1906-1970*, *supra* note 8.

74. Tsosie, *supra* note 14, at 291.

75. *Id.*

proclamation, but their access was subject to the decision-making authority of the federal government.[76]

In using the Antiquities Act to protect Devil's Tower as a national monument, President Roosevelt "erased the presence and silenced the voices of the Northern Plains' peoples" for whom the site "held, and still holds, strong cultural and historical meaning,"[77] and restricted Indigenous peoples from practicing their religion on those lands—their ancestral lands—in the name of preservation.[78] It is not surprising to learn that Roosevelt, "champion of conservation and signatory of the Antiquities Act," was, in fact, "a full-throated proponent of allotment and assimilation policies."[79] Roosevelt described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass" in one breath, and, in the next, he "extolled the virtues of the nation's forest reserves."[80] As Krakoff puts it, Roosevelt's vision of conservation "included retention of lands held for the benefit of the public (by the federal government,) and yet disposition of lands held collectively by tribes."[81]

Subsequent presidents followed in Roosevelt's footsteps, continuing to use the Antiquities Act as a tool of oppression against Native peoples for over a century. This Note shares a few examples to illustrate the point, but it is important to remember that every national monument was once Native land, and each instance of Native dispossession is unique.

II. THE FEDERAL INDIAN TRUST DOCTRINE & FEDERAL OBLIGATIONS ON THE PUBLIC LANDS

The federal Indian trust doctrine—rooted in tribes' inherent, pre-constitutional sovereignty, as well as the earliest treaties between tribes and the U.S. government—imposes an affirmative duty on the president to protect certain rights of Native peoples, including their land rights, water rights, hunting and fishing rights, and rights to practice their religion and culture.

This Part explains the historical basis and scope of the trust doctrine, and argues that it requires President Biden to break away from the legacy frameworks that govern the public lands and, instead, create opportunities to share land management authority with Native nations.

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76. *Id.*

77. Anna Marie Kramer, The Power of the Tower: Contesting History at Bear Lodge/Devil's Tower National Monument 44 (2016) (B.A. thesis, Pomona College), https://scholarship.claremont.edu/pomona_theses/151/.

78. *See id.* at 15 ("The federal government was responsible for wresting the space of the Tower from its central place of cultural meaning and sovereignty for the Northern Plains [T]ribes, and constructing it as a site that validated American national heritage."); *id.* at 16 ("[T]he 1906 designation of the Tower as a national monument [] silenced the cultural and historic importance of the Tower for the Northern Plains [T]ribes").

79. Krakoff, *supra* note 9, at 226.

80. *Id.*

81. *Id.*

A. The Historical Basis of the Trust Doctrine

The roots of the federal Indian trust doctrine extend back to the earliest treaties between the United States and Native nations. In order to induce massive land cessions, the United States promised to protect tribes' reservation homelands and support their lifeways. Tribes' reliance on these federal promises of protection "gave rise to a sovereign trust for the benefit of all tribes."[82] Congress formalized this concept in federal statutes enacted as early as 1787. The Northwest Ordinance, for example, envisioned a broad federal duty of protection toward Native peoples: "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed . . . ."[83]

Chief Justice Marshall drew on these early treaties and statutes to articulate the trust doctrine in two foundational Supreme Court cases: *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. In *Cherokee Nation*, Marshall looked to the U.S. Constitution and the treaties that established government-to-government relations with the Cherokee Nation ("the Nation"), to conclude that the Nation's sovereignty resembled that of a foreign nation, different only because it existed completely within the geographic borders of the United States.[84] According to Marshall, the Constitution implied the Nation's inherent sovereignty, and the treaties recognized and guaranteed the Nation's territorial rights and the U.S. government's duty to protect those rights.[85] Importantly, Marshall did not expressly tie this duty to any specific document.[86] Rather, he suggested that it "[arose] out of a special relationship between the two entities,"[87] one "marked by peculiar and cardinal distinctions which exist nowhere else."[88] According to Marshall, the guiding principles of federal Indian law derive from this trust relationship.[89]

Marshall elaborated on the nature of the trust relationship in *Worcester,* where the Court held that the State of Georgia's jurisdiction could not penetrate the territorial boundaries of the Cherokee Nation.[90] Marshall first looked to the charters creating the colonies and found that the colonists intended to "civilize"

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82. Mary C. Wood, *The Indian Trust Responsibility Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 357 (2003).

83. Samuel Osgood & Arthur Lee, *An Ordinance for the Government of the Territory of the United States North West of the River Ohio*, *in* 32 J. OF THE CONT'L CONG. 334, 340 (1787).

84. Cherokee Nation v. Georgia, 30 U.S. 1, 17, 19–20 (1831). Marshall characterized the Cherokee Nation as a "domestic dependent nation" and "a distinct political society . . . capable of managing its own affairs and governing itself." *Id.* at 16–17.

85. *Id.* at 17.

86. *See id.* at 17–20; *see also* Ezra, *supra* note 45, at 709 n.20 (noting that though Chief Justice Marshall looked to the U.S. Constitution and treaties for guidance, those documents were not controlling).

87. Ezra, *supra* note 45, at 709.

88. *Cherokee Nation*, 30 U.S. at 16–17.

89. *Id.* at 17 ("[Natives] look to our government for protection.").

90. Worcester v. Georgia, 31 U.S. 515, 560 (1832).

Native people, not exterminate them.[91] Next, Marshall examined the treaties between the Nation and the United States and determined that the documents were expressions of mutual obligations between coequal parties.[92] He emphasized that the Nation's right to "all the lands within [its territorial] boundaries . . . [wa]s not only acknowledged, but guarant[e]ed by the United States."[93] Finally, Marshall examined the Indian Trade and Intercourse Acts[94] and found them to be a congressional recognition of Native nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having the right to all the lands within those boundaries."[95] Thus, Marshall found that the U.S. government's promise of federal protection did not implicitly destroy or overwrite the Nation's inherent sovereignty.[96] He concluded that the federal government's role as trustee included a duty to protect the Nation's territory and sovereignty, subject to negotiated cessations.[97] In summary, the Court recognized the rights of Native nations to their ancestral territory, as well as the duty of the U.S. government to protect those rights from encroachment.

Reid Chambers, the former Associate Solicitor for Indian Affairs for the DOI, interprets the *Cherokee* cases as "an expansive protection of the tribe's status as a self-governing entity, as well as its property rights."[98] Under this interpretation, "Tribal autonomy is supported by a federal duty to protect the tribe's land and resource base."[99] Further, Chambers argues, "Marshall could be read as holding that the . . . tribes, prior to discovery and colonization of their lands, were vested with 'inherent' powers of sovereignty. The executive and legislative practice of concluding and ratifying treaties with the tribes could be seen simply as recognition of that status by the United States."[100] Thus, "the trust relationship is not so much *created* by the treaties as it is implicitly *recognized* by them."[101] Because the federal government's duties as trustee exist independent of any specific statutes, treaties, or other agreements, they often extend beyond those formally recognized by federal Indian law.

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91. *Id.* at 546.
92. *Id.* at 551.
93. *Id.* at 557.
94. The prohibition on purchases of, or intrusion upon, Native lands by states or private parties was first enacted on July 22, 1790. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790). That statute provided "[t]hat no sale of lands by any Indians, or any nation or tribe of Indians within the United States, shall be valid . . . unless the same shall be made . . . [by] some public treaty." *Id.* at 138. The statute became permanent in 1802, 2 Stat. 139, 143 (1802), and survives today as 25 U.S.C. § 177.
95. *Worcester*, 31 U.S. at 557.
96. *Id.* at 552.
97. *See id.* at 555–56, 560–62.
98. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219–20 (1975).
99. *Id.* at 1220.
100. *Id.* at 1221.
101. *Id.* (emphasis added).

B. The Modern Scope of the Trust Doctrine

The context around the trust doctrine has changed since Chief Justice Marshall first articulated the concept in the *Cherokee* cases.[102] At the time, Professor Mary Christina Wood notes, "federal protection was needed to secure reservation lands against the intrusions of white settlers," whereas in modern times, "federal protection is needed to shield Indian country from environmental threats coming primarily from corporate industry and the government itself."[103]

As noted above,[104] the trust doctrine stems from the status of Native Nations as separate and pre-constitutional sovereigns that inherently possess all the powers of sovereign nations.[105] As Yale Law Professor Perry Dane puts it: "[Native] nations are not creatures of the United States Constitution, and are not bound by it. Historically and legally, they are distinct entities. The tribes' complex tie to the United States limits the exercise of their sovereignty. But the source of that sovereignty is not the United States but themselves."[106] The federal trust duty, then, is rooted in supporting and protecting the inherent sovereignty of Native nations.

Professor Rebecca Tsosie suggests that the duty should include federal support and protection for tribes' "cultural sovereignty."[107] Cultural sovereignty refers to the inherent rights of Native nations and Native people "to exercise their own norms and values in structuring their collective futures."[108] Tsosie suggests that the first step in advancing tribal cultural sovereignty is recognizing that "the essence of who we are as Indian people relates to three things: land, culture, and community."[109] "Each of these things is central to our survival as distinctive peoples," Tsosie argues, "and thus, our vision of cultural sovereignty must respond in kind."[110] Professor Wood agrees: "If [the] trust doctrine is to provide meaningful protection for [N]ative interests, it must incorporate a recognition of the overriding characteristics which are vital to [N]ative sovereignty,"[111] namely "(1) a stable land base; (2) a functioning economy; (3) the ability to govern; and (4) cultural and religious vitality."[112] Because each of these characteristics is "integral" to tribal sovereignty, Wood argues, "the trust doctrine must afford protection to all four."[113] I attempt to situate this argument within modern federal

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102. Wood, *supra* note 82, at 359.

103. *Id.* at 359–60.

104. *See supra* Subpart II.A.

105. Tsosie, *supra* note 14, at 301.

106. Perry Dane, *The Maps of Sovereignty A Meditation*, 12 CARDOZO L. REV. 959, 961–62 (1991).

107. Tsosie, *supra* note 14, at 274, 301.

108. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

109. *Id.* at 197 (citing Simon Oritz, Address at the ASU Indian Studies Conference (March 2, 2000)).

110. *Id.*

111. Wood, *supra* note 17, at 234.

112. *Id.* at 132.

113. *Id.* Professor Wood continues: "[B]ecause a significant portion of the [N]ative population still struggles to continue important aspects of a traditional [N]ative way of life, . . . the trust doctrine may

Indian law by examining how the three branches of the U.S. government have defined the trust doctrine in recent decades.

Though Chief Justice Marshall and the U.S. Supreme Court first recognized tribes' inherent sovereignty and the federal government's corresponding trust duties in 1832,[114] the subsequent centuries saw federal officials undertake prolonged efforts to seize tribal land, undermine tribal culture, and ultimately "rid[] America of all vestiges of tribal sovereignty."[115] The legislative and executive branches of the U.S. government did not expressly recognize inherent tribal sovereignty and commit to supporting tribal self-determination until the late 1960s, following decades of social, political, and legal activism by Indigenous people.[116]

In 1961, members of seventy tribes gathered in Chicago for the American Indian Chicago Conference, "the largest multitribal gathering in decades."[117] The official closing statement of the conference asserted "the right of Indian communities to choose their own ways of life."[118] Shortly thereafter, the legislative and executive branches of the U.S government began to formally recognize the permanency of Native nations and the importance of investing in Indigenous communities.[119] In 1968, President Lyndon B. Johnson delivered a special message to Congress entitled "The Forgotten Americans," the first such message to focus solely on Native affairs.[120] Then, in 1970, President Richard Nixon issued a statement calling for a new federal policy of "self-determination" for Native nations, committing the U.S. government—including his administration and future administrations—to supporting and protecting tribal sovereignty:

> From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny . . . . It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[121]

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provide the only buffer to protect . . . tribal ways against the imposing forces of the majority society." *Id.* at 235.

114. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

115. Ezra, *supra* note 45, at 713; *see also supra* Subpart I.A.

116. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 405–13 (1970).

117. STEPHEN E. CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 123–24 (1988).

118. *Id.*

119. *Id.* (citing President Lyndon Johnson's Great Society programs, as well as the Economic Opportunity Act).

120. *Id.*

121. Special Message on Indian Affairs, 213 PUB. PAPERS 564–65 (July 8, 1970).

Nixon grounded this commitment to tribal sovereignty and self-determination in what he called the "special" trust relationship between Native nations and the United States, which arose through "solemn obligations" and continued to carry "immense moral and legal force."[122] Nixon stressed tribes' management of government services and participation in policy making as essential aspects of the inherent right of Native nations to determine their future for themselves.

Congress responded by enacting numerous statutes designed to enhance tribal self-determination, citing as authority the federal policy of self-determination and the federal trust responsibility to Native Nations. Meanwhile, federal courts began interpreting the trust doctrine as a source of protection for tribal land rights, water rights, hunting and fishing rights, and certain cultural rights.[123] Though in most cases courts have used the trust doctrine to secure only those rights mentioned explicitly or implicitly in past treaties or statutes, at least three cases indicate an expansion of the doctrine beyond this narrow interpretation to include federal protection for rights that are essential to sustaining tribal culture and lifeways.[124]

First, in *Menominee Tribe v. United States*, the Supreme Court relied on the trust doctrine and a broad interpretation of the Wolf River Treaty to protect the Menominee Tribe's hunting and fishing rights against state interference.[125] The Court reasoned that the Wolf River Treaty had secured federal protection for the Menominee's "way of life," which necessarily included the right to hunt and fish.[126] Likewise, in *United States v. White*, the Eighth Circuit found that certain rights constituted such an essential part of tribal life that they need not be specifically mentioned in a treaty to create a duty of protection on the part of the federal government: "The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed' remained in them unless granted away."[127] Finally, in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the First Circuit held that the Non-Intercourse Act of 1809[128] created a general trust relationship between the United States and all tribes, regardless of whether any treaty expressly formalized such a relationship.[129] These broad judicial interpretations of the trust doctrine create space for the even broader interpretation posited by Professors Tsosie and Wood, and discussed above, that the trust doctrine secures

122. *Id.* at 565–66.

123. Ezra, *supra* note 45, at 724–25.

124. *See id.* at 725 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); United States v. White, 508 F.2d 453 (8th Cir. 1974)).

125. *Menominee Tribe of Indians*, 391 U.S. at 405–06.

126. *Id.* at 406.

127. 508 F.2d at 457 (citing United States v. Winans, 198 U.S. 371 (1905)).

128. 25 U.S.C. § 177.

129. 528 F.2d 370, 377, 379 (1st Cir. 1975).

federal protection for tribal cultural sovereignty and rights of cultural significance. Under this interpretation, the U.S. government is legally obligated to protect tribal land, culture, and community; its failure to do so violates its duty as trustee to all the tribes within its boundaries.

C. The Trust Doctrine as a Source of Federal Obligations on the Public Lands

The importance of land to the continued survival, autonomy, and sovereignty of Native nations cannot be overstated.[130] Professor Perry Dane writes: "Native Americans cherish the land. They also know its import for their struggle for survival and autonomy. However small a reservation is, however poor it is, it is a stake on which to build sovereignty."[131] Professor Sandra Zellmer explains that members of land-based tribes describe the land as "mother" or "The Heart of Everything That Is": "A close relationship with the land 'permeates American Indian life,' sustaining the health and well-being of individual members and, in turn, the integrity and sovereignty of the tribe itself."[132] Indigenous religious beliefs are often site-specific and "intimately associated with the land and its natural features."[133] The land is a "sacred, living being," which "embodies a divinity that it shares with everything that is part of nature."[134]

Legal scholars Daniel Rey-Bear and Matthew L. Fletcher write that "[f]ederal duties to [Native nations] exist and remain enforceable because 'the government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements, in exchange for which Indians have often surrendered claims to vast tracts of land.'"[135] Further, federal efforts to destroy tribal sovereignty have often "focused on land—taking it, dividing it, or colonizing it."[136] Professor Dane cites the U.S. government's history of removing Indigenous peoples from their ancestral lands and containing them on much smaller reservations as support for

130. *See* Sandra B. Zellmer, *Sustaining Geographies of Hope Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 431 (2002) ("Although generalizations can only be made with caution, given the wide diversity of tribes and tribal interests, it is safe to say that land has tremendous significance to many Indian tribes.").

131. Dane, *supra* note 106, at 997.

132. Zellmer, *supra* note 130, at 431.

133. *Id.* at 432.

134. *Id.*

135. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection From Our Protectors" The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 403 (2017) (citing Brief for the Federal Petitioners at 22, Salazar v. Patchak, 565 U.S. 1092 (2012) (No. 11-247)).

136. Dane, *supra* note 106, at 997; *see also* Zellmer, *supra* note 130, at 434 ("The pressure for land provided the subtext, if not the explicit objective, of federal Indian relations throughout the nineteenth century.").

his argument that the federal duty to protect Native lands should apply to Native lands located both inside and outside of reservation boundaries.[137]

Professor Wood points out that certain land uses may "defile the natural geography, or degrade particularly sacred places"—and, therefore, "irrevocably damage" tribal sovereignty—regardless of whether they occur on- or off-reservation.[138] Professor Kristin Carpenter argues that "ensuring access to off-reservation sacred sites, and protecting the physical integrity of those sites, is essential to fulfilling the government's trust duty."[139] Professor Zellmer extends this reasoning to frame the trust doctrine as a source of federal obligations on the public lands:

> For many . . . tribes, physical features and objects on the public lands hold extraordinary political and spiritual significance. The land has represented an unparalleled bulwark against the otherwise inevitable effects of colonization . . . . [Tribes'] cultural interests in the public lands deserve special consideration, given their unique associations with the land and its resources, and the political and legal obligations arising from the historic treatment of tribes, their treaties, and their continuing sovereign status.[140]

Professor Wood also identifies a number of federal court cases, discussed below, where tribes successfully used the trust doctrine to claim that the federal land management agencies have a duty to protect tribal rights and resources on the public lands.[141] In *Klamath Tribes v. United States*, the Klamath Tribes challenged timber sales on U.S. Forest Service ("Forest Service") lands that served as a habitat for mule deer, which the Tribes depended on for their "subsistence and way of life."[142] The Tribes argued that the Forest Service had breached its trust duty by allowing logging without consulting the Tribes. The district court agreed, finding that the federal land management agency had a "substantive duty to protect to the fullest extent possible the Tribes' treaty rights, and the resources on which those rights depend."[143]

Similarly, the court in *Pyramid Lake Paiute Tribe v. Morton* held that the DOI's decision to divert water away from a tribal lake and fishery violated its trust duty to the Pyramid Lake Paiute Tribe,[144] while the court in *Northern*

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137. Dane, *supra* note 106, at 997; *see also* Tsosie, *supra* note 14, at 293 ("Moreover, as a matter of basic morality, the brutal history of the government's dispossession of tribes from their sacred and ancestral lands instructs that tribal cultural and religious rights should be protected by the trust responsibility.").

138. Wood, *supra* note 17, at 236.

139. Kristen A. Carpenter*, A Property Rights Approach to Sacred Sites Cases Asserting a Place for Indians as Nonowners,* 52 UCLA L. REV. 1061, 1108–09 (2005); *see also* Ezra, *supra* note 45, at 732–35 (arguing that protecting sacred sites outside the reservation is consistent with the values of the trust doctrine); Wood, *supra* note 17, at 123 (discussing the inadequacy of the standards of conduct to protecting the "full-bodied nature of native sovereignty interests").

140. Zellmer, *supra* note 130, at 414.

141. Wood, *supra* note 82, at 362–63.

142. No. 96-381-HA, 1996 WL 924509, at *1 (D. Or. Oct. 2, 1996).

143. *Id.* at *1, 8.

144. 354 F. Supp. 252, 258 (D.D.C. 1972).

Cheyenne Tribe v. Hodel rejected a Bureau of Land Management (BLM) proposal to lease public lands for coal development near the Northern Cheyenne Tribe's reservation because of the potential adverse effects on the Tribe.[145] The *Hodel* court concluded: "[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."[146]

"Importantly," Professor Carpenter notes in summarizing Professor Wood's research, "these cases provide that the federal trust duty . . . applies even when the government is faced with competing interests such as energy development or agriculture."[147] "[I]t is not enough for federal officials to weigh all of the options equally and make a reasoned decision."[148] Where, for example, an agency faces a decision about whether to grant a mining license on a tribal sacred site, the agency "cannot ignore its trust duties to the tribe out of a desire to accommodate other competing users or interests."[149] The trust doctrine—rooted in the inherent sovereignty of Native nations—thus serves as a source of Native rights and federal obligations on the public lands.

D. The Multiple-Use Statutory Framework and Legacy Tribal Consultation Framework: How Federal Officials Fall Short of Their Trust Obligations in Managing the Public Lands

The U.S. government's dispossession of Indigenous peoples from their ancestral lands continues today in the form of "formal, legal exclusion from exercising meaningful and independent authority to access, protect, or manage those lands."[150] By failing to elevate the Native land rights above the interests of other stakeholders,[151] the existing legal frameworks continue to marginalize Native people and minimize Native presence on the public lands.[152]

1. The Multiple-Use Statutory Framework

The federal agencies tasked with managing the federal public lands include the Forest Service, housed in the Department of Agriculture, and the Bureau of Land Management (BLM), housed in the DOI.[153] In the 1970s, Congress passed several statutes requiring the Forest Service and BLM to manage most of the public lands under "multiple-use" mandates designed to enable continued

145. Carpenter, *supra* note 139, at 1109 (citing Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rptr. 3065, 3071, 3074 (D. Mont. May 28, 1985)).
146. *Id.* (quoting *Hodel*, 12 Indian L. Rptr. at 3071, 3074).
147. Carpenter, *supra* note 139 at 1109.
148. *Id.* at 1110.
149. *Id.* at 1110–11.
150. Mills & Nie, *supra* note 11, at 22.
151. *See* Tsosie, *supra* note 14, at 300.
152. Mills & Nie, *supra* note 11, at 21–22.
153. *Id.*

development and extraction—so-called "sustained yield"—over time.[154] The Federal Land Policy and Management Act of 1976 (FLPMA) defines multiple use as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."[155] Sustained yield is "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands."[156] Thus, federal management of the public lands is "intended to support the traditional commodity uses of grazing, mining, and timber."[157] Though these uses conflict with the "preservation" goals embedded in laws like the Antiquities Act, agencies are often required to accommodate both sets of values.[158]

Indigenous peoples have their own ideas regarding the appropriate use of the public lands, but the modern statutory framework pays them little attention. As Professor Tsosie puts it, "Conservation and preservation are policies that have been developed by the dominant society to favor the political goals of the majority."[159] As a result, Indigenous values "have not been given equal respect within public decisionmaking under the current structure."[160] While FLPMA recognizes certain values that tribes might use to protect their rights on the public lands, it characterizes those values as "historical" and "archaeological" in nature.[161] The law is otherwise silent on Native values and rights.[162] Similarly, the National Forest Management Act, the Forest Service's multiple-use mandate, includes no mention of Native values or rights whatsoever.[163]

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154. Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 ECOLOGY L.Q. 921, 941–42 (2018). These multiple-use mandates provide a general statutory framework but emphasize the role of agency discretion to fill in the details. *Id.* at 942; *see also* Mills & Nie, *supra* note 11, at 20.

155. 43 U.S.C. § 1702(c).

156. *Id.* § 1702(h).

157. Tsosie, *supra* note 14, at 297.

158. *Id.* (explaining the inherent conflict between multiple-use policies, which prioritize output, and preservation policies, which recognize "the intrinsic value of nature and the need to preserve biological diversity and ecosystem health by limiting the uses of public lands").

159. *Id.*

160. *Id.*

161. 43 U.S.C. § 1701(a)(8).

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

163. *See* 16 U.S.C. § 528.

The lack of explicit statutory language requiring the Forest Service and BLM to consider tribal rights or consult with Native nations on issues that affect their ancestral lands contributes to the continuing oppression of Indigenous peoples.[164] By failing to elevate Native *rights* on the public lands above the *interests* of other parties in developing and extracting resources from those lands, FLMPA and other multiple-use mandates ignore the important legal, historical, and cultural connections between the public lands and their original inhabitants, and give federal agencies discretion to ignore their trust obligations. As Professor Wolfley writes: "[Because] there is no prioritization of tribal interests commensurate with the trust obligations . . . the tribal interests in most instances will be weighed against the [agency's] mission and other majority interests."[165] In this way, the existing multiple-use statutory framework perpetuates the continuing removal and erasure of Indigenous peoples from the public lands.[166]

2. The Legacy Tribal Consultation Framework

Because the multiple-use framework gives federal agencies broad discretion in making decisions about the public lands, agencies frequently make decisions that hurt tribes. For example, the Forest Service and BLM have "routinely allow[ed] destruction of federal land where sacred sites are located."[167] According to Professor Wood, the trust doctrine should prohibit such outcomes: "[c]arrying out the [trust doctrine] in the contemporary setting requires prioritizing the trust responsibility in the missions of agencies acting under statutory law."[168]

Recent presidents have instituted tribal consultation requirements to try to get agency officials to prioritize the trust responsibility when making decisions about the public lands. Understanding this legacy tribal consultation framework—and its shortcomings—is key to understanding why President Biden must find new ways of fulfilling his trust obligations.[169]

In 1994, President Clinton invited the leaders of over 550 Native nations to the White House for the first time.[170] Following the summit, Clinton issued a directive recognizing the status of Native nations as distinct sovereigns and requiring all federal agencies to consult with tribal governments before taking actions that might affect their rights and interests.[171] Clinton later signed an

164. Mills & Nie, *supra* note 11, at 21–22.
165. Wolfley, *supra* note 4, at 67.
166. Mills & Nie, *supra* note 11, at 21.
167. Wood, *supra* note 82, at 360.
168. *Id.*
169. *See* Mills & Nie, *supra* note 11, at 22 ("[T]ribal engagement with the management of federal public lands must proceed through avenues outside of traditional public land law.").
170. Wolfley, *supra* note 4, at 62.
171. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (April 29, 1994).

executive order, Executive Order 13,175, to implement these requirements.[172] Executive Order 13,175 ("the Order") required each federal agency to establish "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[173] The Order emphasized that consultation with tribal officials should occur "early in the process" of policy development.[174] The Order directed each agency to submit its tribal consultation process for approval within sixty days.[175]

Though the Order resulted in a "proliferation of internal consultation policies and regulations,"[176] the passage of time exposed widespread problems with their application.[177] In 2008, Representative Nick Rahall (D-WV) accused the Bush administration of "flagrantly ignor[ing]" its consultation duties, often taking actions that had "serious and negative consequences on Indian country, without any consultation at all."[178] Even when consultation did occur, tribes found the process ineffectual. Joe Shirley, then-President of the Navajo Nation, expressed his frustration during a hearing before the House Committee on Natural Resources:

> One need only look to the [Bureau of Indian Affairs (BIA)] to see the ineffectiveness of tribal consultation . . . . [The BIA budgetary] process culminates each year with a meeting in a Washington area conference facility where tribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence . . . . While the tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats sit there impassively listening. All the while, the BIA officials know that the budgetary decisions have already been made, and that "consultation" is nothing more than a pretense to being able to say that we listened and took notes but other priorities governed the process.[179]

In 2009, President Obama issued a memorandum reminding agency officials that they were "charged with engaging in regular and meaningful

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172. Exec. Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

173. *Id.* at 67,250.

174. *Id.*

175. *Id.*

176. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 443–44 (2013).

177. *Id.* at 445.

178. 154 CONG. REC. E383-84 (daily ed. Mar. 13, 2008) (statement of Rep. Nick J. Rahall); *see also* Routel & Holth, *supra* note 176, at 446, 446 n.160 (citing *Department of Interior's Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications Policy on Off-Reservation Acquisition of Land in Trust for Indian Gaming, Hearing Before the H. Comm. on Nat. Res.*, 110th Cong. 70 (2008) (statement of Kevin K. Washburn, Oneida Indian Nation Visiting Professor of Law, Harvard Law School) (calling development of the DOI's consultation policy "haphazard," and noting that "the weakness of the Guidance Memorandum is directly attributable to the failure to consult on these important policies with tribal governments")).

179. Routel & Holth, *supra* note 176, at 445–46 (quoting *Consultation and Coordination with Indian Tribal Governments Act Hearing on H.R 5608 Before the H. Comm. on Nat. Res.*, 110th Cong. 25 (2008) (statement of Joe Shirley, President, The Navajo Nation)).

consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications."[180] The memorandum sought to further integrate the directives of Clinton's executive order by requiring each agency to develop a detailed plan for implementation.[181] Agencies were required to submit their plans for approval within ninety days.[182] Unfortunately, the memorandum failed to set a deadline for agencies to have their final consultation policies in place.[183] Thus, an agency could comply with the letter of Obama's memorandum "without actually developing a final policy at all."[184] Agencies that did update their policies were given very little guidance.[185] Consultation policies still vary widely from agency to agency, making it difficult for tribes to keep track.[186] On any given day, there are numerous consultation hearings going on across the country.[187] For tribes with limited staff and resources, responding to notices, reviewing the relevant documents, and conferring with the necessary tribal representatives is a "daunting responsibility."[188]

In 2019, the Government Accountability Office (GAO) published a sweeping review of agency tribal consultation policies.[189] Interviews with fifty-seven tribal leaders and comments from 100 tribes revealed common complaints: agencies started the consultation process too late and did not adequately consider tribal input or respect tribal sovereignty.[190] Too often, the process devolved into a "one-way system of communication," where agencies issued orders and gave updates to tribal leaders about plans that were already underway.[191] In other words, tribal consultation became a mere "box to be checked."[192] Another government report co-authored by the DOI, the Department of the Army, and the Department of Justice shared similar findings:

> Tribes noted that often agencies neither treat Tribes as sovereigns nor afford Tribes the respect they would any other governmental entity—let alone treat

180. President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009) [hereinafter Obama Memorandum].

181. *Id.*

182. *Id.*

183. *See id.*

184. Routel & Holth, *supra* note 176, at 447. Further, the Obama Memorandum expressly disclaimed legal enforceability. Obama Memorandum, *supra* note 180, at 57,882 ("This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.").

185. Routel & Holth, *supra* note 176, at 448 ("The Obama Memorandum does not even explain what 'consultation' means or when the consultation right is triggered.").

186. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR FEDERAL INFRASTRUCTURE PROJECTS 82-86, (2019) (providing various departmental and agency definitions of "consultation") [hereinafter GAO Report 19-22].

187. Wolfley, *supra* note 4, at 68.

188. *Id.*

189. *See* GAO Report 19-22, *supra* note 186.

190. *Id.*

191. Smith, *supra* note 18.

192. Wilkinson, *supra* note 22, at 326.

> Tribes as those to whom the United States maintains a trust responsibility or as those who hold reserved rights through treaties that granted the United States vast amounts of territory.[193]

In failing to improve this tribal consultation framework—even after tribal leaders stressed its importance to federal officials from multiple agencies—Presidents Clinton, Bush, and Obama failed to fulfill their trust duties to Native nations. As for President Trump, policy researcher Sahir Doshi wrote: "tribal consultation is too often seen as a formality that agencies undertake after making the substantial decisions on their own. During the Trump administration, this dynamic was evidenced in significant decisions concerning oil and gas leasing, mining, logging, and monument downsizing."[194] President Biden must do better.

E. The Trust Doctrine as an Affirmative Duty to Share Management Authority on Public Lands

"[W]hile history teaches that the trust responsibility has not been fully honored in the past due to outright racism and subordination of Indian interests to federal prerogatives, it remains a key principle that should guide and shape future development of federal Indian policy."[195] President Biden should break away from the legacy frameworks that govern public lands management and, instead, identify opportunities to implement the trust doctrine as an affirmative duty on federal officials in making decisions about the public lands. As Professor Tsosie argues, "[P]ublic land policy should be shaped by the preexisting obligations of the United States to the first nations of this continent."[196] Tsosie envisions "a more active role for [Native] nations as sovereigns who are able to apply their own norms and values to structure appropriate land use."[197] According to Tsosie, "This is ideally accomplished by repatriation of traditional lands back to tribal ownership and control. However, it can be accomplished on public lands through the exercise of tribal co-management authority."[198] Viewed through this lens, the trust doctrine compels President Biden to seriously consider the idea of giving Native nations control—or at least co-management authority—over public lands that contain portions of their ancestral lands.[199] By formalizing a broad interpretation of the trust doctrine as a source of Native rights and federal obligations on the public lands, President Biden will demonstrate a deep respect for tribal sovereignty and an understanding of how it stems from land, culture, and community.[200]

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193. DEP'T OF THE INTERIOR, DEP'T OF THE ARMY & DEP'T OF JUST., IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 3 (2017).

194. DOSHI, *supra* note 5, at 2.

195. Rey-Bear & Fletcher, *supra* note 135, at 460.

196. Tsosie, *supra* note 14, at 272.

197. *Id.* at 297.

198. *Id.*

199. *See id.* at 300.

200. *See infra* Part IV, which discusses this idea in detail.

III. THE PRESIDENT'S EXPANSIVE AUTHORITY UNDER THE ANTIQUITIES ACT

The Antiquities Act of 1906 grants the president of the United States expansive authority to set aside federal public lands as national monuments for preservation purposes.[201] This authority includes the authority both to create new national monuments and to dictate the terms of their management. Courts have consistently deferred to the president's discretion under the Act, and Congress has been unable to muster support for meaningful amendment or repeal.

By exercising his expansive authority under the Antiquities Act to create new national monuments and enable tribal co-management of those new monuments, President Biden can withdraw public lands from development and extraction, protect tribal sacred sites and ancestral lands, promote tribal sovereignty, and make progress toward fulfilling his trust responsibility.

A. Expansive Presidential Authority

The president's expansive authority under the Antiquities Act includes the authority to create new national monuments, as well as the authority to direct the terms of their management.

1. The Authority to Create National Monuments

The Property Clause of the United States Constitution vests Congress with plenary authority over the federal public lands: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."[202] Through the Antiquities Act of 1906, Congress lawfully delegated part of this authority to the President.[203] The Antiquities Act expressly grants the president the authority to withdraw public lands to protect "objects of historic or scientific interest."[204] It states:

> The 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[, and] . . . 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 be protected.[205]

There are few limitations on the president's authority to establish national monuments. The Antiquities Act requires no public input, local consultation, or

201. 54 U.S.C. § 320301(a).
202. U.S. CONST. art. IV, § 3, cl. 2.
203. *See* 54 U.S.C. § 320301.
204. *Id.*
205. *Id.*

congressional consent.[206] It is simply a "breathtakingly broad grant of power to the executive."[207] This power is consistent with the president's general authority to legislate through directives and proclamations.[208] Presidents since George Washington have used various types of directives and proclamations to accomplish goals the legislature could not or would not accomplish on its own.[209] Such directives are presumptively valid when they are issued in accordance with a statute like the Antiquities Act.[210]

The president's power under the Antiquities Act seems to be limited by the statute's provision requiring monuments to be "confined to the smallest area compatible with the proper care and management."[211] However, President Roosevelt's initial use of the Act set a precedent for a loose reading of this provision. Two years after it was enacted, Roosevelt used the Antiquities Act to protect 800,000 acres of land around the Grand Canyon.[212] By the time he left office, Roosevelt created eighteen national monuments, covering 1.5 million acres.[213]

With few exceptions, every president since Roosevelt has exercised his authority under the Antiquities Act to designate national monuments, citing archeological, scientific, and cultural objectives in preserving millions of acres of public land.[214] In the 1990s, President Clinton embarked on what was then "the most ambitious expansion of the national monument system ever."[215] By

206. Hartman, *supra* note 60, at 165–68; *see also id.* at 167 (explaining that presidential authority pursuant to the Antiquities Act is not subject to the requirements of NEPA or the Administrative Procedure Act). Nor is the president required to consider the local economic impact or environmental impact of the new monument, or to hold hearings for those with interests in the lands. Eric C. Rusnak, Note, *The Straw That Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 679 (2003). Congress has repeatedly tried and failed to amend the Antiquities Act to enact such requirements. *See supra* Part I.C.

207. Wilkinson, *supra* note 22, at 323.

208. *See* Rusnak, *supra* note 206, at 678. Very few rules govern the use and substance of presidential directives. *Id.* at 679 ("Among the few existing rules is one requiring that proclamations and orders of general applicability and legal effect be published in the Federal Register unless the president requests that they not be published due to issues of national security or other specific reasons. Further, some statutes giving the president directive power require the president to exercise the power through a specific type of directive or order. These rules, however, are fairly insignificant, given that the president has free reign in his discretion.") (citing Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 292 (2001)).

209. Rusnak, *supra* note 206, at 678–79; *see also id.* at 678 (explaining that President Abraham Lincoln, for example, used presidential directives and proclamations to run aspects of the Civil War, "expand the military, produce war ships, and provide for payments from the treasury without congressional approval").

210. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.").

211. 54 U.S.C. § 320301(b).

212. Francis P. McManamon, *The Antiquities Act and How Theodore Roosevelt Shaped It*, 31 GEORGE WRIGHT F. 324, 338–39 (2014).

213. CONG. RSCH. SERV., *supra* note 10, at 13, 14; Collins, *supra* note 10.

214. CONG. RSCH. SERV., *supra* note 10, at 1, 1 n.5; *see also* Collins, *supra* note 10.

215. Squillace, *supra* note 58, at 473–75.

the end of his second term, President Clinton had proclaimed twenty-two new or expanded national monuments and added six million acres to the monument system.[216] A decade later, President Obama made Clinton's work look paltry. In his eight years in office, President Obama created thirty-four new or expanded national monuments, covering 553 million acres.[217]

2. The Authority to Direct the Management of National Monuments

Though the Antiquities Act requires the President to provide for "proper care and management" of newly created national monuments, it does not specify which federal agency—or other entity—should manage them.[218] Historically, presidents have exercised their discretion under the Antiquities Act to name the managing agency in each monument proclamation.[219]

As of January 2021, eighty-two of the 128 national monuments are exclusively managed by the National Park Service (NPS).[220] BLM manages twenty-one;[221] the Forest Service, eight;[222] and the Fish and Wildlife Service, two.[223] The remaining monuments are co-managed by two different federal agencies,[224] a federal agency and a state or local agency,[225] a federal agency and a private entity,[226] or a federal agency and a federally recognized Native nation.[227]

In addition to broad discretion to decide which entity will manage each newly created national monument, the president has broad discretion to determine what practices constitute "proper care and management."[228] While many early proclamations did not contain any guidance on how the new monuments were to be managed, later proclamations "contained quite a bit of

216. *Id.* at 474.

217. CONG. RSCH. SERV., *supra* note 10, at 2, 13; Collins, *supra* note 10.

218. *See* CONG. RSCH. SERV., *supra* note 10, at 1, 7.

219. *See* Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management Enforcing the Direction of the President Under the Antiquities Act*, 40 ENV'T L. 765, 781–88 (2010).

220. Jennifer Melroy, *A Complete List of US National Monuments*, NAT'L PARK OBSESSED (Dec. 11, 2020), https://nationalparkobsessed.com/list-of-national-monuments/ (last accessed July. 29, 2020).

221. *Monuments, Conservation Areas, and Similar Designations*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/national-conservation-lands/monuments-ncas (last updated Sept. 24, 2021).

222. Melroy, *supra* note 220.

223. *Id.*

224. CONG. RSCH. SERV., NATIONAL PARK SYSTEM: UNITS MANAGED THROUGH PARTNERSHIPS (2016), https://www.everycrsreport.com/reports/R42125.html#_Toc447698172. (e.g., Craters of the Moon National Monument is jointly managed by NPS and BLM).

225. *Id.* For example, Waco Mammoth National Monument is jointly managed by the NPS and the City of Waco, Texas. *Id.*

226. *Id.* For example, César E. Chávez National Monument is jointly managed by the NPS and the National Chávez Center. *Id.*

227. *Id.* For example, Canyon de Chelly National Monument is jointly managed by the NPS and the Navajo Nation. *Id.* Subpart IV.B.1 of this Note discusses the co-management of Canyon de Chelly National Monument in greater detail.

228. *See* 54 U.S.C. § 320301.

detail," defining, for example, "the extent to which water was reserved as a matter of federal law, and the extent to which grazing, off-road vehicle travel, hunting and fishing, and other activities might be allowed."[229] President Clinton's monument proclamations uniformly included management directives, and President Bush followed suit. President Bush's proclamation establishing the Northwestern Hawaiian Islands Marine National Monument, for example, included "highly specific" management directives, "perhaps the most far-reaching declared for any monument,"[230] including detailed restrictions on commercial fishing.[231] President Obama continued the trend of including detailed management directives in monument proclamations. His proclamation establishing the Northeast Canyons and Seamounts National Monument, for example, granted joint management responsibility to two federal agencies and ordered the secretaries to prohibit specific activities such as drilling and commercial fishing.[232]

Thus, once the president has created a national monument, they have expansive authority to subject those public lands to "fairly restrictive management," such as "barring off-road motor vehicles and withdrawing [them] from mining and other uses inconsistent with preservation."[233]

B. Judicial Deference

Courts have consistently deferred to the president's expansive authority under the Antiquities Act to designate national monuments and direct the terms of their management.[234] In fact, no court has ever overturned an action taken by a president under the Antiquities Act.[235] Because monument proclamations are presidential proclamations, and presidential proclamations fall within the congressionally granted powers of the president, courts generally decline to second-guess the president's decisions.[236] In *Tulare County. v. Bush*, the District Court for the District of Columbia upheld President Clinton's establishment of the Giant Sequoia National Monument, holding that courts must accept the president's proclamation that the objects are historic or scientific and that the area is the smallest compatible to protect those objects.[237] "By simply including

229. GEORGE COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 400 (7th ed. 2014).

230. BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 25 (2015), https://www.bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf.

231. Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 51,134, 51,138 (June 15, 2006).

232. Proclamation No. 9496, 81 Fed. Reg. 65,161, 65,165 (Sep. 15, 2016).

233. Tsosie, *supra* note 14, at 298.

234. *See, e.g.*, Cameron v. United States, 252 U.S. 450, 454–56 (1920); Cappaert v. United States, 426 U.S. 128, 134 (1976); Tulare Cty. v. Bush, 185 F. Supp. 2d 18, 25 (D.D.C. 2001); *see also* Hartman, *supra* note 60, at 163.

235. Rusnak, *supra* note 206, at 690 n.102, 692.

236. *Id.*

237. 185 F. Supp. 2d at 25.

the 'scientific or historic' and 'smallest compatible' language in the [monument] proclamation[, then,] the president leaves the court virtually powerless to review his findings."[238] Therefore, legal commentators have pointed out, the president's power under the Antiquities Act "remains largely insulated from judicial tampering."[239]

The long history of judicial deference to presidential discretion under the Antiquities Act has not stopped opponents from challenging national monuments through the courts. The District Court for the District of Columbia recently rejected one such challenge to President Obama's designation of the Northeast Canyons and Seamounts Marine National Monument.[240] Several commercial fishing associations brought the action, arguing, in part, that President Obama had exceeded his statutory authority under the Antiquities Act.[241] The district court disagreed.[242] "[J]ust as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908," the district court held, "President Obama could establish the Canyons and Seamounts Monument in 2016."[243] The D.C. Circuit affirmed on appeal in 2019.[244]

Judicial deference to presidential discretion under the Antiquities Act has proven critical to ensuring that national monuments survive changes in administrations and shifts in political will. By enforcing the president's decisions regarding the stringency of monument protection, courts have also ensured fidelity to the preservationist intent and history of the Antiquities Act.

C. Congressional Inaction

In upholding national monument designations, courts have stated that Congress holds the power to resolve conflicts over the Antiquities Act.[245] Congress has tried to act to limit or repeal presidential authority under the Act, but bill sponsors have been unable to muster sufficient support.[246] Following President Clinton's designation of Grand Staircase-Escalante National Monument in 1996, a number of bills were introduced, including provisions for acreage limits, congressional approval, notice to state governments, and NEPA compliance.[247] Most of these bills never made it out of committee.[248] The House

238. Hartman, *supra* note 60, at 163.
239. *Id.* at 164.
240. Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48, 51 (D.D.C. 2018), *aff'd as modified*, 945 F.3d 535 (D.C. Cir. 2019).
241. *Id.* at 53–54.
242. *Id.*
243. *Id.* at 51.
244. Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied sub nom.,* Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979 (2021).
245. Hartman, *supra* note 60, at 169 (citing Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945)).
246. *Id.* at 176–77.
247. *Id.* at 174.
248. *Id.*

managed to pass the National Monument NEPA Compliance Act, but the "limited reform" stalled in the Senate and ultimately failed.[249] Thus, "history indicates that the Act is not in serious jeopardy of repeal or significant amendment."[250] Given President Biden's veto power, comprehensive reform would likely require a supermajority vote of Congress.[251] While such vast opposition is imaginable, it is unlikely.[252]

D. From "Land Grabs" to "Landback": Reframing the Narrative Around the Antiquities Act

The dominant narrative around the Antiquities Act centers on the question of control of the public lands and frames the answer as a debate between public interest and private interests.[253] While members of the public generally applaud the creation of new national monuments, those aligned with development and extractive industry interests attack them as "land grabs" and examples of government overreach. Far-right extremists often take center stage in this debate, as their inflammatory rhetoric, armed protests, and threats of violence capture the attention of the media and, therefore, the public. Their cry to "return federal lands to their rightful owners" receives validation from Republican officials in western states and Washington, D.C., who craft legislation to transfer the public lands "back" to state control.

The argument that the states are the "rightful owners" of the federal public lands not only lacks legal validity, it also exposes the settler colonialism embedded in this dominant narrative. If there is a "right" answer to the question of who should control the public lands, surely it is the Indigenous peoples who trace their connections to the land back through dozens of generations. This Subpart points out fatal flaws in the idea of "returning" the federal public lands to the states and attempts to re-direct the reader's attention to the landback movement, a grassroots movement carried through the centuries by tribal leaders and Indigenous activists, based on legitimate legal claims and characterized by Indigenous values and direct, place-based action.

Professor Tsosie succinctly summarizes why challenging the dominant narrative around control of the public lands and the president's authority under the Antiquities Act is so crucial:

> The conflict between developers and preservationists is clearly a feature of the contemporary political arena. For Native people, however, this is not merely a debate about which side will prevail. The debate also raises the question of how the complex rights of Native people will be protected . . . . All stakeholders have some right to participate in a democratic dialogue to

249. *Id.* at 174–75.
250. *Id.* at 176.
251. *See id.* at 176–77.
252. *Id.*
253. *See* Sandra B. Zellmer, *Mitigating Malheur's Misfortunes The Public Interest in the Public's Public Lands*, 31 GEO. ENV'T L. REV. 509, 510–11 (2019).

> assist in agency management of public lands. However, Native peoples' *interests* as "stakeholders" must be differentiated from their *rights* as separate nations that have a trust relationship with the United States government . . . . [Tribes], as sovereigns, have a unique range of interests and rights, both cultural and political, which should be given independent weight in the policy battles over public lands.[254]

I do not intend to suggest a binary choice between the transfer movement and the landback movement; rather, I aim to shift the conversation about the public lands away from debates over control and toward expressions of duty, care, and justice for the original stewards of those lands.

1. The Movement to "Take Back" the Public Lands: National Monuments as "Land Grabs"

Nearly every national monument established in the last five decades has prompted fierce backlash from ranchers, developers, resource extractors, and their allies, who cast monuments as federal "land grabs" and urge the "transfer" of the federal public lands "back" to the states.

The movement to "take back" the public lands[255] originated with the Sagebrush Rebellion of the 1970s and was rekindled in the modern era following President Clinton's massive expansion of the national monument system.[256] In 1996, President Clinton used his expansive authority under the Antiquities Act to create Grand Staircase-Escalante National Monument.[257] Covering 1.7 million acres of public lands in Utah, the monument is the largest in the continental United States.[258] Clinton's action prompted swift rebukes from Republican officials in Utah and Washington, D.C.[259] Senator Orrin Hatch criticized it as "the mother of all land grabs,"[260] and Governor Mike Leavitt called it "[o]ne of the greatest abuses of executive power in history."[261]

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254. Tsosie, *supra* note 14, at 300.

255. *See* John C. Ruple, *The Transfer of Public Lands Movement The Battle to Take "Back" Lands That Were Never Theirs*, 29 COLO. NAT. RES., ENERGY & ENV'T L. REV. 1, 17 (2018) ("Pundits, politicians, and even some scholars . . . characterize the transfer movement as an effort to 'take back' lands that once belonged to the state[s].").

256. *See* Jonathan Thompson, *The First Sagebrush Rebellion What Sparked It and How It Ended*, HIGH COUNTRY NEWS (Jan. 14, 2016), https://www.hcn.org/articles/a-look-back-at-the-first-sagebrush-rebellion.

257. Proclamation No. 6920, 3 C.F.R. § 6920 (1996).

258. Janice Fried, *The Grand Staircase-Escalante National Monument A Case Study in Western Land Management*, 17 VA. ENV'T L.J. 477, 477–78 (1998).

259. *See* Kirk Johnson, *In the West, Monument' Is a Fighting Word*, N.Y. TIMES (Feb. 20, 2010), https://www.nytimes.com/2010/02/20/us/politics/20utah.html.

260. 143 CONG. REC. S2563 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); *see also id.* (statement of Sen. Hatch) (equating the "massive proclamation" to the attack on Pearl Harbor—"completely without notice to the public"—and noting the extent of the lack of public engagement: "There has been no consultation; no hearings; no town meetings; no TV or radio discussion shows; no input from federal land managers on the ground; no maps; no boundaries; no nothing.").

261. Rusnak, *supra* note 206, at 671 n.12. These frustrations fermented for decades and eventually boiled up into legislative action. *See* John C. Ruple, *The Transfer of Public Lands Movement The Battle*

The Republican Party quickly began lobbying for the "transfer" of the public lands away from federal control and into state or local control. At the 1996 Republican National Convention, the party adopted "transfer" rhetoric into its official party platform: "We support a thorough review of the lands owned by the federal government with a goal of transferring lands that can best be managed by State, county, or municipal governments."[262] Platforms adopted in subsequent election years included similar language, always prioritizing the interests of private landowners, developers, and extractors over the rights of the public.[263] The Republican Party called it "absurd" to think that the federal public lands in the West "must remain under the absentee ownership or management of official Washington."[264] "We call upon all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands . . . to all willing states for the benefit of the states and the nation as a whole."[265]

Republicans in Congress took up the call and began introducing bills that

to Take "Back" Lands That Were Never Theirs, 29 COLO. NAT. RES., ENERGY & ENV'T L. REV. 1, 3 (2018) (explaining the tensions surrounding Grand Staircase and outlining the events leading up to the passage of the Transfer of Public Lands Act in Utah in 2012). In 2012, Utah state legislators enacted the Transfer of Public Lands Act, demanding that the federal government turn over 31.2 million acres of federally managed public lands to the state. H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101 through 104 (2014)); *see also* Ruple, *supra*, at 3–6. Though the Transfer of Public Lands Act's definition of "public lands" explicitly excluded most national parks and national monuments within state boundaries, it did not exclude Grand Staircase-Escalante National Monument. UTAH CODE ANN. § 63L-6-102(3). Under the terms of the Transfer of Public Lands Act, non-excluded public lands, including the monument, would "return" to state control. Ruple, *supra*, at 4. Utah's efforts inspired similar attempts by states across the West. By 2015, ten of the eleven contiguous western states had entertained some form of transfer legislation. *Id.* at 6–7. Idaho joined Utah in calling for a transfer of the federal public lands; Arizona's attempt to do the same was thwarted by the governor's veto; Montana, Nevada, and Wyoming passed laws calling for transfer option studies; Nevada then enacted a joint resolution urging Congress to transfer lands to the state; Colorado defeated at least one joint resolution and three transfer bills; Oregon thwarted four; and Washington blocked three. *Id.* at 7–8.

262. *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1996 (last visited Oct. 30, 2021).

263. *See, e.g.*, *Republican Party Platform of 2008*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/2008-republican-party-platform (last visited Oct. 30, 2021) ("In caring for the land and water, private ownership has been the best guarantee of conscientious stewardship, while the world's worst instances of environmental degradation have occurred under governmental control."); *Republican Party Platform of 2012*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/ documents/2012-republican-party-platform (last visited Oct. 30, 2021) ("Experience has shown that, in caring for the land and water, private ownership has been our best guarantee of conscientious stewardship, while the worst instances of environmental degradation have occurred under government control. . . . In this context, Congress should reconsider whether parts of the federal government's enormous landholdings and control of water in the West could be better used for ranching, mining, or forestry through private ownership. Timber is a renewable natural resource, which provides jobs to thousands of Americans. All efforts should be made to make federal lands managed by the U.S. Forest Service available for harvesting. The enduring truth is that people best protect what they own.").

264. *Republican Party Platform of 2016*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/2016-republican-party-platform (last visited Oct. 30, 2021).

265. *Id.*

would transfer title or jurisdiction over the federal public lands to the states.[266] Representative Rob Bishop (R-Utah) explained that the Republicans' goal was to "return these lands back to the rightful owners."[267] Though their legislative efforts ultimately floundered, the elevation of transfer rhetoric into the national narrative emboldened far-right extremists, who seized on it to justify "wresting public lands from the federal government," often through threats and violence.[268]

Cliven Bundy relied on rhetoric like this in justifying his armed resistance to federal land management in and around Gold Butte, Nevada.[269] For decades, Bundy refused to pay grazing fees, dismissing federal efforts to regulate grazing as a "land grab" and claiming that he had a "vested right" to graze his cattle on the public lands.[270] When the federal government began seizing Bundy's cattle as payment for the one million dollars in fees and fines that Bundy had racked up over the years, hundreds of armed supporters flocked to Bundy's side.[271] Bundy said "that he was 'ready to do battle' to protect 'his property' and to keep his cattle on the range."[272]

A few months later, Phil Lyman, a county commissioner in San Juan County, Utah, organized an illegal all-terrain vehicle (ATV) ride on federal lands in Recapture Canyon.[273] Like Bundy, Lyman relied on transfer rhetoric to justify his illegal actions: "We have power and jurisdiction to do things independent of

266. Ruple, *supra* note 261, at 8 n.34 (citing S. 361, 114th Cong. (2015) (directing the Secretary of the Interior to sell specified federal public lands); H.R. 435, 114th Cong. (2015) (same); H.R. 3650, 114th Cong. (2015) (requiring the Secretary of Agriculture, upon a request from a state, to sell that state up to two million acres of National Forest System lands); H.R. 925, 114th Cong. (2015) (directing grants of public land to the state of Nevada and its counties, and requiring public land auctions); S. 472, 114th Cong. (2015) (same); H.R. 1484, 114th Cong. (2015) (directing the secretaries of Agriculture and the Interior to convey without consideration to the state of Nevada all interest in Forest Service and BLM lands); H.R. 3650, 114th Cong. (2015) (authorizing states to select and acquire National Forest System lands)). In April 2015, Representatives Rob Bishop and Chris Stewart, both from Utah, began to develop a "legislative framework for transferring public lands to local ownership and control." Press Release, Congressman Chris Stewart, Reps. Stewart and Bishop Launch New Federal Land Action Group (Apr. 28, 2015), https://stewart.house.gov/media-center/press-releases/reps-stewart-and-bishop-launch-new-federal-land-action-group.

267. Press Release, Congressman Chris Stewart, *supra* note 266.

268. Ruple, *supra* note 261, at 3.

269. *See id.* at 9–11.

270. *Id.* at 10.

271. *Id.* (citing Criminal Indictment, United States v. Bundy, No. 2:16-CR-46 (D. Nev. Feb. 17, 2016)). The DOI ultimately backed down, avoiding violence but further "emboldening anti-government sentiments." *Id.* at 10; *see also id.* at 11 (quoting and discussing a 2014 Department of Homeland Security Intelligence Assessment, which explained: "[T]he belief among militia extremists that their threats and show of force against the BLM during the April Bunkerville standoff was a defining victory over government oppression is galvanizing some individuals—particularly militia extremists and violent lone offenders—to actively confront law enforcement officials, increasing the likelihood of violence. Additionally, this perceived success likely will embolden other militia extremists and like-minded lone offenders to attempt to replicate these confrontational tactics and force future armed standoffs with law enforcement and government officials during 2014.").

272. Zellmer, *supra* note 253, at 516.

273. Phil Taylor, *Utah Official Plans Illegal ATV Ride Through BLM Canyon*, E&E NEWS (Apr. 15, 2014), https://subscriber.politicopro.com/article/eenews/1059997933.

BLM."[274] Many of the same extremists who supported Bundy descended on Recapture Canyon for the ride.[275] Lyman was ultimately charged and convicted in federal court for his actions,[276] but his conviction only exacerbated tensions.

In early 2016, many of the same armed militants descended on Burns, Oregon, to protest the resentencing of two local ranchers who were convicted of arson after setting fire to nearby public lands.[277] A group led by Cliven Bundy's son, Ammon Bundy, seized control of the nearby Malheur Wildlife Refuge and refused to leave unless the federal government ceded the land to local ranchers, loggers, and miners.[278] The occupation lasted forty-one days and ended with one of the armed militants shot and killed by Oregon State Patrol officers.[279] This tragic conclusion illustrates the danger of the movement to "take back" the public lands, a movement centered around "[h]eated rhetoric, sensationalistic media coverage, and semi-automatic weapons."[280] Following the Malheur occupation and the Bundy standoff, the U.S. government still owns the public lands in the area and still regulates grazing on those lands. Yet "the discontents' claims have tremendous tenacity and a remarkable degree of political and public support."[281]

In addition to prioritizing extractive uses over preservation, proponents of the movement to "take back" the public lands "insist that federal ownership of

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274. *Id*.

275. Phil Taylor, *BLM Pressured to Bring Illegal ATV Riders to Justice*, E&E NEWS (May 13, 2014), https://subscriber.politicopro.com/article/eenews/1059999494.

276. Associated Press, *Utah Official Gets 10 Days in Jail for ATV Ride*, L.A. TIMES (Dec. 18, 2015), https://www.latimes.com/nation/nationnow/la-na-nn-utah-atv-protest-20151218-story.html. Former President Trump later issued a full pardon to Lyman. Jennifer Yachnin, *Trump Pardons Lawmaker Who Led Protest Ride on BLM Tract*, E&E NEWS (Dec. 23, 2020), https://subscriber.politicopro.com/article/eenews/1063721441.

277. Press Release, U.S. Att'y's Off., Dist. of Or., Eastern Oregon Ranchers Convicted of Arson Resentenced to Five Years in Prison (Oct. 7, 2015), https://www.justice.gov/usao-or/pr/eastern-oregon-ranchers-convicted-arson-resentenced-five-years-prison.

278. Les Zaitz, *Demands by Oregon Standoff Leaders Defy Logic and Law, Authorities Say*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/oregon-standoff/2016/01/demands_by_oregon_refuge_occup.html. Bundy claimed the federal government had no constitutional right to "Harney County land." *Oregon Standoff A Chronicle of an Occupation*, OREGONIAN (Feb. 14, 2016), https://www.oregonlive.com/oregon-standoff/page/oregon_standoff_a_timeline_of.html.

279. *Oregon Standoff Timeline 41 Days of the Malheur Refuge Occupation and the Aftermath*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da html. During the forty-one days of occupation, the federal government closed nearby Forest Service and BLM offices due to threats against federal employees, local schools were shuttered, local businesses were forced to close their doors, and residents of Burns called for the militants to leave their community in peace. *Oregon Standoff*, *supra* note 278.

280. Zellmer, *supra* note 253, at 511, 517–18 ("The Malheur occupation was supported by an affiliation of militia-type groups, including the Patriot Movement and the Oregon Constitutional Guard, that fight a perceived 'systematic abuse of land rights, gun rights, freedom of speech and other liberties' by the federal government. Cliven Bundy's lawyer compared Bundy 'with the Rev. Dr. Martin Luther King Jr. and the stand at Bunkerville with the 1965 march on Selma.' Trespassers on federal public lands say they are 'Going Bundy.' The Bundy family has become a potent symbol in anti-government circles, with 'a small army of live-streamers, radio hosts and local politicians champion[ing] their cause.' According to the BLM, over two dozen incidents of so-called 'sovereign citizen' activity took place on public lands in seven western states between 2012 and 2015.").

281. *Id.* at 518.

public lands is illegal and seek divestiture of them to the states."[282] Of course, this argument ignores an essential detail: the public lands never belonged to the states. The states cannot "take back" what was never theirs. As Richard Lamm, former Governor of Colorado, said about the Sagebrush Rebellion thirty years ago, "The West had no conceivable legal claim to land that had never been its own."[283]

In 2014, the Conference of Western Attorneys General formed the Public Lands Subcommittee to examine the legal issues regarding the transfer of federal public lands to the western states.[284] It specifically focused on the question of "whether the federal government was legally obligated to sell or transfer the public lands within a given state to that state."[285] The subcommittee's final report refuted several legal theories advanced by "take back our land" proponents, including the one which contends that the Property Clause granted the federal government the power to "dispose of" the public lands, but not to retain them indefinitely.[286] After analyzing a long line of federal court cases on the matter, the subcommittee concluded:

> [The] Supreme Court consistently has held that: (1) public lands fall within the purview of the Property Clause; (2) the authority of the United States under the Property Clause has no limitations; (3) the Property Clause vests the United States with exclusive authority to decide whether "to dispose of" or sell public lands; and (4) under the Property Clause, the United States may withhold public lands from sale. No Supreme Court case has directly addressed the question of whether the Property Clause empowers the federal government to retain ownership of public lands indefinitely. In *Stearns v. Minnesota*, 179 U.S. 223 (1900) and *Light v. United States*, 220 U.S. 523 (1911), the Supreme Court explicitly stated that the United States may withhold public lands from sale indefinitely, but in both cases the statement about indefinite retention arguably was *dicta*. The readers of this Paper must draw their own conclusions as to whether the Supreme Court likely would

282. *Id.* at 515–16; *see also id.* at 522 ("Sagebrush-Patriots are known to wield pocket-sized versions of the U.S. Constitution to dispute federal authority over the federal public lands and resources.").

283. Ruple, *supra* note 261, at 18 (quoting RICHARD D. LAMM & MICHAEL MCCARTHY, THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE 215 (1982)).

284. PETER MICHAEL ET AL., CONFERENCE OF WESTERN ATTORNEYS GENERAL, REPORT OF THE PUBLIC LANDS SUBCOMMITTEE 1 (2016) [hereinafter CONFERENCE OF WESTERN ATTORNEYS GENERAL], http://keepitpublicwyo.com/wp-content/uploads/2016/09/CWAG-Report-002-1.pdf. The Subcommittee included attorneys from the Attorney General Offices of Idaho, Montana, Nevada, Utah, New Mexico, Washington, Colorado, Oregon, Arizona, Alaska, and Wyoming. *Id.* at i. Attorney General Peter Michael served as Chair. *Id.* Its express purpose was "to produce, through directed and concerted objective legal research and analysis, a document containing detailed, organized, and comprehensive commentary on legal theories for and against the continuation of substantial proprietary ownership by the [U.S.] Government of land in the western United States of America." *Id.* at 1.

285. *Id.*

286. *Id.* at 2; *see also* Motion to Dismiss for Lack of Subject Matter Jurisdiction Re: Adverse Possession at 2, United States v. Bundy, 195 F. Supp. 3d 1170 (D. Or. 2016) (No. 3:16-cr-00051-BR) (using Property Clause arguments to justify transfer arguments).

> follow *Stearns* and *Light* if squarely presented with the indefinite ownership question.[287]

A comprehensive analysis of whether the Supreme Court would follow *Stearns* and *Light* today is outside the scope of this Note. The point is this: without legitimate claims to the public lands based on past occupation or title, the transfer movement pins its hopes for legal victory on the willingness of federal courts to act against Supreme Court dicta. Indeed, the court that ruled on Ammon Bundy's case declined to do so.[288] Bundy contended that the District Court for the District of Oregon lacked subject matter jurisdiction because "the Constitution does not permit the federal government to 'forever retain the majority of land within a State' and, thus, to exercise its current ownership over federal lands including the [Malheur National Wildlife Refuge]."[289] The court disagreed, explaining that the federal government never relinquished title to the Malheur, and that "'Oregon never had any claim to sovereignty prior to its admission to the Union,' and, therefore, 'it had no basis to claim independence or ownership of land.'"[290]

Of course, neither the 2014 report by the Conference of Western Attorneys General nor the 2016 federal court decision in the Bundy case stopped Republicans from trying to turn the public lands into private property ripe for development and extraction. One of President Donald Trump's first acts was to order Secretary of the Interior Ryan Zinke to review the size and scope of all national monuments created since 1996.[291] Trump called the monuments a "massive federal land grab" that "unilaterally put millions of acres of land and water under strict federal control."[292] His order provided the subtext—monument designations, the document said, can "create barriers to achieving energy independence" and "otherwise curtail economic growth."[293] More broadly, the Trump administration's "energy dominance" platform "aimed at obliterating obstacles to the development of oil, gas, coal, and other commodities from the public lands."[294]

Meanwhile, industry interests continue to challenge monument designations in federal court. In the latest example, *Massachusetts Lobstermen's Ass'n v. Ross*, five commercial fishing groups filed suit seeking to abolish the Northeast Canyons and Seamounts Marine National Monument and open it to

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287. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 284, at 2.

288. *See* United States v. Bundy, No. 3:16-cr-00051-BR, 2016 WL 3156309, at *4–6 (D. Or. June 3, 2016) (denying defendants' motion to dismiss for lack of subject matter jurisdiction).

289. *Id.* at *4.

290. *Id.* at *5 (quoting 48 Or. Op. Att'y Gen. 1, 3 (1995)).

291. Exec. Order No. 13,792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429, 20,429 (April 26, 2017).

292. Darlene Superville & Jill Colvin, *Trump National Monuments a Massive Federal Land Grab'*, AP (Apr. 26, 2017), https://apnews.com/article/a1469cd70d6d49ef9de4fd062e9e0de3.

293. Exec. Order No. 13,792, 82 Fed. Reg. at 20,429.

294. Zellmer, *supra* note 253, at 542.

commercial fishing.[295] Speaking through their lawyers at the Pacific Legal Foundation, the commercial groups criticized President Obama's designation of the monument as an example of government overreach and abuse of power: "[W]hen the government sweeps in like a red tide, beachfront homeowners aren't the only victims. Small businesses can also be suffocated by red tape and regulatory overreach. Nowhere is this more apparent than in America's fishing industry."[296] Their legal argument centered on the fact that the federal government cannot control land it does not own—in this case, the land under the ocean.[297] Even here, where there were no federal *lands* to "return" to state or private control, the commercial groups pushed for the creation of private property rights in the public domain: "When fishermen are given a vested property interest in the fish they catch, they are more effective stewards of the oceans than government regulators could ever be."[298]

The district court rejected the commercial fishermen's arguments and the D.C. Circuit affirmed on appeal.[299] The commercial fishermen filed a petition for certiorari, which the Supreme Court denied on March 22, 2021.[300] However, Chief Justice John Roberts wrote a concurrence indicating that he agreed with certain aspects of the fishermen's arguments:

> While the Executive enjoys far greater flexibility in setting aside a monument under the Antiquities Act, that flexibility, as mentioned, carries with it a unique constraint: Any land reserved under the Act must be limited to the smallest area compatible with the care and management of the objects to be protected. Somewhere along the line, however, this restriction has ceased to pose any meaningful restraint. A statute permitting the President in his sole discretion to designate as monuments "landmarks," "structures," and "objects"—along with the smallest area of land compatible with their management—has been transformed into *a power without any discernible limit to set aside vast and amorphous expanses of terrain* above and below the sea . . . . We may be presented with other and better opportunities to consider this issue without the artificial constraint of the pleadings in this case. I concur in the denial of certiorari, keeping in mind the oft-repeated statement that such a denial should not be taken as expressing an opinion on the merits.[301]

These comments suggest that the Chief Justice may be resistant to expansive use of the Antiquities Act in the future. They also indicate that the idea of national

295. Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48, 51 (D.D.C. 2018), *aff'd as modified*, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied sub nom.*, Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979 (2021).

296. Daniel Ortner, *Regulating Fisheries Out of Business Won't Protect the Oceans*, PAC. LEGAL FOUND. (July 2, 2019), https://pacificlegal.org/regulating-fisheries-out-of-business-wont-protect-the-oceans/.

297. *Id.*

298. *Id*.

299. Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535 (D.C. Cir. 2019).

300. Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979 (2021).

301. *Id.* at 980–81 (emphasis added) (citation omitted).

monuments as "federal land grabs" has made its way into the minds of those who sit on the nation's top court.

2. The "Landback" Movement

Long before it was declared a national wildlife refuge, the Malheur was the traditional winter gathering ground for the Paiute people,[302] whose ancestral territory encompassed most of what is now Southeast Oregon.[303] The federal government forced the Paiute off their ancestral lands in the 1800s,[304] but their descendants still consider the Malheur sacred.[305] Some Paiute returned and purchased property in the Burns area, and they continue to use the Malheur for religious and cultural ceremonies, such as collecting plants for medicine and crafts.[306] The Paiute watched in dismay as Bundy's militants handled and moved their cultural artifacts and bulldozed through their sacred land while trying to build themselves a road.[307] Tribal leaders spoke out against the hypocritical notion that the militants would "return" the land to its "rightful owners."[308] "The protesters have no right to this land. It belongs to the Native people who live here," said Tribal Chair Charlotte Rodrique.[309] "This land belonged to the Paiute people as wintering grounds long before the first settlers, ranchers and trappers ever arrived here . . . . We haven't given up our rights to the land. We have protected sites there. We still use the land."[310]

This story plays out all over the country. For every instance of local ranchers, commercial fishermen, or ATV enthusiasts demanding that the federal government "return" the public lands to their "rightful owners," there are Indigenous communities calling for the same thing, on the same lands. When Cliven Bundy claimed his family had "ancestral" rights to the federal lands in

302. *See* Kirk Siegler, *Oregon Occupation Unites Native American Tribes to Save Their Land*, NPR (Oct. 27, 2016), https://www.npr.org/2016/10/27/499575873/oregon-occupation-unites-native-american-Tribes-to-save-their-land.

303. Eric Cain & John Rosman, *Broken Treaties An Oral History Tracing Oregon's Native Population*, OPB (Mar. 22, 2017), https://www.oregon.gov/ode/students-and-family/equity/NativeAmericanEducation/Documents/SB13%20Curriculum/Materials_OPB_Broken%20Treaties.pdf.

304. *See* Rebecca Dobkins, Susan Stevens Hummel, Ceara Lewis, Grace Pochis, & Emily Dickey, *Tribes of the Oregon Country Cultural Plant Harvests and Indigenous Relationships with Ancestral Lands in the Twenty-First Century*, 118 OR. HIST. Q. 488, 504 (2017).

305. Terrence Petty & Manuel Valdes, *Oregon Tribe Armed Group "Desecrating" Their Land*, KATU (Jan. 6, 2016), https://katu.com/news/local/burns-paiute-Tribe-responds-to-armed-standoff-in-news-conference.

306. *Id.*; John M. Glionna, *How the Oregon Militia Standoff Became a Battle with a Native American Tribe*, GUARDIAN (Jan. 6, 2016, 13:30 EST), https://www.theguardian.com/us-news/2016/jan/06/oregon-militia-malheur-wildlife-refuge-paiute-indian-tribe-sacred-land.

307. Glionna, *supra* note 306.

308. Siegler, *supra* note 303.

309. Petty & Valdes, *supra* note 305.

310. Glionna, *supra* note 306 (quoting Paiute Tribal Chairwoman Charlotte Rodrique); *see also* Siegler, *supra* note 303 (quoting Burns Paiute councilman Jarvis Kennedy, who said: "I was raised like this to know that it's always going to be our land—no matter who owns it, it's always going to be us . . . . We're the first people, and when everything's done and said, we're going to still be there.").

and around Gold Butte, Nevada, Vernon Lee had this to say: "If anybody's got a right it would be the Moapa Band of Paiutes."[311] Lee is a member of the Moapa Band of Paiutes, whose territory once included all of Gold Butte—until the U.S. government reduced it tenfold.[312] Today the Paiute reservation is a "small sliver of desert" adjacent to a coal-fired power plant.[313] "To be quite candid I wish they would give it all back, but realistically that probably won't happen," Lee said in 2016.[314] For two years following the armed standoff with the Bundy family, the federal government stopped managing the area altogether due to safety concerns.[315] Bundy's cattle continued to trespass, walking and defecating on ancient petroglyphs.[316] Tribal members documented evidence of people shooting at petroglyphs carved into rocks, stealing pottery and arrowheads, and cutting ATV tracks across plants Native peoples have gathered for centuries.[317]

Recapture Canyon, the location of Phil Lyman's illegal ATV ride, also sits on sacred tribal land. The canyon contains an "unusually dense collection of Anasazi and Pueblo sites dating back more than 2,000 years, including ceramic hearths and storage cisterns as well as cliff habitations, ceremonial kivas[,] and ancient trash heaps."[318] BLM closed the land to ATVs in 2007 after two Utah men used picks, shovels, and other tools to blaze an illegal [ATV] trail through the canyon.[319] The "scar" is seven miles long and four feet wide; sections run right through 1,000-year-old Puebloan archaeological sites, causing "relatively severe damage" to six sites and "bisecting one prehistoric village the size of a football field."[320] A 2007 BLM report found that the illegal ATV activity had caused more than $300,000 in archaeological damage and "permanently and significantly diminished the cultural heritage value of . . . these sites to Native Americans and the American public as a whole."[321]

Stories like these, of widespread ignorance and intentional disregard for the rights and interests of Indigenous people in their ancestral lands, demonstrate the need for a dramatic shift in the way Americans think about the public lands. This argument is a moral one, but shifting the narrative away from states' rights and toward Indigenous stewardship would also have financial, cultural, and environmental ramifications. Industry interests have invested extensive resources into litigation against new national monuments and immense time and

311. Kirk Siegler, *In Nevada, Tribes Push to Protect Land at the Heart of Bundy Ranch Standoff*, NPR (Aug. 18, 2016), https://www.npr.org/sections/codeswitch/2016/08/18/490498442/in-nevada-Tribes-push-to-protect-land-at-the-heart-of-bundy-ranch-standoff.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. Taylor, *supra* note 273.

319. *Id.*

320. Andrew Gulliford, *Recapture Canyon and an Illegal ATV Trail*, HIGH COUNTRY NEWS (Feb. 12, 2014), https://www.hcn.org/wotr/recapture-canyon-and-an-illegal-atv-trail.

321. *Id.*; Taylor, *supra* note 273.

energy into propping up the transfer movement's weak (and, arguably, unfounded) legal arguments. Far-right extremists have done immeasurable harm to important historical, cultural, and natural resources.

Indigenous peoples inhabited and cultivated this land for centuries, long before European settlers set foot on this continent, and long before the United States stole it. Today, their descendants fight for the rightful return of their sacred sites and ancestral lands to Indigenous stewardship. The idea of returning land to Indigenous stewardship is not new—it has existed in various forms since colonial governments seized the land in the first place.[322] But the movement has gained steam in recent years as Indigenous communities continue to grapple with the lasting effects of settler colonialism[323] and government officials across the political spectrum begin to recognize the environmental, financial, and political benefits of Indigenous land management.[324]

Indigenous peoples possess "traditional ecological knowledge"—also called "traditional Indigenous knowledge"—a "cumulative body of knowledge, practice[,] and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings . . . with one another and with their environment."[325] Supplementing scientific knowledge with traditional Indigenous knowledge led to the development of many modern remedies, including aspirin, which is derived from willow bark.[326] As the devastating effects of climate change loom on the horizon, tribal attorney Brett Kenney argues that enabling Indigenous land stewardship is "in the national interest."[327] Kenney writes that Indigenous land stewardship is "intrinsically stabilizing because tribes have an inherent interest in both the health of their aboriginal lands and their local economies," generally "balanc[ing] a need to conserve resources for future generations with a need to provide a current livelihood."[328]

On Indigenous Peoples' Day, October 12, 2020, the nonprofit advocacy organization NDN Collective launched its nationwide "LANDBACK Campaign."[329] Director Krystal Two Bulls emphasized that the "landback" narrative has existed through "generations and generations of work and effort

322. *See, e.g.*, Mike Gouldhawke, *100 Years of Land Struggle*, BRIAR PATCH MAG. (Sept. 10, 2020), https://briarpatchmagazine.com/articles/view/100-years-of-land-struggle (tracing the history of the landback movement in Canada).

323. *See* Harmeet Kaur, *Indigenous People Across the U.S. Want Their Land Back – And the Movement is Gaining Momentum*, CNN, https://www.cnn.com/2020/11/25/us/indigenous-people-reclaiming-their-lands-trnd/index.html (last updated Nov. 26, 2020).

324. *See* Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RES. & ENV'T 47, 47, 50 (2012).

325. *Id.* at 47.

326. *Id.*

327. *Id.*

328. *Id.* (citing Mary Christina Wood, *Nature's Trust Reclaiming an Environmental Discourse*, 25 VA. ENV'T L.J. 243, 265 (2007)).

329. *LANDBACK Updates From Launch to Looking Forward*, NDN COLLECTIVE (Oct. 28, 2020), https://ndncollective.org/landback-updates-from-launch-to-looking-forward/.

and sacrifice from Indigenous peoples"[330] and characterized the newly launched campaign as "a mechanism to connect, amplify and resource the landback movement and the communities that have been fighting to reclaim stewardship of the land."[331] The movement has already seen success, including the planned removal of dams along the Klamath River in Oregon following decades of effort by the Yurok Tribe and other activists,[332] and the return of 1,200 acres in Big Sur, California, to the no longer landless Esselen Tribe.[333]

These examples demonstrate the determination of many Native nations to settle for nothing less than the return of their ancestral lands. An analysis of what it would take to return the public lands to Indigenous ownership is outside the scope of this Note. I focus instead on what I believe is the best way for President Biden to take the first step on that path, using the Antiquities Act to protect Native lands and share management authority with Native nations.

IV. USING THE ANTIQUITIES ACT TO ENABLE TRIBAL CO-MANAGEMENT OF PUBLIC LANDS

President Biden has expansive authority under the Antiquities Act to create new national monuments by presidential proclamation.[334] He would do well to follow the lead of his predecessor and former colleague, President Obama, who "put his own stamp on the Antiquities Act."[335] Expressing a desire to protect land that had "special meaning to traditionally under-represented or dispossessed peoples," President Obama established the César E. Chávez National Monument to honor farm workers; the Stonewall National Monument to commemorate the struggles of the LGBTQ+ community; the Belmont-Paul Women's Equality National Monument to celebrate women's efforts to gain the right to vote; and the Birmingham Civil Rights National Monument to remember the history of the Civil Rights Movement.[336] Obama capped his public lands legacy by establishing Bears Ears National Monument during his final days in office.[337]

330. Claire Elise Thompson, *Returning the Land Indigenous Leaders on the Growing "Landback" Movement and Their Fight for Climate Justice*, GRIST (Nov. 25, 2020), https://grist.org/fix/indigenous-landback-movement-can-it-help-climate/.

331. *LANDBACK Updates From Launch to Looking Forward*, *supra* note 329.

332. Jes Burns, *Plan Revived for Dam Removal on Klamath River in Oregon, California*, OPB (Nov. 17, 2020), https://www.opb.org/article/2020/11/17/klamath-river-dam-removal-oregon-california/.

333. Mario Koran, *Northern California Esselen Tribe Regains Ancestral Land After 250 Years*, GUARDIAN (July 28, 2020), https://www.theguardian.com/us-news/2020/jul/28/northern-california-esselen-tribe-regains-land-250-years.

334. *See supra* Subparts III.A.–C.

335. Wilkinson, *supra* note 22, at 324.

336. *Id.* (citing Proclamation No. 9567, 82 Fed. Reg. 6167 (Jan. 12, 2017); Proclamation No. 9465, 81 Fed. Reg. 42,215 (June 24, 2016); Proclamation No. 9423, 81 Fed. Reg. 22,503 (Apr. 12, 2016); Proclamation No. 8884, 77 Fed. Reg. 62,413 (Oct. 8, 2012)).

337. *See* Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

A. The Vision

President Biden should focus his "monumental" efforts on returning public lands to Indigenous stewardship. By exercising his authority under the Antiquities Act to create and manage new national monuments in partnership with Native nations, President Biden can usher in a new era of public lands policy focused on mutual partnership instead of exclusion.

During his first week in office, President Biden signed an executive order pledging to protect 30 percent of U.S. lands by 2030.[338] Restoring Bears Ears and Grand Staircase-Escalante was a key first step toward accomplishing this 30x30 goal.[339] Moving forward, local efforts will be essential.[340] "The idea is really locally driven conservation efforts," says Dan Ritzman of the Sierra Club.[341] "[B]ottom-up campaigns, where people familiar with the land and affected by its management will be deeply involved in its conservation."[342]

In a 2019 House resolution advocating for a similar 30x30 goal, Secretary Haaland framed Indigenous-led conservation and tribal sovereignty as cornerstones of the effort.[343] Woody Lee, a member of the Navajo Nation and the Executive Director of Indigenous-led conservation organization Utah Diné Bikéyah, said Bears Ears National Monument—which is co-managed by a coalition of tribes and two federal agencies[344]—could serve as a model for the type of locally-driven, place-focused effort necessary to meet President Biden and Secretary Haaland's goal.[345] "I think [Bears Ears] blazed a trail" Lee said.[346] "I would support other tribes that want to go the same path, or a similar path that would have the same result."[347] This Note argues that President Biden ought to work with other tribes to retool the Antiquities Act as a mechanism for both preservation and justice, enabling Native nations to create and manage new monuments that protect those portions of their ancestral lands that are located on the federal public lands. The following Subparts explain this vision in greater detail.

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338. Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021). Only 12 percent of U.S. lands and 23 percent of coastal waters are permanently protected; thus, to reach Biden's goals, the United States will have to conserve more than 400 million acres of land and inland waterways in the next decade. Hannah Chinn, *America, Send Us Your Ideas' Biden Pledges to Protect 30% of U.S. Lands by 2030*, GUARDIAN (Feb. 17, 2021), https://www.theguardian.com/environment/2021/feb/17/biden-public-lands-waters-30-by-30.

339. *See* Chinn, *supra* note 338. President Trump "slashed protections" for Bears Ears and Grand Staircase-Escalante in 2017, removing thousands of acres from both monuments. *Id.* President Biden reinstated their protections and restored their original boundaries in October 2021. Deepa Shivaram, *Biden Restores Protections for Bears Ears Monument, 4 Years After Trump Downsized It*, NPR (Oct. 8, 2021), https://www.npr.org/2021/10/07/1044039889/bears-ears-monument-protection-restored-biden.

340. *See id.*

341. *Id.*

342. *Id.*

343. DOSHI, *supra* note 5, at 3.

344. *See infra* Subpart IV.B.2.

345. Chinn, *supra* note 338.

346. *Id.*

347. *Id.*

B. Case Studies

Many Native nations are already co-managing lands and resources with federal agencies.[348] This Subpart compares two examples of co-management in the national monument context and identifies best practices to emulate and potential pitfalls to avoid. First, however, I explain what I mean by "co-management" using Professor Ed Goodman's oft-cited definition:

> Co[-]management embodies the concept and practice of two (or more) sovereigns working together to address and solve matters of critical concern to each. Co[-]management is . . . 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.[349]

My first example, Canyon de Chelly National Monument, which has been co-managed by the NPS and the Navajo Nation since 1931,[350] serves as a cautionary tale of the harm that results when the U.S. government enters into "partnerships" with Native nations without first establishing a "mutual, participatory framework" to ensure adequate protection of tribal rights. I use it here to draw out specific examples of how President Biden should proceed differently.

My second example, Bears Ears National Monument, serves as an optimistic story of co-management done (nearly) right. Unlike every other monument created since the passage of the Antiquities Act, Bears Ears was proposed by a coalition of tribes.[351] Their proposal included specific frameworks for dividing responsibilities between federal and tribal authorities, resolving disputes, and protecting tribal rights. Though President Obama adopted most of the tribes' recommendations, he declined to fully commit to their vision of "collaborative management." I analyze both the tribes' proposal and Obama's proclamation to illustrate what true federal-tribal co-management could look like and how President Biden can make it happen.

Though these case studies provide just two examples of federal-tribal co-management arrangements,[352] comparing them side-by-side should help readers

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348. *See generally* 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. RES. J. 585 (2008).

349. Ed Clay Goodman, *Protecting Habitat for Off-Reservation Hunting and Fishing Rights Tribal Comanagement as a Reserved Right*, 30 ENV'T L. 279, 284–85 (2000).

350. 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*, 13 HARV. ENV'T L. REV. 475, 490 (2007) (citing Pub. L. No. 71-667, 46 Stat. 1161 (1931)). The boundaries of Canyon de Chelly National Monument were later changed by Pub. L. No. 72-404, 47 Stat. 1419 (1933) (codified as amended at 16 U.S.C. § 445 (2006). *Id.* at 490 n.75.

351. Krakoff, *supra* note 9, at 214.

352. Other examples of tribal co-management of federal public lands include—but are not limited to—the Santa Rosa and San Jacinto Mountains National Monument, co-managed by the BLM, the U.S. Forest Service, and the Agua Caliente Band of Cahuilla Indians, *see* Tsosie, *supra* note 14, at 309–310;

draw conclusions about the key elements that differentiate equitable, mutually beneficial and collaborative partnerships from those that serve only to perpetuate settler-colonialist injustices against Indigenous peoples.

1. Canyon de Chelly National Monument

Canyon de Chelly is the heart of the Navajo homeland (*Dinébikeyah*), a "spectacularly beautiful geological site consisting of over twenty miles of red sandstone walls rising hundreds of feet above the ground,"[353] bounded by the four sacred mountains of the Navajo people.[354] The canyon is located in arid northeastern Arizona, where "[t]he beauty and openness of the land lend a sense of both the stillness of time and the movement of time" and "the extremes of the environment . . . require people to live in balance with nature."[355] Humans have lived in the caves there for thousands of years, beginning with the Hopi and Pueblo in roughly 750 A.D.[356] The Navajo began living in the canyon in the late 1600s, and many continue to do so to this day.[357] The Navajo consider Canyon de Chelly sacred ground; it features in their creation stories, which maintain that spiritual figures and deities like Spider Woman still reside there.[358]

The story of the Navajo Nation's relationship with Canyon de Chelly is a story marked by violence and dispossession at the hands of the U.S. government. In 1849, two Navajo men signed a treaty with the United States, signing the Navajo territory over to "the exclusive jurisdiction and protection" of the federal government.[359] Though neither of these men had the authority to represent the Navajo people, Congress ratified the treaty on September 9, 1850.[360] Thirteen

Badlands National Park, co-managed by the NPS and the Oglala Sioux, *see* Elizabeth Zach, *In the Bandlands, Where Hope for the Nation's First Tribal Park Has Faded*, N.Y. Times (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/travel/badlands-faded-hope-for-indian-tribal-park.html; and Kasha-Katuwe Tent Rocks National Monument, managed by the BLM in "close cooperation" with the Pueblo de Cochiti, Proclamation No. 7394, 3 C.F.R. § 7394 (Jan. 17, 2001).

353. Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084, 1086 (9th Cir. 2016).

354. The four sacred mountains are the San Francisco Peaks, Mount Blanca, Mount Taylor, and Mount Hesperus. Kathryn L. Sweet, *Political Negotiation and Jurisdiction of the Navajo Nation, Arizona, and Public Law 280*, 24 W. LEGAL HIST. 27, 30 (2011).

355. *Id.* at 31. For information on the Navajo Nation, see OFFICIAL SITE OF THE NAVAJO NATION, https://www.navajo-nsn.gov/ (last visited Aug. 1, 2021). For information on Canyon de Chelly, see *Canyon de Chelly National Monument*, NAT'L PARK SERV., https://www.nps.gov/cach/index.htm (last visited Aug. 1, 2021).

356. *Navajo Nation*, 819 F.3d at 1086.

357. *Id.* at 1086–87.

358. *See id.* (citing KELLI CARMEAN, SPIDER WOMAN WALKS THIS LAND: TRADITIONAL CULTURAL PROPERTIES AND THE NAVAJO NATION x, xvii–xx (2002)); Laurel Morales, *Earth+Bone, Part 5 Navajo Demand Human Remains Be Returned to Sacred Canyon de Chelly*, KJZZ (Feb. 10, 2017), https://kjzz.org/content/10569/earthbone-part-5-navajo-demand-human-remains-be-returned-sacred-canyon-de-chelly.

359. *Navajo Nation*, 819 F.3d at 1087 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.–Navajo Nation, September 9, 1849, 9 Stat. 974, 974); *see also* Sweet, *supra* note 354, at 32.

360. Sweet, *supra* note 354, at 32.

years later, the U.S. Army "hunted down, starved out, and rounded up 8,500 Navajo people," removing them by force from Canyon de Chelly and marching them to Fort Sumner, a military fort 300 miles away.[361] After four years of exile, during which time more than two thousand Navajo died from illness and starvation, the U.S. government signed a second treaty with the Navajo Nation and allowed the exiled Navajo people to return to Canyon de Chelly. [362] Under the Treaty of 1868, the United States reserved and promised to protect Canyon de Chelly and its surrounding lands for "the exclusive use and occupation" of the Navajo.[363]

Since 1868, the federal government has failed to uphold its end of the bargain. In the late 1800s, white settlers began illegally entering the Navajo Reservation, pillaging Navajo sacred sites for ancient artifacts to sell to museums on the East Coast and in Europe.[364] Congress passed the Antiquities Act in 1906, citing the need to protect ancient Indigenous artifacts in the Southwest;[365] from then on, instead of settlers stealing from the Navajo Nation in order to make a buck, archaeologists did the excavating, this time with the federal government's permission.[366]

In 1930, sixty years after the establishment of the Navajo Reservation by treaty, the Navajo Nation Council approved the creation of Canyon de Chelly National Monument, which the Council understood would be jointly managed by the Navajo Nation and the U.S. government.[367] The monument was proclaimed by President Herbert Hoover using his authority under the Antiquities Act and formally established by an act of Congress the following year.[368] Though the years prior to Hoover's proclamation had seen extensive dialogue between federal officials and Navajo leaders,[369] neither Hoover's

361. *Id.*; *see also* Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1063 (2009) (discussing the "Long Walk" period and the "Navajos' attachment to their sacred homeland").

362. Sweet, *supra* note 354, at 32–33.

363. *Navajo Nation*, 819 F.3d at 1087 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.–Navajo Nation, June 1, 1868, 15 Stat. 667, 668).

364. Morales, *supra* note 358.

365. *See supra* Subpart I.B.

366. Morales, *supra* note 358.

367. *Id.*; King, *supra* note 350, at 490.

368. Morales, *supra* note 358; King, *supra* note 350, at 490 (citing Pub. L. No. 71-667, 46 Stat. 1161 (1931)).

> Canyon de Chelly National Monument was not established under the Antiquities Act of 1906. A 1927 act required congressional action for changes to reservation boundaries. 25 U.S.C. § 398d (2006). Thus, a presidential proclamation under the Antiquities Act would not [have been] sufficient . . . . Congress passed an act to authorize the President of the United States to establish the Canyon de Chelly National Monument within the Navajo Indian Reservation [in] Arizona. Act of Feb. 14, 1931, 16 U.S.C. § 445 (2006). The boundaries . . . were later changed by Pub L. No. 72-404, 47 Stat. 1419 (1933) (codified as amended at 16 U.S.C. § 445 (2006)).

Id. at 490 n.75.

369. Brian Upton, *Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex Historical, Legal, and Global Perspectives*, 35 PUB. LAND & RES. L. REV. 51, 111 (2014); *see*

proclamation nor the act of Congress that formally established the national monument ("the enabling act") explicitly *required* federal land management agencies to work with the Navajo Nation in managing the monument. Both the proclamation and the enabling act lacked specificity about the division of responsibilities and included no mention of procedures for dispute resolution. Further, though the Navajo Nation Council conditioned its consent on the federal government's agreement not to interfere with Navajo grazing and mineral rights, both the proclamation and the enabling act failed to include adequate protections for Navajo sacred sites and cultural resources in the national monument.[370]

Both President Hoover's proclamation and the enabling act simply specified that the Navajo Nation retained title to Canyon de Chelly and its surrounding lands and charged the United States with the "administration of the area . . . so far as it applies to the care, maintenance, preservation[,] and restoration of the prehistoric ruins, or other features of scientific or historical interest."[371] With regard to Navajo rights, the enabling act stated: "Nothing herein shall be construed as in any way impairing the right, title, and interest of the Navajo [Nation] which they now have and hold to all lands and minerals, including oil and gas, and the surface use of such lands for agricultural, grazing, and other purposes."[372] Thus, since 1931, the NPS has managed the monument's prehistoric ruins and objects of scientific or historical interest, while the Navajo Nation has managed the water, forest, mineral, and subsurface resources, as well as the grazing allotments. Lacking more specific guidance, federal and Navajo officials have coordinated other management efforts, such as law enforcement and facilities management, on an ad-hoc basis.[373]

Like many prior agreements between Native nations and the United States, the co-management of Canyon de Chelly resulted in the continued oppression and dispossession of the Navajo Nation by the federal government. Beginning shortly after the creation of the monument in 1931—and continuing for decades—NPS officials dug up and carried off human remains and other cultural resources from Canyon de Chelly without the consent or permission of the Navajo Nation.[374] As of 2016, the NPS held at least 303 sets of these pillaged resources in its collection at the Western Archeology Conservation Center in Tucson, Arizona.[375] In 2011, the Navajo Nation sued the U.S. government in federal court, asserting that the Navajo maintained the right of ownership over

also DAVID M. BRUGGE & RAYMOND WILSON, NAT'L PARK SERV., ADMINISTRATIVE HISTORY: CANYON DE CHELLY NATIONAL MONUMENT, ARIZONA ch. 2, at 6 (1976), http://www.nps.gov/cach/learn/historyculture/upload/CACH_adhi.pdf (explaining the events leading up to the establishment of Canyon de Chelly National Monument in 1931).

370. BRUGGE & WILSON, *supra* note 369.

371. 16 U.S.C. §§ 445a–445b.

372. *Id.* § 445a.

373. *See* Mary Ann King, *supra* note 350, at 490.

374. Complaint at 5–6, Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084 (9th Cir. 2016) (No. 3:11-cv-08205-PGR).

375. Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084, 1088 (9th Cir. 2016).

"all human remains and associated funerary objects" within Canyon de Chelly and seeking their immediate return.[376] The Navajo Nation alleged that the NPS's refusal to return the human remains and cultural resources to their rightful owners—the Navajo Nation—violated the Treaty of 1849, the Treaty of 1868, and the federal Indian trust doctrine.[377]

The story of federal-tribal co-management of Canyon de Chelly National Monument is yet another example of the continuing oppression of Indigenous peoples at the hands of the federal government. This case study should serve as a warning about the harm that results when the federal government "partners" with Native nations without committing to real partnership, establishing dispute resolution procedures, or ensuring adequate protection of tribal rights.

2. Bears Ears National Monument

Bears Ears National Monument, on the other hand, serves as a positive example of federal-tribal co-management. Bears Ears was the first national monument proposed by a coalition of tribes.[378] The Coalition envisioned federal-tribal co-management carried out through a hybrid federal-tribal entity called the "Bears Ears Commission." President Obama's proclamation designating Bears Ears National Monument under the Antiquities Act called for the formation of a federal advisory committee as well as a Bears Ears Commission.[379] I analyze both the Coalition's proposal and Obama's proclamation to show how the Coalition originally conceived of federal-tribal co-management at Bears Ears. These documents should serve as reference points for President Biden's efforts.

Bears Ears National Monument encompasses 1.35 million acres "in the heart of Utah's dramatic red rock country, where the forces of water and wind turn cliff walls into natural works of art."[380] The "landscape of canyons, mesas, mountains, and redrock formations is every bit the equal of national parks such as Canyonlands, Arches, Zion, and Capitol Reef."[381] Famed writer Wallace Stegner once wrote that the wonders of the region "fill up the eye and overflow the soul."[382] Rising from the center of the landscape, and visible from every direction, are twin buttes "so distinctive that in each of the [N]ative languages of the region, their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe, or 'Bears Ears.'"[383]

Like Canyon de Chelly, the Bears Ears region was once solely populated by

376. *Id.* at 1085, 1089.

377. *Id.* at 1090. The Navajo Nation brought related claims under the Administrative Procedure Act and other federal statutes, as well as the Fifth Amendment of the U.S. Constitution. *Id.*

378. Krakoff, *supra* note 9, at 214.

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

380. Krakoff, *supra* note 9, at 213.

381. Wilkinson, *supra* note 22, at 318.

382. *Id.* (quoting WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER 18 (1969)).

383. Proclamation No. 9558, 82 Fed. Reg. at 1139.

Indigenous peoples.[384] For hundreds of generations, members of at least thirty different tribes lived in the surrounding canyons, mesas, and mountaintops.[385] Clovis people hunted among the cliffs and canyons as early as 13,000 years ago.[386] Ancestral Puebloans followed, beginning to occupy the region at least 2,500 years ago, as did the Ute, Navajo, and Paiute peoples more recently.[387]

In the 1860s, as white settlers began to move westward in search of fertile lands and extractable resources, the U.S. government began to force Indigenous peoples out of the Bears Ears region.[388] Federal troops marched the Navajo away as part of the Long Walk, and federal law confined other tribes to reservations that comprised fractions of their ancestral territory.[389] Still, their descendants came back to Bears Ears to hunt, hold ceremonies, celebrate family occasions, and gather medicines, roots, nuts, and berries, maintaining a connection to the land that continues today.[390] Regina Whiteskunk, Chair of Ute Mountain Ute Tribe, said she continues to return to Bears Ears "to alleviate the continuing pain of the centuries-old land loss":

> Like all Native Americans, I feel this historical trauma. We've lost our land and may never get it back . . . . Going back to Bears Ears reminds us of where we came from. I find a valley with yellow flowers, and I go there quietly and take it all in. This is personal healing like nothing else can be.[391]

The Bears Ears Inter-Tribal Coalition (the "Coalition"), which included representatives from the Hopi, Navajo Nation, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni tribal governments, presented its proposal for the creation of Bears Ears National Monument to President Obama in October 2015.[392] Each of these Tribes has historic ties to Bears Ears, and their members today "engage in cultural, religious, and subsistence practices" in the region.[393] Professor Charles Wilkinson, who served as Special Advisor to the Coalition,[394] called the proposal "a call for justice as well as a blueprint for a different way to conceive of human/land relations[,]"[395] while Krakoff called it a model for co-management that would "blend[] Native traditional knowledge and culture with existing federal public land practices."[396] Obama's proclamation recognized the Tribes' profound connections to the land, acknowledged traditional Indigenous

384. Krakoff, *supra* note 9, at 213.
385. Wilkinson, *supra* note 22, at 321; Proclamation No. 9558, 82 Fed. Reg. at 1139.
386. Proclamation No. 9558, 82 Fed. Reg. at 1139.
387. *Id.*
388. Wilkinson, *supra* note 22, at 321.
389. *Id.*
390. *Id.* at 318, 321–22.
391. *Id.* at 318–19 (quoting Regina Lopez-Whiteskunk, *Bears Ears, a Land of Culture and Mystery A Time for Healing*, WILLIAM AND FLORA HEWLETT FOUND. (Oct. 13, 2016), https://www.hewlett.org/bears-ears/).
392. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 1.
393. Krakoff, *supra* note 9, at 214.
394. *See generally* Wilkinson, *supra* note 22.
395. Krakoff, *supra* note 9, at 239.
396. Wilkinson, *supra* note 22, at 319.

knowledge as "a resource to be protected,"[397] and gave them a "unique role in managing the monument."[398] Still, it did not go quite as far as the Coalition had proposed.[399]

The Coalition's proposal centered around "collaborative management," whereby federal and tribal authorities would "work[] together as equals to make joint decisions."[400] Much like Professor Goodman's definition of "co-management," which I employ throughout this Note, the Coalition's vision of collaborative management recognized the distinct contributions of both Indigenous and scientific knowledge and promoted learning across knowledge systems:

> [T]his 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. We have reflected long and hard to come up with the right words to install Collaborative Management in this particular place and circumstance, and believe in our suggested approach, but we welcome your thoughts on how to improve our formulation. 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 States in charting the vision for the monument and implementing that vision.[401]

Professor Wilkinson characterized the Coalition's goals for Bears Ears as follows:

> The [T]ribes . . . wanted true joint responsibility for the management of the land. They did not want to be advisors, consultants, or have any other title that connoted that their contribution to the management of the monument would be their words alone. Rather, the [T]ribes wanted to have a hand in actual land management decisions.[402]

The Coalition emphasized that only through truly collaborative management would Native people "have real influence on how this sacred land is managed."[403] Natasha Hale, a member of the Navajo Nation who participated in the drafting process, explained that co-management[404] was crucial to the

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397. Proclamation No. 9558, 82 Fed. Reg. 1139, 1140.

398. Krakoff, *supra* note 9, at 214.

399. *See* Proclamation No. 9558, 82 Fed. Reg. at 1144 (describing the structure and role of the Bears Ears Commission).

400. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 22, 26.

401. *Id.* at 3–4.

402. Wilkinson, *supra* note 22, at 326.

403. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 21.

404. Though the Bears Ears Inter-Tribal Coalition uses the term "collaborative management" throughout its proposal, this Note continues using "co-management" for the sake of simplicity and consistency.

proposal because "our history with monuments has not been good."[405] Professor Jason Anthony Robison beautifully describes the "paradigm-shifting" spirit of the Coalition's proposal: "Uttered by descendants of Native peoples made from the Bears Ears landscape, and channeled into the colonial legal and political system via a tribal *partnership* seeking precisely the same thing with their federal trustee, these words are paradigm-shifting."[406]

The Coalition saw the Bears Ears Commission ("the Commission") as the "primary vessel" for this vision.[407] As the "policy making and planning body for the monument," the Commission would include eight members, one from each Coalition tribe and one from each relevant federal agency—the BLM, the Forest Service, and the NPS.[408] "The Commission would choose a chairperson and annually report to the secretaries of agriculture and interior on the monument's administration. Members of the Commission would 'collaborate jointly on all procedures, decisions, and other activities,' . . . beginning with the management plan for Bears Ears,"[409] which the Coalition called a "key document, second in importance only to the proclamation."[410] The Coalition noted that the Commission would benefit from memoranda of agreement and understanding jointly drafted by the federal government and the tribes before or shortly after President Obama's proclamation.[411] These memoranda of agreement and understanding could "chart out the nuts and bolts of their relationship" and begin to address substantive issues such as "the nature of the mediation process" and the ability of monument leadership "to speak with 'one voice.'"[412]

The Coalition's proposal also mapped out a two-step dispute resolution process in the event the Commission faced an "impasse, undue delay, or other extraordinary circumstances."[413] First, the federal and tribal authorities would "proceed to appropriate mediation."[414] If mediation failed, "the Secretary of Interior or the Secretary of Agriculture, as appropriate, [would] in a written opinion explaining the reasons, make the relevant decisions."[415] The Coalition crafted this co-management arrangement, including the second step of the

405. Krakoff, *supra* note 9, at 245 (citing Interview with Natasha Hale, Native American Program Director, Grand Canyon Trust (June 27, 2017)).

406. Jason Anthony Robison, *Indigenizing Grand Canyon*, 1 UTAH L. REV. 101, 165 (2021).

407. *Id.*

408. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 29. Under the Coalition's proposal, Tribal representatives who sat on the Bears Ears Management Commission would receive salaries. *Id.*

409. Robison, *supra* note 406, at 165.

410. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 22, 30. Under the Coalition's proposal, the monument staff would draft the document, while the Commission would provide "specific direction . . . regarding plan design and content" and regular review. *Id.* at 30. The Coalition noted that NEPA notice-and-comment requirements would give members of the public and other key stakeholders "ample opportunity" to contribute to the development of the management plan as well. *Id.* at 30–31.

411. *Id.* at 34.

412. *Id.*

413. *Id.* at 22.

414. *Id.*

415. *Id.*

dispute resolution process, to ensure the Commission's joint decisionmaking at Bears Ears would fit within existing parameters of federal law—specifically, the non-delegation doctrine described below.[416]

There is no formal process for filing a monument proposal.[417] Krakoff describes how a delegation of Coalition representatives "filed" their proposal with President Obama's administration by traveling to Washington, D.C. and handing hard copies to officials at the DOI and the White House.[418] Numerous meetings followed. The Coalition's co-management proposal emerged as one of the main "sticking points."[419] Ultimately, Obama's proclamation establishing Bears Ears National Monument slightly modified the Coalition's proposal.[420]

Rather than cutting and pasting the Coalition's proposal for a joint federal-tribal Bears Ears Commission, Obama's proclamation created a Bears Ears Commission of a different form—one made up solely of tribal members, one representative from each of the five Coalition tribes.[421] Instead of facilitating joint decision-making with federal agency representatives, the Commission would "provide guidance and recommendations on the development and implementation of management plans and on management of the monument."[422] In this way, the Commission would "partner" with the federal agencies.[423] Importantly, Professor Robison notes, "the Commission would not be a toothless shell."[424] Obama's proclamation required the secretaries of agriculture and interior to "meaningfully engage the Commission" when developing the management plan and making subsequent management decisions.[425] If the secretaries declined to follow written recommendations submitted by the Commission, they were required to provide the Commission a "written explanation of their reasoning."[426]

In addition to the modified Bears Ears Commission, Obama's proclamation called for a second advisory body—a federal advisory committee.[427] Unlike the Commission, the advisory committee was not part of the Coalition's vision for federal-tribal co-management at Bears Ears.[428] Rather than directing the Commission to manage the new monument and draft the management plan, as the Coalition had envisioned, Obama's proclamation called for the secretaries of agriculture and interior to manage the new monument through the Forest Service

416. *See infra* Subpart IV.C.2.
417. Krakoff, *supra* note 9, at 247.
418. *Id.* at 248.
419. *Id.*
420. *See generally* Proclamation No. 9558, 82 Fed. Reg. 1139.
421. *See id.* at 1144.
422. *See id.*
423. *Id.*
424. Robison, *supra* note 406, at 166.
425. Proclamation No. 9558, 82 Fed. Reg. at 1144.
426. *Id.*
427. *Id.*
428. *See* Robison, *supra* note 406, at 162–64.

and the BLM, respectively, and to jointly prepare a management plan.[429] As part of this effort, the proclamation instructed the two agencies to establish an advisory committee to "provide information and advice regarding the development of the management plan and, as appropriate, management of the monument."[430] According to the proclamation, the committee was to be made up of a "fair and balanced representation of interested stakeholders," including tribes.[431]

Subsequent actions taken by the Trump administration made clear that the advisory committee "has not worked out as an entity for facilitating progressive federal-tribal collaborative management as sought by the Coalition when proposing Bears Ears."[432] When the Forest Service and the BLM adopted the charter for the advisory committee in August 2018, the document called for fifteen members in total, including "[t]wo representatives of Tribal interests."[433] Professor Robison rightly notes that "[t]his arrangement poses an egregious ratio and sovereignty problem. Five tribal sovereigns form the Coalition . . . yet the committee's structure only allots two spots for 'representatives of Tribal interests,' whatever that phrase may mean exactly."[434] Further, appointments to the advisory committee apparently went exclusively to "individuals who opposed creation of the Bears Ears National Monument."[435] Thus, the Trump administration "seriously compromised" the committee's composition.[436]

The Bears Ears Commission fared better than the federal advisory committee under Trump, though by no means did it emerge unscathed.[437] President Trump's purported reduction of Bears Ears National Monument entailed modifying its boundaries to encircle two "islands" of land—namely, the Indian Creek and Shash Jáa units.[438] As a result, the Bears Ears Commission

429. *See* Proclamation No. 9558, 82 Fed. Reg. at 1143–44.

430. *Id.* at 1144.

431. *Id.*

432. Robison, *supra* note 406, at 164.

433. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR & U.S. FOREST SERV., U.S. DEP'T OF AGRIC., BEARS EARS NATIONAL MONUMENT ADVISORY COMMITTEE CHARTER 4 (2020), https://www.blm.gov/sites/blm.gov/files/2020%20SIGNED%20Charter_%20Bears%20Ears_%2009%2011%202020.pdf.

434. Robison, *supra* note 406, at 163. Coalition Co-Chairman Carlton Bowekaty, a Zuni leader, underlined the "sovereignty problem" that Robison alludes to, emphasizing that all of the Coalition Tribes "are recognized domestic sovereigns and as such, all should be represented by their respective tribal leadership." *Id.* at 163–64.

435. *Injustice Reassured Bears Ears Advisory Committee Stacked for Opposition*, BEARS EARS INTER-TRIBAL COAL. (Apr. 24, 2019), https://bearsearscoalition.org/injustice-reassured-bears-ears-advisory-committee-stacked-for-opposition/; *see also* Jennifer Yachnin, *Grijalva, Greens Fault BLM Rollout of Bears Ears Plan*, GREENWIRE (July 26, 2019), https://subscriber.politicopro.com/article/eenews/1060792319?keyword=Grijalva,%20greens%20fault%20%20BLM%20rollout%20of%20Bears%20Ears%20plan.

436. Robison, *supra* note 406, at 164.

437. *See id.* at 166–67.

438. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,082, 58,084 (Dec. 4, 2017), https://www.govinfo.gov/content/pkg/FR-2017-12-08/pdf/2017-26709.pdf. For a map of these units, see *id.* at 58,087.

took a new name—the "Shash Jáa Commission."[439] The Trump proclamation also altered the Commission's composition, adding as a sixth member the San Juan County Commissioner for District 3.[440] Still, Professor Robison remains optimistic about the fate of the Commission under President Biden—at least as compared to the advisory committee: "Although deviating from precisely what the Coalition had in mind, the form of the Commission created by the Obama Proclamation foreseeably would have made strides in the right direction, and hopefully will still do so as events unfold."[441]

Professor Krakoff agrees, noting that though President Obama's Bears Ears proclamation did not adopt the Coalition's vision of co-management, it took "a very significant step in that direction" by creating the Bears Ears Commission and emphasizing the significance of the Tribes' connections to the land and the value of their knowledge systems.[442] Krakoff characterizes Bears Ears as a story of "profound loss, followed by reinvention and resistance":

> Through their concerted effort to make the Antiquities Act an instrument for reparations and justice, the Tribes not only protected 1.35 million acres for all Americans. They also reclaimed their histories, safeguarded traditional practices, and spurred hope for younger generations. And they created an inter-tribal political movement for others to follow, reviving optimism that public lands could become sites of cultural revival rather than solely of pain and trauma.[443]

According to Krakoff, Bears Ears shows how public lands laws like the Antiquities Act "can become vehicles for equality and justice, even if they initially served the interests of the politically and economically powerful."[444] It constitutes "a step toward repairing past injustices and reintegrating disenfranchised groups with the landscape," an example of how preservation can be achieved through "participatory stewardship rather than exclusion."[445] It is for these reasons that Professor Wilkinson calls Bears Ears "the first Native national monument."[446]

C. The Details

President Biden has the power to create a whole new slate of Native monuments before he leaves office. This section draws from the case studies of both Canyon de Chelly and Bears Ears to explain how President Biden can build

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439. *Id.* at 58,086.

440. *Id.*

441. Robison, *supra* note 406, at 166–67. ("For now, though, it is the season of the Shash Jáa Commission. That season may be likened to winter and the Bears Ears Commission idea to fire. Fire makes winter bearable across the Colorado Plateau, its nurturing light and warmth staving off the long dark until spring revives life.").

442. Krakoff, *supra* note 9, at 256.

443. *Id.* at 254.

444. *Id.* at 216.

445. *Id.*

446. *See generally* Wilkinson, *supra* note 22.

on the success of Bears Ears and use the Antiquities Act to protect public lands and return ancestral lands to Indigenous stewardship.

I start from the beginning, with the establishment of procedures for filing a new monument proposal, and continue on to a discussion of the monument proclamation and management plan.

1. The Monument Proposal

There currently exists no formal process through which interested parties can draft and file a proposal for the creation of a new national monument.[447] President Biden should create a formal process and establish procedures to allow members of federally recognized tribes and unrecognized Indigenous peoples to propose new national monuments. Biden and Secretary Haaland can leverage their existing relationships with tribes, as well as the long-dormant White House Council on Native American Affairs to oversee the process.[448]

Tom Cors of the Nature Conservancy calls President Biden's 30x30 goal a "10-year moonshot" because it demands "a tremendous amount of collaboration at an unprecedented scale and speed."[449] Millions of acres of public lands will need to be protected in the next decade. Biden may accelerate existing national monument campaigns in places like the Owyhee Canyonlands in Oregon and the Greater Grand Canyon in Arizona,[450] but his administration will have to identify new locations for national monuments as well. "There is no secret list," said Biden's BLM director Tracy Stone-Manning, then of the National Wildlife Federation.[451] "We need to put a call out to America: send us your ideas. Let's hear from the people who know their places best."[452] President Biden must prioritize new processes to help Native Nations do just that.

2. The Monument Proclamation

In drafting each monument proclamation, President Biden must keep in mind three types of considerations: legal, practical, and financial. Financial considerations fall outside the scope of this Note, but this section addresses the legal and practical considerations in detail.

First, legally, the Antiquities Act gives the President expansive authority to create national monuments and direct their management without congressional consent or approval.[453] By simply including the right language and some supporting evidence in each monument proclamation, President Biden will leave

447. Krakoff, *supra* note 9, at 247.

448. *See* Exec. Order 13,647, Establishing the White House Council on Native American Affairs, 78 Fed. Reg. 39,539 (June 26, 2013).

449. Chinn, *supra* note 338.

450. *Id.*

451. *Id.*

452. *Id.*

453. *See supra* Subparts III.A–C.

courts "virtually powerless" to review his actions.[454] As the Bears Ears Inter-Tribal Coalition wrote in its proposal, "The President's exact authority to provide for Collaborative Management with Tribes . . . has not been tested because no president has yet provided for it, but every sign is that the courts would uphold it."[455]

President Biden must draft each monument proclamation to ensure that the federal-tribal co-management arrangement does not run afoul of the non-delegation doctrine, which prohibits the federal government from delegating authority to non-federal entities.[456] A 1999 federal court case illustrates how the doctrine applies in the context of federal land management.[457] In *National Park & Conservation Ass'n v. Stanton*, the District Court for the District of Columbia rejected the NPS's attempt to delegate essentially all of its decision-making authority over the Niobrara National Scenic River to a private entity, holding that the non-delegation doctrine prevented the federal agency from "completely shift[ing] its responsibility to administer the Niobrara to a private actor."[458] The court made it clear that such delegations are unlawful only if they attempt to transfer full and complete authority: "Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority."[459]

To ensure every new federal-tribal co-management structure passes this test, President Biden's monument proclamations should leave final decision-making authority to the federal government, as the Bears Ears Inter-Tribal Coalition suggested in their proposal:

> [T]he Federal and Tribal teams are directed to work together to reach joint decisions. Up to that point, the system does not violate the unlawful delegation doctrine because, by definition, the Federal agency will have approved these decisions. But, if the collaborators cannot agree, the dispute will go to mediation. If all that fails, then the Secretary of Interior or Agriculture makes the final decision. The Departments, therefore, have three final decision-making mechanisms and the requirements of the unlawful delegation doctrine have been met.[460]

If federal courts follow the reasoning in *National Park & Conservation Ass'n v. Stanton*, Biden's monument proclamations will not run afoul of the non-delegation doctrine.

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454. *See* Hartman, *supra* note 60, at 163. Further, given his presidential veto power, Congress will be unable to prevent President Biden from testing the outer limits of his authority under the Antiquities Act. *See id.* at 166–67; *see also supra* Parts III.B–C.

455. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 26.

456. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

457. *See* Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7 (D.D.C. 1999).

458. *Id.* at 18.

459. *Id.* at 19.

460. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 27.

Second, co-management must be more than just legally sufficient; it must work in practice. The case studies of federal-tribal co-management at Canyon de Chelly and Bears Ears[461] enable the identification of three important practical considerations. Each one of President Biden's monument proclamations must include: (1) specifics about the division of management responsibilities between federal and tribal authorities; (2) procedures for dispute resolution; and (3) adequate protections for tribal rights. The Bears Ears Inter-Tribal Coalition accounted for all three of these considerations; President Biden should follow its lead.

First, monument proclamations should be specific in spelling out how management responsibilities should be divided between federal and tribal authorities. As discussed above, courts will defer to the president's discretion to direct the management of newly-created monuments so long as the president's proclamation includes some language on which they can base their decisions.[462] The Bears Ears Coalition spelled out exactly how President Obama should divide management responsibilities to enable true collaboration between the tribes and the United States; President Biden should follow their blueprint even though President Obama did not. First, with the creation of each new national monument, President Biden should establish a management commission made up of representatives from each tribe and each federal agency that will be involved in its management. A monument's commission will serve as "the policy making and planning body for the monument."[463] In the model proposed by the Bears Ears Coalition, tribal representatives outnumbered federal representatives on the Commission. Given that one of the goals of President Biden's new monuments should be to shift the traditional balance of power away from federal agencies and—as much as possible—return lands to Indigenous stewardship, Biden should endeavor to give as much power as possible to the tribal representatives on each commission. Depending on the number of tribes and federal agencies involved in the management of each new monument, Biden may consider altering the structure proposed by the Bears Ears Coalition by, for example, requiring two representatives from each tribe and one from each agency.

Next, each of Biden's proclamations should require that the relevant commission draft a specific monument management plan at the outset of the relationship. Each management plan should include use restrictions, as well as rules and standards governing control over scientific and cultural resources within the area of the monument. The Bears Ears Coalition recognized that this would likely be the most difficult part of the process—but also the most rewarding:

In our many Tribal discussions of collaborative management, we saw

461. *See supra* Subpart IV.B.
462. *See supra* Subpart III.B.
463. *See* BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 29.

> differences in the way Federal and Tribal agencies view "land management." Federal laws, and often state laws as well, generally call for regulating logging, grazing, mining, hunting and fishing, water diversions, and activities that cause air and water pollution.
>
> At our meetings, when Tribal land managers and Tribal members discussed land management, they invariably used fundamentally different categories . . . .
>
> We think of it this way. It's not a matter of deciding which approach toward cataloguing is better or worse. What we believe is that there will be a powerful, constructive vitality and sense of searching for the right answers when the two groups work together in Collaborative Management, beginning with the management plan. We think it will result in as good a monument as there has ever been. And that's consistent with our fondest goal in this proposal.[464]

Each management plan will require tribe-specific, site-specific, and region-specific planning. In the absence of many real-world models—outside of those already discussed—the effects of slight differences in language are difficult to predict. Thus, Biden should include in each monument proclamation a catch-all provision *requiring* the federal representatives on the Commission to "collaborate jointly" with the tribal representatives "on all procedures, decisions, and other activities" that the management plan does not specifically circumscribe.[465]

Second, President Biden should also use each proclamation to establish procedures for resolving disputes between federal and tribal authorities on the relevant Commission. As discussed above, President Hoover's proclamation creating Canyon de Chelly National Monument failed to include any dispute resolution procedures.[466] As a result, when Navajo officials learned about the NPS's pillaging of their human remains and other cultural resources, they were forced to try resolving the dispute on their own through direct communication with the agency.[467] Because nothing in Hoover's proclamation required NPS officials to respond to their concerns, the Navajo Nation's only hope for resolution was decades-long federal litigation.

The Bears Ears Coalition addressed this problem head-on, recommending that President Obama include in his Bears Ears proclamation a provision requiring federal and tribal representatives on the Commission to "proceed to appropriate mediation" in cases of "impasse, undue delay, or other extraordinary circumstances."[468] President Biden should work with each tribe and agency stakeholder to include a similar provision in his monument proclamations.

Third and finally, President Biden must ensure that his monument

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464. *Id.* at 38.
465. *See id.* at 22.
466. *See supra* Subpart IV.B.
467. *See* Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084, 1089–90 (9th Cir. 2016).
468. BEARS EARS INTER-TRIBAL COALITION, *supra* note 230, at 22.

proclamations provide adequate protection for tribal rights and interests. Each one should list the rights and interests of all Native nations involved, including their rights and interests in the monument's land, water, natural resources, and cultural resources, as well as in hunting, fishing, gathering, holding events, and conducting other culturally important activities on the land. Each proclamation should then explicitly state that the aforementioned list of rights and interests is not exhaustive and that the establishment of the monument does not in any way impair any existing tribal rights.

CONCLUSION

The dominant narrative around the public lands tends to ignore the systemic injustices embedded in the lands themselves. The national monuments that often cause uproar from ranchers, developers, and extractive industry interests would not exist but for the dispossession of Indigenous lands by the U.S. government. Modern approaches to managing the public lands are rooted in settler-colonialist ideals and, thus, continue to perpetuate these historic injustices.

However, the federal Indian trust doctrine—rooted in inherent tribal sovereignty and first articulated by Chief Justice Marshall in 1832—imposes an affirmative duty on the president and all federal officials to protect tribal rights and promote tribal sovereignty and self-determination. Several legal scholars have framed the trust doctrine as a source of tribal rights and federal responsibilities on the public lands.[469] Professor Tsosie argues that "public land policy should be shaped by the preexisting obligations of the United States to the first nations of this continent."[470] Professor Zellmer agrees: "Tribal sovereignty and the protection of cultural integrity and land-based resources are critical aspects of the federal trust responsibility, given the extensive backdrop of government involvement in [Native] culture, religion, and property rights."[471] Professors Wood and Carpenter point to a number of recent cases where courts held that the trust doctrine protects tribal rights in situations where federal land management agencies are faced with competing interests such as development, extraction, or agriculture.[472]

Recent presidents have attempted to carry out the federal government's trust obligations through tribal consultation requirements. Because these requirements are merely procedural in nature, however, federal land management agencies often use their considerable discretion—mandated by multiple-use statutes like FLPMA—to make decisions about the public lands that favor development and extractive interests at the expense of tribal rights and interests.

President Biden must find a way to break away from this broken system, reengage with Native nations on a government-to-government basis, and enact

469. *See supra* Subpart II.C.
470. Tsosie, *supra* note 14, at 272.
471. Zellmer, *supra* note 130, at 437.
472. *See* Carpenter, *supra* note 139, at 1109.

policies designed to redress the fundamental injustices embedded in the federal public lands. The Antiquities Act allows the president to designate national monuments efficiently, effectively, and without congressional approval. As President Biden begins his efforts to protect 30 percent of the land in the United States over the next decade, he should prioritize sharing management authority with Native nations. By building on President Obama's work and establishing a slate of new national monuments in true collaboration with Native nations, President Biden will usher in a new era of public lands policy centered around mutual partnership, Indigenous stewardship, and justice.

Further, by affirming each new monument as an instrument for carrying out the federal government's trust responsibility to Native nations, President Biden will set the groundwork for a broad affirmative interpretation of the trust doctrine—one that envisions, enables, and secures "a more active role for [Native] nations as sovereigns who are able to apply their own norms and values to structure appropriate land use."[473] By embedding Indigenous values, ecological knowledge, and land stewardship practices in the management of national monuments and other public lands, President Biden will deepen the government-to-government relationship between the United States and Native nations, and—perhaps—begin to make amends for centuries of settler-colonialist oppression and violence at the hands of his predecessors.

473. Tsosie, *supra* note 14, at 297.