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# The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands

**ABSTRACT**

*Several Native Nations in the United States have cultural resources and reserved treaty rights on federal lands. This article examines two approaches that can be used to protect such values and rights: the use of cooperative management models and protected land-use designations made by Congress or federal land agencies. Background on both subjects is provided, and the case of the Badger-Two Medicine area in Montana is used for illustration. Though most pronounced in the context of fish and wildlife management, tribes are playing several roles in cooperatively managing federal lands and resources. Some of the most substantive cooperative arrangements on federal land are the result of laws and policies mandating their use. Protected land-use designations, including place-based legislation, have also been used to protect sacred lands and reserved treaty rights. This article describes several cases where such strategies have been used in the past and analyzes what they might offer in contrast to more reactive and procedural-based protections.*

## INTRODUCTION

Several Native Nations in the United States have cultural resources and reserved treaty rights on federal lands. In many cases, these values and rights are threatened by resource development and recreational activities permitted by a federal land agency. A typical approach to such conflicts is for a tribe to legally challenge an agency's decision or to seek some type of accommodation by the agency through planning and other decision making processes. This article explores two additional, often interrelated, strategies that can be used by tribes to protect cultural resources and reserved rights:

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(1) cooperative management arrangements, and (2) protected land-use designations. These two strategies, especially the use of protected land-use designations made by Congress, have not received as much study and analysis as have other approaches that are more reactive and procedural-based.

The central findings and focus of the article are as follows. First, tribes are playing several roles in cooperatively managing selected federal lands and resources, from helping set standards and desired conditions, to implementing laws. Co-management models are most advanced in the context of fish and wildlife management, largely because of judicially enforced off-reservation treaty rights, and the unique situation in Alaska. If applied, a cooperative or co-management model on federal land should be built upon basic principles of American Indian law. This is why tribal co-management should not be confused with other types of stakeholder cooperation or other public-private partnerships. Though its application on federal land is not without challenge, there is ample legal authority and internal agency direction encouraging more collaborative relationships with tribal governments. One important finding is that some of the most substantive co-management arrangements on federal land are the result of laws and policies mandating their use. The Kasha-Katuwe Tent Rocks National Monument and the Santa Rosa and San Jacinto Mountains National Monument provide examples.

Cultural resources and reserved treaty rights on federal land can also be protected by land-use designations made by agencies or Congress. Traditional Cultural Property (TCP) designation, made by agencies pursuant to the National Historic Preservation Act (NHPA), is an often-used example. The success of this designation in protecting tribal cultural values ultimately depends upon the manner of its implementation. More substantive protection can be provided through place-specific land use legislation.

Protected land-use designations made by Congress have been used as a way to protect tribal cultural values and off-reservation treaty rights. A glance at the history explains why Indian tribes have good reason to be suspicious of protected land law and policy. Nevertheless, some tribes have sought legislative solutions that might protect cultural values more permanently, including federal wilderness designation. Some examples of these attempts are the El Malpais Act, the T'uf Shur Bien Preservation Trust Area Act, the Ojito Wilderness Act, omnibus wilderness laws, and proposed wilderness bills. Tribes seeking to use protected land designations, especially access management, to protect tribal values, may encounter special problems and challenges.

Protected land designations made through federal land reclassifications and by tribal governments may also be used to preserve tribal resources and rights. Some examples of protected land designations are the

return of Blue Lake to Taos Pueblo, the Grand Canyon National Park Enlargement Act, and the Ojito Wilderness Act; the Wind River Reserve and the Mission Mountains Tribal Wilderness are examples of tribally-managed protected areas. Congress could make other land designations that permanently protect cultural resources and reserved treaty rights on federal land.

This article proceeds in the following fashion. First, I provide an example of a prominent conflict regarding management of cultural resources and reserved treaty rights on a national forest. Montana's Badger-Two Medicine area, managed by the Lewis and Clark National Forest, is used for illustration. Three interrelated factors make this place particularly significant: (1) off-reservation treaty rights, (2) religious and cultural significance, and (3) ceded lands contiguous to reservation boundaries (and bordered by U.S. Forest Service [USFS], National Park Service [NPS], and federal wilderness lands on other boundaries). The Blackfeet Nation considers this area sacred and has several reserved treaty rights on the ceded lands. These values and rights are threatened by oil and gas development, motorized recreation, and other incompatible uses of national forest land. I provide a brief summary of the Badger-Two Medicine case and review the claims made by the Blackfeet Nation regarding management of the area. I then examine the use of tribal co-management in the United States, and explain how this model, most often used with fish and wildlife management, might be used on federal land. This section reviews some relevant principles of American Indian law as they relate to co-management while discussing the different roles that can be played by tribes in cooperatively managing federal land and natural resources. This is followed by a review of different protected land-use designations that may be used to protect sacred sites and reserved rights on federal land. Particular attention is paid to the National Historic Preservation Act's Traditional Cultural Property or District designation, federal wilderness designation, and other legislative-based options. I discuss the general history and design of these designations and document where they have been used in other parts of the country.

This article is mostly based on a review of relevant federal land laws and their congressional histories (e.g., reports, hearings, testimony, etc.), case law, administrative and tribal government materials (e.g., resource plans and environmental impact statements, agreements, contracts, regulations, etc.), and scholarly literature. I also communicated with federal land managers, tribal representatives, attorneys, scholars, and other interested parties in collecting materials and pursuing some issues and cases discussed herein. Note that I provide no framework for evaluating the success and failure of co-management models and land-use designations because such a proposal would require extensive interviews and other analytic methods to assess how political actors evaluate these policies and

their implementation. This initial inquiry is designed to set the stage for more in-depth analysis and evaluation of how cultural resources and reserved treaty rights can be protected in the future. My goal is not to instruct how tribes, agencies, and other political actors should protect cultural resources and reserved rights, but rather to survey various methods of protection and how they have been used by others.

## I. THE BADGER-TWO MEDICINE CASE

The Badger-Two Medicine area is home to one of the most prominent sacred land disputes in the United States.[1] It is also one of several places, state and nationwide, where a Native Nation possesses reserved treaty rights on a national forest.[2]

This area is bounded by Glacier National Park to its north, the Bob Marshall and Great Bear Wilderness areas to its south and west, and the Blackfeet Indian Reservation to its east. This larger geographic area has

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1. These conflicts are also evident in Montana. In the Sweet Grass Hills, for example, the Department of Interior withdrew lands having religious, cultural, and environmental significance from mineral location and entry. Legislation was also introduced by Congressman Pat Williams of Montana to permanently prohibit mineral location and entry within the Bureau of Land Management's (BLM) Sweet Grass Hills' Area of Critical Environmental Concern and to establish a "Sweetgrass Hills Natural Area." To Designate Certain Bureau of Land Management Land in the State of Montana to Preserve Unique Cultural and Natural Features, H.R. 2074, 104th Cong. § 2 (1995). In *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 758 (D.C. Cir. 2007), the Court found the BLM's withdrawal of land permissible and not in violation of the United States Constitution's Establishment Clause. In another case, the Federal Energy Regulatory Commission (FERC) denied a license for a proposed hydroelectric development on the Kootenai River at Kootenai Falls, finding that such development "is not best adapted for beneficial public uses of the river, including its use for wildlife and aquatic habitat and other recreational purposes, and for religious practices of the Kootenai people." *See* Northern Lights, Inc. Project No. 2752-000, 39 Fed. Energy Reg. Comm'n Rep. (CCH) 61,352, 62,101–02 (1987). For an overview of other conflicts throughout the country, see Sacred Lands Film Project, http://www.sacredland.org/ (last visited Dec. 30, 2008).

2. For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation have expansive use rights on federal lands. Article III of the Hellgate Treaty provided that Indians were to receive "[t]he exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975 (1855). The Montana Supreme Court found that "open and unclaimed land" includes national forest lands. *See* Montana v. Stasso, 563 P.2d 562, 565 (Mont. 1977).

been historically governed through a succession of treaties between the Blackfeet Nation and the federal government. Most important, for purposes here, is the Blackfeet Treaty of 1895–96 (1896 Treaty). For $1,500,000 the Blackfeet ceded nearly 400,000 acres of its reservation to the U.S. government. Most of this ceded land is now managed by Glacier National Park, with the remaining 130,000 acres managed by the Lewis and Clark National Forest. This area is commonly referred to as the "ceded strip" or the Badger-Two Medicine area, and is managed as geographic unit RM-1 by the USFS.

As discussed below, it is quite common for tribes to have reserved rights in treaties and the 1896 Treaty is no exception. Within it the Blackfeet reserved several rights on lands ceded to the U.S. government. Article I reads:

> That said Indians shall have, and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber for agency and school purposes, and for their personal uses for houses, fences, and all other domestic purposes: *And provided further*, That the said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State of Montana.[3]

Put simply, the Blackfeet have reserved rights in both Glacier National Park and the Lewis and Clark National Forest, including the Badger-Two Medicine area. Such rights are an encumbrance upon the land and can only be abrogated by an explicit act of Congress (discussed below).

The importance of the 1896 Treaty and its reserved rights cannot be overstated. For the Blackfeet, it is the major basis on which various claims to the Badger-Two Medicine area are made. To start with, the Tribe has questioned the legality of the 1896 Treaty because of misinformation provided to the Blackfeet by federal negotiators, and because tribal oral history holds that the Blackfeet were only agreeing to a mining lease, not a final sale of land.[4] This contention aside, the Tribe has based several of its

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3. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, § 9, art. I, 29 Stat. 350, 350 (1896).

4. U.S. FOREST SERV., LEWIS & CLARK NATIONAL FOREST PLAN ENVIRONMENTAL IMPACT STATEMENT, vol. II, app. at F-110 (1986) (Position Paper of the Blackfeet Tribe of the Blackfeet Indian Reservation) [hereinafter 1986 Blackfeet Position Paper]. *See also* U.S. FOREST SERV. & BUREAU OF LAND MGMT., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR EXPLORATORY OIL & GAS WELLS: PROPOSED OIL & GAS DRILLING NEAR BADGER CREEK & HALL CREEK, app. at P-46 (1990) (statement of the Blackfeet Tribal Business Council) [hereinafter BADGER & HALL CREEK EIS].

positions and criticisms regarding forest management on the rights reserved in the 1896 Treaty. They are one reason, for example, why the Tribe has historically opposed oil and gas drilling in the area.[5] The Blackfeet now urge qualified lease owners to take advantage of a recently passed lease-withdrawal law and tax incentives. "The fate of the Blackfeet Nation and our confederated Tribes is bound to the fate of the Badger-Two Medicine and we refuse to accept any activities within the Ceded Strip that violate this Traditional Cultural Site and our Treaty Rights."[6]

Reserved treaty rights also were used at one point by tribal representatives to oppose wilderness designation of the Badger-Two Medicine area. The original Great Bear Wilderness bill, for example, included the Badger-Two Medicine area, but it was eventually removed from the final version passed in 1978 because of Blackfeet opposition.[7] Though its position on possible wilderness designation later changed,[8] the Tribal Business Council once opposed such designation because it was seen

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5. BADGER & HALL CREEK EIS, *supra* note 4, app. at P-47. The Tribe has a history of opposing oil and gas and other development in the Badger-Two Medicine and the Rocky Mountain Front, partly because it "believes that energy development and associated activities along the Rocky Mountain Front could violate our treaty and reserved rights." Letter from William Talks About, Chairman, Blackfeet Tribal Business Council, to Whom it May Concern (Dec. 8, 2004) (on file with author). *See also* U.S. FOREST SERV., LEWIS & CLARK NATIONAL FOREST OIL & GAS LEASING: FINAL ENVIRONMENTAL IMPACT STATEMENT 39 (1997) (Blackfeet Res. 111-97).

6. Letter from Earl Old Person, Chair, Blackfeet Tribal Bus. Council, to Robert Malone, Chairman and President of BP American, Inc. (Sept. 7, 2007) (on file with author).

7. Arnold W. Bolle, Wilderness Protection on Forest Service Lands: Badger-Two Medicine 9 (June 8–10, 1987) (presented at the Natural Resources Law Center, University of Colorado School of Law) (unpublished manuscript, on file with author). According to Bolle, "[e]ver since then, members of the delegation refuse to consider wilderness designation of this area until they have full approval from the tribe. Environmentalists feel that they made a serious error by not being in touch with the tribe and working out an agreement with them." *Id. See also* Pub. L. No. 95-546, 92 Stat. 2062 (1978) (codified at 16 U.S.C. § 1132 (2006)).

8. The position was changed to the following:

> The Blackfeet Tribal Business Council, after much negotiation with various elements of the Blackfeet reservation populace, have decided that the five year study of possible wilderness status for the "Ceded Strip" or, as it has more recently been called, "The Badger-Two Medicine" area of the northern portion of the Lewis and Clark National Forest, would benefit the Blackfeet…If the Montana Congressional delegation can assure the Blackfeet Tribal Business Council that the full force and authority of the legal rights outlined in the Agreement of 1895 will be maintained during the five year period of study status recommended in your wilderness bill, the Blackfeet Tribal Business Council will remain supportive of the measure.

BADGER AND HALL CREEK EIS, *supra* note 4, app. at J-13 (letter from Earl Old Person, Chairman, Blackfeet Tribal Business Council, to Senator Max Baucus).

as adversely impacting Blackfeet reserved rights, such as access to timber, grazing, and water rights.[9]

On the other hand, some Blackfeet traditionalists, including the Pikuni Traditionalists Association, have advocated a form of federal wilderness designation for the Badger-Two Medicine area.[10] In appealing the Lewis and Clark Forest Plan in 1986, one prominent group of Blackfeet traditionalists proposed protecting the Badger-Two Medicine area as wilderness, with some special provisions. These included a timber removal clause for Blackfeet Tribal members,[11] a permit system to limit overuse that is controlled by traditional religious leaders, and self-enforcement procedures for traditional religious leaders and practitioners aimed to protect site locations and sacred objects.[12] According to the appellants, "[w]ilderness designation is the wish and recommendation of those who practice the native traditional religion in the Badger/Two Medicine area" and "[t]his is the most effective way that the government could manage its property without infringing on its citizens' rights to free exercise of religion,

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9. *Id.* app. at J-7 (letter from Earl Old Person, Chairman, Blackfeet Tribal Business Council, to Representative Pat Williams).

10. Press Release, Pikuni Traditionalists Ass'n, Blackfeet Nation Cultural and Spiritual Wilderness Protection Act (April 29, 1989) (media packet with bill, map, and accompanying information on file with author) [hereinafter Pikuni Traditionalists Ass'n]. The proposed act is based on the model used to protect the Blue Lake area in New Mexico, as explained in Part III(C)(1).

11. There has been some debate concerning the Blackfeet Treaty timber provision and its relation to possible wilderness designation of the Badger-Two Medicine. The 1986 Lewis and Clark National Forest Plan cites the Blackfeet Treaty timber provision as precluding possible wilderness designation: "Under the Agreement, the Blackfeet Tribe retained the right to cut and remove timber, consequently, these lands are not included in the Forest's regulated timber base, and are not included in any wilderness recommendation." U.S. FOREST SERV., LEWIS & CLARK NATIONAL FOREST PLAN RECORD OF DECISION 11 (1986). But others see the timber clause as not posing an insurmountable hurdle to wilderness designation. The proposed Blackfeet Nation Cultural and Spiritual Wilderness Protection Act of 1989 included language stipulating that "the Blackfeet Indians shall use the lands for traditional purposes only, such as a source of water and wood, timber for their personal uses for houses, fences, and all other domestic purposes, and other natural resources for their personal use," all subject to various regulations or conservation purposes. *See* Pikuni Traditionalist Ass'n, *supra* note 10. Jay Hansford Vest, whose writing accompanies the Lewis and Clark Forest Plan appeal as an appendix, argues that wilderness designation of the Badger-Two Medicine is compatible with Blackfeet timber rights and the Wilderness Act. Jay Hansford C. Vest, A Badger-Two Medicine Review 4–5 (no date) (unpublished manuscript, on file with author). Vest cites section 4(d)(3) of the Wilderness Act, Pub. L. No. 88-577 (1964), that allows for timber cutting "under sound principles of forest management" where required for mining purposes. He also cites the Blue Lake legislation, as explained in Part III(C)(1). Vest argues that the USFS claim that the Blackfeet Treaty "right to cut and remove timber" precludes wilderness designation is mistaken.

12. ROBERT J. YETTER ET AL., APPEAL OF THE LEWIS AND CLARK FOREST PLAN AND ENVIRONMENTAL IMPACT STATEMENTS 25 (1986) (unpublished, on file with author).

and to 'accommodate' that 'right to the fullest extent.'"[13] It is against this historical backdrop that the Blackfeet, USFS, conservationists, and Montana's congressional delegation have struggled in how to best protect the Badger-Two Medicine area and Blackfeet Treaty rights.[14]

The Blackfeet have criticized the USFS in the past for the "narrow restricted manner" in which the agency has understood the Tribe's reserved rights.[15] Following one controversial oil and gas proposal, for example, the Tribal Business Council advocated a much stronger tribal role in managing the area, while emphasizing that priority should be given to reserved rights:

> [W]e believe that as the holders of substantial property rights in the Badger-Two Medicine Unit, resource management decisions should be made by the Blackfeet in the first instance, or at least said decisions should be made only after consultation with and agreement of the Blackfeet…it is clear that those lands cannot seriously be considered "public lands" as that term is commonly understood…Thus, the "public" nature of the Badger-Two Medicine Unit is limited by and dependant [sic] upon the Blackfeet Treaty Rights.[16]

The Blackfeet Nation, as represented by its Tribal Business Council, has also made clear that it considers the Badger-Two Medicine area sacred and wants the area managed as an ethnographic/cultural landscape. The Chairman of the Council, William Talks About, says that

> [t]he Front is our 'backbone of the world' and a vital part of our culture since it gives us life and is utilized everyday as it was by past generations of our ancestors to provide us

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13. *Id.*

14. Take, for example, some of the bills introduced by Montana's congressional delegation. In 1987, Montana Senator John Melcher introduced a bill designed to clarify Blackfeet Treaty rights, preclude further wilderness study of the area, and require the USFS to prepare a "joint management plan" for the area in consultation with the Tribal Business Council. *See* S. 275 (1988) (on file with author). In 1990, Montana Representative Pat Williams introduced the "Badger-Two Medicine Act" that would have designated the area as "congressional study lands" for the purpose of protecting treaty rights. The proposed bill withdrew lands from mining and energy development and called for the USFS to cooperate with the Tribe in the preparation of a "joint land management plan." It prohibited commercial timber sales in the area, though it did not "preclude the gathering of timber by the Blackfeet Tribe in the exercise of valid treaty rights." To Designate Certain Lands in the State of Montana as Congressional Study Lands for the Purpose of Protecting Indian Treaty Rights, H.R. 3873, 101st Cong. (1990). In 1993, Senator Max Baucus introduced the Badger-Two Medicine Protection Act, S. 583, 103rd Cong. (1993). The bill proposed to conduct a wilderness review of the area, with a tribally-represented committee providing advice and reports to the Secretary and Congress, with special consideration given to Blackfeet treaty rights.

15. BADGER & HALL CREEK EIS, *supra* note 4, app. at J-9.

16. *Id.* app. at J-7, J-9.

> strength, subsistence, cultural identity and to connect us with our creator. We are committed to its protection and to the protection of our treaty and reserved rights.[17]

Several sources have carefully documented the cultural and religious significance of the Badger-Two Medicine area.[18] Within the area 89,376 acres are eligible for designation as a Traditional Cultural District (TCD) and managed pursuant to the NHPA and its regulations (discussed below).[19] In declaring eligibility of the area for the National Register of Historic Places, the Keeper of the Register stated that

> the remote wilderness area is associated with the significant oral traditions and cultural practices of the Blackfoot people, who have used the lands for traditional purposes for generations and continue to value the area as important to maintaining their community's continuing cultural identity… the area is directly associated with culturally important spirits, heroes and historic figures central to Blackfoot religion and traditional lifeways and practices.[20]

Motorized recreation in the Badger-Two Medicine area is also a major tribal concern. The Tribal Council opposes motorized use in the area, with some possible exceptions for short segments of existing, peripheral roads.[21] Ninety-four miles of national forest system roads or trails within the area's TCD-eligible lands are open to motorized use, with another 28.7 miles of undesignated routes found within that boundary.[22] According to the USFS, "[t]he Blackfeet see the proliferation of motorized use on these routes as an increasing trend with commensurate cumulative effects to the cultural landscape and a threat to the continuance of traditional practices and associated cultural lifeways."[23] Furthermore, "[t]he Tribe has identified

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17. Letter from William Talks About, *supra* note 5.

18. *See, e.g.*, BOB YETTER, THE LAST STRONGHOLD: SACRED LAND OF THE GRIZZLY, WOLF, AND BLACKFEET INDIAN (1992) (on file with author); U.S. FOREST SERV., FS-6200-7, REPORT ON SOCIAL EFFECTS, PERCEPTIONS, AND ATTITUDES OF THE CHEVRON EXPLORATORY WELL PROPOSAL, LEWIS & CLARK NATIONAL FOREST 8 (1987) (on file with author); and Jay Hansford C. Vest, *Traditional Blackfeet Religion and the Sacred Badger-Two Medicine Wildlands*, 6 J.L. & RELIGION 455 (1988) (similar unpublished papers by Vest on file with author).

19. The remaining parcels have been studied, and at the time of this writing documents are being prepared to send to the Keeper for determinations of eligibility and possible expansion.

20. U.S. FOREST SERV., DRAFT ENVIRONMENTAL IMPACT STATEMENT: ROCKY MOUNTAIN RANGER DISTRICT TRAVEL MANAGEMENT PLAN 91 (2005) [hereinafter TRAVEL DEIS].

21. *Id.* at 219. This has been a long-time position of the Tribe. *See, e.g.*, 1989 Blackfeet Position Paper (1986), *supra* note 4, at 7 (opposing all motorized activity and the building of new roads in the area).

22. *Id.* at 94.

23. *Id.* at 97.

no acceptable mitigation (other than avoidance) to anticipated adverse effects regarding the TCD."[24] The USFS reports that the Blackfeet indicate that closing roads by gating is its preferred management option, because elders who cannot walk or ride horseback could be accommodated by use of a wagon or other non-motorized means on the existing road system.[25]

This brief background helps explain continued tribal interest in co-management of the Badger-Two Medicine area.[26] The Blackfeet have long advocated a larger role for the Tribe to play in managing this sacred land and its reserved rights. The remainder of this article examines selected cases where other sacred places and treaty-based resource disputes were managed via co-management arrangements or legislated land designations.

## II. CO-MANAGEMENT

### A. Co-Management and Federal Indian Law

Options in tribal co-management cannot be understood without first recognizing some foundational principles of Indian law. These principles also explain why *tribal* co-management differs from other types of collaborative management for federal lands.

First, tribal governments are sovereign and have inherent powers of self-government. For this reason, there is a unique government-to-government relationship between federally-recognized tribes and the federal government. Several laws, regulations, executive orders, and internal agency management directives make clear how this relationship affects federal land management.[27] I emphasize this point because of the

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24. *Id.* at 94.

25. *Id.* at 95.

26. *See, e.g.*, 1986 Blackfeet Position Paper, *supra* note 4, at 5; TRAVEL DEIS, *supra* note 20, at 218. Though not writing in his official capacity as an attorney for the Blackfeet Legal Department, John Harrison states the following:

> Tribes should not overlook the authority of the Forest Service to administratively designate and manage specific landscapes on the forest. Special use areas, [s]pecial interest areas, experimental areas, wildlife management areas and wilderness study areas are all administratively designated by the Forest Service. These designations can be utilized to protect resources that are of concern to tribes. Tribes should familiarize themselves with the range of management options available to the Forest Service, and should be ready to propose and justify specific management options during consultation.

John Harrison, American Indians and Federal Conservation Statutes: From Conflict to Collaboration 23 (2006) (unpublished paper, University of Montana, Environmental Studies Program) (on file with author).

27. For an overview focused on the USFS, see U.S. FOREST SERV., FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS (1997) [hereinafter RESOURCE GUIDE], *available at* http://www.fs.fed.us/people/tribal.

historic tendency of land management agencies to erroneously think about tribes as one of several "stakeholders" or "publics" that must be consulted before an activity takes place.

Also relevant to co-management is the trust relationship between tribes and the federal government. Though sovereign, Indian tribes are not foreign nations, but rather distinct political communities "that may, more correctly, perhaps be denominated domestic, dependent nations," whose "relation to the United States resembles that of a ward to his guardian."[28] A less paternalistic way of thinking about this relationship is by thinking in terms of property; that the federal government has a duty to prevent harm to another sovereign's property.[29] The federal government, in other words, has a responsibility to protect the rights, assets, and property of Indian tribes and citizens. Some courts, moreover, have used the trust doctrine as a way to force the federal government to protect tribal lands, resources, and off-reservation (property) rights. *Klamath Tribes v. United States* (1996) provides one relevant example where a tribe successfully stopped planned timber sales by the USFS to protect deer herds reserved by treaty.[30] The Oregon District Court ruled that the federal government had a "substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend."[31] This trust duty, enforced in this case and others,[32] provides the context in which tribal co-management is taking place.

Another example of how the trust responsibility can foster intergovernmental cooperation is the Joint Secretarial Order on "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act."[33] The Order was negotiated between tribal representatives and the federal government to harmonize "the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation."[34] Several

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28. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 13 (1831) (one of the famous "Marshall Trilogy" cases).

29. See the collective work of Mary Christina Wood, including *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

30. Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

31. *Id.* at *8 (citing Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973)).

32. For a review, see Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 UTAH L. REV. 355, 362–63 (2003–04).

33. DEP'T OF INTERIOR & DEP'T OF COMMERCE, JOINT SECRETARIAL ORDER NO. 3206 (June 5, 1997).

34. *Id.* § 1.

principles are stated in the Order encouraging "cooperative assistance," "consultation," "the sharing of information," and the "creation of government-to-government partnerships to promote healthy ecosystems."[35] Among other applicable provisions, the Order also calls for federal-tribal intergovernmental agreements:

> The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribes own ecosystem management objectives.[36]

Some commentators believe that an effective way to harmonize the trust responsibility with species conservation is through the use of such cooperative agreements, including co-management.[37]

The process in which this Order was made is also noteworthy in that it contrasted to more typical consultation procedures. Instead, the Joint Secretarial Order was produced through a formal negotiation, and protocols for guiding the process were jointly developed. There are some lessons here for the USFS, according to law professor Charles Wilkinson, who participated in the process, because "there are times for consultation and times for negotiations," and "[n]ow it is time to acknowledge the duty to negotiate in the right circumstances."[38]

As discussed in Part I, reserved treaty rights are central to the Badger-Two Medicine case. Treaties are legally binding agreements between two or more sovereign governments.[39] Three hundred and eighty-nine treaties precede the creation of the USFS.[40] Sixty treaties contained

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35. *Id.* § 4.

36. *Id.* § 6.

37. Sandi B. Zellmer, *Conserving Ecosystems Through the Secretarial Order on Tribal Rights*, 14 NAT. RESOURCES & ENV'T 162, 211 (1999–2000). "The Secretarial Order provides a vehicle for turning the ESA sword into a tool for cooperative approaches that equitably distribute the conservation burdens among tribal, federal, state and private interests." *Id.* at 162.

38. Charles F. Wilkinson, *Indian Tribal Rights and the National Forests*, 34 IDAHO L. REV. 435, 461 (1997–98). For more on his perspective about the Order and its process see Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063 (1997).

39. U.S. CONST. art. II, § 2, cl. 2.

40. RESOURCE GUIDE, *supra* note 27, at 18.

provisions that reserved rights on what was then public domain land.[41] The extent of off-reservation use rights reserved by a tribe depends on specific treaty language, but many treaties reserved various rights on ceded lands, and such lands are now managed by different federal land agencies. On national forest lands, for example, off-reservation treaty rights include hunting and fishing rights, gathering rights, water rights, grazing rights, and subsistence rights. It is critical to understand that the term "reserved rights" means just that; the federal government did not *give* such rights to the tribes, but rather the tribes *reserved* such rights as sovereigns.[42] This is partly why such reserved rights constitute property, and why the governmental taking of this property requires financial compensation.[43] When interpreting treaties, Courts use accepted canons of construction that are liberally construed in favor of tribes. Treaties are to be interpreted as the Indians who agreed to them understood them, and any ambiguities in the treaty are to be resolved in favor of the tribes.[44] Congress has the plenary power, however, to abrogate treaty rights, though it must do so explicitly and with clear evidence for the Courts to recognize such change.[45]

Also relevant to the forthcoming discussion is the U.S. Constitution's Establishment Clause and its relationship to cultural resources management. The Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[46] It is within these parameters that the courts have decided a number of sacred lands disputes by applying different tests.[47] For purposes here, the two most important are *Lyng v. Northwest Indian Cemetery Protective Association* (1988)[48] and *Bear Lodge Multiple Use Association v. Babbitt* (1998).[49]

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41. *Id.*

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

43. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

44. *See* Winters v. United States, 207 U.S. 564, 576–77 (1908); *Winans*, 198 U.S. at 380–81; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

45. The Supreme Court's test for Congressional abrogation is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 740 (1986). *See generally* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

46. U.S. CONST. amend. I.

47. *See generally* Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T. 19 (1997) (reviewing numerous cases and explaining the tests used by courts in deciding them).

48. 485 U.S. 439 (1988).

49. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd,* 175 F.3d 814 (10th Cir. 1999), *cert. denied* 529 U.S. 1037 (2000) [hereinafter *Bear Lodge*].

In *Lyng*, the USFS planned to allow major timber harvesting activities in the high country held sacred by three California Indian tribes, and to construct 200 miles of logging roads in areas adjacent to the sacred Chimney Rock area. One section of road linking the towns of Gasquet and Orleans (known as the "G-O" road) would dissect the high country's sacred places. Indian plaintiffs argued that completion of this road and its attendant noise and environmental damage would violate the free exercise clause by degrading sacred lands and eroding the religious significance of this area. But the Supreme Court ruled in favor of the USFS, finding no free exercise violation because the government was not coercing Indians into religious beliefs. Similar free exercise-based arguments have basically been abandoned by Indian plaintiffs following this controversial decision. Property and ownership is also central to *Lyng*.[50] The Supreme Court explained that federal ownership (of national forests and other federal lands) could be dispositive and shield the government against Indian free exercise claims. Writing for the majority, Justice O'Connor summarized that "[w]hatever rights the Indians may have to the use of the area,…those rights do not divest the Government of its right to use what is, after all, *its* land."[51]

The issue of accommodation was also addressed by the Court in *Lyng*: "nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen"[52] [and] "[t]he Government's rights to the use of its own land…need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[53] But when it comes to accommodation, the *Bear Lodge* decision is most instructive. That case concerns NPS management of Devil's Tower National Monument in Wyoming (known to some Plains Indians as Bear Lodge). Bear Lodge is considered sacred by several Indian tribes and is also a very popular recreational climbing spot. Following tribal complaints, and a formal planning process, the NPS initially banned commercial rock climbing during the month of June, when most tribal ceremonies take place. The NPS then changed this ban to a voluntary closure upon a successful Establishment Clause challenge brought by the Bear Lodge Multiple-use Association and rock climbers. The Wyoming

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50. *See generally* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners,* 52 UCLA L. REV. 1061, 1064 (2004–05) (arguing that Indian nations can use property law to challenge *Lyng's* absolutist version of ownership).

51. *Lyng,* 485 U.S. at 452–53 (emphasis added). Despite the fact that Indians were not claiming ownership rights in this case, nor requesting the exclusion of other people from the area, the Court feared the precedent that could be established: "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property." *Id.* at 453.

52. *Id.*

53. *Id.* at 454.

District Court and the Tenth Circuit upheld the voluntary closure and ruled that it was a legitimate accommodation of religious beliefs. The *voluntary* climbing ban, according to the district court, was "a policy that has been carefully crafted to balance the competing needs of individuals using Devil's Tower National Monument while, at the same time, obeying the edicts of the Constitution" and thus "constitutes a legitimate exercise of the Secretary of the Interior's discretion in managing the Monument."[54]

Congress also has provided additional laws and resolutions that have been considered by the courts. The American Indian Religious Freedom Act of 1978 (AIRFA)[55] makes the protection of American Indian religious freedom federal policy. Though symbolically important, this policy statement is mostly hollow and largely unenforceable.[56] More substantive in nature is the Religious Freedom Restoration Act of 1993 (RFRA).[57] It provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[58] Note that the RFRA goes beyond the Constitution's use of the word prohibiting the free exercise of religion to include the broader verb burden, thus providing more religious protection.

RFRA was central in a recent case involving the USFS in northern Arizona. The agency approved plans by a ski area to use recycled sewage effluent to make artificial snow on the San Francisco Peaks in the Coconino National Forest. The Peaks are sacred to the Navajo, Hopi, and several other Indian tribes, and are eligible for inclusion in the National Register of Historic Places as a TCP (as discussed below). In *Navajo Nation v. United States Forest Service* (2006),[59] plaintiffs challenged this decision using RFRA and other laws. On appeal, the Ninth Circuit reversed the Arizona District Court, finding the agency's approval of the upgrade in violation of RFRA and the National Environmental Policy Act (NEPA). Among other findings, the circuit court concluded that the agency's authorization to use sewage effluent to make snow and expand the ski resort would impose a "substantial burden" on plaintiffs' exercise of religion and was not a "compelling governmental interest."[60] *Navajo Nation* was petitioned for

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54. *Bear Lodge,* 2 F. Supp. 2d at 1456.

55. 42 U.S.C. § 1996 (2006).

56. AIRFA, according to one of its legislative sponsors, and reiterated by the Court in *Lyng,* provides no substantive rights and has "no teeth." *Lyng,* 485 U.S. at 455. *See also* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 221 (5th ed. 2005).

57. 42 U.S.C. § 2006bb-1 (2006).

58. *Id.*

59. 408 F. Supp. 2d 866 (D. Ariz. 2006).

60. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1044 (9th Cir. 2007).

rehearing *en banc*. But at the time of this writing, it represents a significant shift from *Lyng*.

A few lessons can be drawn from these important cases. While *Lyng* basically put an end to First Amendment arguments as a way to protect sacred places, in some situations the RFRA might be successfully used as a way to protect them on federal lands. Courts, as made clear in *Bear Lodge* and subsequent cases, have found acceptable agency accommodations of religious practices.[61] When such accommodations are voluntary in nature, and do not cause actual injury to other citizens, they generally withstand Establishment Clause challenges. This has left the protection of sacred places largely to the discretion of federal land managers—and this helps explain the interest in more predictable and permanent types of protection, as discussed in the following sections. Numerous laws,[62] administrative regulations,[63] internal directives,[64] and an Executive Order[65] instruct agencies about how to consult with tribes, manage cultural resources, and possibly make accommodations to safeguard sacred places. A few studies[66] have exhaustively documented these sources of authority for federal land

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61. *See, e.g.*, Access Fund v. Veneman, No. CV-03-00687-HDM, at *55 (D. Nev. Jan. 28, 2005), *aff'd*, Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007) (ruling that a USFS decision to prohibit rock climbing at Lake Tahoe's Cave Rock was an acceptable way "to protect the physical integrity and character of a culturally and historically significant Native American site").

62. NEPA and its regulations, for example, require analysis of historical and cultural impacts of proposed actions. 42 U.S.C. §§ 4231, 4331–35, 4341–47 (2006); 40 C.F.R. §§ 1502.15, 1502.25, 1508.27 (2003). It also requires agencies to use "all practicable means" to "preserve important historic, cultural, and natural aspects of our national heritage" and to consult with affected parties. 42 U.S.C. § 4331(b)(4) (2006).

63. USFS regulations state: "The Forest Service recognizes the Federal Government's trust responsibility for federally recognized Indian Tribes. The Responsible Official must consult with, invite, and provide opportunities for any federally recognized Indian Tribes and Alaska Native Corporations that may be affected by the planning process to collaborate and participate. In working with federally recognized Indian Tribes, the responsible official must honor the government-to-government relationship between Tribes and the Federal Government." 36 C.F.R. § 219.9(a)(3) (2008).

64. *See supra* note 62.

65. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) (requiring that agencies "shall, to the extent practicable, permitted by law, and not clearly inconsistent with agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites").

66. *See, e.g.*, Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413 (2002); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475 (2005); Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133 (1995).

agencies, including the USFS,[67] so there is no need to repeat them here. But the upshot is that, like the NPS in the *Bear Lodge* case, federal land agencies often have a great deal of discretion when making sacred land decisions, and can legally justify such choices if they are carefully crafted and within the constitutional parameters outlined above.

One quick example illustrates how the USFS can respond given such discretion. It concerns oil and gas leasing on the Rocky Mountain Front, managed by the Lewis and Clark National Forest. Using a careful and thorough social assessment, among other tools, USFS supervisor Gloria Flora made the decision not to lease part of the Front for development. She based her decision on environmental laws *and* a "value of place" articulated by the Blackfeet Tribe and public comments made during the NEPA process. Said Flora, "The Forest has tried to recognize these social and emotional values and they have figured prominently in my decision not to lease the Rocky Mountain Division."[68] The Rocky Mountain Oil and Gas Association litigated the decision, arguing that "value of place" was not a valid management criterion and that Flora's decision was based on land use for Indian religious practices and was therefore in violation of the Establishment Clause. The district court disagreed,[69] and upon appeal the Ninth Circuit ruled that the no-lease decision had a secular purpose and did not advance or endorse religious beliefs nor foster excessive entanglement with religion.[70] Moreover, said the court, "the government may, consistent with the Establishment Clause, accommodate religious practices in its decision-making processes."[71]

This sort of accommodation is but one strategy that could be used to protect sacred lands in the future. Several scholars, advocates, and other interests promote others. Some emphasize the success and potential of using existing laws, policies, and agency decision making processes; viewing them as more flexible, site-specific, legitimate, and a less risky way to protect sacred sites than by using the highly uncertain and precedent-establishing judicial system.[72] Others, however, remain skeptical of agency processes that essentially treat Indians as yet another stakeholder that must be consulted; some believe that "tribal rights to sacred sites are being

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67. *See* RESOURCE GUIDE, *supra* note 27.

68. LEWIS AND CLARK NATIONAL FOREST OIL AND GAS LEASING, FINAL ENVIRONMENTAL IMPACT STATEMENT, RECORD OF DECISION (Sept. 1997) (on file with author).

69. Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv., 157 F. Supp. 2d 1142 (D. Mont. 2000).

70. Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv., No. 00-35349, 2001 WL 470022, at *2 (9th Cir. May 3, 2001) (mem.).

71. *Id.*

72. *See, e.g.*, Marcia Yablon, *Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1626 (2003–04).

collapsed into a series of procedural requirements" that do not go far enough.[73] Legislative approaches have also been proposed, with debate centered on how prescriptive the law should be given constitutional constraints, and whether it should contain an enforceable cause of action, among other items.[74] These approaches represent just a few potential options.[75] This article explores the strengths and limitations of two additional strategies that have received far less attention to date: the use of different management models, and statutory and administrative land designations as ways to protect reserved treaty rights and sacred places on federal land.

### B. Types of Co-Management

Tribal co-management is the sharing of resource management goals and responsibilities between tribes and federal agencies. Attorney and co-management authority Ed Goodman describes it as thus:

> Comanagement embodies the concept and practice of two (or more) sovereigns working together to address and solve matters of critical concern to each. Comanagement is not a demand for a tribal veto power over federal projects, but rather a call for an end to federal unilateralism in decision making affecting tribal rights and resources. It is a call for a process that would incorporate, in a constructive manner, the policy and technical expertise of each sovereign in a mutual, participatory framework.[76]

Several studies have analyzed the use of co-management at the international level.[77] In the United States, several tribal co-management models

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73. Rebecca Tsosie, *Challenges to Sacred Site Protection*, 83 DENV. U. L. REV. 963, 964, 973 (2005–06).

74. *See* Native American Sacred Lands Act, H.R. 2419, 108th Cong. (1st Sess. 2003). For a discussion of what some consider essential elements in any sacred places legislation, see *Native American Sacred Places: Hearing Before the Comm. on Indian Affairs*, 108th Cong. 8–9, 54–57 (2003) [hereinafter *Native American Sacred Places Hearing*] (statement and prepared statement of Suzan Shown Harjo, President, Morningstar Institute), *available at* http://bulk.resource.org/gpo.gov/hearings/108s/87991.pdf.

75. *See* Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 990–92 (2005–06) (discussing various legal theories and practices used to protect sacred lands).

76. Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 284–85 (2000).

77. *See generally* Holly Spiro Mabee & George Hoberg, *Equal Partners? Assessing Comanagement of Forest Resources in Clyoquot Sound*, 19 SOC'Y AND NAT. RESOURCES 875 (2006); CONSERVATION THROUGH CULTURAL SURVIVAL: INDIGENOUS PEOPLES AND PROTECTED AREAS (Stan Stevens ed., 1997).

focus on off-reservation fish and wildlife management, and the unique context in Alaska.[78]

*1. Fish and Wildlife Management*

As discussed above, several Indian tribes reserved off-reservation rights to use resources, including the taking of fish and game on ceded lands. Tribes have had to engage in numerous, often epic battles to ensure that such rights are faithfully honored by federal and state governments.[79] In the fishing wars of the Pacific Northwest[80] and Great Lakes states,[81] for example, tribes have had to continually fight for their rights to access and harvest such resources. The so-called Boldt decision (named after the judge who authored it) provides a widely recognized example, as it guaranteed Washington tribes a 50-percent share of the state's anadromous fish runs.[82] In several other cases, using accepted canons of treaty interpretation, courts have sided with Indians. The result is that throughout much of the country, federal, state, and tribal governments, sometimes against a backdrop of judicial oversight, have negotiated complicated management schemes, some of which could be understood as co-management.

Co-management is likely to be used even more in the future. This is because an increasing number of interests and courts recognize, with some common sense, that habitat protection is implied in these recognized off-reservation resource rights. Degraded watersheds, for example, pose a threat to healthy salmon runs and the tribes who depend upon them. As

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78. There is more limited scholarship focused on methods of tribal cooperation in national park management. *See e.g.,* Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007) (focusing on tribal cooperation in national park management); 21 ECOLOGICAL RESTORATION 245 (Dec. 2003) (theme issue on Native American land management practices in national parks). Perhaps the strongest form of cooperation in this regard is management of Canyon De Chelly National Monument. Established in 1931, it is owned by the Navajo Nation but managed cooperatively with the National Park Service. *See* Act of Feb. 14, 1931, ch. 188, 46 Stat. 1161.

79. *See generally*, CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIANS (2005) [hereinafter WILKINSON, BLOOD STRUGGLE].

80. *See Winans*, 198 U.S. 371 (a cornerstone case recognizing the reserved rights to fish at usual and accustomed tribal fishing sites); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969) (holding that treaty tribes on the Columbia river have rights to fish at usual and accustomed sites and have "an absolute right to that fishery, [and] are entitled to a fair share of the fish produced by the Columbia River system").

81. *See* United States v. Michigan, 653 F.2d 277 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983); Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999).

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

one judge put it, "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[83] In one oft-cited decision, *United States v. Adair* (1983), the Ninth Circuit Court ruled that the Klamath Tribes have a reserved water right to ensure sufficient instream flow that is necessary to maintain tribal reserved fishing rights.[84] This decision is significant to several tribes with reserved rights, including water rights by the Blackfeet Nation in the Badger-Two Medicine area.[85]

It is within this context that tribes are asking to play a more meaningful role in the management of off-reservation lands and resources, one that goes beyond simply responding to proposals made by other governments. As Goodman explains in his comprehensive analysis, "[t]he right to habitat protection must also include a right to meaningful tribal participation in the decision-making process regarding such habitat."[86] This background, not to mention the significant expertise and resources brought to the table by Indian governments, helps explain why so many tribes are now playing larger roles in fish and wildlife management.[87]

*2. Alaska*

Co-management models in Alaska have also been used and examined thoroughly,[88] but they cannot be understood outside of the state's unique federal land and resource laws that provide Alaska Natives with an unusual amount of power over fish and wildlife management on federal

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83. United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, United States v. Washington, 694 F.2d 1374 (9th Cir. 1982).

84. United States v. Adair, 723 F.2d 1394, 1397 (9th Cir. 1983).

85. *See* Michael D. Wood, An Exploration of the Pikuni World View; Pikuni Water Rigths in the Ceded Strip (1994) (unpublished Master's Thesis, University of Montana, School of Forestry) (on file with author) (analyzing the issue from a cultural, historical, and legal perspective). Based on historical research, Wood concludes that "[u]nder the guiding principles as outlined in *Adair*, the Pikuni [Blackfeet] therefore implicitly reserved their Aboriginal Water Rights in reserving the right to hunt and fish within the 'ceded strip' landscape." *Id.* at 93.

86. Goodman, *supra* note 76, at 299–300.

87. For a list of tribal organizations managing fish and wildlife resources, see Native American Fish & Wildlife Society, http://www.nafws.org (last visited Dec. 30, 2008); Columbia River Inter-Tribal Fish Commission, http://www.critfc.org (last visited Dec. 30, 2008); and the Great Lakes Indian Fish and Wildlife Commission, http://www.glifwc.org (last visited Dec. 30, 2008). For information regarding state and tribal co-management of fishing and bird hunting on the Flathead Indian Reservation, see *State/Tribal Agreement Renewed*, MONTANA FISH, WILDLIFE & PARKS, Nov. 9, 2006, *available at* http://fwp.mt.gov/news/article_5011.aspx. For background on Montana's legal context for tribal rights in fish and wildlife management, see Montana Fish, Wildlife & Parks, http://fwp.mt.gov/tmc/reports/legal.html#fw8 (last visited Dec. 30, 2008).

88. *See, e.g.*, Eric Smith, *Some Thoughts on Comanagement*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (1996–98).

lands.[89] One of the most important laws in this regard is Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) that sets a priority for subsistence uses of fish and wildlife on federal lands in Alaska.[90] This means that preference is given to "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation," and for other purposes like the making and selling of handicrafts and customary trade and barter.[91] This subsistence mandate places serious procedural and analytical requirements on federal land agencies. For any decision that would "significantly restrict subsistence uses" it must be determined, among other things, that "such a significant restriction of subsistence uses is necessary, [and] consistent with sound management principles for the utilization of the public lands."[92] To implement the subsistence priority, ANILCA authorizes the federal government to enter into cooperative agreements with Native corporations, the State of Alaska, and other organizations.[93] ANILCA also requires reasonable access to resources used for subsistence on public lands,[94] with specific regulations pertaining to subsistence use in national parks and monuments.[95]

ANILCA sets up a Federal Subsistence Board, comprised of regional agency directors, and a number of Regional Advisory Councils throughout the state. These Councils provide recommendations and information to the Board; review proposed regulations, policies and management plans; and provide a public forum for subsistence issues.[96] ANILCA also specifies the extent of these recommendation powers, with language forcing the Secretary of Interior to take them seriously.[97]

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89. *See generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS (2d ed. 2002).

90. Alaska National Interest Lands Conservation Act, Pub. L. 96-487, § 802, 94 Stat. 2371, 2423 (1980) (codified at 16 U.S.C. § 3112 (2006)).

91. 16 U.S.C. § 3113 (2006).

92. *Id.* § 3120.

93. *Id.* § 3119.

94. *Id.* § 3121. According to David Case and David Voluck, two authorities on Alaska Natives and American Law, "[e]ach of these provisions affects public land-use decisions in Alaska in a manner not found elsewhere in the United States." CASE & VOLUCK, *supra* note 89, at 305.

95. 16 U.S.C. §§ 3118, 3126 (2006).

96. U.S. Fish & Wildlife Serv., Alaska Region, Federal Subsistence Management Program, http://alaska.fws.gov/asm/index.cfml (last visited Dec. 30, 2008).

97. *See* Alaska National Interest Lands Conservation Act, Pub. L. 96-487, § 805(c), 94 Stat. 2371, 2424–25 (1980) (codified at 16 U.S.C. § 3115(c) (2006)).

The Marine Mammal Protection Act (MMPA) provides another example.[98] It authorizes the taking of marine mammals for subsistence by Alaska Natives provided that it is done in a non-wasteful manner. Native harvest may not be regulated by the federal government unless it finds that a particular species or stock is "depleted."[99] This means that Alaska Natives manage marine mammals at the tribal level or through various commissions sometimes having co-management characteristics. The Alaska Eskimo Whaling Commission (AEWC), for example, takes on most whaling management responsibilities, and is considered the oldest and arguably most successful co-management regime in Alaska.[100] It also signed a cooperative agreement with the National Oceanic and Atmospheric Administration (NOAA) who provides back-up services and assumes enforcement responsibilities when AEWC is unable to do so.[101]

These two laws, among others, provides the context in which Alaska Natives have assumed various co-management functions, including: research (e.g., gathering baseline biological data), regulation (e.g., restrictions on harvests), allocation (e.g., setting harvest levels), and enforcement (e.g., ensuring regulations are followed).[102] Perhaps most important, the Alaska experience demonstrates the importance of law in shaping the use of co-management in the United States, as ANILCA and MMPA give Alaska Natives a substantive and even dominant position in managing some resources. I will return to this point when reviewing legislation, and the lack thereof, pertaining to co-management outside Alaska.

### C. Co-Management Roles

Outside of Alaska and the context of fish and wildlife management, what does and can co-management look like? The term is a bit unwieldy, and some agencies prefer to talk about other types of "cooperative agreements" and managerial arrangements that can be used to accommodate tribal interests. Some USFS officials I spoke with, for example, emphasized that the agency did not have the legal authority to co-manage national forest lands (unlike Interior agencies who may use the Tribal Self Governance Act, as discussed below), but did have other ways in which tribes could partner with the agency. Some USFS officials also

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98. Marine Mammal Protection Act, 16 U.S.C. § 1361 (2006).

99. 16 U.S.C. § 1371(b)(3) (2006). *E.g.*, Didrickson v. U.S. Dep't of the Interior, 796 F. Supp. 1281 (D. Alaska 1991).

100. CASE & VOLUCK, *supra* note 89, at 314.

101. Smith, *supra* note 88, at 2.

102. *Id.* at 3.

recommended that I do not use the term co-management in pursuing this topic, as it might be negatively construed by agency personnel.

Such reticence to use the term co-management is partly explained by legal requirements imposed on federal land managers to manage federal lands, and not to delegate such duties to another party. Fair treatment of the subdelegation doctrine is beyond the scope of this article, but it basically forbids federal agencies from delegating final decision-making authority to another party, like a collaborative group or advisory commission. There are different interpretations of related case law, but most emphasize that the doctrine will not be violated as long as federal agencies retain final decision-making power.[103] Particular statutes are also important in this regard because courts will ask whether Congress intended to permit a delegation of authority.[104] If such evidence does not exist, courts may likely find such delegation unlawful. This principle has an obvious impact on how far co-management can go on federal lands, though tribal participation is fundamentally different than forms of stakeholder or contractor involvement.[105]

In analyzing degrees of public participation in agency decision making, co-management is often considered the most authentic and participatory of models. However, there is a great deal of diversity within the co-management model as well. One group of distinguished scholars usefully organizes it by outlining the different roles played by governments in various co-management arrangements.[106] I adapt this framework for

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103. The most oft-cited case here is *National Park & Conservation Association v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999) ("Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority"). For related analyses, see, for example, Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67, 95 (2003) (analyzing subdelegation doctrine in terms of using collaborative groups in federal land management); SARAH BATES VAN DE WETERING, UNIV. OF MONT. PUB. POL'Y RESEARCH INST., THE LEGAL FRAMEWORK FOR COOPERATIVE CONSERVATION 16 (2006), *available at* http://cooperativeconservation.gov/library/LegalFrameworkCC.pdf (summarizing that "a federal agency may not fully shift its administrative responsibilities to third parties, but always must retain final decision-making authority over the public resources that are its responsibility"); Robert D. Comer, *Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands*, 75 U. COLO. L. REV. 1133 (2004) (providing an expansive view of federal agency authority to cooperate with non-federal interests).

104. Nat'l Park and Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 18 (D.D.C. 1999) ("The relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate the authority conferred by Congress") (quoting United States v. Widdowson, 916 F.2d 587, 592 (10th Cir. 1990)).

105. *See infra* note 110 and accompanying text.

106. *See* JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 596–97 (2006). "Tribal 'co-management' has evolved as a descriptive term encompassing a broad spectrum of tribal efforts to assert native sovereign prerogatives in resource management off the reservation." *Id.* at 596.

purposes here, while adding examples more focused on federal land management.

*1. Setting Objectives, Standards, and Desired Environmental Conditions*

The first possible role is setting objectives and standards and helping define desired environmental conditions. There are strong and weak versions of this. On federal land, because of the property/ownership (e.g., *Lyng*) and subdelegation issues discussed above, tribes will often play an indirect role in this regard. But through NEPA, resource planning processes, and government-to-government consultation requirements, among other means, tribes can help set standards and conditions that will invariably affect them.

In other policy fields, tribes can play a more direct role. Some national pollution laws, for example, contain "treatment as states" (TAS) provisions allowing tribes to set standards on their reservations, among other things.[107] The Columbia River Fisheries Management Plan provides another example. As a result of the landmark fishing rights litigation in Oregon,[108] multiple parties entered into a court-sanctioned consent decree with continuing judicial oversight. This agreement provided joint management and a direct role for tribes to play in setting fish management standards and goals, from setting seasons and harvest-levels to stock-rebuilding plans.[109]

*2. Policy Implementation*

The second role is implementation of these standards. Once environmental goals are set, tribes are responsible for helping ensure that they are achieved. This section briefly describes the authorities and vehicles that can be used in this role, followed by relevant land management examples.

*a. Authorities*

The Tribal Self-Governance Act of 1994 (TSGA) is often cited as an example of co-management because it authorized Interior Department agencies to delegate functions that are not "inherently federal" to participating tribes.[110] The TSGA permits tribes to petition Interior agencies

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107. *E.g.*, Clean Water Act, 33 U.S.C. § 1377(e) (2006); Clean Air Act, 42 U.S.C. § 7601(d) (2006); Safe Drinking Water Act, 42 U.S.C. § 300(j)-11(a) (2006).

108. *See* United States v. Oregon, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990).

109. *See* Goodman, *supra* note 76, at 349–50 for analysis.

110. 25 U.S.C. § 458cc(k) (2006). Section 458cc(k) provides that annual agreements cannot include programs, services, functions, or activities that are "inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought

to manage federal programs that are of "special geographical, historical, or cultural significance" to the tribe, thus providing a possible vehicle for tribal participation in federal land management.[111] It is under this authority that the U.S. Fish and Wildlife Service (USFWS), NPS, and other Interior agencies have entered into annual funding agreements with some eligible tribes.[112] Some of these agreements, like that with the Confederated Salish and Kootenai tribes to co-manage the National Bison Range in western Montana,[113] have been quite controversial, as some interests are worried about its precedent and possible implications for federal land management writ large.[114] Others, however, view the TSGA as underutilized, though "a significant step in connecting public land management to Indian self-determination."[115]

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by the tribe." *Id.* For a listing of eligible programs, from construction and concessions to conservation and restoration, see List of Programs Eligible for Inclusion in FY 2003 Annual Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 67 Fed. Reg. 16,431 (Apr. 5, 2002). The "inherently federal" provision has been subject to some debate and subsequent clarification by the Office of the Solicitor. *See* Memorandum from the Office of the Solicitor, U.S. Dept. of the Interior, to Ass't Sec'ys & Bureau Heads, on Inherently Federal Functions under the Tribal Self-Governance Act (May 17, 1996) (on file with author). Among other questions, Solicitor Leshy analyzes the constitutional issue of delegating powers to non-federal agencies. He relies upon *United States v. Mazurie*, 419 U.S. 544 (1975), in concluding that non-delegation limitations, on both Congress *and* the Executive, "are relaxed where the delegation is to a tribe in an area where the tribe exercises sovereign authority." *Id.* at 8. He also notes that while *Mazurie* concerned congressional delegation to tribes, it has also been relied upon to support executive branch delegations of a governmental function to a tribe. *Id.* at 9. The solicitor also emphasizes that "federal law makes clear that tribes are not analogous to private contractors because they possess a substantial measure of independent sovereign authority." *Id.* at 2.

111. 25 U.S.C. § 458cc(c) (2006).

112. *See* King, *supra* note 78, at 506–08. King also lists NPS annual funding agreements, *id.* at 529–30, while providing in-depth analysis of the Act and its use at Grand Portage National Monument, *id.* at 508–23.

113. Fish and Wildlife Service and Confederated Salish and Kootenai Tribal Governments Sign Annual Funding Agreement, 70 Fed. Reg. 5205 (Feb. 1, 2005).

114. For related debate focused on the National Bison Range, see Grady Hocutt, *Why Operation of Wildlife Refuges Shouldn't be Privatized*, HIGH COUNTRY NEWS, Jan. 22, 2007, at 20, *available at* http://www.hcn.org/issues/338/16792; Paul Bishop, *How the Indians Were Set Up to Fail at Bison Management*, HIGH COUNTRY NEWS, Jan. 22, 2007, at 20, *available at* http://www.hcn.org/issues/338/16791; and Erin Patrick Lyons, *"Give Me a Home Where the Buffalo Roam": The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation*, 8 J. GENDER RACE & JUST. 711 (2004–05).

115. King, *supra* note 78, at 527. King states:

> [T]he NPS has conceptualized the TSGA not as a step in a long path toward Indian self-determination, but as an aberration in public land policy and an intrusion into public land management. The NPS has narrowly construed the TSGA, framed it within the NPS's conventional tools for sharing money

Another form of implementation involves the non-discretionary aspects of implementing projects or programs. Implementation can be done through all sorts of governmental partnership authorities,[116] and some federal land laws explicitly authorize the use of cooperative agreements. The Multiple Use Sustained Yield Act of 1960 (MUSYA), for example, allows the Secretary of Agriculture "to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons" for various purposes including pollution control and forest protection, "when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations."[117]

Each agency has its own vocabulary for describing how this is done, but several types of contracts, cooperative agreements, assistance agreements, and memorandums-of-understanding (MOU) are being used to share some management, and even financial, responsibilities.[118] As discussed below, these range from the simple to the complex. An example of the former is the use of an MOU between the Nez Perce Tribe and the USFS regarding the exemption of Nez Perce tribal members from recreational use fees at all campgrounds in several national forests when engaged in the exercise of reserved treaty rights.[119] A more significant

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> and authority with non-tribal entities, and proceeded carefully to avoid setting precedent. Consequently, tribes may negotiate on a government-to-government basis with the NPS, but the substantive programs look more like contracting than co-management. It is not clear that the TSGA provides a sovereign nation with any more programmatic control and decision-making authority than a contractor.

*Id.* at 481.

116. For an exhaustive review of related resources, laws, and policies, see the Partnership Resource Center, http://www.partnershipresourcecenter.org (last visited Dec. 30, 2008) (providing numerous links to detailed guides about how to build partnerships with federal land agencies, especially the USFS).

117. 16 U.S.C. § 565a-1 (2006). FLPMA is even broader, allowing the Secretary to "enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands." 43 U.S.C. § 1737(b) (2006). Note, however, that FLPMA's legislative history shows that Congress did "not intend any diminution in the authority and responsibility of the Secretaries to make public land [and] National Forest decisions." H.R. REP. NO. 94-1163, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6181.

118. *See generally* AMERICAN INDIAN LAW DESKBOOK, ch. 14 (Clay Smith ed., 3d ed. 2004) (providing a representative sample in areas of environmental protection, natural resource management, taxation, law enforcement, and social services).

119. Memorandum of Understanding between the Nez Perce Tribe and the Northern Region, Intermountain Region, and Pacific Northwest Region of the USDA Forest Service, R-4 Agreement No. 30-MOU-98-001 (May 5, 1998) (on file with author). A similar arrangement has been agreed to by the Kootenai National Forest and Confederated Kootenai-Salish and Kootenai Tribe of Idaho who also have reserved rights on ceded land on the Kootenai National Forest through the Hellgate Treaty of 1855. The Hellgate Treaty of July 16, 1855, 12 Stat. 975.

example is provided by agreements between the Nez Perce and USFWS to help manage wolves reintroduced into central Idaho.[120] When the state of Idaho refused to participate in this program, the Nez Perce took full advantage of their wildlife expertise to assist in the recovery of wolves, a species of special significance to the Tribe.[121]

Another significant agreement is between the Klamath Tribes and Winema and Fremont National Forests. Its complicated history is beyond the purview of this article, but it includes significant judicial decisions that resulted in a consent decree establishing a cooperative management system between the Klamath Tribes, Oregon Department of Fish and Wildlife, and the USFS.[122] Furthermore, an amended 2005 Memorandum of Agreement (MOA) between the Klamath Tribes and USFS recites the federal government's procedural and substantive trust obligations to the Tribes (discussed earlier) and provides detail in how this is to be carried out.[123] Among its other significant provisions, the MOA mandates government-to-government coordination at the regional forester level and quarterly meetings between tribal program directors and forest supervisors. It also creates a special process to be used by the USFS when considering tribally-initiated proposals and recommendations, and calls for tribal involvement with USFS interdisciplinary teams.

The Tribal Forest Protection Act of 2004 (TFPA) provides another example of existing contract authority.[124] Indian tribes and the USFS share roughly 2,100 miles of contiguous boundary.[125] In 2003, several wildfires originating on national forest lands spread to adjacent tribal lands. The TFPA is designed to protect tribal forest assets by authorizing tribes to propose work and enter into agreements and contracts with the USFS and the Bureau of Land Management (BLM) to reduce threats posed by fire on federal land. Among other restrictions, the law requires tribal proposals to focus on USFS land that (1) is adjacent to federal land, (2) poses a fire, disease, or other threat to Indian trust land or community or is in need of restoration, and (3) involves a "feature or circumstance unique to that

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120. For annual progress reports and discussion of management responsibilities, see Nez Perce Tribe, Wildlife Program, http://www.nezperce.org/content/Programs/wildlife_program.htm (last visited Dec. 30, 2008).

121. For history and analysis, see Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 NAT. RESOURCES J. 543 (1999).

122. *See* U.S. FOREST SERV., LAND AND RESOURCE MANAGEMENT PLAN: WINEMA NATIONAL FOREST (1990) (providing background and the consent decree as Appendix D), *available at* http://www.fs.fed.us/r6/frewin/projects/forestplan/1990plan/winapp.pdf.

123. Memorandum of Agreement: The Klamath Tribes and U.S. Forest Service (Feb. 17, 2005) (on file with author).

124. 25 U.S.C. § 3115a (2006).

125. U.S. FOREST SERV., OFFICE OF TRIBAL RELATIONS, QUARTERLY REPORT (Apr. 2006) *available at* http://www.fs.fed.us/spf/tribalrelations/regs.shtml.

Indian tribe (including treaty rights or biological, archeological, historical, or cultural circumstances)."[126] When evaluating tribal proposals, the TFPA allows the USFS to use a "best value basis" and give specific consideration to tribally-related factors, such as the cultural, traditional, and historical affiliation of the tribe with the land, reserved treaty rights, and the indigenous knowledge of tribal members, among other factors.[127] Though the USFS could use a wide range of tools to implement the TFPA, it is emphasizing the use of stewardship contracts.[128]

Internal agency direction should also be considered along with these more formal authorities to co-manage or partner with Indian tribes. Several sources within the USFS have identified the need to "institutionalize long-term collaborative relationships with tribal governments."[129] According to the agency's Office of Tribal Relations, "[t]here is a compelling need for a more formal means of collaboration between the Forest Service and federally recognized Tribes."[130] Here, moreover, is the vision of the National Tribal Relations Program Task Force: "We envision a future where the Forest Service and Indian Tribes work collaboratively through government-to-government relationships to manage the resources entrusted to their care[,] a future where the Forest Service possesses the organizational structure, skills, and policies to redeem our responsibilities in this partnership."[131]

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126. 25 U.S.C. § 3115a(c) (2006).

127. 25 U.S.C. § 3115a(e) (2006).

128. Originally implemented on a pilot basis, Congress extended the authority of the USFS to use stewardship contracting as a way to achieve various land management goals, like restoring forest and rangeland health and water quality, improving fish and wildlife habitat, reestablishing native plant species, and reducing hazardous fuels. The contracts allow the exchange of goods for services, so the USFS could, for example, combine timber sales with restoration projects. It is also authorized to enter into stewardship projects to achieve land management objectives that meet local rural community needs, while complying with applicable environmental laws and regulations. The projects require a collaborative process, including multiparty monitoring and evaluation. Pub. L. No. 108-7, § 323, 117 Stat. 11, 275 (2003). For more background see Stewardship End Result Contracting, 68 Fed. Reg 38,285, 38,286 (June 27, 2003); U.S. Depart. of Agriculture, Stewardship Contracting, http://www.fs.fed.us/forestmanagement/projects/stewardship/index.shtml (last visited Dec. 30, 2008) (providing news and information about USFS stewardship contracting); PINCHOT INSTITUTE, POLICY REPORT NO. 01-06, STEWARDSHIP CONTRACTING: A SUMMARY OF LESSONS LEARNED FROM THE PILOT EXPERIENCE (2006), http://www.pinchot.org/ (last visited Dec. 30, 2008) (reporting on the program).

129. U.S. FOREST SERV., REPORT OF THE NATIONAL TRIBAL RELATIONS PROGRAM IMPLEMENTATION TEAM 7 (2003) [hereinafter USFS TRIBAL RELATIONS IMPLEMENTATION REPORT] (on file with author).

130. U.S. FOREST SERV., OFFICE OF TRIBAL RELATIONS, QUARTERLY REPORT (Apr. 2006), http://www.fs.fed.us/spf/tribalrelations/regs.shtml (last visited Dec. 30, 2008).

131. U.S. FOREST SERV., REPORT OF THE NATIONAL TRIBAL RELATIONS TASK FORCE (2000) [hereinafter USFS TRIBAL RELATIONS TASK FORCE] (on file with author).

The Task Force and its Implementation Team make a number of detailed recommendations in how this vision can be achieved. Many of them focus on fixing various organizational problems. Recommendations related to sacred lands, treaty rights, and co-management principles are also made. The Task Force, for example, recommends development of new legislation that would "provide the authority of the [US]FS to close lands to the general public for the shortest duration of time necessary to accommodate various tribal and non-tribal uses, including traditional tribal use."[132] And at the administrative level, the Implementation Team recommends that the USFS "[m]aximize use of existing authorities for voluntary closure of areas to accommodate tribal traditional uses," including by using MOUs.[133] Though the term co-management is not used, the Task Force believes that the USFS "has significant unrealized potential through our grants, agreements, [and] acquisition programs to improve relationships, better honor our unique legal responsibilities, and to encourage equal access to Federal programs by American Indian and Alaska Native governments."[134] While the ultimate impact of the Task Force Report is yet to be determined, some high-ranking USFS officials have voiced enthusiastic support for the principles on which it is based.[135]

*b. Kasha-Katuwe Tent Rocks National Monument*

Other substantial agreements have been signed by the BLM and tribes, including co-management of two recently created national monuments. The Kasha-Katuwe Tent Rocks National Monument, located in the foothills of the Jemez Mountains in north-central New Mexico, was created by presidential proclamation in 2001.[136] Prior to its designation as a Monument, the area was managed by the BLM as an Area of Critical Environmental Concern (ACEC). In 1997 and 2000, the BLM and Cochiti Pueblo signed intergovernmental cooperative agreements to "provide for more consistent, effective and collaborative management of the Tent Rocks ACEC, now the Monument."[137] President Clinton's proclamation emphasized the indigenous history of this area and mandated that the BLM

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132. *Id.* at 21. A USFS Sacred Sites Development Team was appointed in 2002 to help develop a legal framework for managing sacred sites.

133. USFS TRIBAL RELATIONS IMPLEMENTATION REPORT, *supra* note 129, at 7.

134. USFS TRIBAL RELATIONS TASK FORCE, *supra* note 131, at 22.

135. Joel Holtrop, U.S. Forest Serv. Deputy Chief, State and Private Forestry, Remarks at Working Together: American Indian Tribes and the Forest Service: A Training Course for Line Officers, in Jackson, WY (May 27, 2004) (on file with author).

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

137. U.S. BUREAU OF LAND MGMT., KASHA-KATUWE TENT ROCKS NATIONAL MONUMENT PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT, ES-1 (2006).

*shall* manage the Monument "in close cooperation with the Pueblo de Cochiti."[138]

The BLM is currently doing so through an assistance agreement for the purpose of "co-management" of Kasha-Katuwe Tent Rocks National Monument, the ACEC, a National Recreation Trail, a fee demonstration program, and visitor fee/information station.[139] This agreement details the significant management responsibilities of the Pueblo, from trail maintenance and visitor services work to coordinating law enforcement with the BLM (discussed below). With legislative authority under the Federal Land Policy and Management Act of 1976 (FLPMA),[140] among other sources, the assistance agreement provides funds to the Pueblo to hire full time staff to manage and monitor the Monument.[141] Access to the Monument is also managed by the Pueblo because a three-mile road leading to it runs through Pueblo land.

According to the Interior Department, a few lessons can be learned from the Kasha-Katuwe co-management model. It first emphasizes the proclamation's mandate to cooperate with the Pueblo. It also emphasizes how the BLM's New Mexico State Office "was able to negotiate directly with the Governor and leadership of the Pueblo de Cochiti in an atmosphere of mutual respect and trust."[142] The result, says Interior, is joint management that "will enhance their efforts to protect and maintain the natural and cultural values of the land while they strive to increase visitors' enjoyment of the area."[143]

*c. Santa Rosa and San Jacincto Mountains National Monument*

Management of the Santa Rosa and San Jacinto Mountains National Monument in southern California provides another example of how cooperative agreements can be used to manage federal land. Created by Congress in 2000, the Monument consists of 271,400 acres encompassing

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138. Proclamation No. 7394, *supra* note 136.

139. U.S. BUREAU OF LAND MGMT., ASSISTANCE AGREEMENT NO. GDA060004, COOPERATIVE MANAGEMENT OF THE KASHA-KATUWE TENT ROCKS NATIONAL MONUMENT (no date given) (on file with author) [hereinafter ASSISTANCE AGREEMENT NO. GDA060004].

140. Section 307(b) of FLPMA provides that "the Secretary may enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands." 43 U.S.C. § 1737(b) (2006).

141. U.S. BUREAU OF LAND MGMT, STATE OF PROGRAMMATIC INVOLVEMENT FOR AN ASSISTANCE AGREEMENT (AA) FOR PUEBLO DE COCHITI FOR THE MANAGEMENT OF KASHA-KATUWE TENT ROCKS NATIONAL MONUMENT (no date given) (on file with author).

142. *Native American Sacred Places Hearing*, *supra* note 74, at 46 (statement of William D. Bettenberg, Director, Office of Policy Analysis, Dep't. of the Interior).

143. *Id.*

federal, state, and tribal lands.[144] Two federal wilderness areas (the San Jacinto and Santa Rosa) are also located within the Monument's boundaries. It is the first congressionally-designated national monument to be jointly managed by the BLM and USFS. The legislation creating the Monument recognizes its "special cultural value to the Agua Caliente Band of Cahuilla Indians,"[145] and thus provides a number of provisions related to consultation, cooperation, and land exchanges.[146] The Secretaries of Interior and Agriculture, for example, "shall make a special effort to consult with representatives of the [Tribe] regarding the management plan during the preparation and implementation of the plan."[147] The Santa Rosa and San Jacinto Mountains National Monument Act of 2000, which created the Monument, also authorizes the use of cooperative agreements and "shared management arrangements," including special use permits, to manage it.[148] Section 7 of the Act creates a local advisory committee (an emerging pattern discussed below), consisting of one tribal representative in addition to other interested parties, which shall advise the Secretaries with respect to the preparation and implementation of the management plan (note that tribal representation on the advisory committee supplements government-to-government consultation).[149]

Though the Act only applies to federal land and interests within the Monument's boundaries, its management "will be a cooperative effort that encourages collaboration between the BLM, Forest Service, other Federal and State agencies, and Tribal and local governments."[150] Some of this collaboration is being advanced through various cooperative and assistance agreements between the BLM and Tribe. Some of these agreements are stated broadly, like the "joint commitment to address areas of Tribal concern," including "[t]he need to preserve and protect cultural and tradi-

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144. Santa Rosa and San Jacinto Mountains National Monument Act of 2000, Pub. L. No. 106-351, §§ 1–8, 114 Stat. 1362 (codified at 16 U.S.C. § 431 (2006)) (pertaining to the federal lands and interests within the Monument's established boundaries); U.S. BUREAU OF LAND MGMT. & U.S. FOREST SERV., SANTA ROSA & SAN JACINTO MOUNTAINS NATIONAL MONUMENT FINAL MANAGEMENT PLAN AND RECORD OF DECISION (2004), *available at* http://www.blm.gov/ca/st/en/fo/palmsprings/santarosa/management_plan.html.

145. Santa Rosa and San Jacinto Mountains National Monument Act of 2000 § 2(a)(4).

146. *Id.* § 6(e) (the land exchange authorization recognized a related pre-existing "cooperative agreement"/Memorandum of Understanding between the Tribe and BLM that is on file with the author).

147. *Id.* § 4(b)(2).

148. *Id.* § 4(c)(1).

149. *Id.* § 7.

150. U.S. BUREAU OF LAND MGMT. & U.S. FOREST SERV., SANTA ROSA & SAN JACINTO MOUNTAINS NATIONAL MONUMENT PROPOSED MANAGEMENT PLAN AND FINAL ENVIRONMENTAL STATEMENT ES-2 (2003).

tional uses, including gathering and access to sacred places."[151] But others are quite specific, like an ongoing assistance agreement to remove tamarisk from watersheds that are shared with the Tribe.[152] The Monument's advisory committee also has made a number of recommendations for consideration, several of which pertain to the management of tribal cultural resources.[153]

Rebecca Tsosie, a law scholar and Supreme Court Justice for the Fort McDowell Yavapai Nation, believes the cooperative agreements used to manage the Santa Rosa and San Jacinto Monument are a way to "manage traditional areas located on public lands in the exercise of cultural sovereignty."[154] "This approach," she says, "provides a favorable comparison to the standard approach used by federal land managers, which considers tribal interests as part of the many interests advanced by stakeholders and accommodated through the 'multiple-use' policy applicable to public lands."[155]

*3. Enforcing Standards and Regulations*

Another role that could be played in co-management is the enforcement of standards and regulations, like arresting poachers or citing people for national park violations. This role, however, is quite complicated because of jurisdictional issues regarding the power of tribal governments over non-Indians, though enforcement against tribal members is generally appropriate.[156] In some situations, tribes possess extraterritorial governmental authority, meaning that their enforcement powers go beyond tribal boundaries.[157] This power is particularly relevant in the context of

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151. U.S. BUREAU OF LAND MGMT., COOPERATIVE AGREEMENT BETWEEN THE USDI BUREAU OF LAND MANAGEMENT AND THE AGUA CALIENTE BAND OF CAHUILLA INDIANS FOR THE SANTA ROSA AND SAN JACINTO MOUNTAINS (1999) (on file with author).

152. U.S. BUREAU OF LAND MGMT, ASSISTANCE AGREEMENT NO. 1422-BFA-00-0001, TAMARISK REMOVAL, (multiple agreements/funding extensions between Aug. 23, 2000 and Sept. 9, 2003) (on file with author).

153. SANTA ROSA & SAN JACINTO MOUNTAINS NATIONAL MONUMENT PROPOSED MANAGEMENT PLAN AND FINAL ENVIRONMENTAL STATEMENT, *supra* note 150, app. at B-1.

154. 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, 310 (2003–04).

155. *Id.*

156. For case law and related analysis, see generally LAITOS ET AL., *supra* note 106, at 597; JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW (2d ed. 2008); and GETCHES ET AL., *supra* note 56.

157. *See generally* Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. LAND RESOURCES & ENVTL. L. 185 (2000) (analyzing this jurisdictional maze and how it applies to transboundary resource management).

regulating off-reservation hunting and fishing rights. A number of laws also authorize tribal governmental authority outside tribal boundaries.[158]

The Cochiti Pueblo has some enforcement responsibilities in managing the Kasha-Katuwe Tent Rocks National Monument. A BLM-Pueblo assistance agreement stipulates that the Pueblo will patrol the Monument and ACEC on a daily basis and "[r]eport and coordinate unauthorized activities to BLM Law Enforcement or the BLM Monument Manager, including fuel-wood cutting and gathering, littering, dumping of hazardous materials, off-highway vehicle travel, destroying cultural sites, pot hunting, unauthorized campfires, shooting and vandalism to recreation facilities, rock formations, scenic overlook, the NRT [National Recreation Trail] and trail signs."[159]

The complexity of off-reservation enforcement authority does not mean that tribes cannot play a role in this capacity. Rather, it means that any agreement and/or legislation must be explicit in how such authority is to be administered. The T'uf Shur Bien Preservation Trust Area Act of 2003 provides one example.[160] As discussed below, this legislation, designed to protect tribal cultural values and off-reservation rights on the Cibola National Forest, is unique in several respects. The legislation deals with jurisdiction of the area in some detail, explaining what sovereign has criminal and civil jurisdiction within the preservation area. With some stipulations, the Act provides the Pueblo exclusive authority to "regulate traditional or cultural uses by the members of the Pueblo and administer access to the Area by other federally-recognized Indian tribes for traditional or cultural uses, to the extent such regulation is consistent with this title;" and to "regulate hunting and trapping in the Area by members of the Pueblo, to the extent that the hunting is related to traditional or cultural uses.…"[161]

## III. PROTECTED LAND POLICY OPTIONS

As discussed above, approaches to sacred land disputes and off-reservation treaty rights on federal land often focus on important constitutional-legal considerations, possible agency accommodations, and to a certain extent, the adoption of some co-management roles. What has

158. *Id.* at 191.

159. ASSISTANCE AGREEMENT NO. GDA060004, *supra* note 139, at 4–5.

160. T'uf Shur Bien Preservation Trust Area Act, Pub. L. No. 108-7, div. F, tit. IV, §§ 401–15, 117 Stat. 282 (2003) (codified at 16 U.S.C. §§ 539m-1–539m-12 (2006)).

161. *Id.* § 408(b)(2)(b). In some sections of the area hunting and trapping by members of the Pueblo "shall be regulated by the Pueblo in a manner consistent with the regulations of the State of New Mexico concerning types of weapons and proximity of hunting and trapping to trails and residences." *Id.*

not been explored in as much detail are the possibilities of protecting sacred lands and reserved rights with special land-use designations, especially those made by Congress.

Before proceeding, some brief historical context is necessary, as it teaches some valuable lessons regarding American Indians and protected lands. Unfortunately, much of this history teaches us what not to do in the future. NPS experience is illustrative and has been superbly documented.[162] Numerous stories can be told of how the federal government flagrantly disregarded its trust responsibilities, treaty obligations, and Indian sovereignty in creating or enlarging national parks. Relations between Glacier National Park and the Blackfeet Nation provide an example. Recall that the Blackfeet, through the 1896 Treaty, retained their rights to hunt and fish on ceded lands for "so long as the same shall remain public lands of the United States, under and in accordance with the provisions of the game and fish laws of the State of Montana."[163] In 1914, Congress created Glacier National Park on some of the lands ceded by the Blackfeet, and prohibited the hunting of wildlife inside Park boundaries.[164] The Tribe obviously assumed that their hunting and fishing rights, like their free access to the Park,[165] were still secure on these "public lands."[166] But the Montana District Court found otherwise, and ruled that the Blackfeet did not have a treaty right to hunt inside the Park because Congress chose to abrogate this right

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162. *See generally*, THEODORE CATTON, INHABITED WILDERNESS: INDIANS, ESKIMOS, AND NATIONAL PARKS IN ALASKA (1997); ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS (1998); MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (2000); PHILIP BURNHAM, INDIAN COUNTRY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS (2000).

163. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, *supra* note 3, at ch. 389.

164. All hunting or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited with the limits of said park…The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of property therein, especially for…the protection of the animals and birds in the park from capture or destruction, and to prevent their being frightened or driven from the park.

16 U.S.C. § 170 (2006).

165. This is a right that had to be fought for as well. *See* United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974). The Blackfeet position (as stated in 1986) holds that this decision "is an excellent precedent regarding the right of entry of its members onto the Lewis and Clark National Forest lands." 1986 Blackfeet Position Paper, *supra* note 4, at 6.

166. The federal government argued that when Glacier was created, the Blackfeet ceded lands ceased to be "public lands" and became park lands, therefore terminating the Tribes right to hunt in the Park. *See* United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000).

in its creation of Glacier.[167] It is clear, said the Court, that "Congress intended to create a game preserve in Glacier Park where the Secretary of the Interior was not authorized to allow any hunting."[168] This story is not anomalous. Other national park cases similarly demonstrate how Congress and the courts have often prioritized park purposes over their federal responsibilities to Indian tribes.[169]

To make a long story short, tribes have good reason to be suspicious of protected lands law and policy. But as we will see, not all protected land designations are the same, and some types may prove an advantageous way to secure tribal values and environmental protection. Some designations, moreover, can minimize the problematic level of discretion evident in other strategies used to protect sacred places and reserved rights, such as use of co-management or administrative decisions to accommodate tribes. Furthermore, some types of land designations, like a federal wilderness or conservation area, could be a more proactive and permanent way to protect sacred sites and treaty rights than through interminable rounds of confusing planning processes. These designations could, in other words, alleviate tribal needs to constantly react to agency plans and projects that may be hostile to their values and interests.

As discussed above, some of the most notable cultural resources and reserved rights cases involve non-compatible interests on multiple-use lands, like proposing timber sales and road building projects through sacred sites or important fishing and hunting grounds. Multiple-use lands are notorious for the conflicts they generate and the amount of discretion

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167. *Id.* at 1315.

168. *Id.* at 1320.

169. *See, e.g.*, *Miccosukee Tribe of Indians v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997). The Miccosukee Tribe lives on land in and around Everglades National Park. In 1994, flooding caused by Tropical Storm Gordon had nearly catastrophic impacts on tribal sites important to religious and cultural practices and the planting of corn and other vegetables, among other tribal values. Because of the flooding, the Tribe wanted vegetation cut and other steps taken in order to facilitate the flow of water through their properties in the Everglades. Arguments pertaining to the Indian trust doctrine and freedom of religion were made by the Tribe. But the court instead emphasized the laws governing the Park. The Everglades National Park Act states that nothing in the Act "shall be construed to lessen any existing rights of the Seminole Indians *which are not in conflict with the purposes for which the Everglades National Park is created*." 16 U.S.C. § 410(b) (2006) (emphasis added). The Everglades Act also incorporated the National Park Service Organic Act of 1916, which makes conserving scenery, nature, and wildlife the primary purposes of all national park management. 16 U.S.C. § 1 (2006). Under these applicable laws, said the court, "the only duty the Park Service had to the Tribe was to uphold its rights insofar as they did not conflict with overall park purposes." *Miccosukee Tribe of Indians*, 980 F. Supp. at 462. The court also emphasized how "the general trust relationship does not give rise to an affirmative duty by the government to act," *id.* at 463, nor does the First Amendment "require the government to assist any group in the exercise of its religion." *Id.* at 464 (citing *Lyng*, 485 U.S. at 448).

given to the USFS and BLM to manage them. These agencies often deal with such conflicts through planning processes that allocate lands and resources to particular uses. Some of the "decisions" made in these plans, however, are not necessarily binding on agencies or enforced by the courts.[170] The uncertain nature of resource planning helps explain interest in resolving conflicts legislatively. One way of doing this is for Congress to remove a piece of land from the multiple-use mandate and place it in another statutory framework. The remainder of this article examines a few versions of this strategy, along with other types of land designations that can be made by agencies, Congress, and tribes.

### A. The National Historic Preservation Act

I will start by reviewing an administrative designation that has often been used as a way to consider, and sometimes protect, sacred places and cultural resources on federal land.[171] The National Historic Preservation Act (NHPA, 1966)[172] is the basic charter and method of historic preservation in the United States. Agencies implement the Act by determining whether a "federal undertaking" will "diminish the integrity of the property's location…setting,…feeling, or association."[173] The Act authorizes the Secretary of Interior "to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects

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170. The Supreme Court ruled that national forest plans are "tools for agency planning and management," *Ohio Forestry Ass. v. Sierra Club*, 523 U.S. 726, 737 (1998), that "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal licenses, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Id.* at 733. The Supreme Court made a similar decision about planning by the Bureau of Land Management (BLM). In *Southern Utah Wilderness Alliance v. Norton*, 542 U.S. 55, 65–73 (2004), the Court ruled that plans are a preliminary step in land management and are tools by which present and future uses are projected. It is "generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." Plans are not a "legally binding commitment" but rather are strategic in nature. *Id.* at 71–72. The take home points from both rulings, as recently interpreted by the USFS in its 2005 planning regulations (currently enjoined), are that plans are merely strategic and aspirational in nature; they "are neither commitments nor final decisions approving projects and activities." *See* National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. 1026 (Jan. 5, 2005).

171. For a comprehensive overview and analysis, *see* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996–97).

172. 16 U.S.C. § 470-1 (2006).

173. 36 C.F.R. § 800.5(a)(1) (2008).

significant in American history, architecture, archeology, engineering, and culture."[174]

Procedural protections are provided to properties that are listed on the National Register, or are determined eligible for listing. State Historic Preservation Officers and federal agencies nominate properties for inclusion on the National Register, though individuals and other entities may request nominations.[175] The NHPA requires agencies to ensure that their historic properties are preserved to maintain their historic, archaeological, architectural, and cultural values.[176] "Properties of traditional religious and cultural importance" to Indian tribes are types of properties eligible for listing.[177] Though not defined by statute, the term traditional cultural properties (TCP) is used to describe a type of property that is eligible for listing because of its traditional cultural significance.[178]

Two types of protection are provided by the Act, one substantive and the other more procedural in nature. Properties designated as National Historic Landmarks receive greater substantive protection. Before approving actions that would affect a landmark, Section 110 of the NHPA requires that the responsible federal agency "shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark."[179]

The Bighorn Medicine Wheel in Wyoming's Bighorn National Forest provides an oft-used example of how this designation can help protect a sacred site on federal lands and influence agency decisions. This prehistoric stone circle was constructed by aboriginal peoples of North America and a number of Indian tribes consider the Medicine Wheel sacred. It was designated as a National Historic Landmark in 1969, with 110 acres included in the designation. USFS management of the area had been controversial. In 1991, for example, the agency chose a management alternative that included road construction and improvements to allow unrestricted vehicular access except during ceremonial uses, and construction of a parking lot (with restrooms) adjacent to the Medicine Wheel. Upon a very critical reception of the proposal, the USFS began the

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174. 16 U.S.C. § 470a(a) (2006).

175. 36 C.F.R. §§ 60.6, 60.9., 60.11 (2008).

176. 16 U.S.C. § 470h-2(a) (2006).

177. 16 U.S.C. § 470a(d)(6)(A) (2006).

178. A traditional cultural property is one "associat[ed] with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." U.S. DEPT. OF INTERIOR, NAT'L PARK SERV., NAT'L REGISTER BULLETIN NO. 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (rev. ed. 1998), *available at* http://www.nps.gov/history/nr/publications/bulletins/nrb38/nrb38.pdf.

179. 16 U.S.C. § 470h-2(f) (2006).

NHPA consultation process. This process resulted in a long-term Historic Preservation Plan (HPP) that required consultation between the USFS and other parties for any project proposed within a 18,000–20,000 acre "area of consultation" surrounding the Medicine Wheel. The USFS approved the HPP by amending its existing forest plan in 1996.

This decision was also controversial because it had the potential of limiting timber harvesting activities in the Bighorn National Forest, even though the HPP does not prohibit logging in the area of consultation. A commercial timber company litigated the decision on constitutional and procedural grounds, arguing among other things that the HPP was a significant change to the forest plan that required full NEPA/NFMA (National Forest Management Act) compliance. But the district and circuit courts found in favor of the USFS, partly because the area of consultation comprises only 1.6 percent of the Bighorn National Forest, and was thus a non-significant change to the forest plan that did not require the full NEPA/NFMA process to be used by the agency.[180]

Section 106 of the NHPA, on the other hand, provides procedural protection in that it requires effects on properties to be considered by agencies.[181] This is basically a required consultation process whereby agencies consult "with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to an historic property that would be affected by a proposed federal undertaking.[182] The Section 106 process also requires that agencies assess the affects of their undertakings on any eligible properties found, determine whether the effect will be adverse, and to avoid, minimize, or mitigate the adverse effects.[183]

Though the courts have characterized Section 106 as a "stop, look, and listen" provision requiring agencies to consider the effects of their programs, this provision, along with others, is not to be taken lightly.[184] In one case, for example, the court held that the USFS did not make a reasonable effort to identify traditional cultural properties or engage in a meaningful consultation process.[185] And in another important decision, the court found that the USFS did not satisfy the NHPA's mitigation

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180. *See* Wyoming Sawmills v. U.S. Forest Serv., 179 F. Supp. 2d 1279 (D. Wyo. 2001), *aff'd* 383 F.3d 1241 (10th Cir. 2004).

181. 16 U.S.C. § 470f (2006).

182. 16 U.S.C. § 470a(d)(6)(B) (2006). Under NHPA regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them." 36 C.F.R. § 800.16(f) (2008).

183. 36 C.F.R. §§ 800.5, 800.6, 800.7 (2008).

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

185. Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995). In this case, the USFS found no properties eligible for inclusion for listing on the Register and withheld relevant information from the State Historic Preservation Officer during the consultation process. *Id.*

requirement when it proposed to map and photograph culturally significant land that was proposed to be exchanged with Weyerhaeuser timber corporation.[186]

In other places, however, historic designation seems to have mattered little to agencies or the courts. Take, for example, in the *Lyng* case the USFS proposed road building and timber sales in the sacred high country managed by the Six Rivers National Forest (discussed above). At the time this proposal was made, the area was already part of the Helkau Historic District and determined eligible for listing on the National Register. Yet this did not dissuade the USFS from its plans to construct the road and allow timber harvesting.[187]

A more recent example is provided by the *Navajo Nation*/San Francisco Peaks case in which the USFS permitted the expansion of the Snowbowl ski area and the use of sewage effluent to make snow on land held sacred by multiple tribes. The Peaks are eligible for inclusion on the National Register as a TCP. Because of this, the USFS began its required consultation process whereby consulting parties must consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register for eligible property.[188] For the Snowbowl project, a "finding of adverse effect" was made by the USFS. Its attempt to avoid, minimize, or mitigate this effect included allowing access for traditional cultural practitioners and free use of the ski lifts in the summer.[189] Though the Ninth Circuit Court found in favor of Indian plaintiffs on other grounds, both it and the district court found the USFS in full compliance with the NHPA because it attempted to consult with affected tribes and adequately described ways to mitigate adverse effects.[190]

There are several different perspectives on how effective the NHPA has been in protecting sacred sites on federal land. Much of the divergence stems from the considerable discretion afforded to agencies in determining eligibility, and how agencies manage the cultural properties that have been administratively designated as such. On one hand, the NHPA designation requires consultation, and this process is important. According to Dean Suagee, director of the First Nations Environmental Law Program at the University of Vermont, "[b]ecause many tribes attach religious and cultural importance to places that are not within the boundaries of their reservations, many tribes regard this as a very important right, even though

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

187. For background on the District and how the USFS responded, *see* JeDon Emenheiser, *The G-O Road Controversy: American Indian Religion and Public Land* (1999), http://www.humboldt.edu/~jae1/emenLyng.html (last visited Dec. 30, 2008).

188. 36 C.F.R. §800.4 (2008).

189. Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 879–80 n.10 (D. Ariz. 2006).

190. *See id.*; *see* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

it is just a procedural right. In essence, it is the right to have a seat at the table, a chance to persuade the responsible federal official to do the right thing."[191] On the other hand, there are lots of cases in which such persuasion did not work, and tribal government representatives and other commentators often voice frustration at how little NHPA designation seems to matter at times.[192]

## B. Federal Wilderness Designation

My research review revealed relatively little discussion about how federal wilderness or another protected land designation might be used as a way to better protect sacred places and reserved treaty rights on federal land. But my analysis shows that Congress is increasingly recognizing tribal values in passing wilderness legislation, and that some tribal governments see federal wilderness and other protective land designations as an effective way to protect cultural resources and sacred places.

### *1. History*

For some Indian tribes, there is some unfortunate historical baggage associated with federal wilderness law.[193] Much of this is due to the complicated legacy of Bob Marshall, a prominent and highly effective advocate for roadless country and Indian independence, two values he saw as interdependent.[194] Marshall, in close cooperation with Indian

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191. Dean B. Suagee, *Historic Storytelling and the Growth of Tribal Historic Preservation Programs,* 17 NAT. RESOURCES & ENV'T 86, 88 (2002).

192. *See, e.g., Native American Sacred Places Hearing*, *supra* note 74, at 65–69 (statement of Gene Preston, Chairman, Pitt River Tribe) (criticizing agency implementation of the NHPA concerning the sacred Medicine Lake Highlands managed by the Modoc National Forest). For a more detailed critique focused on NHPA implementation and cultural resources management by the BLM, see T. DESTRY JARVIS, NATIONAL TRUST FOR HISTORIC PRESERVATION, CULTURAL RESOURCES ON THE BUREAU OF LAND MANAGEMENT PUBLIC LANDS: AN ASSESSMENT AND NEEDS ANALYSIS (May 2006), *available at* http://www.preservationnation.org/issues/public-lands/additional-resources/NTHP-BLM-Report.pdf. Among other things, the report finds that increased energy exploration and development on BLM lands has resulted "in a decrease in the adequacy of Section 106 compliance, fewer National Register listings, and limited land use restrictions to protect cultural resources sites." *Id.* at 5.

193. For insightful analysis *see* Diane L. Krahe, Last Refuge: The Uneasy Embrace of Indian Lands by the National Wilderness Movement, 1937–1965 (2005) (unpublished Ph.D. dissertation, Washington State University) (on file with author) (placing the story in a much larger context of New Deal-era Indian policy, the American wilderness movement, and the fight for Indian self-determination) [hereinafter Krahe, Last Refuge].

194. According to historian Paul Sutter, Marshall's Indian roadless policy "was not meant to dispossess Indians or lock up their resources." PAUL S. SUTTER, DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT 228 (2002). Rather, he aimed to protect Indian economic and cultural autonomy from what he saw as a

Commissioner John Collier, believed that roadless designation on tribal lands was necessary to protect Indian culture and political autonomy. As Chief Forester in the Office of Indian Affairs, in 1937 Marshall prepared Order No. 486 which designated nearly five-million acres of Indian reservation land as roadless.[195] The Order, however, was made without tribal consultation. Good intentions notwithstanding, this type of federal paternalism was resented by affected tribes who valued sovereignty over roadless designation.[196]

Early versions of the 1964 Wilderness Act also included tribal reservation lands. Unlike Marshall's earlier reservation roadless order, Senate Bill 1176 included a tribal consent provision: "[N]o such area shall be included until the tribe or band within whose reservation it lies, through its tribal council or other duly constituted authority, shall have given its consent to the inclusion of the area within the System."[197] The catch? Any changes to reservation roadless areas would have to conform to the stated purpose of the legislation, which was "to establish on *public lands* of the United States a National Wilderness Preservation System for the *permanent good of the whole people*" (emphasis added).[198] Many Indians resented their lands being classified as public lands that would once again serve the needs

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new set of threats," often coming in the form of roads. *Id.* "Rather than preserving a romanticized pristine nature against any human use, Marshall's policy sought to prohibit roads and other modern developments as a way of protecting both Native Americans and wilderness." *Id.* at 229.

195. "From the standpoint of the Indians, it is of special importance to save as many areas as possible from invasion by roads. Almost everywhere they go the Indians encounter the competition and disturbances of the white race. Most of them desire some place which is all their own. If, on reservations where the Indians desire privacy, sizeable areas are uninvaded by roads, then it will be possible for the Indians of these tribes to maintain a retreat where they may escape from constant contact with white men." Office of Indian Affairs, Order No. 486, Establishment of Roadless and Wild Areas on Indian Reservations, 3 Fed. Reg. 1408, 1409 (Oct. 25, 1937). Curiously, however, the Order allows for access by non-Indians, and discusses the economic benefits to tribes that could result from guiding and outfitting in these roadless areas. *Id.* at 1409.

196. Krahe, for example, calls Marshall's roadless policy "well-intentioned but ill-fitting." Krahe, Last Refuge, *supra* note 193, at 11. "Yet all the noble intentions of Marshall and his superiors could not compensate for the fact that the reservation roadless policy was itself a non-native creation, one that dictated the value and use of these designated lands without any input from the Indians to which they belonged." *Id.* at 97. She goes on: "No doubt Marshall believed he was defending the cultural heritage of Indians in his roadless order for reservations. Although Marshall's motives in this pursuit extended beyond native communities, he did not knowingly impose values upon Indian people against their will. His mistake came in his *assumption* that each tribe shared his view on how to best use the remaining wild landscapes on reservations." *Id.* at 103–104.

197. *National Wilderness Preservation Act: Hearings on S. 1176 Before the Comm. on Interior and Insular Affairs*, 85th Cong. 5 (1st Sess. 1957).

198. *Id.* at 1, 7.

of non-Indians. A subsequent version of the Wilderness Act, Senate Bill 4028, did not include all reservation roadless areas, but this time allowed the Interior Secretary to designate such areas as wilderness "after consultation with the several tribes or bands, through their tribal councils or other duly constituted authorities."[199] Such unilateral power was obviously threatening to those tribes who participated in the wilderness debates, and who insisted on tribal consent in any wilderness legislation.[200]

This history goes much deeper, of course, but suffice it to say that Marshall's reservation roadless order and provisions for Indian lands in early wilderness legislation were "inextricably linked."[201] Historian Diane Krahe summarizes that "Indian resentment toward the former had bred either mistrust or contempt of the latter."[202] And this explains why the reservation roadless designation was eventually lifted, with the Wind River Tribal Roadless Area the only survivor of Marshall's 16 roadless designations on Indian reservations (discussed below).[203] It also explains tribal opposition to early versions of the Wilderness Act and why all references to reservation lands were eventually removed from the final legislation signed in 1964.[204]

*2. Post-1964 Wilderness Legislation*

Despite this contentious history, wilderness and other protected land designations with tribal provisions have been made by Congress since the 1964 Wilderness Act. Recall, again, the *Lyng* case in which the Six Rivers National Forest proposed a large timber harvesting and road building project in the high country sacred to some California tribes. What is sometimes not told about this story is that the project was not implemented as planned because some of the area was subsequently designated as wilderness in the California Wilderness Act of 1984.[205] The controversial G-O road strip was exempted from this legislation, but wilderness designation prohibited logging in much of the sacred high country; thus removing the main purpose of the road. In any case, the road was not built because

199. *National Wilderness Preservation Act: Hearings on S. 4028 Before the Comm. on Interior and Insular Affairs*, 85th Cong. 3 (2d Sess. 1958).

200. A subsequent bill, S. 1123, provided a "tribal consent" clause. *See National Wilderness Preservation Act: Hearings on S.1123 Before the Comm. on Interior and Insular Affairs*, 86th Cong. 4 (1st Sess. 1959).

201. Krahe, Last Refuge, *supra* note 193, at 180.

202. *Id.* at 200.

203. *Id.*

204. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–36 (2006)).

205. The California Wilderness Act of 1984 designated the Chimney Rock region as part of the Siskiyou Wilderness. Pub. L. No. 98-425, § 101(a)(30), 98 Stat. 1619 (codified at 16 U.S.C. § 1132 (2006)).

Congress subsequently protected the area in the 1990 Smith River National Recreation Area Act, which added parts of the G-O road corridor to the Siskiyou Wilderness.[206] This postscript to *Lyng* begs the question of how land-use designations, like a federal wilderness, might fare in protecting tribal values and interests on federal land elsewhere.

Though the 1964 Wilderness Act makes no mention of treaty rights and sacred sites,[207] such language has appeared with increasing frequency in enabling legislation creating individual wilderness areas. I will start my review by examining some older legislation and work towards proposed wilderness bills in Congress. This brief statutory review is then followed by a section discussing relevant wilderness management issues as they pertain to tribal rights and sacred sites.

*a. El Malpais Area*

In 1987 Congress used three land-use designations to protect the *el malpais* ("badlands" in Spanish) region of New Mexico (near the city of Grants), a place of historical, religious, and cultural importance to the Acoma and Zuni Pueblos and other tribes. This law created the El Malpais National Monument which is managed by the NPS (114,277 acres), and the El Malpais National Conservation Area (NCA) (roughly 263,000 acres) and the West Malpais and Cebolla Wilderness Areas (roughly 98,000 acres) managed by the BLM (the wilderness areas are within the NCA).[208] The Monument was designated to "*preserve* for the benefit and enjoyment of present and future generations…the nationally significant Grants Lava Flow, the Las Ventanas Chacoan Archaeological Site, and other significant natural and cultural resources."[209] The NCA, on the other hand, was created to "*protect* for the benefit and enjoyment of future generations…the La Ventana Natural Arch and other unique and nationally important

206. Smith River National Recreation Area Act, Pub. L. No. 101-612, § 5(b)(2)(H) 104 Stat. 3209 (1990) (codified at 16 U.S.C. § 460bbb-3 (2006)) (note that references to sacred land and religion are not made in the Act).

207. The Wilderness Act's legislative history reveals no discussion of Congressional abrogation of Indian treaty rights. This absence is important to the courts who require "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 740 (1986). Though written with other interests in mind, wilderness legislation typically includes "subject to valid existing rights" language, and it is reasonable to think in a similar way about preexisting off-reservation treaty rights in federal wilderness areas.

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

209. *Id.* § 101 (emphasis added).

geological, archeological, ecological, cultural, scenic, scientific, and wilderness resources of the public lands surrounding the Grants Lava Flows."[210] Land was designated as wilderness with purposes provided in the Wilderness Act's and the El Malpais Act's special provisions.[211]

Cultural resources, aboriginal rights, and tribal access to these protected lands were central themes in the El Malpais Act's legislative history and negotiations.[212] As a result, all three designations recognize the cultural heritage of the area by requiring the development of cultural resource management plans, authorizing the designation of the Masau (historic and cultural) Trail, and special provisions related to tribal access. The law, for example, recognizes the religious and historic importance of the region by assuring "nonexclusive access to the monument and the conservation area by Indian people for traditional cultural and religious purposes," with such access consistent with the American Indian Religious Freedom Act, and where applicable, the Wilderness Act.[213] The Secretary is also authorized by the El Malpais Act to "temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people," so long as such closure affects "the smallest practicable area for the minimum period necessary for such purposes."[214] Also authorized is a tribally-represented advisory committee focused on implementation of these access provisions, and a different section encouraging the use of cooperative agreements.[215]

The El Malpais Act is significant because of its legislative approach to sacred lands conflict. Unlike other approaches during this time period focused on free exercise claims or administrative accommodation of tribal

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210. *Id.* § 301 (emphasis added).

211. *Id.* §§ 401–02.

212. Debated issues included the boundaries and restrictions of designated wilderness, vehicle access for Native Americans, land exchanges, Indian water rights, and others. For example, the boundaries of the Cebolla Wilderness were modified by Congress to exclude a sacred spring in order to maintain access for Acoma Pueblo and to reduce potential conflicts with grazing. For a detailed legislative history and analysis, *see* KATHRYN MUTZ & DOUG CANNON, NATURAL RESOURCES LAW CENTER, EL MALPAIS AREA: NATIONAL MONUMENT, NATIONAL CONSERVATION AREA AND THE WEST MALPAIS AND CEBOLLA WILDERNESS AREAS 20–21 (2005), *available at* http://www.colorado.edu/law/centers/nrlc/projects/wilderness/ElMalpais.pdf; Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133 (1994).

213. El Malpais Act § 507(a). The House Committee Report emphasizes that active management of cultural resources in the designated wilderness areas is important and compatible with the Wilderness Act. MUTZ & CANNON, *supra* note 212, at 13.

214. El Malpais Act § 507(c).

215. *Id.* §§ 507(d)–08.

resources, Congress in this case used its powers under the property clause and Indian trust doctrine to protect an area sacred to Indian tribes. Wilderness designation was part of the answer in this region, though as we will see, its subsequent management has not been free of problems and challenges.

*b. T'uf Shur Bien Preservation Trust Area*

The T'uf Shur Bien Preservation Trust Area Act provides another relevant and unique legislative approach to cultural resources and sacred lands.[216] The Pueblo of Sandia claimed access to the western face of Sandia Mountain, which is part of the Sandia Mountain Wilderness, near Albuquerque, New Mexico. The Pueblo claimed that roughly 10,000 acres were excluded from its Spanish land grant because of a survey error. Following litigation over the matter, a settlement agreement was reached by the Pueblo, the federal government, and another private party. The T'uf Shur Bien Act was passed by Congress because it was the only way in which the agreement could be made permanent.[217]

The law created the T'uf Shur Bien Preservation Trust Area within the Cibola National Forest and Sandia Mountain Wilderness "to preserve in perpetuity the national forest and wilderness character of the Area."[218] Despite the survey error, the United States retains title to this land, with public access allowed, and it will continue to be managed by the USFS as federally-designated wilderness. What is different, however, are new powers given to the Pueblo regarding how the area will be managed. First, "[t]raditional or cultural uses by Pueblo members and members of other federally-recognized Indian tribes authorized to use the Area by the Pueblo…shall not be restricted," except by the Wilderness Act and applicable federal wildlife protection laws.[219] In this case, the Pueblo was not concerned about the restrictions imposed by wilderness designation, but rather how existing wilderness laws and regulations pertaining to this area could change in the future.[220] The Pueblo voiced concern about how policies often change when Native Americans are involved, and wanted "perpetual preservation" of this area.[221] To guarantee such protection, the Act gives the Pueblo the right to consent or withhold consent—veto power—over any

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216. T'uf Shur Bien Preservation Trust Area Act, Pub. L. No. 108-7, div. F, tit. IV, §§ 401–15, 117 Stat. 282 (2003) (codified at 16 U.S.C. §§ 539m-1–539m-12 (2006)).

217. For history of this case and the legislation *see* S. REP. NO. 107-285 (2002).

218. T'uf Shur Bien Preservation Trust Area Act § 404(a)(2).

219. *Id.* § 404(b)(2).

220. *T'uf Shur Bien Preservation Trust Area Act: Joint Hearing Before the S. Comm. on Energy and Natural Resources and the S. Comm. on Indian Affairs*, 107th Cong. 50 (2d Sess. 2002) [hereinafter *T'uf Shur Bien Hearing*] (statement of Stuwart Paisano, Governor, Pueblo of Sandia, Sandia Tribal Council).

221. *Id. See also* T'uf Shur Bien Preservation Trust Area Act § 405(a)(2).

new use of the area that might be proposed by the USFS in the future. A compensable interest is also created by the Act, meaning that if Congress diminishes the national forest or wilderness area by allowing a prohibited use, or denies access for any traditional or cultural use in the area, the United States must compensate the Pueblo as if the Pueblo held a fee title interest in the area.[222]

The history of the Sandia litigation case explains the unique nature of the T'uf Shur Bien Act. Its debate in Congress focused on the precedent that many interests did not want established by this "super-wilderness" law.[223] But its supporters insisted throughout the debate that the situation-at-hand is unique, and the resulting legislation reflected this concern.[224] Others fully appreciated why the Pueblo demanded veto power over USFS management decisions, as some believe the agency has allowed too many projects in the Sandia Wilderness that have diminshed the mountain's wild character.[225]

*c. Omnibus Wilderness Laws*

More recent wilderness legislation also includes various tribal provisions. Take, for example, the controversial Nevada "omnibus wilderness" laws, which include multiple deals and land conveyances in exchange for wilderness designation. This legislation includes the Clark County Conservation of Public Land and Natural Resources Act of 2002,[226] the Lincoln County Conservation, Recreation, and Development Act of 2004,[227] and the White Pine County Conservation, Recreation, and Development Act of 2006.[228] Each of these Acts contain similar sections on "Native American Cultural and Religious Uses." The Clark County legislation is typical, stating that "[n]othing in this Act shall be construed to diminish the rights of any Indian Tribe [nor] be construed to diminish tribal rights regarding

222. T'uf Shur Bien Preservation Trust Area Act § 405(c).

223. *See, e.g.*, *T'uf Shur Bien Hearing*, *supra* note 220, at 8, 10 (statements of Senators Pete Domenici & Larry Craig).

224. "The provisions of this title creating certain rights and interests in the National Forest System are uniquely suited to resolve the Pueblo's claim and the geographic and societal situation involved, and shall not be construed as precedent for any other situation involving management of the National Forest System." T'uf Shur Bien Preservation Trust Area Act § 411(c).

225. *See, e.g.*, *T'uf Shur Bien Hearing*, *supra* note 220, at 78–79 (statement of Edward Sullivan, Executive Director, New Mexico Wilderness Alliance).

226. Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 116 Stat. 1994.

227. Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, 118 Stat. 2403.

228. White Pine County Conservation, Recreation, and Development Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, 3028.

access to Federal lands for tribal activities, including spiritual, cultural, and traditional food-gathering activities."[229]

The Steens Mountain Cooperative Management and Protection Act of 2000 has a similar "protection of tribal rights" provision, along with a variety of other special land designations and management arrangements.[230] These include wilderness designation, the creation of a "cooperative management and protection area," the authorization of cooperative management agreements, and the establishment of an advisory council. These provisions have more specific tribal components as well. For instance, two of the stated objectives of the cooperative management and protection area is "to maintain and enhance cooperative and innovative management projects, programs and agreements between tribal, public, and private interests" and "to conserve, protect and to ensure traditional access to cultural, gathering, religious, and archeological sites by the Burns Paiute Tribe on Federal lands and to promote cooperation with private landowners."[231] Tribal cultural site protection is addressed in the Act by authorizing the Secretary of the Interior to enter into agreements with the Tribe to protect cultural sites in the cooperative management and protection area.[232] The Act also stipulates that the established advisory council shall include a member of the Burns Paiute Tribe.[233]

Like the Nevada laws and other omnibus wilderness legislation, the Steens Act is controversial for several reasons, though critics have not focused explicitly on its tribal provisions.[234] As of 2002, based on testimony provided during a congressional hearing, the Burns Paiute Tribe was not

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229. Clark County Conservation of Public Land and Natural Resources Act of 2002 § 206. The White Pine County Act also authorizes a transfer of land to be held in trust for the Ely Shoshone Tribe. White Pine County Conservation, Recreation, and Development Act of 2006 § 361.

230. Steens Mountain Cooperative Management & Protection Act of 2000, Pub. L. No. 106-399, 114 Stat. 1655, 1658 (2000) (codified at 16 U.S.C. § 460nnn (2006)). Section 5 provides that "[n]othing in this Act shall be construed to diminish the rights of any Indian tribe [nor] shall be construed to diminish tribal rights, including those of the Burns Paiute Tribe, regarding access to Federal lands for tribal activities, including spiritual, cultural, and traditional food gathering activities." *Id.* § 5.

231. *Id.* §§ 102(b)(1), (3).

232. *Id.* § 121(d).

233. *Id.* § 131(b)(4).

234. *See* JANINE BLAELOCH, WESTERN LANDS PROJECT & KATIE FITE, Western Watersheds Project, *QUID PRO QUO* WILDERNESS—A NEW THREAT TO PUBLIC LANDS,WESTERN LAND EXCHANGE PROJECT & WESTERN WATERSHEDS PROJECT 1 (May 2006), http://www.westlx.org/assets/quid-pro-quo.pdf (last visited Dec. 30, 2008) ("If this trend continues, the days of the stand-alone wilderness bill, along with the strict observance of the letter and spirit of the Wilderness Act, may become relics of the past"). For a sometimes more charitable view, including details about the political processes and players involved in these deals, see A WESTERN GOVERNORS ASSOCIATION WHITE PAPER, COLLABORATIVE CONSERVATION STRATEGIES: LEGISLATIVE CASE STUDIES FROM ACROSS THE WEST (June 2006).

satisfied with the implementation of the "carefully crafted" wording of the Steens Act.[235] Much of the Burns Paiute criticism focuses on a lack of cooperation and respect from the BLM and the Advisory Council, despite the stated purposes of the Act, and problems related to wilderness access for traditional practices. A number of these practices are done within the Steens Mountain Wilderness (known as Tse Tse Ede or "Cold, Cold Mountain"), and the Burns Paiute complain about its management, including prohibitions on some types of access for those tribal members of limited mobility, and limitations placed on group size.[236] The Burns Paiute correctly emphasize that all sorts of non-conforming uses and special provisions are provided in wilderness laws, like access for maintenance of power lines, fish and wildlife management, and mining claims, among others (as discussed below). While the importance of such exclusions are recognized by the Tribe, "they do not consider their right and need to continue Traditional Practices as less vital [than] the management of Big Horn Sheep and the maintenance of outhouses."[237]

The Steens wilderness management and access issues can be contrasted to more explicit tribal use language found in the Northern

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235. *Steens Mountain Cooperative Management and Protection Act: Oversight Hearing Before the Subcomm. on the National Parks, Recreation, and Public Lands of the Comm. on Resources*, 107th Cong. 81–86, 84 (2d Sess. 2002) (statement of the Burns Paiute Tribe).

236. Tribal testimony states:

> A great number of Traditional Practices are conducted at Tse Tse Ede: subsistence gathering, secular and sacred Traditional Practices to name a few. While a number of these Traditional Practices are singular or are participated in by small groups, numerous are also participated in by larger numbers of individuals and individuals of limited mobility due to advanced age. The Burns Paiute Tribe is not willing to leave out participating Tribal members due to an arbitrary numeric limit to group size in the wilderness. The Burns Paiute Tribe is not willing to leave at home the most valued members of their community from any Traditional practice because those individuals are of limited mobility due to age solely to accommodate the limited interpretation of the Wilderness Act by environmental 'evangelists'. The Burns Paiute Tribe is not willing to alter, accommodate, or dismantle Traditional sacred practices and religion to accommodate the Wilderness Act and those individuals within the [Steens Mountain Advisory Council] and BLM who represent a singular agenda and detrimental ethnocentric view…For the Burns Paiute People to be able to continue with Traditional Practices, they all must be able to have access to Tse Tse Ede. This is not a matter of having a 'wilderness experience', but the survival of a culture.

*Id.* at 83. Though no tribal references are made in their critique of the Steens, Blaeloch and Fite argue that a central problem with the Act's implementation "is that locals have interpreted the Steens legislation in such a way that the 'innovations' and flexibility established in the [cooperative management and protection area] would also apply to the Wilderness." BLAELOCH & FITE, *supra* note 234, at 2. Like others, they worry that special exceptions will erode the integrity of the Wilderness Act. *Id.* at 6 (discussed below).

237. *Id.*

California Coastal Wild Heritage Act of 2006.[238] Its access provision, cited in accordance with AIRFA, recognizes "the past use of wilderness areas designated by this Act by members of Indian tribes for traditional cultural and religious purposes," and provides "the Secretary shall ensure that Indian tribes have access to the wilderness areas for traditional cultural and religious purposes."[239] Upon request of an Indian tribe, the Secretary "may temporarily close to the general public [one] or more specific portions of a wilderness area to protect the privacy of the members of the Indian tribe in the conduct of the traditional cultural and religious activities in the wilderness area," though any closure "shall be made in such a manner as to affect the smallest practicable area for the minimum period of time necessary for the activity to be carried out."[240]

*d. Ojito Wilderness Act*

The Ojito Wilderness Act of 2005 designated 11,183 acres of wilderness, and allowed the purchase of roughly 11,500 acres by the Pueblo of Zia to become part of its reservation.[241] The purpose of the latter was "to protect its religious and cultural sites in the area and to consolidate its land holdings."[242] Zia Pueblo leadership supported the legislation because it connected two important pieces of ancestral land containing significant cultural values and sacred sites.[243] The legislation was also endorsed by a wide range of other interests.[244] The Act allows for public access to the

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238. Northern California Coastal Wild Heritage Wilderness Act, Pub. L. No. 109-362, 120 Stat. 2064 (2006) (codified at 16 U.S.C. § 460sss (2006)).

239. *Id.* § 4(k)(1).

240. *Id.* §§ 4(k)(2)(A)-(B).

241. Ojito Wilderness Act of 2005, Pub. L. No. 109-94, 119 Stat. 2106 (2005) (codified at 16 U.S.C. § 1132 (2006)).

242. H.R. REP. NO. 108-71, at 4 (2003).

243. *Alaska Native Allotment Subdivision Act; Alaska Land Transfer Facilities Act; Ojito Wilderness Act; and Inventory and Management Program for Public Domain Lands: Hearing Before the S. Comm. on Energy and Natural Resources*, 108th Cong. 26–27 (2004) (statement of Peter M. Pino, Governor, Pueblo of Zia).

244. This included unanimous endorsements from nearby county commissions and the Albuquerque City Council; letters of support from the Governor, Lt. Governor, State Land Commissioner and several members of the New Mexico State Legislature; support from the Navajo, Hopi, and Zuni Nations, and the All Indian Pueblo Council; and the Coalition for New Mexico Wilderness; among others. *See id.* at 28–29 (statement of Martin Heinrich, City Councilor, Albuquerque, NM). The BLM, however, expressed some concerns about the bill's transfer of public land provision. *See id.* at 11–12 (statement of Kathleen Clarke, Director, BLM). *See also* April Reese, *New Mexico's Ojito Area a Signature Away from Protection*, LAND LETTER, Oct. 20, 2005 (noting the broad support for the legislation). *See also* Laura Paskus, *The Little Wilderness That Could*, HIGH COUNTRY NEWS, Nov. 28, 2005, at 3, *available at* http://www.hcn.org/issues/311/15941 (noting that the "Ojito also lacks surface water, known oil and gas reserves, and forests full of timber").

transferred land[245] and stipulates the conditions under which it is to be managed, leading some to call it "de facto wilderness."[246] For example, the conveyed land "shall be maintained as open space and the natural characteristics of the land shall be preserved in perpetuity"; and "the use of motorized vehicles (except on existing roads or as is necessary for the maintenance and repair of facilities used in connection with grazing operations), mineral extraction, housing, gaming, and other commercial enterprises shall be prohibited within the boundaries of the land conveyed…."[247]

*e. Wilderness Bills*

Several proposed wilderness bills also include provisions related to tribal rights and sacred sites, including the California Wild Heritage bill,[248] the Lewis and Clark Mount Hood Wilderness bill,[249] the Owyhee Initiative Implementation bill,[250] and the Central Idaho Economic

245. Ojito Wilderness Act of 2005 § 4(d)(1).

246. Paskus, *supra* note 244.

247. Ojito Wilderness Act of 2005 § 4(d)(2).

248. H.R. 860, 110th Cong. § 102(p) (2007) (ensuring access to wilderness areas for traditional cultural and religious purposes with authorization for temporary closures affecting the smallest practicable area).

249. S. 647, 110th Cong. §§ 802, 804 (2007) (establishing priority use areas in Mount Hood National Forest for the gathering of "first foods" by members of Indian tribes with treaty-reserved gathering rights). This bill contains an extraordinary amount of controversial provisions. Furthermore, the Confederated Tribes of the Warm Springs Reservation of Oregon opposed an earlier version of this bill's wilderness designation. Though Tribal leadership supported the purpose and intent of the bill, they "are simply not convinced that wilderness designation is the appropriate protective tool to achieve *this purpose, as it can lead to some unintended consequences such as substantial timber losses from fire and disease*." *Development in Lincoln County, Nevada [sic]; Designate Wilderness in Oregon; and Reforestation of Appropriate Forest Cover on Forest Land: Hearing Before the S. Comm. on Energy and Natural Resources*, 108th Cong. 85–87 (2004) (statement of the Confederated Tribes of the Warm Springs Reservation of Oregon). Given their substantial history in forest management, the Tribe expressed particular concern about the transboundary nature of unmanaged wilderness, and how easily problems could spread onto adjacent timber lands, including those on the Reservation. The Tribe also expressed concern that wilderness designation could attract more recreationists and lead to excessive overuse and more trespass on the Reservation. *Id.* at 87.

250. S. 3794, 109th Cong. (2006). Among other tribal provisions, nothing in this Bill diminishes "the rights of any Indian tribe, including rights of access to Federal land for tribal activities, including spiritual, cultural, and traditional food-gathering activities." *Id.* § 4. Title IV of this Bill also contains provisions related to cultural resource management and supports "a broad range of measures to protect cultural sites and resources important to the continuation of the traditions and beliefs of the Tribes." *Id.* tit. IV. *See also* Owyhee Initiative Agreement, http://www.owyheeinitiative.org/agreement.htm (last visited Dec. 30, 2008) (providing more details on how the Agreement deals with cultural resources and tribal aboriginal claims).

Development and Recreation bill.[251] The proposed Northern Rockies Ecosystem Protection Act (NREPA), which is the most sweeping wilderness bill recently considered by Congress, also deals with the issue of Native American uses in wilderness areas.[252] It generally does so by ensuring "nonexclusive access to these protected areas by native people for such traditional cultural and religious purposes," consistent with AIRFA and the Wilderness Act.[253] The bill also authorizes temporary closures of specific portions of protected areas "in order to protect the privacy of religious activities and cultural uses in such portions by an Indian people."[254] To assure protection of religious, burial, and gathering sites in wilderness areas, NREPA directs the USFS and the BLM to enter into cooperative agreements with appropriate Indian tribes.[255]

NREPA also includes specific provisions related to the creation of the "Blackfeet Wilderness Area," which would comprise 128,622 acres of the Badger-Two Medicine.[256] This bill recognizes the importance of Blackfeet Treaty rights[257] by creating a review committee consisting of Blackfeet tribal representatives (to include those from the Blackfeet Tribal Business Council and Tribal Traditionalists) and other interests who shall advise the Secretary and develop a wilderness management plan. This plan is to ensure "that Blackfeet religious and treaty rights to lands in the wilderness are recognized and honored."[258] The Secretary and the committee, moreover, shall "give special consideration to the religious, wilderness, and wildlife uses of the Blackfeet Wilderness, taking into account treaties the United States has entered into with the Blackfeet Nation."[259]

This brief overview of selected wilderness law illustrates the disparate ways in which tribal values are being recognized, and perhaps protected, through wilderness legislation and other land-use designations. They range from the substantive tribal veto-powers granted in the T'uf Shur Bien Act to what is becoming more standard legislative language regarding sacred lands access and reserved use rights in federal wilderness areas. In some cases, the legislation is too recent to fairly analyze how it is being

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251. H.R. 222, 110th Cong. § 208 (2007) (providing that "[n]othing in this title shall be construed to diminish the rights of any Indian tribe" nor "to diminish tribal rights regarding access to Federal lands for tribal activities, including spiritual, cultural, and traditional food-gathering activities").

252. H.R. 1975, 110th Cong. § 504 (2007).

253. *Id.* § 504(b).

254. *Id.*

255. *Id.* § 504(c).

256. *Id.* § 108.

257. H.R. 1975, 110th Cong. § 602 (2007) also states that "[n]othing in this Act may be construed to affect or modify any treaty or other right of an Indian tribe."

258. *Id.* § 108(e).

259. *Id.* § 108(f).

implemented and evaluated by various interests. These new tribal provisions in wilderness law might represent a new tribal power in natural resource management and a growing awareness of treaty rights by various constituencies. The rooting of tribal self-determination, a resurgence and focus on tribal cultural protection, and new political dynamics in some western states, among other factors, might help explain this important trend. To answer with confidence, more in-depth study of each case is required. The review does show, however, that protected land legislation can be designed to meet tribal needs and treaty obligations.

For better and worse, all sorts of special provisions and exemptions are included in individual wilderness laws, pertaining to such things as access, rights-of-way, water rights, grazing, and other "non-conforming" wilderness uses.[260] These special provisions, the result of political negotiation, help build political support for wilderness designation. But they are also controversial because they can weaken the legal meaning of wilderness (as defined in the 1964 Wilderness Act) and make purer legislation more difficult to pass in the future.[261] But politics aside, this history illustrates the flexibility of wilderness law, and how tribal provisions could be incorporated into future legislation. And certainly, making accommodations for tribal sacred places and reserved rights in wilderness should prove less controversial than allowing extractive uses to occur in these areas.

*3. Wilderness Management*

We should also consider some possible sources of conflict concerning tribal needs and the management of wilderness. As discussed above, the Burns Paiute Tribe have complained about management of the Steens Mountain Wilderness because of limited access. This has been an issue elsewhere, such as the El Malpais region discussed above. The El Malpais Act assured access for traditional cultural practices; yet it did not define the extent and specific type of access allowed. This issue became controversial when the Ramah Navajo wanted vehicle access to a wilderness area for Indian religious purposes.[262] The BLM was therefore placed in a difficult position because the law demands both that wilderness

260. *See* ROSS W. GORTE, CONGRESSIONAL RESEARCH SERVICE, 98-848 ENR, WILDERNESS LAWS: PROHIBITED AND PERMITTED USES (1998); NATURAL RESOURCES LAW CENTER, SPECIAL USE PROVISIONS IN WILDERNESS LEGISLATION (2004), http://www.colorado.edu/law/centers/nrlc/projects/wilderness/SpecialUseProvisions.pdf (last visited Dec. 30, 2008).

261. *See* GEORGE NICKAS & KEVIN PROESCHOLDT, WILDERNESS WATCH, KEEPING THE WILD IN WILDERNESS: MINIMIZING NON-CONFORMING USES IN THE NATIONAL WILDERNESS PRESERVATION SYSTEM (2005), http://www.wildernesswatch.org/pdf/Special%20Provisions.pdf (last visited Dec. 30, 2008).

262. *See* MUTZ & CANNON, *supra* note 212, at 32.

values be protected and that nonexclusive access to the wilderness for traditional American Indian cultural and religious practices is ensured.[263] The agency concluded that it could allow vehicle access if it was the only reasonable alternative, would not degrade wilderness values, was done on the advice of local Indian tribes, and was in areas where such activities occurred before the wilderness designation.[264] The final El Malpais NCA Management Plan allows tribes motor vehicle access to the perimeter of each wilderness, with vehicle use inside the wilderness prohibited unless the BLM grants prior authorization.[265] In any event, one study reports that the NCA manager has not had any requests for access authorization in 12 years.[266]

Motor vehicle access has also been an issue in Minnesota's Boundary Waters Canoe Area Wilderness (BWCAW). The Bois Forte and other Bands of Chippewa Indians have reserved hunting and fishing rights on ceded lands that are now part of the Superior National Forest and the BWCAW. In 1998 two members of the Bois Forte Tribe were cited for illegal motor vehicle use inside the BWCAW, one for using a motorized canoe and the other for using an all-terrain vehicle (ATV) on frozen waters in order to fish the area's lakes. The defendants claimed that the law creating the BWCAW[267] and its regulations may not be enforced against the Bands insofar as they affect their treaty-based fishing rights. But the district and circuit courts disagreed, finding that the prohibition of motorized vehicles inside the wilderness area does not infringe upon the exercise of tribal treaty rights.[268] "Rather, the United States has merely made the exercise of

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263. General BLM wilderness management regulations state that American Indians may use wilderness areas for traditional religious purposes, subject to the provisions of the Wilderness Act and other applicable laws and regulations. 43 C.F.R. § 6302.18 (2008). They also state that "[w]hen necessary to carry out the provisions of the Wilderness Act and other Federal laws, BLM may close or restrict the use of lands or waters within the boundaries of a BLM wilderness area" and "will limit any such closure to affect the smallest area necessary for the shortest time necessary." 43 C.F.R. §6302.19 (2008). *See also* 43 C.F.R. § 8364.1 (2008) (providing information on closures and restrictions); Wilderness Management, 65 Fed. Reg. 78,358 (Dec. 14, 2000) (to be codified at 43 C.F.R. pts. 6300 & 8560) (providing information on reasoning and discussion).

264. MUTZ & CANNON, *supra* note 212, at 32.

265. *Id.*

266. *Id.*

267. The Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978), is unique among older wilderness legislation in that it explicitly makes reference to tribal treaty rights. Section 17 of the Act provides that "[n]othing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness." *Id.* § 17.

268. United States v. Gotchnik, 57 F. Supp. 2d 798 (D. Minn. 1999), *aff'd*, United States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000).

fishing rights in the most remote areas of the BWCAW less convenient."[269] Following precedent, the courts found the restrictions on motors "reasonable and necessary conservation measures."[270] The courts also reasoned that the signatories of the September 30, 1854, Treaty with the Chippewa would not have understood it to include *unrestricted* travel to and from protected fishing grounds. The defendants, in other words, "have precisely the same access to all parts of the Boundary Waters Area that the Bands had at the time the treaty was signed."[271]

### C. Protected Tribal Lands

#### *1. Federal Reclassification*

There are some cases in which the federal government has chosen to reclassify federal lands by removing them from federal agency management and placing them under tribal control, often with stipulations regarding how repatriated lands are to be protected in the future. The most studied case in this regard is the historic return of Blue Lake to the Taos Pueblo in northern New Mexico.[272] This sacred area, found in the Sangre de Cristo Mountains, includes numerous shrines and is used for several religious purposes. The Pueblo's ownership of the lake terminated upon President Theodore Roosevelt's creation of the Taos Forest Preserve, now managed as the Carson National Forest. The Pueblo claimed that the area had been wrongfully taken and wanted it returned. Against all odds, and tremendous opposition, the Pueblo was successful in recovering some 48,000 acres of land, including Blue Lake. Among other reasons, opponents feared the precedent that would be established by returning the area to the Pueblo. Though the Pueblo adamantly testified that it did not want to economically develop this sacred area, Congress provided limitations in how the returned land must be managed in the future:

> That the Pueblo de Taos Indians shall use the lands for traditional purposes only, such as religious ceremonials, hunting

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269. *Gotchnik*, 57 F. Supp. 2d at 802. Unlike the use of a motorized ice augur in the wilderness, which the lower court found acceptable in this case, on appeal, the Eighth Circuit Court of Appeals found the use of motorized vehicles "peripheral" to protected treaty rights: "A motorboat, all-terrain vehicle, or helicopter for that matter, may make it easier to reach a preferred fishing or hunting spot within the Boundary Waters Area, but the use of such motorized conveyances is not part and parcel of the protected act of hunting or fishing, as is the use of rifle, ice augur, or other hunting and fishing instrument." *Gotchnik*, 222 F.3d at 510.

270. *See Gotchnik*, 57 F. Supp. at 804.

271. *Gotchnik*, 222 F.3d at 511.

272. *See, e.g.*, R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1995); WILKINSON, BLOOD STRUGGLE, *supra* note 79; and John Bodine, *Blue Lake: A Struggle for Indian Rights*, 1 AM. INDIAN L. REV. 23 (1973).

> and fishing, a source of water, forage for their domestic livestock, and wood, timber, and other natural resources for their personal use, all subject to such regulations for conservation purposes as the Secretary of the Interior may prescribe. Except for such uses, the lands shall remain forever wild and shall be maintained as a wilderness as defined in section 2 (c) of the Act of September 3, 1964 (78 Stat. 890). With the consent of the tribe, but not otherwise, nonmembers of the tribe may be permitted to enter the lands for purposes compatible with their preservation as a wilderness.[273]

Though proponents of the Blue Lake legislation argued that the Taos Pueblo claim was singular, the Act did not rule out similar approaches to contested lands in the future. In passing the Grand Canyon National Park Enlargement Act of 1975, for example, Congress transferred 185,000 acres of NPS and USFS lands to the Havasupai Indian Reservation.[274] The Grand Canyon Act also created a 95,300 acre traditional use area inside Grand Canyon National Park for grazing and other traditional purposes.[275] This controversial and contested restoration of tribal land came with several provisions.[276] The lands, for example, may be used for traditional and religious purposes, but not for commercial timber or mining production nor commercial or industrial development.[277] Except for these and other provisions, Congress also mandated that the transferred lands "shall remain forever wild and no uses shall be permitted under the plan which detract from the existing scenic and natural values of such lands."[278]

The repatriation of tribal lands is ongoing, and several proposals are currently being publicly debated and considered by Congress.[279] One of

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273. Act of Dec. 15, 1970, Pub. L. No. 91-550, § 4(b), 84 Stat. 1437 (1970).

274. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, § 10(a), 88 Stat. 2089 (1975) (codified as amended at 16 U.S.C. § 228i (2006)).

275. *See id.* § 10(e).

276. *See* KELLER & TUREK, *supra* note 162, at 156–84, for history including the bitter fight between Indians and environmentalists over the Act.

277. Grand Canyon National Park Enlargement Act §§ 10(b)(1)–(6).

278. *See id.* § 10(b)(7).

279. See, for example, Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, 114 Stat. 1875 (2000) (codified at 16 U.S.C. § 410aaa (2006)), which transferred lands within Death Valley National Park to the Tribe. The law also created a "Timbisha Shoshone Natural and Cultural Preservation Area" consisting of NPS and BLM lands, and includes other provisions pertaining to access and cooperative management with the NPS and BLM. *See* Steven Haberfeld, *Government-to-Government Negotiations: How the Timbisha Shoshone Got Its Land Back*, 24 AM. INDIAN CULTURE & RESEARCH J. 127 (2000). *See also* U.S. DEPART. OF THE INTERIOR, NAT'L PARK SERV., DEATH VALLEY NATIONAL PARK GENERAL MANAGEMENT PLAN (2002), *available at* www.nps.gov/deva/parkmgmt/upload/GMP_001.pdf. *See also* Valles Caldera Preservation Act, Pub. L. No. 106-248, § 104(g), 114 Stat. 598 (2000) (allowing the Secretary of Agriculture to "assign to the Pueblo of Santa Clara rights to acquire for fair market value

the most interesting (and complicated) acquisitions is that of the 3,845-acre InterTribal Sinkyone Wilderness in northern California.[280] The land and its cultural values are protected by conservation easements and managed according to the terms of those agreements, with provisions related to such things as public access and prohibitions on commercial timber harvesting.[281] It is also governed by the InterTribal Sinkyone Wilderness Council, which is comprised of 10 tribes with direct ties to the region. The Council has initiated several projects in the area, focusing on cultural resource protection and ecological restoration.

*2. Tribal Roadless and Wilderness Areas*

As discussed above, sometimes Congress will stipulate the conditions under which returned land is to be managed and protected by tribes. In the future, Congress and tribes should study how other native nations have chosen to protect tribal lands. Recall, again, the tribal roadless designations made by the Office of Indian Affairs in 1938. Tribes were successful in removing this order so that they could decide for themselves how best to manage their lands. But unlike other affected tribes, the Shoshone and Arapahoe on the Wind River Reservation chose to retain the roadless designation and the area is currently managed as such by the Tribes and the Bureau of Indian Affairs (BIA). Roughly 180,000 acres are

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portions of the Baca ranch"). In another prominent case, Senator Gordon Smith of Oregon introduced legislation that would return about 62,000 acres of the Siuslaw National Forest, with a high concentration of cultural sites and forest management potential, to the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw. *See Native American Sacred Places Hearing*, *supra* note 74, at 30. The Klamath Tribes have made one of the most controversial proposals in seeking the return of roughly 690,000 acres of land currently managed by the Winema and Fremont National Forests. *See* April Reese, *Tribal Claims Meet Resistance*, LAND LETTER, Dec. 11, 2003, *available at* http://www.eenews.net/ll/archive. See Timothy C. Seward, *Survival of Indian Tribes Through Repatriation of Homelands*, 21 NAT. RESOURCES & ENV'T 32 (2007), for more on protection of cultural properties through repatriation and tribal acquisition. *See also* John P. LaVelle, *Rescuing* Paha Sapa: *Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40 (2001) (explaining the historic effort by the Sioux Tribes to reclaim the Black Hills of the Northern Plains). See the Indian Land Tenure Foundation, http://www.indianlandtenure. org/index.html (last visited Dec. 31, 2008); Indian Lands Working Group, http://www. ilwg.org/ (last visited Dec. 31, 2008); and the Trust for Public Land's Tribal and Native Lands Program, http://www.tpl.org/ (last visited Dec. 31, 2008), for associated organizations and programs.

280. See the Trees Foundation website for an overview of the InterTribal Sinkyone Wilderness Council and its history, at http://www.treesfoundation.org/affiliates/specific-22 (last visited Dec. 31, 2008), and http://www.treesfoundation.org/publications/article-274 (last visited Dec. 31, 2008).

281. Letter from Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council, to Martin Nie (June 21, 2007) (on file with author).

protected as the "Wind River Reserve," which is often referred to as the Wind River Roadless Area.[282] Regulations managing the area are not as prescriptive as the federal Wilderness Act and tribal members are managed differently than non-members.[283] But the reserve is generally protected from additional road building and motor vehicle use and is an important part of the larger Wind River wilderness complex.[284]

The most prominent case in tribal protected area management is the Mission Mountains Tribal Wilderness managed by the Confederated Salish and Kootenai Tribes (CSKT) of western Montana.[285] Even before Bob Marshall's tribal roadless designation was made, which included the Mission Mountains roadless area,[286] the Tribes tried to protect the Mission Range in 1936 as an Indian-maintained national park. This proved unsuccessful, but further attempts at protecting the mountains were made by the Tribes following aggressive timber harvesting and plans for more by the BIA. Tribal member Thurman Trosper, a former USFS supervisor and

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282. 25 C.F.R. §§ 265.1, 265.3 (2008).

283. See Krahe, Last Refuge, *supra* note 193, at 245–52, for a discussion of how the Wind River Reserve is managed in contrast to the Wilderness Act.

284. Within the boundaries of this officially designated roadless area it will be the policy of the Interior Department to refuse consent to the construction or establishment of any routes passable to motor transportation, including in this restriction highways, roads, truck trails, work roads, and all other types of ways constructed to make possible the passage of motor vehicles either for transportation of people or for the hauling of supplies and equipment, unless the requirements of fire protection, commercial use for the Indians' benefit or actual needs of the Indians clearly demand otherwise…Foot trails and horse trails are not barred. The Superintendent of the Wind River Reservation on which this roadless area has been established will be held strictly accountable for seeing that the area is maintained in a roadless condition. Elimination of this area or any part thereof from the restriction of this order will be made only upon a written showing of an actual and controlling need.

25 C.F.R. § 265.3 (2008).

285. This overview draws heavily from three excellent histories of the wilderness area. *See generally* CONFEDERATED SALISH AND KOOTENAI TRIBES, MISSION MOUNTAINS TRIBAL WILDERNESS: A CASE STUDY (2005) (prepared for the Native Lands and Wilderness Council), *available at* http://wild.org/wp-content/uploads/2008/11/mmcase-study_smfile.pdf [hereinafter CSKT, MISSION MOUNTAINS TRIBAL WILDERNESS]; Diane L. Krahe, *A Sovereign Prescription for Preservation: The Mission Mountains Tribal Wilderness*, *in* TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT 195 (Richmond L. Clow & Imre Sutton, eds., 2001) [hereinafter Krahe, *A Sovereign Prescription for Preservation*]; The Univ. of Mont., Wilderness Mgmt. Distance Educ. Program, *Mission Mountains Tribal Wilderness Case Study* (Apr. 29, 1999) (draft), *available at* http://www.wilderness.net/toolboxes/documents/IFST/mmtw_case.pdf.

286. Like other tribes impacted by this Order, the CSKT requested that the tribal land be withdrawn and this was done in 1959. *See* Krahe, *A Sovereign Prescription for Preservation*, *supra* note 285, at 207.

president of The Wilderness Society, first proposed the idea of establishing a tribal wilderness area to the Tribal Council. Eventually, other Tribal leaders advocated wilderness protection and the University of Montana's Wilderness Institute was contracted to help draft boundaries and the management proposal. In 1982, the Tribal Council approved Ordinance 79A which created the Mission Mountains Tribal Wilderness, protecting nearly 92,000 acres. According to the Tribes, "[i]t was the first time that an Indian Tribe had decided on its own accord to protect a sizable portion of its lands as wilderness and provide policy and personnel to fulfill its [purpose]."[287]

The tribal definition of wilderness is quite similar to that of the 1964 Wilderness Act. The Ordinance defines it as thus:

> A wilderness is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined as an area of undeveloped tribal land, retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions. It is the principal objective of this Ordinance to protect and preserve an area of land in its natural conditions in perpetuity. This Wilderness shall be devoted to the purposes of recreational, scenic, scientific, educational, conservation, cultural, religious and historical use only insofar as these uses are consistent with the spirit and provisions of this Ordinance. Human uses of this area must not interfere with the preservation of the area as wilderness.[288]

A significant difference between the two is that the tribal Ordinance emphasizes the preservation of tribal culture and the perpetuation of traditional Indian religion:

> Wilderness has played a paramount role in shaping the character of the people and the culture of the Salish and Kootenai Tribes; it is the essence of traditional Indian religion and has served the Indian people of these Tribes as a place to hunt, as a place to gather medicinal herbs and roots, as a vision seeking ground, as a sanctuary, and in countless other ways for thousands of years. Because maintaining an enduring resource of wilderness is vitally important to the people of the Confederated Salish and Kootenai Tribes and the perpetuation of their culture, there is hereby established a Mission Mountains Tribal Wilderness Area and this area,

287. CSKT, MISSION MOUNTAINS TRIBAL WILDERNESS, *supra* note 285, at 11.
288. *Id.* at 11–12.

> described herein, shall be administered to protect and preserve wilderness values.[289]

To this end, and like the federal Wilderness Act, there are several prohibited uses in the tribal wilderness:

> [E]xcept as necessary to meet the minimum requirements for administration of the Area for the purpose of this Ordinance (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft or other form of mechanical transport, and no structure or installation within the area.[290]

Two other observations are worth making for purposes here. First, the tribal Ordinance can be revised or rescinded by a majority vote of the Tribal Council, so it is not as binding or permanent as an ordinance passed by the Council and approved by a referendum vote of tribal members.[291] Second, in one respect, the tribal wilderness goes beyond the protections afforded by the federal Wilderness Act. In 1987, the Tribal Council adopted the Mission Mountains Tribal Wilderness Buffer Zone Management Plan. This buffer zone, or cushion, is found along the Mission Mountain foothills and includes roughly 23,000 acres.[292] It is "designed to control, to the extent possible, those activities that may adversely impact the Tribal Wilderness and erode its primary purpose."[293] The buffer zone is comprised of several ownerships, and certain types of activities, such as hazardous fuel

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289. *Id.* at 11.

290. *Id.* at 12.

291. *Id.* at 10. Compare Article IX of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, *available at* http://www.cskt.org/documents/gov/cskt_constitution.pdf, which contrasts to CSKT "primitive areas" that were put to referendum vote and designated as such in 1979.

292. The Wilderness Act provides no buffer zone provision. The New Mexico Wilderness Act of 1980 was the first bill to include "no buffer zone" language:

> Congress does not intend that designation of wilderness areas in the State of New Mexico lead to the creation of protective perimeters or buffer zones around each wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

An Act to Designate Certain National Forest System Lands in the State of New Mexico for Inclusion in the National Wilderness Preservation System, and for Other Purposes, Pub. L. No. 96-550, § 105, 94 Stat. 3221 (1980). The Natural Resources Law Center found that similar language appears in 17 wilderness bills. *See* NATURAL RESOURCES LAW CENTER, *supra* note 260, at 1BOL 45 \f "Symbol" \s 116.

293. CSKT, MISSION MOUNTAINS TRIBAL WILDERNESS, *supra* note 285, at 25.

reduction, receive special analysis and consideration by the Tribes before they can proceed.[294]

The area is currently managed under a tribal wilderness plan that was revised in 1997. This plan details how the area is managed, with several different management zones receiving special consideration (e.g., grizzly bear zone, trailess area, etc.). Though the needs and values of tribal members are prioritized, the tribal wilderness is open to non-members who must pay a fee to access and camp in the area.[295] The Tribes also state that there is a high level of cooperation between the Tribes and the USFS who manages the adjacent Mission Mountains federal wilderness.[296]

### D. Other Designations

There is a range of other designations that could, in theory, be used to protect the Badger-Two Medicine and other places where sacred lands and reserved rights are an issue. Most alternative protected area designations are managed by the National Park Service (e.g., national monuments), Fish and Wildlife Service (e.g., national wildlife refuges), and the Bureau of Land Management (e.g., national conservation areas and national monuments). The El Malpais case discussed above provides an example because Congress chose to use a variety of designations (federal wilderness, national monument, and national conservation area), some with tribal provisions, to manage the area.

This type of package deal has been used elsewhere. Take, for example, the Arizona Desert Wilderness Act of 1990.[297] It designated multiple wilderness areas and the Gila Box Riparian National Conservation area. Politics necessitated this alternative designation because the wilderness option was opposed by influential interests in the state.[298] While

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294. *See* CONFEDERATED SALISH AND KOOTENAI TRIBES, FORESTRY DEPT., MISSION MOUNTAIN WILDERNESS BUFFERZONE RECLASSIFICATION: ENVIRONMENT ASSESSMENT (2005), *available at* http://www.cskt.org/documents/forestry/fmpamendment_nov2005.pdf (providing maps of the buffer zone and its relation to hazardous fuels reduction and recommending a policy change so that land in the buffer zone classified as "commercially unavailable" is changed to "restricted management").

295. CONFEDERATED SALISH AND KOOTENAI TRIBES, 2007-2008 RESERVATION PERMIT VENDORS FOR NON-MEMBERS, *available at* http://www.cskt.org/documents/nrd/2007-08nonmemregs.pdf (adjacent tribal "primitive areas," on the other hand, are closed to non-members except member spouses and children).

296. CSKT, MISSION MOUNTAINS TRIBAL WILDERNESS, *supra* note 285, at 7.

297. Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469.

298. *See generally* DOUGLAS KENNEY & DOUG CANNON, GILA BOX AREA: GILA BOX RIPARIAN NATIONAL CONSERVATION AREA, AND THE FISHHOOKS AND NEEDLE'S EYE WILDERNESS AREAS (2005) (in-depth case study) [hereinafter KENNEY & CANNON, GILA BOX AREA], *available at* http://www.colorado.edu/law/centers/nrlc/projects/wilderness/GilaBox.pdf.

not as restrictive as wilderness, management of the area goes beyond the frustratingly vague multiple-use mandate. The purpose of the designation is "to conserve, protect, and enhance the riparian and associated areas…and the aquatic, wildlife, archeological, paleontological, scientific, cultural, recreational, educational, scenic, and other resources and values of such areas."[299] Some deference is given to the BLM in terms of Off-Highway Vehicle (OHV) management, but the law does state that "use of motorized vehicles in the conservation area shall be permitted only on roads specifically designated for such use as part of the management plan."[300] In its planning for the area, the BLM used these provisions to prohibit all Off-Road Vehicle (ORV) use within the NCA.[301]

National conservation areas are not defined in legislation outside the laws establishing them. In other words, there is no "National Conservation Area Act" or similar law providing overall guidance in how such places are to be governed. Instead, each area is managed according to specific enabling or "establishment" legislation provided by Congress. In its study of protected area designations, the Natural Resources Law Center concludes that areas with various non-wilderness designations "were unquestionably better off than if they had been managed under the default principle of multiple-use."[302] The move from a multiple-use mandate to a more dominate-use mandate, says the Center, "can allow the managing agency to focus on the special resources of concern in the area."[303] NCAs are typically managed by the BLM, not the USFS. But of relevance to the Badger-Two Medicine area, the Center found that "OHV and travel management is an area where special designation can greatly reduce OHV use and its associated impacts."[304]

Though most alternative land designations are managed by the NPS, USFWS, and BLM, the USFS is not immune from legislation stipulating how a national forest must be managed in some way. The Tongass National Forest, for instance, is governed by a complicated patchwork of laws that only apply to Alaska, with several important provisions related to Alaska Natives and subsistence.[305] More recently,

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299. Arizona Desert Wilderness Act § 201(a).

300. *Id.* § 201(d)(2).

301. KENNEY & CANNON, GILA BOX AREA, *supra* note 298, at 13.

302. NATURAL RESOURCES LAW CENTER, PROTECTIVE DESIGNATIONS ON FEDERAL LANDS: CASE STUDIES OF NATIONAL CONSERVATION AREAS, NATIONAL MONUMENTS, NATIONAL PARKS, NATIONAL RECREATION AREAS, AND WILDERNESS AREAS 16 (2004), *available at* http://www.colorado.edu/law/centers/nrlc/projects/wilderness/OtherProtectiveDesignations.pdf.

303. *Id.* at 16.

304. *Id.* at 12.

305. *See generally* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385 (2006).

Congress legislated how three national forests in California are to be managed in the controversial Herger-Feinstein (Quincy Library) legislation.[306] My point is simply to remind us that Congress has intervened in forest management in the past and could do so again in the future, only this time providing specific language pertaining to such things as sacred sites, cultural resources, motorized recreation, and reserved treaty rights, among others.

## IV. CONCLUSION

There are several ways of approaching the issues of cultural resources and reserved treaty rights on federal land. This article focuses primarily on two approaches that could, if so desired, be used and adapted in the future: the use of cooperative management arrangements and protected land-use designations. These two approaches could possibly prove to be proactive and durable ways to protect tribal values and rights on federal land. This initial survey shows that there is increasing interest in these approaches. However, more detailed case-specific policy work is needed in order to provide more definitive answers as to how successfully they are being implemented and evaluated.

The Badger-Two Medicine is one of several cases in which management of cultural resources on federal land has been contested by tribes. Within the general parameters established by the *Lyng* and *Bear Lodge* decisions (and possibly the more recent *Navajo Nation*), there is quite a bit of agency discretion that can be used to accommodate tribal values and protect these places. There are numerous laws, regulations, and policies that can be used by decision makers to legitimize and defend such decisions. The bottom-line, however, is that such accommodation is left to the discretion of federal land managers that may or may not be sympathetic to tribal values. For this and other reasons, some tribes have sought more durable solutions and a higher degree of protection through place-specific legislation. Such laws can make it clear that sacred sites, cultural values, and reserved treaty rights *shall* be protected; thus, minimizing agency discretion in this regard.

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306. The Quincy Library Group wrote a controversial "Community Stability Proposal" on how to manage the Lassen, Plumas, and part of the Tahoe National Forests. With the USFS unable or not willing to adopt the proposal, the group took to Washington and succeeded with passage of The Herger-Feinstein Quincy Library Group Forest Recovery Act. Pub. L. No. 105-277, tit. IV, § 401, 112 Stat. 2681-305 (1998). This Act required that the pilot project must be consistent with applicable federal laws, but it also provided place-specific direction concerning how these national forests should be managed, in terms of fire, silviculture, roadless area protection, and other things.

Though most often used in the context of fish and wildlife management, several co-management arrangements have been used by federal land agencies in the past. Unlike Department of the Interior agencies, which are covered by the Tribal Self Governance Act, the USFS will not use the term co-management, but there are several examples in which this agency and others have cooperated or partnered with tribal governments. These cooperative agreements are unlike other stakeholder initiatives or public-private partnerships because they are built upon foundational principles of American Indian law.

My review also emphasizes the importance of law in catalyzing and shaping the use of co-management throughout the country. In some cases, Congress and the Executive branch have mandated (through place-specific legislation or Orders) better cooperation between federal land agencies and tribes. But even without such laws, there is ample legal authority and policy direction for agencies to work more cooperatively with tribes in managing cultural resources and reserved treaty rights on federal land.

Protected land-use designations are another way of possibly protecting tribal values and rights on federal land. There are several cases in which Congress has passed place-specific legislation focused on tribal sacred places, cultural values, and reserved treaty rights. Though not without challenges, congressionally legislated land-use designations could provide tribes with a greater degree of security than reliance on the possibility of agency accommodation. In some places, and for some tribes, wilderness or some other form of protected land designation was the chosen way of securing tribal values and rights. If this approach is used again there are several cases, on public and tribal lands, from which to learn.