

Bridges to a New Era, Part 2: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands in Alaska

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Nowhere else in the United States are tribal connections and reliance on federal public lands as deep and geographically broad-based as in what is now Alaska. The number of Tribes—229 federally recognized tribes—and the scope of the public land resource—nearly 223 million acres—are simply unparalleled. Across that massive landscape, federal public lands and the subsistence uses they provide remain, as they have been since time immemorial, “essential to Native physical, economic, traditional, and cultural existence.”¹ Alas, the

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institutions, systems, and processes responsible for managing those lands, protecting those uses, and honoring those connections are failing Alaska Native Tribes.

The cases referenced in this article share a common theme: federal land officials underutilize their existing legal authorities to engage tribes in the management of federal public lands, or treat them like pro-forma “check-the-box” exercises that must be done but have no real substantive impact on decisions that are likely already made. In case after case, Alaska Native Tribes are forced to defensively react to federal land use programs, plans, and projects they had no role in substantively shaping. Though traditional methods of tribal consultation and engagement are used by federal land agencies, they are viewed for the most part as procedural hurdles that are divorced from their core missions and mandates.

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outsiders and newcomers to the long, fraught struggle over public lands, resources, and authorities in what is now Alaska. Therefore, this work aims to provide a resource that will support—not speak for, on behalf of, or in lieu of—those committed to healing the land and divisions of the past in service of a better, more sustainable future. The goal of the authors is to be as collaborative, transparent, open, and helpful as possible in researching, preparing, editing, finalizing, and distributing this work. In addition, the authors recognize this work is not done on a blank slate and, rather than repeat or rehash matters that have already been researched, written, and dissected, this work is intended to build upon the fantastic work of those who have previously considered and addressed these issues. The authors dedicate this work to them and to all those committed to a more just future for our nation’s lands and resources.

¹ 16 U.S.C. § 3111(1).

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I. INTRODUCTION

The peoples indigenous to what is now Alaska² have been intimately connected with the lands and resources of their homelands since time immemorial. Notwithstanding those long-standing connections, a more recent history of dispossession and oppression, along with the unconsented imposition of the laws and legal system of the United States, have impinged upon and severely limited the ability of many Alaska Natives and their Tribes to maintain their connections to and lifeways across those territories. This history has resulted in the acquisition of millions upon millions of acres within the State's boundaries by the United States and, subsequently, the State of Alaska and private, non-Tribal citizens. The lands retained by the United States are now mostly federal public lands, managed by federal agencies pursuant to federal laws largely rooted in non-Native perspectives, priorities, and management approaches. Furthermore, the unique history of American imperialism in Alaska has resulted in a convoluted and contentious system for managing so-called "subsistence" activities on these lands,³ which, since the creation of that framework over forty years ago, has caused intense battles among federal, state, and tribal interests while the resources on which those activities rely suffer.

Ultimately, the combination of (1) these historical and ongoing failures to meaningfully engage and empower Alaska Native Tribes in the management of federal public lands and (2) a management framework that prioritizes non-Native, state, and federal interests to the detriment and exclusion of any significant management authority on the part of Alaska Natives and Tribes threatens the future and sustainability of Native cultural existence. The disruption of those generational lifeways and separation of Native voices from the lands

²We use the terms "Alaska Natives" and "Alaska Native Tribes" to refer primarily to the 229 federally recognized Indian tribes within the borders of what is now the State of Alaska. In doing so, however, we understand and recognize the limited and often ill-conceived equation of federal recognition and Native status. Therefore, although we rely on these terms for ease of reference and consistency throughout, we do not mean to exclude or disrespect the numerous and diverse range of peoples indigenous to what is now called Alaska and their continuing relationship with their homelands and its resources.

³The word "subsistence" is fraught with problems and wholly inadequate to convey the deep web of interconnections and Native ways of life in Alaska. See generally THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (1985) (providing testimony about the meanings of subsistence from hearings in 60 villages throughout Alaska). To avoid confusion, however, we use the term as it is used and understood in the context of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). Our use of the term in that context is not intended, nor should it be interpreted as, an endorsement of its use in all contexts.

on which they have always been heard also undermines the opportunity to heal these lands and the laws by which they are governed for all who share an interest in more equitably and permanently protecting our Nation's shared resources.

Given these threats and challenges to the connections between Alaska Natives and their homelands, as well as their continuing reliance upon those lands and their resources for subsistence, how can Alaska Native Tribes and their allies enhance and strengthen their role in the co-management of federal public lands in Alaska? Although the specifics of tribal co-management of federal public lands in Alaska must be shaped by tribal leadership and will be best described by tribal voices, this article serves to support those efforts by providing a comprehensive review and analysis of the legal and policy avenues through which that new and brighter future can flourish.

Multiple legal authorities and processes could be used as "bridges" to models of tribal co-management in Alaska. Tribal consultation, federal public lands planning, the National Historic Preservation Act, and the use of self-governance contracts and compacts are all methods that could be strategically linked to ensure that tribes are full partners in federal lands management, from cooperatively shaping desired conditions and objectives to getting work done on the ground via contract and agreement.

With the exception of the Antiquities Act, all of the potential tools and pathways available to Tribes outside of Alaska are similarly available to Alaska Native Tribes. The lack of Indian Country or a tribal land base and the absence off-reservation treaty-based use rights do not diminish or preclude opportunities for meaningful tribal co-management on federal public lands in Alaska. Most importantly, Alaska Native Tribes have an additional statutory-based pathway for tribal co-management as provided in Title VIII of the Alaska National Interest Land Claims Act (ANILCA).⁴

The most effective and efficient way to enable tribal co-management on federal public lands in Alaska and beyond is through congressional lawmaking. This could happen through system-wide or place-based legislation. Those options are sketched out in the original

⁴See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. VIII, 94 Stat. 2371, 2422-30 (1980).

*Bridges Report*⁵ and discussed here are more focused potential modifications to Title VIII of ANILCA. These amendments could serve as a corrective action from Congress in response to widespread dissatisfaction with implementation of Title VIII and an administrative structure and set of regulations that fail to adequately protect and represent Alaska Natives and their ways of life.

Catalysts for change are also emerging from the bottom-up in Alaska, and this article also discusses these innovations. Tribes, tribal commissions, and collaborative organizations are formalizing new agreements and partnerships with federal land agencies that provide important foundations for continued tribal management activities. These existing partnerships and networks are critically important for continued expression and expansion of tribal interests, even if they are currently operating in a way that is something short of co-management. Each such agreement or collaborative project offers another opportunity to learn and build mutual trust—an essential foundation for new models of cooperation and co-management to possibly emerge in the future.

All of these potential avenues provide existing bridges on which to build toward a new and more just future of tribal-federal relations across public lands in Alaska. After generations of steady work and advocacy by Alaska Native leaders, recent actions of the federal government suggest significant potential for reform of the existing legal and policy framework.⁶ We hope this article can help lay the foundation from which those reforms can be launched.

We present this work in five main sections. It begins with a broad overview of tribal co-management, including a review of recent developments in the field. From this general background, the article turns to the current state of play in Alaska, beginning with a high-level view of the history and context of tribal co-management there

⁵Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. L. & RES. L. REV. 49 (2021) [hereinafter Mills & Nie, *Bridges* or *Bridges Report*].

⁶*See, e.g.*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., DEAR ALASKA NATIVE LEADER LETTER (2021), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/DTLL-Subsistence-Policy-Consultation-AK-%20FINAL-With-links_12.20.21_508_Updated.pdf [<https://perma.cc/JGG6-HFVN>] (“The Department of the Interior and the U.S. Department of Agriculture . . . will conduct a virtual listening session and formal virtual consultations with Tribes, Tribal consortia, and Alaska Native corporations on Federal subsistence policy in January 2022.”); U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf> [<https://perma.cc/329N-BFZJ>].

and a description of current challenges often frustrating those efforts. The next section takes that analysis deeper, focusing on four core areas of obstacle and opportunity related to tribal co-management of federal public land in Alaska. These four issues—the delegation of federal authority, ANILCA's Title VIII, contracting and compacting, and federal lands planning—are the main arenas from which a new era of tribal co-management could evolve. This section aims to illuminate the intricacies of these often-confounding legal and policy thickets in an effort to dispel confusion about the barriers they pose to tribal co-management and set the stage for finding potential pathways forward. Finally, the article closes with findings, recommendations, and suggestions for those pathways and includes legislative, executive, and administrative measures that could be leveraged by Alaska Native Tribal leaders, federal officials, and their allies to empower a new era of tribal co-management on federal public lands in the state.

II. TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS: BACKGROUND

The practice and potential of tribal co-management on federal public lands can cause conflict and confusion among federal and tribal officials, as well as others interested in the management of shared lands and resources.⁷ Therefore, before focusing on the specific situation in Alaska, this introductory section reviews the history of tribal co-management, provides some basic principles on which co-management can be practiced and understood, explains the concept of bridging to a new era of co-management, and reviews some recent developments.⁸

A. *History*

Since time immemorial, Indigenous inhabitants of North America have been engaged in close relationships with the continent's lands, waters, and resources. In what has become the United States, centuries of invasion, oppression, destruction, and separation of the nation's first people from their homelands resulted in the acquisition of

⁷See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 151–57.

⁸For a detailed discussion of tribal co-management on federal public lands, see Mills & Nie, *Bridges*, *supra* note 5. This section summarizes some of the key takeaways from that comprehensive report and provides a brief update on developments occurring since it was written (in 2020) and published (in early 2021).

significant acreage by the federal government to be owned for the nation's benefit as public lands.⁹ The legal and policy framework for managing these lands and resources developed largely without regard to this history and significantly ignored or excluded the long-standing connections between Tribes and lands now denominated national forests, national parks, wildlife refuges, or otherwise managed by the federal government.¹⁰ More recently, however, Indian tribes have powerfully asserted their interests in maintaining, protecting, and building upon those connections by insisting upon a greater role in the federal decision-making that guides the management of many of those lands and resources.¹¹

This movement toward greater co-management is rooted in tribal values and inter-generational knowledge of lands now managed to serve a broad range of interests as is mandated by federal laws and policies of more recent eras. But, in addition to their ancestral connections to these lands, tribes may also base their claims to greater legal authority upon foundational principles of federal Indian law, which recognize tribal sovereignty, the supremacy of tribally-reserved rights to hunt, fish, and gather, and the federal government's trust duties to tribes.¹² Although those historical legal concepts were imposed upon tribes and are the (often flawed) fruit of European settler-colonial imperialism,¹³ they provide important and sometimes powerful arguments in support of tribal co-management efforts. Furthermore, like the history of Indigenous dispossession that preceded the establishment of federal public lands, these core principles of the American legal system have been marginalized from the laws and regulations governing the management of those lands.¹⁴ While recent decades have marked a shift toward greater

⁹See Mills & Nie, *Bridges*, *supra* note 5, at 71–74.

¹⁰See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 52–54, 157–59 (describing the Public Land Law Review Commission's comprehensive and influential report on the nation's public lands and its separation of tribes and tribal interests from those lands).

¹¹See, e.g., NAT'L CONG. OF AM. INDIANS, RESOL. NO. PDX-20-003, CALLING FOR THE ADVANCEMENT OF MEANINGFUL TRIBAL CO-MANAGEMENT OF FEDERAL PUBLIC LANDS 2 (2020), https://www.ncai.org/attachments/Resolution_FamhBAHVFLnQfgvKBsgXjzlr-dYAbDzKlaVtsEdSjWibSZtJDkFR_PDX-20-003%20SIGNED.pdf [<https://perma.cc/WJC4-MUWH>] (calling on “Congress to pass legislation and direct federal agencies to include tribal nations in land management decisions at every level of the government based on incorporation of tribal co-management principles and practices.”).

¹²See Mills & Nie, *Bridges*, *supra* note 5, at 64–83 (describing these “first principles” of federal Indian law in the co-management context).

¹³See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823) (“The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country.”).

¹⁴See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 83–88 (discussing the framework of federal public land laws).

appreciation for and integration of federal Indian law principles within the broader work of the federal government,¹⁵ this history of separation helps contextualize the current challenges of tribal co-management of federal public lands across the country, including in Alaska.

B. Principles

Perhaps because of the history and continuing separation of public land law from federal Indian law and tribal interests, the assertion of those interests by tribes in pursuit of greater authority in public lands management can generate concerns over the concept of tribal co-management. These concerns often surface in relation to the term “co-management” itself:

There are legal, symbolic and normative dimensions of the term co-management. Is the term just short-hand for “cooperative management” or does the use of the prefix co- (meaning: with, together, joint, jointly) make it something different, especially when preceded by the word tribal? This unwieldy term is often subject to inconsistent interpretations and applications, and of course, politics.¹⁶

Even when federal law specifically authorizes tribal co-management,¹⁷ the term is subject to sometimes conflicting interpretations.¹⁸ Therefore, although the terminology and its definitions are important, more critical to understanding the dimensions and potential impact of tribal co-management of federal public lands is the way in which the federal-tribal management partnership actually works.¹⁹ The implementation and operation of those partnerships and the extent to which they reflect certain core principles of a meaningful co-management approach provide a firmer basis from

¹⁵See Mills & Nie, *Bridges*, *supra* note 5, at 88–102 (addressing the evolution of federal directives and policies aimed at improving tribal consultation across federal agencies).

¹⁶Mills & Nie, *Bridge*, *supra* note 5, at 133.

¹⁷See, e.g., 16 U.S.C. § 1388(a) (“The Secretary [of the Interior] may enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and *provide co-management* of subsistence use by Alaska Natives.”) (emphasis added).

¹⁸See Mills & Nie, *Bridges*, *supra* note 5, at 138 n.382.

¹⁹See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 146 (“Though definitions are important, especially for the purpose of creating mutual understanding and common expectations, what matters most are the core principles or attributes of a co-management approach, regardless of whether the term is used or substituted for ‘cooperative management,’ ‘collaborative management,’ ‘joint management,’ or some variation thereof.”).

which to assess and understand tribal co-management than various attempts to specifically and universally define that term.

As attorney Ed Goodman first described in the context of treaty-reserved tribal rights, the fundamental principles of tribal co-management can be understood as consisting of the following: (1) the recognition of Tribes as sovereign governments; (2) the incorporation of the United States' trust responsibility; (3) the existence of legitimation structures for tribal involvement; (4) the integration of Tribes early in the decision-making process; (5) the extent of recognition and incorporation of tribal expertise; and (6) the effectiveness of dispute resolution mechanisms.²⁰ Within the broader context of tribal co-management across federal public lands, these principles can also help assess the extent to which particular laws, regulations, practices, regions, or agencies are meaningfully engaging in co-management, regardless of whether their work is defined or described that way.²¹

²⁰Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENV'T L. 279, 343–49 (2000).

²¹See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 148–51 (including examples of principles).

Table 1. Principles of Tribal Co-Management

<p>Tribal co-management covers a variety of approaches in which Indian tribes and federal public land agencies exercise their authorities and expertise in a coordinated and systemic manner to conserve and manage federal public lands and resources. Rather than a prohibited or improper delegation or abdication of federal authorities or responsibilities, the <i>sharing</i> of authority and responsibility is the defining feature of tribal co-management.</p> <p>This mutual and participatory framework is best conceived as consisting of fundamental principles including:</p>
<p>1. The recognition of Indian tribes as sovereign governments.</p>
<p>2. The incorporation of the federal government's trust responsibility as both a substantive and procedural obligation, including the integration of Indian tribes at the earliest phases of federal public lands planning and decision-making in order to shape the direction and desired conditions of management rather than only being asked to comment on projects and decisions already developed by federal public land agencies.</p>
<p>3. The recognition and incorporation of tribal expertise and/or traditional knowledge into federal decision-making, including a significant degree of federal agency deference to Indian tribes in matters concerning management of tribal reserved treaty rights.</p>
<p>4. The creation and use of equitable, agreed-upon, and clearly established institutional arrangements and dispute resolution mechanisms for resolving potential conflicts among competing interests, values, or priorities—and between co-managers themselves—to facilitate the sharing of authority and responsibility.</p>

These principles are central to understanding and assessing the context of and potential for tribal co-management in Alaska.

C. *Bridges*

Consistent with the principled understanding of tribal co-management described above, a range of laws, policies, and practices can be understood to enable an expanded role for tribes in the management of federal public lands, even if those existing authorities do not explicitly address “tribal co-management.” Rather, through improved recognition and respect for the fundamental principles of tribal co-management, the current legal framework could be built upon to bridge to a new era of enhanced tribal involvement.²²

For example, in the context of federal land planning, the Blackfeet Nation (in Montana) has leveraged the designation of the Badger Two-Medicine area as a traditional cultural district (TCD), a status defined and entitled to certain procedural protections under the National Historic Preservation Act (NHPA),²³ into the revision of a national forest plan. In doing so, the Blackfeet were able to take the procedural protections provided in section 106 of the NHPA and translate them into more substantive and enforceable forest plan “components,” such as forward-looking desired future condition statements and enforceable standards.²⁴

Public lands planning, especially for federal agencies with broad multiple use mandates like the U.S. Forest Service (USFS) and Bureau of Land Management (BLM), is potentially a significant bridge to improved tribal co-management. Most everything that happens on a piece of public land must be consistent or conform in some fashion with the governing land use plan.²⁵ As a result, plans can be problematically general and vague, and too often punt important decisions to lower levels or site-specific aspects of decision-making. Nonetheless, many contemporary threats to tribal cultural resources, sacred lands, treaty rights, and the trust obligation in general can be traced back to land use plans that failed to protect these values and

²²See Mills & Nie, *Bridges*, *supra* note 5, at 57 (“Existing legal authorities and processes—such as tribal consultation, contracting and compacting, the National Historic Preservation Act, and public lands planning—can be strategically used and serve as a bridge to variations of tribal co-management.”).

²³National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4006, 106 Stat. 4753, 4757 (codified as 54 U.S.C. § 302706).

²⁴See Mills & Nie, *Bridges*, *supra* note 5, at 113–32.

²⁵36 C.F.R. §219.15 (2021) (USFS’s consistency provision); 43 C.F.R. §1601.0-5 (b) (2020) (for the BLM conformity “means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment”).

rights (or to even acknowledge them). Conversely, if the principles of tribal co-management are seriously considered and incorporated by planning agencies, the federal land planning process could be a meaningful bridge to empowering tribal co-management of public lands.

Another area in which existing federal laws enable tribal empowerment but regularly fall short of meaningful co-management is the contracting or compacting of federal functions by tribes under the Indian Self Determination and Education Assistance Act.²⁶ Tribes across the country have relied upon those agreements to take on the management and delivery of important programs serving their members and communities and, as a result, have built meaningful technical, governance, and administrative capacity and capability.²⁷ Given the success of this approach, the use of the self-governance contracting and compacting model has begun to expand by including other federal programs and agencies outside of those focused on Indian programs.²⁸ But, the use and success of those options has thus far been limited by the discretionary nature of that authority, the limited options available for assuming that authority, and (largely federal) uncertainty regarding the scope of programs, functions, services, and activities that can be lawfully delegated through those existing avenues.²⁹

Part of that uncertainty, rooted in the so-called “subdelegation doctrine,”³⁰ is particularly relevant to contracting and compacting but impacts tribal co-management more broadly as well. As a general matter, the subdelegation doctrine limits the ability of executive agencies to delegate to other actors the powers entrusted to them by

²⁶See, e.g., 25 U.S.C. § 5321 (directing the Secretary to enter into self-determination contracts with tribes to assume various federal programs, functions, services, or activities).

²⁷See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1, 21–22, 48–49 (2014) (describing growth in self-determination and self-governance funding and implementation).

²⁸25 U.S.C. § 5363(c) (authorizing the inclusion in a self-governance compact of “other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”). See also *Concrete Steps to Improve Tribal Co-Management of Federal Public Lands*, Testimony of Kevin K. Washburn before the Committee on Natural Resources of the U.S. House of Representatives (March 8, 2022), available at <https://naturalresources.house.gov/imo/media/doc/Washburn,%20Kevin%20-%20Testimony%20-%20FC%20Ovr%20Hrg%203.08.22.pdf>.

²⁹See Mills & Nie, *Bridges*, *supra* note 5, at 108–12.

³⁰See *infra* Part III(A).

Congress.³¹ Those limitations may not be applicable so long as the federal official retains final decision-making authority.³² Although often considered relevant to—and regularly seen as a barrier for—tribal co-management, the subdelegation doctrine does not necessarily preclude various forms of tribal co-management on federal public lands.³³

Finally, the extent to which the federal government meaningfully and timely engages with tribes in consultation can also provide an important bridge to enhanced tribal co-management. Although the federal obligation to consult with tribes has evolved and expanded, particularly through various executive actions in the last three decades, the extent to which tribes are meaningfully involved and can influence federal agency decisions remains limited at best.³⁴ Improving the effectiveness of tribal consultation across federal agencies could have significant and widespread impacts as doing so would enable tribal input on the range of public land management activities from planning down to discrete, day-to-day determinations.

Recently, in response to a January 26, 2021 Memorandum from President Joseph R. Biden,³⁵ the Department of the Interior has developed a detailed plan and timeline for improving its consultation practices, which includes efforts to update the Department's consultation policies, practices, and expanded work to compile tribal histories and ancestral territories.³⁶ Whether and the extent to which

³¹Stated differently, subdelegation happens when an agency “redelegates” the authority it was delegated by Congress. Thus, the term “redelegation” is sometimes used in this context.

³²This authority “must be a meaningful retention of control over the activity of the private party, through oversight, veto, or otherwise” so that the “Federal agency may ensure that the actions it takes support the national interest, and that the Federal role is not subordinated inappropriately to parochial interests.” DEPT OF INTERIOR, OFFICE OF SOLICITOR, PARTNERSHIP LEGAL PRIMER 13 (2004).

³³See Mills & Nie, *Bridges*, *supra* note 5, at 141–43 (distinguishing the *sharing* of federal authority with tribes as sovereign governments in the context of co-management from the potentially unlawful and unilateral subdelegation of such authority, particularly to private, non-sovereign parties). For a summary of other perceived and actual barriers to more effective and ubiquitous tribal co-management on federal public lands, see Mills & Nie, *Bridges*, *supra* note 5, at 151–57.

³⁴See Mills & Nie, *Bridges*, *supra* note 5, at 88–99 (summarizing executive actions and agency policies and describing examples of consultation challenges).

³⁵Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 26, 2021).

³⁶U.S. DEPT. OF THE INTERIOR, A DETAILED PLAN FOR IMPROVING INTERIOR'S IMPLEMENTATION OF E.O. 13175 (2021), <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf> [<https://perma.cc/EXX7-VZ2Y>]. Most recently, the Department has proposed revisions to its departmental manual regarding consultation and will be engaging with Tribes to discuss those revisions. See *Updates to DOI's Tribal Consultation Policy and Procedure*, U.S. DEPT OF THE INTERIOR, <https://www.bia.gov/tribal-consultation/updates-dois->

these efforts impact the management of federal public lands remains to be seen.

This overview of tribal co-management provides an important context in which to understand, assess, and build upon the current state of tribal co-management in Alaska; but it is only one aspect of that story. Beyond the general history, principles, and current state of tribal co-management, the more specific history and context of what is now Alaska is also central to considering tribal co-management of public lands in that region.

Table 2. Tribal Co-Management on Federal Public Lands: What It Is and Is Not

Tribal Co-Management Is:	Tribal Co-Management Is Not:
Sharing authority and responsibility among federal and tribal sovereigns.	The transfer of federal public lands into tribal (trust) ownership.
Based on a set of core principles that can be shaped into creative and accountable ways of governing that address different issues and work in different places.	A complete and unqualified delegation of authority to tribes.
An approach in line with the cooperative federalism provisions already provided in federal public land laws and extended to State governments.	An abdication of the federal government's duty to fulfill the purposes and objectives of federal public lands and environmental laws.
Compatible with the statutory missions and mandates provided to federal public land agencies by Congress.	An open-ended and discretionary framework that provides for no political or legal accountability.
A way to substantively integrate the federal government's	A one-sided relationship in which a federal agency dictates the terms on which tribal engagement happens.

tribal-consultation-policy-and-procedure [<https://perma.cc/2AMT-9YZX>] (last visited December 14, 2021).

trust obligation into the practice of federal public lands management.	A restatement or repackaging of existing obligations and consultation processes that place tribes in a defensive and reaction position.
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III. TRIBAL CO-MANAGEMENT ON PUBLIC LANDS IN ALASKA

As with the broader and complex mélange of history, laws, policies, and practices of tribal co-management across the continental United States, the specific history and context of Alaska lend their own intricacies to tribal co-management there. This section provides a brief overview of that history and context and summarizes the current challenges to co-management that have emerged from that framework.

A. *History and Context—Not Such ‘Simple Truth[s]’: Federal Indian Law and Alaska Exceptionalism*³⁷

At first blush, the complex and unique challenges of tribal co-management on federal public lands in Alaska may appear the result of a similarly complex and unique history. But although the United States’ approach to the lands and Native people of what is now Alaska has evolved in a unique fashion—especially over the last half-century—the historical circumstances preceding and underlying those developments are similar to those relevant to federal-tribal relations in the contiguous American West. In both areas, the United States acquired the rights to large tracts of land from foreign counterparts and acceded to those rights notwithstanding the longstanding and continued occupation and use of those lands by Indigenous peoples. Similarly, the rights and responsibilities of the United States vis-à-vis those peoples were, and remained, defined by a well-established body of laws and legal principles (Federal Indian Law), rooted in European legal traditions and influenced by drastic changes in federal policies.³⁸ Thus, the complexities and unique challenges posed for tribal co-management efforts on federal public

³⁷See *Sturgeon v. Frost*, 577 U.S. 424, 440 (2016) (suggesting provisions in federal law providing for Alaska-specific approaches “reflect the simple truth that Alaska is often the exception, not the rule.”)

³⁸See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); Joseph William Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in *INDIAN LAW STORIES* 229, 251–52 (Carole Goldberg et al. eds., 2011) (comparing erasure of tribal nations from stories of western expansion and in Alaska).

lands in Alaska result not from significant historical differences that set Alaska entirely apart from its lower continental counterparts. Rather, the timing of Alaska's purchase by the United States, the perceived national interests at stake in the ownership and management of the lands and resources of Alaska, and the policy choices made by Congress and the Executive Branch to address the rights and status of Alaska Natives all contribute to the seemingly singular and intricately complicated past, present, and potential future of tribal co-management on federal public lands in the 49th State.³⁹

1. *Timing: 'Seward's Folly' and the End of Treaty-Making*

The degree to which the Native inhabitants of what is now Alaska have been or should be treated differently from Indigenous people within the continental United States has long been a topic of analysis and discussion on the part of the federal government.⁴⁰ From the start of the United States' involvement—its purchase from Russia of certain rights to the territory—the federal government sought to define the terms on which it would relate to the Indigenous people within the area.⁴¹ By seeking to import the body of law that would become known as federal Indian law to what would become Alaska, the United States imbued its relationship with Alaska Native Tribes with all of the nuance, complication, and history of its relations with Indian tribes elsewhere in the country. Yet Tribes in Alaska would see little evidence of the federal government or its laws for decades after the transaction with Russia.⁴² When the federal government's attention did eventually turn northward, however, the foundational principles of federal Indian law and their application in Alaska would

³⁹There are many well-written, helpful accounts of this history. See, e.g., DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, 24–50 (3d ed. 2012); Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *TULSA L. REV.* 17 (2007); COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* § 4.07[3][b] at 327–29 (Neil Jessup Newton ed., 2012). Rather than restating those works, this section focuses only on those issues most relevant to considering co-management issues on federal public lands in Alaska.

⁴⁰See, e.g., *Leasing of Lands within Reservations created for the benefit of the Natives of Alaska*, 49 *Pub. Lands Dec.* 592, 594 (1923) (summarizing the federal government's evolving—and sometimes conflicting—views on Alaska Natives since the 1867 Treaty with Russia).

⁴¹Treaty with Russia, March 30, 1867, Art. III, 15 Stat. 539, 542 (expressly distinguishing the “uncivilized native tribes” of the area from other inhabitants and subjecting those tribes to the laws and regulations applicable to other “aboriginal tribes” of the United States). See also CASE & VOLUCK, *supra* note 39, at 24, 63–64 (addressing whether civilized tribes might be entitled to benefits equal to other inhabitants, including U.S. citizenship).

⁴²See, e.g., Anderson, *supra* note 39, at 17 (“The territory of Alaska was largely ignored by the United States in the 19th Century and thus there was relatively little encroachment on the property of Alaska Natives.”)

have important consequences for both Alaska Natives and the United States.⁴³

But differences in the timing and context of those consequences for Alaska Natives compared to Indian tribes elsewhere in the country would continue to pose challenges for the terms of the federal-tribal relationship there. For example, contemporaneous with the United States' purchase of rights to the territory of Alaska from Russia, the federal government was also embarking upon an expansive effort to solidify and secure its ownership of territories across the American West. Congress charged The Indian Peace Commission of 1867 and 1868 with negotiating treaties with Tribes across the region in an effort to secure tribal cessions of vast swaths of territory and isolate those Tribes on reservations.⁴⁴ As a legal matter, these treaties were necessary in order for the United States to formally extinguish the Tribes' aboriginal title in the lands which, despite international real estate transactions like the Louisiana Purchase, remained a legally cognizable property interest of the Tribes.⁴⁵ The United States' interests in peace and settlement of the West by non-Native citizens demanded these efforts and, by virtue of the securing of various guarantees from the United States through those negotiations, those (and other) treaties remain meaningful avenues through which Tribes can assert and protect their interests in the region.⁴⁶ Although formal treaty-making would end shortly thereafter, the United States continued to assert its interests by establishing reservations through Executive Order or other acts of Congress and opening up formerly tribally-owned and occupied lands for non-Native settlement.⁴⁷

In what would become Alaska, however, no such efforts to negotiate treaties or otherwise address the continuing presence (and property

⁴³For more on the foundational principles of federal Indian law, particularly as they relate to tribal co-management, see Mills & Nie, *Bridges*, *supra* note 5, at 64–83 (2021).

⁴⁴See Kerry Oman, *The Beginning of the End: The Indian Peace Commission of 1867-1868*, 22 GREAT PLAINS Q. 35, 37 (2002).

⁴⁵See *Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823); Anderson, *supra* note 39, at 19; Mills & Nie, *Bridges*, *supra* note 5, at 69. Notwithstanding the recognition of these rights, however, in 1955, the United States Supreme Court determined that the federal government is not obligated by the constitution to compensate Alaska Natives for the taking of aboriginal title. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 278-79 (1955); see also Mills & Nie, *Bridges*, *supra* note 5, at 79–80.

⁴⁶See, e.g., *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019) (recognizing the continuing existence of rights reserved by the Crow Tribe in their 1868 Treaty to hunt in the Bighorn National Forest in Wyoming).

⁴⁷See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03(8)-(9), at 67–71 (Nell Jessup Newton, ed. 2012).

rights) of Native people would take place until well into the twentieth century and, even then, the United States did not engage in the same type of comprehensive treaty-making effort that had marked its approach to tribal relations through the end of the nineteenth century. Instead, the federal government sought to fold Alaska Natives into its contemporaneous federal Indian laws and policies, starting with authorizing individual allotments.⁴⁸ But, unlike in the continental United States, where allotment was a tool to break up reservations and tribal cultures, the use of allotments in Alaska sought to secure fee ownership for individual Alaska Natives.⁴⁹ Eventually, as federal Indian policy changed, the United States moved to create reservations in Alaska⁵⁰ and encouraged the organization of tribal governments pursuant to the Indian Reorganization Act, which was amended two years after passage to include Alaska.⁵¹ During these years, however, uncertainty over the status of Alaska Natives prompted additional consideration from federal lawyers and policymakers, with some confirming their status and rights according to well-established principles of federal Indian law.⁵² But, given the real or perceived differences between the rights of Native peoples inhabiting what would become Alaska and those elsewhere in the United States, the different path by which the United States ultimately recognized those rights would have significant practical implications for the present-day authority of Alaska Native Tribes to influence federal public land management. Without treaty confirmed or reserved rights, that recognition would take much longer and be catalyzed by non-Native interests and priorities.

⁴⁸Act of May 17, 1906, Pub. L. 59-171, 34 Stat. 197.

⁴⁹Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA*, 33 ALASKA L. REV. 187, 196 (2016) [hereinafter Anderson, *Sovereignty and Subsistence*].

⁵⁰*See, e.g.*, Case & Voluck, *supra* note 39, at 29 (“[B]etween 1943 and 1945, the Department [of the Interior] withdrew nearly two million acres for six Native reserves.”).

⁵¹Act of May 1, 1936, Pub. L. No. 74-538, 49 Stat. 1250; *see also* Anderson, *supra* note 39, at 24–26.

⁵²*See, e.g.*, Status of Alaska Natives, 53 Interior Dec. 593 (1932) (determining that there could be “no distinction” between Alaska Natives and “Indians of the United States” despite the lack of formal recognition through treaties); Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461 (1942) (“Although the natives of Alaska did not enter into formal treaties with the United States, such treaties are not essential to the maintenance of rights based on aboriginal occupancy”).

2. *National Interests*

Despite the federal government's treaty promises and trust obligations toward Indian Tribes and Alaska Natives,⁵³ for most of the nation's history, federal Indian law and policy has not been motivated by tribal interests or perspectives.⁵⁴ Instead, like the objectives of the Indian Peace Commission of the late-1860s, which sought to remove and isolate Tribes in order to open the West to transit and settlement by non-Indians, the perceived "national interests" often drive Congress to authorize, and the Executive branch to implement, policies that diminish, if not disregard entirely, inherent tribal sovereignty.⁵⁵ That same scenario—the often-overwhelming force of federal law pushed by non-Native interests colliding with time-honored Native legal rights—helps explain the central conflicts that resulted in the current state of Alaska Native law and policy.

The confusion and uncertainty over Native status in what would become Alaska that reigned through the first part of the twentieth century became a significant question as non-Native settlers flooded to the region in the post-World War II era and began militating for more land, development, and statehood.⁵⁶ Like their predecessors streaming across the American West nearly a century earlier, those interested in staking a claim to Alaska often viewed Alaska Native people and their rights as historical relics in the way of modern progress.⁵⁷ Similar too was the overtly racist but legally authorized treatment of Native people.⁵⁸ Perhaps it is more than coincidence that, upon becoming a state, Alaska's official motto would be "The Last Frontier."⁵⁹

⁵³For more on the federal trust relationship and duties, see Mills & Nie, *Bridges*, *supra* note 5, at 67–71. For more on treaties and rules for interpreting them, see *id.* at 74–78.

⁵⁴Arguably, the modern era of self-determination is the only potential exception. See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07, at 87–98 (Nell Jessup Newton ed., 2012).

⁵⁵For more on inherent tribal sovereignty, see Mills & Nie, *Bridges*, *supra* note 5, at 64–67.

⁵⁶See Anderson, *supra* note 39, at 26–27.

⁵⁷See, e.g., *id.* at 26 ("For the most part . . . non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title during the post-war economic expansion.").

⁵⁸See *id.* at 27, n.67 (quoting source describing Jim Crow-style segregation and rejection by the territory of laws banning racial discrimination).

⁵⁹See *Alaska Kids Corner*, STATE OF ALASKA, <https://alaska.gov/kids/student.htm> [<https://perma.cc/HCM5-VCET>] (last visited June 29, 2021). For a slightly different take, see JOINT FED.-STATE LAND USE PLANNING COMM'N, FINAL REPORT: SOME GUIDELINES FOR DECIDING ALASKA'S FUTURE 1 (1979) ("[w]ith more square miles than people and its small population . . . concentrated in several urban areas, the wide open spaces that had largely disappeared in the American West by 1890 can still be found in 1980 in Alaska [But t]he traditional frontier impulse has changed. Only a reckless few still seek land rushes, exploitation of resources devastating to the environment or destruction of the culture of the original inhabitants. A new land ethic has been

But, unlike the settlement of the Great Plains and Rocky Mountains by non-Indians, who were ultimately able to rely upon the federal government to negotiate tribal treaties to secure ownership of most of the territory before authorizing statehood or transferring valid title, Alaska would be admitted to the Union without any clear definition of the status of Native Tribes or their rights within its boundaries. In fact, rather than settle tribal claims to property or define tribal status, the Statehood Act and Alaska's constitution instead simply preserved the status quo by disclaiming any State interests in "any [Native] lands or other property (including fishing rights)."⁶⁰ Notwithstanding that disclaimer and the continuing uncertainty around Native rights, however, Congress also sought to support Alaska's statehood by authorizing the selection of lands by the state over a twenty-five year period following the Statehood Act.⁶¹ These contradictory provisions lit the fuse for what one leading commentator deemed an "inevitable collision."⁶²

The causes, dynamics, and evolution of the "inevitable collision" between Alaska, its non-Indian citizens, and tribal rights all echoed the earlier history of continental tribal resistance to dispossession.⁶³ Like tribal leaders reserving important rights in treaties, Alaska Native Tribes, intent on preserving their livelihoods, banded together to oppose the state's efforts to claim and reserve lands under the Statehood Act.⁶⁴ After filing claims to lands across the state; claims rooted in the foundational notion of unextinguished aboriginal title recognized by the Supreme Court in *Johnson v. M'Intosh*,⁶⁵ and demanding that the federal government protect those rights, the Tribes succeeded in substantially freezing Alaska's efforts to acquire lands and other property interests.⁶⁶ That impasse could only last so long,

adopted. None wish to 'pave Paradise, and put up a parking lot.' Everyone 'knows what they've got before it's gone.'") (Citations omitted).

⁶⁰Alaska Omnibus Act, Pub. L. 86-70, §2(a), 73 Stat. 141, 141 (1959) (amending original Statehood Act to add this language); ALASKA CONST. art. XII, § 12.

⁶¹See Alaska, Statehood, Pub. L. No. 85-508 § 6, 72 Stat. 339, 340 (1958).

⁶²Anderson, *supra* note 39, at 28.

⁶³See *id.* at 31 ("The situation faced by Alaska Natives with respect to their aboriginal claims in the 1960s differed little from that faced by Indian tribes that entered into "agreements" with the United States in the late nineteenth and early twentieth centuries.")

⁶⁴See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 233 (2005).

⁶⁵See Singer, *supra* note 38, at 244.

⁶⁶WILKINSON, *supra* note 64, at 234 (responding to requests from Alaska Natives and Native groups, in 1969, then-Secretary of the Interior Stuart Udall issued the "'Deep Freeze,' a formal withdrawal order declaring Alaska's public domain lands, over 90 percent of the state, off limits to its statehood selection, mineral leases, homesteading, and other forms of federal land transfer.").

especially once other competing interests—particularly those seeing access to recently discovered and immense oil resources of northern Alaska⁶⁷—came to the fore.

Ultimately, after a century of uncertainty and unwillingness on the part of the United States to formally recognize and protect the rights of Alaska Natives, the impetus to extract Alaska's natural resources became a primary catalyst for resolving Native property claims.⁶⁸ As with the historical and contextual factors that led to that resolution, the settlement of those claims would echo other eras of federal Indian law and policy.

3. *Policy Choices: ANCSA and its Legacy*

The modern era of federal Indian policy that aims to support tribal sovereignty and self-determination, was ushered in by President Richard M. Nixon's message to Congress, which he delivered in 1970.⁶⁹ That message cemented a new federal approach to the United States' relationship with Tribes, one rooted in tribal, not federal, prerogatives and centered on strong communication between the federal government and its tribal counterparts.⁷⁰ Consistent with this shift in policy, President Nixon signed the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971 and, shortly afterward, he placed a call to the newly formed Alaska Federation of Natives (AFN) to let them know he had done so.⁷¹ The formation of AFN and the President's interest in ensuring that ANCSA's terms were acceptable to that group speak to both the import of the law and the growing role and power of Alaska Natives within the political halls of power.⁷² But, even with that burgeoning influence, the passage of ANCSA has not yet fulfilled the policy of tribal self-determination announced by President Nixon's influential statement.

⁶⁷*See id.* (noting that oil had been discovered on the North Slope the year before the 'Deep Freeze' and describing the various interests competing for "the last pork chop.")

⁶⁸*See, e.g.,* Anderson, *supra* note 39, at 31 ("[t]he state's inability to receive title to land under the Statehood Act, the injunction against permitting and construction of a trans-Alaska oil pipeline, and increasing disputes over fish and game resources set the table for movement on the settlement of Native land claims. Of all these factors, however, it was the thirst for the oil of Alaska's North Slope that served as the impetus for settlement of the land claims by Congress.")

⁶⁹President Richard M. Nixon, Special Message on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970), <https://www.epa.gov/sites/default/files/2013-08/documents/president-nixon70.pdf> [<https://perma.cc/ZK5M-ZQ4K>].

⁷⁰*See* Mills & Nie, *Bridges, supra* note 5, at 52–53.

⁷¹WILKINSON, *supra* note 64, at 235–36.

⁷²*See, e.g., id.* at 234–36.

Instead, ANCSA set the stage for the modern-day challenges faced by Alaska Native Tribes seeking to protect the lands, waters, and resources on which they and their ancestors have relied for millennia.

First and most importantly, the law put an abrupt and formal end to any uncertainty about Native claims of title: “[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”⁷³ The law also revoked the authority to grant future allotments pursuant to earlier law and revoked all but one of the then-existing reservations.⁷⁴ In exchange, ANCSA provided for financial compensation and withdrew various lands, including those surrounding existing Native villages for selection by and transfer to Native ownership.⁷⁵

The end of aboriginal title removed any potential cloud on other conveyances that the United States might make and accomplished the goals of the State of Alaska and others interested in opening up the State and its resources for acquisition and development.⁷⁶ And, reminiscent of the bygone federal policy of termination, ANCSA’s rejection of reservation and federal superintendence of tribal lands promised a far different federal-tribal relationship than elsewhere in the United States.⁷⁷ But Native access to and management of land and resources were central interests in the negotiation of ANCSA, even if the structure of that access and management was less of an emphasis.⁷⁸

⁷³Alaska Native Claims Settlement Act, Pub. L. 92-203, § 4(b), 85 Stat. 688, 690 (1971). That section also made clear that any prior conveyances by the United States also extinguished aboriginal title and extinguished any future or pending claims against the United States, the State, and “all other persons” based on “Native use and occupancy.” *Id.* at § 4(a), 4(c). Congress made clear, however, that ANCSA was not intended to disturb claims that had already been resolved. *Id.* at § 2(d).

⁷⁴*Id.* at §§ 18–19. ANCSA excluded the Annette Island Reserve and the members of the Metlakatla Indian community.

⁷⁵*Id.* at §§ 11–12, 14.

⁷⁶*See, e.g.,* Anderson, *supra* note 39, at 31. (“If one views it from the perspective of the state and oil companies intent on development of oil and gas at Prudhoe Bay, ANCSA was a resounding success. It unequivocally extinguished all claims to aboriginal title in Alaska and also all claims for past damages based on trespass to Native aboriginal title.”)

⁷⁷*See* WILKINSON, *supra* note 64, at 238–39.

⁷⁸Willie Hensley, a State representative and chair of the Alaska Native Claims Taskforce made important recommendations regarding ANCSA:

Our focus was on land. Land was our future, our survival. In my region all we wanted was to get control of our space so we could live on it and hunt and fish on it and make our own way into the twentieth century at our own pace. Our focus was on land not structure. The vehicle for administering the land was not our focus. We weren't lawyers. We were battling the state tooth and tong. We

That structure comprised ANCSA's second central feature. The law was silent with regard to the status of Alaska Native Tribes as sovereigns and instead called for a corporation-based structure for the disbursement of settlement funds and the selection and ownership of land. These corporations, which came to be known as Alaska Native Corporations (ANCs), were to be either region or village-based and comprised of shareholders enrolled as members of each particular village or residing in each region.⁷⁹ ANCSA also withdrew lands around each established and recognized village from which the village ANC could then select lands (the amount of land would be based on the village population).⁸⁰ Regional ANCs could also select lands out of a total of 38 million available acres, with each regional ANC entitled to an amount proportional to their size.⁸¹ While the Native shareholder control ensured that the oversight of and benefits from ANCs would flow to Alaska Natives, ANCSA's preference for corporate instead of tribal land ownership led (in part) to the Supreme Court determining that Native Tribes in Alaska cannot exercise sovereign control over those lands.⁸² As such, Alaska law generally applies across all lands acquired by ANCs pursuant to ANCSA.⁸³

Along with aboriginal title claims settlements and a structure and process for the selection of lands by the ANCs, a third major component of ANCSA was the establishment of a process for advising the federal and state governments about uses, selection, and transfer of remaining lands across the state. ANCSA established the Joint Federal-State Land Use Planning Commission (LUPC), to be comprised of representatives appointed by the Governor of Alaska (including at least one Native member), the President (with the advice and

were always afraid the President might create a pipeline corridor. We were afraid of failure, of not getting a settlement and not protecting the land for our future generations. As a minority group we knew we could only press the country so far. But none of us ever envisioned a loss of tribal structure. We never thought the tribal control would not continue.

Id. at 238.

⁷⁹Alaska Native Claims Settlement Act, Pub. L. 92-203, §§ 5, 7–8, 85 Stat. 688, 690–91, 694 (1971).

⁸⁰*Id.* at §§ 12, 14. The village ANCs could also be equitably allocated certain additional acreage (up to a state-wide total of 22 million acres) from lands allocated to the regional ANCs “after considering historic use, subsistence needs, and population.” *Id.* at § 12(b).

⁸¹*Id.* at § 12(c).

⁸²Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).

⁸³See WILKINSON, *supra* note 64, at 239 (“All, or nearly all, of the land granted by ANCSA is subject to state jurisdiction”). Notwithstanding the apparent lack of respect for (or understanding of) Native tribal sovereignty, Congress viewed the corporate model as “adopt[ing] a policy of self-determination on the part of Alaska Native people.” H.R. Rep. No. 92-746, at 37 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

consent of the Senate), and the Secretary of the Interior.⁸⁴ Among other charges focused on making recommendations regarding balanced economic growth and coordination between the federal and state governments, the LUPC was specifically tasked with identifying “ways to avoid conflict between the State and the Native people in the selection of public lands.”⁸⁵

The LUPC’s work spanned much of the 1970s and was complicated by numerous challenges in implementing ANCSA, which also led to a series of legislative amendments aimed at improving implementation.⁸⁶ In its final report, however, the LUPC offered a series of recommendations responding to Congress’s charge in ANCSA and included recommendations specifically focused on “Assuring Alaska Natives Their Choice of Futures.”⁸⁷ There, the report made clear the LUPC’s belief, backed by guidance from the federal judiciary and Interior officials, that a “clear understanding of [ANCSA] as Indian law should inform future policy formulation and conflict resolution in [the Act’s] implementation . . . decisions, when in doubt, should generally be resolved in favor of Alaska Natives.”⁸⁸ And, although much of the narrative in support of the LUPC’s recommendations focused on the details of ANCSA’s land selection process, the report noted the “vital interests” of Alaska Natives in “the protection of lands and wildlife,” a goal that, without “their full cooperation,” would be “difficult to obtain.”⁸⁹ Perhaps in service of that cooperative approach, the report specifically recommended that “[c]ooperative agreements addressing development of resources or protection of natural features and habitat should be extensively utilized by government land managers and adjoining Native landowners.”⁹⁰

Finally, ANCSA did not mention, much less address, the means and authorities by which Native people would be able to continue to hunt, fish, and gather across the lands that could now be carved up and distributed among the State of Alaska, ANCs, and various types of federal ownership, including as federal public lands to be managed as national parks, fish and wildlife refuges, national forests, or

⁸⁴Alaska Native Claims Settlement Act, Pub. L. 92-203, § 17, 85 Stat. 688, 706 (1971)..

⁸⁵*Id.* at § 17(a)(7)(K).

⁸⁶*See* JOINT FED.-STATE LAND USE PLANNING COMM’N, *supra* note 59, at 2–3 (describing obstacles to ANCSA’s implementation and the Joint Commission’s work).

⁸⁷*Id.* at 25.

⁸⁸*Id.* at 28 (citing *Calista v. Andrus*, 435 F. Supp. 664, 671 (D. Alaska 1977)).

⁸⁹*Id.* at 29.

⁹⁰*Id.* at 31.

by the Bureau of Land Management. In fact, with the extinguishment of any aboriginal hunting and fishing rights and only a passing nod to “subsistence needs” as a factor for regional ANCs to consider when reallocating lands to village ANCs, the law that President Nixon signed simply ignored the need to protect Native access across all of these lands for critically important subsistence activities. While the Senate-passed version of the law recognized and sought to accommodate those concerns, that language was struck by the conference of House and Senate negotiators who were unable to agree on legislative language even “after careful consideration.”⁹¹ Instead, the Congressional Conference Committee “believe[d]” that the Secretary of the Interior could rely on the withdrawal authority to protect “Native interests in subsistence resource lands,” and “expect[ed] both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.”⁹²

As part of its work on national interest lands, the LUPC considered actions that could be taken to protect those needs. Unlike its nod to deference to Native interests and cooperative management described above, however, the LUPC instead suggested State control of fish and wildlife management, which could not, in the Commission’s view, allow for differential treatment of Native subsistence uses or users.⁹³ Rather than recognize and seek to protect the unique and multi-generational connections between Native peoples and their landscape, the LUPC’s report suggested instead that, “[a] management approach[that] avoid[s] racial distinctions, *prevents social disharmony in those villages and towns in rural Alaska, which, while predominantly Native, are not exclusively so; and where non-Native residents frequently have similar dependencies on local fish and wildlife as their Indian, Eskimo, and Aleut neighbors.*”⁹⁴ This approach, which ignored and erased the “social disharmony” visited on Native communities by the preceding century of American involvement in the region, equalized non-Native interests in those lands and resources, and rested on the history of overt anti-Native racism,⁹⁵

⁹¹H.R. Rep. No. 92-746, at 37 (1971) (Conf. Rep.), as reprinted in 1971 U.S.C.C.A.N. 2247, 2250.

⁹²*Id.*

⁹³JOINT FED.-STATE LAND USE PLANNING COMM’N, *supra* note 59, at 10 (“the State of Alaska has the primary role in wildlife management and regulates hunting and fishing wherever they are allowed The Constitution of the State of Alaska forbids any distinctions made on the basis of race and the Alaska State Department of Fish and Game defines subsistence use in terms of local residency.”).

⁹⁴*Id.*

⁹⁵Anderson, *supra* note 39, at 27 n.67.

would come to form the basis of subsistence management across Alaska's public lands.⁹⁶

With regard to the Secretary's withdrawal authority, ANCSA called for the Secretary to utilize existing public land laws to identify and withdraw appropriate lands "to insure the public interest in these lands is properly protected,"⁹⁷ and authorized the further withdrawal of up to 80 million additional acres that might be "suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems."⁹⁸ These latter lands would remain withdrawn until Congress acted upon the Secretary's recommendations for such additions or creations, which had to occur within five years of those recommendations.⁹⁹ Although the Secretary made those recommendations in December 1973, it soon became clear that Congress would not meet that deadline and, as a result, both the Secretary and, eventually, President Carter (through the Antiquities Act) took action to protect over 160 million acres.¹⁰⁰ Additional Congressional action would be needed to finally resolve the status of those lands,¹⁰¹ and, in addition to cementing the federal government as the largest land owner and manager within the State of Alaska, that legislation would provide an initial—though largely unsatisfactory—framework for fulfilling the expectations and beliefs of ANCSA's creators regarding Native subsistence rights.¹⁰²

4. *Policy Choices: ANILCA—Fulfilling ANCSA's promises?*

Like the political tumult and multitude of forces that drove the settlement of Alaska Native claims to property in ANCSA, the Alaska National Interest Lands Conservation Act (ANILCA)¹⁰³ was also the product of pressure upon lawmakers to resolve issues still lingering from ANCSA's implementation. Enacted within a decade of ANCSA, ANILCA represented yet another effort on the part of Congress to address and balance competing interests in (and claims to) the sprawling lands and resources of Alaska, especially because ANCSA had not

⁹⁶See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. VIII, 94 Stat. 2371, 2422-30 (1980).

⁹⁷Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 17(d)(1), 85 Stat. 688, 708 (1971).

⁹⁸*Id.* at § 17(d)(2)(A), 85 Stat. at 709.

⁹⁹*Id.* at § 17(d)(2)(C), 85 Stat. at 709.

¹⁰⁰CASE & VOLUCK, *supra* note 39, at 296.

¹⁰¹Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

¹⁰²See *id.* at tit. VII, 94 Stat. at 2422-30.

¹⁰³Pub. L. No. 96-487, 94 Stat. 2371 (1980).

succeeded in fully and finally resolving those interests.¹⁰⁴ Given the lack of express protection for Native subsistence activities in ANCSA (and the law's extinguishment of any aboriginal claims), ANILCA presented an opportunity to confirm and fulfill the expectations expressed in ANCSA's legislative history that steps would be taken to secure and protect those continuing rights.¹⁰⁵ But rather than meet that objective, ANILCA has instead resulted in decades of litigation, distrust, and frustration across Alaska, particularly with regard to the law's inability to promote and secure Alaska Native subsistence activities across the State.¹⁰⁶

While ANILCA's efforts to clarify and classify the status of land ownership in Alaska created immense complexity and confusion, particularly for owners or users of inholdings within those units,¹⁰⁷ the ANILCA framework for managing subsistence activities across federal public lands is at the heart of the challenges presented by the law's legacy. Consistent with the recommendations of the LUPC, Title VIII of ANILCA deferred to existing State wildlife management regimes by authorizing Alaska to regulate subsistence users across federal public lands in a manner consistent with Congress's goals under ANILCA.¹⁰⁸ And, also consistent with the LUPC's suggestions and the State's approach to resources management, ANILCA recognized and

¹⁰⁴*See id.* § 101(d), 94 Stat. at 2375 (“[T]he designation and disposition of the public lands in Alaska pursuant to this act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition . . .”).

¹⁰⁵*See, e.g.* CASE & VOLUCK, *supra* note 39, at 296 (“By its terms, title VIII of ANILCA is intended to carry out the subsistence-related policies and fulfill the purposes of ANCSA. In this respect, it is in some sense a settlement of the Alaska Native aboriginal hunting and fishing claims, seemingly extinguished in ANCSA.”).

¹⁰⁶*See, e.g.*, *The Implementation of the Alaska National Interest Lands Conservation Act of 1980, Including Perspectives on the Act's Impacts in Alaska and Suggestions for Improving the Act: Hearing before the S. Comm. on Energy and Nat. Res.*, 114th Cong. 121, 125 (2015) (letter from AHTNA, Inc. to Sen. Murkowski) (“The ANILCA plan to protect Alaska subsistence rights has ended up in the worst of all worlds, with a lack of defined protection of Alaska Native customary and hunting and fishing rights. Instead, it has become a labyrinth of bureaucracy and litigation with the State and private parties. The implementation of ANILCA subsistence rights continues to absorb the very limited resources of the Alaska Native people was supposed to protect.”); *Id.* at 125 (written testimony of Julie Kitka, President, Alaska Federation of Natives: “We hope this Committee will recognize that ANCSA and ANILCA failed to provide the long-term protections for Native subsistence needs that Congress intended, and take the actions necessary to provide those protections.”); *see also* Anderson, *supra* note 49, at 216–17.

¹⁰⁷Section 102(3) of ANILCA defined “public lands” to exclude lands that had already been selected by the State of Alaska or ANCs but the law still withdrew and reserved “conservation system units,” or public lands to be managed by federal land management agencies defined by section 102(4), that encompassed or surrounded some of those non-public lands. Alaska National Interest Lands Conservation Act § 102(3), 94 Stat. at 2375.

¹⁰⁸*Id.* § 805(d), 94 Stat. at 2425.

prioritized the subsistence activities of both Native and non-Native rural residents of the State.¹⁰⁹ Despite that more general, residency-focused definition of subsistence; however, Congress still drew upon its plenary power over Indian affairs to enact Title VIII and expressly recognized that continued subsistence uses across public lands are “essential to Native physical, economic, traditional, and cultural existence.”¹¹⁰

In light of the importance of these uses, Congress required that federal agencies engaged in planning and management activities specifically assess and seek to avoid decisions that would impact or impair subsistence uses on federal public lands.¹¹¹ In an effort to ensure that ANILCA’s purposes could be effectively carried out in a cooperative manner, Congress also authorized the use of cooperative agreements with “other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies” of Title VIII.¹¹²

To implement the law’s preference for rural resident subsistence activities across federal public lands, ANILCA provided for an administrative structure designating subsistence regions across the state and establishing regional and local advisory councils to advise the State or the Secretary of the Interior on the management and oversight of subsistence activities in each region.¹¹³ In fact, ANILCA significantly empowered these regional advisory councils (RACs) by limiting the ability of the Secretary to deviate from their recommendations, which can be done only where those suggestions are “not supported by substantial evidence, violate[] recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.”¹¹⁴ Even then, the Secretary is required to respond to the RAC with a factual basis and reasons for not agreeing with a RAC recommendation.¹¹⁵ ANILCA imposed similar

¹⁰⁹*Id.* at §§ 801(1), 804, 94 Stat. at 2422–23.

¹¹⁰*Id.* § 801(1), (4), 94 Stat. at 2422.

¹¹¹*Id.* § 810, 94 Stat. at 2422.

¹¹²*Id.* § 809, 94 Stat. at 2427. *See also* 50 C.F.R. §100.10(d)(xvi) (2020) (authorizing the Federal Subsistence Board to “[e]nter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program.”)

¹¹³Alaska National Interest Lands Conservation Act § 805, 94 Stat. at 2424.

¹¹⁴*Id.* § 805(c), 94 Stat. at 2424.

¹¹⁵*Id.*

requirements upon the State if the State assumed primary regulatory responsibility pursuant to the deference provisions described above.¹¹⁶ This structure provided an important avenue for local input, if not control, over subsistence management but, consistent with the rural rather than Native/non-Native distinction, ANILCA only required that RACs be comprised of “residents of the region” without regard to their tribal affiliation or status.¹¹⁷

Although ANILCA represented a key recognition of the importance of Alaska Native subsistence activities, its power and potential to ensure those activities would continue undisturbed have been significantly curtailed by subsequent political and legal conflicts. Accepting Congress’s invitation to assume responsibility for subsistence management, the State of Alaska initially worked to develop its own regulatory efforts to comply with the law. In 1989, however, the Supreme Court of Alaska determined that the State could not constitutionally allow for, much less enforce, a rural subsistence priority.¹¹⁸ The federal government then stepped in, promulgating temporary regulations in 1990¹¹⁹ and finalizing those rules in 1992.¹²⁰ Even though the federal regulations “establish[ed] a Federal program that minimize[d] change to the State’s program consistent with meeting the Federal government’s responsibilities under Title VIII,”¹²¹ further conflict ensued, including extensive litigation over whether and to what extent the scope of the federal government’s ANILCA authority over subsistence activities applied upon waterways (i.e., whether and which rivers fit within the law’s definition of “public lands.”)¹²²

¹¹⁶*Id.* § 805(d), 94 Stat. at 2425.

¹¹⁷*Id.* § 805(a)(3), 94 Stat. at 2424.

¹¹⁸*McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989).

¹¹⁹Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹²⁰Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940 (May 29, 1992) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹²¹Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. at 27,114. Although the temporary rules noted the short timeframe available in which to adopt them as a basis for maintaining consistency with existing State approaches, the temporary rules simply adopted then-existing State regulations, and the final rules demonstrated a federal preference for a return to State control. *See id.* (“To do otherwise [i.e., develop a new structure different from the State’s] would be extremely disruptive to subsistence users and create unnecessary chaos if and when the State is able to bring its subsistence program back into compliance with ANILCA.”); Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. at 22,940 (“The Secretaries [of Interior and Agriculture] agree that it is preferable for the State of Alaska to manage the subsistence taking and use of fish and wildlife.”)

¹²²*See, e.g., John v. United States*, 720 F.3d 1214, 1221-24 (9th Cir. 2013) (reviewing prior litigation over the extent of federal authority to regulate waterways as part of “public lands” under ANILCA); Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA*, 51 ARIZ. ST. L.J. 845 (2019) (reviewing the series of Katie John cases and the

The State of Alaska has not yet established an ANILCA-compliant regulatory structure and the result has been a federal framework based on and substantially similar to the State's prior structure but mired in litigation and contentious uncertainty.

The assumption of the ANILCA framework by the federal government led to other complications as well, including the determination that the Federal Advisory Committee Act (FACA), which mandates certain representational balance and procedural safeguards for federal committees, applied to ANILCA's RACs and local advisory committees.¹²³ In light of those requirements, RAC members could not be elected or designated by residents of a particular region and the make-up of each RAC is intended to "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."¹²⁴ Thus, while the RACs are intended to support the federal management and oversight of subsistence activities, a third of their members represent differing—and often competing—interests.¹²⁵

Similarly, despite the assumption of federal oversight on public lands, the State of Alaska retained regulatory authority over non-public lands, including State, private, and ANC-owned lands that may be adjacent to or within the exterior boundaries of ANILCA's conservation system units.¹²⁶ Thus, in a result one leading commentator described as "more than ironic,"¹²⁷ the State of Alaska exercises authority over Alaska Native subsistence uses on the lands that were acquired in recognition of their aboriginal title while Alaska Native Tribes and their members must navigate a complicated and diffuse federal bureaucracy to influence federal management of those uses on federal public lands taken from them by virtue of that settlement. And, despite the clear indications in ANCSA's legislative history and

non-Title VIII challenges to federal authority, *Sturgeon v. Frost*, 577 U.S. 424 (2016) [*Sturgeon I*] and *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) [*Sturgeon II*].

¹²³Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. at 22,945 ("[u]ntil Congress provides otherwise, Regional Councils are subject to the requirements of the FACA."); Federal Advisory Committee Act (FACA), 5a U.S.C. §§ 1–16.

¹²⁴See 41 C.F.R. § 102-3.30(c) (2020).

¹²⁵50 C.F.R. § 100.11(b)(1) (2020) ("To ensure that each Council represents a diversity of interests, the Board will strive to ensure that 70 percent of the members represent subsistence interests within a region and 30 percent of the members represent *commercial and sport interests* within a region.") (emphasis added).

¹²⁶See Anderson, *supra* note 49, at 217–18 (noting that 60% of the lands and waters within Alaska's boundaries are subject to federal authority while 104 million acres of state-owned lands and 44 million acres of ANC-owned lands are excluded from consideration as 'public lands').

¹²⁷*Id.* at 218.

Congress's statements of purpose in ANILCA recognizing the United States' trust obligations to those Tribes, the federal government's legislative and regulatory dilution of those unique responsibilities in the name of consistency with the State's prior regulatory structure and the rural (instead of Native) subsistence priority has led to disagreement as to whether ANILCA should be considered Indian legislation and interpreted as such.¹²⁸

Despite these lingering—and significant—challenges and uncertainties, Alaska Native Tribes have found avenues to assert and assume broader authority to protect their ongoing subsistence lifeways across federal public lands. As discussed in more detail below, more avenues to do so may still yet be utilized to bridge existing progress to a new era of tribal co-management of these critical lands and resources.

B. Current Challenges to Tribal Co-Management in Alaska

The history, context, and unique legal framework applicable in Alaska presents novel challenges for assessing and implementing effective tribal co-management of federal public lands. For example, as discussed in greater detail below, the federal subsistence management scheme authorized by ANILCA and its subsequent start-and-stop implementation by the State of Alaska and the Department of the Interior is a one-of-its-kind approach that has resulted in intricate knots of regulatory authority over wildlife across a patchwork of federal, state, private, and ANC-owned lands.¹²⁹ Similarly, the broader national interests inherent in Alaska's statehood and a legacy of explicit and implicit federal deference to the State of Alaska,¹³⁰ as well as an often-emboldened sense of sovereignty on the part of the State,¹³¹ all make for a unique federal-state relationship. By

¹²⁸ Compare *People of Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984) (relying on legislative history suggesting that Title VIII was understood as Indian legislation to which the Indian canons of construction should apply) with *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228–29 (9th Cir. 1999) (dismissing legislative history and relying on ANILCA's recognition of a rural subsistence priority to determine that law is not Indian legislation).

¹²⁹ See, e.g., Anderson, *supra* note 39, at 37–38 (describing ANILCA implementation issues).

¹³⁰ See, e.g., Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114, at 27,114 (June 29, 1990) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100); Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940, at 22,940 (May 29, 1992) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹³¹ See, e.g., Press Release, Office of Governor Mike Dunleavy, Governor Moves to Exert Control over Alaska Lands and Waters (March 26, 2021), <https://gov.alaska.gov/newsroom/2021/03/26/governor-moves-to-exert-control-over-alaska-lands-and-waters/> [<https://perma.cc/4BGV-2PNT>]

promoting cooperation with and deference to State priorities, the federal government subjugates its trust duties to Alaska Native Tribes, especially where tribal and state interests may conflict. Those conflicts are ubiquitous in federal management of public lands and subsistence policies, which further emphasizes the impacts of the federal government's deferential approach. Those and other Alaska-specific issues present some exceptional hurdles to meaningful tribal co-management that simply do not exist anywhere else.

1. Federal Deference to the State of Alaska and the administration of ANILCA's Title VIII

New laws and regulations are not required in order to practice tribal co-management on federal public lands in Alaska. Federal public land agencies already possess the necessary authorities, drawing from federal and Indian law, to enable tribal co-management in the State. As we show above, Title VIII of ANILCA provides Alaska Natives with another potential subsistence-based pathway for co-management. Here too, tribal co-management could take root without legislative modification to Title VIII.

This potential notwithstanding, the most significant impediment to the subsistence-based co-management pathway are the regulations and administrative structure designed to implement Title VIII. Many of these problems can be traced to the federal government's deference to the State of Alaska and Alaska's antagonism to the purposes of Title VIII,¹³² both of which have resulted in a stifling regulatory framework and limited implementation of that law, particularly as it relates to the potential fulfillment of ANCSA's promises to Alaska Natives. As a result, the potential for tribal co-management of these subsistence activities and resources is significantly hamstrung and will likely remain so without specific focus on and revision to the regulations implementing Title VIII and the federal government's routine and sometimes reflexive deference to the State of Alaska.

(announcing State effort to assert ownership to all submerged lands underlying navigable waterways based on Alaska's statehood).

¹³²State "Restrictions on Cooperation with Federal Government" is codified in ALASKA STAT. § 16.05.935 (2021). The law clarifies "that the state has not assented to federal control of fish and game in Glacier Bay National Park and Preserve or the navigable waters within or adjoining the park and preserve" and provides more general restrictions on state departments and boards from entering into agreements with federal agencies that cede state authority for the management of fish and game. Some exceptions are made such as those pursuant to the Migratory Bird Treaty Act, Marine Mammal Protection Act, and Magnuson-Stevens Fishery Conservation and Management Act, and others. Not included in this list of exceptions, however, is Title VIII of ANILCA.

How we got to the current state of affairs is amply documented elsewhere so there is no need to replay it all here.¹³³ Nor must we catalog all the problems resulting from the “dual management” system of subsistence and wildlife management in the State. The short of it is that ANILCA provided the State of Alaska the opportunity to implement the rural subsistence priority provided in Title VIII by enacting state laws that were consistent with ANILCA.¹³⁴ The State did so until 1989 when the Alaska Supreme Court, in *McDowell v. State of Alaska*, struck down the rural preference as being contrary to several “equal access” clauses in the Alaska State Constitution, including one stating that “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”¹³⁵

The federal government stepped in and took over implementation of Title VIII in 1990 as a result of *McDowell* and the State’s failure to comply with federal law. Regulations implementing Title VIII were necessary and Section 814 provides the Secretary broad authority to “prescribe such regulations as necessary and appropriate to carry out his responsibilities under this title.”¹³⁶ The RACs created in Section 805 were not yet formed at the time so they were unable to fulfill one of their core missions: “the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within [their] regions.”¹³⁷ Because of the chaos caused by *McDowell*, and the shortness of time available to promulgate new regulations, the Secretary of Interior adopted and institutionalized the State of Alaska’s subsistence hunting and fishing program.¹³⁸

In 1980, Congress used its constitutional authorities over Native affairs and those provided in the Property and Commerce Clauses to enact a *federal* statutory approach to subsistence management.¹³⁹ In

¹³³See generally CASE & VOLUCK, *supra* note 39, at 265–324; FRANK NORRIS, ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY (2002).

¹³⁴16 U.S.C. § 3115(d).

¹³⁵*McDowell v. Alaska*, 785 P.2d 1, 5 (Alaska 1989).

¹³⁶16 U.S.C. § 3124.

¹³⁷16 U.S.C. § 3115(a)(3)(A).

¹³⁸Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100) (“To do otherwise [i.e., develop a new structure different from the State’s] would be extremely disruptive to subsistence users and create unnecessary chaos if and when the State is able to bring its subsistence program back into compliance with ANILCA.”).

¹³⁹16 U.S.C. § 3111(4); See also *John v. United States*, 247 F.3d 1032, 1036 (9th Cir. 2001).

recognition of state interests, Congress offered Alaska the opportunity to administer the subsistence program, not undermine it, but the history of Title VIII is colored most deeply by state efforts to limit its application.¹⁴⁰

Some of these efforts by the State are rooted in its view of state ownership of wildlife; that it has almost unlimited authority to manage fish and wildlife in the State and do so in a way that is unfettered by federal law and regulation.¹⁴¹ This view results in a very narrow reading of Title VIII with anything more perceived as yet another federal intrusion into the state's authority to manage fish and wildlife.¹⁴² In support of this argument, Alaska often invokes ANILCA's savings clause, which provides in part that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII of this Act]."¹⁴³

In some cases, conflicts result from the fundamentally different approaches to subsistence management of the federal program and

¹⁴⁰Robert T. Anderson reviews some of this litigation in *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 ALASKA L. REV. 186, 215 (2016). He includes the following: *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988) (holding state's statutory definition of "rural" unlawful, as it was inconsistent with the plain meaning of the term); *Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989) (striking down state seasons and bag limits for moose and caribou as inconsistent with the customs and traditions of a Native Village, and affirming that ANILCA precludes restrictions on subsistence uses by rural residents unless all other non-subsistence uses are first eliminated); *John v. Alaska*, No. A85-698-CV, slip op. at 2 (D. Alaska Jan. 19, 1990) (Order on Cross Motions for Summary Judgment) (striking down state regulations that restricted subsistence fishing at a historic Native fish camp); *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991) (setting aside a federal Lacey Act prosecution on the ground that state law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use); *Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990) (striking down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with the customary and traditional harvest patterns of Yupik Natives).

¹⁴¹See Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction (GMU 13 Closure), Alaska v. Fed. Subsistence Bd., Civ. Action No. 3:20-cv-00195-HRH (Aug 10, 2020) (challenging the FSB's closure of game management units to moose and caribou hunting to non-federally qualified users on the grounds that Alaska has management authority over its game resources because "fish and wildlife are the property of the State held in trust for the benefit of all residents."). *Id.* at 5.

¹⁴²See *Federal Interactions with State Management of Fish and Wildlife Before the Comm. on Env't and Pub. Works*, 114th Cong. 41, 44 (2016) (statement of Doug Vincent-Lang, Former Dir., Alaska Div. of Wildlife Conservation) (reviewing federal agency actions that are perceived as an "unprecedented administration intrusion by federal agencies into the state's traditional role as the principal manager of fish and wildlife.").

¹⁴³16 U.S.C. § 3202(a). This savings clause, like others in federal land law, is still subject to the U.S. Constitution's Supremacy Clause and principles of federal preemption. The legislative record of Title VIII "does not support the State's sweeping interpretation of [Section]1314(a)." *Alaska v. Bernhardt*, 500 F. Supp. 889, 914 (D. Alaska 2020).

State of Alaska. The dual management model of wildlife management in Alaska means that the State administers a far different version of subsistence on non-federal lands. Unlike the rural preference provided in Title VIII, under state law, all Alaskans have a subsistence priority regardless of where they live.¹⁴⁴ Alaska also designates certain so-called “nonsubsistence areas” in which the State’s version of a subsistence priority does not apply.¹⁴⁵

Alaska’s model of wildlife governance—driven in large part by its Board of Game—is also a factor in this regard, with the State system largely dominated by non-Native, urban, sport and commercial interests that “make wildlife management policies in splendid isolation from the rural (predominantly Native) populations.”¹⁴⁶ Like state wildlife agencies elsewhere, funding for the Alaska Department of Fish and Game is driven by hunting, trapping and fishing-based user fees that are matched with federal dollars from excise taxes.¹⁴⁷ Of no surprise, this “user-pay, user-benefit” funding model leads to the prioritization of sport and commercial users in contrast to the priorities of the federal subsistence program.

Alaska Native Tribes are often caught in the middle of this long-standing struggle between the federal government and State over the power and authority to manage fish and wildlife management. In other cases, Tribes and Native subsistence users are the specific target of State efforts to limit Title VIII.¹⁴⁸ The roots are deep in this regard, as it wasn’t until the turn of the twentieth century until the State’s executive branch and Supreme Court even acknowledged the

¹⁴⁴See ALASKA STAT. § 16.05.258(b) (2021) (directing the Board of Game and Board of Fisheries to provide a reasonable opportunity for subsistence uses first, before providing for other uses of any harvestable surplus of fish and game population.)

¹⁴⁵ALASKA STAT. § 16.05.258(c) (2021).

¹⁴⁶CASE & VOLUCK, *supra* note 39, at 294. The Alaska Department of Fish and Game administers regulations adopted by the State’s Board of Game, a government entity authorized to regulate “the conservation, development, or utilization of game in a manner that addresses whether, how, when, and where the public asset of game is allocated or appropriated.” ALASKA STAT. §16.05.255 (2021).

¹⁴⁷See, e.g., Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV’T. L. 797, 809 (2017).

¹⁴⁸The State’s decision to open the Kuskokwim River to King Salmon fishing in the face of a federal subsistence fishing closure provides one recent example. See, e.g., Greg Kim, *State Announces Kuskokwim River Fishing Opening that Feds Say Isn’t Legitimate, Prompting Confusion*, ANCHORAGE DAILY NEWS (June 25, 2021), <https://www.adn.com/alaska-news/rural-alaska/2021/06/25/state-announces-kuskokwim-river-fishing-opening-that-feds-say-isnt-legitimate-prompting-confusion/> [<https://perma.cc/WP7P-EQQZ>]. Another recent example is provided by the State of Alaska’s lawsuit seeking to remove the Federal Subsistence Board’s ability to work with rural and tribal communities to ensure access to traditional foods and subsistence ways of life during the COVID-19 pandemic. See *Alaska v. Fed. Subsistence Bd.*, 501 F. Supp. 3d 671 (D. Alaska 2020).

mere existence of tribes and tribal sovereignty as a matter of law.¹⁴⁹ The Alaska State Legislature has yet to do so and claims continue to be made that Alaska Tribes do not exist and lack inherent sovereignty.¹⁵⁰ This backdrop helps explain why federal deference to the State of Alaska in implementing Title VIII can be so problematic.

2. *Title VIII Regulations*

As discussed above, Title VIII provides a participatory framework for subsistence management, with decisions intended to flow from regional and local participation. Though Congress chose a rural preference, that preference did not directly align with Congress's intent when passing ANCSA, which clearly predicted that Native interests would be protected and should have an influential role to play in this framework.¹⁵¹ More locally and tribally-driven participatory approaches to Title VIII implementation could have been adopted by the Secretaries in 1990 and 1992.¹⁵²

Instead, the choice was made to create an administrative structure dominated by federal land agencies and susceptible to undue influence by the State of Alaska. The Federal Subsistence Board (FSB) provides a case-in-point. This is the core decision-making body responsible for overseeing the federal subsistence management program. Voting members of the Board consist primarily of federal agency officials who represent the shifting priorities of the Executive branch, which may or may not align with the purposes of Title

¹⁴⁹See ALASKA OFF. OF THE GOVERNOR, ADMIN. ORDER No. 186 (Sept. 29, 2000), <https://gov.alaska.gov/admin-orders/administrative-order-no-186/> [<https://perma.cc/U4CD-MEXA>] (Governor Knowles acknowledging "the legal and political existence of federally recognized Tribes with the boundaries of Alaska"); *John v. Baker*, 982 P.2d 738 (Alaska 1999).

¹⁵⁰Letter from Alaska Att'y Gen. Jahna Lindemuth to Governor Bill Walker on Legal Status of Tribal Governments in Alaska (Oct. 19, 2017), law.alaska.gov/pdf/opinions/opinions_2017/17-004_JU20172010.pdf [<https://perma.cc/N7J7-R3Y4>] (reviewing the sovereign status of Alaska Native Tribes and their relationship with the State of Alaska).

¹⁵¹H.R. REP. No. 92-746, at 37 (1971) (Conf. Rep.), as reprinted in 1971 U.S.C.C.A.N., 2247, 2250 ("The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority. The Secretary could, for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs and requirements by closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened. The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.").

¹⁵²For example, one alternative provided in the 1992 NEPA Record of Decision for subsistence management emphasized local involvement which included prioritizing input from subsistence users. See FED. SUBSISTENCE BD., SUBSISTENCE MANAGEMENT FOR FEDERAL PUBLIC LANDS IN ALASKA: ENVIRONMENTAL IMPACT STATEMENT, RECORD OF DECISION (1992).

VIII.¹⁵³ Board membership also includes a non-voting State liaison who may attend meetings and “be actively involved as [a consultant] to the Board.”¹⁵⁴ As one authoritative source summarizes, “[h]istory has shown that the degree to which the Federal Subsistence Board effectively protects the federal subsistence priority or balances it off against the interests of the state of Alaska can depend more on the political policies of the federal administration than the law.”¹⁵⁵

The Office of Subsistence Management (OSM), which is housed within the USFWS, provides administrative support to the FSB. This placement inside USFWS was not envisioned by Congress in Title VIII, and the OSM’s agency position within USFWS, which has a unique mission and mandate, raises a host of institutional challenges. Some of these are related to the problems confronted by agencies with multiple goals, with evidence showing that agencies systematically prioritize tasks that are easier to measure and have higher incentives, while underperforming on tasks that are harder to measure and have lower incentives.¹⁵⁶ Where OSM fits in this regard is unclear, as the Office is not found on the USFWS’s organizational chart¹⁵⁷ and its value to the Department not explained, and sometimes not even referenced, in the USFWS’s budget justifications.¹⁵⁸ This is not to denigrate OSM or the people that work within it. The point is that Alaska Native Tribes are not adequately represented or protected by a regulatory structure that does not align with the purposes of Title VIII.

¹⁵³Members of the FSB are: “A Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs.” 50 C.F.R. §100.10 (b)(1) (2011). Members are drawn from the Senior Executive Service. See *Policy, Data, Oversight*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/senior-executive-service/> [<https://perma.cc/7JD7-27UB>] (last visited Feb. 25, 2022).

¹⁵⁴50 C.F.R. § 100.10(b) (2020).

¹⁵⁵CASE & VOLUCK, *supra* note 39, at 311.

¹⁵⁶Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T L. REV. 1, 9 (2009) (reviewing literature in political science, economics, and public administration that examines the incentives facing multiple-goal agencies).

¹⁵⁷See *National Organizational Chart*, U.S. FISH AND WILDLIFE SERV. (Jan. 25, 2021), <https://fws.gov/offices/org-chart.html> [<https://perma.cc/B6JG-J3PE>].

¹⁵⁸See, e.g., U.S. FISH AND WILDLIFE SERV., BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FISCAL YEAR 2022 (2021) (reviewing the Subsistence Management Program in the context of Fish and Aquatic Conservation); U.S. FISH AND WILDLIFE SERV., BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FISCAL YEAR 2021 (2020) (referencing subsistence fishing but not OSM).

Title VIII regulations have also modified the composition of the Regional Advisory Councils (RACs). As discussed above, these Councils are intended to effectuate the purposes of Title VIII, which requires “an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.”¹⁵⁹ A bottom-up approach to subsistence management was called for by Congress in Title VIII and it was therefore expected that the RACs would consist exclusively of subsistence users.¹⁶⁰ But this approach was challenged in court as being in violation of the Federal Advisory Committee Act of (FACA).¹⁶¹ Concurrently with this challenge, the Secretary of Interior requested the FSB to examine the composition of RACs and to see that groups such as “residents of non-rural areas, commercial users of fish and wildlife resources and sportsmen are represented on the councils.”¹⁶² As a result of this litigation and the Secretary’s independent review, RACs are now comprised of a 70/30 membership ratio providing “majority representation for subsistence users without domination by sport or commercial interests” while still allowing for “meaningful representation by sport and commercial interests.”¹⁶³

The administrative structure created by Title VIII’s regulations is a constant focus of criticism by Alaska Native Tribes and organizations. Central to this critique is that the overall framework fails to adequately represent and protect natives and their subsistence ways of life. The Alaska Federation of Natives traces part of the problem back to the influence provided by the structure to the State of Alaska, stemming all the way back to the initial incorporation of the State’s regulations into the federal program.¹⁶⁴ Similar criticism was

¹⁵⁹ 16 U.S.C. § 3111(5).

¹⁶⁰ CASE & VOLUCK, *supra* note 39, at 311.

¹⁶¹ Safari Club v. Demientieff, 227 F.R.D. 300 (D. Alaska 2005).

¹⁶² Subsistence Management Regulations for Public Lands in Alaska; Federal Subsistence Regional Advisory Council Membership, 73 Fed. Reg. 19,433 (Apr. 10, 2008) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹⁶³ *Id.* at 19,435.

¹⁶⁴ Alaska Fed’n of Natives, Recommendations: Secretarial Review of Federal Subsistence in Alaska, in THE RIGHT TO SUBSIST: FEDERAL PROTECTION OF SUBSISTENCE IN ALASKA 22, 26 (2010) (page 5 of the recommendations), <https://www.nativefederation.org/wp-content/uploads/2018/07/2010-april8-the-right-to-subsistence.pdf> [<https://perma.cc/358N-32ZA>]. See also *Subsistence: Hearing to Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act Before the Committee on Energy and*

provided during the last review of the federal subsistence program in 2009 and 2010.¹⁶⁵ Modest changes to the program were made as a result, including the addition of two rural subsistence users on the FSB.¹⁶⁶

Despite these minor and incremental changes, the regulatory structure implementing Title VIII continues to have a cumulative impact on Native subsistence users. Piece by piece, the goals and objectives of Title VIII have been diminished by a framework that too often fails to represent and protect Alaska Natives and their continuing ways of life. It is a disappointing irony that those with the deepest, most intimate, and potentially most helpful connections to subsistence uses and resources on public lands are those most marginalized by the current structure.

3. *Broader Issues and Bridging Forward*

Underlying the unique issues related to tribal co-management on federal public lands in Alaska are more common statutory and legal avenues and impediments for tribal co-management across all federal public lands. Alaska Native Tribes are federally recognized Indian Tribes entitled to the benefits of a trust relationship with the federal government.¹⁶⁷ Federal law has defined and limited tribal legal status that of a “domestic dependent nation,”¹⁶⁸ and, as such, Alaska Native Tribes are empowered to exercise their inherent sovereignty as well as the panoply of rights available to all other Indian tribes pursuant to and within the strictures imposed by Federal Indian Law.¹⁶⁹ Those rights ensure a government-to-government relationship between the United States and Alaska Native Tribes rooted in the United States long-recognized trust duties to Native Nations. tribal consultation, the availability of contracts and compacts under the Indian Self-Determination and Educational Assistance Act, and (outside of Alaska) the protection and implementation of treaty-reserved tribal rights all flow from this relationship and secure

Nat. Resources, 113th Cong. 47 (2013) (Statement of Rosita Worl, Chair, Subsistence Comm., Alaska Fed’n of Natives).

¹⁶⁵U.S. DEPT. INTERIOR, REVIEW OF FEDERAL SUBSISTENCE MANAGEMENT PROGRAM, ALASKA (2010).

¹⁶⁶Subsistence Management Regulations for Public Lands in Alaska—Subpart B, Federal Subsistence Board, 76 Fed. Reg. 56,109 (Sept. 12, 2011) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹⁶⁷See Anderson, *supra* note 49, at 219–23.

¹⁶⁸Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

¹⁶⁹See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 64–83.

important pathways for the assertion of tribal interests in co-managing federal public lands.

And yet, the historical and ongoing disconnection between these fundamental rights of Tribes and the laws, regulations, and practices governing the management of federal public lands continues to present barriers to meaningful, effective, and widespread tribal co-management of federal public lands.¹⁷⁰

Ultimately, the challenges facing Alaska Native Tribes interested in exercising greater authority with regard to the management of public lands in Alaska are both consistent with the challenges faced by Indian tribes in the lower forty-eight and unique to the specific history of federal Indian law and policy in Alaska. Like tribes elsewhere, the intrusion of non-Native settlers, laws, perspectives, and interests had significant impacts on the legal rights and status of Alaska Natives, not to mention their own cultural and physical health and wellbeing. And, by virtue of those intrusions and the laws and policies imposed upon them by the United States, ongoing Indigenous connections to important lands, resources, and activities have been severed or severely strained.

Unlike tribes in the continental United States, however, the lack of treaties between the United States and Alaska Natives resulted in over a century of failures on the part of the federal government to formally recognize and protect Native rights to land and activities across what would become Alaska. Then, when pressure to address those rights from largely non-Native interests intensified, Congress took a different path, one harkening back to the termination era for other tribes but yet altogether unique, which laid the foundation for the current challenges facing Alaska Native Tribes interested in co-managing federal public lands. While those challenges are unique to Alaska, they also present opportunities to leverage existing laws and policies—both those that evolved as a result of Alaska's history and more universally applicable standards—to bridge to a new era of enhanced tribal co-management across the federal public lands of the "last frontier."

¹⁷⁰See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 181.

IV. BRIDGING TO A NEW ERA? OBSTACLES AND OPPORTUNITIES FOR TRIBAL CO-MANAGEMENT IN ALASKA

In Alaska, the opportunities for and obstacles to tribal co-management reverberate between the underlying principles of Federal Indian Law, such as the trust relationship and the sovereign status of Indian tribes, and the singular context of Alaska, including the historical evolution and treatment of tribal rights in ANCSA and ANILCA as well as the federal-state and state-tribal relationships. Alaska Native Tribes can assert or rely upon their sovereign and governmental interests to build or solidify important bases from which to pursue greater authority across federal public lands. But, in addition to the more widely applicable limitations on those tribal interests, Alaska presents the additional complications and challenges noted above. Bridging to a new era of tribal co-management in Alaska requires navigating the interplay between both arenas.

This section explores the chance and challenges within that interplay along four major axes of intersection: (1) the delegation (and subdelegation) of federal authority; (2) ANILCA's Title VIII; (3) contracting and compacting; and (4) federal public lands planning.

A. *Delegation of Federal Authority*

Any viable pathway for tribal co-management on federal public lands must deal with the issue of subdelegation. This doctrine limits the ability of executive agencies to (sub) delegate the powers it was given by Congress to other actors. It is a line that basically forbids federal agencies from delegating final decision-making authority to another party. As reviewed in *Bridges*, there is a widespread and often reflexive assumption that any variation of co-management will trigger the doctrine and thus require *a priori* congressional approval.¹⁷¹ There are, of course, legitimate concerns in this regard. But unfortunately, the subdelegation issue is too often oversimplified, too frequently used by federal public land agencies to defend the status quo, and fails to account for how so much public land management is already done on the ground via contract and agreement with non-federal actors.

¹⁷¹See Mills & Nie, *Bridges*, *supra* note 5, at 140–46.

Subdelegation is of particular importance to the future of tribal co-management in Alaska.¹⁷² It has lurked beneath the surface for years. In 1992, for example, the Secretaries of Interior and Agriculture dismissed calls for the co-management of subsistence resources under Title VIII of ANILCA, saying “[b]ecause ANILCA does not authorize the Secretaries to delegate their title VIII responsibilities to private persons or groups, these regulations do not authorize the Board to delegate such responsibilities to private persons or groups.”¹⁷³ No further analysis was provided in the 1992 Rule and so the “delegation of authority” issue has remained a rather vague and unexamined obstacle for decades to come.

1. *Subdelegation and Federal Public Land and Indian Law*

Tribal co-management would take place in the larger statutory context provided by federal public lands law and these laws typically provide an array of opportunities for non-federal actors and governments to participate in federal lands planning and management. This is particularly germane here because a core question asked by the courts in subdelegation cases is whether there is “affirmative evidence of authority” by Congress to subdelegate.¹⁷⁴ The specific text and statutory provision is of course most relevant, such as Congress’s explicitly permitting a function be done “by contract.”¹⁷⁵ But legislative intent is also important to the courts, with consideration being given to the larger context and purposes of the statute in question.¹⁷⁶

As it pertains to tribal co-management, part of this inquiry should include the “cooperative federalism” framework provided in several federal public land laws. We review these provisions in *Bridges*, and while most of these statutes place tribes in a disadvantaged position in contrast to state governments (and even private actors), the statutes are nonetheless designed to promote cooperative intergovernmental relations. Statutory requirements to “coordinate” or

¹⁷²See generally Daniel Franz, *The Subdelegation Doctrine as a Legal Tool for Establishing Tribal Co-management of Public Lands: Through the Lens of Bears Ears National Monument*, 32 COLO. NAT. RES., ENERGY & ENV’T L. REV. 1 (2021).

¹⁷³Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C. 57 Fed. Reg. 22,940, 22,944 (May 29, 1992) (to be codified at 36 C.F.R. pt. 242, 50 C.F.R. pt. 100).

¹⁷⁴*U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

¹⁷⁵*Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 295–96 (D.C. Cir. 2013).

¹⁷⁶*Assiniboine & Sioux Tribes of Fort Peck Indian Rsrv. v. Bd. Of Oil and Gas Conservation of State of Montana*, 792 F.2d 782, 795 (9th Cir. 1986) (“Without express congressional authorization for a subdelegation, we must look to the purpose of the statute to set its parameters.”).

“cooperate” in federal public lands planning or in the management of ESA-listed species provide examples.¹⁷⁷

Even more specific are those federal public land statutes authorizing non-federal actors to enter into cooperative agreements and contracts with federal land agencies. The Multiple Use Sustained Yield Act of 1960 (MUSYA), for example, allows the Secretary of Agriculture “to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons” for various purposes including pollution control and forest protection, “when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations.”¹⁷⁸ The Federal Land Policy and Management Act’s (FLPMA) provision is more open-ended, allowing the Secretary to “enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.”¹⁷⁹

In addition to the general public land statutes governing federal public lands and ANILCA’s Title VIII, we must also consider U.S. Indian law principles in order to determine the extent to which public lands management can be shared between Alaska Native Tribes and federal agencies. In *Bridges*, we clarify the intersections and overlap between federal public lands and Indian law. Though too often compartmentalized and treated as distinct, legal principles such as the federal government’s trust obligation must be viewed as an overlapping and concurrent responsibility by federal land agencies, and should therefore be a central part of any sub-delegation inquiry. There are also numerous laws that are of particular relevance to native tribes that directly intersect with federal public land statutes—such as the NHPA, the Archeological Resources Protection Act, and the Native American Graves Protection and Reparation Act—and these provide more focused avenues for shared management.¹⁸⁰ Most broad in this regard are the compacting and contracting authorities provided in the Tribal Self-Governance Act (TSGA). As discussed above, and more thoroughly in *Bridges*, it is based on the principle of Indian self-determination and was designed, in part, to provide Indian people “*an effective voice* in the planning and

¹⁷⁷See Mills and Nie, *Bridges*, *supra* note 5, at 161–66.

¹⁷⁸16 U.S.C. § 565a-1.

¹⁷⁹43 U.S.C. § 1737(b).

¹⁸⁰See Franz, *supra* note 172, at 31–35.

implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.”¹⁸¹

2. *Subdelegation Viewed from a Management Perspective*

A bottom-up view of federal lands management—with a focus on how things actually get done on the ground—provides a different perspective of the sub-delegation issue in practice. The debate over sub-delegation centers almost entirely on general legal principles and those threshold questions most often posed by the courts, such as what constitutes final decision-making authority or meaningful retention of control by a federal agency. This is understandable but misses how central are contracts and agreements to the actual day-to-day management of federal public lands. The bottom-line is that there is already quite a bit of limited delegation taking place in federal lands management. At the most basic level are long-standing uses of timber contracts, grazing leases and permits, and similar resource-specific arrangements with non-federal actors. Of course, the USFS and BLM are in control of what these contracts and leases entail and the agencies retain final decision-making authority. But there is nonetheless considerable room within these traditional mechanisms for what we call “lower case” decision-making by non-federal actors. For example, the USFS is now using a method of timber management called “designation by prescription,” which permits a contractor to select which trees to harvest based on desired conditions that are established by the USFS.¹⁸²

There is now a full suite of programs, authorities, and agreements frequently used by the USFS and BLM to contract and collaborate with tribes and non-federal actors on public lands.¹⁸³ Some of these

¹⁸¹25 U.S.C. § 5301 (emphasis added).

¹⁸²U.S. FOREST SERV., FOREST PRODUCTS MODERNIZATION: INNOVATION UNDERWAY, USING DESIGNATION BY PRESCRIPTION ON THE COLVILLE NATIONAL FOREST, NO. FS-1149 (2020).

¹⁸³See RURAL VOICES FOR CONSERVATION COAL., FROM IDEAS TO ACTION: A GUIDE TO FUNDING AND AUTHORITIES FOR COLLABORATIVE RESTORATION (Emery Cowan, Tyson Bertone-Riggs & Emily Jane Davis eds., 2020); U.S. FOREST SERVICE, START A PARTNERSHIP WITH THE USDA FOREST SERVICE OR OBTAIN FEDERAL FINANCIAL ASSISTANCE: A GUIDE FOR TRIBAL GOVERNMENTS, NO. FS-1034 (2014). One important authority not available to Alaska Native Tribes is the 638 contracting extension made available to the USFS in the 2018 Farm Bill. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 8703, 132 Stat. 4490, 4877 (2018) (codified at 25 U.S.C. § 3115b). This provision enabled tribes to enter agreements with the Department of Agriculture (and not just agencies inside the Department of Interior) to carry out “demonstration projects” involving the administration or management of certain national forest lands pursuant to the Tribal Forest Protection Act (TFPA). The TFPA, however, is limited to protecting tribal lands or forest lands “bordering or adjacent to” lands under tribal jurisdiction. 25 U.S.C. § 3115a(b)(1)–(3).

are already being used in Alaska, such as “challenge cost share” agreements with the USFS. These agreements are used by the USFS to partner with outside parties on mutually beneficial work that also enhances the agency’s own activities.¹⁸⁴

The different contract and agreement mechanisms already provide varying levels of flexibility and discretion to non-federal actors. While they must comport with the laws and authorities sanctioning their use, and be consistent with the governing land use plans, contracts and agreements can nonetheless provide room for professional judgment and types of shared management. Stewardship contracts provide one such example. They are designed to “achieve land management goals for the national forests and the public lands that meet local and rural community needs.”¹⁸⁵ Final decision-making authority is retained by federal land managers, but federal and non-federal actors collaborate throughout the process, “from concept to design, through implementation and monitoring.”¹⁸⁶ Focused as they are on “desired end results,” contractors have flexibility to determine best approaches on the ground.¹⁸⁷

Good Neighbor Authority (GNA) provides another example of how management is already shared between the USFS/BLM, states, counties, and to a lesser extent, Tribes.¹⁸⁸ In an effort to “share stewardship” and “co-manage fire risk” on public lands, GNA permits the USFS and BLM to partner with states—via cooperative agreements with a State Governor or county—in performing a wide range of “Forest, Rangeland, and Watershed Restoration Services,” including “activities to treat insect-and disease-infected trees; activities to reduce hazardous fuels,” and “any other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat.”¹⁸⁹ This includes permitting states to administer timber sales on federal land and for federal agencies to use the value of wood products to purchase restoration services from state

¹⁸⁴U.S. FOREST SERV., FSH 1509.11, FOREST SERVICE HANDBOOK: GRANTS, COOPERATIVE AGREEMENTS, AND OTHER AGREEMENTS HANDBOOK, Ch. 70 (2009).

¹⁸⁵16 U.S.C. § 6591c(b)

¹⁸⁶RURAL VOICES FOR CONSERVATION COAL., *supra* note 183, at 38.

¹⁸⁷*Id.*

¹⁸⁸Tribes were not originally included in the Farm Bill law making GNA permanent in 2014. Agricultural Act of 2014, Pub. L. No. 113-79, § 8206, 128 Stat. 649, 921. Tribes and counties were included in 2018. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 8624, 132 Stat. 4490, 4857.

¹⁸⁹16 U.S.C. § 2113a.

agencies.¹⁹⁰ In 2018, Congress also permitted funds received by a state (but not tribes or counties) through GNA timber sales to be retained and used by the State on additional GNA projects.¹⁹¹

The USFS and States using GNA are mutually committed to identifying shared priorities, making joint decisions, and sharing resources and planning efforts.¹⁹² They are typically structured into a cooperative agreement or contract called a “Master Agreement,” which serves as an umbrella for “Supplemental Project Agreements (SPAs) that have more specific terms and conditions for project implementation.¹⁹³ Though States are the primary beneficiaries of “shared stewardship” and GNA so far,¹⁹⁴ there are four GNAs with tribal governments/organizations, and these demonstrate the type of authority that is already essentially delegated via agreement.¹⁹⁵ For example, the GNA between the Pueblo of Jemez and Santa Fe National Forest authorizes a wide range of “forest, rangeland, and watershed restoration services,” but focuses primarily on invasive plant control.¹⁹⁶ NEPA responsibilities are retained by the USFS, but the Agreement authorizes the “reconstruction, repair, or restoration” of NFS system roads to carry out the restoration services.

Another one of the four tribally-based GNAs with the USFS is with the Chugachmiut tribal consortium on the Chugach National Forest.¹⁹⁷ The Agreement covers the entire Chugach National Forest and focuses on forest restoration projects associated with the region’s spruce bark beetle epidemic. It also includes a commitment by both parties to collaboratively develop a “joint statement of work,” with work to commence “once areas and technical specifications have

¹⁹⁰See TYSON BERTONE-RIGGS ET AL., RURAL VOICES FOR CONSERVATION COAL., UNDERSTANDING GOOD NEIGHBOR AUTHORITY: CASE STUDIES FROM ACROSS THE WEST (2018).

¹⁹¹ANNE A. RIDDLE, CONG. RSCH. SERV., THE GOOD NEIGHBOR AUTHORITY (2020).

¹⁹²See, e.g., U.S. FOREST SERV., UTAH SHARED STEWARDSHIP ACTION PLAN, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd675774.pdf [https://perma.cc/9U74-DH6U] (last visited Mar. 14, 2022).

¹⁹³RIDDLE, *supra* note 191, at 1.

¹⁹⁴See, e.g., *Id.*; CHAD KOOISTRA ET AL., ASSESSMENT OF EARLY IMPLEMENTATION OF THE US FOREST SERVICE’S SHARED STEWARDSHIP STRATEGY (2021), https://ewp.uoregon.edu/sites/ewp.uoregon.edu/files/WP_104.pdf [https://perma.cc/SBS4-GFLQ].

¹⁹⁵The USFS currently oversees 314 GNAs in 38 states. U.S. FOREST SERV., STATUS OF GOOD NEIGHBOR AUTHORITY IN THE U.S. FOREST SERVICE—FY21 SECOND QUARTER (2021) (on file with authors).

¹⁹⁶Good Neighbor Agreement Between Pueblo of Jemez and the U.S. Forest Serv., Santa Fe National Forest, FS Agreement No. 20-GN-11031000-049 (on file with authors).

¹⁹⁷Chugachmiut is a non-profit organization serving seven Native tribes in the Chugach region of Southcentral Alaska. See *About Chugachmiut*, CHUGACHMIUT, <https://www.chugachmiut.org/about-us/about-chugachmiut/> [https://perma.cc/D3BY-36WW] (last visited Mar. 7, 2022).

been mutually agreed upon and documented by USFS and the Cooperator.”¹⁹⁸

The legal issues at play in subdelegation look very different when we view federal lands management from the bottom-up. Federal land managers (and their lawyers) too often reflexively use the subdelegation issue as a way to say no to tribal initiatives and defend the status quo and do so without considering the fully array of existing contract and agreement mechanisms that they already use with non-tribal partners.

3. *Subdelegation, Alaska Native Tribes and Alaska Native Corporations*

Another important consideration in subdelegation cases is the type of “outside entity” that is being delegated authority.¹⁹⁹ In *U.S. v. Mazurie*, the Supreme Court draws an important distinction in a case focused on Congress’s authority to delegate its constitutional authority over the sale of alcohol to a tribal council.²⁰⁰ The Court distinguishes between a private entity and sovereign government in this case, stating that congressional limitations on delegation are “less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”²⁰¹

Mazurie causes some confusion because the case centers on congressional delegation of authority and not subdelegation of authority made by federal agencies. There is an apparent split between the Ninth and D.C. Circuits in this regard, with the Ninth applying the less stringent standard used in *Mazurie* and the D.C. Circuit making no such distinction between private and sovereign entities.²⁰²

Though focused on delegation in the narrower context of the TSGA, the Solicitor of the Department of Interior issued further guidance in

¹⁹⁸Good Neighbor Agreement Between the Chugachmiut and U.S. Forest Serv., State and Private Forestry, Alaska Region, and U.S. Forest Serv., Chugach National Forest, FS Agreement No. 19-GN-11100106-806 (July 1, 2019).

¹⁹⁹U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004).

²⁰⁰United States v. Mazurie, 419 U.S. 544, 546 (1975).

²⁰¹*Id.* at 557.

²⁰²See Franz, *supra* note 172, at 20–21 (reviewing the circuit split). Compare *Assiniboine & Sioux Tribes of Fort Peck Indian Rsrv. v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986); *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1986) with *U.S. Telecom Ass’n v. FCC* 359 F.3d 544, 565 (D.C. Cir. 2004).

1996.²⁰³ Determinations of what “inherently federal functions” can be delegated to tribes can only be made on a case-by-case basis according to the Solicitor. But the Solicitor also noted that such application must consider the extent of tribal sovereignty and jurisdiction,²⁰⁴ the United States Supreme Court’s recognition that delegation of federal authority to Indian tribes is not limited by the general principles of the non-delegation doctrine,²⁰⁵ and that “close calls should go in favor of inclusion [of programs for tribal control] rather than exclusion.”²⁰⁶ We recommend in *Bridges* that the Solicitor update its advice on this matter with a clearer focus on subdelegations to sovereign Indian tribes in contrast to private actors operating on federal lands. We see the intermingling of federal and tribal powers as “sovereignty-affirming subdelegations” that are lawful and in the national interest.²⁰⁷

The distinction between delegating authority to a sovereign Indian tribe and private actor is an important one, with courts scrutinizing possible conflicts of interest between private actors and the national interest in public lands.²⁰⁸ In *National Parks Association v. Stanton*, for example, the court found an unlawful subdelegation of authority by the NPS to a local council “made up almost wholly of local commercial and land-owning interests” that “does not share NPS’s national vision and perspective,” and that “the Council’s dominant private local interests are likely to conflict with the national environmental interests that NPS is statutorily mandated to represent.”²⁰⁹

The distinction between private and sovereign is particularly important—and complex—in Alaska because of the ANCSA’s creation of Alaska Native Corporations (ANCs). Like the lengthy disputes

²⁰³Memorandum From John Lesly, Solicitor, Dep’t of Interior, to Assistant Secretaries and Bureau Heads of the Dep’t of Interior on Inherently Federal Functions under the Tribal Self-Governance Act 14 (May 17, 1996).

²⁰⁴*Id.* at 12.

²⁰⁵*Id.* at 7–10, 12 (citing *U.S. v. Mazurie*, 419 U.S. 544 (1975)).

²⁰⁶*Id.* at 13.

²⁰⁷Samuel Lazerwitz, *Sovereignty-Affirming Subdelegations: Recognizing the Executive’s Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 *STAN. L. REV.* 1041 (2020) (proposing a presumption that “sovereignty-affirming subdelegations” are permissible unless Congress has expressly indicated otherwise).

²⁰⁸*See, e.g.*, *Nat’l Park and Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999); *High Country Citizens’ All. V. Norton*, 448 F. Supp. 2d 1235, 1247 (“Delegation to outside entities increases the risk that these parties will not share the agency’s ‘national vision and perspective,’ and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.”)

²⁰⁹*Nat’l Park and Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999).

over the status of Alaska Native Tribes,²¹⁰ the establishment of ANCs and their charge to own and manage lands and resources for the benefit of Alaska Natives resulted in some confusion over their standing as quasi-tribal/quasi-corporate entities. Within only a few years of ANCSA's passage, for example, Congress included language specifically referencing ANCs in the definition of "Indian tribe" in the landmark Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).²¹¹ That Congressional recognition opened the door for ANCs to contract to assume federal programs, functions, services, and activities pursuant to the ISDEAA and secure other benefits from federal laws relying on that definition, although the ambiguous wording of the statute left the precise boundaries of its application unclear.²¹² Consistent with the federal government's goals to promote economic development through ANCs, they are entitled to certain other federal contracting benefits as well.²¹³

But ANCs are also corporate entities without sovereign powers and excluded from explicit federal recognition as Indian tribes.²¹⁴ Thus, although ANCs were granted lands and funds in ANCSA and are responsible for owning and managing those resources on behalf of their shareholders, they do not and cannot exert broader governmental authority over those territories. Instead, as noted above, the State of Alaska is responsible for managing fish and wildlife resources, including subsistence users and activities, across ANC lands.

That sovereign/corporate distinction, though blurred in some instances by the unique nature of ANCs and Congress's recognition of their special status and purposes within ANCSA, is critical when considering the potential subdelegation of federal regulatory and management authority. In addition, the distinction between ANC (corporate) land ownership on which Alaska exercises regulatory authority and federal public lands on which, since 1989, the United States has

²¹⁰See Anderson, *supra* note 49, at 219–23.

²¹¹Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, § 4(b), 88 Stat. 2203, 2204 (Jan. 4, 1975) (codified as amended at 25 U.S.C. § 5304(e)) (“‘Indian tribe’ means any Indian tribe, band, nation, or organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” (emphasis added)).

²¹²See Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434 (2021).

²¹³*E.g.* 15 U.S.C. § 637(a).

²¹⁴See, e.g., U.S. Dep’t of the Interior, Bureau of Indian Affairs, Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4640–41 (Jan. 28, 2022) (listing “227 federally recognized Tribal entities within the state of Alaska”).

been responsible for regulating subsistence activities, creates further complications for the transfer of meaningful—and comprehensive—management authority from the federal government to Alaska Native Tribes.²¹⁵

4. *Subdelegation and ANILCA's Title VIII*

Most significant to subdelegation in Alaska is Title VIII of ANILCA. The subsistence priority and participatory framework provided in Title VIII provides clear affirmative evidence of congressional authority to subdelegate particular functions and responsibilities on federal public lands. As we show below, the challenges posed by Title VIII regulations are significant. But if they are overcome, tribally-led variations of co-management could flourish in the statutory context of ANILCA.

Section 805 of ANILCA provides a regionally-based participatory framework in order to ensure that subsistence management is informed and driven from the bottom-up, by Native and non-Native subsistence users. Regional Advisory Councils (RACs), for example, were created to encourage “local and regional participation . . . in the *decisionmaking* process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses.”²¹⁶ Unlike other statutes in question in subdelegation case law, Title VIII makes clear Congress’s intent in establishing a participatory framework that is designed to shape and influence regulations, policies and management decisions pertaining to subsistence.²¹⁷ This goes far beyond Title VIII’s authorization of cooperative agreements as it extends to the highest level of decision-making within Interior.²¹⁸

Final decision-making authority is reserved by the Secretary but Section 805 narrows the discretion to reject RAC recommendations: “The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs.”²¹⁹ RAC

²¹⁵See, e.g., Anderson, *supra* note 49, at 218–19 (describing avenues through which Congress could alter the regulatory scheme on ANC lands, including denominating them “public lands” under ANILCA).

²¹⁶16 U.S.C. § 3115(a) (emphasis added).

²¹⁷16 U.S.C. § 3115(a)(D).

²¹⁸16 U.S.C. § 3119.

²¹⁹16 U.S.C. § 3115.

recommendations are therefore entitled to a substantial amount of deference and we explain below why we find FSB regulations problematic in this regard.

As we discuss below, we believe Title VIII's current administrative structure does not align with the intent and purposes of Title VIII and is too often an impediment to more meaningful and substantive Native engagement in federal public lands management. We are also not suggesting that RACs must be the mechanism used for tribal co-management on federal lands in Alaska. There are other forms and arrangements that could be developed by tribes, with linkages to RACs and the local advisory committees authorized by Section 805.²²⁰ For example, a RAC could potentially use its authority to provide "*a recommended strategy* for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs" by offering a model of tribal co-management.²²¹ The Federal Subsistence Board could also use its authority to enter into cooperative agreements with "Native organizations" "to effectuate the purposes and policies of the Federal subsistence management program."²²²

There are multiple options in this regard and those subsistence users closest to the federal lands are in the best position to create innovative forms of governance that work on the ground and align with Title VIII. What is clear, however, is that Title VIII's participatory framework opens up an array of options for tribal co-management that comport with the principles and sideboards of the subdelegation doctrine.

B. ANILCA's Title VIII and Connections to Federal Public Lands Management

Title VIII-based variations of tribal co-management could extend beyond the relatively narrow way in which federal land agencies typically approach the subsistence priority and procedural framework provided in Sections 802 and 810 of ANILCA. Key to this more holistic approach is to focus on the connections between "the conservation of healthy populations of fish and wildlife [and] the utilization of

²²⁰16 U.S.C. § 3115(a)(2).

²²¹16 U.S.C. § 3115(a)(3)(D)(iii).

²²²50 C.F.R. § 100.10(d)(4)(xvi) (2022).

the public lands in Alaska.”²²³ The law and regulations of Title VIII make clear the direct link between the management of fish and wildlife and the habitat and ecosystems provided by federal public lands:

Conservation of healthy populations of fish and wildlife means the maintenance of fish and wildlife resources and their habitats in a condition that assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystem, including the recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem; minimizes the likelihood of irreversible or long-term adverse effects upon such populations and species; ensures the maximum practicable diversity of options for the future; and recognizes that the policies and legal authorities of the managing agencies will determine the nature and degree of management programs affecting ecological relationships, population dynamics, and the manipulation of the components of the ecosystem.²²⁴

This linkage provides further authority and a strong rationale for tribal co-management of federal public lands in Alaska.

The connection between subsistence and federal public lands management goes beyond Section 810. This Section of ANILCA provides what is essentially a two-tiered procedural framework in which federal land use decisions are evaluated in terms of their impacts to subsistence uses and needs.²²⁵ This important provision provides a platform to assess the connections between subsistence and land use, but its design once again places Tribes in a typical position of having to react and respond to decisions and proposals that they had no role in developing. It is also viewed by the courts as a procedural requirement and federal land agencies can, and often do, make the case that a particular use in their broad multiple use or conservation

²²³16 U.S.C. § 3112.

²²⁴50 C.F.R. § 100.4 (2022).

²²⁵In the first phase or tier of 810 “the head of the Federal agency having primary jurisdiction” over lands affected by a proposed use must “evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.” 16 U.S.C. § 3120(a). The agency moves to tier two analyses if the proposed activity may significantly restrict subsistence uses. Here, the agency must provide notice, hold hearings, and make a series of findings and determinations. Significant restrictions on subsistence uses are not permitted unless the head of the federal agency “determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.” 16 U.S.C. § 3120(a)(3).

mandates are “necessary” and thus more important than the risks posed to subsistence uses and needs.²²⁶

Tribal co-management offers a more pro-active and affirmative way in which tribes can manage at the intersection of subsistence and federal lands management. Outside of Alaska, federal land agencies often make, albeit mistakenly, a hard distinction between managing for fish and wildlife and managing for habitat.²²⁷ But in Alaska that line is even more blurred with federal land agencies recognizing the interplay between land use and fish and wildlife-based subsistence uses and needs. Some of this is by implication and some of it stems from specific provisions of Title VIII. Section 811 of ANILCA, for example, mandates the Secretary to “ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.”²²⁸ This provision means that all sorts of actions pertaining to transportation, roads, and other decisions that either increase or restrict access on public lands must be approached through a subsistence-based analytical lens.

Land use plans prepared by the BLM and USFS in Alaska clarify the connections between subsistence and various management actions as well. Whether done sufficiently or not, the environmental impact statements accompanying these plans routinely analyze a range of actions and their possible impacts to subsistence. This includes decisions about minerals and mining, vegetation management, travel management, permits and leasing, recreation and, of course, wildlife management, among others.²²⁹ In some cases, the connections between land and a subsistence species become so strong that they become one in the same. The so-called “salmon forests, managed as the Tongass and Chugach National Forests, provide well-known examples. The productive salmon fisheries and “forest fish” so crucial to subsistence (and commercial fisheries) found in Southeast and

²²⁶See, e.g., *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223 (1999).

²²⁷See Nie et al., *supra* note 147, at 906–07 (reviewing the ecological fallacy of separating wildlife from habitat).

²²⁸16 U.S.C. § 3121(a). Section 1110 of ANILCA provides another important provision related to access for traditional activities and travel on conservation system units, national recreation areas, national conservation areas, lands designated as wilderness study, and wild and scenic rivers. 16 U.S.C. § 3170(a).

²²⁹See, e.g., 1 BUREAU OF LAND MGMT., *BERING SEA—WESTERN INTERIOR PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT*, app. R, at 3-202 (2020).

Southcentral Alaska are indelibly tied to the land management decisions made by the USFS.²³⁰

In short, the land use/subsistence relationship codified in Title VIII law and regulation provides further authority and justification for tribal co-management of public lands in Alaska. Furthermore, the range of management actions typically analyzed at the planning level and pursuant to Section 810 demonstrate the range of actions that could potentially be subject to tribal co-management.

1. *Tribal Co-Management and Alternatives to Title VIII's Subsistence Priority for Rural Residents*

ANILCA provides a subsistence priority for “rural residents of Alaska, including both Natives and non-Natives.”²³¹ This provision in no way precludes a Native and subsistence-based tribal co-management framework. As shown above, one authority for tribal co-management is found in Title VIII of ANILCA, but it is more deeply rooted in principles of federal Indian law and the federal government’s trust responsibility to Alaska Native Tribes.

This trust responsibility, according to the court in *People of Togiak v. United States*, imposes “fiduciary duties upon the United States, including the duties so to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities against interference by the States.”²³² This case focused on the Marine Mammal Protection Act (MMPA), which like other subsistence-based statutes applied to Alaska, includes exceptions explicitly for *Alaska Natives*. But there are other regulatory frameworks demonstrating how tribal co-management could be used to administer programs that include Native and non-Native subsistence uses.

The Migratory Bird Treaty Act (MBTA) provides one such example. The 1995 Protocol amending the MBTA authorizes the non-wasteful taking of migratory birds and the collection of their eggs by

²³⁰See Adelaide C. Johnson et al., *Quantifying the Monetary Value of Alaska National Forests to Commercial Pacific Salmon Fisheries*, 39 N. AM. J. FISHERIES MGMT. 1119 (2019) (demonstrating the significance of the Tongass and Chugach National Forests to commercial fisheries).

²³¹16 U.S.C. § 3111.

²³²*People of Togiak v. United States*, 470 F. Supp. 423, 428 (1979).

“indigenous inhabitants” of the State of Alaska.²³³ This is defined as “a permanent resident of a village within a subsistence harvest area, regardless of race.”²³⁴ The Protocol also mandates the creation of a management body “to ensure an effective and meaningful role for indigenous inhabitants in the conservation of migratory birds,” and are to include “Native, Federal, and State of Alaska Representatives as equals.”²³⁵

The management body called for in the 1995 Protocol was established as the Alaska Migratory Bird Co-Management Council by the USFWS in 2002.²³⁶ Even though the scope of the Protocol extends to “indigenous inhabitants,” the Council is comprised of a state representative appointed by the Alaska Commissioner of Fish and Game, a federal representative appointed by the Alaska Regional Director of the USFWS, and twelve Native representatives from the twelve Alaska Native regions established by ANCSA.²³⁷

The subsistence-based exemptions provided in these and other laws, whether applied strictly to Native or more broadly to Native and non-Native users, are part of larger statutory schemes that place limitations on subsistence uses. The MMPA, for example, permits the take of marine mammals for subsistence purposes; yet the federal government can regulate even the native taking of a species if it becomes “depleted.”²³⁸ A subsistence-based tribal co-management arrangement could and would be similarly bounded by the larger purposes of Title VIII. When viewed as such, tribal co-management can be used to more effectively implement all the purposes of Title VIII, for the benefit of Native and non-Native rural residents, and for “the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska.”²³⁹

²³³MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A PROTOCOL BETWEEN THE U.S. AND CANADA AMENDING THE 1916 CONVENTION FOR THE PROTECTION OF MIGRATORY BIRDS IN CANADA AND THE U.S., S. TREATY DOC. NO. 104-28, at viii, ix (Aug. 2, 1996) [hereinafter 1995 MBTA PROTOCOL]. An existing statute authorizes the Department of Interior to promulgate regulations to implement the migratory bird treaties, with no additional statutory authority being required to implement the Protocol. See 16 U.S.C. §712.

²³⁴50 C.F.R. § 92.4 (2020).

²³⁵1995 MBTA PROTOCOL, *supra* note 233.

²³⁶Procedures for Establishing Spring/Summer Subsistence Harvest Regulations for Migratory Birds in Alaska, 67 Fed. Reg. 53,511, (Aug. 16, 2002) (to be codified at 50 C.F.R. pt. 92).

²³⁷*Id.* at 53,519.

²³⁸16 U.S.C. § 1371(b).

²³⁹16 U.S.C. § 3111.

To be clear, the most powerful and straightforward way to enable tribal co-management in the context of subsistence is for Congress to amend Title VIII and to provide for a Native preference, or some variation thereof.²⁴⁰ There is no question that Congress has the authority to do so, as such distinctions are not based upon impermissible racial classifications, but rather Indian tribes being “unique aggregations possessing attributes of sovereignty over both their members and their territory.”²⁴¹ As summarized by Professor Robert T. Anderson:

The undeniable federal power in this area, coupled with the federal action since acquisition of Alaska to the present time, demonstrates that the proposed Native preference is consistent with federal law. The question here is whether Congress has the authority, consistent with equal protection values embodied in the Due Process clause of the 5th Amendment, to establish a Native priority for access to fish, game and other natural resources. The answer, based on over two hundred years of congressional, judicial and executive branch precedent, is yes.²⁴²

Though the law is clear on this matter, the politics are not and calls for a Native preference have long gone unheeded. We hope that campaign continues because it is the most simple and forceful way to ensure that Native subsistence rights are protected and can be managed by tribes on federal public lands. But a native preference is in no way a precondition for tribal co-management. Tribal co-management can still take place in the context of Title VIII, and neither tribes nor federal land agencies must wait for Congress in order to explore new co-management frameworks and models that comport with ANILCA and federal public lands and Indian law more broadly.

²⁴⁰Variations include a “Native plus rural” or “tribal plus rural” preference. See Alaska Fed’n of Natives, Recommendations: Secretarial Review of Federal Subsistence Management Program, in THE RIGHT TO SUBSIST: FEDERAL PROTECTION OF SUBSISTENCE IN ALASKA 22, 22 (2010) (page 1 of the recommendations), <https://www.nativefederation.org/wp-content/uploads/2018/07/2010-april8-the-right-to-subsistence.pdf> [<https://perma.cc/358N-32ZA>]. See also Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 UMKC L. REV. 645, 674 (1991) (recommending a tribal community preference in contrast to an individual preference, which would apply to members of a Native community and determined by tribal government rolls and/or encoded membership definitions and requirements).

²⁴¹*Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁴²*Subsistence: Hearing To Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 44 (2013), (statement of Robert T. Anderson, Professor of Law, Univ. of Wash. School of L., Director, Native Am. Ctr.). Professor Anderson currently serves as Principal Deputy Solicitor and has been nominated to serve as Solicitor for the Department of the Interior. See *Robert Anderson Nominated as Solicitor of the Department of the Interior*, U.S. DEP’T. OF THE INTERIOR (Apr. 7, 2021), <https://www.doi.gov/news/robert-anderson-nominated-solicitor-department-interior> [<https://perma.cc/3J53-LREX>].

C. *Contracting and Compacting*

One avenue available under existing law and already being utilized in Alaska to promote greater tribal authority over federal public land is the contracting or compacting for federal programs, functions, services, and activities (or PFSAs) pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA).²⁴³ These self-determination contracts or self-governance compacts under the ISDEAA allow Tribes to assume the responsibility for carrying out those previously federal PFSAs and, by empowering that authority, have been the lynchpin of the modern resurgence of tribal sovereignty. The use of such agreements by Tribes to secure and expand governmental capabilities and capacities has sky-rocketed in the decades since ISDEAA's enactment.²⁴⁴

But, outside of the assumption by Tribes of PFSAs from the Bureau of Indian Affairs and the Indian Health Service, which are primarily focused on supporting tribal communities, ISDEAA contracts and compacts empowering Tribes to take on additional federal functions have been limited in number and scope. The availability of such agreements is somewhat limited by the narrower (and discretionary) authority for other federal agencies to enter them.²⁴⁵ And, even where such agreements are successfully negotiated and entered, other complexities may frustrate their success.²⁴⁶ Nonetheless, Alaska Native Tribes have secured and leveraged agreements under ISDEAA to build one of the most effective and responsive health care systems in the nation.²⁴⁷ The success of those programs and the existing, though limited, ISDEAA agreements related to tribal management of federal public lands demonstrate the potential of these and similar intergovernmental agreements to become the foundation for a new era of tribal co-management of federal public lands in Alaska.

²⁴³Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1975) (codified as amended at 25 U.S.C. §§ 5301–56).

²⁴⁴See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 48–49 (2015).

²⁴⁵See Mills & Nie, *Bridges*, *supra* note 5, at 107–08.

²⁴⁶See, e.g., Mills & Nie, *Bridges*, *supra* note 5, at 111 (discussing the failure of the United States Fish and Wildlife Service to contract for tribal management of the National Bison Range).

²⁴⁷See ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, [www.anthc.org \[https://perma.cc/L7ZG-KQGX\]](https://perma.cc/L7ZG-KQGX)

(last visited Aug. 12, 2021).

A long-standing agreement between the U.S. Fish and Wildlife Service (USFWS) and the Council of Athabascan Tribal Governments (CATG) demonstrates that potential and the frustrating shortcomings of this approach.

Since 1994, agencies within the Department of the Interior have been authorized to transfer federal programs, functions, services, or activities “which are of special geographic, historical, or cultural significance to the participating Indian tribe” to tribal management and control.²⁴⁸ Unlike Congress’s mandates to the Bureau of Indian Affairs and the Indian Health Service to engage in such transfers,²⁴⁹ the transfer of these PFSAs of special significance is discretionary on the part of other Interior agencies.²⁵⁰ As encouragement to these agencies, Congress required that the Secretary of the Interior publish an annual list of such PFSAs that may be available to Tribes as well as programmatic goals for each agency to pursue.²⁵¹

Those lists also include the number and type of such agreements entered each year and show the slow expansion of their use. In 2005, for example, there were 10 such agreements spread across the four non-BIA DOI agencies responsible for land and resource management (BLM (none), Bureau of Reclamation (four), National Park Service (four), and USFWS (two)) and the programmatic target was for each agency to simply do more.²⁵² Fifteen years later, the listing of available programs for Fiscal Year 2021 included the same number of agreements (10), although the distribution across those agencies

²⁴⁸25 U.S.C. § 5363(c).

²⁴⁹See 25 U.S.C. § 5363(b)(1) (BIA); *id.* § 5385(a)-(b) (IHS).

²⁵⁰25 U.S.C. § 5363 (c) (“Each funding agreement negotiated pursuant to subsections (a) and (b) of this section *may*, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.” (emphasis added)). See also Strommer & Osborne, *supra* note 244, at 39; Mills & Nie, *Bridges*, *supra* note 5, at 108–09.

²⁵¹25 U.S.C. § 5365(c). See, e.g., List of Programs Eligible for Inclusion in Fiscal Year 2012 Funding Agreements to be Negotiated with Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 76 Fed. Reg. 57,068 (Sept. 15, 2011).

²⁵²List of Programs Eligible for Inclusion in Fiscal Year 2006 Funding Agreements to be Negotiated with Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 70 Fed. Reg. 53,680, 53,684 (Sept. 9, 2005) (setting the fiscal year 2006 programmatic targets as “upon request of a self-governance tribe, each non-BIA bureau will negotiate funding agreements for its eligible programs beyond those already negotiated.”)

had shifted somewhat.²⁵³ The Department's programmatic goals remained the same.²⁵⁴

Notwithstanding the lack of expansion in the use of these agreements, the success of a few existing compacts and important changes in the PFSAs available for new compacts suggest new potential for their use for broadening and strengthening tribal co-management across Alaska. For example, one of the compacts listed in both the 2005 and 2021 lists is an agreement between the USFWS and the Council of Athabascan Tribal Governments (CATG).²⁵⁵ The CATG is a consortium comprised of 10 Alaskan villages and Gwich'in and Koyukon Athabascan Tribes, including Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Fort Yukon, Rampart, Stevens Village, and Venetie, and, since its organization in 1985, has been committed to "the vision of self-sufficient communities with a shared commitment to promoting common goals and taking responsibility for a culturally integrated economy based on customary and traditional values in a contemporary setting."²⁵⁶ The territories on which the Tribes of the CATG have long existed now include the Yukon Flats National Wildlife Refuge (YFNWR) and a portion of the Arctic National Wildlife Refuge (ANWR),²⁵⁷ which has motivated the consortium to work with the USFWS, the federal agency responsible for managing those refuges.

As a result, even before the self-governance compact shown in the lists mentioned above, the CATG entered agreements with the USFWS to help support federal management. According to a presentation given by CATG representatives in 2018, those agreements focused on collecting data regarding harvests and were entered into

²⁵³List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2021 Programmatic Targets, 86 Fed. Reg. 14,147, 14,147-48 (Mar. 12, 2021) (listing the following distribution of agreements: BLM (2); BuRec (4); NPS (3); USFWS (1)).

²⁵⁴*Id.* at 14,152 ("The programmatic target for Fiscal Year 2020 [sic] provides that, upon request of a self-governance Tribe, each non-BIA bureau will negotiate funding agreements for its eligible programs beyond those already negotiated.").

²⁵⁵See List of Programs Eligible for Inclusion in Fiscal Year 2006 Funding Agreements to be Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs, 70 Fed. Reg. at 53,680; List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2021 Programmatic Targets, 86 Fed. Reg. at 14,148.

²⁵⁶Letter from Dr. Charlene Fisher, Exec. Dir., Council of Athabascan Tribal Gov'ts, to Alaska State Reps. Ortiz, Kriess-Tomkins, Parish, Edgmon, Foster, Kopp, Lincoln, Chenault & Tarr (Mar. 5, 2018), http://www.akleg.gov/basis/get_documents.asp?session=30&docid=42061 [<https://perma.cc/Q3SC-UGZK>].

²⁵⁷*Id.*

pursuant to Section 809 of ANILCA, which, as described above, authorizes and encourages collaborative agreements to fulfill the purposes and administration of ANILCA's Title VIII.²⁵⁸

But, seeking to take advantage of broader authority under the ISDEAA and pursue a broader, co-management approach, the CATG sought to negotiate a self-governance compact pursuant to the ISDEAA beginning in 1998. For six years, however the USFWS consistently rebuffed and rejected the CATG's proposals.²⁵⁹ Initially, for example, the USFWS believed the CATG to be seeking broad management of the YFNWR and that such tribal control would be outside of and beyond the rights of the Tribes and the mission and authority of the USFWS.²⁶⁰ These concerns echo the challenges of addressing the subdelegation issues described above and reflect the lingering uncertainty or unwillingness to deeply analyze the nature of the federal-tribal relationship as it may relate to supporting—instead of conflicting with—broader federal and national interests.

It took until 2004, after the dedicated and determined efforts of the CATG to educate the USFWS about its intentions with regard to management, for the parties to enter a compact and, even then, the work and funding made available to the CATG was far more limited than their original proposal.²⁶¹ Nonetheless, the compact marked the first such agreement between a tribal entity and the USFWS.

²⁵⁸RHONDA PITKA & CHARLEEN FISHER, *THE COUNCIL OF ATHABASCAN TRIBAL GOVERNMENTS: PROMOTING SELF-GOVERNANCE IN THE YUKON FLATS FOR 30 YEARS, 1985-2018*, at 4 (2018), <https://www.tribalsegov.org/wp-content/uploads/2018/05/CATG-SG-NR-Presentation.pptx> [<https://perma.cc/9XKU-XMCF>] [hereinafter *PROMOTING SELF-GOVERNANCE PRESENTATION*].

²⁵⁹*Department of the Interior and the Department of Health and Human Services Tribal Self-Governance Act: Hearing before the S. Comm. on Indian Affairs*, 108th Cong. 2d Sess. 67–68 (2004) [hereinafter *2004 Senate TSGA Hearing*].

²⁶⁰*Id.* at 116–17 (CATG's legal counsel testified that in rejecting the CATG's first co-management proposal, "[t]he FWS found that the programs of the Refuge are national conservation programs and not meant to solely benefit Indians, so could not be completed or maintained through the proposed contract and could not be lawfully carried out by CATG under the ISDEAA" and that the agency rejected the second proposal because it "was inconsistent with the mission of the National Wildlife Refuge System, which is identified in the National Wildlife Refuge System Administration Act, and with the purposes of the Yukon Flats National Wildlife Refuge as established under the Alaska National Interest Lands Conservation Act."). In addition to those concerns, the USFWS also expressed uncertainty over the CATG's capacity to perform the PFSA's that were sought in the proposal. *See id.* at 118 (in rejecting one of the CATG's ISDEAA proposals "the [USFWS] Regional Director offered to negotiate a standard procurement contract or cooperative agreement in lieu of a self-governance agreement under the ISDEAA for programs that would be cost effective and could be accomplished in a 'sound and competent manner'" due to concerns with the CATG's capacity for performance).

²⁶¹*Id.* at 118–19 (The 2003 proposal eventually accepted by the USFWS "had, by comparison to earlier proposals, a very condensed scope and focused on assuming discreet programs[,] and included only \$60,000 in funding).

Since reaching that agreement in 2004, the parties began negotiating annual funding agreements to describe the services that would be provided by the CATG and the funds paid to the consortium by the federal agency.²⁶² Over those years, the services—and funding amounts—have remained mostly static.²⁶³

The parties' annual funding agreement (AFA) for 2020-21 demonstrates the specifics of the relationship and shows the limits (and potential) of such arrangements in promoting tribal co-management of federal public lands. In that AFA, for example, the USFWS explicitly retains "all responsibility and authority for directing and controlling the administration, management and operations of the [YFNWR]," a provision that reflects the federal concerns that scuttled the CATG's earliest proposals and demonstrates the traditionally narrow view of sub-delegation limitations discussed above.²⁶⁴ Similarly, the AFA makes clear that, consistent with the USFWS other reasons for declining the CATG's early proposals, any and all work under the agreement must be performed in accordance with the pre-existing (and federally-established) purposes of the Refuge and existing federal laws and regulations.²⁶⁵ That performance is also subject to strict record-keeping requirements and monitoring by the USFWS for compliance with those standards.²⁶⁶

But, despite the immense challenges in negotiating and securing the agreement and the limitations of the negotiated outcome, the agreement provides a foundation for "open, continuous, and meaningful consultation and communication" on a government-to-government basis, including priorities and protocols for such communication and information sharing.²⁶⁷ In addition, the CATG is authorized to take on responsibility for four separate projects from USFWS, including both discreet deliverables, such as developing and hosting a youth

²⁶²PROMOTING SELF-GOVERNANCE PRESENTATION, *supra* note 258, at 4; *Self-Governance*, COUNCIL OF ATHABASCAN TRIBAL GOVERNMENTS, <https://www.catg.org/natural-resources/self-governance/> [<https://perma.cc/9XKU-XMCF>] (last visited Aug. 15, 2021).

²⁶³PROMOTING SELF-GOVERNANCE PRESENTATION, *supra* note 258, at 4; *Self-Governance*, *supra* note 262.

²⁶⁴Fiscal Year 2020 and 2021 Annual Funding Agreement Between the United States Fish and Wildlife Service and the Council of Athabaskan Tribal Governments 4 (effective Oct. 1, 2019) [on file with authors].

²⁶⁵*Id.* at 5. Importantly, however, the agreement recognizes that the CATG can request waivers of certain regulations in accordance with the terms of the Compact. *Id.*

²⁶⁶*Id.* at 6–8.

²⁶⁷*Id.*

cultural and science camp, as well as broader collaborative efforts such as the management and conservation of moose populations and providing important links between local communities and USFWS Refuge managers.²⁶⁸ Within that latter task, the CATG is charged with “bring[ing] local issues of concern or questions” to the Refuge Manager and USFWS recognizes that adaptive management of the Refuge “must reflect dialogue with local residents.”²⁶⁹ In concert with the agreement’s mutual commitments around consultation and communication, that project provides a basis on which the CATG member Tribes and their constituents may be able to enhance and influence the management of the Refuge although the agreement expressly retains federal management authority.²⁷⁰

As CATG’s experience demonstrates, self-governance compacting and contracting may provide an avenue for Alaska Native Tribes interested in bridging to greater management input and, potentially, authority over federal public lands. While CATG’s agreement with the USFWS focuses on management activities within the YFNWR specifically, the USFWS has included broader federal subsistence management activities as programs available for Tribes or tribal entities to assume as well, saying in the federal register that the following programs “may be eligible for tribal participation”:

Subsistence Programs within the State of Alaska. Evaluate and analyze data for annual subsistence regulatory cycles and other data trends related to subsistence harvest needs, and facilitate Tribal Consultation to ensure ANILCA Title VII terms are being met *as well as activities fulfilling the terms of Title VIII of ANILCA.*²⁷¹

Despite expressly listing the availability of those programs in each annual list of non-BIA programs since 2011, calls from Alaska Native Tribes to enter such contracts have continued.²⁷² Still, however,

²⁶⁸*Id.* attach. A.

²⁶⁹*Id.* attach. A at 7.

²⁷⁰*See, e.g., 2004 Senate TSGA Hearing, supra* note 259, at 66 (“The agreement is viewed as a first step in a relationship between Fish and Wildlife Service and CATG that tribal leaders hope will grow and last long into the future.”). CATG also operates various PFSA’s related to wildland fire-fighting through agreements with the Bureau of Land Management (BLM). *See* Strommer & Osborne, *supra* note 244.

²⁷¹List of Programs Eligible for Inclusion in Fiscal Year 2012 Funding Agreements to be Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs, 76 Fed. Reg. 57,072 (Sept. 15, 2011).

²⁷²*See, e.g.,* ALASKA FED’N OF NATIVES, 2016 PRIORITIES (2015), https://legacy-assets.ee-news.net/open_files/assets/2017/06/05/document_cw_01.pdf [<https://perma.cc/9WLC-HDQB>]

according to the 2021 annual list of non-BIA ISDEAA agreements, the CATG agreement remains the only ISDEAA agreement between the USFWS and any Tribe, including Alaska Native Tribes.²⁷³

D. *Other Cooperative Agreements*

Outside of ISDEAA, other Alaska Native Tribes and tribal groups are also pursuing agreements on which to build better tribal-federal relationships and enhance tribal authority over federal public lands and resources. Similar to the CATG-USFWS relationship established through an ISDEAA agreement, these arrangements do not equate to or necessarily enable strong tribal co-management of federal public lands but can provide important foundations of trust, communication and collaboration between federal and tribal partners.

Within the subsistence management framework of ANILCA's Title VIII, for example, the Kuskokwim River Inter-Tribal Fish Commission (KRITFC) has negotiated and reached agreement with the USFWS to form a federal-tribal partnership for the management of the salmon fishery within the Kuskokwim river drainage.²⁷⁴ The impetuses for that agreement were drastically declining fish runs necessary for tribal subsistence and survival and the jurisdictional and administrative issues inherent in Title VIII's management scheme.²⁷⁵ Specifically, KRITFC representatives pointed to concerns with the USFWS' Office of Subsistence Management and Federal Subsistence Board as the prompts for KRITFC to seek the agreement as an alternative avenue to secure greater management authority.²⁷⁶

(calling for the Dept. of the Interior to mandate an increase in non-BIA ISDEAA contracting and compacting).

²⁷³List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by

Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2021 Programmatic Targets, 86 Fed. Reg. 14,148 (Mar. 12, 2021).

²⁷⁴See Memorandum of Understanding between the U.S. Dep't of Interior, U.S. Fish and Wildlife Serv., Alaska Region and Kuskokwim River Inter-Tribal Fish Comm'n , https://static1.squarespace.com/static/5afdc3d5e74940913f78773d/t/5deb2a0ebc75324ecc635451/1573595663976/MOU_Final_wSignatures.pdf [https://perma.cc/244S-9DBZ] (last visited August 19, 2021).

²⁷⁵*Keep What You Catch: Promoting Traditional Subsistence Activities in Native Communities: Hearing before the Committee on Indian Affairs*, 115th Cong. (2018) [hereinafter *Keep What You Catch Hearing*].

²⁷⁶See *id.* at 18–19.

The agreement, which lists ANILCA, ANCSA and various executive orders regarding tribal consultation as supporting authorities,²⁷⁷ focuses on establishing a “substantive consultation” process for fishery management decisions and, by its terms, aims to “begin[] to address the long-standing desire of Alaska Native Tribes in the Kuskokwim Drainage to engage as co-managers of fish resources.”²⁷⁸ To do so, the agreement sets forth a framework by which the federal agency will provide technical and other data to KRITFC and commit to collaboratively developing management plans and restoration projects. Importantly, the parties agreed to strive for consensus throughout this process and, where consensus could not be reached, the agreement includes follow-up measures providing for additional federal involvement and follow-up to KRITFC.²⁷⁹

But, as noted in 2018 Congressional testimony from KRITFC’s Executive Director and a 2021 update to the local Regional Advisory Council, despite the promise of the agreement, its effectiveness has been limited over the course of its first half decade.²⁸⁰ More recently, however, relying on the agreement, KRITFC and USFWS representatives developed joint strategies for salmon management and harvest, each of which were the result of a collaborative process envisioned by the 2016 agreement.²⁸¹ The recommitment of the parties to a more cooperative relationship and their development of a shared strategy for fishery management and harvest has not overcome the

²⁷⁷*Id.* at 22 (Memorandum of Understanding Between U.S. Dep’t of Interior, U.S. Fish and Wildlife Serv., Alaska Region and Kuskokwim River Inter-Tribal Fish Comm’n) (listing Executive Order 13175, Secretarial Orders 3317 and 3335, and the 1994 USFWS’ Native American Policy as authorities).

²⁷⁸*Id.* at 21–22.

²⁷⁹*Id.* at 23–25 (the agreement also notes that this approach is consistent with the “*gasqig* model, a Yup’ik problem-solving framework similar to a collaborative decision-making framework widely practiced among federal agencies known as operational leadership.”).

²⁸⁰*Id.* at 29 (“[T]he KRITFC continues to face the same administrative delays and bureaucratic obstacles which exclude tribal participation and fail to prioritize subsistence opportunities for the rural users who need them the most.”); KUSKOKWIM RIVER INTER-TRIBAL FISH COMM’N, SUMMARY TO THE YKDRAC – 2021 SPRING MEETING 2 (2021), <https://static1.squarespace.com/static/5afdc3d5e74940913f78773d/t/608c6ccdb9b1dd598a60dcb9/1619815631422/Spring+2021+YKDRAC+KRITFC+Summary.pdf> [<https://perma.cc/2N6Q-T47E>] (“We each have strayed from the purpose of the [agreement] in recent years but are re-dedicated to collaborating in the 2021 season and onward as we come together at the management table with other stakeholders.”).

²⁸¹*See* KUSKOKWIM RIVER INTER-TRIBAL FISH COMM’N, *supra* note 280, at 2–3; KUSKOKWIM RIVER INTER-TRIBAL FISH COMM’N, DRAFT 2021 KUSKOKWIM RIVER SALMON MANAGEMENT STRATEGY (2021), <https://static1.squarespace.com/static/5afdc3d5e74940913f78773d/t/61005f0dbdf6542c63e1535d/1627414296021/FINAL+Draft+2021+Management+Strategy+4-30-21.pdf> [<https://perma.cc/44BZ-H2C7>].

administrative, bureaucratic, and jurisdictional challenges imposed by the framework of Title VIII,²⁸² but it portends an improved and strengthened tribal role in management of this resource in the future.

Like the KRITFC agreement, the 2016 Memorandum of Agreement between the Department of the Interior and the Ahtna Inter-Tribal Resource Commission also aimed to establish a common process and protocol for cooperative management of subsistence resources in the Ahtna region.²⁸³ That MOA, entered into just after the Secretary of the Interior issued Secretarial Order 3342 calling for more federal-tribal management partnerships,²⁸⁴ included the Ahtna Inter-Tribal Resource Commission, which consists of members of eight federally recognized Tribes as well as the local regional and village ANCs.²⁸⁵

The Department of the Interior commits in the MOA to allow the Commission to “cooperatively manage, within the parameters established by the [Federal Subsistence] Board, certain aspects of subsistence hunting on Federal public lands” by tribal members of those eight Tribes.²⁸⁶ To do so, the MOA calls for the Department to commence rule-making to allow for Commission-issued permits, to establish a local advisory council within the Title VIII regulatory and advisory structure that would be Ahtna-specific, and agree to a “cooperative partnership for the development and implementation of policies, programs, and projects that will serve mutual subsistence management objectives.”²⁸⁷ Importantly, the MOA also calls upon both parties to seek funding to support capacity building on the part of the Commission and sets the expectation that the Commission will

²⁸²See, e.g., Letter from Kuskokwim River Inter-Tribal Fish Comm’n to David L. Bernhardt, Secretary of the Interior (Sept. 15, 2020), <https://static1.squarespace.com/static/5afdc3d5e74940913f78773d/t/608c6c656eec231459d30c02/1619815529076/KRITFC+letter+to+Sec.+B.+SIGNED+FINAL.pdf> [<https://perma.cc/AN9T-2GRW>] (requesting that the Secretary exercise broader federal authority to reserve, manage, and protect the Kuskokwim River).

²⁸³Memorandum of Agreement between U.S. Dep’t of the Interior and Ahtna Inter-Tribal Res. Comm’n for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region, https://www.doi.gov/sites/doi.gov/files/uploads/ahtna_doi_moa_with_signature_pages_final.pdf (last visited Aug. 21, 2021) [hereinafter AHTNA MOA].

²⁸⁴U.S. Dep’t of Interior, Secretarial Order No. 3342 (2016), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf [<https://perma.cc/7LSP-PSU6>].

²⁸⁵AHTNA MOA, *supra* note 282, at 3.

²⁸⁶*Id.*

²⁸⁷*Id.* at 6.

enter funding agreements with the Department to fund the work described in the Agreement.²⁸⁸

By setting forth specific steps for the regulatory, advisory, and capacity-building necessary to support the Commission's co-management activities, the Ahtna MOA provides a secure roadmap for catalyzing broader tribal authority across federal public lands in the region. In addition, as with the CATG and KRITFC agreements, the coalescence of the regional tribes into a consortium for management promises a stronger and more durable approach to that management strategy. Including the ANCs as partners is unique in the Ahtna model and presents the opportunity to consider unified management structures across both ANC and federal public lands. Finally, as with the evolution of the CATG self-governance agreements, the Ahtna MOA recognizes the need to build capacity and technical expertise over time and the mutual commitment between the federal and tribal parties to the MOA to secure and support such expanded capability is a critical aspect of the partnership.

This MOA, coming as it did on the heels of the strong statement in support of expanded tribal partnerships made in Secretarial Order 3342 and with these unique, thoughtful, and forward-looking approaches to ensuring a successful expansion of the Commission's management authority, had all of the elements to significantly shift the subsistence management paradigm, both in the Ahtna region and, perhaps, beyond. Unfortunately, however, there remain challenges and roadblocks to the successful implementation of the terms and ambitions of the MOA. Nearly two years after entering the MOA, for example, the Commission's Executive Director updated Congress that, rather than making progress, the Commission had "been met with delays and resistance to the implementation of our MOA."²⁸⁹ She went on to identify the primary factor in those challenges as bureaucratic and regulatory structure of the Office of Subsistence Management and its supervision within the USFWS.²⁹⁰

²⁸⁸*Id.* at 7.

²⁸⁹*Keep What You Catch* Hearing, *supra* note 275, at 52.

²⁹⁰*Id.* ("Housing the OSM beneath the USFWS continues to present clear ethical concerns. How can the OSM adequately serve the rural residents of Alaska while also charged with the task of serving each of the five federal agencies that makeup the FSB? Moving the Office of Subsistence Management out of the US Fish & Wildlife Service would be a move to strengthen and lend autonomy to the OSM.")

As demonstrated by this testimony and each of these self-governance intergovernmental agreement examples, contracting and compacting provides a promising bridge forward to more sustainable tribal authority on federal public lands. But significant roadblocks remain that hamper the success of those agreements. Structural limitations inherent in the existing federal regulatory framework and the continuing exercise of discretion by federal agencies and officials working within that framework limit the implementation of meaningful provisions of those agreements. Funding and capacity-building for tribal partners remain challenges and, as demonstrated by the CATG approach, can take decades of progress through successively more substantial agreements to expand. And, the negotiation and practical administration of these agreements, often among multiple Tribes, federal officials, and sometimes competing interests, present routine but sometimes confounding complications to achieving their stated intentions.

Nonetheless, as described in more detail below, these agreements and others across Alaska and beyond provide a meaningful foundation for building toward meaningful tribal authority across federal public lands. Even if only focused on establishing protocols for federal-tribal relations through consultation and coordination, such an agreement can be the basis from which true co-management can evolve. Other measures must certainly be used in concert with such agreements to sustain progress toward that evolution but self-governance compacts and intergovernmental agreements are an essential element for bridging toward tribal co-management in Alaska.

E. Public Lands Planning

Public lands planning is an essential way for tribes to more pro-actively shape the vision and desired conditions on public lands. To do so, before decisions get made and a trajectory is set by at the plan-level, is key to tribal co-management.²⁹¹ Consider two scenarios in this regard. In the first status-quo scenario, a tribe enters into a relatively narrow contract or agreement to perform a function, something like culvert maintenance or replacement for fish passage, but management of the area-as-a-whole is nonetheless managed in a

²⁹¹The integration of Tribes early in the decision-making process, along with the recognition and incorporation of tribal expertise, are core principles of tribal co-management. See Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENV'T. L. 279, 343 (2000); *Bridges*, *supra* note 5, at 149–50.

way that is contrary to tribal values and vision. The second scenario is much different than the status quo. It begins with meaningful tribal participation and integration of tribes at the earliest phases of planning, to ensure that they can shape the overall direction of management and not just contract with agencies on projects that they had no role in developing. In this scenario, implementation—via compact, contract, agreements, or other implementation mechanisms—would be driven by the larger purposes, objectives, goals and desired conditions set forth in a plan that are developed with meaningful tribal participation.

Our focus in *Bridges* was on national forest planning and we reviewed tribally-related provisions in the Forest Service's 2012 Planning Rule that could be used in the context of tribal co-management.²⁹² The Chugach National Forest recently used this Rule to promote a "spirit of shared stewardship" with Alaska Native Tribes and Native Corporations.²⁹³ Embracing the collaborative nature of the 2012 Planning Rule, the revised Forest Plan recognizes "the importance of the Chugach National Forest as ancestral lands" and seeks "to identify and achieve common desired conditions across shared boundaries," and to "work collaboratively to consider projects that provide mutually beneficial outcomes that contribute to socio-economic sustainability of tribal communities and resiliency of the national forest's natural resources."²⁹⁴

The revised Chugach Plan also designates "areas of tribal importance," a new designation provided for in the 2012 Planning Rule.²⁹⁵ Those areas with special land status, including an archeological district and selected ANCSA cultural and historic sites, are "protected against degradation in coordination with affected Alaska Native Tribes and Alaska Native Corporations."²⁹⁶ Though not offered as a more strict and enforceable planning "standard,"²⁹⁷ this forest-wide desired condition nonetheless shows how a plan could be used in a more strategic and forward-looking fashion in the future.

²⁹²*Bridges*, *supra* note 5, at 127–30.

²⁹³U.S. FOREST SERV., CHUGACH NATIONAL FOREST: LAND MANAGEMENT PLAN 15 (2020).

²⁹⁴*Id.* at 16.

²⁹⁵36 C.F.R. §219.10(b)(1)(iii) (2020).

²⁹⁶U.S. FOREST SERV., CHUGACH NATIONAL FOREST: LAND MANAGEMENT PLAN 28 (2020).

²⁹⁷Standards in forest planning are particularly important because they serve as "a mandatory constraint on project and activity decision-making." 36 C.F.R. § 219.7(e)(1)(iii) (2020). *See also* Alaska Native Claims Act § 14(h)(1), 43 U.S.C. § 1613 (withdrawal and conveyance provisions related to existing cemetery sites and historical places).

The BLM does not have a new planning rule but it could still use existing authorities to revise resource management plans (RMPs) in Alaska that better reflect tribal participation, protect subsistence use and cultural resources, and fulfill the BLM's trust obligation in a substantive way. Similar to forest plans, RMPs provide broad guidance for managing BLM lands and guide future land management actions and subsequent site-specific projects. These plans make land allocations, establish goals and objectives of management, and make clear what uses are permitted, restricted or prohibited. RMPs are "revised as necessary, based on monitoring and evaluation findings, new data, new or revised policy and changes in circumstances affecting the entire plan or major portions of the plan."²⁹⁸

Tribal engagement at the planning level is critically important because plans "are the basis for every on-the-ground action the BLM undertakes."²⁹⁹ The building blocks already exist and are articulated in the agency's Tribal Relations Manual and Handbook (1780).³⁰⁰ The BLM could use this policy direction to revise plans that provide for tribally-influenced desired outcomes for a planning area and make corresponding decisions about goals, objectives, allowable uses, and management actions.³⁰¹

The BLM also has an important tool to protect tribal values and uses that is not available to other agencies. FLPMA requires BLM's land use planning process to "give priority to the designation and protection of areas of critical environmental concern" (ACECs).³⁰² As defined in FLPMA, the term "areas of critical environmental concern" means "areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife

²⁹⁸43 C.F.R. § 1610.5-6 (2021).

²⁹⁹U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1601-1, LAND USE PLANNING HANDBOOK 1 (2005). As the BLM makes clear in the Central Yukon plan revision, "[t]hese decisions establish goals and objectives for day-to-day and long-term resource management." U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., CENT. YUKON RES. MGMT. PLAN AND ENV'T IMPACT STATEMENT ES-1 (2020).

³⁰⁰U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1780-1, BLM HANDBOOK: IMPROVING AND SUSTAINING BLM-TRIBAL RELATIONS (2016).

³⁰¹See U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1601-1, LAND USE PLANNING HANDBOOK 15-16 (2005) (explaining the meaning and application of these terms).

³⁰²43 U.S.C. § 1712(c)(3).

resources or other natural systems or processes, or to protect life and safety from natural hazards.”³⁰³

BLM’s guidance on determining relevancy as it pertains to a “significant historic, cultural, or scenic value” includes but is not limited to “rare or sensitive archeological resources and religious or cultural resources important to Native Americans.”³⁰⁴ This special designation, and “other appropriate forms of special recognition and protection of lands and resources of interest to tribes provide opportunities to consult with Indian tribes to consider, protect, and provide access to places of importance to them.”³⁰⁵

Congress, in unambiguous fashion, ordered the agency to prioritize the designation and protection of ACECs. This means that BLM should be giving ACECs priority for consideration in the planning process and extra weight in decision-making. As summarized in a recent authoritative study: “The legislative history of FLPMA establishes Congress’s clear intent to provide for special protection of ACECs and to direct BLM to accord priority for that protection over other multiple uses in the agency’s inventory, land designation and planning activities.”³⁰⁶ The study finds that such prioritization has not taken place and recommends a number of steps be taken to meet FLPMA’s mandate. This includes “restor[ing] the visibility and effectiveness of ACECs”—in BLM regulations, policy guidance, and budget justifications—and providing them “the heightened level of protection required by FLPMA.”³⁰⁷

³⁰³*Id.* § 1702(a).

³⁰⁴U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1613.02, BLM MANUAL: AREAS OF CRITICAL ENVIRONMENTAL CONCERN 1, https://eplanning.blm.gov/public_projects/lup/35315/47944/52063/ACEC_Guidance_BLM.pdf [<https://perma.cc/WTH4-XARH>] (last visited Mar. 15, 2022). The agency’s criteria for determining importance includes “locally significant qualities which give it special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource.” *Id.*

³⁰⁵U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., MS-1780, BLM MANUAL 3-2 (2016). THE BLM HANDBOOK (1780-1) similarly makes clear that ACECs “can be designated in whole or in part within RMPs to protect land and resources of traditional cultural or religious importance to tribes [and] protective stipulations attached to the management of these areas can help accommodate use and access by Indian people and limit potentially conflicting land uses.” U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1780-1, BLM HANDBOOK IV-4 (2016).

³⁰⁶Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA’s Unfulfilled Conservation Mandate*, 28 COLO. NAT. RES., ENERGY & ENV’T. L. REV. 1, 5 (2017).

³⁰⁷*Id.* at 59, 61.

1. *Federal Lands Planning: The Potential and Reality*

Recent revisions of RMPs in Alaska demonstrate the gulf between what the BLM could do and is doing at the plan-level regarding the protection of tribal rights and values on public lands. The recent revision of the Bering Sea-Western Interior RMP provides an example.³⁰⁸ Over 60 federally recognized tribes are within this planning area, covering roughly 13.5 million acres.³⁰⁹ A number of these tribes nominated local watersheds for protection as ACECs, based on the attendant values of fisheries and/or cultural resources.³¹⁰ But the final RMP not only rejected these nominations but also eliminated 1.8 million acres of existing ACECs.³¹¹ Instead of using the agency's open-ended and highly subjective "relevance and importance" criteria for ACECs to provide substantive protections for tribally-significant fisheries and cultural resources, the BLM used its discretion to prioritize other multiple uses and values (primarily mining) asserting that "standard or routine management prescriptions provide sufficient protection."³¹² The deficiencies of this planning process go beyond ACECs and are far more systematic according to tribes participating thus far, including problems related to consultation, the agency's failure to respond to Tribes' cooperating agency requests, and the lack of Alaska Natives, anthropologists and tribal liaisons on the BLM's planning team.³¹³

³⁰⁸U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., BERING SEA-WESTERN INTERIOR: RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2021). The under-utilization of ACECs in BLM planning and management to protect tribal rights and interests goes well beyond Alaska. See e.g., AFFILIATED TRIBES OF NORTHWEST INDIANS, RESOLUTION No. 2021-38, REQUEST THE U.S. BUREAU OF LAND MANAGEMENT DEVELOP AN AREA OF CRITICAL ENVIRONMENTAL CONCERN REGULATION AS REQUIRED BY THE FEDERAL LAND POLICY MANAGEMENT ACT OF 1976 (2021), <https://atntribes.org/wp-content/uploads/2021/10/Res-2021-38.pdf> [<https://perma.cc/T27L-NTG4>] (calling for updated guidance and improvement in how ACECs are established and managed "for the benefit of future generations of Tribal nations with historical connections to traditional land now managed by the Bureau.").

³⁰⁹Letter from Tanana Chiefs Conf., in BERING SEA-WESTERN INTERIOR COMMENT SUMMARY REPORT, VOL 2 apps. A & B, at A473 (2020)

³¹⁰U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., BERING SEA-WESTERN INTERIOR: RESOURCE MANAGEMENT PLAN, AREAS OF CRITICAL ENVIRONMENTAL CONCERN: REPORT ON THE APPLICATION OF THE RELEVANCE AND IMPORTANCE CRITERIA (2016).

³¹¹U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., BERING SEA-WESTERN INTERIOR: RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN I-10 (2021).

³¹²U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., LAND USE PLANNING PROTEST RESOLUTION REPORT FOR THE BERING SEA-WESTERN INTERIOR PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT (PROPOSED RMP/FINAL EIS) 9 (2021).

³¹³Letter from Tanana Chiefs Conf., in BERING SEA-WESTERN INTERIOR COMMENT SUMMARY REPORT, VOL 2 apps. A & B, at A473 (2020).

Similar patterns are playing out in the revision of the Central Yukon RMP, which covers roughly 13.1 million acres of BLM lands that are the traditional territories of multiple tribes in the region.³¹⁴ Here too, the BLM is proposing to eliminate existing ACECs and rejected numerous tribal nominations to designate more than four million acres of ACECs to protect fish and wildlife, subsistence uses, cultural resources, and other values.³¹⁵

A consortium of thirty-three federally recognized Tribes participated in the Central Yukon planning process as the “Bering Sea-Interior Tribal Commission.” Several tribes that are part of this Commission submitted to the BLM detailed information, based on tribal knowledge and expertise, on the values and significance of the areas nominated for ACEC protection.³¹⁶ But the planning record illustrates a general disregard and discounting of this place-based information, with the BLM failing to adequately respond to the evidence provided by tribes.

In other cases, the BLM inexplicably draws an arbitrary line between the types of subsistence and cultural values that could be protected by an ACEC designation in the Central Yukon, as if a place having cultural values cannot simultaneously be significant from a subsistence standpoint. For example, the draft Plan denies protection of traditional hunting and fishing areas for the Loudon Tribe, rationalizing that “[c]ultural significance should not be confused with subsistence importance because subsistence use is accounted for under a unique set of laws and regulations.”³¹⁷

Of course, this rationale does not align with Title VIII’s recognition of subsistence as being “essential to Native physical, economic, traditional, and cultural existence.”³¹⁸ As the Loudon Tribal Council explained in its ACEC nomination, “[t]he lands and waters we depend on for traditional harvest are necessary for practicing what the

³¹⁴U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CENTRAL YUKON DRAFT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT (2020).

³¹⁵U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CENTRAL YUKON RESOURCE MANAGEMENT PLAN: AREAS OF CRITICAL ENVIRONMENTAL CONCERN: REPORT ON THE APPLICATION OF THE RELEVANCE AND IMPORTANCE CRITERIA (2015).

³¹⁶Letter from Eugene Paul, Chairman, Bering Sea-Interior Tribal Comm’n, to Michelle Ethun, Plan. and Env’t Coordinator, Bureau of Land Mgmt. (Mar. 11, 2021) (on file with authors).

³¹⁷U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CENTRAL YUKON RESOURCE MANAGEMENT PLAN: AREAS OF CRITICAL ENVIRONMENTAL CONCERN: REPORT ON THE APPLICATION OF THE RELEVANCE AND IMPORTANCE CRITERIA 95 (2015).

³¹⁸16 U.S.C. § 3111(1).

federal government refers to as our ‘subsistence priority.’ We call it life.”³¹⁹

2. *Planning and the National Historic Preservation Act (NHPA)*

The National Historic Preservation Act (NHPA) could also factor more significantly into the revision of these and other federal public land use plans in Alaska. As reviewed in *Bridges*, the NHPA is a procedural statute affording federal agencies considerable discretion in how rigorously it is applied to the protection of sacred places and cultural resources on federal lands, as the statute encourages but does not mandate preservation.³²⁰ Shortcomings aside, we reviewed in *Bridges* an exemplary case where tribal leadership was able to leverage the designation of a TCD into more substantive protection of the Badger Two-Medicine area of Montana.³²¹ The values and attributes of this area were also integrated into the revision of the area’s national forest plan, thus providing a degree of protection that goes beyond the procedural and consultative nature of Section 106.

There is nothing precluding a similar approach by Alaska Native Tribes, or perhaps something even more expansive, such as applying the NHPA to wild pacific salmon runs and the watersheds that protect them, or to migrating caribou or other subsistence species.³²² The NHPA could also be more pro-actively and strategically

³¹⁹Letter from Eugene Paul, Chairman, Bering Sea-Interior Tribal Comm’n, to Michelle Ethun, Plan. and Env’t Coordinator, Bureau of Land Mgmt. Central Yukon Field Office (Mar. 11, 2021) (on file with authors). Related criticism also comes from the Western Interior Alaska Subsistence RAC, created under Section 805 of ANILCA. It views the planning process taking place without the deliberation and input required by Title VIII. The Council “is deeply disturbed by what it considers the inappropriate fast-tracking of a massive planning document that will affect subsistence resources and subsistence users throughout a large portion of the Western Interior Region.” Letter from Western Interior Alaska Subsistence Reg’l Advisory Council, to Chad Padgett, Alaska State Dir., Bureau of Land Mgmt. (May 21, 2019), in BERING SEA-WESTERN INTERIOR COMMENT SUMMARY REPORT, VOL. 2 apps. A & B at A493 (2020) (emphasizing perceived deficiencies in multiple BLM planning processes going on in the region).

³²⁰Mills & Nie, *Bridges*, *supra* note 5, at 113–19.

³²¹*Id.* at 113–126.

³²²The National Register of Historic Places comprises “districts, sites, buildings, structures, and objects.” 16 U.S.C. §470(a)(1)(A) (emphasis added). See also D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENV’T L. REP. 10366 (2012) (laying out the rationale and strategy); *Dugong v. Rumsfeld*, No. C 03-4350 MHP (N.D. Cal. Mar. 1, 2005) (finding the Okinawa dugong species covered by the NHPA); see also Alan S. Boraas et al., THE CH’U’ITNU TRADITIONAL CULTURAL LANDSCAPE: A DISTRICT ELIGIBLE FOR THE NATIONAL REGISTER OF HISTORIC PLACES, SUBMITTED BY THE NATIVE AMERICAN RIGHTS FUNDS ON BEHALF OF THE NATIVE VILLAGE OF TYONEK (2015) (proposing a watershed-based approach to protecting the Chuit River drainage as a Traditional Cultural Landscape).

integrated into federal lands planning processes, such as by using NEPA to facilitate Section 106 consultation and using “Section 106 to inform the development and selection of alternatives in NEPA documents.”³²³

This potential notwithstanding, Alaska Native Tribes are facing challenges similar to what tribes are facing elsewhere when it comes to implementation of the NHPA. First, there are few traditional cultural properties thus far officially designated in Alaska.³²⁴ This stems from the fact that the vast majority of federal public lands in the State have not been inventoried for cultural resources.³²⁵ There is also a tendency for federal land agencies to dismiss nominations for properties at a larger landscape or watershed level, mistakenly viewing them as having to apply to “discrete landforms or specific locations relating to traditional religious practices or significant events in the traditional belief system, such as places of cultural origin.”³²⁶

These factors often lead to a situation where federal land agencies and State Historic Preservation Offices view federal land use plans as mostly an administrative “check-the-box” sort of endeavor—or officially, as “an undertaking with no potential to cause adverse effects.”³²⁷ The Chugach National Forest typifies this approach, viewing its revised land management plan as “an administrative direction rather than physical alteration of the landscape that could have the potential to affect cultural and historic sites.”³²⁸

³²³COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT & ADVISORY COUNCIL ON HISTORIC PRES., NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, at 5 (2013). See also 36 C.F.R. §800.8(c) (2021) (“Use of NEPA process for section 106 purposes”).

³²⁴There are nine TCPs in the Alaska Heritage Resources Survey database. The Alaska Heritage Resources Survey Manager would not inform us of how many of these TCPs are located on federal public lands, though we are aware of one TCP on BLM lands between Tok and Tanacross, Alaska. Email from Jeffrey Weinberger, Alaska Heritage Res. Survey Manager, Alaska Dep't of Nat. Res., Off. of Hist. and Archeology, to Martin Nie (July 6, 2021) (on file with author).

³²⁵See, e.g., U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., ANALYSIS OF MANAGEMENT SITUATION, CENTRAL YUKON RESOURCE MANAGEMENT PLAN 86–87 (2016) (reviewing the lack of cultural resource inventories in the planning area). One general estimate is that less than six percent of Alaska, including federal public lands, has been systematically surveyed for archaeological and historic resources. Email from Jeffrey Weinberger, Alaska Heritage Res. Survey Manager, Alaska Dep't of Nat. Res., Off. of Hist. and Archeology, to Martin Nie (July 6, 2021) (on file with author).

³²⁶U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., CENTRAL YUKON RESOURCE MANAGEMENT PLAN: AREAS OF CRITICAL ENVIRONMENTAL CONCERN: REPORT ON THE APPLICATION OF THE RELEVANCE AND IMPORTANCE CRITERIA 95 (2015).

³²⁷36 C.F.R. § 800.5 (2021).

³²⁸U.S. FOREST SERV., CHUGACH NATIONAL FOREST: LAND MANAGEMENT PLAN 41 (2020).

In several cases, NHPA-based “Programmatic Agreements” are essentially used as either a substitute or supplement to what is provided or not provided in a federal land use plan.³²⁹ These too have the potential to be used in a strategic and substantive way, another avenue through which Alaska Native Tribes and federal land agencies could re-negotiate the terms and conditions of Section 106 consultation and the management of cultural resources on federal public lands. Instead, these agreements or “PAs” too often do little more than re-state Section 106 law and regulations and do more to protect the discretion and flexibility of federal land agencies, and the State Historic Preservation Office, than tribal rights, values, and interests on federal public lands.³³⁰

The approach generally taken by federal land agencies means that more thorough applications of Section 106 get pushed to future undertakings at the project level.³³¹ This pattern places tribes in a defensive and reactive posture, as they are essentially forced to use the Section 106 consultation framework *after* the key threshold decisions have already been made by federal agencies.

Implementation of Section 106 as applied to oil and gas development across the Coastal Plain provides a case-in-point. Instead of strategically using Section 106 at the large-scale planning and leasing level, the BLM deferred its evaluation of adverse effects to the post-leasing (APD, application for permits to drill) stage of decision-making and issued its draft EIS before completion of the 106 process.³³² Failure to initiate the NHPA 106 process in an early fashion meant that the development, evaluation, and selection of NEPA alternatives were not meaningfully informed by tribal consultation. Furthermore, the

³²⁹Programmatic agreements are the most commonly used alternative to Section 106 implementation. NHPA regulations specify that they may be used: “When effects on historic properties are similar and repetitive or are multi-State or regional in scope; When effects on historic properties cannot be fully determined prior to approval of an undertaking; When nonfederal parties are delegated major decision-making responsibilities; Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or Where other circumstances warrant a departure from the normal section 106 process.” 36 C.F.R. § 800.14(b)(1) (2021).

³³⁰*See, e.g.*, U.S. FOREST SERV. ET. AL., PROGRAMMATIC AGREEMENT AMONG THE USDA FOREST SERVICE, ALASKA-REGION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE ALASKA STATE HISTORIC PRESERVATION OFFICER REGARDING HERITAGE PROGRAM MANAGEMENT ON NATIONAL FORESTS IN THE STATE OF ALASKA (2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd550722.pdf [<https://perma.cc/4JT7-RGGU>].

³³¹*See, e.g.*, Letter from Judith E. Bittner, State Historic Pres. Officer, to Chad Padgett, Alaska State Dir., Bureau of Land Mgmt. (June 13, 2019), *in* BERING SEA-WESTERN INTERIOR COMMENT SUMMARY REPORT, VOL 2 apps. A & B, at A458 (2020).

³³²*See* BUREAU OF LAND MANAGEMENT, COASTAL PLAIN OIL AND GAS LEASING PROGRAM: DRAFT ENVIRONMENTAL IMPACT STATEMENT, VOL. I, at 3-157 (2018).

BLM failed to perform any original research or field work related to cultural resources, even after specific sites and areas were identified through tribal consultation. Instead of doing plan-level cultural resource inventories, as requested by Tribes, the BLM claimed such work would only become necessary upon any ground disturbing activity.

V. TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS IN ALASKA: FINDINGS, OPTIONS, AND POTENTIAL PATHWAYS

We have previously offered a number of recommendations for enhancing tribal co-management on federal public lands, including both executive and congressional actions that could be taken if so desired by tribes and tribal organizations.³³³ With the exception of recommendations focused on the Antiquities Act, all of these options could be applied to Alaska. This section supplements those recommendations and offers additional general observations based on our initial research.³³⁴ This section also discusses recent developments on the Tongass National Forest in Southeast Alaska to illustrate problems and opportunities that are found more broadly throughout the State of Alaska.

A. *Federal Public Lands are Failing Alaska Native Tribes*

There is perhaps nowhere in the U.S. where tribal connections and reliance on federal public lands are as deep and geographically broad-based as Alaska: 229 federally recognized tribes and nearly 223 million acres of federal public land in the state.³³⁵ As declared

³³³See Mills & Nie, *Bridges supra* note 5 at 169–81.

³³⁴As non-Natives and outsiders to Alaska, we remain focused on some of the more technical legal and policy issues and our intention is to utilize our previous research on co-management outside of Alaska and focus on how that work could be potentially used in the State. As such, some of the options explored below are purposefully kept general with an understanding that the details must be developed by Alaska Native Tribes and tribal organizations to implement and support their own perspectives and priorities.

³³⁵This number includes lands managed by the Department of Defense. See CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2020) (calculating total federal acreage in Alaska at 222,666,580, which is 60.9% of all acreage in the State). See ALASKA DEP'T OF FISH AND GAME, SUBSISTENCE IN ALASKA: A YEAR 2017 UPDATE 2 (2018) (reviewing the nutritional and monetary values of subsistence harvests in Alaska). The State estimates that about 34 million pounds (usable weight) of wild foods are harvested annually by rural residents and the annual wild food harvest is about 276 pounds per person per year for rural residents. ALASKA DEP'T OF FISH AND GAME, FY 2022 GOVERNOR'S OPERATING BUDGET 433 (2020), https://omb.alaska.gov/ombfiles/22_budget/Fish/Proposed/budget_summary_fish.pdf [<https://perma.cc/KUB7-B9EN>].

by Congress in ANILCA, these federal lands and the subsistence uses they provide are “essential to Native physical, economic, traditional, and cultural existence.”³³⁶ These connections notwithstanding, our federal public land institutions, systems and processes are failing Alaska Native Tribes.

As emphasized throughout the preceding sections, there exist multiple legal authorities and processes that could be used as a “bridge” to models of tribal co-management. Tribal consultation, federal public lands planning, the NHPA, self-governance contracting and compacting: all could be strategically linked to ensure that tribes are full partners in federal lands management, from shaping desired conditions and objectives in federal land use planning to getting work done on the ground via contract and agreement. But most of these authorities and processes are being used by federal land agencies in the most limited of ways and they are generally viewed as procedural obligations that are entirely distinct from their core missions and statutory mandates.

Nowhere is this failure more apparent than with implementation of Title VIII of ANILCA. The purposes and objectives of ANILCA’s subsistence framework have been diminished by regulations and an administrative structure that too often fails to represent and protect Native subsistence users. Instead, rooted as it is in federal deference to the State of Alaska’s interests and priorities, the critical rights of Alaska Native Tribes have been marginalized and largely ignored. Furthermore, given the deep and long-standing antagonism on the part of the State toward Alaska Native Tribes, their sovereignty, and the federal government’s recognition of its trust duties in the purposes of Title VIII, that federal deference to the State further limits effective tribal empowerment. To lift the weight of those systemic burdens, federal land agencies must be compelled to reassess and realign their respective obligations to Alaska Native Tribes and the State of Alaska.

B. The Need to Compel Action by Federal Land Agencies

Core to our recommendations is the belief that federal land agencies must be compelled to more effectively work with Tribes on a co-management basis, much like they are compelled to fulfill their other

³³⁶16 U.S.C. § 3111(1).

obligations and priorities in managing and protecting the lands for which they are responsible. There are, of course, cases where federal land managers voluntarily use their leadership and discretion to co-create new models of shared governance. But much more common is the story of federal officials underutilizing existing authorities or treating them like pro-forma “check-the-box” exercises that must be done but have no real substantive impact on decisions that are likely already made.

The need to compel action—by the Executive Branch, Congress, or the judiciary—is a core theme running through co-management cases in and outside of Alaska. In the U.S., this begins with the protests, litigation and “fishing wars” of the Pacific Northwest and Great Lakes States. In those cases, co-management was essentially compelled by the courts in order to ensure that tribes have “meaningful participation” in the regulatory process.³³⁷ The co-management frameworks used in Alaska were also compelled by statute and international treaties.³³⁸ The recommendations offered here, and in *Bridges*, are additional ways to compel change, from significant top-down pushes by the President and Congress to more discrete and internal incentives for federal land agencies and managers.

C. *The Need to Challenge a Paradigm that Places Alaska Native Tribes in a Reactive and Defensive Position*

A common thread running through the cases and examples referenced in this article is the defensive posture in which Alaska Native Tribes are placed by the actions and decisions made by federal land agencies. In case after case, Tribes have been forced to defensively react to plans and projects they had no role in substantively shaping. Though traditional methods of tribal consultation and engagement

³³⁷See *Bridges*, *supra* note 5, at 134–37 (reviewing the fishing rights litigation in Washington State and Oregon and the court’s continuing jurisdiction over implementation of consent decrees to ensure that tribes have “meaningful participation” in the regulatory process).

³³⁸The 1994 co-management Amendment to the Marine Mammal Protection Act is discussed below. A more complicated example, including a mix of Congressional and Executive powers, is the 1995–96 “Canada Protocol” amending the Migratory Bird Treaty Act (MBTA) of 1918. 1995 MBTA PROTOCOL, *supra* note 233, at viii, ix. The Protocol creates an exemption for “indigenous inhabitants” of Alaska and Canada to take migratory birds and their eggs during the closed season and created a management body—the Alaska Migratory Bird Co-Management Council—to develop recommendations for the management of these subsistence hunts. The body is “created to ensure an effective and meaningful role for indigenous inhabitants in the conservation of migratory birds” and includes “Native, Federal, and State of Alaska representatives as equals.” See *id.* at x; 50 C.F.R. § 92.4 (2020) (“Co-management Council means the Alaska Migratory Bird Co-Management Council consisting of Alaska Native, Federal, and State of Alaska representatives as equals.”)

are used, they are viewed for the most part as procedural obligations that are divorced from the core mission and mandates of federal public land agencies.

Tribal co-management, and the principles on which it is based, offers one way of changing this defensive paradigm. One core principle of the approach is the integration of tribes at the earliest phases of planning and decision-making, to ensure that tribes can shape the direction of management and not just retroactively comment on projects and decisions already developed by agencies.

D. The Value of Tribal Organization, Collective Action, and New Approaches to Federal Lands Management

Bridges reviewed historic cases of tribal resistance and conflict that eventually evolved into models of tribal co-management, such as the treaty-based fishing cases in the Pacific Northwest and Great Lakes states. Through decades of protest and litigation, a number of “treaty-tribes” successfully challenged state governments that were hostile to their rights and interests and are now collectively, and successfully, managing a shared resource. We also discuss more recent cases of innovation where multiple tribes are working together to challenge the status quo and design new models of shared governance, with the proposal offered by the Bears Ears Inter-Tribal Coalition being most prominent.

As outsiders looking in, our sense is that Alaska Native Tribes and their allies, are poised for a similar type of paradigm shift. What strikes us most are not some of the inevitable differences that exist between the 229 federally recognized tribes in the State, nor the legal distinction between tribes and Alaska Native Corporations. Instead, most remarkable are the number of tribes organizing collectively in order to challenge and fix a broken system. We reference some of these tribal organizations above, such as the Bering-Sea-Interior Tribal Commission, the Kuskokwim River Inter-Tribal Fish Commission, and the AHTNA Inter-Tribal Resource Commission. Others, such as United Tribes of Bristol Bay and the Southeast Alaska Indigenous Transboundary Commission are using a full array of domestic and international legal channels in opposition to the Pebble Mine in Bristol Bay and a number of proposed hard rock mines in

British Columbia.³³⁹ Tribal voices become organized and amplified by these types of commissions, alliances, and consortiums and together, they are using all means available to not only oppose proposed developments, but to proactively re-envision a new way of governing federal lands, waters and resources.

These tribal organizations are fully engaged in all of the legal frameworks and processes reviewed herein, from consultation to the minutiae of federal lands planning and Title VIII subsistence determinations. The cases we reviewed reveal a pattern whereby Alaska Native Tribes participate in every way and venue available to them, but most often to little or no avail.

One case perfectly illustrating this pattern is provided by those tribes participating in the Alaska roadless rulemaking process. This controversial rule, requested and then accepted by the USFS as a petition from the State of Alaska exempted the Tongass National Forest from the 2001 Roadless Area Conservation Rule.³⁴⁰ Southeast Alaska Tribes participated throughout the agency's consultation process, with some of these meetings taking place online because of the Administration's schedule of finalizing the Rule during a national pandemic.³⁴¹ Six tribes also contributed as "cooperating agencies" during the rulemaking process,³⁴² with all of them opposed to the USFS's proposed rule and exemption for the Tongass.³⁴³ Tribes also participated in the Rule's subsistence determination process but were unable to get the USFS to incorporate updated information and descriptions of their traditional use areas, among other deficiencies in what was viewed as a superficial and pro-forma subsistence review.³⁴⁴

And so it went, a storyline very familiar to tribes throughout the State of Alaska. But from this broken system emerged an altogether

³³⁹See, e.g., SE. ALASKA INDIGENOUS TRANSBOUNDARY COMM'N, PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS OF THE RIGHTS OF THE MEMBERS OF THE SOUTHEAST ALASKA INDIGENOUS TRANSBOUNDARY COMMISSION RESULTING FROM HARD-ROCK MINING IN BRITISH COLUMBIA, CANADA, (2020).

³⁴⁰Special Areas: Roadless Area Conservation, National Forest System Lands in Alaska, 85 Fed. Reg. 68,688 (Oct. 29, 2020) (to be codified at 36 C.F.R. 294).

³⁴¹See Letter from Hoonah Indian Ass'n, Organized Village of Kasaan, Organized Village of Kake, Organized Village of Saxman, Ketchikan Indian Cmty., Central Council of Tlingit and Haida Indian Tribes of Alaska, to Sonny Perdue, Secretary of Agric. (Apr. 23, 2020) (on file with authors).

³⁴²NEPA regulations permit a State, Tribe or local agency to become a "cooperating agency" by agreement with the lead agency. 40 C.F.R. § 1501.8 (2020).

³⁴³Special Areas: Roadless Area Conservation, National Forest System Lands in Alaska, 85 Fed. Reg. 68,688, 68,696.

³⁴⁴*Id.* at 68,692, 68,696.

different vision of how the Tongass could be managed with tribal engagement in the future. Tribal governments in Southeast petitioned the USFS to create a “Traditional Homelands Conservation Rule for the Long-Term Management and Protection of Traditional and Customary Use Areas in the Tongass National Forest.”³⁴⁵ Laid out in the Petition are all the ways in which the Tribes participated throughout the process, only to have their voices “disregarded, disrespected, undervalued, and ignored.”³⁴⁶ The Tribal Petition also critiqued “a one-way system of communication in which the federal government engages in ‘consultation’ as a way to issue orders and give updates to the Tribes about what *will* happen in decision-making processes, while ignoring the recommendations provided by the Tribes.”³⁴⁷

To fix this system—to ensure that decisions are truly informed by tribal participation—the Petition calls for a new management structure and new methods of consultation. The latter is to be based on the principle of mutual concurrence, a principle already articulated in USFS policy: “[C]onsultation only occurs when the office or Agency and tribal officials mutually agree that consultation in taking place.”³⁴⁸ From here, the Petition calls for the USFS to take a number of feasible actions to ensure that tribes have a meaningful say in the decisions affecting traditional and customary uses of the land; and for the USFS to use and expand upon the existing tools and authorities reviewed in this article, from Good Neighbor Authority to 638 contracting. But at its core the Petition stands out for its collective vision and demand for a “fundamental shift in how the Tongass is managed” and for the USFS to listen, work and partner with those

³⁴⁵ORGANIZED VILLAGE OF KASAAN, ET AL., PETITION FOR USDA RULEMAKING TO CREATE A TRADITIONAL HOMELANDS CONSERVATION RULE FOR THE LONG-TERM MANAGEMENT AND PROTECTION OF TRADITIONAL AND CUSTOMARY USE AREAS IN THE TONGASS NATIONAL FOREST (2020) (on file with authors) [hereinafter TONGASS PETITION]. The Tribal petition was provided pursuant to the First Amendment of the U.S. Constitution and the Administrative Procedure Act. See U.S. Const. amend. I. (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”); see also 5 U.S.C. § 553(e) (granting any “interested person the right to petition for the issuance, amendment, or repeal of a rule”); 5 U.S.C. §§ 551(13), 702 (providing that “agency action” includes “the whole or a part of an agency rule, . . . or the equivalent or denial thereof, or failure to act”); *id.* § 706(1), (2)(A) (granting a reviewing court the authority to “compel agency action unlawfully withheld or unreasonably delayed” and/or to “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion”).

³⁴⁶See TONGASS PETITION, *supra* note 345, at 2.

³⁴⁷See *id.* at 5.

³⁴⁸See *id.* at 3; see also U.S. FOREST SERV., FSH 1509.13, FOREST SERVICE HANDBOOK, AMERICAN INDIAN AND ALASKA NATIVE RELATIONS HANDBOOK, Ch. 10; U.S. FOREST SERV., FSM 1500, FOREST SERVICE MANUAL: EXTERNAL RELATIONS § 1563.03(3)(e) (2016).

tribes that have inhabited what is now the Tongass since time immemorial.³⁴⁹

E. A New Joint Secretarial Order to Begin ‘A New Era of Engagement and Partnership with Federally Recognized Indian Tribes in the Management of Federal Public Lands and Resources’

We finished *Bridges* by recommending a new Executive Order or Joint Secretarial Order on tribal co-management and for this new Order to build on Secretary Jewell’s 2016 Order (3342) focused on “Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources.”³⁵⁰ That 2016 Order recognized Interior’s “broad management responsibilities for Federal lands and resources,” the “special geographical, historical, and cultural connections,” between Indian tribes and those lands and resources, and the “Department’s obligation to uphold the Federal trust responsibility to tribes.” That Order also articulated “the principles and legal foundation for interactions between bureau land managers and tribes” and identified a number of examples of cooperative management arrangements including tribal co-management of Kasha-Katuwe Tent Rocks National Monument in New Mexico and through the FWS’s Memorandum of Understanding with the Kuskokwim River Intertribal Fisheries Commission in Alaska. Building on those important examples, principles, and foundations, we recommended a new Order elaborating on additional avenues through which the Departments of Interior and Agriculture will be able to better fulfill their trust obligations to Indian tribes while carrying out their various land and resource management missions.³⁵¹

On November 15, 2021, Secretaries Haaland (Interior) and Vilsack (Agriculture) issued Order Number 3403, a Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.³⁵² The Order calls upon their respective departments, bureaus, and agencies to manage federal public lands and resources “in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized

³⁴⁹TONGASS PETITION, *supra* note 345, at 10.

³⁵⁰See Mills & Nie, *Bridges*, *supra* note 5, at 169–71.

³⁵¹*Id.*

³⁵²See U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., *supra* note 6.

Indian Tribes including the Native Hawaiian Community,” and recognizes “that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States’ unique trust obligation to federally recognized Indian Tribes and their citizens.”³⁵³ The Order then sets forth various authorities and principles for implementation before setting for the objective that “[t]he Departments will endeavor to engage in co-stewardship where Federal lands or waters, including wildlife and its habitat, are located within or adjacent to a federally recognized Indian Tribe’s reservation, where federally recognized Indian Tribes have subsistence or other rights or interests in non-adjacent Federal lands or waters, or where requested by a federally recognized Indian Tribe.”³⁵⁴

With its clarion call to shift the priorities of the federal departments and agencies primarily responsible for managing federal public lands and resources, Order 3403 provides an important foundation for building a new era of federal-tribal co-stewardship. While it remains to be seen how the details of these priorities will be implemented and may affect the day-to-day decision-making of federal agency officials and staff, the Order itself is a remarkable reformation of prior Departmental philosophies that rests the baseline for future progress. Consistent with Secretary Jewell’s 2016 Order and our earlier recommendations, Order 3403 is a significant step toward enabling broader and more functional tribal authority across federal public lands and resources.

F. Accountability and Performance Measures

The legal foundations and bridges for tribal co-management on federal public lands in Alaska already exist. Federal land agencies have the authorities, tools, and processes necessary in order to affirm tribal sovereignty and effectuate the federal government’s trust obligations through innovations in tribal co-management and shared governance. But what emerges from our review of cases in Alaska is the stark difference between what is possible and what is most commonly practiced by federal land agencies.

³⁵³*Id.* § I.

³⁵⁴*Id.* § V.

Of course, federal land agencies are controlled by the President, and reviewed herein are cases where tribal rights and interests take a back seat to Executive-level agendas and priorities, from roadbuilding on the Tongass to mineral development on public lands managed by the BLM. But another challenge faced by Alaska Native Tribes are State-based and field-level federal land decision-makers who fail to recognize or use their existing authorities. This was one of the most common themes discussed by those individuals participating in our early scoping sessions for the project. These individuals spoke of mid to high-level federal land managers and line officers who either refused to use their existing authorities to promote more cooperative approaches with tribes or that willfully undermine these initiatives by “gate-keeping” and “road-blocking.”

Federal land agencies have multiple legal obligations and the discretion afforded to them by Congress means that some goals get prioritized over others, especially those that are easier to measure.³⁵⁵ This means that new tribal initiatives can be too easily disregarded by agencies whose behavior is driven by other performance-based metrics. It is therefore imperative to consider how best to incentivize and institutionalize the principles of tribal co-management and to hold agencies accountable for their actions, from federal officials working in the field all the way to members of the Senior Executive Service.³⁵⁶

The particulars of how best to do so is beyond the scope of this article and the options for change should instead stem from a meaningful exchange between federal land agencies and Alaska Native Tribes. But changing how performance is measured is quite feasible, and lessons could be drawn from other federal land programs and agency reforms focused on collaboration and partnerships.³⁵⁷ A

³⁵⁵See Biber, *supra* note 156.

³⁵⁶Members of the Senior Executive Service “serve in the key positions just below the top Presidential appointees,” and the program is administered by the U.S. Office of Personnel Management (OPM). *Senior Executive Service*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/senior-executive-service/> [<https://perma.cc/V7DC-EANY>] (last visited Mar. 15, 2022). We heard from multiple sources consulted as part of this research that members of the Service working in Alaska are partly evaluated and awarded in annual performance reviews based on how well they cooperate with the State of Alaska and that this helps explain some of the federal deference provided to the State. We were unable to substantiate these claims based on the public availability of the Service’s basic appraisal template. But it is nonetheless useful to consider ways in which to incentivize meaningful cooperation with Tribes in this context. *See generally id.*

³⁵⁷*See generally* Courtney A. Schultz et al., *Striking the Balance Between Budgetary Discretion and Performance Accountability: The Case of the U.S. Forest Service’s Approach to Integrated*

good example in the context of cooperative federalism is how the USFS intends to track implementation of its “Shared Stewardship Strategy,” as discussed in Part III(A)(ii).³⁵⁸ The agency intends to “stimulate discussion with Agency leadership, the broader [USFS] Shared Stewardship community, and partners about what data is most useful to collect and how [USFS] metrics may evolve over time.”³⁵⁹ Some of the current indicators used include a relatively simple accounting of the number and value of grants and agreements that implement shared stewardship work. But the new performance framework is also “designed to build a portfolio of evidence (short and long-term indicators) that will demonstrate . . . impacts from improving how we work with partners (shared priorities and collaboration).”³⁶⁰ Importantly, the Joint Secretarial Order (Order 3403) discussed above includes direction for agencies to “[d]evelop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives and goals of this Order, including success toward developing new collaborative stewardship agreements and enhancing existing ones.”³⁶¹

Another approach is to consider accountability mechanisms that are external to the agency. There are a wide range of options to explore in this regard, including models where Congress specifically authorizes one federal agency to lobby the decision-making agency.³⁶² A law requiring the Federal Energy Regulatory Commission (FERC) to consider comments about the environmental impacts of licensed dams from state and federal fish and wildlife agencies provides an example of this approach.³⁶³ Another is the role provided to the Advisory Council on Historic Preservation (ACHP) by the NHPA.³⁶⁴ The Council oversees the Section 106 process and is provided by law an

Restoration, 7 J. NAT. RES. POL’Y RSCH. 1 (2015); Courtney A. Schultz et al., *Aligning Policies to Support Forest Restoration and Promote Organizational Change*, 73 FOREST POL’Y & ECON. 195 (2016).

³⁵⁸See also ANNA SANTO ET AL., ECOSYSTEM WORKFORCE PROGRAM & RURAL VOICES FOR CONSERVATION COAL., IMPLEMENTING OUTCOME-BASED PERFORMANCE MEASURES ALIGNED WITH THE FOREST SERVICE’S SHARED STEWARDSHIP STRATEGY (2020).

³⁵⁹U.S. FOREST SERV., SHARED STEWARDSHIP PERFORMANCE: FY 2020 RESULTS AND PRIORITIES FOR FY 2021 2 (2021) (on file with authors).

³⁶⁰*Id.* at 1.

³⁶¹U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., *supra* note 6.

³⁶²See Biber, *supra* note 156.

³⁶³See J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005)

³⁶⁴See Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 ECOLOGY L.Q. 609 (2015) (assessing those environmental laws that divide decision-making authority among more than one agency, such as the NEPA, NHPA, ESA, CWA, and the Federal Power Act (FPA)).

opportunity to influence the decisions made by “actions agencies” proposing “federal undertakings.”³⁶⁵

G. Government-to-Government Negotiated Contracts, Agreements, MOUs, and Decision-Making Protocols

Much of this article is focused on higher-level law and policy issues that are significant to enabling tribal co-management on federal lands in Alaska. While issues such as subdelegation and the administrative structure of Title VIII must be addressed, it is also necessary to appreciate and build on the bottom-up work and innovation happening throughout Alaska. One such way of doing so is to formalize the agreements negotiated by federal and tribal partners. We discuss some of these agreements above, such as memorandum-of-understanding between the USFWS and the Kuskokwim River Inter-Tribal Fish Commission and the Memorandum-of-Agreement between the Department of Interior and the Ahtna Inter-Tribal Resource Commission.

Still, barriers remain and, despite the best hopes of the tribal consortia entering these agreements, they’ve resulted in something less than the tribal objectives or functional co-management. Nonetheless, there is important value in negotiating and formalizing federal-tribal partnerships and entering into different types of contracts and agreements. To dismiss some arrangements, such as a narrow self-governance contract, as a token measure is understandable. After all, calls to “start small and go slow” can too often be used to defend the status-quo. But also true is the type of capacity-building and mutual trust by and between federal and tribal actors that can be developed through these agreements and contracts.³⁶⁶

This is one of the more valuable lessons to be learned by tribal engagement on the Tongass National Forest. Slowly, over time, a number of networks and partnerships arose, such as the Sustainable Southeast Partnership, the Hoonah Native Forest Partnership, the Kee’ Kwaan Community Forest Partnership, and Tribal Conservation

³⁶⁵36 C.F.R. § 800.5 (2020).

³⁶⁶While outside of the context of co-management, the slow but steady success of the Alaska Native Tribal Health Consortium demonstrates the potential of this approach. See *History*, ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, <https://anthc.org/who-we-are/history/> [<https://perma.cc/6CE8-DHWK>] (last visited Aug. 21, 2021).

Districts, among others.³⁶⁷ This includes a significant agreement and funding arrangement signed by the USFS and Central Council of Tlingit and Haida Indian Tribes of Alaska in support of creating an Indigenous Guardians Program, which was inspired by similar programs on the north coast of British Columbia and Haida Gwaii.³⁶⁸ Each network and partnership is working at a different scope and scale, but collectively these inspiring initiatives—from the big collaborative vision-based endeavors to individual projects and workshops—offer the USFS different paths for how it works on the ground and shares governance more broadly.³⁶⁹

This was illustrated recently with the USFS proposing a new “Southeast Alaska Sustainability Strategy.”³⁷⁰ Facing tribal protest, and the tribal Petition discussed above, the USFS reversed course on its roadless rule exemption for the Tongass and offered a broader strategy that includes improved tribal consultation and \$25 million in additional funding for projects and workforce development in the region. This includes “opportunities for longer-term investments that are responsive to tribal and local priorities for sustainable economic development in Southeast Alaska, and supportive of ongoing

³⁶⁷Some of these stories are profiled by the Sustainable Southeast Partnership. See SUSTAINABLE SE. P'SHIP, <http://sustainablesoutheast.net/> [<https://perma.cc/6DGN-XTP2>] (last visited Mar. 15, 2022). See also THE HOONAH NATIVE FOREST PARTNERSHIP: AN INTERDISCIPLINARY APPROACH TO WATERSHED ASSESSMENT AND RESOURCE PLANNING (2019), https://www.nature.org/content/dam/tnc/nature/en/documents/19_ELE_Hoonah_ForestReport_3F_WEB-1.pdf [<https://perma.cc/WNL8-UYNT>].

³⁶⁸The federal government of Canada supports an “Indigenous Guardians Pilot” program to provide “Indigenous Peoples with a greater opportunity to exercise responsibility in stewardship of their traditional lands, waters, and ice.” *Indigenous Guardians Pilot*, GOV'T OF CAN., <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/indigenous-guardians-pilot.html> [<https://perma.cc/VC9K-74S7>] (last visited Mar. 15, 2022). See INDIGENOUS GUARDIANS TOOLKIT, <https://www.indigenousguardianstoolkit.ca> [<https://perma.cc/4UZY-HRN5>] (last visited Mar. 15, 2022); Graeme Reed et al., *Indigenous Guardians as an Emerging Approach to Indigenous Environmental Governance*, 35 CONSERVATION BIOLOGY 179 (2020).

³⁶⁹An illuminating example of this is a recent workshop focused on “Monument Trees” and cedar stewardship on the Tongass. Marina Anderson, the tribal administrator of the Organized Village of Kasaan, helped organize the workshop and frames the initiative as a way to build trust between the USFS and tribes, something akin to a first-date developing into a more enduring relationship. For a profile see Katie Riley & Marina Anderson, *Resilient Peoples and Place: “Monument Trees” and Cedar Stewardship on the Tongass National Forest*, JUNEAU EMPIRE (May 26, 2021), <https://www.juneauempire.com/news/resilient-peoples-and-placemonument-trees-and-cedar-stewardship-on-the-tongass-national-forest/> [<https://perma.cc/68LV-42FQ>]. The Sitka Conservation Society, a partner in this and related initiatives, hosts a website sharing similar stories. See *Protecting the Tongass National Forest since 1967*, SITKA CONSERVATION SOC'Y, <https://www.sitkawild.org/> [<https://perma.cc/QJ3D-FS57>] (last visited Mar. 15, 2022).

³⁷⁰See *USDA Announces Southeast Alaska Sustainability Strategy, Initiates Action to Work with Tribes, Partners and Communities*, U.S. DEP'T AGRIC. (July 15, 2021), <https://www.usda.gov/media/press-releases/2021/07/15/usda-announces-southeast-alaska-sustainability-strategy-initiates> [<https://perma.cc/2HTN-JCAM>].

partnerships.”³⁷¹ Referenced by the USFS in this regard are the networks and partnerships that have developed on the Tongass, reflecting “principles of collaboration and respect for Indigenous knowledge that are building trust and opportunity in Southeast Alaska.”³⁷²

It is too early to tell what becomes of the USFS’s new strategy but the practical importance of the existing partnerships and networks across the Tongass is already clear, even if they currently operate in a way that is something short of co-management. Each cooperatively-managed project offers another opportunity to learn and build mutual trust—an essential foundation for new models of cooperation and co-management to possibly emerge in the future.

The executive-level pendulum swings impacting the Tongass and other places throughout Alaska provide further reason to consider formalizing agreements and partnerships. The turnover of personnel within federal land agencies can make it difficult to sustain the types of relationships and partnerships that are developed in a particular place.³⁷³ In our initial scoping sessions, we repeatedly heard stories of agency turnover and how changes of leadership can either facilitate or doom more cooperative approaches with tribes. And tribal governments, like all governments, are similarly susceptible to swings of leadership and policy positions. So, while not a cure-all, formalized agreements such as MOUs can provide some continuity and institutional memory.

These agreements can also provide a platform for more substantive change. One of the more powerful examples comes from Minnesota and a MOU between the Chippewa National Forest and the Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe.³⁷⁴ The 2019

³⁷¹*Id.*

³⁷²*Id.*

³⁷³The impact of agency turnover on collaboration, partnerships, and planning by the USFS is a well-known example. It has also impacted implementation of the Tribal Forest Protection Act. The National Advisory Committee for Implementation of the National Forest System Land Management Planning Rule provides recommendations and a model “Handover Memo” that can be used to sustain long-term relationships. See *Summary of Committee Recommendations, 2012–2016*, U.S. DEPT AGRIC., <https://www.fs.usda.gov/detail/planningrule/committee/?cid=fseprd545202> [<https://perma.cc/L6JY-ZWXA>] (last visited Mar. 15, 2022).

³⁷⁴See Memorandum of Understanding Between the USDA Forest Serv., Chippewa National Forest and the Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe (Oct. 4, 2019), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd672397.pdf [<https://perma.cc/UN7E-T6ZF>] [hereinafter Leech Lake MOU]. The history of this agreement is more complicated than most, due partly to the fact that roughly 90 percent of the Leech Lake Indian Reservation is within

agreement calls for “a shared decision-making model,” “utilizing Traditional Ecological Knowledge,” and “develop[ing] mutually agreeable protocols for monitoring” progress in reaching the desired conditions on the Chippewa as established in the MOU.³⁷⁵ The MOU includes specific and mutually agreeable protocols for communication, consultation, NEPA-based scoping and tribal coordination, monitoring and dispute resolution, among others.

A key attribute of the agreement, and a core theme emphasized in this article, is the importance of early and meaningful tribal engagement and coordination in USFS decision-making, at the project and plan level. The MOU, for example, provides the Tribe an opportunity to review contemplated projects or activities that are not on the USFS’s formal “Schedule of Proposed Actions.”³⁷⁶ It also provides for tribal coordination—through NEPA’s cooperating agency provision, structured participation at key meetings, and/or pre-decisional quarterly updates—prior to public scoping; and a consultation framework that must precede the release of a NEPA-based categorical exclusion, environmental assessment or draft environmental impact statement.³⁷⁷

Mutual accountability is the central theme running through each section of the MOU. Nowhere in the agreement does the USFS abdicate its legal responsibilities. Instead, the USFS takes a more holistic approach that integrates its legal obligations to the National Forest and to the Leech Lake Band of Ojibwe. This then serves as the backdrop for the MOU’s elaborate dispute resolution provision, one that includes tribal letters of concurrence or non-concurrence on USFS actions and a provision related to non-binding mediation.³⁷⁸

the Chippewa National Forest, and 45 percent of the Forest is within the Reservation. The Chippewa was also the first National Forest created by statute, with the Minnesota National Forest Act of 1908 including several provisions specifically related to the Chippewa Indians. Minnesota National Forest Act, Pub. L. No. 60-137, 35 Stat. 268 (1908). Another long-term and substantive MOU is between member Tribes of the Great Lakes Indian Fish and Wildlife Commission and the Eastern Region of the USDA Forest Service. The MOU implements gathering rights on National Forest System lands under tribal regulations and establishes a “consensus-based consultation process for management decisions that affect treaty rights in the National Forests located within the areas ceded by the Ojibwe (Chippewa) in the Treaties of 1836, 1837, and 1842.” See U.S. DEP’T OF AGRIC., CELEBRATING 20 YEARS OF IMPLEMENTING TRIBAL TREATY RIGHTS: PAST, PRESENT, AND FUTURE (2019), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd599987.pdf [<https://perma.cc/AVB4-U82H>].

³⁷⁵Leech Lake MOU, *supra* note 374, at 1–2.

³⁷⁶*Id.* at 6.

³⁷⁷*Id.* at 7–10.

³⁷⁸*Id.* at 10–11.

We can imagine Alaska Native Tribes pursuing a similar strategy in some cases. In negotiating these agreements, even the process itself could become an opportunity to reconstruct or strengthen the government-to-government relationship.

H. Congressional Actions

The most effective and efficient way to enable tribal co-management on federal public lands is through congressional lawmaking. *Bridges* reviewed two broad potential pathways that could be taken by Congress in this regard: (1) tribal co-management through place-based legislation, and (2) tribal co-management through system-wide legislation. Both approaches could be made applicable to Alaska in addition to possible amendments to Title VIII of ANILCA or a co-management statute that goes beyond the subsistence framework.

There is precedent for such a strategy. The Marine Mammal Protection Act (MMPA) of 1972 was amended in 1994 with a co-management provision now found in Section 119 of the Act: “The Secretary may enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”³⁷⁹ The term co-management is not defined in the statute or MMPA regulations. But the Act permits agreements and grants with statutorily-established co-management bodies—Alaska Native Organizations—for purposes including: “(1) collecting and analyzing data on marine mammal populations; (2) monitoring the harvest of marine mammals for subsistence use; (3) participating in marine mammal research conducted by the Federal Government, States, academic institutions, and private organizations; and (4) developing marine mammal co-management structures with Federal and State agencies.”³⁸⁰

Section 119 is problematically narrow in terms of the permitted purposes of co-management, especially in contrast to the statute’s section authorizing the federal government to *transfer* management authority to the States, for broadly defined species “conservation and management,” if certain criteria are met.³⁸¹ To receive this authority a State must develop and implement “a program for the conservation

³⁷⁹ 16 U.S.C. § 1388.

³⁸⁰ *Id.*

³⁸¹ 16 U.S.C. § 1379(b)(1).

and management of the species that...is consistent with the purposes, policies, and goals of [the MMPA] and with international treaty obligations.”³⁸² To be meaningful, a tribal co-management bill focused on Alaska must go beyond the limited nature of Section 119 of the MMPA and provide for a broader range of management actions and decisions that can be shared with tribes or tribal organizations in Alaska.

A possible amendment to Title VIII of ANILCA provides an example and opportunity to go much further than the MMPA’s limited co-management provision. Title VIII could be amended in order to not just explicitly authorize co-management agreements but to compel their use by federal land agencies. We envision this as a corrective action by Congress in response to widespread dissatisfaction with implementation of Title VIII. As reviewed above, co-management aligns with the principles and purposes of Title VIII and Congress could once again use its constitutional authority to finally “fulfill the policies and purposes of [ANCSA]” and to do so using the bottom-up participatory approach it created in ANILCA.³⁸³

One key consideration is to ensure that the scope of potential co-management authority matches the purposes and objectives of Title VIII, which includes the full suite of land management actions and decisions that are typically analyzed in subsistence reviews pursuant to Section 810.³⁸⁴ The details of any potential amendment to Title VIII should emerge from tribal leadership and those subsistence users most impacted on the ground. But Title VIII provides the building blocks and an overall framework that could produce multiple variations of tribal co-management.

Future legislation could also be framed in the context of cooperative federalism so as to ensure that Alaska Native Tribes are provided the same opportunities as are State governments in the management of federal lands. Our discussion of Good Neighbor Authority (GNA), in Part III(a)(ii) above provides an example. One short provision in a Farm Bill designed to “share stewardship” and “co-manage fire risk” has quickly altered State relationships with the USFS and BLM. And unlike the discourse over tribal co-management, this authority became law largely without focus on legal issues pertaining to

³⁸² 16 U.S.C. § 1379(b)(1)(A).

³⁸³ 16 U.S.C. §3111(4).

³⁸⁴ 16 U.S.C. §3120.

delegation of authority and related matters. It was instead advanced as yet another step toward sharing management of resources and risks that transcend boundaries—the same logic that needs to apply to tribal co-management of federal public lands and resources.

VI. CONCLUSION

Of all the historic events of 2020, that year also marked two significant fifty-year anniversaries: President Nixon's Special Message to Congress on Indian Affairs and the Public Land Law Review Commission's comprehensive report on the nation's public lands.³⁸⁵ While the President's message in 1970 marked a major turning point in federal Indian law and policy, the latter spoke nothing about the rights, interests and role of Indian tribes in the management of federal public lands. It was as if tribes and tribal connections to these lands and resources did not exist or were erased altogether. There were, indeed, principles of federal Indian law in 1970, but the Commission's approach was to divorce these principles from the law and management of federal public lands.

Three other important anniversaries happened over the course of our research for this project. First, 2020 also marked the forty-year anniversary of ANILCA while ANCSA turned 50 in December 2021. Like the Public Land Law Review Commission's Report, the framework established by these laws and, in particular, ANILCA and its regulations, once again disassociated the federal government's legal obligations and promises to Alaska Native Tribes from the actual management of federal public lands and resources. The result is that Title VIII of ANILCA has done more to generate conflict, confusion, and litigation than to fulfill the "the policies and purposes of [ANCSA]" and to protect Native ways of life and existence across federal public lands.³⁸⁶

There are many roots to this problem. From a legal perspective, one of the deepest stems from federal land agencies separating their land management activities from their interactions and obligations to Native Alaskan Tribes, viewing the former as a priority and the latter as a burden or only ancillary to their mission. As we concluded in *Bridges*, federal public land agencies must be compelled—through

³⁸⁵See Mills & Nie, *Bridges*, *supra* note 5, at 52–53, 182.

³⁸⁶16 U.S.C. §3111(4).

statute or Executive action—to no longer treat their obligations to tribes and to federal public lands as separate endeavors and to work with tribes on a co-management basis.³⁸⁷

In this regard, perhaps the most significant, and informative, anniversary of all happened in May, 2021. Sixty years prior, in May 1961, the so-called “Barrow Duck-In” reached a crescendo and was a significant milestone for Alaskan Native dissent and civil disobedience. That uprising stemmed from another federal statute that entirely failed to consider and protect Native subsistence uses and traditional ways of life.³⁸⁸ The protest’s genesis was federal enforcement of the Migratory Bird Treaty Act (MBTA), which had its roots in the first migratory bird treaty of 1916 that was ratified without consideration of Alaska Native subsistence uses. Based on the MBTA, federal officials arrested residents of Utqiagvik (known as Barrow from 1901 to 2016) for harvesting birds out of season (between March 10 and September 1). The harvest closure period was the only time that birds were present in the area and the aggressive enforcement of the Act posed an existential threat to the people of Utqiagvik. A collective uprising ensued and 138 Utqiagvik residents risked federal prosecution by showing up before the game warden with unlawfully taken ducks in-hand, an organized move that forced the federal government to either arrest an entire community or to make changes in law and management.

Slowly, change did happen. In 1995, the MBTA was amended and the new Protocol between the U.S. and Canada created an exemption for “indigenous inhabitants” to take migratory birds and their eggs during the closed season.³⁸⁹ It also created a management body—the Alaska Migratory Bird Co-Management Council—to develop recommendations for the management of these subsistence hunts and to “ensure an effective and meaningful role for indigenous inhabitants in the conservation of migratory birds.”³⁹⁰

³⁸⁷Mills & Nie, *Bridges*, *supra* note 5, at 166-67.

³⁸⁸*See generally* MICHAEL BURWELL, U.S. DEP’T OF THE INTERIOR, “HUNGER KNOWS NO LAW”: SEMINAL NATIVE PROTEST AND THE BARROW DUCK-IN OF 1961 (2010), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=D7B50AA60A17DF1305548199CA7B718B?doi=10.1.1.495.7179&rep=rep1&type=pdf> [<https://perma.cc/C5SH-3JUJ>].

³⁸⁹1995 MBTA PROTOCOL, *supra* note 233, at viii, ix.

³⁹⁰*Id.* at x; *see also* 50 C.F.R. § 92.4 (2020) (“Co-management Council means the Alaska Migratory Bird Co-Management Council consisting of Alaska Native, Federal, and State of Alaska representatives as equals.”).

Viewed together, these anniversaries provide an opportunity to confront the past, to heal, and to learn from past mistakes and shortcomings.³⁹¹ They each constituted very different moments in time: one when tribes and native people were relegated to outsider status on traditional territories that became public lands, and one when, by virtue of Native leadership, co-management was compelled and instituted as a more just and logical way to steward shared resources.

Perhaps another significant moment in time is opening now. The Biden Administration has taken a number of Executive actions, some bold and some cautious, that may constitute an important shift in the management of federal public lands. Most significant in this regard is the “Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters” (Order No. 3403).³⁹² Framed in the context of “Building a New Era of Nation-to-Nation Engagement,” Order 3403 includes several of our recommended principles and approaches to tribal co-management on public lands. It begins by recognizing that tribal consultation and collaboration must be implemented *as components of* federal land management priorities, thus giving hope that it is possible to fully integrate foundational principles of Indian law into the management of public lands.³⁹³

In so doing, the Order directs bureaus and agencies within the Departments of Interior and Agriculture to “[m]ake agreements with Indian Tribes to collaborate in the *co-stewardship* of Federal lands and waters under the Departments’ jurisdiction, including for wildlife and its habitat.”³⁹⁴ Moreover, these agreements are to be based on a set of principles that we believe are essential for co-management to take root and flourish.³⁹⁵ As noted above, the Order also envisions the use of employee performance review standards and using land planning processes as a way to promote co-stewardship of public lands, two strategies that we see as essential in moving forward.³⁹⁶

³⁹¹In 2018, the Alaska Department of Fish and Game and the USFWS offered formal apologies for their institution’s roles in enforcing “shortsighted” harvest regulations and for causing “long term and unnecessary pain.” Letter from Gregory E. Siekaniec, U.S. Fish and Wildlife Serv. and Samuel R. Cotton, Alaska Dep’t of Fish and Game, to Indigenous People of Alaska (Sept. 13, 2018).

³⁹²U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., *supra* note 6..

³⁹³*Id.* at 1.

³⁹⁴*Id.* at 2.

³⁹⁵*Id.* at 3.

³⁹⁶*Id.* at 4.

Skepticism is of course warranted, as Orders may only be symbolic without vigilant oversight and follow-through and concrete measures to insulate them from shifting political winds. And to be sure, legislation remains the preferred channel for making the most substantive, sustainable, and long-lasting reforms that are necessary, either through system-wide or place-based laws.³⁹⁷ But the recent actions of the current Administration nonetheless reveal a door to a new future. And perhaps now, with an unprecedented number of tribal leaders inside the White House and Department of Interior, this cracked doorway can be thrown open—an opening to be used by tribes that are already leading toward a “New Era of Nation-to-Nation engagement.”

Included in the President’s suite of actions pertaining to tribes and public lands includes the Department of Agriculture and Interior hosting consultations on federal subsistence policy in Alaska, with recommendations to be finalized soon thereafter.³⁹⁸ The directive to begin that process sets forth the following course of action:

In implementing the joint Secretarial Order on Tribal Homelands, and building upon the Southeast Alaska Sustainability Strategy, the Departments of Agriculture and the Interior will launch a series of listening sessions in Alaska to understand how federal land managers can better partner with local tribal communities and Alaska Native Corporations on issues of access, subsistence use, and co-stewardship. The Department will aim to complete listening sessions and review within nine months after the White House Tribal Nations Summit.³⁹⁹

Time will tell whether this process will result in serious listening and learning from Alaska Native Tribes and tribal organizations. Like the 138 residents of Utqiagvik who ushered in a new approach that secured their right to continue their harvest of ducks, true and meaningful reform will be driven and led by Alaska Native voices, priorities, and interests. If recent Orders, statements, and indications from the federal government are sincere, the potential for such meaningful listening and learning is real and the time for an entirely new era

³⁹⁷See *Mills & Nie, Bridges*, *supra* note 5, at 174–81.

³⁹⁸WHITE HOUSE, DOMESTIC POL’Y COUNCIL, THE WHITE HOUSE TRIBAL NATIONS SUMMIT PROGRESS REPORT 14 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/11/WH-Tribal-Nations-Summit-Progress-Report.pdf> [<https://perma.cc/XEN9-LVR8>].

³⁹⁹*Id.* at 15.

of tribal-federal co-management of federal lands and resources in
Alaska is now.