

Shared Stewardship

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It is time we listen to what the Indians have been telling us.¹

Watch the tribes: they are going to lead us.²

As improper land use, climate change, and egregious natural resource consumption have increased across the United States, so too have the threats facing the country's unique national environmental treasures. Such treasures include landscapes and geological landmarks with significant archeological, environmental, and cultural importance. The responsibility of managing and safeguarding these areas belongs to states and federal agencies. Yet states and the federal government generally lack crucial knowledge related to effective management of these areas. Many tribes and indigenous peoples possess traditional ecological knowledge that would help effectively manage these lands. For generations, tribes have managed the majority of land now comprising the modern-day United States. As a result, tribal people developed cultural ties and traditional ecological knowledge regarding managing public land that was originally on or next to their ancestral homeland. Today, tribes' environmental ethics, traditional ecological knowledge, and experience managing natural resources make them uniquely qualified to assume larger responsibilities in stewarding public lands. Consequently, federal agencies and state officials must work with and look to tribes for guidance to effectively manage the country's natural resources. Even

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1. *Statement of Secretary of the Interior Walter J. Hickel on President Nixon's Special Message to Congress on Indians*, U.S. DEPT. OF THE INTERIOR (July 8, 1970) <https://www.bia.gov/as-ia/opa/online-press-release/statement-secretary-interior-walter-j-hickel-president-nixons-special>

2. Nicola Jones, *How Native Tribes are Taking the Lead on Planning for Climate Change*, YALE ENV'T 360 (Feb. 11, 2020), <https://e360.yale.edu/features/how-native-tribes-are-taking-the-lead-on-planning-for-climate-change> (quoting Don Sampson, Umatilla Tribe member and head of the climate change project for the Affiliated Tribes of Northwest Indians).

when a region lacks a direct modern-day tribal presence, stewardship and conservation activities would benefit from the traditional ecological knowledge tribes gained while spending centuries stewarding the land. The benefits stemming from present-day tribal co-stewardship efforts in Bears Ears and potential future efforts for the Great Salt Lake exemplify how shared stewardship between tribes and managing government agencies offers a path toward creating long-lasting protections for sacred tribal land and the nation's environmental treasures. Ultimately, the shared stewardship between tribes, states, and the federal government will lead to better management of national treasures and, as a result, should be encouraged at every opportunity.

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INTRODUCTION

An “Environmental Nuclear Bomb”—that is how a June 8, 2022 article in the *New York Times* referred to the peril facing the Great Salt Lake.³ Through the combined impacts of climate change and increasing uses of water in the Wasatch region, the Great Salt Lake, which has already shrunk dramatically, is set to shrink to catastrophic levels.⁴ The local economy will suffer because of a loss of various industries connected to the lake and invaluable ecosystems will die.⁵ As the lakebed dries, toxic dust clouds will plague the region when winds whip up dirt from the ground.⁶ People, plants, and animals will die, which is why the threat facing the Great Salt Lake is an “environmental nuclear bomb.”⁷ Despite the dire consequences, state and federal officials have failed so far to reach a solution to defuse the ticking bomb. The failure may be because these officials are missing some of the best information available to resource managers—tribal traditional ecological knowledge.

Tribal spheres of influence are not limited to Indian Country,⁸ as many tribes and Natives maintain a close connection to ancestral homelands outside federally recognized Indian Country.⁹ Tribes are increasingly interested in joining other sovereigns, such as states and the federal government, to manage land and resources outside of Indian Country.¹⁰ This tribal interest can extend to lands not currently near their tribal territories because of the extensive nature of tribal traditional homelands.¹¹ Because many tribes were removed from their

3. Christopher Flavelle, *As the Great Salt Lake Dries Up, Utah Faces an ‘Environmental Nuclear Bomb’*, N.Y. TIMES, <https://www.nytimes.com/2022/06/07/climate/salt-lake-city-climate-disaster.html> (last updated June 22, 2023).

4. BENJAMIN W. ABBOTT ET AL., EMERGENCY MEASURES NEEDED TO RESCUE GREAT SALT LAKE FROM ONGOING COLLAPSE 5–8 (2023) [hereinafter *GSL EXPERT REPORT*].

5. *Id.* at 8–10.

6. Flavelle, *supra* note 3.

7. *Id.*

8. 18 U.S.C. § 1151 defines “Indian country” as:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

9. MARIEL J. MURRAY, R47563, CONG. RSCH. SERV., TRIBAL CO-MANAGEMENT OF FEDERAL LANDS: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 1 (2023); *Hearing on History of Federal Lands and the Development of Tribal Co-Management Before H. Comm. on Natural Res.*, 117th Cong. 2 (2022) (statement of Kevin K. Washburn, Dean, University of Iowa College of Law).

Kevin Washburn, *Congressional Testimony on Tribal Co-Management of Federal Public Lands*, U. IOWA LEGAL STUD. RSCH. PAPER SERIES 2022-07, 7 (2022) [hereinafter *Washburn, Congressional Testimony*] (“Today, the vast majority of federal public land is located in the western United States, and tens of millions of acres of this land can be traced to specific land cessions from tribes pursuant to Senate-ratified treaties, or President executive orders, that were later violated.”).

10. Washburn, *Congressional Testimony*, *supra* note 9, at 2.

11. *Id.* at 3.

traditional homelands by the federal government,¹² tribes may continue to have knowledge about and interest in lands not necessarily contiguous with current land holdings. In regard to federal public lands, “[t]he historical record shows that all of the current federal public land base was once tribal lands, and much of it can be traced to specific land cessions from tribes, often pursuant to senate-ratified treaties or presidential executive orders.”¹³

Increasingly, scholars and indigenous people are calling to return tribes to a more involved role in managing public lands.¹⁴ Such calls are supported by evidence suggesting that “in some circumstances, tribal governments manage public lands better than federal agencies.”¹⁵ This is especially true with ecological management, a role tribes have historically performed successfully, suggesting that all sovereigns can benefit from tribal co-stewardship¹⁶ of national treasures.¹⁷ This Article uses the terms “co-stewardship” and “shared stewardship” interchangeably to have a larger scope than the term “co-management.” Tribal co-stewardship refers to tribal interests in being involved in the management of areas of tribal significance while not necessarily taking on the management of the resource. It “includes ‘expanding scope and scale of Tribal involvement in agency work, planning, and decision making, as well as Tribal self-determination.’”¹⁸

Today, tribes are well-situated to assume greater roles in the stewardship of public lands because of their environmental ethics, traditional ecological knowledge, and experience managing tribal lands.¹⁹ Historically, tribes managed the majority of what is now the United States, and as a result, they also possess land and ecosystem expertise.²⁰ Further, tribes possess a long record of successfully managing federal contracts with the Bureau of Indian Affairs (BIA) and Indian Health Services (IHS).²¹ Ultimately, “[t]ribes can make the case that they can perform functions on some federal lands more competently than the federal land agencies themselves due to the comparative tribal advantages on federal public lands that lie in and adjacent to their aboriginal homelands.”²² Further, from a practical perspective, other governments may want to involve tribes in the co-stewardship of national treasures because “a larger tribal role in

12. See, e.g., Library of Congress, *Removing Native Americans from their Land*, available at: [Removing Native Americans from their Land | Native American | Immigration and Relocation in U.S. History | Classroom Materials at the Library of Congress | Library of Congress](#) (last visited Oct. 4, 2024).

13. Kevin Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 265 (2022) [hereinafter Washburn, *Facilitating Tribal Co-Management*].

14. *Id.* at 265–66.

15. *Id.* at 287.

16. See MURRAY, *supra* note 9, at 4.

17. *Id.* (laying out a comparable definition of tribal co-management as referring “to the sharing of management power and responsibility between the federal government and nonfederal entities, typically through a formal agreement”) (internal citation omitted).

18. *Id.* at 8.

19. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 266.

20. *Id.* at 267.

21. *Id.* at 268.

22. *Id.* at 269.

land management may lessen conflicts with tribes around matters related to sacred sites and sacred places on public lands.”²³ Notably, tribal co-stewardship does not supplant the federal and state roles because “[b]y winning the right to manage wildlife themselves, moreover, tribes have not supplanted state and federal management, they have augmented them.”²⁴

Traditionally, rather than tribes, states have been privileged in co-stewardship activities.²⁵ However, the time has come to better incorporate tribes into such activities and give tribes at least the same rights and responsibilities in co-stewardship as held by states²⁶ and private entities.²⁷ As Mills and Nie explain, “the future of public lands management will be defined by the law’s ability to justly recognize and reconcile the historical and legal context of indigenous dispossession through a new era of reform that thoughtfully and meaningfully restores tribal management to federal public lands.”²⁸

Including tribes in co-stewardship of these natural resources is critical to avoid their “erasure” from public lands,²⁹ as “[t]he historical exclusion of indigenous people and Native nations from lands that they traditionally occupied enabled the acquisition, disposition, and management of those areas by the federal government.”³⁰ Accordingly, there is a strong moral claim for the inclusion of tribes in stewardship activities, as well as arguments that tribes can be very effective stewards as a result of their traditional ecological knowledge.³¹ As Mills and Nie state, “enhancing opportunities for tribal co-management of federal public lands is about justice, reconciliation, healing, and sharing.”³²

While the direct benefits that would flow from an expanded tribal role would serve our shared interests by better protecting our public lands, tribal co-stewardship also offers a path to a more equitable future that promotes and sustains the core values of justice, reconciliation, healing and sharing for *all* Americans.³³

23. *Id.* at 283.

24. Bethany R. Berger, *Intertribal: The Unheralded Element in Indigenous Wildlife Sovereignty*, 48 HARV. ENV'T'L L. REV. 1, 37 (2023).

25. See generally Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 74 (2020).

26. *Id.* at 80, 165 (“In recent years, state governments have received even greater authority to ‘share stewardship’ and ‘co-manage fire risk’ on public lands with the USFS and BLM.”) (internal citation omitted).

27. See *id.* at 158–59.

28. *Id.* at 54.

29. Deep ancestral and traditional connections tie many Native Nations to the federal government’s public lands. The removal of these lands from indigenous control, their acquisition by the federal government, and the federal government’s approach to their management are largely premised upon the erasure or marginalization of those connections.

Id. [27]

30. *Id.* at 84.

31. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 289.

32. Mills & Nie, *supra* note 25, at 60.

33. *Id.*

Therefore, federal agencies should be compelled to work with tribes to manage natural resources, especially those of significant value to tribes and the country.³⁴ Based on moral and legal theories, such as the federal trust responsibility, tribal treaties, the requirement for tribal consultations, and tribal co-management provisions, the federal government should “shift the reactionary tribal consultation paradigm to a more proactive and sovereignty-affirming model in which Indian tribes envision their own approach and plans for managing their rights and interests on federal lands.”³⁵ This Article thus challenges the trend of existing public land laws to exclude tribes from participating in the co-stewardship of national lands.³⁶ This Article examines the existing paradigm and offers creative solutions that will create a path to tribal co-stewardship.³⁷

Historically, opposition to tribal co-stewardship exists,³⁸ but as this Article demonstrates, such opposition is outweighed by the tremendous benefits tribes bring to such stewardship. Questions and concerns about tribal co-stewardship persist, but commentators have recommended in response that:

co-management is done right so that it establishes a positive precedent that all parties want replicated and modified to fit unique places. Learn from failures, practice innovation and make improvements over time. From a conservation standpoint, co-management builds on the measurable successes of indigenous-led conservation in the U.S. and internationally.³⁹

34. *Id.* at 54.

35. *Id.* at 56.

36. The lack of any explicit statutory, public land law basis promoting federal agency engagement with Native Nations has contributed to the continuing exclusion of tribes from public lands; albeit a formal, legal exclusion from exercising meaningful and independent authority to access, protect, or manage those lands rather than their historic actual, physical exclusion. Rooted as they are in the removal of the original inhabitants or what would become federal public lands, these traditional approaches to public lands management continue to marginalize or minimize tribal interests in those lands. While the assertion of tribal treaty rights and the modern tribal sovereignty movement have begun to reshape those approaches, they remain mostly centered on federal policies borne of an era in which Native Nations were erased or overlooked.

Id. at 88 (citations omitted).

37. *Id.* (“The bottom line is that tribal engagement with the management of federal public lands must proceed through avenues outside of traditional public land law, many of which are necessarily reaction to the prioritization of other federal interests already imbedded in these laws.”).

38. See, e.g., Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 315 (discussing obstacles that have sprung up to prevent tribal co-management of federal resources).

39. Mills & Nie, *supra* note 25, at 69 (explaining some of the questions and concerns raised regarding co-stewardship).

The question asked is what piece of public land might not be subject to this approach in the future? Similar concerns are often raised in opposing efforts to protect native sacred sites on public lands, with some interests fearing a sort of tribal land-grab or “religious servitude” on public lands as a result. And the apprehension is most palpable when debating those rare instances when public lands are restored into tribal or trust ownership and this explains why so many of those transfer statutes included a debate over the precedent established.

Id.

As this Article will discuss, the Biden Administration has taken steps to promote increasing tribal co-stewardship,⁴⁰ which is to be applauded. However, President Biden will not be president of the United States forever. Accordingly, this Article provides insights into how tribal co-stewardship might be promoted even in the absence of a supportive executive.

This Article begins by explaining why tribes are particularly effective co-stewards. Then, it delves into a discussion of how the existing legal scheme is a helpful backdrop upon which advocates can build arguments for tribal co-stewardship. The Article then moves to a discussion of two case studies exemplifying the benefits of tribal co-stewardship both in the present and potentially in the future—Bears Ears and the Great Salt Lake. The Article proposes a path forward for tribal stewardship even when a direct tribal “implication” may not be present but where stewardship activities would benefit from the inclusion of tribes, such as in the Great Salt Lake case study presented below. In terms of the “Federal-Tribal Co-management Spectrum,” this Article focuses on the value and importance of tribal consultation and incorporation into specific federal and state land management actions.⁴¹ This Article also identifies the value of tribal co-stewardship beyond direct “tribal implications.”⁴² In this regard, the Article builds on the existing (although nascent) scholarship in innovative and impactful ways.

I. TRIBES AS EFFECTIVE CO-STEWARDS⁴³

Tribal inclusion in efforts to steward national treasures brings many benefits, in addition to such collaboration being necessary to affirm the sovereign-to-sovereign relationship between tribes and other governments. Tribes can be very successful at accomplishing conservation goals, and they may be able to do so less expensively than other sovereigns.⁴⁴ This Part briefly highlights how a couple of factors—tribal commitment to environmental preservation and traditional ecological knowledge—contribute to tribes’ successful natural resource stewardship.

40. MURRAY, *supra* note 9, at 7 (explaining that, under the Biden Administration, the USDA and Department of Interior have encouraged co-stewardship).

41. *Id.* at 5 (detailing the Federal-Tribal Co-management Spectrum, a spectrum involving “different types of co-management activities, ranging from less to more tribal involvement”).

42. *Id.* at 6 (explaining that many federal agencies to date have developed guideline for consultation when there are “tribal implications”).

43. Portions of this Part have been taken from another article written by one of the authors. See Elizabeth Ann Kronk Warner & Joseph P. Brewer, *Protecting Indigenous Knowledge in the Age of Climate Change*, 27 GEO. INT’L ENV’T L. REV. 585 (2015).

44. MURRAY, *supra* note 9, at 28–29; *but c.f., id.* (“On the other hand, federal land management agencies may have economies of scale that reduce its direct and indirect costs relative to tribes. In addition, the federal government may not necessarily reduce its costs by entering into ISDEAA agreements with tribes.”).

A. *Many Tribes Possess a Deep Commitment to Environmental Preservation*

First, tribes are successful stewards because many possess a deep commitment to the environment and places of traditional significance.⁴⁵ Tribal governments may be specifically motivated by a close connection to their land and environment as “[m]any tribes maintain ongoing physical, cultural, spiritual, and economic relationships with their ancestral homelands.”⁴⁶ For example, the land and its environment can have special meaning for individual Indians. As Professor Rebecca Tsosie explains, “American Indian tribal religions . . . are located ‘spatially,’ often around the natural features of a sacred universe. . . . Thus, while indigenous people often do not care when the particular event of significance in their religious tradition occurred, they care very much about *where* it occurred.”⁴⁷

Professor Tsosie gives the example of the Tewa of New Mexico, who view their world as being bound by four sacred mountains, which are related to their origin myth.⁴⁸ Professor Frank Pommersheim agrees that land plays an important spiritual role for many tribes and individual Indians, as he explains that land “is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.”⁴⁹ For many tribes and individual Indians, this strong connection to a specific place translates into an equally strong desire to promote sustainability.⁵⁰ Because many tribes and Indians view their relationship with nature and future generations as “holistic, cyclical, and permanent,” a strong sense and promotion of sustainability is the natural result.⁵¹

45. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 265.

46. MURRAY, *supra* note 9, at 1.

47. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 282–83 (1996). Professor Tsosie goes on to explain,

Under the Native American perception of reality, which is ‘bound up in spatial references,’ specific natural areas are imbued with complex significance. Thus, a tribe may speak of its ‘origin place’ – such as a river, mountain, plateau, or valley – as a central and defining feature of the tribal religion. The tribe may also depend on a number of ‘sacred’ places for practice of religious activities. These spatial references orient the people and place them within the land; they give a sense of history, rootedness, and belonging.

Id. at 283. She ultimately concludes that “[t]he connections of the Indian people to their reservation lands are deeply-rooted and complex. Tribal governments clearly perceive that the future of the people is linked to the land; land is not fungible for Indian people, not is it merely of instrumental value.” *Id.* at 331–32.

48. *Id.*

49. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

50. See, e.g., Tsosie, *supra* note 47, at 287 (“Many contemporary indigenous peoples thus advocate a Native concept of sustainability that ‘means ensuring the survival of the people, the land and the resources for seven generations.’”).

51. *Id.* at 286–87.

B. Tribes' Traditional Ecological Knowledge Can Benefit the Stewardship of Natural Resources and Land

Second, as co-stewards of national treasures, tribes have much to offer other sovereigns engaged in stewardship of such areas, such as traditional ecological knowledge. As the federal government and specific members of Congress⁵² have already recognized, such knowledge is incredibly useful.⁵³ Amongst “the highest levels of the Federal Government,” efforts have recently been taken “to highlight the importance of Indigenous Knowledge to inform Federal decision making, improve outcomes, and foster collaboration with Tribal Nations.”⁵⁴ The federal government calls on agencies and departments to maintain relationships with tribes and incorporate traditional ecological knowledge into “federal research, policies, and decision making.”⁵⁵ Incorporating traditional ecological knowledge into decision making can prove mutually beneficial for both tribes and other sovereigns, like the federal government.⁵⁶ An example of the benefits of traditional ecological knowledge is as follows:

[M]any regulatory impact analyses of Federal rules include an analysis of the rule’s distributional effects and/or an environmental justice assessment. These analyses discuss how benefits or adverse impacts of the Federal action affect different communities. Indigenous Knowledge may be relevant to include in such analyses. For example, including Indigenous Knowledge may more accurately capture the impact of a rule on culturally or ecologically significant land.⁵⁷

Beyond the inherent value of traditional ecological knowledge, such knowledge can be the best available science⁵⁸ and so “can” be incorporated into federal decision-making under both the Foundations for Evidence-Based Policymaking Act of 2018 and the Information Quality Act.⁵⁹ Further, the Department of Interior indicates that it will use the best available science to help “conserve, protect, manage, and restore natural and cultural resources in the face of climate change and other stressors.”⁶⁰

It is helpful to understand the contours and meaning of the term traditional knowledge:

52. MURRAY, *supra* note 9, at 19.

53. Memorandum from Arati Prabhakar, Dir., Office of Science and Technology Policy, & Brenda Mallory, Chair, Council on Environmental Quality, to Heads of Federal Departments and Agencies, Guidance for Federal Departments and Agencies on Indigenous Knowledge 1 (Nov. 30, 2022).

54. *Id.* at 3.

55. *Id.* at 1–2.

56. See MURRAY, *supra* note 9 (citing the report’s Summary section).

57. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 19.

58. Beyond the federal government’s recognition of traditional ecological knowledge as the best available science, see note 55, traditional ecological knowledge is science as it is knowledge that has been formed over generations of observation, and, on occasion, experiments.

59. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 20.

60. U.S. DEP’T OF THE INTERIOR FY 2022–23 ANNUAL PERFORMANCE PLAN 22 (2023) [hereinafter 2022–23 ANNUAL PERFORMANCE PLAN].

Traditional Knowledge is the knowledge that is developed over time and used to sustain a community. [Traditional Knowledge] can consist of experience, culture, environment, local resources, animal knowledge, or plant resources. Communities expand their [Traditional Knowledge] over many years and develop and research new innovative practices to encourage growth in farming and medicine. [It] is generally considered part of the collective ownership of the community and is transmitted across generations through traditional stories⁶¹

The term itself—*traditional knowledge*—invokes complex histories and relationships with a particular landscape involving both human and non-human entities.⁶² Tribes' historical and spiritual influence in the community is what makes the knowledge traditional.⁶³ Further, the benefits of tribal traditional knowledge stem from the manner in which this knowledge was acquired and the usefulness of the information.⁶⁴ Place-based traditional knowledge derives from observational experiences in a landscape. In indigenous communities, observation over time is the vanguard of traditional knowledge, and the importance of understanding environmental surroundings is emphasized.⁶⁵ The surroundings or natural environment provide for the people, therefore establishing a spiritual connection to the world is essential.⁶⁶ This approach is different from modern science, which aims to test and control the world.⁶⁷ As Vine Deloria, Jr. explains, “the old Indians . . . were interested in finding the proper moral and ethical road upon which humans should walk. All knowledge, if it is to be useful, was directed toward that goal.”⁶⁸

Traditional ecological knowledge is uniquely specific to place as it is tied to the intergenerational collective memory of indigenous people.⁶⁹ Observational experiences passed from one generation to the next with a profound intention to be a part of, not apart from, the ever-changing universe.

61. Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law*, 21 MICH. ST. INT'L L. REV. 751, 773 (2013).

62. See, e.g., CAROLINE BROWN ET AL., TRADITIONAL ECOLOGICAL KNOWLEDGE AND HARVEST SURVEY OF NONSALMON FISH IN THE MIDDLE YUKON RIVER REGION, ALASKA, 2005-2008 (Alaska Dep't Fish & Game 2010).

63. See, e.g., Angayuqaq Oscar Kawagley & Ray Barnhardt, *Education Indigenous to Place: Western Science Meets Native Reality*, ALASKA NATIVE KNOWLEDGE NETWORK (Mar. 26, 2014), <http://www.ankn.uaf.edu/curriculum/Articles/Barnhardtraditionalknowledgeawagley/EIP.html>.

64. See *id.*

65. See, e.g., Patricia Cochran et al., *Indigenous frameworks for observing and responding to climate change in Alaska*, 120 CLIMATIC CHANGE 557 (2013); Fikret Berkes, *Traditional Ecological Knowledge in Perspective*, in TRADITIONAL ECOLOGICAL KNOWLEDGE: CONCEPTS AND CASES 1 (Julian T. Inglis ed., 1993).

66. See Michael Davis, *Bridging the Gap or Crossing the Bridge? Indigenous Knowledge and the Language of Law and Policy*, in BRIDGING SCALES AND KNOWLEDGE SYSTEMS: CONCEPTS AND APPLICATIONS IN ECOSYSTEM ASSESSMENT (Walter V. Reid et al. eds., 2006); Vine Deloria Jr., *If You Think About it You Will See That It Is True*, in SPIRIT AND REASON (1999).

67. See generally Davis, *supra* note 66; Deloria Jr., *supra* note 66.

68. Deloria Jr., *supra* note 66, at 43.

69. See Lynn M. Baker & Mutitjulu Community, *Comparing Two Views of Landscape: Aboriginal Traditional Ecological Knowledge and Modern Scientific Knowledge*, 14 RANGELAND J. 174, 185–86 (1992).

Further, traditional ecological knowledge does not require validation from Western science.

“Indigenous Knowledge and other forms of knowledge do not depend on each other for validation, and each system can support the insights of the other . . . Indigenous Knowledge can provide accurate information, valuable insights, and effective practices that complement practices and knowledge derived from other approaches.”⁷⁰

To better understand the value of such knowledge, it is helpful to consider an example of its effective application. For instance, traditional ecological knowledge can enhance and provide a foundation for effective fire suppression. One method, bridging fire, is basically a prescribed burn between two natural water-based landscapes (i.e., a wetland and a river that will stifle a larger potentially naturally occurring fire) from moving forward and burning undesired locations, like a village.⁷¹ By incorporating indigenous methodologies into the management of the forests, forest managers can cut off larger fires from communities, establishing a bridge that fire will follow between landscapes as opposed to burning the community, and, in turn, reducing fire frequency and fuel load, and therefore suppressing fire.⁷²

The idea of fire suppression is an old practice that indigenous peoples⁷³ have been using for millennia. Conversely, in the United States, the management of reducing fuel loads by the National Park Service has been inconsistent due in large part to the Park Service’s understanding of how fire, or prescribed burning, affects the ecosystem.⁷⁴ Unlike tribes, who have managed various forests for eons, the Park Service is relatively new to such management and lacks these generations of observations that tribal communities possess. On the other hand, Omer S. Stewart has shown that indigenous people in North America have been using fire as a management tool with accuracy for generations.⁷⁵ Since the

70. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 4.

71. Elizabeth Ann Kronk Warner & Joseph P. Brewer, *Protecting Indigenous Knowledge in the Age of Climate Change*, 27 GEO. INT’L ENV’T L. REV. 585 (2015).

72. *Id.*

73. The term “indigenous peoples” here is used in the same context as Professor S. James Anaya uses it. He explains that:

The rubric of indigenous peoples includes the diverse Indian and aboriginal societies of the Western Hemisphere, the Inuit and Aleut of the Arctic, the aboriginal peoples of Australia, the Maori of Aotearoa (New Zealand), Native Hawaiians and other Pacific Islanders, the Sami of the European far North, and at least many of the tribal or culturally distinctive non-dominant people of Asia and Africa. They are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.

S. James Anaya, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 1 (2009).

74. David Parsons et al., *Natural Fire Management in National Parks*, 10 ENV’T MGMT. 20, 20–22 (1986).

75. See generally OMER STEWART, FORGOTTEN FIRES: NATIVE AMERICANS AND THE TRANSIENT WILDERNESS (1908).

beginning, Indigenous peoples have been using fire not only to manage landscapes but ecosystems as a whole.⁷⁶

Fire suppression is not the only example where traditional ecological knowledge has proven valuable.

The Tulalip tribes of Washington state are relocating nuisance beavers from urban areas back to traditional watersheds to help lower river temperatures and aid salmon populations; they are also redirecting agricultural runoff for electricity generation. The Jamestown S’Klallam tribe in Washington is removing invasive butterfly bushes from the banks of the Dugress River to help protect its salmon. The Confederated Salish and Kootenai Tribes of Montana are gathering and planting seedlings of the whitebark pine that are more resistant to warming-related diseases such as blister rust. Alaskan tribes are using microscopy to identify harmful algae blooms spurred by warming waters.⁷⁷

Beyond improving land management in the immediate context, incorporating traditional ecological knowledge also helps to promote tribal sovereignty. Incorporation of such knowledge “results in the benefit of generations of applied knowledge and, through the harmonizing of tribal self-determination and public lands management and conservation, the potential for reckoning with—and reconciliation of—the ‘dark side of our conservation history.’”⁷⁸ Tribal sovereignty, in turn, buttresses strong tribal governments, which are valuable laboratories of innovation.⁷⁹ Innovation is needed to help solve environmental challenges facing modern society.

Related to the value of traditional ecological knowledge, just as tribal communities develop traditional ecological knowledge over generations, these communities “also tend to think many generations ahead when planning how to utilize resources. . . .”⁸⁰ This intergenerational approach to the management of resources allows for overall better resource management, as tribes are not constrained by the comparatively short-term thinking of the federal government, which tends to reflect the length of political terms.⁸¹

Because of the value of traditional ecological knowledge (as well as the sovereign-to-sovereign relationship between tribes and the federal government), the federal government has called upon federal agencies and departments to partner with tribes so that traditional ecological knowledge is appropriately applied.⁸² Inter-sovereign collaboration in stewarding resources is not only beneficial for the resource being managed but also enhances existing traditional

76. See generally *id.*

77. Jones, *supra* note 2.

78. Mills & Nie, *supra* note 25, at 181.

79. See generally Elizabeth Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857 (2015).

80. Jones, *supra* note 2.

81. *Id.*

82. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 5.

ecological knowledge, as Native people direct the research being done and the questions asked, as well as additional financial resources being put into the use of such knowledge.⁸³ Of course, non-tribal partners must comply with tribal law and customs when seeking to obtain traditional ecological knowledge.⁸⁴

The federal government is not the only entity recognizing the effectiveness of tribal management of natural resources and land.

The UN Intergovernmental Panel on Climate Change's recent reports have acknowledged with "high confidence" that adaptation efforts benefit from the inclusion of local and indigenous knowledge. "One of the things that comes across really clearly is the fact that indigenous peoples are by far the most effective stewards of biodiversity," . . . "They do the best job." One study showed for example, that deforestation rates across the Amazon were two to three times lower in indigenous-held lands. . . . In Canada, the government funded an Indigenous Guardians program in 2017, recognizing that First Nations communities are well placed to serve as stewards of the land.⁸⁵

Tribes have consistently demonstrated an ability to implement their understanding and commitment to environmental preservation in ways that benefit conservation efforts and make them extremely effective stewards of natural resources. Given the exceptional value of traditional tribal ecological knowledge, it only makes sense to incorporate such knowledge broadly. Increasing state and federal governmental use of such knowledge only increases the likelihood that it is incorporated into "mainstream environmental policies."⁸⁶ In addition to the many moral and historic reasons for co-stewardship, Indian law provides further justification for increased cooperative stewardship efforts between tribes and federal and state governments.

II. LEGAL JUSTIFICATIONS UNDERLYING CO-STEWARDSHIP

More than the fact that tribes are successful co-stewards of national treasures, legal principles of federal Indian law justify tribal co-stewardship. Full comprehension of these legal principles is crucial to understanding the call for

83. Berger, *supra* note 24, at 38 ("Intertribal organizations also enhance the development of Indigenous science . . . Indigenous science is what emerges when Indigenous people direct the questions that science must address and influence the sources of information used to answer them. In part, intertribal organizations enhance Indigenous science simply by using their collective power to hire scientists not enmeshed in existing bureaucracies.").

84. See generally Kronk Warner & Brewer, *supra* note 43; see also Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep'ts & Agencies, *supra* note 53, at 8–9 (noting that federal agencies must work to develop positive relationships with tribes when engaging in this type of outreach). Perhaps because of the historic injustices the federal government has subjugated tribes to, federal agencies are under an obligation to gather this information but respect tribes when doing so: "Agencies should not initiate consultation with an assumption that the Tribal Nation will share its knowledge with the agency, but rather with an inclusive process that empowers the Tribal Nation to determine if, and how, Indigenous Knowledge may be included in the agency's process." *Id.*

85. Jones, *supra* note 2.

86. See MURRAY, *supra* note 9, at 20.

increased tribal co-stewardship as one carrying historical, moral, and legal weight.

To date, the Biden Administration has been supportive of co-stewardship. For example, Charles Sams, an enrolled citizen of the Confederated Tribes of the Umatilla Indian Reservation in Northeast Oregon, serves as the National Park Service Director.⁸⁷ Director Sams has expressed strong interest in increasing the presence of Native stewardship within the National Parks.⁸⁸ As a result, there is a great likelihood that the National Park Service will enter into shared stewardship opportunities with tribes during Director Sams' tenure.

But President Biden will not always be president. As a result, it is helpful to consider what legal principles support calls for increased shared stewardship so that future federal agencies are more likely to engage in shared stewardship. From a legal perspective, increased shared stewardship is desirable given the federal obligations to tribes, as “[t]he intergovernmental dimensions of the federal public lands management must more fully recognize the federal government’s fiduciary obligations to Indian tribes and include sovereign tribal governments.”⁸⁹ This Part therefore delves into those legal principles supporting increased tribal stewardship. These principles combine to make a powerful legal argument supporting increased tribal stewardship of national treasures of the United States that have connections to Indian Country. This powerful legal argument holds force regardless of who occupies the Oval Office.

Beyond the legal principles of federal Indian law explored in this Part, tribal co-stewardship is consistent with the goals of federal agencies. For example, the U.S. Department of the Interior (DOI) released its Annual Performance Plan,⁹⁰ and the first strategic goal, promoting well-being, equity, and justice for tribes, American Indians, Alaska Natives, Native Hawaiians, and insular communities, underscores the consistency between tribal co-stewardship and agency goals.⁹¹ Moving forward, DOI will work to “[b]uild stronger government-to-government relationships with federally recognized tribal governments and engage in opportunities that promote self-governance and self-determination through

87. *About Us: National Park Service Director*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/director.htm> (last visited Nov. 4, 2023).

88. See B. “‘Toastie’ Oaster, *From Dominance to Stewardship: Chuck Sams’ Indigenous Approach to the NPS*, HIGH COUNTRY NEWS (Nov. 1, 2022), <https://www.hcn.org/issues/54.11/indigenous-affairs-national-park-service-from-dominance-to-stewardship-chuck-sams-indigenous-approach-to-the-nps>.

89. Mills & Nie, *supra* note 25, at 55.

90. 2022-23 ANNUAL PERFORMANCE PLAN, *supra* note 60, at 14 (“The Annual Performance Plan is the Department’s performance plan for the next two fiscal years. The plan translates the priorities, goals, and objectives of the Biden-Harris Administration and Secretary Haaland. . .”).

91.

The Department is a multi-faceted agency, and part of the Department’s goals are to promote equity and justice for tribes, American Indians, Alaska Indians, Alaska Natives, Native Hawaiians, and insular communities. The scope of the Department’s responsibilities includes fulfilling fiduciary trust responsibilities, supporting tribal self-governance and self-determination, and strengthening the government-to-government relationship between the Federal Government and tribal nations. *Id.* at 15.

meaningful consultations and shared technical expertise with tribal communities.”⁹² Moreover, the Performance Plan specifically identifies protecting habitats and ecosystems through “appropriate co-stewardship and use of tribal and Indigenous traditional ecological knowledge.”⁹³ Similarly, tribes may be able to help the Department meet its goal for “people [to] find enjoyment and take pride in our lands, waters, and heritage,” given the value that traditional ecological knowledge brings to better stewarding natural resources and the great need for improved stewardship of some national treasures, such as the Great Salt Lake.

A. *Foundational Principles of Federal Indian Law*

Before delving into legal principles specific to shared stewardship, it is helpful to first begin with foundational legal principles describing tribal sovereignty and the duty of the federal government to act in the best interests of tribes. Because tribes are separate sovereigns, they possess the legal capacity to innovate in important ways that other sovereigns, such as the federal government, can learn from, benefitting all governments. Additionally, the trust responsibility that the federal government owes to tribes to act in their best interest supports tribes playing a larger role in the management of national treasures. These two legal principles provide a strong foundation for legal arguments calling for shared stewardship.

1. *Tribal Sovereignty and Treaties Preserving Tribal Rights*

Anytime the relationship between tribes and other sovereigns is examined, such examination must start with an understanding of tribal sovereignty. In the context of this Article, understanding tribal sovereignty is necessary to grasp tribes’ unique legal claims to co-stewardship that non-sovereign entities do not have.

Tribes have existed as separate sovereigns since before the founding of the United States,⁹⁴ and, as a result, exist outside of the federal or state legal systems. Tribes generally possess exclusive authority to regulate their citizens and territory, subject to limitations placed by Congress on tribes under federal law.⁹⁵

92. *Id.* at 16.

93. 2022-23 ANNUAL PERFORMANCE PLAN, *supra* note 60, at 51.

94. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton et al. eds., 2012) (“Most Indian tribes were independent, self-governing societies long before their contact with European Nations, although the degree and kind of organization varied widely among them.”). As evidence that the framers of the U.S. Constitution did not envision tribal governments as part of the federal structure, tribes and/or Indians are only mentioned in two places in the Constitution itself: (1) art. I, § 2, cl. 3 states that “Representatives and direct Taxes shall be apportioned among the several States . . . excluding Indians not taxed . . .”; and (2) art. I, § 8 cl. 3 states that “The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”

95. *See, e.g.,* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that, absent an explicit statement to the contrary, the laws of the state of Georgia did not apply within the Cherokee territory); *see generally* *Ex parte Kan-gi-shun-cha*, 109 U.S. 556 (1883) (holding that, absent a federal law to the contrary, the Tribe possessed the authority to apply criminal punishment within its territory); Fisher v.

Tribes may also have authority to regulate non-Natives under certain circumstances.⁹⁶ The genesis of tribal governmental authority lies within inherent tribal sovereignty.⁹⁷ While states also possess inherent sovereignty, tribal inherent sovereignty has a different origin and is not constrained by the U.S. Constitution to the same extent that states are constrained.⁹⁸ As most recently acknowledged by the Supreme Court in its 2023 decision in *Brackeen v. Haaland*,⁹⁹ tribal sovereignty persists today despite findings of direct and implicit divestiture over the years. As a result, “[w]hen engaging with Indigenous Knowledge holders who are members of Federally-recognized Tribes, Agencies should be mindful of Tribal sovereignty and recognize that Tribal leaders grant consent for the sharing of Indigenous Knowledge.”¹⁰⁰

In addition, many tribes have exercised their inherent sovereignty to enter into treaties with the federal government, the text of which may further support the argument for tribal inclusion in co-stewardship. Over 400 treaties exist between tribes and the federal government, and treaties play a significant role in determining the legal rights held by tribes.¹⁰¹ As explained in Cohen’s *Handbook of Federal Indian Law*, the seminal treatise on federal Indian law:

Many tribes view these treaties not only as vital sources of law for the federal government, but also as a significant repository of tribal law in

Dist. Ct. of Sixteenth Jud. Dist. of Montana, in & for Rosebud Cnty., 424 U.S. 382, 389 (1976) (per curiam) (holding that the Tribe possessed jurisdiction over an adoption matter involving solely tribal citizens and residents of the Tribe’s reservation that took place largely on the reservation). Admittedly, over the centuries, numerous federal laws have been enacted to curtail tribal sovereignty. However, a complete discussion of such limitations is beyond the scope of this Article. For our purposes, it is enough to acknowledge that tribal sovereignty persists absent federal limitation.

96. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (holding that tribes “may also retain inherent power to exercise civil authority over” non-Indians on non-Indian land located within tribal territory where the non-Indian in question has consented to regulation and when the non-Indian conduct threatens the health, safety and welfare of the tribal community).

97. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 94, § 4.01[1][a] (“Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as ‘distinct, independent political communities,’ qualified to exercise power of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.”) (citations omitted). Notably, in some instances, the federal government may delegate authority to tribes. As an example, the tribes as states provisions of the various federal environmental statutes delegate authority to tribes in such instances, as discussed below. However, tribal sovereignty pre-dates the formation of the federal government, and, accordingly, the ability of tribes to govern generally does not spring from federal authority but rather inherent tribal sovereignty.

98. Admittedly, tribal sovereignty is constrained by federal plenary power over tribes. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886). However, unless either Congress or the federal courts have acted to limit tribal sovereignty, the presumption is that tribal sovereignty persists. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 94, § 4.01[1][a].

99. 599 U.S. ___, No. 21-376 (2023) (slip op.).

100. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 10. Further, only tribal leaders can consent to the sharing of such knowledge. *Id.*

101. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 94, § 4.05[2]. Some believe the number of treaties between the federal government and tribes exceeds 500. Samuel Vargo, *With More Than 500 Treaties Already Broken, the Government Can Do Whatever It Wants, It Seems . . .*, DAILY KOS (Nov. 21, 2014), <https://www.dailykos.com/stories/2014/11/21/1345986/-With-more-than-500-treaties-already-broken-the-government-can-do-whatever-it-wants-it-seems>.

such areas as identification of tribal boundaries, environmental regulation, and the use and control of natural resources on the reservation. As organic documents made with the federal government, treaties constitute both bargained-for exchanges that are essentially contractual, and political compacts establishing relationships between sovereigns. In both capacities, treaties establish obligations binding on Indian nations and the federal government alike.¹⁰²

Treaties between tribes and the United States are grants of certain rights from the tribes to the United States, and the tribes retain any rights not relinquished in the treaty.¹⁰³ Tribes have often turned to their treaties with the United States as a way of protecting valuable rights. For example, the Swinomish Indian Tribal Community successfully asserted its treaty rights to fish, a “cultural keystone” for the Tribe, in the 1970s.¹⁰⁴ Given the importance of tribal treaty rights, the Biden Administration is working to ensure that treaty and reserved rights are protected.¹⁰⁵

Historically, federal courts have interpreted treaties in expansive and progressive ways for the time in which each decision was made. For example, in 1908, the U.S. Supreme Court determined that tribal treaties that made no explicit mention of water rights reserved water rights sufficient for the primary purposes of a reservation.¹⁰⁶

Today, the U.S. Supreme Court still gives substantial weight to tribal treaty rights. For example, in *Washington v. United States*,¹⁰⁷ the Court issued a single sentence opinion upholding the U.S. Court of Appeals for the Ninth Circuit’s opinion and affirmed tribal treaty rights.¹⁰⁸ At issue in the case was the interpretation of treaties entered into between tribes and the federal government in the nineteenth century.¹⁰⁹ The Tribes contended that Washington State had violated, and was continuing to violate, the treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds, prevented smolt (juvenile salmon) from moving downstream and out to sea, and prevented very young salmon from moving freely to seek food and escape predators.¹¹⁰ The equally divided Court affirmed the Ninth Circuit’s finding that culverts infringed on the Tribes’ treaty right to take fish at usual and accustomed places.¹¹¹

102. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 94, § 4.05[2].

103. *Id.* § 5.01[3]. Admittedly, the federal government does retain plenary authority and can abrogate the treaty. *Id.*

104. SWINOMISH INDIAN TRIBAL COMMUNITY, SWINOMISH CLIMATE CHANGE INITIATIVE CLIMATE ADAPTATION ACTION PLAN 10 (2010).

105. *See generally* DOMESTIC POLICY COUNCIL, THE WHITE HOUSE TRIBAL NATIONS SUMMIT PROGRESS REPORT (2022).

106. *Winters v. United States*, 207 U.S. 564, 567 (1908).

107. *Washington v. United States* [Washington II], 584 U.S. 837, 837 (2018).

108. “The judgment is affirmed by an equally divided Court.” *Id.* at 837.

109. *See United States v. Washington* [Washington I], 853 F.3d 946, 954–59 (9th Cir. 2017).

110. *Id.* at 954.

111. *Washington II*, 584 U.S. at 837; *see also Washington I*, 853 F.3d at 965–66 (discussing the underlying infringement the tribal rights).

Similarly, in 2019, the U.S. Supreme Court found in favor of a citizen of the Yakama Nation and upheld tribal treaty rights in *Washington State Department of Licensing v. Cougar Den, Inc.*¹¹² Notably, the Court upheld tribal treaty rights even when enforcement of these rights seemed counter to state interests, which is evidence of the legal strength of these claims. Cougar Den, Inc., a wholesale fuel importer owned by a citizen of the Yakama Nation and incorporated under Yakama law, challenged the application of taxes by the Washington State Department of Licensing.¹¹³ The State of Washington assessed Cougar Den a total of \$3.6 million in taxes, penalties, and licensing fees for failure to pay taxes on fuel it imported into the State of Washington on its way for sale on the Yakama Nation.¹¹⁴ However, the Court determined that the 1855 treaty between the Yakama Nation and the federal government pre-empted the application of the State of Washington's fuel tax to Cougar Den.¹¹⁵ Further, the Court explained that under the Indian canons of construction, treaty terms should be read how the Tribe would have understood them, that the Tribe understood the right to travel as including the right to travel with goods for sale, and that taxes would burden this right to travel.¹¹⁶ In a concurring opinion, Justice Gorsuch explained:

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.¹¹⁷

These decisions and others demonstrate the capacity for federal courts to interpret treaties in broad ways in order to protect tribal resources, which is consistent with the Indian canons of construction applicable to cases involving federal Indian law.¹¹⁸ Moreover, such decisions also demonstrate federal courts' willingness to demand specific action from the federal government on the basis of implicit treaty provisions. As a result, where treaty provisions may refer to a tribe's usufructuary rights to traditional lands or speak to the management

112. 139 S. Ct. 1000 (2019).

113. *Id.* at 1007.

114. *Id.*

115. *Id.* at 1011-13.

116. *See id.* at 1013-15.

117. *Id.* at 1021 (Gorsuch, J., concurring).

118. The Supreme Court has stated: "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law." The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; all ambiguities are to be resolved in favor of the Indians. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 94, § 2.02[1] (citations omitted).

authority of tribes, such language would provide powerful support for a tribe's claims to shared stewardship.

Tribal sovereignty persists today, and tribal treaty rights continue to bind parties. Accordingly, as separate sovereigns, tribal claims to tribal co-stewardship fundamentally differ from claims of non-sovereigns. The continued existence of tribal sovereignty means that the federal government must interact with tribes on a government-to-government basis, which is consistent with principles of shared stewardship. It also means that, as separate sovereigns, tribes have the capacity to innovate, developing stewardship principles that will benefit other sovereigns. Further, depending on the treaty language at issue, tribes may have related claims to co-stewardship based on treaty provisions—provisions that federal courts have consistently applied in progressive and expansive ways benefiting tribal interests.

2. *Federal Trust Responsibility*

In addition to inherent tribal sovereignty, the trust relationship between the federal government and federally recognized tribes may provide federally recognized tribes an additional legal claim to co-stewardship. Where present, the trust relationship requires the federal government to act in the best interests of tribes. Should the federal government breach this trust responsibility, tribes may bring a claim against the federal government, assuming certain criteria are met.

The federal trust relationship has historically been described as a “ward” relationship between the federal government and tribes.¹¹⁹ The Court first styled the relationship between tribes and the federal government as a wardship in *Worcester v. Georgia*.¹²⁰ In *United States v. Kagama*,¹²¹ the Court found that Congress has plenary power as a result of this wardship relationship.¹²² In *Lone Wolf v. Hitchcock*, the Court elaborated on Congress' power in Indian Country, explaining that Congress was obligated to act in good faith when exercising its plenary authority.¹²³

119. Peter S. Heinecke, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1025 (1993); but see Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 359 (2003) (arguing that “[t]hose who believe that the trust doctrine can be useful today in protecting tribal rights could begin purging the trust responsibility of paternalistic guardian-ward language.”). The author acknowledges that the federal trust relationship is premised on paternalistic notions, as indicated by the language used by the courts. However, because this Article seeks to explore the doctrine as applied by the courts, the Article uses the same terminology used by the courts. It is unlikely that advocates would need to explore the historical origins of the federal trust relationship, and, therefore, modern day advocates may be well-placed to pursue this “wardship” language in briefs to courts moving forward.

120. See 31 U.S. 515 (1832).

121. 118 U.S. 375 (1886).

122. *Id.* at 384-85.

123. 187 U.S. 553, 565-66 (1903). Overall, “[t]he Court has allowed Congress tremendous latitude in its dealings with Native Americans; nevertheless, once Congress has acted, the Court assumes Congress was acting as a guardian.” Heinecke, *supra* note 119, at 1030.

In *Seminole Nation v. United States*, the Court considered the responsibility of the executive branch under the trust responsibility.¹²⁴ The Court found that there is a “distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people”¹²⁵ and that the executive branch’s dealings were to be judged by “the most exacting fiduciary standards.”¹²⁶ Indeed, “the Court has repeatedly struck down executive actions that infringe on Native American rights or that do not live up to a strict fiduciary standard.”¹²⁷

In fact, the federal government’s obligation to act by “the most exacting fiduciary standards” is so significant that federal courts have struck down agency actions that are inconsistent with this standard. In *Pyramid Lake Paiute Tribe of Indians v. Morton*, the district court found that the actions of the Secretary of Interior were arbitrary and capricious when he failed to implement the federal trust responsibility in weighing conflicting obligations.¹²⁸ The Secretary was called on to resolve three different claims to water from the Truckee River, including protecting water interests for the Pyramid Lake Paiute Tribe of Indians, when the available water in the river at issue made it impossible to satisfy the three conflicting obligations. However, “[t]he Tribe contend[ed] that the [Secretary’s chosen solution] deliver[ed] more water to the District than required by applicable court decrees and statutes, and improperly divert[ed] water that otherwise would flow into nearby Pyramid Lake located on the Tribe’s reservation.”¹²⁹ In finding that the Secretary’s actions were arbitrary and capricious, the court explained that, in making his “judgement call,” he failed “to demonstrate an adequate recognition of his fiduciary duty to the Tribe.”¹³⁰ Accordingly, the *Pyramid Lake* decision demonstrates how the actions of federal agencies will be set aside if the agencies fail to fully consider their fiduciary responsibilities to tribes. In deciding whether to engage in shared stewardship with tribes, the federal trust responsibility supports arguments for such coordination, as it would allow the federal government to act in the best interests of tribes.

In addition to requiring that federal agencies consider the federal trust responsibility when engaging in decision making that impacts tribes, the federal trust responsibility can become an enforceable obligation to act whether or not the federal government has agreed to such a responsibility to act. The Court provided additional guidance on the contours of the federal trust responsibility at the end of the twentieth century in deciding *United States v. Mitchell*. In 1980,

124. See generally *Seminole Nation v. United States*, 316 U.S. 286 (1942).

125. *Id.* at 296.

126. *Id.* at 297.

127. Heinecke, *supra* note 119, at 1032; see *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

128. 354 F. Supp. at 256-57.

129. *Id.* at 254.

130. *Id.* at 257.

the U.S. Supreme Court considered the case for the first time in *Mitchell I*.¹³¹ In *Mitchell I*, the U.S. Supreme Court evaluated section 5 of the General Allotment Act to determine whether the Secretary of the Interior was liable for breach of trust related to the management of timber resources and related funds.¹³² Because the General Allotment Act did not place any affirmative management duties on the federal government, the Court held in favor of the Secretary. However, in 1983, the Court considered the matter again in *Mitchell II*.¹³³ Unlike *Mitchell I*, in *Mitchell II*, the Tribes relied on a variety of statutes related to the management of timber resources, which is an area where the federal government has exercised sizeable control.¹³⁴ The Court agreed with the Tribe that the federal government had undertaken substantial control over the trust corpus at issue, finding that the statutes in question “clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.”¹³⁵ Once the Court determined that the federal government had agreed to assume control over the trust corpus at issue, the Court then looked to the common law of private trusts to assess the government’s liability.¹³⁶

In 2003, the Supreme Court continued to develop its jurisprudence on the question of the federal trust relationship in *White Mountain Apache Tribe v. United States*.¹³⁷ The claim at issue in *White Mountain Apache* was whether the federal government had failed to adequately manage Fort Apache, which was held in trust for the Tribe, entitling the Tribe to compensation for the upkeep of Fort Apache. Because the federal government had the authority to control and manage Fort Apache, the trust corpus at issue, the Court determined that an enforceable trust relationship existed between the federal government and the Tribe, and the Court awarded damages to the Tribe.¹³⁸

In 2011, the U.S. Supreme Court revisited the question of the scope of the federal government’s trust relationship in *United States v. Jicarilla Apache Nation*.¹³⁹ In relevant part, the *Jicarilla Apache Nation* Court held that in order to be legally liable, the government must consent to be liable.¹⁴⁰ This is because the trust relationship is a sovereign function of Congress,¹⁴¹ as the trust relationship was designed to benefit both the tribes and the federal

131. 445 U.S. 535 (1980) [*Mitchell I*].

132. *Id.* at 536.

133. 463 U.S. 206 (1983) [*Mitchell II*].

134. *Id.* at 207.

135. *Id.* at 224.

136. *Id.* at 226.

137. 537 U.S. 465 (2003).

138. *Id.* at 475.

139. 564 U.S. 162 (2011). Because the underlying case in this matter involves Indian trust fund management, the Court’s decision might properly be limited to such cases, which are not the focus of review in this Article. However, given *Jicarilla Apache Nation* represents the Court’s most recent discussion of the federal trust relationship, a review of the Court’s analysis is still helpful in understanding the contours of that relationship.

140. *Id.* at 174.

141. *Id.*

government.¹⁴² The Court did, however, acknowledge the continued existence of the federal trust relationship, explaining, “[w]e do not question ‘the undisputed existence of a general trust relationship between the United States and the Indian people.’ . . . Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes.”¹⁴³ Justice Sotomayor, in her dissent, went on to explain:

Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. Our decisions over the past century have repeatedly reaffirmed this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians. Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.”¹⁴⁴

The lower federal courts have required that a tribe asserting the federal trust responsibility as the basis of its claim against the federal government must first assert a substantive source of law that requires the federal government to act as a fiduciary or undertake certain obligations.¹⁴⁵ Furthermore, the federal courts have explained that mere federal oversight does not amount to the necessary day-to-day control over operations typically required for a successful claim based on the federal trust relationship.¹⁴⁶ At least one court discussed applying the Indian canons of construction to resolve any ambiguities in determining whether or not a trust relationship exists.¹⁴⁷

Today, the federal trust relationship between tribes and the federal government persists as a moral responsibility, a duty to engage in decision making that considers the full weight of the trust responsibility, and, under the right conditions, a legally enforceable responsibility of the federal government to tribes.

The *federal trust responsibility* is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes. It can include obligations to protect tribal treaty rights, lands, assets, and resources on behalf of tribes and tribal members. The National Congress of American Indians (NCAI), a national organization of American Indian and Alaska Native tribal governments, has argued that acting in the best interests of tribes, as determined by tribes, is critical to fulfilling the federal trust

142. *Id.* at 180.

143. *Id.* at 176 (internal citations omitted).

144. *Id.* at 192 (Sotomayor, J., dissenting) (internal citations omitted).

145. *Blackfeet Housing v. United States*, 106 Fed. Cl. 142, 149 (2012), *aff'd* 521 F.App'x 925 (Fed. Cir. 2013).

146. *Id.* at 151.

147. *See, e.g., Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013).

responsibility.¹⁴⁸

When considering whether the federal government should partner with tribes in co-stewardship of national treasures, the federal trust responsibility is a legal factor in favor of such co-stewardship. The general trust responsibility applies in all interactions between tribes and the federal government, requiring that the federal government comport itself in compliance with the moral obligation to act in the best interest of tribes. Depending on the existing obligations undertaken by the federal government to the benefit of the specific tribe, so too may the federal government be under a legally enforceable obligation to support tribal co-stewardship.

B. Legal Principles Specific to Shared Stewardship

Having examined general principles of federal Indian law that support shared stewardship, it is helpful to now focus on legal principles directly related to shared stewardship that would support a legal claim for such cooperation between the federal government and tribes. First, this Subpart considers recent changes to federal consultation requirements that align with calls for shared stewardship. Next, this Subpart examines claims under Section 638 contracts and co-management agreements that support calls for increased shared stewardship. Both of these legal arguments could be used to call for increased shared stewardship of national treasures regardless of who occupies the White House.

1. Co-Stewardship through Tribal Consultation

Laws and policy statements governing the federal government's duty to consult with tribes also provide a legal framework for tribal requests to engage in co-stewardship activities with the federal government.

As states and the federal government work to develop land management strategies, they can benefit from tribal consultation.¹⁴⁹ The value of tribal consultation is evidenced by federal statutes that require tribal consultation under certain circumstances. For example, Section 106 of the National Historic Preservation Act (NHPA) requires a consultation process for any "undertakings" by a federal agency, or assisted or licensed by a federal agency, that may affect "any district, site, building, structure, or object" that is on, or is eligible to be included in, the National Register.¹⁵⁰ Under NHPA, "[t]he goal of consultation

148. MURRAY, *supra* note 9, at 3 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

149.

"Importantly, however, these efforts should aim to incorporate tribal consultation as an objective on an equal basis with existing federal land management priorities in order to integrate the process of consultation with the balancing of multiple-use, wilderness, refuge, or other management framework. Doing so would help overcome the historical exclusion and separation of tribes from the legal structure of public land management."

Mills & Nie, *supra* note 25, at 104-05.

150. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 917. Also, this discussion of the National Historic Preservation Act is largely excerpted from ROYSTER, BLUMM, &

is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”¹⁵¹ NHPA may be applicable in many places where co-stewardship of national treasures could be executed.¹⁵²

In addition to statutes that require the federal government to consult with tribes, Presidents have issued executive orders requiring consultation. President Clinton enacted Executive Order 12,895, “Enhancing the Intergovernmental Partnership.”¹⁵³ This was a mandate imposed on “[s]tate, local, and tribal governments” to develop a process that would “provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.”¹⁵⁴ In 1994, President Clinton signed the memorandum “Government-to-Government Relations with Native American Tribal Governments,” which established principles for federal executive departments and agencies to consult with tribal governments before taking actions that affect federally recognized tribal governments, assessing the impact of federal initiatives on tribal trust resources, and ensuring that tribal rights are considered in those initiatives.¹⁵⁵ Another executive order, Executive Order 13,007, created obligations to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.”¹⁵⁶ Executive Order 13,175, “Consultation and Coordination with Indian Tribal Governments,” enacted in 2000, requires federal agencies to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal

KRONK WARNER, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS, 45-48 (Carolina Acad. Press 4th ed. 2018). Elizabeth Kronk Warner is both an author of this Article and author of the casebook.

151. 36 C.F.R. § 800.1 (2020).

152. See Mills & Nie, *supra* note 25, at 114–19 (discussing the role of the NHPA in public land management). For example, Black Rock Site, a landmark that sits either on the shores of or in Utah’s Great Salt Lake (depending on the Lake’s water level) was recently added to the National Register. Matthew Jacobson, *Then & Now: Utah’s Black Rock Officially Added to California Historical Trail Sites*, KUTV, <https://kutv.com/news/local/black-rock-salt-lake-california-historical-trail-sites> (last updated Oct. 13, 2022); see also Christopher W. Merritt, *A Colorful History: Black Rock’s History and Graffiti Woes*, UTAH HIST. SOC’Y, <https://history.utah.gov/a-colorful-history-black-rocks-history-and-graffiti-woes> (last visited Nov. 3, 2023). Although, Black Rock Site was added based on it being a landmark on the Hastings Cutoff of the California Trail, archaeological evidence found nearby suggests that ancient Tribes from the area likely discovered the Rock first. See *Black Rock Site*, NAT’L PARK SERV., <https://www.nps.gov/places/black-rock-site.htm> (last visited Nov. 3, 2023); Merritt, *supra* note 152. Additionally, local tribes, like the Goshute, Ute, and Shoshone Tribes, frequently traveled past Black Rock. *Id.* Since these Tribes have a long history in the region, they are likely in a unique position to help government officials gain a better understanding of the landmark and help mitigate any potential adverse effects that may impact the Rock. See discussion and cited sources *infra* Subpart III.B.1 (describing Great Salt Lake’s history with indigenous people).

153. Exec. Order No. 12875, 58 Fed. Reg. 58093 (Oct. 26, 1993).

154. *Id.*

155. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (May 4, 1994).

156. Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

implications.”¹⁵⁷ This order provided more guidance by requiring the creation of an internal consultation process.¹⁵⁸

President Obama issued a memorandum to executive departments and agencies, which formally adopted President Clinton’s Executive Order 13,175.¹⁵⁹ The memorandum also explained that federal officials “are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”¹⁶⁰ Further, each agency was required to submit a plan that indicated what steps the agency would take to implement the mandate.¹⁶¹

In a presidential memorandum dated January 26, 2021, President Biden stated that “regular, meaningful, and robust consultation with Tribal Nations” was a priority of his Administration.¹⁶² Additionally, under the Biden Administration, the federal government has engaged tribes to obtain feedback on existing consultation processes, and even released a plan for improving upon the status quo. Following meetings with tribes focused on improving consultations, the Department of the Interior (DOI) released “A Detailed Plan for Improving Interior’s Implementation of E.O. 13175.” The foreword by Secretary Deb Haaland notes that “[t]ribes are not interest groups,” but “sovereign entities with indigenous perspectives and knowledge that can improve the quality of Federal decisions and result in better outcomes for all affected communities.”¹⁶³ The DOI has already responded to tribal feedback by both reconstituting the White House Council on Native American Affairs and revoking several Trump-era policies regarding NHPA and NEPA consultation.¹⁶⁴ The DOI also provided six action items that it will implement: (1) a centralized consultation website; (2) identify technology to improve notice to tribes; (3) update consultation policy; (4) educate interior officials and staff on tribes; (5) establish a Secretary’s Tribal

157. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

158. *Id.*

159. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).

160. *Id.*

161. *Id.*

162. *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, THE WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships>. The Memorandum also lists as priorities “respect for Tribal sovereignty and self-governance, [and a] commitment to fulfilling the Federal trust and treaty responsibilities to Tribal Nations . . .” *Id.* The legal necessity for effective consultation and sometimes consent is tied directly to tribal sovereignty and the federal trust and treaty obligations.

163. 2022-23 ANNUAL PERFORMANCE PLAN, *supra* note 60, at 1. This Plan builds on a previous memorandum released on April 24, 1994. *See generally* Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (May 4, 1994). This memorandum recognized that “[t]he United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions.” *Id.*

164. Government-to-Government Relations with Native American Tribal Governments, *supra* note 162, at 9.

Advisory Committee; and (6) review policies that inhibit consultation.¹⁶⁵ Finally, DOI provided timelines for the implementation of the action items.¹⁶⁶

On November 30, 2022, the White House released the “Memorandum on Uniform Standards for Tribal Consultation,” intended for heads of executive departments and agencies.¹⁶⁷ This memorandum builds on the Biden Administration’s 2021 executive order, explaining that “[t]he purpose of this memorandum is to establish uniform minimum standards to be implemented across all agencies regarding how Tribal consultations are to be conducted.”¹⁶⁸ The 2022 memorandum goes on to detail principles that should guide consultation between the federal government and tribes:

Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations. Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome. Consultation should generally include both Federal and Tribal officials with decision-making authority regarding the proposed policy that has Tribal implications. Consultation will ensure that applicable information is readily available to all parties, that Federal and Tribal officials have adequate time to communicate, and that after the Federal decision, consulting Tribal Nations are advised as to how their input influenced that decision-making. All of these principles should be applied to the extent practicable and permitted by law.¹⁶⁹

Building on its “A Detailed Plan for Improving Interior’s Implementation of E.O. 13175,” on November 30, 2022, the DOI released two documents laying out its tribal consultation policies moving forward—“Chapter 4: Department of the Interior Policy on Consultation with Indian Tribes,”¹⁷⁰ (DM 4) and “Chapter 5: Procedures for Consultation with Indian Tribes” (DM 5).¹⁷¹ DM 4 provides definitional guidance and reiterates the general policy of the DOI to respect tribal sovereignty, consult on a government-to-government basis, and affirm the

165. *Id.* at 11–16.

166. *Id.* at 16–18.

167. *Memorandum on Uniform Standards for Tribal Consultation*, THE WHITE HOUSE (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation>.

168. *Id.* § 1.

169. *Id.* § 2.

170. Department of the Interior, Departmental Manual, 512 DM 4 (Nov. 30, 2022), <https://www.doi.gov/sites/doi.gov/files/512-dm-4-department-of-the-interior-policy-on-consultation-with-indian-tribes.pdf> [hereinafter DM 4].

171. Department of the Interior, Departmental Manual, 512 DM 5 (Nov. 30, 2022), <https://www.doi.gov/sites/doi.gov/files/512-dm-5-procedures-for-consultation-with-indian-tribes.pdf> [hereinafter DM 5].

unique relationship between tribes and the federal government.¹⁷² DM 5 drills deeper into the methods that the DOI will use moving forward when conducting consultations with tribes. DM 5 provides that the DOI will give notice to tribes of consultation early in the decision making process, that there is a presumption that federal activities impacting land or resources will be of interest to tribes, and that tribal interest may extend beyond the boundaries of Indian Country into what were traditional tribal homelands.¹⁷³ This second point underscores the argument that tribes should be invited to co-steward national treasures where the territories connect to the traditional homelands of the tribe. Combined, DMs 4 and 5 go well beyond the 2022 memorandum mandating that DOI employees take certain steps and that they seek tribal consensus when the federal action impacts core tribal governmental interests.

Combined, these statutes, presidential directives, and agency guidance provide a foundation for tribal co-stewardship. The network of executive orders and policies currently in place call on federal agencies to increasingly engage with tribes in a meaningful government-to-government manner. The executive and certain agencies, such as the DOI, expect extensive consultations with tribes, which could naturally lead to calls for co-stewardship. In addition, tribes can use this network of consultation requirements to force the federal government to the table for consultations related to opportunities for shared stewardship.

2. *Co-Management and Section 638 Contracts*

Although tribal co-stewardship is not the same as co-management, which involves tribes taking on an official role in the management of national treasures, examining the existing legal structures underlying co-management is helpful for advancing claims for tribal co-stewardship. There are numerous examples of the federal government and tribes engaging in successful co-management projects.¹⁷⁴ Ultimately, “[t]ribal contracting is the easiest way to achieve tribal co-management of federal public lands.”¹⁷⁵ In 1975, Congress enacted Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDA), which allowed tribes to contract with certain federal agencies to administer federal programs that provide services to Indian people because of their status as Indians. Under such contracts—commonly called “638 contracts”—tribal governments step into the shoes of the federal government in providing federal services.¹⁷⁶ Additionally, tribal contracting for federal services acknowledges the historic connections between tribes and most of the lands of the United States,¹⁷⁷ and, therefore, “co-management is a small measure of

172. DM 4, *supra* note 170, at 1–3.

173. DM 5, *supra* note 171, at 1.

174. *See, e.g.*, MURRAY, *supra* note 9, at 11–16.

175. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 282.

176. Washburn *Congressional Testimony*, *supra* note 10, at 2.

177. *Id.* at 283.

restorative justice at a time when the United States seems more willing to take seriously its responsibility to address past wrongs.”¹⁷⁸

Since the 1970s, tribes could contract with the federal government to assume management of federal services.¹⁷⁹ Initially, these contracts between the federal government and tribes were limited to the BIA and IHS. But starting in 1988, the tribes’ ability to contract with the federal government expanded beyond these two agencies.¹⁸⁰ As a result,

while the [Indian Self-Determination and Education Assistance Act of 1975] began with the goal of transferring federal programs within the BIA and IHS to tribal control, the evolution of the self-determination policy has expanded the reach of that objective to open avenues for tribes to assume the responsibility for certain programs across the Departments of the Interior and Agriculture.¹⁸¹

Today, “as long as the program [has] a geographic, historical, or cultural significance to the tribe,” a tribe can enter into a contract with the federal government to assume management of the resource.¹⁸² “Since virtually all public lands in the United States were once occupied by tribal nations, the potential here seemed almost unlimited.”¹⁸³ The U.S. Forest Service (USFS) has contracted with tribes on several occasions,¹⁸⁴ and the record suggests that tribes may be more effective managers of federal lands than federal agencies.¹⁸⁵ One reason for this success may be that “tribes may have an incentive to accomplish more with less.”¹⁸⁶

Awarding of these contracts, however, is still at the agencies’ discretion,¹⁸⁷ and agencies cannot contract with tribes for functions that are inherently federal in nature.¹⁸⁸ To date, “tribes have had very little success contracting with the federal land management services. Compared to more than 800 annual contracts with the BIA in recent years, tribes have entered fewer than a dozen contracts annually with all of the other land management agencies within the Interior combined.”¹⁸⁹ However, the Biden Administration is working to increase the

178. *Id.*

179. For a historical discussion of the evolution of tribal contracting with the federal government, see *id.* at 278–82.

180. *Id.* at 279.

181. Mills & Nie, *supra* note 25, at 107.

182. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 279.

183. *Id.*

184. *Id.* at 280.

185. *Id.* at 287.

186. *Id.* at 288.

187. Mills & Nie, *supra* note 25, at 109 (“The TSGA’s provisions therefore allow ‘non-BIA bureaus unchecked discretion to deny tribal proposals,’ which, as one commentator has noted in the context of public land management, allows for a myopic focus on the objectives of public lands management without consideration of the continuing evolution of the federal government’s policy to support tribal self-determination.”).

188. 25 U.S.C. § 5363(k); see also Mills & Nie, *supra* note 25, at 141–42 (discussing what type of work may be inherently federal).

189. Washburn, *Congressional Testimony*, *supra* note 10, at 3.

number of official contracts between the federal government and tribes. Starting in 2022, the Administration began delivering on its commitment: “in total, USDA Forest Service and DOI signed over 20 new co-stewardship agreements with Tribes to further co-stewardship goals, and they have more than 60 additional agreements under various stages of review.”¹⁹⁰

Despite the Biden Administration’s efforts, the significant potential for tribal collaboration with agencies other than the BIA and IHS remains underutilized. Allowing tribes to actively participate in smaller federal contracts, such as incorporating traditional ecological knowledge into managing the Great Salt Lake, could allow tribes to demonstrate the value of their contributions while simultaneously allowing agencies to become more comfortable with tribal co-stewardship.¹⁹¹ Collaboration between the federal government and tribes on stewarding the Bears Ears National Monument and the Great Salt Lake, as discussed below, provides valuable pilot projects to demonstrate the significant value and capacity of tribes as partners.¹⁹² The federal government has already engaged in extensive contracting with private entities, which may not have as significant of a connection to certain lands as tribes.¹⁹³ It is therefore logical for the federal government to take advantage of deep tribal expertise and traditional ecological knowledge.

Overall, “[t]he tribal self-determination and self-governance contracting regime is widely viewed as a successful federal Indian policy.”¹⁹⁴ Increased tribal co-stewardship of national treasures is therefore a logical next step given this success. This Article will next examine how employing the principles described above to two unique national treasures, Bears Ears and the Great Salt Lake, demonstrates how current and potential co-stewardship efforts offer a path toward creating long-lasting protections for national treasures.

III. CASE STUDIES OF THE PRESENT AND FUTURE: BEARS EARS AND THE GREAT SALT LAKE¹⁹⁵

Having explored why tribes are excellent co-stewards and the legal principles underlying calls for increased co-stewardship, this Part explores two case studies for how these ideas might come together in practice. The Bears Ears case study presents an example where tribal co-management of a cultural resource is proving beneficial, even where the land in question is not directly adjacent to current tribal lands. The case study of the Great Salt Lake provides a prospective example of how these ideas might combine moving forward.

190. DOMESTIC POLICY COUNCIL, *supra* note 105, at 15.

191. Mills & Nie, *supra* note 25, at 83.

192. *See id.* at 144.

193. *See id.*

194. Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 277.

195. For a discussion of other situations where the federal government has partnered with tribes in a collaborative and productive way, *see* Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep’ts & Agencies, *supra* note 53, at 22–33.

These case studies are presented as evidence that the success of co-stewardship is not limited to lands directly adjacent to tribal lands or where there is an explicit tribal connection. Despite physical separation, many tribes possess valuable knowledge that lead to successful co-stewardship. Throughout history, “[f]ederal policies have resulted in the separation (both physically and intellectually) of Indigenous Peoples from the places they are connected to, severing relationships with lands, waters, and social systems.”¹⁹⁶ Yet, despite this physical separation from lands, “Tribes and Indigenous communities have demonstrated remarkable resiliency in maintaining and continuing to develop Indigenous Knowledge, which has existed since time immemorial and remains strong today.”¹⁹⁷

Federal agencies should seek out partnerships with tribes when such efforts are “of particular interest to Tribes, like land and resource management decisions affecting traditional homelands.”¹⁹⁸ Both of the examples discussed below present situations where resources are being threatened on both tribal traditional homelands and land without a direct modern tribal connection, making these situations where federal (and potentially state) outreach to tribes is valuable.

Importantly, neither of these case studies present calls for tribal unilateralism, as both contemplate tribal consultation and cooperation with the state and federal government where appropriate.¹⁹⁹

A. *Shared Stewardship to Preserve Bears Ears*

The intertribal commission at the heart of the Bears Ears National Monument exemplifies the ability of tribes to work together with other sovereigns. Co-stewardship among sovereigns presents an opportunity to overcome obstacles facing single sovereign stewards, as “ecosystems ignore political boundaries” and “traditional use patterns may create shared use of resources.”²⁰⁰ Additionally, intertribal coordination results in highly valuable resource management information being shared.²⁰¹ For example, “intertribal wildlife management has encouraged development of a science [that is] driven by the concerns, experience, and traditional knowledge of Indigenous people,” and it has “enhanced and transformed the understanding of the relationship between humans, wildlife, and their ecosystem.”²⁰² Inter-sovereign collaboration to manage one resource can also lead to better management of

196. *Id.* at 8–9.

197. *Id.* at 9.

198. *Id.* at 14.

199. Mills & Nie, *supra* note 25, at 110–11 (explaining that calls for tribal unilateralism may violate the subdelegation doctrine).

200. Berger, *supra* note 24, at 7.

201. *Id.* at 19 (explaining that intertribal organizations, such as the Northwest Indian Fishing Commission can provide incredibly valuable information helping to better manage a resource, such as a fishery).

202. *Id.* at 40.

resources not directly within tribal traditional homelands.²⁰³ The Bears Ears example also demonstrates the power of multiple sovereigns uniting in vision regarding the management of one resource.²⁰⁴ After all, “unity is legitimacy.”²⁰⁵ As Billy Frank Jr., a revered Indian leader, once explained, “[w]e are confident that by working together—all of us—we can reach our common goals.”²⁰⁶

1. *Historical Underpinning of the Bears Ears Region*

Bears Ears’ unique environment and ability to cultivate life²⁰⁷ has made the region a home to many.²⁰⁸ For over 13,000 years, indigenous people have cultivated and inhabited Bears Ears and its surrounding lands.²⁰⁹ Early hunter-gatherers roamed the land and left behind some of the oldest archeological sites and relics found in western North America.²¹⁰ Moreover, an assortment of artifacts and historical scenes are scattered throughout Bears Ears, including petroglyphs, housing remnants, ancient cliff dwellings, villages, granaries, ceremonial sites, prehistoric architecture, and archaic road systems.²¹¹

Generations of indigenous people and tribal nations have held Bears Ears as sacred and used parts of the lands for ceremonial purposes.²¹² Despite having different histories, cultures, and languages,²¹³ many tribes view Bears Ears as a spiritual place and part of their culture’s creation story.²¹⁴ Approximately thirty tribes have lived throughout the region and felt a similar spiritual tie to the land,²¹⁵ including the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni Tribes.²¹⁶ Each of the different tribes relied on the land for sustenance

203. *Id.* at 37 (explaining how the Northwest Inter-Fishery Commission’s management of resources important to tribes resulted in better management of other resources not targeted by inter-tribal management, such as the entire Puget Sound Ecosystem).

204. *Id.* at 10.

205. *Id.* at 40.

206. *About Us*, NORTHWEST TREATY TRIBES, <https://nwtreatytribes.org/about-us> (last visited Nov. 28, 2023).

207. See Bruce M. Pavlik et al., *Plant species richness at archaeological sites suggests ecological legacy of Indigenous subsistence on the Colorado Plateau*, 118 PNAS 1, 3 (noting that early groups of people were dependent on the plant life within Bears Ears).

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

209. *Id.*

210. *Id.*; see also Andrew Gillreath-Brown et al., *Redefining the Age of Tattooing in Western North America: A 2000-year-old Artifact from Utah*, 24 J. ARCHAEOLOGICAL SCI. 1064, 1065 (2019) (noting that a 2,000-year-old artifact was found in the Bears Ears Region and is the oldest artifact ever found in western North America).

211. *Id.*

212. Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1139.

213. *Protecting Bears Ears National Monument*, NATIVE AM. RTS. FUND, <https://narf.org/cases/bears-ears> (last visited July 7, 2023).

214. BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 1, 8 (2015) [hereinafter 2015 BEARS EARS COALITION PROPOSAL].

215. Charles Wilkinson, “*At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top*”: *The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317, 321–22 (2018).

216. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 8.

and used it as a place to gather and pray.²¹⁷ As a result of generations of tribal nations and indigenous people occupying the area, more than 100,000 tribal cultural sites and artifacts exist throughout the Bears Ears and provide indispensable knowledge about the region's history.²¹⁸

While many distinct Tribes once lived, hunted, and "built civilizations" within Bears Ears,²¹⁹ the region no longer acts as a home for tribal people.²²⁰ Starting in the 1850s, as non-Native settlers began expanding across the United States, the Tribes were forcibly removed from their traditional homelands to areas outside the Bears Ears territory.²²¹ For example, despite generations of Navajo people inhabiting Bears Ears and relying on the region for food,²²² in 1864, federal military forces removed and marched thousands of Navajos from the area.²²³ Eventually, the Navajo people were placed on a new reservation outside of Bears Ears.²²⁴ These military forces attempted to keep the Tribes on their reservations and off the land within Bears Ears.²²⁵ In the 1880s, white settlers began to inhabit the surrounding region.²²⁶ Initially, the non-Native people were generally cordial with the Tribes still occupying the land within Bears Ears.²²⁷ However, as time passed, the non-Native settlers grew hostile toward the tribal people and began forcing them out of Bears Ears.²²⁸ For the Ute people, the development of non-Native settlements in specific locations forced the Tribe to relocate its traditional winter camps, sites with vital resources needed during the winter months.²²⁹

Although federal mandates required the Tribes to remain on their reservations, tribal people attempted to return to their homeland within Bears Ears.²³⁰ However, tribal people were met with violence and insults from the non-Native settlers.²³¹ Nevertheless, the tribal people "continued to visit their homeland, but the harsh, unwelcoming atmosphere caused the number of visits to decline."²³² Today, the Tribes once inhabiting the area live on reservations

217. *Id.*

218. *Id.* at 9.

219. *Id.* at 8.

220. See Wilkinson, *supra* note 215, at 321–22 (noting that "in the 1860s, tribal people were forced out of Bears Ears").

221. See 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 10–13 (describing the removal of Indians inhabiting Bears Ears to other areas outside of the region); see also Wilkinson, *supra* note 215, at 321–22 (describing settlers moving into the Bears Ears region).

222. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 9.

223. *Id.* at 10–11.

224. *Id.* at 11.

225. See *id.* (noting that the military "kept the Navajos and the other Southwestern tribes on their reservations, which did not include the Bears Ears landscape").

226. *Id.*

227. Wilkinson, *supra* note 215, at 321–22.

228. *Id.*

229. See 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 11–12.

230. Wilkinson, *supra* note 215, at 321–22.

231. See 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 12–13.

232. *Id.* at 12.

outside Bears Ears.²³³ Despite not living in Bears Ears, modern indigenous and tribal people still consider Bears Ears their ancestral homeland and continue using the area for ceremonial purposes.²³⁴

Beyond having a significant tribal history and cultural importance, Bears Ears contains numerous historic, environmental, geological, and recreational resources. Amongst Southern Utah's panoramic views and red rocks, the Bears Ears territory sprawls out over a million acres of land and offers breathtaking sceneries of varied landscapes.²³⁵ Named after two tall buttes rising from the ground,²³⁶ Bears Ears and the surrounding region feature prominent mesas, winding canyons, hanging gardens, arches, and natural bridges.²³⁷ Additionally, the land's storied history as a home for generations of different people and wildlife has left the region filled with a myriad of cultural and historical artifacts.²³⁸ Bears Ears' geological record has offered and continues to provide scientists with a broader understanding of Earth's history.²³⁹ By studying Bears Ears' fossil and geological record, paleontologists have garnered increased knowledge about evolution, mass extinctions on Earth, various living and extinct organisms, and the changing diversity of life on Earth throughout different paleontological eras.²⁴⁰

While Bears Ears provides significant insight into the past, today, it also provides a home for diverse vegetation and organisms.²⁴¹ Bears Ears' unique environment shelters many distinct wildlife species,²⁴² including more than eighteen endangered species, such as the greenback cutthroat trout, the California

233. The Uintah and Ouray Ute, Hopi, and Zuni Tribes live on reservations near the four corner states and central Utah, with the Navajo Nation and White Mesa Ute Tribe living on reservation directly bordering Bears Ears. See *Native American Connections*, BEARS EARS INTER-TRIBAL COALITION, <https://www.bearscoalition.org/ancestral-and-modern-day-land-users> (last visited July 25, 2023) (providing a map with the current locations for the reservations belonging to the Tribes in the Bears Ears Inter-Tribal Coalition).

234. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 8–9; see also NATIVE AM. RTS. FUND, *supra* note 213 (noting that tribes continue to use the region for ceremonial and other purposes).

235. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 4–8, 20.

236. Tribes in the region have referred to the landmark as a translation of Bears Ears for thousands of years. NATIVE AM. RTS. FUND, *supra* note 213.

237. Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1140–42 (Jan. 5, 2017).

238. See *id.* at 1139.

239. See generally Robert J. Gay et al., *Paleontology of Bears Ears National Monument (Utah, USA)*, 7 GEOL. INTERMOUNTAIN WEST J. 205 (2020) (describing paleontological research and discoveries that have occurred in the Bears Ears region).

240. *Id.* at 206; see also Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1141 (noting that the region has “one of the best continuous rock records of the Triassic-Jurassic transition in the world, crucial to understanding how dinosaurs dominated terrestrial ecosystems and how our mammalian ancestors evolved”).

241. See Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1141–42 (describing the environment, plants, and wildlife in Bears Ears).

242. See *id.* (“Consistent sources of water in a dry landscape draw diverse wildlife species to the area’s riparian habitats, including an array of amphibian species such as tiger salamander, [and the] red-spotted toad.”); see also JONATHAN BARTH & THOMAS MEINZEN, BEARS EARS NATIONAL MONUMENT: WILDLIFE HIGHLIGHTED IN THE 2016 PROCLAMATION 3 (Grand Canyon Trust pub., 2018) (describing different wildlife species that live in Bears Ears National Monument).

condor, and the Mexican spotted owl.²⁴³ Even though Bears Ears exists in a desert region, the land's unique geography also provides consistent water sources for many different kinds of vegetation and wildlife.²⁴⁴ Today, numerous visitors from across the globe enjoy a variety of recreational activities throughout Bears Ears.²⁴⁵ Tourists flock to the region for whitewater rafting, rock climbing, hiking, fishing, backpacking, and many more experiences.²⁴⁶

Despite the scientific, historical, and cultural significance of Bears Ears and the surrounding area, the region has become threatened by outsiders and foreign actors.²⁴⁷ Over the past two centuries, looters and grave robbers have increasingly desecrated and destroyed archaeological sites in search of rare artifacts and cultural resources.²⁴⁸ Additionally, the abundance of gas, oil, and other resources in the Bears Ears region has led energy companies to pursue more energy development throughout the area.²⁴⁹ Reckless vehicle use has permanently destroyed once lavish natural landscapes and archeological resources.²⁵⁰ Finally, enhanced tourism and growing rates of uneducated visitors have led to increased litter and greater destruction of the area.²⁵¹ These impending problems seriously threaten the archeological record in Bears Ears and jeopardize the historical resources and ceremonial sites dispersed throughout the region.²⁵² Recognizing the past devastation and potential future consequences caused by these threats, five Tribes joined forces and began an uphill journey to protect their ancestral homeland.²⁵³

243. Paul Tolmé, *More Than Majesty*, THE NAT'L WILDLIFE FED'N (June 1, 2018), <https://www.nwf.org/Magazines/National-Wildlife/2018/June-July/Conservation/National-Monuments>.

244. See Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1142 (noting that “[n]umerous seeps provide year-round water and support delicate hanging gardens, moisture-loving plants, and relict species”); see also generally MARC COLES-RITCHIE, BEARS EARS NATIONAL MONUMENT: PLANTS HIGHLIGHTED IN THE PROCLAMATION (Grand Canyon Trust ed., 2018) (providing an overview of many different kinds of plants inhabiting Bears Ears).

245. The most recent estimates show that over 450,000 people visit the Bears Ears National Monument each year. *Bears Ears National Monument*, WORLD MONUMENTS FUND, <https://www.wmf.org/project/bears-ears-national-monument> (last updated Feb. 2023); see also U.S. FOREST SERVS., BEAR EARS NATIONAL MONUMENT - QUESTIONS & ANSWERS 4, <https://www.fs.usda.gov/sites/default/files/bear-ears-fact-sheet.pdf> (noting that people travel from across the world to Bears Ears for its recreational activities).

246. U.S. FOREST SERVS., *supra* note 245, at 4.

247. *Threats*, BEARS EARS INTER-TRIBAL COALITION, <https://www.bearscoalition.org/threats> (last visited July 7, 2023) [hereinafter *Threats*, BEARS EARS INTER-TRIBAL COALITION].

248. *Id.*; see also Wilkinson, *supra* note 215, at 322 (noting that “[l]ate in the nineteenth century, non-Indians became fascinated by artifacts they found and began to explore the gravesites and abandoned homes of the ancients”).

249. *Threats*, BEARS EARS INTER-TRIBAL COALITION, *supra* note 247.

250. *Id.*

251. *Id.*

252. *Id.*; see also Wilkinson, *supra* note 215, at 322 (describing the destruction of tribal sites, gravesite desecration, and removal of human remains that has occurred in Bears Ears).

253. NATIVE AM. RTS. FUND, *supra* note 213.

2. *Five Tribes' Journey to Save Their Ancestral Home*

For decades Native groups have sought protection for Bears Ears.²⁵⁴ Tribes recognized that threats such as looting, tourism, natural energy development, and improper land use threaten the area and their ancestral home.²⁵⁵ Consequently, Tribes have long advocated for safeguards to protect Bears Ears and the ceremonial sites and artifacts contained within the region.²⁵⁶ Still, politicians and governments took little to no action until 2010.²⁵⁷ Various citizen groups, government agencies, and other parties had spent years disputing the BLM's designation of land throughout southern Utah as areas meant for purposes such as oil and gas leases, roads, grazing, or as having "wilderness characteristics worthy of congressional protection."²⁵⁸ Desiring to ease years of conflict, Senator Robert Bennett started a Public Lands Initiative (PLI).²⁵⁹ The PLI brought together various organizations and counties to negotiate land use throughout Southern Utah.²⁶⁰ As part of the PLI, Senator Bennett invited Tribes in San Juan County to provide input on the ways the land should be used.²⁶¹

Welcoming the opportunity to participate in the land use discussions, Navajo leaders formed a nonprofit group called Utah Diné Bikéyah (UDB) for the purpose of ensuring tribal representation in the PLI process and protecting Bears Ears.²⁶² In June 2010, UDB embarked on a several year effort to map the areas of Bears Ears with cultural and scientific significance and needing protection.²⁶³ UDB's mapping efforts relied on various research methods and interviews with experts and tribal elders.²⁶⁴ In April 2013, after UDB's mapping efforts concluded, UDB and the Navajo Nation released their initial Bears Ears proposal.²⁶⁵ They sought protections for 1.9 million acres of public land throughout the Bears Ears region.²⁶⁶

254. See Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L.L. REV. 213, 240–41 (2018) (describing tribes' long history of seeking protections for the Bears Ears territory).

255. See *Threats*, BEARS EARS INTER-TRIBAL COALITION, *supra* note 247 (describing the threats facing bears ears and tribes' connection to the land).

256. Krakoff, *supra* note 254, at 240–41 (describing tribes' long history of seeking protections for the Bears Ears territory).

257. *Id.*

258. *Id.* For a discussion on the designation of the relevant BLM land, *see id.*

259. *Id.*

260. *Timeline of Tribal Engagement to Protect Bears Ears*, BEARS EARS INTER-TRIBAL COALITION, <https://www.bearscoalition.org/timeline> (last visited June 20, 2023) [hereinafter *Timeline*, BEARS EARS INTER-TRIBAL COALITION].

261. Krakoff, *supra* note 254, at 242.

262. NATIVE AM. RTS. FUND, *supra* note 213; *see also* Krakoff, *supra* note 254, at 242.

263. NATIVE AM. RTS. FUND, *supra* note 213.

264. *UDB Timeline*, UTAH DINÉ BIKÉYAH, <https://utahdinebikeyah.org/about/udb-timeline/> (last visited June 20, 2023); *see also* Krakoff, *supra* note 254, at 243 (noting that UDB's research efforts "drew from multiple sources, including academic experts in ecology, biology, anthropology, and public policy; data on wildlife from Utah State officials, and the traditional knowledge of local Native people").

265. *Timeline*, BEARS EARS INTER-TRIBAL COALITION, *supra* note 260.

266. *Id.*

However, in 2013, Senator Bennett was not re-elected, and new political leadership took control of the PLI.²⁶⁷ Under the PLI's new leadership, discussions with UDB occurred "in ways that marginalized conservationist and tribal voices."²⁶⁸ After years of mapping the region and developing a proposal to protect Bears Ears, in April 2013, UDB presented its proposal to San Juan County, state, and congressional leaders.²⁶⁹ However, government officials and San Juan County largely ignored the initial proposal.²⁷⁰

In 2014, the county excluded the Bears Ears Proposal from its public commenting process on land use planning.²⁷¹ Nevertheless, UDB organized a write-in campaign during its proposal's public commenting process and received 64 percent approval from San Juan County residents.²⁷² Despite the extensive support for UDB's Proposal, San Juan County refused to work with UDB and adopted an alternative land proposal.²⁷³

After UDB and other tribes were again excluded from the public land planning discussions, tribal leadership examined alternative ways of ensuring that Bears Ears received protection.²⁷⁴ In July 2015, five federally recognized Tribes formed a historic alliance "in furtherance of protecting the sacred Bears Ears landscape."²⁷⁵ The Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain, and Zuni Tribes called their new alliance the Bears Ears Inter-Tribal Coalition and sought "to protect and preserve the homeland area they all care[d] so deeply about."²⁷⁶ Over the following months, the Bears Ears Inter-Tribal Coalition met with federal officials and developed an extensive proposal requesting that President Obama create federal protection for Bears Ears and formally proclaim the region a national monument.²⁷⁷

On December 28, 2016, President Obama signed Proclamation 9588 and used his authority under the Antiquities Act²⁷⁸ to create the Bears Ears National Monument.²⁷⁹ Recognizing the importance of preserving the area's "cultural,

267. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 15.

268. Krakoff, *supra* note 254, at 242.

269. *Timeline*, BEARS EARS INTER-TRIBAL COALITION, *supra* note 260.

270. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 15–16.

271. Krakoff, *supra* note 254, at 243.

272. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 16.

273. NATIVE AM. RTS. FUND, *supra* note 213.

274. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 17; Krakoff, *supra* note 254, at 244–47 (providing a discussion of the Tribes planning process for seeking protections for Bears Ears).

275. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 18; *see also* NATIVE AM. RTS. FUND, *supra* note 213 (noting the "[f]or the first time in history, five federally recognized tribes banded together to advocate for a national monument to protect a sacred site").

276. 2015 BEARS EARS COALITION PROPOSAL, *supra* note 214, at 18.

277. Wilkinson, *supra* note 215, at 325; *see also Timeline*, BEARS EARS INTER-TRIBAL COALITION, *supra* note 260.

278. Under the Antiquities Act, the President may create a National Monument for any federally owned or controlled land with "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 54 U.S.C. § 320301(a). Creation of a national monument supplies federal protection for the land from issues such as artifact looting or destruction. *See* Wilkinson, *supra* note 215, at 322–23.

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

prehistoric, and historic legacy,” President Obama designated 1.35 million acres of land for federal protection and as the Bears Ears National Monument.²⁸⁰ While Obama’s Proclamation gave the USFS and BLM control of the National Monument, it also imposed historic consultation requirements on the BLM and USFS.²⁸¹ Obama’s proclamation made Bears Ears the first National Monument co-stewarded by federal agencies and tribal leaders²⁸² by declaring the following:

In recognition of the importance of knowledge of Tribal Nations about these lands and objects and participation in the care and management of the objects [of historic and scientific interest], and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge, a Bears Ears Commission (Commission) is hereby established to provide guidance and recommendations on the development and implementation of management plans and on management of the monument. . . . The Commission may adopt such procedures as it deems necessary to govern its activities, so that it may effectively partner with the Federal agencies by making continuing contributions to inform decisions regarding the management of the monument.²⁸³

Obama’s proclamation further required that the Secretaries of the BLM and USFS “carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission” during the development of the management plan.²⁸⁴ Moreover, the proclamation required that the managing federal agencies and the new Bears Ears Commission create “parameters for continued meaningful engagement with the Commission . . . in implementation of the management plan.”²⁸⁵

Despite the Bears Ears Commission’s historic victory, less than a year after Obama created the Bears Ears National Monument, President Trump released a new proclamation undoing many of the protections created by President Obama.²⁸⁶ On December 4, 2017, President Trump dramatically reduced the national monument’s boundaries, removing 1.15 million acres of land and adding a small portion of land.²⁸⁷ Trump’s reasoning for reducing the National Monument’s size was premised on his belief that it was in the public’s interest to modify the boundaries, which he found “unnecessary for the care and

280. *Id.* at 1143.

281. *Id.* at 1143-44; *see also* Maxine Joselow, *Native American Tribes to Co-manage National Monument for First Time*, WASH. POST (June 20, 2022), <https://www.washingtonpost.com/climate-environment/2022/06/20/bears-ears-national-monument-tribes> (noting that the co-management of a national monument with tribes is historic).

282. *See* Joselow, *supra* note 281 (noting that the co-management of a national monument with tribes is historic).

283. Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1144.

284. *Id.*

285. *Id.*

286. Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081 (Dec. 8, 2017).

287. *Id.* at 58081, 58085 (reducing the Monument’s size to 201,876 acres from its original 1.35 million acres).

management of the objects to be protected within the monument.”²⁸⁸ In addition to removing protection for many historical sites and lands,²⁸⁹ Trump renamed the Bears Ears Commission the “Shash Jáa Commission” and determined their managerial duties only applied to a small piece of land in Bears Ears known as the Shash Jáa unit.²⁹⁰

Trump’s dramatic actions brought about various legal challenges regarding a president’s authority to alter or revoke a national monument under the Antiquities Act.²⁹¹ According to some scholars, “[t]he Antiquities Act confers only the power to declare national monuments,”²⁹² and only Congress has the power to “modify and revoke withdrawals for national monuments created under the Antiquities Act.”²⁹³ On the other hand, some argue that the president does have the power to revoke or alter a national monument²⁹⁴ and that previous presidents did not abide by the Antiquities Act’s requirement that a national monument be “confined to the smallest area compatible.” After Trump reduced the Bears Ears National Monument, Tribes and other environmental groups sued, claiming his actions were unlawful.²⁹⁵

In October 2021, after President Biden was elected to office, he signed Proclamation 10285 which “confirms, restores, and supplements the boundaries and protections provided by [Obama’s proclamation], including the continued reservation of land added to the monument by [Trump’s proclamation].”²⁹⁶ In addition to restoring Bears Ears National Monument’s boundaries to its former size, Biden’s proclamation reestablished the Bears Ears Commission “in accordance with the terms, conditions, and obligations set forth in [Obama’s proclamation]” for the purpose of “provid[ing] guidance and recommendations

288. *Id.* at 58085.

289. Environmental experts estimated that Trump’s actions left approximately 100,000 sites having archaeological and cultural importance without protection. See Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

290. Modifying the Bears Ears National Monument, 82 Fed. Reg. at 58085–86.

291. Ethel Branch & Daniel Cordalis, *The Unlawful Reduction of Bears Ears National Monument: An Executive Overreach*, A.B.A. 4, 6 (May 1, 2018), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/may-june-2018/the_unlawful_reduction_of_bears_ears.

292. This reasoning is premised on the notion that the Act’s silence on the President’s authority to change or revoke a national monument indicates that Congress intentionally limited the President’s power. *Id.*

293. *Id.* (quoting H.R. Rep. No. 94-1163, at 9 (1976)).

294. See Todd Gaziano & John Yoo, *Op-Ed: It’s Magical Legal Thinking to Say Trump Can’t Reverse Obama’s National Monuments*, L.A. TIMES (July 6, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-yoo-gaziano-revoking-national-monuments-20170706-story.html> (opining that “[a]lmost every grant of power, by Constitution or statute, implicitly also includes the power of reversal”).

295. *NRDC et al. v. Trump et al. (Bears Ears National Monument)*, NAT’L RES. DEF. COUNCIL, <https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears> (last updated Apr. 14, 2023). After Biden reestablished the National Monument, the district court stayed the litigation against the Trump administration. *Id.*

296. Bears Ears National Monument, 86 Fed. Reg. 57321, 57321 (Oct. 15, 2021).

on the development and implementation of management plans and on management of the entire monument.”²⁹⁷

Following a tumultuous journey, in June 2022, the Bears Ears Commission, the BLM, and USFS signed the inter-governmental agreement “Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument.”²⁹⁸ The agreement solidified the relationship between the federal government and the Bears Ears Commission while setting forth the responsibilities and authority of each party in co-stewarding the national monument and its resources.²⁹⁹ According to the agreement, the federal agencies and Bears Ears Commission will “coordinate, consult, and engage regularly on resource management priorities and joint management opportunities within the monument.”³⁰⁰ Each year, the federal agencies and the commission will develop a joint work plan setting annual priorities based on the monument’s available funding and create strategies to inventory and monitor the historical objects throughout Bears Ears.³⁰¹ Moreover, the commission and federal agencies agreed to work together to ensure tribal people have access to sites with cultural importance and protect ceremonial locations and artifacts from further desecration.³⁰² While the agreement did not authorize the commission to spend government funds or provide the commission with funding,³⁰³ the agreement authorizes the parties to “[c]ooperatively seek additional partnerships, funds, and authorities to achieve shared Tribal and Federal land management goals.”³⁰⁴

The co-stewardship duties of the Bears Ears Commission include providing the BLM and USFS information about valuable artifacts and sites within the National Monument.³⁰⁵ Additionally, the commission agreed to notify the agencies about issues recognized by other unrepresented tribes in the region.³⁰⁶ On the other side, the BLM and USFS are entrusted with ensuring that “Federal policies reflect the needs of Tribal Nations,” that Tribal leaders have meaningful involvement in the management process, and that “Tribal knowledge and local expertise is reflected in agency decision[s]” affecting Bears Ears.³⁰⁷ Ultimately,

297. *Id.* at 57332.

298. BUREAU OF LAND MGMT., COOPERATIVE MANAGEMENT AGREEMENT OF THE BEARS EARS NATIONAL MONUMENT (June 18, 2022), <https://www.blm.gov/sites/default/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf>.

299. *See id.* at 1–4.

300. *Id.* at 3.

301. *Id.* at 3–4.

302. *Id.*

303. *Id.* at 6.

304. *Id.* at 4–5.

305. *Id.*

306. *Id.*

307. *Id.* In addition to the duties described above, the Agreement also dictates that the BLM and USFS must “[h]onor applicable Executive Orders, Secretarial Orders, and Memorandums of Understanding” regarding tribal consultation and tribal-government relationships,

including, but not limited to, Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments, Secretarial Order No. 3403: DOI and USDA Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, and the November 16, 2021 Memorandum of Understanding Regarding

the agreement governs the co-stewardship of Bears Ears National Monument for an initial five years and will be reviewed every five years after.³⁰⁸

After years of effort, the Tribes from the Bears Ears region obtained increased protections for their homeland—an area with enormous environmental, historical, and scientific importance. As a result of their effort, the Bears Ears Commission and tribal people helped develop a consultation program that will supply Bears Ears and its treasures with protection for future generations.

3. *The Impact of Shared Stewardship on Bears Ears*

The historic creation of the Bears Ears Commission marks a monumental step forward for tribal consultation requirements. It demonstrates how effective tribal co-stewardship can benefit governmental agencies and land in need of conservation.³⁰⁹ In addition to the protections that come with a national monument designation,³¹⁰ the commission's involvement in managing Bears Ears will help create long-lasting measures for safeguarding the region's land and resources, such as ceremonial sites, many historical artifacts, and diverse flora and fauna inhabiting the region.³¹¹ Contrary to the concern that the goals of tribes and government entities may clash,³¹² the tribal consultation occurring in Bears Ears suggests that when tribes and government entities share common end goals, they can effectively communicate and work together to steward the land and preserve natural resources.

Tribal involvement and consultation in managing the Bears Ears National Monument will provide federal agencies with “knowledge, expertise, resources, and services not otherwise available in the development and coordination of resource management programs, [and] land use planning . . . within [] Bears Ears.”³¹³ In July 2022, the Bears Ears Commission released its first land

Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites.

Id. at 5.

308. *Id.* at 6.

309. See generally *infra* Subpart III.A.3.

310. See *Antiquities Act of 1906*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/antiquities-act.htm> (last visited Aug. 9, 2023) (describing various protections for land deemed a national monument, such as setting forth “requirement to secure permission from federal land managers to conduct archeological investigations and remove objects from federal lands” and imposing “[p]enalties upon conviction for unauthorized activities, such as excavation and removal of objects.”); see also *National Monuments Under Attack*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/save_our_national_monuments/index.html (last visited Aug. 10, 2023) (noting that national monuments are “[s]pecial places and [have] objects [which] are protected within monument areas; they may be exempted from mining, logging or oil and gas development”).

311. See BUREAU LAND MGMT., *supra* note 298, at 2 (noting that the purpose of Agreement and co-management relationship is the “development of long-term resource management and programmatic goals”).

312. See MURRAY, *supra* note 9, at 21 (noting that some politicians oppose protecting sacred tribal sites out of concern that they are “too restrictive of federal land use”).

313. BUREAU LAND MGMT., *supra* note 298, at 3.

management plan for the national monument, which detailed its concerns with the state of the area.³¹⁴ The plan set forth the commission's proposed initiatives for managing the monument and described the ways the commission could guide federal officials in addressing the environmental and cultural impacts harming the land.³¹⁵ The commission suggests that tribes' "traditional teachings" could be integrated into and help bolster the effectiveness of various federal land management programs such as "cultural sensitivity programs, tribal monitor programs, hunting awareness, springs restoration programs, and ethnobotanical training."³¹⁶ For example, the Bear Ears Commission notes that the Sa'ah Naagáí Bik'eh Hózhóón (SNBH) philosophy³¹⁷ from the Navajo Nation "could be integrated into the education of youth and the general public on caring for the plants, animals, birds, and insect communities of Bears Ears."³¹⁸ The SNBH philosophy focuses on four principles regarding cultural and natural resource use: "(1) the proper development of the mind, (2) learning the skills of survival, (3) understanding and appreciating positive relationships, and (4) understanding and relating to one's home and environment."³¹⁹

As the commission's plan states, traditional ecological knowledge will offer the USFS and BLM an essential resource in developing long-term plans to preserve Bears Ears' landscape.³²⁰ To reach its goal of creating enduring protections for Bears Ears, the commission has suggested creating a "Traditional Knowledge Institute" for the national monument.³²¹ The institute would comprise various programs dedicated to educating others and supplementing the management-driven research required for the federal land.³²² The programs would also help preserve and guide others in understanding "indigenous perspectives on plants, animals, geology, astronomical, and water resources" throughout Bears Ears.³²³ Moreover, the institute would involve establishing a "cultural ranger program" that focuses on using aspects of traditional knowledge to help train land managers working within the national monument.³²⁴ Consequently, land managers would have a better understanding of the "cultural

314. See generally BEARS EARS INTER-TRIBAL COALITION: A COLLABORATIVE LAND MANAGEMENT PLAN FOR THE BEARS EARS NATIONAL MONUMENT, THE BEARS EARS INTER-TRIBAL COALITION i (2022) (describing the initial plan's purpose as being "intended to provide a synthesis of Tribal perspectives on managing the landscape of the Bears Ears National Monument . . . [and] emphasizes a holistic approach to all resources that gives primacy to indigenous knowledge and perspectives on the stewardship of the Bear's Ears landscape").

315. The Commission was concerned with the effects of mining, recreational activity, water rights, and other forestry and resource use within the Monument. *Id.* at 33.

316. *Id.* at 50–51.

317. See *id.* at 41. For a more in-depth overview of the SNBH philosophy, see generally *id.*

318. *Id.* at 41, 50–51.

319. *Id.*

320. *Id.* at 64.

321. *Id.* at 64–65.

322. *Id.*

323. *Id.* at 65.

324. *Id.*

landscape that comprises archaeological sites, Native histories, and the natural resources” within Bears Ears.³²⁵

Industry experts have recognized that consultation with tribal leaders in managing federal lands and national monuments, like Bears Ears, provides many other benefits for federal agencies.³²⁶ As Brett Kenney, a tribal attorney in Oregon, notes, tribes are more “willing and able to use their tribal resources or to seek grant or foundation funding opportunities to manage federal lands.”³²⁷ Further, tribes’ traditional ecological knowledge can increase modern developments and society’s scientific knowledge.³²⁸ Consequently, tribal co-stewardship of federal lands and the Bears Ears National Monument provides federal agencies with “an opportunity to integrate unique tribal traditional knowledge with contemporary resource management policies to meet mutual objectives.”³²⁹

Tribal co-stewardship and the Bears Ears Commission are set to provide many benefits for the governmental agencies managing Bears Ears. Using its traditional tribal knowledge, the commission plans to implement education and training programs to help officials manage the national monument. Moreover, the commission’s unique familiarity with the region will provide federal agents with the expertise needed to protect Bears Ears and its valuable resources. Using tribal knowledge in regions with deep-rooted tribal ties and where human activity threatens the area offers government officials vital insight for managing and safeguarding the land. Thus, using tribal consultation and co-stewardship approaches similar to those employed in Bears Ears would help supply long-term solutions to protect other national treasures, such as the Great Salt Lake, which have significant environmental importance and are on the verge of destruction.

B. *The Great Salt Lake*

The Bears Ears example demonstrates how effective federal and tribal co-stewardship is already occurring on lands outside of Indian Country. As mentioned in the Introduction, however, this Article seeks to demonstrate how the existing legal principles apply in instances where there is not necessarily a tribal “implication,”³³⁰ but tribal co-stewardship would be very valuable. Additionally, presidents supportive of shared stewardship will not always occupy the Oval Office, and arguments for shared stewardship must rest on existing legal principles in order to be successful during times when the executive may not be

325. *Id.*

326. See Washburn, *Facilitating Tribal Co-Management*, *supra* note 13, at 266–69.

327. Brett Kenney, *Tribes as Managers of Federal Natural Resources*, 27 NAT. RES. & ENV'T 1, 1 (2012).

328. See *id.* (“For example, modern development of aspirin (derived from willow bark); digitoxin (a congestive heart treatment drug derived from foxglove); and quinine (a malaria treatment derived from cinchona) all can be traced to [traditional ecological knowledge].”).

329. MURRAY, *supra* note 9, at 2.

330. *Id.* at 18 (explaining the management of Bears Ears which was justified in part because of the strong tribal cultural and historical ties to the area).

supportive. We therefore examine how tribal co-stewardship can prove incredibly valuable even where there is not a direct tribal implication outside of the land in question being part of the traditional ancestral homelands of the tribes. In this regard, restoration of the Great Salt Lake may prove a valuable pilot project to demonstrate the effectiveness of tribal co-stewardship.³³¹

Like in the Bears Ears context, the state and federal government would benefit from coordination with multiple tribes whose traditional homelands overlapped with the Great Salt Lake for the reasons already discussed (e.g., the inclusion of traditional ecological knowledge and a strong commitment to the preservation of land). Additionally, such intergovernmental coordination benefits tribes, whose human and financial resources are often limited, as the tribes involved can have a larger impact through coordination.³³² Additionally, coordination between tribes and other sovereigns increases the likelihood that politicians will pay attention to the goals of the sovereigns involved.³³³ While some past efforts at inter-sovereign collaboration have resulted in resistance,³³⁴ such a result may be less likely to occur in the context of the Great Salt Lake, as all sovereigns involved acknowledge that efforts must be taken to remediate the Great Salt Lake and that they share a common goal of preventing its demise.³³⁵

As one of the West's national treasures, the Great Salt Lake³³⁶ spans significant portions of northwestern Utah.³³⁷ The lake provides critical support to its neighboring human residents and environments.³³⁸ Moreover, the Great Salt Lake cultivates a variety of ecosystems while also bolstering Utah's economy and safeguarding the health of local Utahns.³³⁹ Nevertheless, increased demands for water, climate change, and other factors have caused the lake to suffer tragic consequences.³⁴⁰ Experts warn that without immediate preventative action, the lake will completely dry up and, as a result, have disastrous

331. *Id.* at 25 (recognizing that Congress may want to develop more pilot projects to show the ability of tribes to effectively co-manage and co-steward areas).

332. Berger, *supra* note 24, at 10–11 (explaining that tribes often have limited resources available and people to assist with large projects, and that the states and federal government have access to resources that tribes do not have access to).

333. *Id.* at 12.

334. *Id.* (“Tribal assertions of authority over wildlife often meet concerted resistance.”).

335. See Samantha Hawkins, *Saving Great Salt Lake Gets a Boost in Utah State Legislature*, BLOOMBERG LAW (Mar. 6, 2023). Utah Rep. Doug Owens stated, “There’s a strong bipartisan commitment to make sure the lake stays alive and healthy.” *Id.*

336. For purposes of this Article, the Authors refer to the Great Salt Lake as either “the lake” or by its formal title.

337. *Great Salt Lake & Lake Bonneville*, UTAH GEOL. SURVEY, <https://geology.utah.gov/popular/great-salt-lake> (last visited June 28, 2023).

338. See *Protecting and Preserving Great Salt Lake*, STATE OF UTAH, <https://greatsaltlake.utah.gov> (last visited June 28, 2023) (noting that “[t]he lake is vital to the environment, ecology and economy, not just in Utah but also the western U.S.”).

339. See generally CODY ZESIGER ET AL., *AGRICULTURE WATER USE AND ECONOMIC VALUE IN THE GREAT SALT LAKE BASIN 1* (Utah St. Univ. ed., 2023) (describing the vital importance of the Great Salt Lake to Utah).

340. See *Protecting and Preserving Great Salt Lake*, *supra* note 338.

consequences for the State of Utah, its residents,³⁴¹ and potentially the continent as a whole.³⁴² Without water in the lake, local ecosystems and the economic activity generated by the lake will cease to exist.³⁴³ Moreover, as the water level drops, toxic pollutants in the lake bed will combine with wind to create poisonous dust clouds, endangering the health of Utah residents.³⁴⁴

While some short-term governmental procedures are in place to increase the lake's water level, without developing long-term water conservation habits, they are insufficient to address the dangers facing the Great Salt Lake.³⁴⁵ To date, state managers have limited conservation participation from those with traditional ecological knowledge about managing the lake, thus missing out on the expertise required to create lasting protections for the benefit of the region.³⁴⁶

1. *History and Significance of the Great Salt Lake*

Before delving into potential solutions to protect the Great Salt Lake, we start with an overview of its value. Once, a massive ancient freshwater lake known as Lake Bonneville covered most of northwestern Utah.³⁴⁷ However, as time passed and the Earth warmed, water from Lake Bonneville evaporated, and its size significantly diminished.³⁴⁸ From the remnants of Lake Bonneville emerged one of the largest saltwater lakes³⁴⁹ in the western hemisphere: the

341. Lucy Kafanov et al., *Great Salt Lake is shrinking fast. Scientists demand action before it becomes a toxic dustbin*, CNN (July 17, 2021), <https://www.cnn.com/2021/07/17/us/great-salt-lake-drought-dying/index.html> (describing concerns and future implications of decreased water level in the Great Salt Lake).

342. On a continental scale, industry experts from across the nation indicate that without evaporation from a lake, like the Great Salt Lake, nearby climates would face “extreme temperature swings, desertification, and further reduction of runoff.” GSL EXPERT REPORT, *supra* note 4, at 9; *see also* CONSEQUENCES OF DRYING LAKE SYSTEMS AROUND THE WORLD, GREAT SALT LAKE ADVISORY COUNCIL 1 (2019) (determining that “the drying of saline lakes around the world costs billions of dollars in economic losses and mitigation efforts and causes severe harms to human health and the environment”).

343. Sarah E. Null & Wayne A. Wurtsbaugh, *Water Development, Consumptive Water Uses, and the Great Salt Lake*, in GREAT SALT LAKE BIOLOGY: A TERMINAL LAKE IN A TIME OF CHANGE 4–5, 12 (Springer 2020); GSL EXPERT REPORT, *supra* note 4, at 10.

344. GSL EXPERT REPORT, *supra* note 4, at 8–9.

345. *See* Sheri Quinn, *Lots of Options Are on the Table for Saving the Great Salt Lake. The Simplest? Use Less Water.*, SALT LAKE TRIB. (Nov. 15, 2022), <https://www.sltrib.com/news/2022/11/15/lots-options-table-saving-great> (noting proposed solutions to address the Lake's issue); *see also* GSL EXPERT REPORT, *supra* note 4, at 2 (describing experts' belief that water conservation is the necessary solution for safeguarding the Lake).

346. *See* Leia Larsen, *Tribes Still Not Consulted as State Tries to Save Great Salt Lake*, SALT LAKE TRIB. (Feb. 7, 2023), <https://www.sltrib.com/news/politics/2023/02/07/stakeholders-gather-save-great> (discussing experts' views that indigenous knowledge is crucial in safeguarding the Lake).

347. *Great Salt Lake & Lake Bonneville*, *supra* note 337. Lake Bonneville existed approximately 30,000 years ago and remained for 17,000 years. *Id.* At its largest size, Lake Bonneville covered approximately 20,000 square miles and was over 1,000 feet deep at its maximum depth. *Id.*

348. *Id.*

349. Salt lakes are also known as saline lakes, which are large bodies of water with no outlets to the ocean and having a high concentration of salt per liter of water. William David Williams, *What Future for Saline Lakes?*, 38 ENV'T 12, 12, 13–14 (1996).

Great Salt Lake.³⁵⁰ Beyond being an awe-inspiring site, the Great Salt Lake has a unique history of tribal inhabitants, is an ecological hub for diverse wildlife, is a vital part of Utah's economy, and safeguards the State from environmental calamity.³⁵¹

Humans have inhabited the area around the Great Salt Lake for more than 12,000 years.³⁵² Ancient indigenous peoples once hunted, cultivated, and relied on the lands around the lake.³⁵³ In approximately 400 A.D., the Fremont people began living in the desert regions of northeastern Utah, building structures, creating petroglyphs, and using ceremonial objects.³⁵⁴ Eventually, Tribes such as the Utes, Shoshone, and Goshute began occupying the Great Salt Lake region.³⁵⁵ Tribes like the Northwestern Shoshone and Skull Valley Goshute Tribes have profound spiritual and cultural ties to the Great Salt Lake, as it is part of their creation story.³⁵⁶ Generations of tribal people relied on the surrounding land and the lake's resources.³⁵⁷ Tribes set up encampments throughout the Salt Lake Valley and used the area for hunting and gathering food.³⁵⁸ Additionally, tribes came to the Great Salt Lake to harvest salt,³⁵⁹ a resource with many traditional and cultural uses for indigenous people.³⁶⁰

In the 1840s, Mormon settlers moved into the Salt Lake Valley.³⁶¹ At first, there was little conflict between the non-Native settlers and the Indian people.³⁶²

350. Utah Water Science Center, *Great Salt Lake Hydro Mapper*, UTAH DIV. OF NAT. RES., <https://webapps.usgs.gov/gsl> (last visited June 28, 2023).

351. See GREAT SALT LAKE FACT SHEET, GREAT SALT LAKE ADVISORY COUNSEL, <https://documents.deq.utah.gov/water-quality/standards-technical-services/gsl-website-docs/DWQ-2021-013131.pdf>; Alastair Lee Bitsoi, *Salt of the Earth: Preserving the Great Salt Lake*, ATMOS (March 15, 2023), <https://atmos.earth/great-salt-lake-utah-indigenous/>.

352. Todd Cromar, *Archaeologists Discover Proof of Wetlands, Ancient Life on the Utah Test and Training Range*, HILL AIR FORCE BASE (July 22, 2016), <https://www.hill.af.mil/News/Article-Display/Article/853362/archaeologists-discover-proof-of-wetlands-ancient-life-on-the-utah-test-and-tra>.

353. Brad Westwood, *Pre-European Settlement, Crossroads, and the Idea of Home*, UTAH DEP'T OF CULTURAL & CMTY. ENGAGEMENT, <https://community.utah.gov/pre-european-settlement-crossroads-and-the-idea-of-home> (last visited July 25, 2023).

354. Dan Rich Lewis, *Native Americans in Utah*, UTAH HIST. ENCYCLOPEDIA, https://www.uen.org/utah_history_encyclopedia/n/NATIVE_AMERICANS.shtml (last visited July 26, 2023); *Utah Native American Tribes*, UTAH.COM, <https://www.utah.com/things-to-do/attractions/culture/utah-native-american-tribes> (last visited July 25, 2023) (noting that “[r]ock art created by members of the Fremont Culture is found on the islands of the Great Salt Lake”).

355. Westwood, *supra* note 353.

356. Julian H. Steward, *Some Western Shoshoni Myths*, in BULLETIN 136 SMITHSONIAN INST. 249, 267–68 (1943) (describing the Skull Valley Goshute Tribes belief that their creation story began on an island in the Great Salt Lake); Larsen, *supra* note 346 (noting the Great Salt Lake is a part of the Northwestern Band of the Shoshone Nation's creation story).

357. Lewis, *supra* note 354.

358. See Westwood, *supra* note 353 (noting that the tribes used the Salt Lake Valley for seasonal camps and as hunting grounds).

359. *Id.*

360. See Alastair Lee Bitsói, *Salt of the Earth: Preserving the Great Salt Lake*, ATMOS (Mar. 15, 2023), <https://atmos.earth/great-salt-lake-utah-indigenous> (describing salt's use and cultural importance for tribal people).

361. Lewis, *supra* note 354.

362. *Id.*

However, as the Mormon people began expanding their foothold along the Valley, violent disputes broke out, leading to many deaths and eventually forcing the Tribes out of their homeland.³⁶³ For the Ute Tribe specifically, after years of conflict with the Mormon settlers, they signed the *Treaty of Spanish Fork* in 1865 and were moved to a reservation in the Uintah Basin.³⁶⁴

Tribes now located within Utah have broad traditional homelands linked to the Great Salt Lake and surrounding area. For example, “the Utes’ territory included most all of present-day Colorado and Utah as well as parts of New Mexico, Arizona, and Wyoming.”³⁶⁵ In the 1868 *Treaty with the Navajo Indians*, the Navajo Nation reserved the right to hunt and gather on lands adjacent to the Nation’s reservation.³⁶⁶ The *Treaty with Western Bands of Shoshonee Indians* specifically mentions the Great Salt Lake Valley as being the eastern boundary for the Nation.³⁶⁷ Today, the Skull Valley Goshutes, the Ute Indian Tribe of the Uintah and Ouray Reservation, and the Northwestern Band of Shoshone all live on reservations moderately close to the Great Salt Lake.³⁶⁸ While the Tribes’ current reservations are not entirely adjacent to the lake, many tribal people still feel a spiritual connection to the region, given their historical and cultural link to the lake and the surrounding area.³⁶⁹

The land around the Great Salt Lake is owned or managed by various federal and state officials, as well as some private parties.³⁷⁰ The lakebed is owned entirely by the State of Utah³⁷¹ and managed by the Utah Division of Forestry, Fire & State Lands.³⁷² Further, much of the land around the lake and some of the islands within it are also owned by the state.³⁷³ On the western side of the lake, the BLM manages a large portion of land and the majority of Stansbury Island.³⁷⁴ The U.S. Air Force operates a testing and training facility on the lake’s western

363. See FRED A. CONETAH, A HISTORY OF THE NORTHERN UTE PEOPLE 37–39 (Kathryn L. Mackay & Floyd A. O’Neil eds., 1982) (describing the violence and conflicts between Mormon settlers and Tribes causing the forceful removal of Indian people out of the region).

364. FLOYD A. O’NEIL & KATHRYN L. MACKAY, A HISTORY OF THE UINTAH-OURAY UTE LANDS 7 (1979).

365. Mills & Nie, *supra* note 25, at 74.

366. Navajo Treaty, U.S.-Navajo Nation, art. XIII, June 1, 1868 (1869).

367. Treaty with the Shoshoni-Northwestern Bands, U.S.-Shoshoni-Northwestern Bands art. V, Oct. 1, 1863 (1869).

368. See *Tribal Nations*, UTAH DIV. OF INDIAN AFFS., <https://indian.utah.gov/tribal-nations/> (last visited July 26, 2023) (providing a map of the tribal reservations in Utah).

369. Larsen, *supra* note 346.

370. See *Utah Land Status and Administrative Ownership Map*, BUREAU OF LAND MGMT. (Feb. 2018),

https://www.blm.gov/sites/blm.gov/files/documents/files/Utah_LandOwnership_PublicRoomMap.pdf (providing a map of the different parties and government agencies managing the area around the Lake).

371. UTAH DIV. NAT. RES., FINAL GREAT SALT LAKE COMPREHENSIVE MANAGEMENT PLAN AND RECORD OF DECISION xii (2013), <https://ffsl.utah.gov/state-lands/great-salt-lake/great-salt-lake-plans> [hereinafter *GSL COMPREHENSIVE MANAGEMENT PLAN*].

372. *Great Salt Lake*, UTAH DIV. OF FORESTRY, FIRE & STATE LANDS, <https://ffsl.utah.gov/state-lands/great-salt-lake> (last visited July 25, 2023).

373. *GSL COMPREHENSIVE MANAGEMENT PLAN*, *supra* note 371, at xii.

374. *Id.* § 1.6.3.

shore.³⁷⁵ In addition, other federal and state agencies help manage the lake's resources.³⁷⁶ Furthermore, small islands and portions of land around the lake are privately owned.³⁷⁷ Since the federal government and Utah have significant land interests around the lake, both federal and state law are implicated in lake restoration efforts.

The lake and the surrounding area are rich with ancient, cultural, and environmental resources.³⁷⁸ Prehistoric resources, such as ancient burial sites dating back thousands of years, have been found around the lake.³⁷⁹ Moreover, the nearby mountains and land contain many ancient artifacts³⁸⁰ and prehistoric fossils of organisms like marine invertebrates from the Paleozoic era.³⁸¹ The Great Salt Lake's ecosystem contains an array of different flora and fauna.³⁸² Approximately 350 species of birds rely on the lake's resources.³⁸³ Some species of birds are dependent on the lake's ecosystem during long migrations.³⁸⁴ For others, the lake supplies an essential habitat during the breeding season or the winter months.³⁸⁵ Both migrating and native birds rely on the Great Salt Lake's abundance of brine shrimp for food.³⁸⁶ Moreover, different microscopic organisms, algae, crustaceans, insects, plants, cattails, frogs, muskrats, and other life-forms inhabit the lake and its surrounding marshes.³⁸⁷

Apart from having a unique history and nurturing a complex ecosystem, the Great Salt Lake is an integral part of the health and economy of one of the fastest-growing states in the United States.³⁸⁸ In 2022, industry experts found that the

375. *Id.* § 1.6.1.

376. *See, e.g., id.* §§ 1.4–1.6 (describing other federal and state agencies that help manage the Lake's resources and environment, such as the U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, and Utah Division of Water Quality).

377. *See id.* § 2.9 (noting that some islands and other areas around the Lake are privately owned).

378. *See id.* §§ 2.2, 2.12.

379. *Id.* § 2.12.

380. *See* Steven R. Simms & Mark E. Stuart, *Ancient American Indian Life in the Great Salt Lake Wetlands: Archaeological and Biological Evidence*, UTAH GEOLOGICAL SURV. 71, 76 (2002) (describing various tools, ceramics, other archeological artifacts found near the Great Salt Lake).

381. GSL COMPREHENSIVE MANAGEMENT PLAN, *supra* note 371, § 2.13.

382. *See* DON S. PAUL & ANN E. MANNING, GREAT SALT LAKE WATERBIRD SURVEY FIVE-YEAR REPORT 5 (1997-2001) (2002) (noting “the local, regional, continental, hemispheric, and world importance of [the Great Salt Lake] to the species” the Lake supports).

383. On average, over 10 million birds visit and rely on the Lake. GREAT SALT LAKE FACT SHEET, *supra* note 351; *see also* Brianna Randall, *The Great Salt Lake is Shrinking. What Can We Do to Stop it?*, SCIENCE NEWS (Apr. 17, 2023), <https://www.sciencenews.org/article/great-salt-lake-shrinking-utah-drought> (noting 350 species of birds rely on the Lake); PAUL ET AL., *supra* note 382, at 23.

384. PAUL ET AL., *supra* note 382, at 5.

385. *Id.*

386. Robert W. Adler, *Toward Comprehensive Watershed-Based Restoration and Protection for Great Salt Lake*, 1999 UTAH L. REV. 99, 113 (1999).

387. GREAT SALT LAKE INFORMATION GUIDE, UTAH DIV. OF NAT. RESOURCES, <https://site.utah.gov/stateparks/wp-content/uploads/sites/13/2015/02/GSL-Ed-packet1.pdf>.

388. *See Census 2020: Utah Fastest Growing State in U.S.*, KEM C. GARDNER POL'Y INST., UNIV. OF UTAH (Apr. 21, 2021), <https://gardner.utah.edu/census-2020-utah-fastest-growing-state-in-u-s> (describing Utah's population growth and reporting that it is the fast growing state in the nation); *see also* GSL EXPERT REPORT, *supra* note 4, at 3 (noting that, in the opinion of thirty-two industry experts from

lake supports nearly 9,000 local jobs and produces more than \$2.5 billion in economic activity for the state.³⁸⁹ Additionally, evaporation from the lake contributes 5-10 percent of the annual snowfall in the neighboring mountains.³⁹⁰ Such snow supplies water to many residents and farmlands across Utah's Wasatch Front during a time of historically severe droughts.³⁹¹ Outside of Utah, the lake's economic activity also has considerable implications for the global production of certain resources.³⁹² For example, the Great Salt Lake contributes 14 percent of the world's magnesium and 40 percent of all global brine shrimp eggs, a resource necessary for the production of certain aquatic organisms.³⁹³

In addition to sheltering diverse ecosystems and bolstering the state's economy, the lake serves an even greater role in safeguarding millions of people from ecological disaster. Below the lake's saltwater sits a lakebed containing high levels of pollutants from anthropogenic and natural sources.³⁹⁴ In particular, experts have discovered arsenic, cadmium, mercury, nickel, chromium, lead, copper, selenium, organic contaminants, and cyanotoxins in the lakebed, many of which are extraordinarily dangerous to humans.³⁹⁵

As water levels in the Great Salt Lake diminish, more lakebed is exposed to wind erosion.³⁹⁶ When the lakebed's crust erodes, wind and the dangerous pollutants form toxic dust clouds and carry the harmful materials to local communities.³⁹⁷ Inhalation of poisonous dust from a dried-up saline lake can cause serious health issues and diseases, such as "reproductive dysfunction, developmental defects, cognitive impairment, cardiovascular damage, and cancer."³⁹⁸ Poisonous dust from a dried-up Great Salt Lake would have catastrophic implications for the environment and millions of people living in northern Utah.³⁹⁹

the U.S. and Canada, "[t]he lake and its wetlands form a keystone ecosystem that supports biodiversity and human economy throughout the Western Hemisphere").

389. GSL EXPERT REPORT, *supra* note 4, at 3. The lakes economic activity primarily stems from mineral extraction, recreation, and brine shrimp harvesting. Wayne A. Wurtsbaugh & Somayeh Sima, *Contrasting Management and Fates of Two Sister Lakes: Great Salt Lake (USA) and Lake Urmia (Iran)*, 14 WATER 3005, 3015 (2022).

390. GSL EXPERT REPORT, *supra* note 4, at 3.

391. Christopher Flavelle, *As the Great Salt Lake Dries Up, Utah Faces an 'Environmental Nuclear Bomb'*, N.Y. TIMES (June 7, 2022), <https://www.nytimes.com/2022/06/07/climate/salt-lake-city-climate-disaster.html>.

392. *See also* GREAT SALT LAKE FACT SHEET, *supra* note 351.

393. *Id.*

394. GSL EXPERT REPORT, *supra* note 4, at 8-9. In general, saline lakes, such as the Great Salt Lake, accrue pollutants in the lakebed from human action and other natural sources. *Id.* Human activity increasing pollutants in saline lake beds includes "coal burning, mining, agriculture, and urban runoff." *Id.*

395. *See id.* (describing health conditions attributed to heavy metal exposure).

396. Flavelle, *supra* note 391.

397. GSL EXPERT REPORT, *supra* note 4, at 8-9.

398. *Id.* [6]

399. *See, e.g., id.* [6] (noting that increased levels of toxic pollutants in the surrounding water could "damage agricultural crops, degrade soil fertility, and cause premature snowmelt.").

In addition to dust clouds poisoning the air in northern Utah, decreased water levels would make the lake uninhabitable for brine shrimp, birds, and other surrounding life.⁴⁰⁰ Moreover, mineral extraction and the economic activity stemming from the lake would cease.⁴⁰¹ While these widespread harms may appear to be a future problem, as increased water use and other factors have decreased the Great Salt Lake's water supply, the ecological harms have already started having significant environmental impacts.⁴⁰²

2. *The Factors Contributing to the Great Salt Lake's Demise*

As the largest saline lake in North America and the largest body of water in the United States west of the Mississippi River,⁴⁰³ the Great Salt Lake typically covers 1,700 square miles and has a maximum depth of 34 feet.⁴⁰⁴ At its largest size, in 1986, the Lake was approximately 3,300 square miles.⁴⁰⁵ However, over the past few decades, climate change, droughts, and increased demand for water have dramatically reduced the size of the lake.⁴⁰⁶ While the Great Salt Lake's water levels have fluctuated throughout time,⁴⁰⁷ in 2021, an analysis of the lake's size showed it had shrunk to approximately 941 square miles.⁴⁰⁸ The water loss constitutes a 73 percent reduction in water volume and a 60 percent decrease in the lake's surface area.⁴⁰⁹

The lake's decreased water levels stem primarily from humans consuming large amounts of the water that would typically flow to the lake.⁴¹⁰ Normally, the water that leaves the Great Salt Lake through evaporation⁴¹¹ is replenished by large rivers throughout northern Utah.⁴¹² However, excessive human water consumption from the lake's water sources has decreased the supply of water entering the lake and caused water to evaporate faster than it can be replenished.⁴¹³

400. Null & Wurtsbaugh, *supra* note 343, at 4–5, 11.

401. GSL EXPERT REPORT, *supra* note 4, at 10.

402. *Id.* at 2, 9–11. [6]

403. Adler, *supra* note 386, at 102.

404. GREAT SALT LAKE INFORMATION GUIDE, *supra* note 387.

405. *Great Salt Lake*, UTAH DIV. OF NAT. RES., <https://water.utah.gov/great-salt-lake> (last visited June 28, 2023).

406. *Protecting and Preserving Great Salt Lake*, *supra* note 338.

407. Null & Wurtsbaugh, *supra* note 343, at 4–5.

408. Utah Water Science Center, *supra* note 350.

409. GSL EXPERT REPORT, *supra* note 4, at 2.

410. Randall, *supra* note 383.

411. Null & Wurtsbaugh, *supra* note 343, at 2.

412. *See also id.* (“Major streams feeding Great Salt Lake include the Bear, Weber, and Jordan Rivers, which drain the west-slope of the Wasatch Range and collectively make up approximately 65 percent of the lake's inflows.”).

413. GSL EXPERT REPORT, *supra* note 4, at 5, 8 (noting that saline lakes' water level “depend[s] on a delicate balance between streamflow and evaporation”).

Great Salt Lake – June 1985⁴¹⁴Great Salt Lake – July 2022⁴¹⁵

414. *The Great Shrinking Lake*, NASA, <https://earthobservatory.nasa.gov/images/150187/the-great-shrinking-lake> (last visited June 28, 2023).

415. *Id.*

In general, most of the Great Salt Lake's water is delivered from various watersheds along the Wasatch Mountains—specifically the Bear, Jordan, and Weber watersheds.⁴¹⁶ Over the past few decades, there has been a steady increase in the rates at which runoff is diverted from the lake's watershed for agricultural, industrial, and municipal usage.⁴¹⁷ In recent years in particular, humans have used and diverted extraordinary amounts of water from the lake's watershed during a period of decreased runoff attributed to climate change.⁴¹⁸

Most of the Great Salt Lake's watershed is diverted for and consumed by agricultural activity.⁴¹⁹ Across Utah, Idaho, Wyoming, and Nevada, agricultural industries divert 74 percent of the lake's annual watershed for various agricultural purposes.⁴²⁰ Additionally, city and industrial use depletes 9 percent of the lake's watershed.⁴²¹ Mineral extraction removes approximately another 9 percent of water directly from the lake.⁴²²

Ultimately, Utah's high level of water consumption, primarily in the form of irrigated agriculture, has left the Great Salt Lake without a healthy water supply and caused water levels to reach record lows. As a result, the lake has diminished in size and exposed large areas of the lakebed, increasing the chance that toxic pollutants will fill the air and be inhaled by residents of surrounding cities.⁴²³ Moreover, the lack of water has already had dire implications for the lake's ecosystem and surrounding wildlife.⁴²⁴ Without human action, scientists expect the Great Salt Lake to completely dry up in the near future, and along with it, the crucial services the lake provides humans and the environment.⁴²⁵ While some action has recently occurred to prevent the Great Salt Lake's demise, current solutions are short-term fixes and inadequate to address the problem for future generations.

416. *Id.* at 5–8.

417. *See id.* (describing the historic trend of federal and state water projects diverting runoff from the lake's watershed).

418. *Id.*; *see also* UTAH DIV. OF WATER RESOURCES, MUNICIPAL AND INDUSTRIAL WATER USE IN UTAH: “WHY DO WE USE SO MUCH WATER, WHEN WE LIVE IN A DESERT?” 1 (2010) (analyzing Utah's historically high rates of water consumption).

419. GSL EXPERT REPORT, *supra* note 4, at 6.

420. *Id.* (noting that “63% of this agricultural land occurs in Utah, 31% in Idaho, 5% in Wyoming, and 1% in Nevada”).

421. *Id.*

422. *Id.*

423. *See, e.g.,* Leia Larsen, *Great Salt Lake is Still Blowing Dangerous Dust*, SALT LAKE TRIB. (May 19, 2023), <https://www.sltrib.com/news/environment/2023/05/19/great-salt-lake-is-still-blowing> (describing and showing large dust storms from the Lake that hit Salt Lake City in 2023).

424. *See* GSL EXPERT REPORT, *supra* note 4, at 10 (describing the socioecological “symptoms” the Great Salt Lake is showing and noting that these “negative effects will grow more severe if water flow is not rapidly restored to the lake”).

425. *See* Kafanov et. al, *supra* note 341 (describing scientists' concerns that the Lake will dry up in the near future).

3. *Unworkability of Current Solutions to Remediate the Lake*

Recently, awareness about the destruction of the Great Salt Lake has increased, causing state and federal government officials to take some preventative action to improve its water level.⁴²⁶ Additionally, after substantial amounts of snowfall in 2023 helped increase the lake's water level, some remain hopeful for the lake's future.⁴²⁷ Nevertheless, scientists warn that one good year is insufficient to prevent the lake from disappearing.⁴²⁸ Without continued action and long-term solutions, the future of the Great Salt Lake remains in peril.⁴²⁹

Industry experts and politicians have offered a plethora of ways to “save” the Great Salt Lake.⁴³⁰ Proposed solutions include building a pipeline that pumps water from the Pacific Ocean to the lake,⁴³¹ cloud seeding,⁴³² installing more secondary water meters, and optimizing agriculture tools to maximize the efficiency of water use.⁴³³ However, experts warn that we cannot rely on techniques such as these to fix the lake's problems.⁴³⁴ Many of the proposed solutions are either too expensive or will have too small of an influence on the lake's water supply to alleviate the consequences of a shrinking Great Salt Lake.⁴³⁵ As many scientists recognize, “conservation is the only way to provide adequate water in time to save [the] Great Salt Lake” and “is also the most cost-effective and resilient response” to safeguard the lake for years to come.⁴³⁶

426. See *Legislative Actions, GREAT SALT LAKE*, <https://greatsaltlake.utah.gov/legislative-actions> (last visited July 27, 2023) (providing Utah 2022 and 2023 legislation aimed at protecting the Great Salt Lake); Amy Joi O'Donoghue, *Lee, Curtis Propose More Money to Help the Ailing Great Salt Lake*, DESERET NEWS (June 14, 2023) <https://www.deseret.com/utah/2023/6/14/23760877/great-salt-lake-conservation-money-lee-curtis> (describing new federal legislation from Sen. Mike Lee and Rep. John Curtis to address the Lake's problems).

427. See Rachel Ramirez, *'It Buys Us Time': Great Salt Lake Still at High Risk of Disappearing after Epic Snow, Scientists Warn*, CNN (Apr. 16, 2023), <https://www.cnn.com/2023/04/16/us/great-salt-lake-water-level-climate/index.html> (noting that “after an incredible winter full of rain and snow, there is a glimmer of hope on North America's largest terminal lake”).

428. *Id.*

429. Carter Williams, *What Can Save the Great Salt Lake? New Report Outlines Possibilities*, KSL.COM (Feb. 8, 2023), <https://www.ksl.com/article/50573793/what-can-save-the-great-salt-lake-new-report-outlines-possibilities> (noting scientists' belief that saving the lake will take a long-term commitment).

430. See Quinn, *supra* note 345 (describing the various methods offered to save the Great Salt Lake).

431. *Pumping Seawater to Great Salt Lake Would Take at Least 11% Of Utah's Electricity Demand*, BYU (Feb. 17, 2023), <https://cce.byu.edu/pumping-seawater-to-great-salt-lake-would-take-at-least-11-of-utahs-electricity-demand>.

432. Lindsay Aerts, *Cloud Seeding Could Bring More Water to the Great Salt Lake, Utah Department of Natural Resources Says*, SALT LAKE TRIB. (Aug. 5, 2022), <https://www.sltrib.com/news/2022/08/04/cloud-seeding-could-bring-more> (explaining that cloud seeding attempts to increase rainfall by deploying “a weather modification that . . . burn[s] silver iodide in the clouds during long winter storms. When the silver iodide burns, particles go into the atmosphere and their charge attracts water to them.”).

433. Quinn, *supra* note 345.

434. See GSL EXPERT REPORT, *supra* note 4, at 22–23.

435. *Id.*; see also BYU, *supra* note 431 (noting that the proposed “pipeline would require . . . 11% of Utah's electricity demand. With current prices and technologies, the electricity would cost over \$300 million per year and emit almost 1 million tons of carbon dioxide per year. . .”).

436. GSL EXPERT REPORT, *supra* note 4, at 2.

During Utah's 2022 and 2023 legislative sessions, the state passed bills appropriating roughly one billion dollars toward water conservation efforts.⁴³⁷ Part of the legislation involved creating a water trust that would issue grant money toward projects and programs meant to improve the lake's water supply.⁴³⁸ In awarding funds, the new legislation requires that the water trust "create and consult with one or more advisory councils on matters related to the mission and objectives of the water trust."⁴³⁹ Further, the advisory council was to consist of nine representatives from different backgrounds.⁴⁴⁰ A key goal of the water trust and advisory council is to find ways to "support efforts to integrate water planning and management efforts that benefit the Great Salt Lake watershed" and "to enhance, preserve, or protect the Great Salt Lake."⁴⁴¹ In 2023, when the advisory council was formed, it did not include representatives with Native Americans' traditional ecological knowledge or from the groups of people who had cared for the lake years before non-Native settlers claimed the region.⁴⁴²

As some have noted, the advisory council and state managers' failure to include tribal and indigenous perspectives is a mistake and will likely make it more difficult to create solutions that protect the Great Salt Lake for future generations.⁴⁴³ Recognizing the importance of using indigenous traditional ecological knowledge and history, Hollis Robbins, an industry expert, has noted that "[n]ations and communities who were sustained by the Great Salt Lake for millennia have a strong understanding of how to sustain and protect the lake ecosystem."⁴⁴⁴ Without guidance from Indigenous people, the advisory council and those tasked with managing and developing solutions to address the lake's demise are losing out on vital insight from those who spent centuries managing the lake.⁴⁴⁵

Despite short-term preventative efforts and occasional bouts of environmental luck increasing the lake's water supply, a shrinking Great Salt Lake still poses an imminent threat to the future of neighboring cities, the health of locals, and the sustainability of various ecosystems. Thus, the future of the Great Salt Lake and its countless benefits depend on humans finding creative

437. *Legislative Actions*, *supra* note 426.

438. Utah Code Ann. § 65A-16-201(1).

439. *Id.* § 65A-16-301(5) (a).

440. *See id.* § 65A-16-301(5)(b) (stating that the advisory council must include representatives from the following groups: agriculture, private landowners, waterfowl conservation organizations, non-game avian species conservation groups, another Great Salt Lake conservation organization, aquaculture, a water conservancy district, and the wastewater treatment facilities).

441. *Id.* § 65A-16-201(1)(g), (k); § 65A-16-301(5).

442. *See* Larsen, *supra* note 346.

443. *See generally id.* (discussing Darren Parry, a tribal historian's concerns that tribal knowledge is needed to manage the lake and its resources).

444. *Can Art and Humanities Save the Great Salt Lake?*, UNIV. OF UTAH <https://humanities.utah.edu/news/can-art-and-humanities-save-the-great-salt-lake.php> (last visited July 27, 2023) (quoting Dr. Hollis Robbins, Dean of the College of Humanities at the University of Utah).

445. *See generally* Larsen, *supra* note 346 (discussing Darren Parry, a tribal historian's concerns that tribal knowledge is needed to manage the Lake and its resources).

solutions to ensure the lake has sufficient water levels for future generations. As a partial solution to the lake's pervasive problems, government officials and community leaders should look to local Indian Tribes for guidance in addressing the state's extreme water consumption and for help finding ways to increase the lake's water supply.

4. *Tribal Co-Stewardship of the Great Salt Lake*

The need to restore the Great Salt Lake presents an opportunity for tribal co-stewardship. Many local Tribes have a significant interest in the lake as it was part of their ancestral homelands. In addition, both the federal government and the state of Utah possess significant land surrounding the lake, creating opportunities for co-stewardship between all sovereigns with interests in the lake.

Such collaboration is consistent with tribal sovereignty, as these Tribes are separate sovereigns with their own laws and knowledge that can be beneficial to state and federal efforts to restore and protect the lake. Further, as discussed above, the Biden Administration, especially under Secretary of the Interior Deb Haaland, has called for increased consultation with tribes in general, and consultation on the Great Salt Lake is certainly consistent with those efforts to promote effective consultation. Additionally, federal officials, such as National Park Service Director Sams, are calling for increased contracting and co-management with tribes, which, again, is consistent with principles of shared stewardship.

Further, local Tribes have treaty provisions specifically mentioning the Great Salt Lake Valley and hunting interests expanding beyond their reservations. This means that Tribes have legal interests in areas around the Great Salt Lake. As demonstrated above, federal courts have traditionally been very protective of tribal treaty rights. Such rights can be a strong foundation for calls for tribal co-stewardship of the Great Salt Lake. Also, as demonstrated in the *Pyramid Lake* example above, federal agency decision makers may not make decisions that fail to fully consider the federal government's obligations to tribes under the federal trust responsibility. While working to restore the Great Salt Lake, federal officials are therefore required to act in the best interests of tribes.

In addition, given the value of tribal traditional ecological knowledge, the federal government and Utah will only benefit from such collaborations. When federal agencies are mandated by federal law to "consider information and make informed decisions, Agencies should consult and collaborate with Tribal Nations and Indigenous Peoples to include Indigenous Knowledge in decision making."⁴⁴⁶ This call to use traditional ecological knowledge to make informed decisions applies in the context of the Great Salt Lake. For example, the Endangered Species Act requires the applicable federal agencies to gather

446. Memo from Arati Prabhakar & Brenda Mallory to Heads of Fed. Dep'ts & Agencies, *supra* note 53, at 5.

information in their decision-making processes.⁴⁴⁷ Both statutes could be implicated in the demise of the Great Salt Lake, as the diminishing lake could affect endangered species, and there are many sites of potential historical significance to tribes along the lake.⁴⁴⁸

Even where federal statutes do not explicitly call for tribal consultation, agencies would benefit from consultations with tribes.⁴⁴⁹ This is because tribes with historical connections to the lake possess traditional ecological knowledge that will benefit state and federal officials engaged in efforts to preserve the lake.

Although this Article focuses on federal law supporting increased shared stewardship, in the case of the Great Salt Lake, state law principles applicable in Utah may also be relevant. As water levels in the Great Salt Lake diminish, the state of Utah faces many negative environmental effects.⁴⁵⁰ Yet, despite Tribes' deep ties to the lake, tribal consultation has remained nonexistent at the state level.⁴⁵¹ The lack of tribal involvement in addressing the Great Salt Lake's issues seems odd, as tribal consultation is embedded in the state's law.⁴⁵² Under Utah law, "tribal consultation" refers to "state and the tribes exchanging views and information, . . . regarding implementing proposed state action" impacting tribal cultural practices, lands, resources, and tribes' "access to traditional areas of tribal cultural or religious importance."⁴⁵³ Utah law also contemplates and seeks to "promote government-to-government relations between the state and tribal governments."⁴⁵⁴ Consequently, Utah's Division of Indian Affairs is required to implement and develop "programs that will [give] Indian citizens . . . an opportunity to share in the progress of Utah," while also "promot[ing] programs to help the tribes and Indian communities find and implement solutions to their community problems."⁴⁵⁵ This law may prove useful in getting tribes a "seat at the table," involving tribes in stewardship activities, and using their traditional ecological knowledge to help protect the Great Salt Lake.⁴⁵⁶ Other states may have similar laws supporting increased tribal co-stewardship.⁴⁵⁷

IV. RECOMMENDATIONS FOR PROTECTING NATIONAL TREASURES THROUGH SHARED STEWARDSHIP

As is seen from the Bears Ears and Great Salt Lake case studies, all sovereigns benefit from tribal co-stewardship of national resources. By serving

447. *Id.* at 6–7.

448. *See, e.g., id.* ("In many instances, Tribes and Indigenous Peoples may have relevant information about species locations, behaviors, habitats, and changes over time that can be applied.").

449. *Id.* at 9.

450. *See* GSL EXPERT REPORT, *supra* note 4, at 8–11 (describing the consequences of losing the Great Salt Lake).

451. *See* Larsen, *supra* note 346.

452. *See generally* Utah Division of Indian Affairs Act, Utah Code Ann. § 9-9.

453. Utah Code Ann. § 9-9-402(15).

454. *Id.* § 9-9-103(4).

455. *Id.* § 9-9-103(1)(3).

456. *Id.* § 9-9-103(1).

457. A full survey of existing state law, however, is beyond the scope of this Article.

as co-stewards, tribes have the opportunity to exert their tribal sovereignty as equal sovereigns with the states and the federal government. The states and federal government likewise benefit from the inclusion of a sovereign government seeped in helpful traditional ecological knowledge about the resource to be conserved. Such co-stewardship activities should not be artificially constrained to instances where there is a direct tribal implication or the land in question is adjacent to tribal territory.

As the foregoing discussion demonstrates, regardless of which politicians occupy office, tribes have significant legal claims to co-stewardship through treaties, the federal trust responsibility, tribal consultation provisions, and potentially 638 contracts and co-management. Given the expansive presence of tribes prior to the arrival of settlers, efforts to distinguish areas of tribal implication are artificial and unnecessarily deprive states and the federal government of the effective co-stewardship of tribes. Natural resources facing immediate peril, such as the Great Salt Lake, deserve better.

Moving forward, we encourage the Biden Administration and future administrations to consider methods of institutionalizing its existing guidance on tribal co-stewardship into congressional legislation. This will ensure that the positive impacts of these efforts can be realized regardless of whether sympathetic executives hold office.

We also echo Dean Kevin Washburn's observation that the language of some existing laws and regulations is "unduly narrow and restrict[s] [co-management to] tribal nations with significant connections to the land, including some tribal nations that are located near public lands, though not formally adjacent."⁴⁵⁸ He goes on to suggest that existing narrow language should be expanded to encourage tribal co-stewardship and co-management.⁴⁵⁹ The federal government and states should not limit outreach to instances where tribal land is adjacent to the natural resource in question or a tribal question is directly implicated. As demonstrated by the Bears Ears and Great Salt Lake case studies, all benefit from tribal stewardship even where tribal lands are not adjacent, or, as in the Great Salt Lake example, the tribal interest is not directly implicated.

Additionally, during times when future federal administrations limit tribal involvement in federal natural resource conservation efforts, state officials, such as those in Utah, can employ the policies described above to strengthen their own relationship with tribes and benefit from tribal traditional ecological knowledge. The principles of federal Indian law and the successes of federal tribal contracting suggest that applying similar principles to state Indian law⁴⁶⁰ would also prove beneficial on the state level. On lands managed primarily by a state, such as the Great Salt Lake, tribal traditional knowledge and shared stewardship between tribes and states offer similar benefits as those on the federal level. Such

458. Washburn, *Congressional Testimony*, *supra* note 9, at 7.

459. *Id.*

460. *See, e.g.*, Utah Code Ann. § 9-9-103 (describing Utah's desire to take actions that "promote government-to-government relations between the state and tribal governments")

benefits and tribal knowledge about nature offer a path toward creating enduring solutions to safeguard national treasures like the Great Salt Lake.

Finally, considering that many of the problems we face regarding natural resource use, such as the receding water level of the Great Salt Lake, involve humans' relationship with the earth, understanding how to garner healthy relationships with the land would prove extremely beneficial for resource conservation. While modern science is relevant to protecting natural resources, it is also incredibly important that humans learn how to interact with the world around them and not overindulge in resource consumption. Tribes' deep ties and understanding of nature offer important knowledge about using environmental resources and progressing human innovation while still conserving and maintaining a respectful relationship with the natural resources we all depend on. For example, human water use and industry use, while important, must be conducted in a way that conserves resources for future generations.

Even when federal agencies and states refuse to listen to tribes, individual non-Native use of traditional ecological knowledge would prove extremely beneficial for all humans in understanding how their actions and relationship with the earth affect the environment. While individual conservation efforts alone may feel insignificant, as Jake Edwards of the Onondaga Nation Council of Chiefs notes, “[w]e all need the same things: clean air and clean water. We have a lot of work to do, but if we can combine our strengths, we can fight for what’s right.”⁴⁶¹ Further, the viability of intertribal organizations in co-stewarding national resources should be more fully explored,⁴⁶² as examples of effective collaboration with intertribal organizations exist across the country, such as in the Pacific Northwest and Great Lakes regions.⁴⁶³

Ultimately, as Washburn explained in his testimony to Congress, “[w]hen tribes manage public land, they bring a longstanding and deep commitment to land stewardship. They also have strong human capital to bring to bear, including traditional ecological knowledge that has developed over centuries.”⁴⁶⁴ Tribes want to engage in co-stewardship activities with other sovereigns, and other sovereigns will benefit from such collaborations.⁴⁶⁵ Through shared stewardship, we all win.

461. See Farzana Kapadia, *Environmental Justice From Pennsylvania to Paris: A Public Health of Consequence*, 113 AM. J. PUB. HEALTH 12, 14 (2023) (quoting Jake Edwards, Member of the Onondaga Nation Council of Chiefs), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2022.307156>.

462. See generally Berger, *supra* note 24.

463. Berger, *supra* note 24, at 13–29 (discussing the Northwest Indian Fisheries Commission, Great Lakes Indian Fish and Wildlife Commission, and the Inter-Tribal Buffalo Council); see Mills & Nie, *supra* note 25, at 135.

464. Washburn, *Congressional Testimony*, *supra* note 10, at 8.

465. *Id.* [11]

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