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Re-Indigenizing Yellowstone

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RE-INDIGENIZING YELLOWSTONE

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I. INTRODUCTION

Tribal connections to the area now known as “Yellowstone” are numerous, varied, and have existed since time immemorial. The creation of Yellowstone National Park a century and a half ago marked an unprecedented approach to preserving the natural and geologic wonders of the region. Yellowstone’s creation also resulted in the physical, legal, and actual exclusion of Indigenous peoples from these spaces.¹ While certain inroads breaking down those barriers have been made, tribal members may still feel like visitors in the park—a deeply tragic state of affairs

¹ See *infra* Part III.A.

given long-standing tribal connections throughout the area.²

In recent years, tribal leaders and their allies have sparked a broader movement to engender restorative justice across the American landscape. Fueled by high-profile conflicts over tribal interests in sacred waters,³ Supreme Court victories upholding and re-validating historic treaty promises,⁴ and a coalescence of conservation, recreation, and other interest groups behind tribal proposals to protect sacred areas,⁵ a national reckoning with the history of tribal dispossession has ensued, resulting in a variety of demands to redress that legacy.⁶ Fundamentally, this movement seeks greater respect for tribal values in and connections to lands and resources from which Indigenous peoples have been separated.⁷ This respect can be operationalized through meaningful federal-tribal partnerships that ensure tribal knowledge, input, and influence are reflected and implemented in the management of those lands and resources.⁸ At their core, calls for #Landback, tribal co-management, or the use of tribal knowledge and wisdom are all rooted in the desire to ensure that peoples indigenous to these lands can restore and invigorate their vital historical, cultural, and other meaningful connections to the places and resources taken from them.⁹

This movement is beginning to open new avenues through which tribes can engage with the federal government in its management of public lands. In November 2021, for example, the Secretaries of Interior and Agriculture issued an unprecedented joint secretarial order calling for increased efforts on the parts of both of their departments to engage in co-stewardship of public lands and

² Interview by Jason Robison with Zedora Enos, Dir., Eastern Shoshone Cultural Ctr.; Robyn Rofkar, Admin. Assistant, Eastern Shoshone Cultural Ctr.; Patricia Shoyo, Clerk, Eastern Shoshone Cultural Ctr.; George Harden, Western Shoshone Tribal Member, Consultant, Eastern Shoshone Cultural Ctr.; Nathaniel Barney, Cultural Specialist, Eastern Shoshone Tribal Hist. Pres. Officer; John Washakie, Co-Chair, Eastern Shoshone Bus. Council; Gloria St. Clair, Councilwoman, Eastern Shoshone Bus. Council; Lee Spoonhunter, Co-Chair, Northern Arapaho Bus. Council; Lee Juan Tyler, Council Member, Fort Hall Bus. Council; James Trosper, Dir., Univ. of Wyo. High Plains Am. Indian Rsch. Inst.; Ann Abeyta, Curriculum Coordinator, Fort Washakie School, in Fort Washakie, Wyo. (Sept. 28, 2021) (on file with author) [hereinafter Wind River Interview].

³ Bill McKibben, *A Pipeline Fight and America's Dark Past*, THE NEW YORKER (Sept. 6, 2016), <https://www.newyorker.com/news/daily-comment/a-pipeline-fight-and-americas-dark-past> [<https://perma.cc/9XZL-SE4C>]; Ryan W. Miller, *How the Dakota Access Pipeline Battle Unfolded*, USA TODAY (Dec. 4, 2016, 11:55 PM), <https://www.usatoday.com/story/news/nation/2016/12/02/timeline-dakota-access-pipeline-and-protests/94800796/> [<https://perma.cc/Y4LE-HQQA>].

⁴ See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

⁵ See *infra* Part IV.C.

⁶ See *infra* Part V.A.; David Treuer, *Return the National Parks to the Tribes*, THE ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/> [<https://perma.cc/9G9E-NWFL>].

⁷ See *infra* Part IV.A.

⁸ See *infra* Part V.B.

⁹ See *infra* Parts IV.B.1, VI.

resources.¹⁰ That order built on a 2016 order from former Secretary of the Interior Sally Jewell seeking to promote similar efforts, which stopped short of suggesting that the federal government could share management responsibilities with tribes.¹¹ In addition, the 2016 proclamation of Bears Ears National Monument marked a wholly new approach to and interpretation of the President's authority to utilize the Antiquities Act to protect Indigenous connections to and values at a landscape-level scale.¹² Numerous other examples of local, state, and federal efforts to promote and support tribal interests in and management of lands and resources abound.¹³

The convergence of these promising developments and Yellowstone's sesquicentennial presents a critical opportunity to consider what the world's first and most famous national park could do to reckon with and address its history of Indigenous exclusion. Now is the time to consider how the next 150 years of the park's story could tell a more just and equitable tale of inclusion for the region's original inhabitants.

Part II of this article begins with an overview of Yellowstone as Native space. The Part examines how Yellowstone is both an evolving and contested concept. In detailing the extent and depth of connections that Indigenous peoples have had with the greater Yellowstone region, the discussion conveys how this landscape is indeed "Native space." Indigenous connections to the greater Yellowstone region are diverse in nature and have been exercised for spiritual, cultural, economic, social, and sustenance purposes.¹⁴ Indigenous connections to the region are also broad in scope. No fewer than 27 federally recognized tribes are connected with the region's landscape.¹⁵ These connections extend back to time immemorial. This

¹⁰ DEB HAALAND & THOMAS J. VILSACK, U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021), <https://www.usda.gov/sites/default/files/documents/joint-so-3403-stewardship-tribal-nations.pdf> [<https://perma.cc/U8SB-8WRV>] [hereinafter ORDER No. 3403].

¹¹ See *id.*; SALLY JEWELL, U.S. DEP'T OF THE INTERIOR, ORDER NO. 3342, IDENTIFYING OPPORTUNITIES FOR COOPERATIVE AND COLLABORATIVE PARTNERSHIP WITH FEDERALLY RECOGNIZED INDIAN TRIBES IN THE MANAGEMENT OF FEDERAL LANDS AND RESOURCES (2016), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf [<https://perma.cc/2DSA-RKJV>] [hereinafter ORDER No. 3342].

¹² See Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016); BEARS EARS INTER-TRIBAL COAL., PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF THE BEARS EARS NATIONAL MONUMENT (2015), <https://bearsarscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> [<https://perma.cc/75Y6-S3YC>] [hereinafter BEARS EARS PROPOSAL].

¹³ See *infra* Parts IV.A, V.A; Joseph Choi, *Minnesota Returns Land to Lower Sioux Indian Community After Decades-Long Battle*, THE HILL (Feb. 21, 2021, 3:50 PM), <https://thehill.com/homenews/state-watch/539788-minnesota-returns-land-to-lower-sioux-indian-community-after-decades> [<https://perma.cc/G5DU-Y6C4>]; MINN. STAT. § 85.053 subd. 5a (2022) ("The commissioner must issue an annual state park permit for no charge to any member of the 11 federally recognized tribes in Minnesota.").

¹⁴ See *infra* Part II.A.

¹⁵ *Yellowstone: Associated Tribes*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/associatedtribes.htm> (last visited May 22, 2022) [<https://perma.cc/YBM5-ZYCY>].

Part also details the legal landscape associated with the greater Yellowstone region as Native space.¹⁶ Yellowstone National Park's creation involved superimposing legal boundaries on the Native space's conjoined cultural and physical landscape. These boundaries derive from legal doctrines addressing inherent tribal sovereignty, aboriginal title and rights, the treaty relationship, and the trust responsibility. By illuminating Native connections to Yellowstone and the park's legal landscape, this Part lays a foundation for considering Indigenous peoples' future connections to this place.

Part III then surveys the evolution of relationships between Yellowstone-associated tribes, the Park Service, and the U.S. military since 1872. In doing so, the Part covers three broad periods. The first period spans from Yellowstone's creation to the 1890s when Yellowstone-associated tribes were effectively disconnected from the park.¹⁷ The second period, in turn, stretches roughly a century, from the 1890s to the 1990s, and is characterized by separation between the Park Service and Yellowstone-associated tribes. No meaningful sovereign partnerships existed between them.¹⁸ Finally, the third period starts in the 1990s with the onset of federal-tribal collaboration over bison management. By the end of that decade, this collaboration fanned out into other substantive areas, a pattern that has continued up to the sesquicentennial. Taken as a whole, the discussion identifies a framework of valuable relationship building that has begun between the Park Service and Yellowstone-associated tribes over roughly the past twenty-five years.¹⁹ This trajectory sets the stage for the future of federal-tribal co-management in Yellowstone.

Part IV next offers a short review of the law and policy of federal-tribal co-management along with prominent examples of shared federal-tribal management scenarios. It details the movements for #Landback, tribal and collaborative land and resource management, tribal engagement, and use of traditional tribal knowledge and wisdom in ecosystem management.²⁰ Drawing from prior scholarship on available avenues for building federal-tribal management partnerships, the discussion examines the legal and regulatory mandates of the National Park Service (Park Service or NPS), including ways in which overarching federal initiatives aimed at better including tribes and their interests have improved federal-tribal relations with regard to national parks. The Part also highlights the two primary, but distinct, bases for tribal engagement: (1) honoring and incorporating tribal knowledge and perspectives in management planning and decision-making, and (2) providing opportunities for tribal sovereigns to influence or shape otherwise federal decisions.²¹ By highlighting numerous co-management success stories, the discussion helps demonstrate the potential for a new future for Yellowstone. The Part

¹⁶ See *infra* Part II.B.

¹⁷ See *infra* Part III.A.

¹⁸ See *infra* Part III.B.

¹⁹ See *infra* Part III.C.

²⁰ See *infra* Part IV.A.

²¹ See *infra* Part IV.B.

reviews place-based exemplars—including Bears Ears National Monument, Kasha-Katuwe Tent Rocks National Monument, Grand Portage National Monument, Sitka Historic National Park, Yukon Flats National Wildlife Refuge, and long-standing intergovernmental co-stewardship of fish and wildlife resources in the Pacific Northwest and Great Lakes Region—to provide a basis for understanding and assessing the opportunity presented in Yellowstone.²² The discussion then describes how co-management has operated across the national park system as a foundation for a re-indigenized Yellowstone.

Finally, Part V offers our recommendations for the future. They rest on a basic premise: Yellowstone can once again change the world. The discussion provides a range of options through which tribes and their advocates interested in re-asserting a meaningful Indigenous presence in and management approach to Yellowstone can build a new future for the park, for all other national parks, and for federal-tribal management of public resources nationwide. From measured, incremental steps, such as tribal compacts for discrete programs, functions, services, and activities within the park, to radical realignments such as land back, the Part charts a course for both pragmatic and aspirational initiatives.²³ By drawing on the successful relationship building reflected in the Interagency Bison Management Plan and other cooperative intergovernmental commissions, the central thrust is to promote additional forums for nation-to-nation dialogue focused on identifying and enhancing meaningful and collaborative engagement of tribal knowledge and authority. Ultimately, the Part establishes that re-indigenizing Yellowstone can restore the shine to the nation's original crown jewel and help ensure that all Americans can look forward to the park's next 150 years and beyond.

II. YELLOWSTONE AS NATIVE SPACE

“Yellowstone” is both a place and a concept, neither of which will ever be fixed. “The idea of Yellowstone is, like nature itself, a work in progress, a vast coming-to-terms that is all the more exciting and fulfilling for its daunting uncertainties.”²⁴ To be clear, this dynamic applies to the entire park system.²⁵ “[T]he only constant in our national park heritage is the reality of change: change in how we conceive of national parks, change in how we manage them, change in what we seek from them, and change on the landscape surrounding them.”²⁶ In short, “multiple conceptions of the national park idea have held sway over the decades.”²⁷

²² See *infra* Part IV.C.

²³ See *infra* Part V.

²⁴ PAUL SCHULLERY, PAST AND FUTURE YELLOWSTONES: FINDING OUR WAY IN WONDERLAND, 2014 WALLACE STEGNER LECTURE 7 (2015) (on file with authors).

²⁵ *Id.* at 3 (“[T]hey are now valuable to us for reasons rarely imagined by their founders and early champions. Everywhere in our perception of them, the neatness of some original idea of parks has been replaced by an ever-messier and hugely stimulating set of definitions and hopes.”).

²⁶ ROBERT B. KEITER, TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA 8 (2013).

²⁷ *Id.* at 10.

In line with this dynamic, what becomes of “Yellowstone” moving forward from its sesquicentennial should be shaped by Indigenous peoples whose connections to the place, if not the concept, run deepest. As mentioned above, at least 27 federally recognized tribes are associated with the landscape encompassed by the park.²⁸ These connections extend back to time immemorial, and this Part’s initial purpose is to shed light on the myriad connections held by Indigenous peoples to the present-day park and its environs. Yellowstone, like all of the continent, is Native space. Yet, in modern times, this Native space lies within a nation-state composed of three sovereigns—federal, state, and tribal—making Yellowstone not only the world’s first national park, but also a place of tension and interaction between inherent sovereigns. The legal landscape surrounding these sovereign relations is where the Part subsequently turns. It is a landscape encompassing the legal doctrines addressing inherent tribal sovereignty, aboriginal title and rights, the treaty relationship, and the trust responsibility. Yellowstone National Park and its broader region must be contextualized within these doctrinal boundaries. By illuminating the Native connections to and legal landscape of Yellowstone, this Part establishes a foundation for considering Indigenous peoples’ future connections to this place.

A. Native Connections

The sublime, high-elevation region labeled “Yellowstone” is known by a litany of other names—linguistic expressions of Indigenous connections to the place that are far older than a century and a half. For the Shoshone, it is *pa’nd* (“up high”) and *Gook-a-moonk-be-heah* (“the buffalo heart”), while for the Bannock it is *Panaiti-Toiai’l* (“Yellowstone country”).²⁹ The Crow have crafted a similarly organic title, *Au’ Pawishe* (“land of steam”), dovetailing with that given by the Blackfeet, *Aisitsi* (“many smoke”).³⁰ So, too, is the wondrous place referred to as *Pahaska* (“white mountain country”) by the Assiniboine and Sioux; *Me-mut-nee-spah* (“boiling earth”) and *Kuuseyn’eyéekt* (“buffalo expedition”) by the Nez Perce; *K ali ssens* (no translation) by the Salish-Kootenai; and *Ohatiipi* (“yellow rock”) by the Comanche.³¹

It matters that these place names are acknowledged—visible within the cultural landscape and alive as traditional cultural properties—for so much is packed into them.³² Native “[l]anguages are site-specific and act as a record of biodiversity and environmental changes that predate Euro-American contact.”³³ Likewise,

²⁸ *Yellowstone: Associated Tribes*, *supra* note 15.

²⁹ W. ANDREW MARCUS ET AL., ATLAS OF YELLOWSTONE 16 (2012).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (“American Indian place names for Yellowstone and its features precede European American settlement and indicate the importance of Yellowstone to tribes of the region.”).

³³ Autumn L. Bernhardt, “Pastoral and Civilized”: *Water, Land, and Tribes in the Colorado River Basin*, in VISION & PLACE: JOHN WESLEY POWELL & REIMAGINING THE COLORADO RIVER

these languages and the traditional ecological knowledge they embody “speak the ‘grammar of animacy’ and remind humans that there are intelligences beyond our own.”³⁴ This tribal customary law principle animates these Native understandings of “Yellowstone,” and enacts it as a Native space.

The diversity of these traditional place names comes as no surprise when considering the duration of Indigenous connections to this space. Indigenous peoples were the first to experience Yellowstone’s natural beauty.³⁵ Indigenous connections dating back to time immemorial are evidenced by traditional stories, songs, and languages depicting Yellowstone. Since time immemorial, Indigenous people lived in the region in a migratory manner according to the circle of the seasons.³⁶ They coexisted in this space, moving up to the high-elevation uplands of the present-day park during summer, and down to the lower-elevation valleys of the Yellowstone, Snake, Madison, and Shoshone rivers, in and adjacent to the park, during winter.³⁷ Traveling through the river valleys “brought people from the sagebrush grasslands up onto the heart of the Yellowstone Plateau, a lush, cool summer haven for Native Americans”³⁸ Reflecting this seasonal occupancy and use, the landscape is replete with the evidence of Indigenous existence,³⁹ including at Obsidian Cliff, a rich source of volcanic glass that was “one of the most desirable commodities in North American prehistory”;⁴⁰ Yellowstone Lake, North America’s largest high-elevation natural lake and “the heart of Yellowstone National Park”;⁴¹ as

BASIN 220, 233 (Jason Robison, Daniel McCool & Thomas Minckley eds., 2020) [hereinafter VISION & PLACE].

³⁴ *Id.* For more on the “grammar of animacy,” see ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS 48–59 (2013).

³⁵ DOUGLAS H. MACDONALD, BEFORE YELLOWSTONE: NATIVE AMERICAN ARCHAEOLOGY IN THE NATIONAL PARK 3, 46 (2018) (“[H]umans have lived in the region for at least 11,000 years. Soon after half-mile-high glaciers melted and formed Yellowstone Lake during the Late Pleistocene era, early Native Americans made their way to Yellowstone.”); MARCUS ET AL., *supra* note 29, at 16 (“American Indians have had a widespread presence in and around Yellowstone for the past 12,000 years.”).

³⁶ MACDONALD, *supra* note 35, at 8. (“Their annual settlement patterns were oriented around the seasons, based on availability of food sources.”).

³⁷ *See id.* at 8, 204 (“[I]t is clear that many regional Native American tribes frequently lived in the various areas of Yellowstone National Park”).

³⁸ *Id.* at 8.

³⁹ *See* MARCUS ET AL., *supra* note 29, at 16, 20, for insightful maps of these sites.

⁴⁰ MACDONALD, *supra* note 35, at 81. For a full discussion of the Obsidian Cliff and Crescent Hill sites, *see id.* at 74–98; MARCUS ET AL., *supra* note 29, at 14–15.

⁴¹ MACDONALD, *supra* note 35, at 99. For a full discussion of the Lake Yellowstone sites, *see id.* at 99–125.

well as across the region's river valleys,⁴² mountain passes and peaks,⁴³ and geysers, thermal areas, and hot springs.⁴⁴

Indigenous connections to the greater Yellowstone region are broad in scope. Yellowstone-associated tribes hail from far and wide given their intersecting traditional homelands and the variable proximity of their contemporary Indian reservations to the park.⁴⁵ Tribes such as the Eastern Shoshone, Shoshone-Bannock, and Crow currently reside on Indian reservations close in proximity to the park. In some cases, these reservations historically included portions of what now constitutes Yellowstone National Park.⁴⁶ In contrast, other tribes' reservations are located hundreds of miles away, including those of the Colville Tribes, Turtle Mountain Band of Chippewa Indians, Flandreau Santee Sioux, Kiowa, and Comanche.⁴⁷

All told, the network of Native connections to Yellowstone is vast, reflecting the sheer number of associated tribes coupled with their variable geographic proximity to the park. Regardless of proximity, however, Yellowstone has held, and continues to hold, rich meaning for all Yellowstone-associated tribes. Each of these tribes embody a unique, individual connection to this place. It has become part of them, and vice versa, on so many levels.⁴⁸

In no uncertain terms, Yellowstone is Shoshone homeland.⁴⁹ Known as *Tukudika*, *Tukuarika*, or *Tukadudka*, the Mountain Shoshone (aka “sheep eaters”)

⁴² *Id.* at 130 (“Literally thousands of archaeological sites along these waterways mark locations where people camped in Yellowstone over the past 11,000 years.”); *see also* MARCUS ET AL., *supra* note 29, at 15 (describing its location as along the North Fork of the Shoshone River, Mummy Cave is an especially notable site, with cultural layers reflecting “nearly continuous use by humans for more than 9,000 years”). For a full discussion of these sites, *see* MACDONALD, *supra* note 35, at 126–55.

⁴³ MACDONALD, *supra* note 35, at 159 (“Four types of archaeological sites are found . . . in the high-elevation settings of the Greater Yellowstone Ecosystem: religious structures (such as rock cairns, medicine wheels, and fasting beds) and three types of subsistence sites—pine nut processing villages, sheep hunting sites, and ice patches.”). For a full discussion of these sites, *see id.* at 156–78.

⁴⁴ *Id.* at 184 (“[T]here appear to be two contrasting (or possibly complementary) views of the Native American use of thermal areas: first, they used them for spiritual purposes, and second, they used them for hunting purposes.”). For a full discussion of these sites, *see id.* at 179–203.

⁴⁵ *See* MARCUS ET AL., *supra* note 29, at 17 (displaying maps of traditional homelands and modern reservations); *Yellowstone: Associated Tribes*, *supra* note 15 (displaying map of modern reservations).

⁴⁶ *See infra* Part II.B.

⁴⁷ *Yellowstone: Associated Tribes*, *supra* note 15.

⁴⁸ ANTON TREUER, *ATLAS OF INDIAN NATIONS* 10 (2013) (“The land shaped Native American cultures. . . . But tribes shaped the land, too.”).

⁴⁹ *See* MARCUS ET AL., *supra* note 29, at 17; MACDONALD, *supra* note 35, at 211 (“[I]t is likely that some portions of the Shoshone tribe or their ancestors have been present in the region for quite a long time, perhaps as much as 9,000 years,” with this presence increasing “substantially in the region in the past 1,000 years.”); PETER NABOKOV & LAWRENCE LOENDORF, *RESTORING A PRESENCE: AMERICAN INDIANS AND YELLOWSTONE NATIONAL PARK* 147 (2004) (“We believe that the Sheep Eaters could have continued to live in the north after an early expansion that took place by at least 3,500 years ago.”).

are the Shoshone peoples most closely associated with Yellowstone.⁵⁰ Often described as its only “permanent residents,” they were “seminomadic hunters whose family bands generally followed the migration of bighorn sheep.”⁵¹ From late spring to fall, the Mountain Shoshone followed bighorn sheep and other large game animals “on their migrations to high alpine pastures, where several families might join in a communal hunt.”⁵² In turn, as the bighorn sheep and other game “moved to lower elevations with the coming of winter, the [*Tukudika*] did likewise and spent the coldest months in sheltered glens and valleys.”⁵³

Yellowstone is an inseparable part of Shoshone identity.⁵⁴ The Mountain Shoshone were historically connected to the greater Yellowstone region in every way. Stated plainly, they *were* Yellowstone. Their spirituality was deeply rooted in this space. “The ‘scene of interaction’ between Sheep Eaters and their spirits was the ‘wooded mountain areas of the Yellowstone Park, the Absarokas, the Wind River Mountains and, possibly, the Big Horn Mountains.’”⁵⁵ This landscape was the “home country of the spirits,” and of all the guardian spirits, the *pukka* or *puha* (power) known as *toyawo* (“mountain medicine”) were the strongest.⁵⁶ Mountain Shoshone spiritual ceremonies, including vision quests and ceremonial dances, recognized the relationship the tribe had with Yellowstone.⁵⁷ The landscape of the present-day park and its environs also supplied Mountain Shoshone clothes, tools, unique pots and bowls, and weapons, including obsidian arrow points and prized bows wrought from bighorn sheep horns.⁵⁸ “[S]ymbiotically bound up” with their primary food source, bighorn sheep, the Shoshone also fished waterbodies such as Yellowstone Lake and the Yellowstone River, as well as foraged for roots, seeds, nuts, plants, vegetables, and fruits.⁵⁹ These activities shaped Mountain

⁵⁰ NABOKOV & LOENDORF, *supra* note 49, at 128. For insightful books about the Mountain Shoshone, see TORY TAYLOR, *ON THE TRAIL OF THE MOUNTAIN SHOSHONE SHEEP EATERS: A HIGH ALTITUDE ARCHAEOLOGICAL ODYSSEY* (2017); LAWRENCE L. LOENDORF & NANCY MEDARIS STONE, *MOUNTAIN SPIRIT: THE SHEEP EATER INDIANS OF YELLOWSTONE* (2006).

⁵¹ NABOKOV & LOENDORF, *supra* note 49, at 130; *see also* JOEL C. JANETSKI, *INDIANS IN YELLOWSTONE NATIONAL PARK* 53 (rev. ed. 2002).

⁵² MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 47 (1999); *see also* MARCUS ET AL., *supra* note 29, at 18.

⁵³ SPENCE, *supra* note 52, at 47.

⁵⁴ MACDONALD, *supra* note 35, at 209.

⁵⁵ NABOKOV & LOENDORF, *supra* note 49, at 194 (quoting Åke Hultkrantz, *The Sheepeaters of Wyoming: Culture History and Religion Among Some Shoshoni Mountain Indians* (unpublished manuscript) (on file with authors)).

⁵⁶ *Id.* at 194–95.

⁵⁷ *Id.* at 196, 199; *see also* JANETSKI, *supra* note 51, at 56–58.

⁵⁸ NABOKOV & LOENDORF, *supra* note 49, at 149–68; *see also* JANETSKI, *supra* note 51, at 53, 58–62; MARCUS ET AL., *supra* note 29, at 19.

⁵⁹ NABOKOV & LOENDORF, *supra* note 49, at 168, 174, 178–81; *see also* MARCUS ET AL., *supra* note 29, at 16, 18; JANETSKI, *supra* note 51, at 53, 62–64.

Shoshone sociopolitical organization.⁶⁰ So, too, were their dwellings hewn from the landscape.⁶¹

Neighboring Shoshone peoples have also held deep connections to Yellowstone. They include “the Lemhi Shoshone, who lived in central Idaho’s Lemhi Valley and Salmon River Mountains north of the Snake River Plain, the Northern Shoshone of southern Idaho and northern Utah, and the Eastern Shoshone of western Wyoming.”⁶² As discussed further below, they now reside on the Wind River Indian Reservation in western Wyoming (Eastern Shoshone Tribe) and the Fort Hall Indian Reservation in southern Idaho (Shoshone-Bannock Tribes).⁶³ These reservations are near Yellowstone’s southern and western entrances, respectively, and they became refuges for the Mountain Shoshone shortly after the park’s designation in 1872.⁶⁴ Contrasting with the Mountain Shoshone, some of these Shoshone peoples adopted the horse during the early 18th century, enabling them to hunt bison on horseback across the prairies of present-day Wyoming and Montana.⁶⁵ As part of these journeys, they “commonly traveled through or camped in the area now known as Yellowstone,” quarrying, fishing, and using “the waters of the hot springs and pools for religious and medicinal purposes.”⁶⁶ Shoshone place names such as *Bahn doy foin* (Yellowstone Lake), *Duupi* (Obsidian Cliff), and *pa’nd’inquint* (Yellowstone geyser basins) clearly reflect their presence in the Yellowstone region.⁶⁷

The linguistic cousins of the Shoshone peoples, the Bannock, hold similar connections.⁶⁸ Of northern Paiute stock, the Bannock speak a Shoshonean dialect—calling themselves *Bana’kwut* (“Water People”)—and migrated from what is now eastern Oregon to southern Idaho in the 1600s or 1700s, having obtained horses toward the end of the former century.⁶⁹ As part of this migration, the Bannock “formed a close affiliation, some maintain a virtual ‘confederation’ that frequently

⁶⁰ NABOKOV & LOENDORF, *supra* note 49, at 189–93; *see also* JANETSKI, *supra* note 51, at 55.

⁶¹ NABOKOV & LOENDORF, *supra* note 49, at 181.

⁶² JANETSKI, *supra* note 51, at 45; *see also* NABOKOV & LOENDORF, *supra* note 49, at 215 (describing an “Indian perspective on the virtual encompassment of the greater Yellowstone ecosystem by members of the Shoshonean peoples all along the southern half of the park.”).

⁶³ For interactive maps of these reservations, *see U.S. Domestic Sovereign Nations: Land Areas of Federally Recognized Tribes*, BUREAU OF INDIAN AFFS., <https://biamaps.doi.gov/indianlands/> (last visited May 22, 2022).

⁶⁴ NABOKOV & LOENDORF, *supra* note 49, at 249; *see also* JANETSKI, *supra* note 51, at 67.

⁶⁵ JANETSKI, *supra* note 51, at 37, 39, 45–46; *see also* TREUER, *supra* note 48, at 128–29; NABOKOV & LOENDORF, *supra* note 49, at 216–17.

⁶⁶ JANETSKI, *supra* note 51, at 39.

⁶⁷ MARCUS ET AL., *supra* note 29, at 16.

⁶⁸ *Id.*

⁶⁹ NABOKOV & LOENDORF, *supra* note 49, at 201, 210; *see also* JANETSKI, *supra* note 51, at 46–47.

was sealed through intermarriage, with the already resident Shoshone.”⁷⁰ As alluded to above, the Bannock currently reside on the Fort Hall Indian Reservation, not far from Yellowstone’s western entrance.⁷¹

The tribe’s presence is indelibly marked on the park’s landscape with the “Bannock Trail,” the “preeminent native roadway” across Yellowstone, consisting of a trail system rather than a singular route.⁷² Although the Bannock were perhaps its “primary travelers,” the trail was important to multiple tribes west of the Rocky Mountains who utilized bison for food, clothing, and other items.⁷³ While Indigenous people used the trail since pre-contact times, travel along it grew significantly during the mid-nineteenth century, following the disappearance of bison from the Snake River Plain and northern Great Basin.⁷⁴ Representatives of the Bannock Tribe have indicated that their original name for Yellowstone was “Buffalo Country.”⁷⁵ On the trail’s eastern end was a favorite tribal hunting ground—an area between the Yellowstone and Musselshell rivers in present-day Montana called *Kutsunambih* (“the buffalo heart”) by the Shoshone.⁷⁶ Thus, while traveling along the trail, the Bannock and other tribes utilized “any resources in their path—plants, smaller game, and minerals—and possibly . . . even stockpiled tipi poles en route.”⁷⁷ Similarly, the Bannock (and Shoshone) are known to have actively used lodges throughout the Yellowstone region.

Yellowstone is also homeland of the *Apsáalooke* (“Children of the Large-Beaked Bird”)—aka the Crow Nation.⁷⁸ The Crow Nation currently resides on the Crow Indian Reservation in what is now southeastern Montana. “The Crow have been active in Yellowstone within the past 1,000 years,” having migrated to their traditional territories in present-day southern Montana and northern Wyoming from the Dakotas during this period.⁷⁹ Closely associated with “the

⁷⁰ NABOKOV & LOENDORF, *supra* note 49, at 210; *see also* JANETSKI, *supra* note 51, at 47 (“[T]he Bannock and the Northern Shoshone got along well together. They intermarried, traveled together, and were usually bilingual, speaking both Shoshone (Central Numic) and Bannock (Western Numic).”).

⁷¹ *Culture & History*, SHOSHONE-BANNOCK TRIBES, <http://www.sbtribes.com/about/> [https://perma.cc/2VME-J5VJ] (last visited May 22, 2022).

⁷² *See* NABOKOV & LOENDORF, *supra* note 49, at 36–37, 204–05 (discussing trail and displaying maps).

⁷³ JANETSKI, *supra* note 51, at 95, 100 (discussing Fort Hall and Lemhi Shoshone, Nez Perce, Flathead, Kalispel, Kutenai, and Pend d’Oreille).

⁷⁴ *Id.* at 95–97, 100.

⁷⁵ NABOKOV & LOENDORF, *supra* note 49, at 212.

⁷⁶ JANETSKI, *supra* note 51, at 100.

⁷⁷ NABOKOV & LOENDORF, *supra* note 49, at 212. Reflecting their use of resources adjacent to the trail, the Bannock refer to Obsidian Cliff as ‘*Tupeshakabna*’. MARCUS ET AL., *supra* note 29, at 16.

⁷⁸ NABOKOV & LOENDORF, *supra* note 49, at 49, 60; *see also* MARCUS ET AL., *supra* note 29, at 17.

⁷⁹ MACDONALD, *supra* note 35, at 212; *see also* JANETSKI, *supra* note 51, at 44 (“[The Crow]

eastern portion of the greater Yellowstone Plateau,” Crow place names fill this landscape, extending to *Awaxaamnaasé* (Heart Mountain), *Aashíilitche* (Shoshone River), *Biliiliche* (Shoshone Pass), *Awaxammaalahkape* (Cedar Mountain), *lichíilikaashaashe* (Yellowstone River), *lichíilikaashaashe Ko’Bilich’esh* (Yellowstone Lake), and *Xakupkaashe* (Grand Canyon of the Yellowstone).⁸⁰ Characterized as a “powerful tribe of mountaineers,” it is within the high country in and around Yellowstone that the Crow historically found “everything they prized on earth.”⁸¹

Crow connections to Yellowstone resemble those held by the Shoshone and Bannock. While the park was an historically important thoroughfare for hunters traveling to buffalo country from west of the Rocky Mountains—along the Bannock Trail and otherwise—Yellowstone was also a “two-way street.”⁸² “The Crow would go back the other way, meet with Shoshone for games, competition, hunting, [and] socializing,” with bison, elk, and deer all hunted in the area.⁸³ A variety of plants were also gathered in Yellowstone—including *Baaapáashiile* (“yellow plant”), *Bachúate* (sweet grass), *Bahpuushé* (horsemint), and *Bishéewaaluushisee* (broomweed)—as well as minerals such as obsidian, chert, and “paint” (thermal residue used as a whitening agent for hides).⁸⁴ Yellowstone also was and is a deeply spiritual place for the Crow. The park and its environs “were very important fasting areas.”⁸⁵ And landscape features such as Yellowstone Lake and Mud Volcano are settings for stories that make up Crow cosmology.⁸⁶ Further, contrary to the idea that Native peoples were “terrified of the hot, spouting, noisy waters” in Yellowstone, the *Bimmaaxpée* (“sacred” or “powerful” water) in and around the park has been a source of profound spiritual experiences for Crow tribal members.⁸⁷

Another tribe with traditional connections to Yellowstone are the *Siksikauw* (“black-footed people”).⁸⁸ They comprise four bands—North Piegan, South Piegan, Blood, and Siksika—and members of the Blackfoot Nation within the United States

left the Hidatsa farming villages on the Missouri River in North Dakota about 1776 and arrived in southern Montana shortly thereafter.”).

⁸⁰ NABOKOV & LOENDORF, *supra* note 49, at 40, 42–43; *see also* MARCUS ET AL., *supra* note 29, at 16.

⁸¹ NABOKOV & LOENDORF, *supra* note 49, at 58; *see also* SPENCE, *supra* note 52, at 48 (“[A]s one Crow elder recently put it, the mountains were an important ‘commissary’ where the Indians went to hunt, gather plants, pasture horses, seek assistance from spiritual helpers, take the waters, and look for signs of the First Maker.”).

⁸² NABOKOV & LOENDORF, *supra* note 49, at 60; *see also* JANETSKI, *supra* note 51, at 39.

⁸³ NABOKOV & LOENDORF, *supra* note 49, at 61; *see also* JANETSKI, *supra* note 51, at 44 (“The Crow occasionally traveled through the Park on hunting or raiding excursions.”).

⁸⁴ NABOKOV & LOENDORF, *supra* note 49, at 46–47.

⁸⁵ *Id.* at 61.

⁸⁶ *Id.* at 81–82.

⁸⁷ *Id.* at 52–57.

⁸⁸ JANETSKI, *supra* note 51, at 40.

primarily descend from the South Piegan.⁸⁹ The Blackfeet Nation currently resides on the Blackfeet Indian Reservation in present-day northwestern Montana,⁹⁰ but Blackfeet connections are far more extensive, spanning north and south of the U.S.-Canadian border to encompass large portions of what are now Montana, Alberta, and Saskatchewan.⁹¹ The Blackfeet historically traveled through and camped in Yellowstone while hunting bison in the area.⁹² So, too, did Blackfeet raiding parties pass through the Yellowstone region, often on far-reaching journeys.⁹³ They arrived on the Yellowstone Plateau through northern access trails,⁹⁴ and their presence was heavily, formidably recounted in early trappers' journals.⁹⁵ Blackfeet spiritual connections to Yellowstone are not the same as those "to the Rocky Mountain highlands of Glacier National Park and the Badger-Two Medicine region."⁹⁶ However, according to interviews with Blackfeet elders, the lands of Yellowstone were considered sacred. "Because they were sacred to others, they were treated as such by [the Blackfeet]. When passing through Yellowstone on the way to the basins of the Snake or Green rivers, they would stop to pray with their pipes or leave tobacco."⁹⁷

In sum, what is offered here is only a snapshot of Yellowstone-associated tribes' deep connections to the place called "Yellowstone." Both historically and now, these connections have been diverse in form, involving spirituality, sustenance, survival, and storytelling.⁹⁸ They have existed in a vast network given the tribes' intersecting traditional homelands and the variable proximity of their contemporary Indian reservations to the park. That said, it is apparent throughout the greater

⁸⁹ *Our Culture*, BLACKFEET NATION, <https://blackfeetnation.com/our-culture/> [<https://perma.cc/HBM7-QK4U>] (last visited May 22, 2022).

⁹⁰ *Our Lands*, BLACKFEET NATION, <https://blackfeetnation.com/lands/> [<https://perma.cc/RA4N-NEPB>] (last visited May 22, 2022).

⁹¹ MARCUS ET AL., *supra* note 29, at 17; NABOKOV & LOENDORF, *supra* note 49, at 95.

⁹² See JANETSKI, *supra* note 51, at 39–40.

⁹³ *Id.* at 40; NABOKOV & LOENDORF, *supra* note 49, at 91–92.

⁹⁴ NABOKOV & LOENDORF, *supra* note 49, at 85.

⁹⁵ *Id.* at 97–98; see also JANETSKI, *supra* note 51, at 40–42.

⁹⁶ NABOKOV & LOENDORF, *supra* note 49, at 93.

⁹⁷ *Id.*

⁹⁸ See JANETSKI, *supra* note 51, at 124 (“[F]or millennia the Park was a hunting, fishing, and gathering area for native peoples. With each season, bands moved through this game-rich country in pursuit of sheep, elk, fish, roots, obsidian, and other basics of life.”); SPENCE, *supra* note 52, at 43–44. This recent description from the Park Service offers a nice synopsis:

For American Indians, Yellowstone offered a place to live, to hunt, to fish, and to gather plants. They created tools and hunting implements from obsidian they quarried in Yellowstone. . . . American Indians also developed a strong spiritual connection to the thermal features in the Yellowstone area, and they used the thermal features and the mineral rich waters within for religious and medicinal purposes.

AMANDA SHAW, NAT’L PARK SERV., FINDING AID: ETHNOGRAPHY OFFICE RECORDS: 1990–2012 (BULK DATES: 2000–2008) (2017) (on file with authors). This document is not paginated, and the text in the block quote appears in its “History” section.

Yellowstone region and elsewhere, how the land has “shaped Native American cultures,”⁹⁹ and how Native cultures equally have shaped the land.¹⁰⁰ “The different paths to sustenance and prosperity shaped political and cultural institutions. . . . Lifeways and religious practices were rooted to place and formed by the land even more than by ancestral history.”¹⁰¹ These reciprocal connections cannot and should not be missed.¹⁰² What has become of them? And what became of Yellowstone as a Native space following its creation as the world’s first national park? These lands were, and remain, spiritually significant for Yellowstone-associated tribes. Their physical presence within the park, however, takes a different turn. We delve into this topic further below, but only after shedding light on another key piece of context: Yellowstone’s legal landscape.

B. Legal Landscape

Legal doctrines and instruments underlie Yellowstone’s geography. Laws of various sorts have superimposed formal lines and norms across the region, culminating in the imposition of political boundaries to create Yellowstone National Park amidst the cultural and physical landscape of Native space.¹⁰³ This geography must be understood in light of the boundaries set by legal doctrines addressing inherent tribal sovereignty, aboriginal title and rights, the treaty relationship, and the trust responsibility. By illuminating Yellowstone’s legal landscape in this way, we lay a foundation for considering Indigenous peoples’ future connections to the place.

⁹⁹ TREUER, *supra* note 48, at 10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² MACDONALD, *supra* note 35, at 218 (“There are . . . hundreds of precontact archaeological sites near the geysers and other thermal features, indicating that for thousands of years, Native Americans lived near them to camp, hunt, and seek spiritual guidance. In addition, Native Americans lived in every other nook and cranny in the park, including the high mountains, along rivers and lakes, and next to obsidian sources. To say that Yellowstone National Park is a pristine landscape untouched by humans discounts the 11,000 years of active use of the region by Native Americans.”); *see also* SPENCE, *supra* note 52, at 43 (“In 1870, Yellowstone was not, as one member of the Washburn party described it, a primeval wilderness ‘never trodden by human footsteps.’ Rather it was a landscape that had been shaped by thousands of years of human use and habitation.”).

¹⁰³ Patty Limerick has described the practice of line drawing poignantly within Western history writ large:

Conquest basically involved the drawing of lines on a map, the definition and allocation of ownership (personal, tribal, corporate, state, federal, and international), and the evolution of land from matter to property. The process had two stages: the initial drawing of the lines (which we have usually called the frontier stage) and the subsequent giving of meaning and power to those lines, which is still under way.

PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987).

1. *Inherent Tribal Sovereignty*

Inherent tribal sovereignty marks our starting point, for it underlies the legal landscape of the entire Yellowstone region and far beyond. As Vine Deloria, Jr. explained, the notions and principles embedded in the concept of sovereignty are an “ancient idea.”¹⁰⁴ Indigenous nations exercised their sovereign powers prior to the arrival of Europeans in North America. For many Indigenous nations associated with the Yellowstone region, sovereignty is embodied in the very names they adopted for their tribal identity as well as for the land.¹⁰⁵

With respect to the Yellowstone region, Indigenous nations exercised sovereign powers internally and through their established systems of governance, which included land management systems, prior to Europeans’ arrival.¹⁰⁶ Indigenous nations also exercised their sovereign powers externally by entering into political alliances and agreements with one another.¹⁰⁷ For Indigenous nations, their sovereign powers are recognized as a key element of their aboriginal title.¹⁰⁸

2. *Aboriginal Title and Rights*

Aboriginal title, also known as original Indian title, refers to the interests that Indigenous nations possess in their land.¹⁰⁹ It is based solely upon the rights acquired by them as original inhabitants of their territories, by virtue of possession of the land and their inherent tribal sovereignty.¹¹⁰ Proof of aboriginal title depends on a “showing of actual, exclusive, and continuous use and occupancy” of a region “for a long time.”¹¹¹ Importantly, actual possession is unnecessary, and aboriginal title may

¹⁰⁴ VINE DELORIA, JR., *TRIBAL SOVEREIGNTY AND AMERICAN INDIAN LEADERSHIP* (Am. Indian Pol’y Ctr. 2002).

¹⁰⁵ See *supra* Part II.A.

¹⁰⁶ VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 81 (1983) (“Indian tribes, nevertheless, had highly complicated forms of government that could be traced far back into precontact days and, according to some tribal traditions, back as far as their creation and migration stories told them intelligible life has existed.”).

¹⁰⁷ ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE* 32–34 (1997).

¹⁰⁸ Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV’T L. REV. 1, 3–4 (2017); see also Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 11–14 (2013) (“Tribal sovereignty exists not because the United States granted special rights to some ethnic group but because, unique among the colonial nations of the world, the United States did not completely abolish the preexisting sovereignty of Indian nations.”).

¹⁰⁹ See *State v. Coffee*, 556 P.2d 1185, 1188 (Idaho 1976) (“[H]unting and fishing are part and parcel with aboriginal title.”); *United States v. Michigan*, 471 F. Supp. 192, 256 (W.D. Mich. 1979).

¹¹⁰ See, e.g., Michael J. Kaplin, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425, § 3–4 (1979); Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947) (“The cases on original Indian title show the development across twelve decades of a body of law that has never rejected its first principles.”).

¹¹¹ *United States v. Seminole Indians of the State of Florida*, 180 Ct. Cl. 375, 383 (1967).

be established through an Indigenous nation's intermittent contact with areas they controlled.¹¹² Joint and amicable possession of property by two or more Indigenous nations, as evidenced in the Yellowstone region, does not defeat aboriginal title.¹¹³ Therefore, an Indigenous nation's contention that it has used and occupied an area since time immemorial is sufficient proof of aboriginal title.¹¹⁴ Under the doctrine of aboriginal title, Yellowstone-associated tribes retain legal rights in the region, because they have collectively used and occupied it since time immemorial.¹¹⁵

An Indigenous nation's aboriginal title derives from the inherent aboriginal rights associated with that title. These include the rights to traditional lands and waters, to practice traditional customs and religion, to retain and develop Indian languages and cultures, and to self-government.¹¹⁶ In turn, aboriginal rights derive from ancestral use, which is the use of a specifically allocated area for traditional purposes and cultural expression.¹¹⁷ Ancestral use consists of the use of the land and water for hunting, trapping, fishing, traditional cultivation, irrigation,

¹¹² *Id.* at 385; Wilcomb E. Washburn, *Original Indian Title [Revisited]*, in READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL 71, 72–73 (Jo Carrillo ed., 1998).

¹¹³ Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 194 n.6 (1966); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1395–96 (1975); Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 437 (1974); Upper Skagit Tribe v. United States, 8 Ind. Cl. Comm. 475, 497 (1960) (recognizing aboriginal rights where Tribes “extracted their principal sustenance from the same areas”); Suquamish Tribe v. United States, 5 Ind. Cl. Comm. 158, 164 (1957) (recognizing aboriginal rights where Tribes “shared gathering, fishing and hunting areas”); Muckleshoot Tribe v. United States, 3 Ind. Cl. Comm. 669, 674–75 (1955) (recognizing aboriginal rights where “fishing waters were used in common by the occupants of all the villages”).

¹¹⁴ Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 806–07 n.7 (D. R.I. 1976).

¹¹⁵ See Kaplin, *supra* note 110, § 3[a].

¹¹⁶ MICHAEL ASCH, HOME AND NATIVE LAND: ABORIGINAL RIGHTS AND THE CANADIAN CONSTITUTION 27 (1984); see also United States v. Winans, 198 U.S. 371, 381 (1905) (“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”); Mitchel v. United States, 34 U.S. 711, 746 (1835) (“Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.”); Native American Languages Act, Pub. L. No. 101-477, § 102, 104 Stat. 1153, 1153–54 (1990) (codified at 25 U.S.C. § 2901) (“The Congress finds that—(1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages; (2) special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities; (3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values.”).

¹¹⁷ Lac Courte Oreilles v. Voigt (*LCO I*), 700 F.2d 341, 352 (7th Cir. 1983) (“Both aboriginal and treaty-recognized title carry with them a right to use the land for the Indians’ traditional subsistence activities of hunting, fishing, and gathering.”).

transportation, and domestic uses.¹¹⁸ Broadly defined to include all “beneficial incidents” of occupancy, aboriginal title includes the aboriginal rights to hunt, fish, and gather¹¹⁹ as well as the rights to effectively manage these activities.¹²⁰ Treaties solidified aboriginal rights because these instruments did not grant rights *to* Indigenous nations, but instead granted rights to the United States *from* Indigenous nations.¹²¹ In other words, Indigenous nations reserved those rights for themselves that were not granted in the treaty.¹²² It is important to note that aboriginal rights can be severed from an Indigenous nation’s aboriginal title and continue to exist after an Indigenous nation’s aboriginal title is extinguished.¹²³

3. *Treaty Relationship*

Extinguishment of the aboriginal title held by Indigenous nations of the Yellowstone region, as well as reservation of aboriginal rights pursuant to treaties, marks our next step in surveying Yellowstone’s legal landscape. We approach this subject by direction.

With respect to Indigenous nations whose traditional homelands lie east and north of Yellowstone, the 1851 Treaty of Fort Laramie, also known as the Horse Creek Treaty, was monumental.¹²⁴ It was a major landmark in the gradual delineation

¹¹⁸ RICHARD BARTLETT, *ABORIGINAL WATER RIGHTS IN CANADA: A STUDY OF ABORIGINAL TITLE TO WATER AND INDIAN WATER RIGHTS* 9, 56 (1988); *Swim v. Bergland*, 696 F.2d 712, 715–16 (9th Cir. 1983) (“[G]razing rights are within the rights reserved to the Tribes and the absence of specific language to that effect is of no consequence. . . . we are bound to construe the Treaty to reserve to the Tribes all rights necessary to effectuate the purpose of the Treaty.”); *United States v. Michigan*, 471 F. Supp. 192, 256 (W.D. Mich. 1979) (“The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess.”); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Adair*, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983); *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

¹¹⁹ *Shoshone v. United States*, 299 U.S. 476, 496 (1937); *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1977).

¹²⁰ See *United States v. Washington*, 520 F.2d 676, 686 n.4 (9th Cir. 1974); *United States v. Michigan*, 471 F. Supp. 192, 274 (W.D. Mich. 1979); *Lac Courte Oreilles v. State of Wisconsin (LCO IV)*, 668 F. Supp. 1233, 1241–42 (W.D. Wis. 1987); *Lac Courte Oreilles v. State of Wisconsin (LCO VI)*, 707 F. Supp. 1034, 1055 (W.D. Wis. 1989); *Mille Lacs Band v. State of Minnesota*, 952 F. Supp. 1362, 1369–75 (D. Minn. 1997).

¹²¹ *Winans*, 198 U.S. at 381.

¹²² *Id.*

¹²³ *LCO I*, 700 F.2d at 352.

¹²⁴ *First Treaty of Fort Laramie with Sioux, etc.*, Sept. 17, 1851, in 2 CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* 594–96 (1904) [hereinafter *Horse Creek Treaty*]. The *Horse Creek Treaty* has been subject to much confusion about whether it was ratified. Harry Anderson, *The Controversial Sioux Amendment to the Fort Laramie Treaty of 1851*, 37 NEB. HIST. 201 (1956). It was effectively ratified. *Id.* at 202–03; 4 CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* 1065 (1929) (“Assent of all tribes was procured, the last acceptance being by the Crows September 18, 1854.”). Undoubtedly, this confusion has been propelled by the first “printing” of the treaty in the *Statutes at Large* in 1859. Charles D. Bernholz, *Citation Abuse and Legal Writing: A Note on the Treaty of Fort Laramie with Sioux, etc., 1851 and 11 Stat. 749*, 29 LEGAL REFERENCE SERVS. Q.

of a host of Yellowstone-associated tribes' contemporary Indian reservations. Aimed at facilitating Euro-American migration by negotiating rights of way and preventing conflicts between settlers and tribes, the treaty functioned to "divide and subdivide" into "territories" the traditional homelands of tribes south of the Missouri River, east of the Rocky Mountains, and north of Texas and New Mexico.¹²⁵ Tribal territories were designated for the "Crow Nation" and "Blackfoot Nation" containing large swaths of what would later become the eastern and northern parts of Yellowstone National Park.¹²⁶ Tribal territories were also delineated for the "Sioux or Dahcotah Nation," "Gros Ventre, Mandans, and Arrickaras Nations," "Assinaboin Nation," and "Cheyennes and Arrapahoes."¹²⁷ In agreeing to these territories, the tribes did not "abandon or prejudice any rights or claims they may have to other lands," nor did they "surrender the privilege of hunting, fishing, or passing over" any of the territories.¹²⁸ The tribes did, however, oblige the United States' right "to establish roads, military and other posts, within their respective territories."¹²⁹ In exchange, the United States bound itself to protect the "Indian nations" against "the commission of all depredations" by U.S. citizens, and also to deliver to the "Indian nations" annual annuities of \$50,000 for 10 years.¹³⁰

While the 1851 Horse Creek Treaty did *not* end conflicts among tribes and between tribes and settlers across the Northern Plains, the treaty's territorial designations created a framework within which multiple Yellowstone-associated tribes' contemporary reservations emerged.¹³¹ Successive treaties illustrating this pattern include the 1855 Treaty establishing a reservation for the Blackfoot

133, 134 (2010). The text of the treaty was not printed there, but the associated citation—11 Stat. 749—has since been commonly and incorrectly used to reference treaty language. *See id.*; Treaty of Fort Laramie, 11 Stat. 749 (1851), <https://memory.loc.gov/lsl/011/0700/07950749.tif> [<https://perma.cc/8JQS-BVZK>].

¹²⁵ Horse Creek Treaty, *supra* note 124, pmb., art. 4, at 594; Lesley Wischmann, *Separate Lands for Separate Tribes: The Horse Creek Treaty of 1851*, WYOHistory.org (Nov. 8, 2014), <https://www.wyohistory.org/encyclopedia/horse-creek-treaty> [<https://perma.cc/RUC2-SWA8>]. The Shoshone attended the treaty negotiations, but a territory was not designated for them. *Id.* Overall, 10,000 tribal members are estimated to have been in attendance. *Id.* For a useful map depicting the tribal territories, see *Compare and Contrast the Fort Laramie Treaties of 1851 and 1868*, WYOHistory.org, <https://www.wyohistory.org/education/toolkit/compare-and-contrast-fort-laramie-treaties-1851-and-1868> [<https://perma.cc/ZBT8-6TQF>] [hereinafter *Horse Creek Treaty Map*] (last visited May 22, 2022).

¹²⁶ Horse Creek Treaty, *supra* note 124, art. 4, at 594; *Horse Creek Treaty Map*, *supra* note 125. The Blackfoot Nation was not present at the treaty negotiations, even though a territory was designated for it. Wischmann, *supra* note 125; *see also* SPENCE, *supra* note 52, at 50 ("By official default, then, the United States recognized the western portions of the future park as belonging to the Shoshone.").

¹²⁷ Horse Creek Treaty, *supra* note 124, art. 5, at 594–95; *Horse Creek Treaty Map*, *supra* note 125.

¹²⁸ Horse Creek Treaty, *supra* note 124, art. 5, at 595.

¹²⁹ *Id.* art. 2, at 594.

¹³⁰ *Id.* arts. 3, 7, at 594–95 (stating that the president could extend the annuities period up to five years).

¹³¹ ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST 1846–1890*, at 60–61 (rev. ed. 2003).

Nation,¹³² as well as a trio of treaties formed at Fort Laramie in 1868 that carved out the Crow Reservation and the Great Sioux Reservation,¹³³ while permitting the Northern Arapaho and the Northern Cheyenne to accept portions of one of two existing reservations as their own.¹³⁴ Commonalities in the substance of these treaties are important to consider—and we offer a synthesis of this sort below—but only after we turn briefly to contemporaneous treaties and treaty substitutes applicable to the south and west of Yellowstone National Park.

The entrance to this adjacent space—in some ways the analogue to the 1851 Horse Creek Treaty—is the 1863 First Treaty of Fort Bridger.¹³⁵ Entered into by the “Shoshone nation,” this treaty designated as “Shoshonee country” a 44-million-acre area spanning across parts of present-day Wyoming, Idaho, Utah, Nevada, and Colorado, with the territory’s western boundary left undefined.¹³⁶ The northeastern portion fell squarely within the Yellowstone region, its border intersecting the Snake River due south of the national park’s eventual entrance, and running along the base of the Wind River range to the southeast.¹³⁷ Within this territory, the United States bargained with the Shoshone for a variety of promises, including safe passage for Euro-American emigrants, siting of military posts and related infrastructure along the emigrants’ trails, non-interference with telegraph and overland stage lines, and permission to construct and to operate the transcontinental railroad through the Shoshonee territory.¹³⁸

¹³² Treaty with the Blackfoot Indians, Blackfeet-U.S., Oct. 17, 1855, 11 Stat. 657.

¹³³ Treaty with the Crow Indians, Crow-U.S., May 7, 1868, 15 Stat. 649 [hereinafter Crow Treaty]; Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635.

¹³⁴ Treaty with the Cheyenne Indians, May 10, 1868, 15 Stat. 655 [hereinafter Cheyenne-Arapaho Treaty]. The two options were the Great Sioux Reservation and a reservation that had been designated by and for the Southern Cheyenne and Arapaho in the Medicine Lodge Treaty of 1867. *Id.* art. 2, at 656. An 1884 Executive Order subsequently created the Northern Cheyenne Reservation in present-day southeastern Montana. Exec. Order (Nov. 26, 1884), in INDIAN OFF., EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 61 (1902) [hereinafter EXECUTIVE ORDERS]. Although General Crook apparently promised the Northern Arapaho a separate reservation along the Tongue River in 1877, this reservation was never created, and the U.S. military escorted the Northern Arapaho to the Wind River Reservation in 1878. *The Arapaho Arrive: Two Nations on One Reservation*, WYO HISTORY.ORG, <https://www.wyohistory.org/encyclopedia/arapaho-arrive-two-nations-one-reservation> [https://perma.cc/9AYQ-UT4E] [hereinafter *Arapaho Arrive*].

¹³⁵ Treaty Between the United States of America and the Eastern Bands of Shoshonee Indians, E. Shoshonee-U.S., July 2, 1863, 18 Stat. 685 (1863) [hereinafter First Treaty of Fort Bridger].

¹³⁶ *Id.* art. 4, at 686; *Coming to Wind River: The Eastern Shoshoni Treaties of 1863 and 1868*, WYO HISTORY.ORG (May 23, 2018), <https://www.wyohistory.org/encyclopedia/coming-wind-river-eastern-shoshone-treaties-1863-and-1868#:~:text=Coming%20to%20Wind%20River%3A%20The%20Eastern%20Shoshone%20Treaties%20of%201863%20and%201868,-Published%3A&text=In%20the%201860s%2C%20the%20U.S.,is%20now%20west%2Dcentral%20Wyoming> [https://perma.cc/WX8U-VY3E] [hereinafter *Coming to Wind River*].

¹³⁷ For a map of the “Shoshonee country,” see *Coming to Wind River*, *supra* note 136.

¹³⁸ First Treaty of Fort Bridger, *supra* note 135, arts. 2–3, at 685.

As significant as it was, however, the “Shoshonee country” only remained part of the Yellowstone region for a few years. The landscape shifted with the 1868 Second Treaty of Fort Bridger’s creation of the Wind River Indian Reservation—where the Eastern Shoshone and Northern Arapaho now reside—and the treaty’s promise of a future reservation for the Bannocks whenever they desired.¹³⁹ The year prior, in 1867, President Andrew Johnson had established the Fort Hall Indian Reservation via executive order, and two years later, in 1869, President Ulysses S. Grant issued another executive order designating Fort Hall as the reservation called for by the Second Treaty of Fort Bridger.¹⁴⁰ Not long after these developments, in 1875, the 100-square-mile Lemhi Indian Reservation was created along the Idaho-Montana border for the “mixed tribes of Shoshone, Bannock, and Sheepeater Indians,” again appearing on the map through an executive order from President Grant.¹⁴¹ All told, in the twelve-year period from 1863–1875, the Wind River, Fort Hall, and Lemhi Indian reservations sprang into existence in place of what the First Treaty of Fort Bridger originally had designated as “Shoshonee country.”

Many more treaties, treaty substitutes, and surrounding events could be referenced to illustrate the broad pattern at play: the United States’ gradual extinguishment of Yellowstone-associated tribes’ aboriginal title to their traditional homelands over the latter half of the 19th century, as well as the tribes’ reservation of aboriginal rights throughout the Yellowstone region. Nonetheless, the examples above suffice to show how, in diverse and iterative ways, these treaties superimposed an array of lines in and around the Yellowstone region that dramatically altered the legal status of and long-standing connections to this Native space.¹⁴² While the drawing of those legal lines dispossessed tribes of many legal rights of ownership, the terms of those acquisitions also remain important. The treaties negotiated by and between the United States and Indian tribes form the bedrock of the federal-tribal relationship, and they have been interpreted by the Supreme Court to establish the core doctrines of federal Indian law as well.¹⁴³

¹³⁹ Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673 [hereinafter Second Treaty of Fort Bridger]. Article 2 delineates the Wind River Reservation and contains the promise of a future reservation for the Bannocks. *Id.* art. 2, at 674. The U.S. military escorted the Northern Arapaho to the Wind River Reservation in 1878. *Arapaho Arrive*, *supra* note 134.

¹⁴⁰ Exec. Order (June 14, 1867), in EXECUTIVE ORDERS, *supra* note 134, at 42; Exec. Order (July 30, 1869), in EXECUTIVE ORDERS, *supra* note 134, at 42–43.

¹⁴¹ Exec. Order (February 12, 1875), in EXECUTIVE ORDERS, *supra* note 134, at 43.

¹⁴² The legal doctrine of state-building—Montana, Idaho, and Wyoming—intersected those connections. An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to form Constitutions and State Governments and to be Admitted into the Union on an Equal Footing with the Original States, and to make donations of Public Lands to Such States, ch. 180, 25 Stat. 676 (1889); An Act to Provide for the Admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890); An Act to Provide for the Admission of the State of the State of Wyoming into the Union, and for other Purposes, ch. 664, 26 Stat. 222 (1890).

¹⁴³ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1831); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Winans*, 198 U.S. 371 (1905).

4. Trust Responsibility

The United States' duty to keep its word and fulfill treaty commitments to Indigenous nations is known as the trust responsibility doctrine.¹⁴⁴ It is a foundational aspect of the Yellowstone region's legal landscape. The doctrine derives from the inherent sovereignty of tribes as well as the treaty obligations of the United States.¹⁴⁵ The Supreme Court has held that treaties created a "trust or special relationship" between Indigenous nations and the federal government.¹⁴⁶ Treaties generally, and particularly through their "protection" provisions, obligate the United States to uphold treaty bargains.¹⁴⁷ Relying on the mutual government-to-government promises of early agreements between the federal government and the Cherokee Nation, for example, the Supreme Court, led by Chief Justice John Marshall, defined the nature of tribal nationhood under federal law and secured the role of the federal government as trustee and protector of tribal interests going forward.¹⁴⁸ The status of tribes as third sovereigns within the otherwise dual system of federal-state sovereignty, and the federal government's ongoing trust responsibilities to protect and honor the best interests of tribal sovereigns, remain guiding and motivating principles in many federal laws, policies, and decisions that may affect Native nations. As a result, the trust doctrine establishes a source of federal responsibility to Indians requiring the United States to further tribal sovereignty and support tribal

¹⁴⁴ See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Mancari*, 417 U.S. 535 (1974).

¹⁴⁵ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2019) ("The concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court.").

¹⁴⁶ *Id.* The trust responsibility doctrine is derived from the guardian-ward relationship. *Id.*; *Cherokee Nation*, 30 U.S. at 17 ("[Indian tribes'] relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

¹⁴⁷ See *Horse Creek Treaty*, *supra* note 124, art. 3, at 594 ("In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty."); *Worcester*, 31 U.S. at 561 ("A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state."); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Writing for the majority in *McGirt*, Justice Gorsuch expanded on the nature of treaty obligations:

If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

Id. at 2482.

¹⁴⁸ *Cherokee Nation*, 30 U.S. at 17.

self-government.¹⁴⁹ Moreover, the federal government's role as trustee is routinely reaffirmed by the legislative,¹⁵⁰ executive,¹⁵¹ and judicial branches.¹⁵²

Significant opportunities exist to build and strengthen federal-tribal relationships at Yellowstone National Park. These opportunities find their foundation in the long-standing federal-tribal treaty trust obligations, which can be leveraged to promote a new approach to the management of all federal public lands, including our national parks. If Yellowstone is to serve as a model for new approaches to federal-tribal cooperation, the success of that model will depend on the foundation laid by the legal landscape of this Native space.

III. FEDERAL-TRIBAL RELATIONS IN YELLOWSTONE

With Yellowstone National Park's creation in 1872, new lines were superimposed across the broader region. A new type of space, a "public park or pleasuring ground"¹⁵³ rooted in federal law, was carved out in the place to which Indigenous peoples had connected since time immemorial.¹⁵⁴ Within this zone, human activities would be controlled not by tribal law, but by legal norms applicable

¹⁴⁹ See, e.g., Memorandum for the Heads of Executive Departments and Agencies, 2009 DAILY COMP. PRES. DOC. 1 (Nov. 5, 2009) (providing federal departments and agencies "are responsible for strengthening the government-to-government relationship between the United States and Indian tribes."); Exec. Order No. 13336—American Indian and Alaska Native Education, 40 WEEKLY COMP. PRES. DOC. 713 (Apr. 30, 2004) ("The United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes."); Memorandum on Government-to-Government Relations With Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936, 936–37 (Apr. 29, 1994) (directing the head of each executive department and agency to implement the government-to-government relationship as well as to consult with federally recognized tribal governments and attempt to work cooperatively with them in matters that affect them); *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms."); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) ("The United States, acting through the Secretary of the Interior, 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.'" (quoting *Seminole Nation*, 316 U.S. at 297)).

¹⁵⁰ See, e.g., Indian Trust Asset Reform Act of 2016, Pub. L. No. 114-178, tit. I, 130 Stat. 432 (codified at 25 U.S.C. § 5601) (recognizing and reaffirming the United States' trust responsibility to Indian tribes).

¹⁵¹ See, e.g., Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. (Jan. 26, 2021).

¹⁵² See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) ("We do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'" (quoting *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983)).

¹⁵³ Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32, 32 (1872) (codified as amended at 16 U.S.C. § 22).

¹⁵⁴ See *infra* Part II.A.

to the territories and eventual states of Wyoming,¹⁵⁵ Montana,¹⁵⁶ and Idaho,¹⁵⁷ as well as to the vast public domain to which the United States had obtained title. That title, of course, had been acquired through treaties with France,¹⁵⁸ Spain,¹⁵⁹ England,¹⁶⁰ and Mexico, and was (and remains) predicated on a dubious construct anchoring the entire chain: the Discovery Doctrine.¹⁶¹ Just as sovereign relations

¹⁵⁵ An Act to Provide for the Admission of the State of Wyoming into the Union, and for other Purposes, ch. 664, 26 Stat. 222 (1890).

¹⁵⁶ Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (admitting North Dakota, South Dakota, Montana, and Washington to the Union). The Enabling Act of 1889 allowed for the admittance of Montana into the Union as a state. The Enabling Act, in the second article of section four, declared:

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Id. § 4, 25 Stat. at 677.

¹⁵⁷ An Act to Provide for the Admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890).

¹⁵⁸ See David E. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U.L. REV. 277, 289 (1998). The land theory of the French was based upon commerce and not conquest. “A somewhat thorough examination of the documents and histories relating to French dominion in Canada and Louisiana fails to reveal any settled or regularly defined policy in regards to the extinguishments of the Indian title to land.” *Id.*

¹⁵⁹ See generally Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942). The inferences of Franciscus de Victoria’s lectures were legalized in the papal bull *Subliminus Dues*:

The said Indians and all other people who may be later discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should freely and legitimately, enjoy their liberty and the possession of their property.

Id. at 12.

¹⁶⁰ See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 121 (1990). England began its representation in North America when King Henry VII granted a “charter of conquest” to John Cabot in 1497. *Id.* This charter recognized the prior papal grants through its instruction to “sail only to lands ‘unknown to all Christians.’” *Id.*

¹⁶¹ With the arrival of European colonizers, Indigenous connections with the lands and resources of this continent were fundamentally and irreparably disrupted, particularly because the primary focus of the settler-colonial enterprise was (and remains) the acquisition of territory and resources from Indigenous peoples. Relying on the Discovery Doctrine, the Supreme Court established the rules for such acquisition and, in doing so, ensured that the federal government would retain an exclusive role in the purchase of lands from their original occupants. See An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573–74 (1823). Upon that self-appointed legal authority, the United States was then able to engage in the largest real estate transaction in the history of the world: the purchase, by treaties, of what would become the continental United States. See FELIX S. COHEN ET AL., *LEGAL CONSCIENCE: THE SELECTED PAPERS OF FELIX S. COHEN* 287, 304 (Lucy Kramer Cohen ed., 1960). France, Spain, England, and Mexico transferred to the United States their preemptive rights to purchase the land of the Yellowstone region from the associated tribes through the following instruments: Treaty Between the United States of America and the French Republic (Louisiana Purchase), France-U.S., April 30, 1803, 8 Stat. 200; Treaty of Amity, Settlement, and Limits, Between the United States of America and

were an essential element of Yellowstone's backstory, so too would they remain a defining aspect of the park's post-1872 history.

Focusing on relationships between Yellowstone-associated tribes and the federal government (particularly, the Park Service) since 1872, the narrative below flows through three periods. The first period spans from Yellowstone's creation up to the 20th century's turn—a time frame characterized by mutual “trespass.”¹⁶² The second period, in turn, stretches for nearly a century, from roughly 1900 to 1990, and is marked by separation between the Park Service and Yellowstone-associated tribes, whereby no meaningful sovereign partnerships existed.¹⁶³ Finally, beginning in the early 1990s, the third period sets on, sparked by federal-tribal collaboration over bison management.¹⁶⁴ Such collaboration has been institutionalized and fanned out into a host of related areas over the past 30 years, including ongoing collaborations for Yellowstone's sesquicentennial. Taken as a whole, this storyline is thus the opposite of a “declensionist narrative,”¹⁶⁵ in that relationship building between the Park Service and Yellowstone-associated tribes has improved considerably during the modern era—no doubt it had room to do so. Overall, the upward trajectory sets the stage for envisioning future federal-tribal co-management at Yellowstone.

A. *Trespass* (1872–1900)

“Trespass”: “An unlawful act committed against the person or property of another; esp., wrongful entry on another's real property.”¹⁶⁶ Spanning from Yellowstone's 1872

his Catholic Majesty (Adams-Onis Treaty), Spain-U.S., Feb. 22, 1819, 8 Stat. 252; Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains (Oregon Treaty), Gr. Brit.-U.S., June 15, 1846, 9 Stat. 869; and Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), Mex.-U.S., Feb. 2, 1848, 9 Stat. 922. For a visual perspective on this process, compare *Map of the Greater Yellowstone Ecosystem*, GREATER YELLOWSTONE COAL., <https://greateryellowstone.org/map> [https://perma.cc/9NJV-Z6NB] (last visited Apr. 18, 2022), with *Acquisitions of Territory*, LIBR. OF CONG., <https://www.loc.gov/resource/g3701sm.gct00482/?sp=40&tr=-0.165,-0.044,1.323,0.796,0> [https://perma.cc/2QUD-7R4B] (last visited Apr. 18, 2022).

¹⁶² See *infra* Part III.A.

¹⁶³ See *infra* Part III.B.

¹⁶⁴ See *infra* Part III.C.

¹⁶⁵ See Mark McLaughlin, *Counterbalancing Declensionist Narratives in Environmental History*, NiCHE (Feb. 3, 2016), <https://niche-canada.org/2016/02/03/counterbalancing-declensionist-narratives-in-environmental-history/> [https://perma.cc/4PCW-AJUV]. McLaughlin describes declensionist narratives:

One of the themes that seems to be the topic of continuous discussion within the field of environmental history is how we need to do more than simply produce declensionist historical narratives. For those who aren't familiar with this topic, it's the idea that environmental historians need to avoid the lure of only telling stories of decline, where humans have degraded or ruined such and such an ecosystem, built environment, etc. . . . over time. Now, that doesn't mean we should write negative consequences completely out of our histories, but I do believe that most of the time declensionist aspects should be counterbalanced in some manner so as to provide our audiences with a version of events that comes as close as possible to actual lived experiences.

Id.

¹⁶⁶ *Trespass*, BLACK'S LAW DICTIONARY (11th ed. 2019).

designation up to the 20th century's turn, this definition from *Black's Law Dictionary* fairly encapsulates the initial stage of the federal-tribal relationship in and around the park. It was a relationship rendering Indigenous connections to the Yellowstone region unlawful, while simultaneously denoting the United States' occupancy of the Yellowstone region as an intrusion into Native space.

That is, the “trespass,” as conceived of here, was mutual rather than singular. For many readers, the term’s immediate connotation involves the federal government’s exclusion of Yellowstone-associated tribes: “With the establishment of Yellowstone as America’s first national park[,] Native Americans living in and around the Yellowstone territory suddenly became trespassers.”¹⁶⁷ “By forcing Native Americans out of Yellowstone territory, early park officials made clear how they intended America’s first National Park to be: Native-American free.”¹⁶⁸ But, of course, there is another angle. It finds expression in a Shoshone-Bannock tribal member’s poignant question to a Park Service official regarding neighboring Grand Teton: “How does it feel to be managing our land?”¹⁶⁹ Applied to Yellowstone, the connotation of “trespass” in this related sense centers on the federal government’s intrusion into tribal homelands encompassed by the park. Ultimately, who was doing the trespassing—the federal government, Yellowstone-associated tribes, or both—is a matter of perspective. With this concept of “trespass” as an umbrella, a variety of actions by the federal government and Yellowstone-associated tribes fit beneath it across this period. These actions are surveyed below to elucidate this initial stage of federal-tribal relations.

The world’s first national park originated in this context. “[T]he tract of land in the Territories of Montana and Wyoming, lying near the head-waters of the Yellowstone river,” the Establishment Act began, “is hereby reserved from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people.”¹⁷⁰ Congress had exercised its constitutional authority under the Property Clause in a novel way. “[A]ll persons who shall locate or settle upon or occupy the [park], . . . except as hereinafter provided,” the Act went on, “shall be considered trespassers and removed therefrom.”¹⁷¹ The Secretary of the Interior was tasked with enforcing this boundary.¹⁷² Regulations developed by the Secretary would provide “for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in

¹⁶⁷ This quote comes from an exhibit titled, *Headdresses and Hatchets: The Exploitation of Native Americans by Early Park Service Officials*, publicly displayed in early October 2021 at Yellowstone National Park’s Heritage and Research Center in Gardiner, Montana [hereinafter *Headdresses and Hatchets*].

¹⁶⁸ *Id.*

¹⁶⁹ Wind River Interview, *supra* note 2.

¹⁷⁰ Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32, 32 (1872) (codified as amended at 16 U.S.C. § 22).

¹⁷¹ *Id.*

¹⁷² *Id.* § 2.

their natural condition.”¹⁷³ So, too, would these regulations protect “against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit.”¹⁷⁴ New boundaries had been set.

Shortly after Yellowstone’s 1872 designation, early park management by civilian superintendents has been described as resembling “that of a small western military installation” in many respects.¹⁷⁵ A tangible expression can be seen in the first park headquarters built in 1879—a “heavily fortified blockhouse” located “on an isolated hill that offered the ‘best defensive point against Indians’” and provided “emergency protection for official documents, park personnel, and tourists.”¹⁷⁶ Accompanying this facility was a “small military post” established along the park’s western border “to keep Indians from the Fort Hall and Lemhi [Indian] reservations from entering.”¹⁷⁷ These facilities emerged around the same time as a historic trio of conflicts between the U.S. Army and Yellowstone-associated tribes inside and outside the park—the Nez Perce War (1877), Bannock War (1878), and Sheep Eater War (1879).¹⁷⁸ Such conflicts raised concerns about the park’s ability to protect its borders and presented “opportunities for military authorities to argue for their own protective necessity to the park.”¹⁷⁹ After park administration was transferred from the Interior Department to the War Department in 1886, Mammoth Hot Springs became the site of an initial cavalry post, Camp Sheridan, and then a permanent fort, Fort Yellowstone, whose construction began in 1891.¹⁸⁰ “Although the U.S. Army was not supposed to stay very long when it entered Yellowstone in 1886, it ended up staying 32 years”—until 1918—with Fort Yellowstone becoming the Park Service’s headquarters following that agency’s birth in 1916.¹⁸¹

Across this time frame, the lives of the Mountain Shoshone—again, the park’s only “permanent residents”—were uprooted.¹⁸² One year prior to Yellowstone’s

¹⁷³ *Id.* § 2, 17 Stat. at 33.

¹⁷⁴ *Id.*

¹⁷⁵ SPENCE, *supra* note 52, at 57.

¹⁷⁶ *Id.* (quoting P.H. CONGER, REPORT OF THE SUPERINTENDENT OF YELLOWSTONE NATIONAL PARK (1883)); see also LEE H. WHITTLESEY & ELIZABETH A. WATRY, IMAGES OF AMERICA: YELLOWSTONE NATIONAL PARK 18 (2008) (providing historical photograph of blockhouse and describing it was “[p]laced atop Capitol Hill because [Superintendent] Norris was worried about Native American attacks”).

¹⁷⁷ SPENCE, *supra* note 52, at 57.

¹⁷⁸ NABOKOV & LOENDORF, *supra* note 49, at 224. For surveys of these conflicts, see *id.* at 225–35.

¹⁷⁹ *Id.* at 224.

¹⁸⁰ *Yellowstone: Fort Yellowstone*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/fort-yellowstone.htm> [<https://perma.cc/SC98-7QAD>] [hereinafter *Fort Yellowstone*] (last visited Apr. 17, 2022); see also WHITTLESEY & WATRY, *supra* note 176, at 36–37 (providing historical photographs of Camp Sheridan and Fort Yellowstone).

¹⁸¹ *Fort Yellowstone*, *supra* note 180.

¹⁸² NABOKOV & LOENDORF, *supra* note 49, at 130. The Mountain Shoshone in and around

designation, in 1871, the Superintendent of Indian Affairs in Montana, J. A. Viall, was tasked with relocating “all those Sheep Eater, Lemhi Shoshone, and Bannock groups not already settled on the Fort Hall Reservation.”¹⁸³ Viall delegated this task to a subordinate, A.J. Simmons, charging him with “depopulating . . . that part of the historical homeland of the Sheep Eaters within which . . . the U.S. government would create Yellowstone National Park.”¹⁸⁴ Simmons’s “successful roundup” resulted in the Mountain Shoshone’s relocation from this portion of their homeland to the Lemhi Indian Reservation and, in 1907, to the Fort Hall Indian Reservation.¹⁸⁵ Other Mountain Shoshone ended up on the Wind River Indian Reservation. There does not appear to be a uniform view about precisely how this relocation took place.¹⁸⁶ By one account, however, following the so-called Sheep Eater War, “the [Mountain Shoshone] left Yellowstone when, under pressure from Superintendent Philetus Norris, the agent at Fort Washakie sent a party of Shoshone ‘to escort the [Mountain Shoshone] to new homes on the Wind River Reservation’ in 1879.”¹⁸⁷ Superintendent Norris viewed the Mountain Shoshone’s presence in the park as a “potential deterrent to tourist traffic”—a topic examined further below.¹⁸⁸ Ultimately, stemming from these efforts, Yellowstone’s “permanent residents” would no longer inhabit the park.

A significant change involving the Crow also occurred at this time. Recall how the 1851 Horse Creek Treaty had designated roughly the eastern half of present-day Yellowstone National Park as the Crow Nation’s tribal territory,¹⁸⁹ as well as how the 1868 treaty formed at Fort Laramie had established the Crow Reservation

Yellowstone were subject to a host of misinformed and negative stereotypes. *Id.* at 130 (“The Sheep Eaters were repeatedly described as reclusive, generally afraid of confrontation, traveling afoot, and dependent on their dogs, and hence were demoted to virtual subhuman status.”).

¹⁸³ LOENDORF & STONE, *supra* note 50, at 165.

¹⁸⁴ *Id.* at 165–66.

¹⁸⁵ *Id.* at 166–67.

¹⁸⁶ See, e.g., NABOKOV & LOENDORF, *supra* note 49, at 288 (“[W]e still need to know more precisely when, why, and how the evacuation of Sheep Eaters from Yellowstone National Park took place.”).

¹⁸⁷ Joseph Owen Weixelman, *Fear or Reverence?: Native Americans and the Geysers of Yellowstone*, YELLOWSTONE SCL., Fall 2001, at 2, 3 (quoting SPENCE, *supra* note 52, at 58). *But see* George Wuerthner & Lee Whittlesey, Opinion, *Are Native Americans Lost from Yellowstone?*, NAT’L PARKS TRAVELER (Feb. 3, 2021), <https://www.nationalparkstraveler.org/2021/02/op-ed-are-native-americans-lost-yellowstone#:~:text=The%20presence%20of%20Indigenous%20people,dated%20to%2013%2C000%20years%20ago> [https://perma.cc/QN99-5ZL2] (“Both F.V. Hayden and Supt. P.W. Norris *asked* the Sheepeaters and their kin, the Shoshones, to go to one or both of the reservations (Lemhi at West and Shoshone at South). Some went, but some did not, but what is important is that no one forced them to go.” (emphasis in original)); *see also id.* (“A few of them [in-park Mountain Shoshone] elected to leave to Shoshone or Lemhi; others remained in the park, some until the late 1880s.”).

¹⁸⁸ NABOKOV & LOENDORF, *supra* note 49, at 287 (“After Yellowstone became a national park in 1872, the presence of Sheepeaters and other Native Americans was perceived as a potential deterrent to tourist traffic by Supt. P. W. Norris, especially after the Nez Perce campaign of 1877.” (quoting JANETSKI, *supra* note 51, at 65)).

¹⁸⁹ Horse Creek Treaty, *supra* note 124, art. 4, at 594; *Horse Creek Treaty Map*, *supra* note 125.

as a “permanent home” within the northern portion of that territory.¹⁹⁰ It turns out there was a problem with line drawing along the southern boundary of the reservation and the northern boundary of Yellowstone. Because surveyors had set the latter “some three miles above the Montana and Wyoming territorial border, a narrow strip of park land also lay within the Crow Reservation.”¹⁹¹ Superintendent Norris got wind of this discrepancy in 1877 and promptly advocated for a quick resolution “for the better protection and management of . . . Yellowstone National Park.”¹⁹² To this end, Congress passed a statute in 1882 extinguishing “Crow rights to that remaining segment of the park north of 45° latitude and east of the Yellowstone River.”¹⁹³

While developments involving the Mountain Shoshone and Crow are certainly revealing as to the trespassory character of federal-tribal relations during this period, equally so are repeated conflicts between federal (and state) officials and Yellowstone-associated tribes over off-reservation hunting. From an ecological and cultural standpoint, the mere act of drawing lines around Yellowstone in 1872 neither diminished its appeal to Native hunters, nor wiped their memories (traditional knowledge) of the proverbial bounty living within the area. Quite the opposite. “It is evident from numerous surviving records that many Indians, primarily Crow, Shoshone, Bannock, and Sheepstealer consistently sought to hunt Yellowstone’s abundant numbers of deer, antelope, elk, bison, and sheep.”¹⁹⁴ And not only did the area’s bounty and the tribes’ traditional knowledge motivate this trespass, so did malnutrition and the prospect of starvation on the nearby Crow, Fort Hall, Lemhi, and Wind River Indian Reservations—in short, “sustenance needs”—as well as the loss of bison herds.¹⁹⁵ It is worth remembering how the Bannock, Crow, and Shoshone tribes expressly reserved off-reservation hunting rights in their respective treaties with the United States forged just four years prior to Yellowstone’s genesis.¹⁹⁶

Park officials were dead set against Native hunting, and their efforts to stop it enlisted an array of federal counterparts, prompting something of a bureaucratic blame game as the period progressed. Yellowstone’s second civilian superintendent, Philetus Norris, cannot go unmentioned given his persistence on this front. In 1880, Norris spent the year eliciting agreements from tribes to cease off-reservation hunting in the park, meeting initially with a Crow delegation in Washington,

¹⁹⁰ Crow Treaty, *supra* note 133, arts. 2, 4, at 650.

¹⁹¹ SPENCE, *supra* note 52, at 58.

¹⁹² *Id.*

¹⁹³ *Id.* at 66; Act of Apr. 11, 1882, ch. 74, 22 Stat. 42.

¹⁹⁴ KATHARINE L. WHITE, AMERICAN INDIANS’ ASSOCIATION WITH YELLOWSTONE NATIONAL PARK (1870–2004): FINAL RESEARCH REPORT 18 (2005); *see also* SPENCE, *supra* note 52, at 51–52 (describing game-rich nature of park and its continued appeal to Native hunters).

¹⁹⁵ WHITE, *supra* note 194, at 18; SPENCE, *supra* note 52, at 60.

¹⁹⁶ Second Treaty of Fort Bridger, *supra* note 139, art. 4, at 674–75; Crow Treaty, *supra* note 133, art. 4, at 650.

D.C., and then traveling directly to the Fort Hall and Lemhi Indian Reservations to secure a “solemn promise from all [the] Indians . . . that thereafter they would not enter the park.”¹⁹⁷ In lieu of an additional meeting on the Wind River Indian Reservation, Norris corresponded with the Bureau of Indian Affairs agent at Fort Washakie and “felt satisfied that his concerns would be equally respected among the people living there.”¹⁹⁸ Norris renewed these unofficial agreements the next year, in 1881, reporting to the Secretary of the Interior that the Bannock, Crow, and Shoshone had “sacredly observed” their pledges.¹⁹⁹ In truth, Native hunters did not stay away from Yellowstone altogether—consider again their tribes’ “sustenance needs”—but rather avoided the park’s more heavily visited northern stretches.²⁰⁰

With the shift away from civilian administration of Yellowstone in 1886, the park’s first military superintendent, Captain Moses A. Harris, elevated the campaign to end Native hunting in the park. Only a few days after assuming office, Harris registered his first complaint about “the one ‘constant annoyance’ that would plague his three-year administration,” reporting to the Secretary of Interior about a “considerable band” of Native hunters from the Fort Hall and Lemhi Indian Reservations who were approaching the park’s western boundary.²⁰¹ Native hunting of this sort was an “unmitigated evil” in Harris’s view—an instance of trespass threatening to undermine Yellowstone’s entire purpose—such that only a concerted effort by park officials and the Bureau of Indian Affairs “could effectively solve Yellowstone’s ‘Indian problem.’”²⁰² Harris blamed Indian agents for failing to keep tribal members segregated on their reservations, quarreling with agents on Fort Hall and Lemhi, and ultimately soliciting help from the Commissioner of Indian Affairs.²⁰³ The commissioner issued an order in 1888 calling for agents to invoke “the aid of the military to remove” Native hunters near the park and to administer “proper measures . . . for their punishment.”²⁰⁴ Harris’s frustration with “incompetent reservation agents” likewise manifested in his 1888 report to the Secretary of the Interior, a document Harris shared with powerful Easterners, including Theodore Roosevelt and George Bird Grinnell,

¹⁹⁷ SPENCE, *supra* note 52, at 59 (quoting PHILETUS W. NORRIS, ANNUAL REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR (1880)); JANETSKI, *supra* note 51, at 65.

¹⁹⁸ SPENCE, *supra* note 52, at 59 (citing PHILETUS W. NORRIS, FIFTH ANNUAL REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 45 (1881)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 60; WHITE, *supra* note 194, at 18.

²⁰¹ SPENCE, *supra* note 52, at 63.

²⁰² *Id.* (quoting Letter from Moses A. Harris to H.L. Muldrow (Aug. 22, 1887) (National Archives)).

²⁰³ *Id.* at 64; WHITE, *supra* note 194, at 19–20.

²⁰⁴ SPENCE, *supra* note 52, at 64 (quoting Restatement of Policies to Secretary of the Interior (Jan. 19, 1889)).

who recently had established the Boone and Crockett Club.²⁰⁵ Grinnell “publicly harangued the Interior Department for not remedying the chronic abuses of Indian marauders.”²⁰⁶ All told, by the early 1890s, this multi-faceted campaign to keep Native hunters out of Yellowstone and segregated on reservations had “some limited success,” though Harris’s successors occasionally echoed his complaints against Indian agents on Fort Hall and Lemhi.²⁰⁷

Congress passed the 1894 Lacey Act in this context.²⁰⁸ Poaching by non-Native hunters in Yellowstone was a major problem at the time, as it had been during the preceding two decades of the park’s early history, and Congress was compelled to enact the statute after receiving dire predictions of the Yellowstone bison herd’s extinction due to poaching.²⁰⁹ As identified above, the 1872 Act establishing Yellowstone had called for secretarial regulations to protect “against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit”²¹⁰ The Lacey Act aimed to bolster this protection, imposing a general prohibition across the park on hunting, killing, wounding, or capturing of “any bird or wild animal,” and accompanying restrictions on fishing methods.²¹¹ Secretarial regulations were again called for to implement the statute, and criminal penalties were imposed on violators.²¹² Although not originating out of concerns about Native hunters trespassing in Yellowstone, the Lacey Act nonetheless held important implications for their future exercise of treaty-based, off-reservation hunting rights.

The U.S. Supreme Court’s 1896 decision in *Ward v. Race Horse* comes into play here.²¹³ It was a test case arranged by the State of Wyoming and the Bureau of Indian

²⁰⁵ *Id.* The Boone and Crockett Club unanimously adopted the following resolution:

[T]he Indians of the Fort Hall, Lemhi, Washaki and Crow agencies should not be permitted to leave their reservations in large parties, except when in charge of some reliable white man who can be held responsible for the conduct of the Indians whom he accompanies, and . . . under no circumstances should these Indians be permitted to approach within twenty-five miles of the borders of the Yellowstone National Park.

WHITE, *supra* note 194, at 21.

²⁰⁶ SPENCE, *supra* note 52, at 64.

²⁰⁷ *Id.*; WHITE, *supra* note 194, at 21–22.

²⁰⁸ Act of May 7, 1894, ch. 72, 28 Stat. 73 (codified as amended at 16 U.S.C. §§ 24–30a). The act is also known as the Yellowstone Game Protection Act.

²⁰⁹ NABOKOV & LOENDORF, *supra* note 49, at 115; *see also* SPENCE, *supra* note 52, at 65 (“When park rangers caught a man named Ed Howell with eleven bison carcasses in March 1894, the story proved so sensational that Congress immediately moved to make hunting in the park a federal offense.”).

²¹⁰ Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 32, 32–33 (1872) (codified as amended at 16 U.S.C. § 22).

²¹¹ § 4, 28 Stat. at 73–74.

²¹² *Id.*

²¹³ *Ward v. Race Horse*, 163 U.S. 504 (1896). For an insightful overview of *Race Horse*, see Tara Righetti et al., *Unbecoming Adversaries: Natural Resources Federalism in Wyoming*, 21 Wyo. L. REV. 289, 320–24 (2021).

Affairs, wherein a Bannock leader from the Fort Hall Indian Reservation, Race Horse, agreed to kill seven elk south of Yellowstone in Uinta County, Wyoming, and to be taken into custody for violating state game laws.²¹⁴ Petitioning for a writ of habeas corpus, Race Horse argued that his detention was unlawful under the 1868 Second Treaty of Fort Bridger, which again had secured off-reservation hunting rights for the Bannock and the Eastern Shoshone—that is, “the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.”²¹⁵ Could Wyoming laws control Race Horse’s exercise of this treaty right?²¹⁶ The federal district court held “no,”²¹⁷ but the Supreme Court reversed, issuing a 7–1 split opinion that would remain good law until being “repudiated” more than 120 years later in *Herrera*.²¹⁸

Two intertwined aspects of *Race Horse* should be highlighted vis-à-vis Yellowstone.

First, from a law-on-the-books perspective, Justice White made an impactful reference within the majority opinion to the 1872 statute establishing Yellowstone. Analyzing the specific nature of the off-reservation hunting right, Justice White concluded it was contingent, as “the treaty clearly contemplated the disappearance of the conditions therein specified.”²¹⁹ More specifically, Justice White determined (1) the “unoccupied lands” where the off-reservation hunting right could be exercised “were only lands of that character embraced within what the treaty denominates as hunting districts,” and (2) “the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts.”²²⁰ It was at this spot in the majority opinion where Justice White brought in Yellowstone:

[T]his view of the temporary and precarious nature of the right reserved, in the hunting districts, is manifest by the act of Congress creating the

²¹⁴ *Race Horse*, 163 U.S. at 505–06; Righetti et al., *supra* note 213, at 321–22.

²¹⁵ *Race Horse*, 163 U.S. at 504–05; Second Treaty of Fort Bridger, *supra* note 139, art. 4, at 674–75.

²¹⁶ *Race Horse*, 163 U.S. at 507 (“[T]he sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege . . . within the limits of the State of Wyoming in violation of its laws.”).

²¹⁷ *In re Race Horse*, 70 F. 598 (Cir. Ct. D. Wyo. 1895), *rev’d sub nom.* *Ward v. Race Horse*, 163 U.S. 504 (1896); Righetti et al., *supra* note 213, at 323.

²¹⁸ *Race Horse*, 163 U.S. at 514 (holding “repeal” of treaty provision securing off-reservation hunting right “results from the conflict between the treaty and the act admitting [the State of Wyoming] into the Union. The two facts . . . are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting”); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (“While *Race Horse* was not expressly overruled in [*Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999)], it must be regarded as retaining no vitality after that decision. . . . [W]e make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.” (internal quotations omitted)).

²¹⁹ *Race Horse*, 163 U.S. at 509.

²²⁰ *Id.* at 508–10.

Yellowstone Park Reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of Congress on the subject.²²¹

Justice White's terminology lacked precision: the United States had not, in fact, "parted" with title when Congress had "carved out" Yellowstone from the hunting districts. Further, as a purely factual matter, Yellowstone was irrelevant to the case in the sense that Race Horse had not exercised his off-reservation hunting right within the park. But the Supreme Court nonetheless sent a powerful message to tribal members who might: Yellowstone was off limits.

Second, from a law-in-action perspective, *Race Horse* effectively marked the end of the trespass stage of federal-tribal relations at Yellowstone. Not only did the Supreme Court differentiate the park from those "hunting districts" where Bannock and Eastern Shoshone tribal members could exercise off-reservation hunting rights per the Second Treaty of Fort Bridger, *Race Horse* ultimately held that Wyoming game laws controlled such hunting.²²² State officials could arrest tribal members whose actions violated those laws, and federal officials could act in a similar manner to prevent Native hunting within Yellowstone. Thus, "[a]lthough smaller bands of Indians would continue to slip in and out of the park for various reasons over the following years, the *Ward v. Race Horse* verdict gave state and federal agencies the power to keep Indians on their reservations and out of places like Yellowstone National Park."²²³ The end result was equally predictable and plain: "By the end of the nineteenth century, native peoples were seldom seen in Yellowstone."²²⁴ And that brings us to the next stage.

B. Separation (1900–1990)

The trespass stage of federal-tribal relations at Yellowstone took its toll on Native connections moving forward into the 20th century. It was a far-reaching toll that spanned nearly the century's entirety:

For tribe after tribe, this suppression of traditional ties to old Yellowstone hunting and traveling grounds precipitated a century of broken connections. Rendering Yellowstone National Park off-limits to Indians during that time meant that any related Indian traditions of practical use, narrative folklore, or historical memories went unrenewed. Without

²²¹ *Id.* at 510.

²²² *Id.* at 510, 514.

²²³ NABOKOV & LOENDORF, *supra* note 49, at 240; *see also* SPENCE, *supra* note 52, at 68–69. The year after *Race Horse*, in 1897, a Bannock delegation apparently traveled to Washington, D.C. and "agreed to give up their treaty right to hunt on the public lands of the United States in return for proper compensation," which eventually resulted in a \$75,000 payment "for the relinquishment of their hunting rights." JANETSKI, *supra* note 51, at 117 (quoting BRIGHAM D. MADSEN, *THE BANNOCK OF IDAHO* 269 (1958)).

²²⁴ Weixelman, *supra* note 187, at 3.

access to geographic reference points in and around the park by which to anchor and remember them, the stories of mythic origins or legendary events of the Crow, Blackfeet, Flathead, Bannock, Shoshone, and quite likely other Plains Indian groups, as well as detailed accounts of plant foraging, game hunting, medicine acquisition, spiritual activities, or war, were thinned out with disuse or forgotten entirely.²²⁵

In this way, Yellowstone-associated tribes became separated from the park, not only in the sense of being physically distanced from it, but also in terms of the diminished presence of the park's landscape and resources within tribal cultures. Relying on the metaphor of fire, Native connections did not go out altogether, but they dimmed and cooled.

As with the trespass stage, several patterns capture the character of this "separation" period. Federal policy during the period not only separated Yellowstone-associated tribes from the park, it also separated the Park Service from interacting with the tribes and the park itself as a Native space. Our discussion of these patterns below is not intended to be exhaustive of federal-tribal interactions throughout the period. But the patterns nonetheless reflect its character.

Park promotion is where we will begin. Native peoples became instruments for it at the 20th century's onset. And, without question, history lacks no sense of irony in this respect. Something of an about face seems to have taken place when accounting for how the relationship between tourists and Yellowstone-associated tribes had been conceived during the trespass stage. "Indians within the park were thought to be bad for business."²²⁶ That appears to capture the earlier view's essence. Park officials saw the presence of Native peoples as a "potential deterrent to tourist traffic" and "realized that even the slightest fear of Indian attack could prevent tourists" from visiting Yellowstone.²²⁷ To neutralize this inhibitory anxiety and non-lucrative effect, a myth was harnessed. Relayed by park boosters and officials alike, the myth had become a "truism of Yellowstone history" by the 19th century's close: Native peoples avoided the park out of fear for its geysers and other thermal features.²²⁸ Although it proved pervasive and persistent, recent scholarship has thankfully worked to debunk this myth.²²⁹

²²⁵ NABOKOV & LOENDORF, *supra* note 49, at 28–29.

²²⁶ WHITE, *supra* note 194, at 20.

²²⁷ NABOKOV & LOENDORF, *supra* note 49, at 287 (quoting JANETSKI, *supra* note 51, at 65); SPENCE, *supra* note 52, at 56.

²²⁸ NABOKOV & LOENDORF, *supra* note 49, at 277; JANETSKI, *supra* note 51, at 121.

²²⁹ The research of Joseph Weixelman, who worked under the direction of park historian Tom Tankersley, has proven illuminating in this regard. "[T]hermal wonders of Yellowstone did not terrify all, or even most, American Indians," describes Weixelman, "Euro-Americans originated the idea that Indians 'feared' Yellowstone and it must be dispelled to understand the true nature of Yellowstone's Indian past." Weixelman, *supra* note 187, at 10.

Around the 20th century's turn, Native peoples seemingly became good for business at Yellowstone. While this pattern can be seen in contemporary souvenirs,²³⁰ it is readily apparent in how Yellowstone-associated tribes were invited to participate in park ceremonies. In this sense, "[t]he first decades of the twentieth century found native peoples visiting the Yellowstone region for very different reasons than those in the previous hundred years."²³¹ The Park Service's opening ceremonies for Yellowstone's west entrance in 1925 offer one example.²³² Shoshone Chief Tyhee and a contingent of tribal members from the Fort Hall Reservation were featured prominently in the ceremony.²³³ During the same year, Superintendent Horace Albright—who notably served as Park Service director both before and after his superintendency²³⁴—similarly invited Crow tribal members into Yellowstone to assist with rounding up the park's bison herd.²³⁵ "The Indians wore 'ancient hunting costumes and rode bareback,' attracting tourists who watched the riders chase the bison through the Lamar River Valley."²³⁶ A couple years later, in 1927, Superintendent Albright invited two Crow tribal members to opening ceremonies for the park's east entrance: the last of General George Armstrong Custer's Crow

²³⁰ The Park Service's "Headdresses and Hatchets" exhibit offers a description of the pattern:

[W]hen surveying the Native American-inspired souvenirs from the early 20th century, the same few stereotypes surface: feathers, pipes, and tomahawks. The souvenirs and advertisements did not celebrate the complex cultural histories of Native tribes as related to the Park; instead, they commodified these people, packaged them up, and sold them as relics of the past.

Headdresses and Hatchets, *supra* note 167.

²³¹ JANETSKI, *supra* note 51, at 119.

²³² *Id.*; see also S. T. MATHER, REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1925 AND THE TRAVEL SEASON, 1925, at 21 (1925) ("Yellowstone Park was opened formally on June 18, 1925, with appropriate ceremonies at the western entrance . . . Bannock and Shoshone Indians . . . contributed color, romance, and historic background to the occasion."). Superintendent Albright also identified Chief Tendoy as one of the principal speakers at the park's opening ceremonies in 1928 at West Yellowstone. HORACE M. ALBRIGHT, ANNUAL REPORT FOR YELLOWSTONE NATIONAL PARK 31 (1928).

²³³ JANETSKI, *supra* note 51, at 119.

²³⁴ *Horace M. Albright*, NAT'L PARK SERV., <https://www.nps.gov/people/horace-m-albright.htm> [<https://perma.cc/Y268-J8JW>] (last visited Apr. 17, 2022). Albright became Yellowstone's superintendent in 1919. *Id.* In this role, he delivered an opening speech at the park's 50th Anniversary ceremony in 1922. Speech by Horace M. Albright, Superintendent, Yellowstone Nat'l Park (July 14, 1922) (on file with authors). A full review of primary sources from this historic occasion would be valuable in understanding how, if at all, Yellowstone-associated tribes may have been invited to participate, but it is worth noting the tribes' virtual invisibility in Albright's speech. See *id.* Native peoples were mentioned once: "As you know, the first white man to come into the Yellowstone country was John Colter, a member of the Lewis & Clark Expedition, who was returning from the West and driven in here by *hostile Indians*." *Id.* at 1 (emphasis added).

²³⁵ JANETSKI, *supra* note 51, at 119.

²³⁶ *Id.* at 120. Although a marketing connection of this sort did not come to fruition, Superintendent Albright "fantasized at the time that the Crow were becoming associated with Yellowstone in the same way that the Blackfeet were a part of Glacier National Park." *Id.*; see also *id.* at 119 ("Inviting Shoshone and other native peoples to the Park from which they had been systematically banned was consistent with the national trend to associate Indians with park and wilderness.").

scouts, White-Man-Runs-Him, and an interpreter for the “old scout,” Max Big Man.²³⁷ These *invitations* for Yellowstone-associated tribes to enter the park speak volumes about their separation from it.

Similar enterprises aimed at bolstering Yellowstone tourism illustrate the same. A failed venture at Dot Island in 1899 cannot be overlooked. Hatched by a private concessionaire, E. C. Waters, the basic premise was to create an “aboriginal exhibit” on Dot Island in Yellowstone Lake by locating a few Crow tribal members and a small bison herd there for summer tourism.²³⁸ Although he succeeded in moving some bison onto the island, Waters “had no luck convincing any Crow to camp in the middle of Yellowstone Lake.”²³⁹ Roughly two decades after this spectacle, in 1916, a well-known writer on the Blackfeet, James Willard Schultz, organized a “very interesting ceremony” in the Yellowstone geyser region—“the first ceremony of its kind given by the Crow Indians in the last 20 years.”²⁴⁰ At this time, the “See America First” campaign promoted recreational tourism, and a proposed film of the Crow ceremony was considered compatible with a “Shoshone project” related to the campaign.²⁴¹ *The Thundering Herd* then emerged in 1924—not a tourism-boosting venture per se, but rather a Hollywood studio production filmed in Yellowstone featuring Arapaho tribal members and other Native peoples.²⁴² Around the same timeframe, the Crow interpreter mentioned above, Max Big Man, began presenting Indian programs for Yellowstone tourists, forming with park officials an “entrepreneurial relationship” extending at least until the early 1930s.²⁴³ While additional examples assuredly exist, the takeaway tracks the preceding discussion: One unmistakable implication of these enterprises is the separation of Yellowstone-associated tribes.

This quality can also be gleaned in a connected thread involving Yellowstone’s wildlife. During the mid-20th century, the Park Service implemented a “reduction

²³⁷ *Id.* at 119; HORACE M. ALBRIGHT, ANNUAL REPORT FOR YELLOWSTONE NATIONAL PARK 1 (1927); *see also* NABOKOV & LOENDORF, *supra* note 49, at 41 (displaying historical photograph of Crow attendees).

²³⁸ SPENCE, *supra* note 52, at 69. The Dot Island venture was apparently inspired by a recent exhibit at the World’s Columbian Exposition in Chicago, and Waters envisioned using the venture to drum up business for his Yellowstone Lake Boat Company. *Id.* The Secretary of Interior and park officials only placed one stipulation on the venture: “Waters needed to use Crow Indians instead of Shoshone or Bannock.” *Id.*

²³⁹ *Id.*

²⁴⁰ NABOKOV & LOENDORF, *supra* note 49, at 76.

²⁴¹ *Id.*

²⁴² *The Thundering Herd*, IMDb, <https://www.imdb.com/title/tt0016430/> [https://perma.cc/WUU7-AZYQ] (last visited Apr. 18, 2022). A “colorful pageant” was apparently held the next summer near a buffalo ranch in the Lamar Valley. NABOKOV & LOENDORF, *supra* note 49, at 76.

²⁴³ NABOKOV & LOENDORF, *supra* note 49, at 78. “The park never encouraged or commercially exploited its romantic association with Indian images in the overt,” according to Nabokov and Loendorf, “[b]ut over the years there were sporadic attempts to encourage or allow Indians from adjoining reservations to display wares or dance.” *Id.* at 75.

policy” that entailed shipping carcasses and live specimens from Yellowstone’s bison and elk herds to parties outside the park, with the lion’s share of shipments going to Native peoples.²⁴⁴ The first documented shipment request occurred in 1916, and it was followed by Congress’s enactment in 1923 of a statute authorizing the Secretary of the Interior “to dispose of most big game and predatory animals within Yellowstone deemed as surplus.”²⁴⁵ Eight years later, in 1931, requests for shipments of bison carcasses and live specimens were made by Indian agencies of Yellowstone-associated tribes, the former being approved and the latter being denied.²⁴⁶ Yet these were the early days.

The Park Service’s reduction program did not officially begin for another three years, and from that point it spanned approximately three decades (*i.e.*, from 1934 to 1967).²⁴⁷ It was a period marked by “the most prolific distribution of Yellowstone’s resources in history.”²⁴⁸ “[O]ver eighty American Indian tribes and institutions . . . received meat or animals, or otherwise [were] involved in Yellowstone’s big game management actions,” with estimates from archival sources suggesting “over eighty percent of all live animals and slaughtered carcasses of both elk and bison were shipped to American Indian-affiliated destinations.”²⁴⁹ Most carcasses went to Yellowstone-associated tribes served by the Rocky Mountain and Great Plains regional offices of the Bureau of Indian Affairs.²⁵⁰ Shipments of live specimens were less common; however, a handful of tribes did request them, and they were ultimately provided to “the Crows at Crow Agency, Montana and the Sioux at Pine Ridge Agency, South Dakota.”²⁵¹

²⁴⁴ For an excellent overview of this reduction policy, see WHITE, *supra* note 194, at 27–34.

²⁴⁵ *Id.* at 23–24.

²⁴⁶ *Id.* at 25–26. Recipients of the bison carcass shipments included the Blackfeet and Crow agencies. *Id.* at 25. The denied request contemplated transplanting a live bison herd on the Crow Reservation. *Id.* at 26.

²⁴⁷ *Id.* at 25, 27, 34; see also NABOKOV & LOENDORF, *supra* note 49, at 122 (“[D]uring the days of Franklin Roosevelt’s ‘Indian New Deal,’ came a period of controlled giveaways of elk and buffalo to newly empowered and hungry Indians.”).

²⁴⁸ WHITE, *supra* note 194, at 27. For specific figures of carcass and live-specimen shipments in the 1930s and 1940s, see NABOKOV & LOENDORF, *supra* note 49, at 122–23; NEWTON B. DRURY, ANNUAL REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR 204 (1943); EDMUND B. ROGERS, ANNUAL REPORT: YELLOWSTONE NATIONAL PARK 18 (1948).

²⁴⁹ WHITE, *supra* note 194, at 27. The proportion of carcasses and live specimens shipped to tribes and tribally affiliated institutions fluctuated across the period. See *id.* at 28 (“By 1940 Indian groups were receiving approximately seventy-three percent of the park’s reduced elk carcasses and by 1950 nearly ninety-two percent.”).

²⁵⁰ *Id.* at 31; *Tribes Served by the Rocky Mountain Region*, INDIAN AFFAIRS, <https://www.bia.gov/regional-offices/rocky-mountain/tribes-served> [<https://perma.cc/6CCN-B7ZQ>] (last visited Apr. 18, 2022); *Tribes Served by the Great Plains Region*, INDIAN AFFAIRS, <https://www.bia.gov/regional-offices/great-plains/tribes-served> [<https://perma.cc/UJE3-W9JP>] (last visited Apr. 18, 2022).

²⁵¹ WHITE, *supra* note 194, at 31.

Cessation of the reduction policy was gradual. Park Service reduction activities became more publicized in the late 1950s and early 1960s—with media attention raising “serious concerns from citizens across the country”—and park officials began to field “letters of alarm from senators, representatives, and other various politicians whose constituents were opposed to annually killing large numbers of big game for the sake of maintaining ‘ecological standards.’”²⁵² The controversy came to a head with the release of an NBC news investigative report on March 7, 1967, just four days after which a public announcement was made that the Secretary of the Interior had agreed “to halt all direct reduction in Yellowstone.”²⁵³ Park officials (and others) were aware that Yellowstone-associated tribes had become dependent on carcass shipments for their winter food supply, but “all requests for elk or bison meat out of Yellowstone following 1967 were emphatically denied.”²⁵⁴ And although several press releases were issued to announce the reduction policy’s cessation, park officials “did not specifically contact tribes who had been receiving meat from the park for the previous three decades.”²⁵⁵ At the end of the day, Yellowstone-associated tribes’ separation is evident not only in the reduction policy’s cessation, including how it was communicated, but also in the very shipments made under the program, consisting of big game hunted by tribes and their ancestors since time immemorial.²⁵⁶

Despite how things unfolded with the reduction policy’s cessation, communication between the Park Service and Yellowstone-associated tribes evolved across this period. Communication was a bureaucratic exercise when the program officially began in the 1930s. Park officials would determine how many bison and elk would be reduced from Yellowstone’s herds, and upon making figures available to the Bureau of Indian Affairs, that agency would decide on the distribution of carcasses among tribes.²⁵⁷ As the reduction policy gained more publicity, tribes increasingly made requests for shipments to the Park Service and the Bureau of Indian Affairs.²⁵⁸ Such requests were “[h]ampered by a large bureaucracy and a lengthy chain of communication,” however, and thus “were often shuffled through four or five departments before a concrete answer was returned.”²⁵⁹ In 1953, after the official policy had been in place for nearly two decades, the mode of communication

²⁵² *Id.* at 32–33.

²⁵³ *Id.* at 33; see also *History of Bison Management*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-history.htm> [<https://perma.cc/VN2E-R3VP>] (last visited Apr. 17, 2022) (“[A] moratorium on culling beginning in 1969 resulted in the bison population increasing dramatically: from 500 animals in 1970 to 3,000 in 1990. At the same time, elk numbers increased to more than 19,000 animals in the late 1980s.”).

²⁵⁴ WHITE, *supra* note 194, at 34.

²⁵⁵ *Id.*

²⁵⁶ See *supra* Part II.A.

²⁵⁷ WHITE, *supra* note 194, at 29.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

shifted based upon a suggestion from the Park Service's regional director.²⁶⁰ From that point until 1967, park superintendents, biologists, and rangers at Yellowstone “communicated *directly* with tribes and agencies to determine allotment quantities and schedules of disposal.”²⁶¹ Separation no doubt diminished with this important shift, but again it cannot be missed as an inherent attribute of the reduction policy.

A final pattern to note in this vein concerns education, interpretation, and research involving Native peoples at Yellowstone.²⁶² Similar to the shift toward direct communication, there was a trend away from separation regarding these activities over the twentieth century, but it did not occur overnight. At the time of John Collier's “Indian New Deal” in the late 1930s, while historical summaries of national parks were being prepared by ethnographers assigned to include Native peoples, Yellowstone's official guidebook did not mention tribes in its text, and alluded to them solely in a timeline referencing General O. O. Howard's pursuit of a lone Nez Perce tribal leader, Chief Joseph, in 1877 (*i.e.*, as part of the Nez Perce War).²⁶³ Laverne Fitzgerald's bogus book, *Trapper Jim's Fables of Sheepstealer Indians in Yellowstone*, appears to have been the only contemporary volume featuring Native peoples for sale in the park's bookstore.²⁶⁴ In 1941, however, the Yellowstone Library and Museum Association conferred its first fellowship in history (a \$250 stipend) to Sidney R. Barsky of the University of Wyoming, the subject being “The Aboriginal Use of Yellowstone Park Lands.”²⁶⁵ Eight years later, park naturalist Merrill D. Beal published his book, *The Story of Man in Yellowstone*.²⁶⁶ Turning to the 1960s, during his tenure as park historian,²⁶⁷ Aubrey Haines was charged with “documenting relationships Native American tribes had with Yellowstone,”

²⁶⁰ *Id.* at 30.

²⁶¹ *Id.* (emphasis added).

²⁶² To be clear, we do not intend to suggest that park officials had not previously undertaken research on Yellowstone-associated tribes. Superintendent Philetus Norris's annual reports alone reveal otherwise. See, e.g., P. W. NORRIS, REPORT UPON THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 838 (1877) (discussing Norris's discovery of burial-cairns and shipment of various items to Smithsonian Institution).

²⁶³ NABOKOV & LOENDORF, *supra* note 49, at 30.

²⁶⁴ *Id.* The purported Native stories in this book have been discredited as “white baloney”—that is, “faked Indian tales” for which no supporting documentation exists. Lee H. Whittlesey, *Native Americans, the Earliest Interpreters: What is Known About Their Legends and Stories of Yellowstone National Park and the Complexities of Interpreting Them*, 19 GEORGE WRIGHT F. 40, 43 (2002).

²⁶⁵ EDMUND B. ROGERS, ANNUAL REPORT: YELLOWSTONE NATIONAL PARK 8 (1941).

²⁶⁶ MERRILL D. BEAL, *THE STORY OF MAN IN YELLOWSTONE* (1949). Beal devoted chapters 3 and 5 to Native peoples, as well as focused chapter 11 on the Nez Perce War. While Beal's ethnocentrism cannot be missed, he did not promote the myth that Native peoples avoided Yellowstone out of fear for its geysers and other thermal features, instead describing the myth's origin with both integrity and cleverness: “It was not a conspiracy against truth, just an adaptation of business psychology to a promising national resort.” *Id.* at 91.

²⁶⁷ *Collection 2477—Aubrey L. Haines Papers, 1940–2000*, MONT. STATE UNIV., <http://www.lib.montana.edu/archives/finding-aids/2477.html> [<https://perma.cc/REK9-58BJ>] (last visited Apr. 17, 2022).

investing research time into these relationships as well as managing archaeology projects.²⁶⁸ Not only do these efforts show a gradual increase in the Park Service's generation and dissemination of knowledge about Yellowstone-associated tribes, they also set the stage for relationship building within the modern era.

C. Connection (1990–present)

Over the past 30 years or so, from the early 1990s up to the sesquicentennial, federal-tribal relations at Yellowstone have changed considerably—drastically, really, when compared to where things stood a century prior. Whether described as a reboot of Yellowstone, a re-conception of new partnerships, or otherwise, what has fundamentally defined the connection period are varied attempts at relationship building.²⁶⁹ The Park Service and Yellowstone-associated tribes have sought connection. The park is not an island in this respect, but rather situated amidst a suite of laws and policies that have emerged calling for consultation, collaboration, and cooperation between the agency and tribes throughout the park system.²⁷⁰ In this way, “[t]he long-standing tradition of American Indian groups being affected by management policies instituted at Yellowstone but not having any influence over those policies themselves has . . . evidently started to change . . .”²⁷¹ We are certainly not alone in applauding this trend.²⁷² Nor do we wager it will reverse. Yellowstone-associated tribes are interested in “strengthening special, ‘traditional’ relationships with [the park’s] many resources,” and park officials view ongoing relationship building with the tribes as a top priority.²⁷³ Precisely how future connections of this sort will be made—including exactly which formal or

²⁶⁸ SHAW, *supra* note 98, at unpaginated “History” section.

²⁶⁹ Rob Hotakainen, *Tribes Hope for a ‘Reboot’ as Yellowstone Marks 150 Years*, E&E NEWS (Mar. 1, 2022), <https://www.eenews.net/articles/tribes-hope-for-a-reboot-as-yellowstone-marks-150-years/>; NABOKOV & LOENDORF, *supra* note 49, at 307 (“To the credit of a more enlightened generation of federal policies, park administrators, and Indian peoples willing to forget the past and conceive of new partnerships, [the historical] separation is gradually being reversed. But this is no easy task.”).

²⁷⁰ MARCUS ET AL., *supra* note 29, at 17 (“The relationship between American Indians and Yellowstone has changed through the years. . . . In the modern era, Yellowstone park managers engage in systematic consultation and collaboration with representatives of tribes . . .”); SCHULLERY, *supra* note 24, at 20 (“Native people have a historically unprecedented level of enfranchisement in park management deliberations.”); SHAW, *supra* note 98, at unpaginated “History” section (“Federal law requires Yellowstone park staff to maintain relations and consult with the 26 associated tribes that have ancestral ties to Yellowstone.”). For a survey of this suite of laws and policies, see Jason Anthony Robison, *Indigenizing Grand Canyon*, 2021 UTAH L. REV. 101, 142–48 (2021).

²⁷¹ WHITE, *supra* note 194, at 37.

²⁷² See, e.g., NABOKOV & LOENDORF, *supra* note 49, at 299 (“[T]he Indian role in the cultural history of the greater Yellowstone ecological system deserves to be restored.”).

²⁷³ *Id.*; Wind River Interview, *supra* note 2; Telephone Interview with Cam Sholly, Superintendent, Yellowstone Nat’l Park, and Tobin Roop, Chief of Cultural Res. Branch, Yellowstone Nat’l Park (Oct. 7, 2021) (on file with authors) [hereinafter Sholly & Roop Interview].

informal institutions may be grown or created anew—remains to be seen.²⁷⁴ For now, our basic goal is to offer a snapshot of connections to date.

Similar to the trespass and separation stages, the diverse connections made (or attempted) by the Park Service and Yellowstone-associated tribes in recent decades involve wide-ranging activities.²⁷⁵ Our coverage of them is necessarily limited, yet hopefully robust enough to convey a sense of their breadth, as well as our overall characterization of the “connection” period.

What seems to have been the proverbial heart of federal-tribal relationship building throughout this period is “probably the most significant ethnographic resource at Yellowstone for the majority of tribes”: bison.²⁷⁶ The Park Service and Yellowstone-associated tribes have been working on bison management in and around the park for at least 30 years—*i.e.*, since 1992.²⁷⁷ A couple historic events spurred this connection during the late 1990s.

One episode involved “the largest slaughter of wild bison” in the 20th century.²⁷⁸ At the beginning of the 1996–1997 winter season, 3,436 bison were

²⁷⁴ We would be remiss not to mention recommendations offered to park managers and interpreters by Peter Nabokov and Lawrence Loendorf in their seminal work roughly twenty years ago. By way of overview:

[W]e strongly encouraged the park to continue its ethnographic research projects and update its ethnographic archives. We stressed the need for a long-term, methodically phased archaeological survey and site-sampling campaign for the entire park, and we urged that the park enlist American Indian elders and students as collaborators and interpretive programs be totally revamped to fully review and entertainingly illustrate the ten-thousand-year associations between various American Indian peoples and the greater Yellowstone region. We suggested that instead of shying away from controversial topics that park interpreters might ‘teach the debates’ about sensitive or timely Indian issues, such as access to sacred sites, procurement of culturally important natural resources, proper treatment of buffalo, and respect for and reburial of human remains found at archaeological sites. We supported improving communication with Indian communities by appointing an Indian advisory committee, hiring Indian staff and interns, and instituting cross-cultural workshops. And most important to many Indians, we urged revisiting the issue of entrance fees and hunting and plant foraging policies for native petitioners.

NABOKOV & LOENDORF, *supra* note 49, at 300–01.

²⁷⁵ A bird’s-eye perspective on these activities from 1990 to 2012 can be gained from the series headings and summaries contained in SHAW, *supra* note 98, at unpaginated “Series Descriptions” section.

²⁷⁶ YELLOWSTONE CTR. FOR RES., YCR–2005–03, YELLOWSTONE CENTER FOR RESOURCES 2004 ANNUAL REPORT: FISCAL YEAR (OCTOBER 1, 2003, TO SEPTEMBER 30, 2004), at 114 (2005), <https://www.nps.gov/yell/planyourvisit/loader.cfm?csModule=security/getfile&PageID=2355123> [<https://perma.cc/L4TY-6H4D>] [hereinafter 2004 ANNUAL REPORT].

²⁷⁷ The Park Service sent a letter to Yellowstone-associated tribes in June 1992 notifying them of the preparation of a Bison Management Environmental Impact Statement. For a useful chronology identifying this milestone and others from 1990 to 1999, see NAT’L PARK SERV., AMERICAN INDIAN TRIBAL CONTACTS AND CONSULTATIONS FOR THE INTERIM BISON MANAGEMENT PLAN ENVIRONMENTAL ASSESSMENT (EA) AND DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) FOR THE INTERAGENCY BISON MANAGEMENT PLAN FOR THE STATE OF MONTANA AND YELLOWSTONE NATIONAL PARK (1999) (on file with authors).

²⁷⁸ NABOKOV & LOENDORF, *supra* note 49, at 124.

counted in Yellowstone, and by the season's end that figure had dropped to 1,089 bison—a loss of more than two-thirds of the herd.²⁷⁹ Most bison died because they “wandered outside the Park and were shot by Montana officials or sent to slaughter because of the fear that they might infect neighboring cattle with brucellosis.”²⁸⁰ Heavy weather and motor vehicle accidents contributed, too.²⁸¹ A National Day of Prayer for the Buffalo was held on March 6, 1997, coinciding with Yellowstone's 125th anniversary and “the shooting of the thousandth animal to wander outside the park.”²⁸² Groups assembled near Yellowstone's northern entrance in Gardiner, Montana, at Montana's capitol in Helena, and in Washington, D.C.²⁸³ Lakota Gerald Miller's words at the U.S. capitol channeled the emotions of Native and non-Native peoples alike: “I am here to speak for the thousand who have passed over to the spirit world and also those yet in danger. I have come to demand the stop of the genocide against my relatives of the Tatanka Oyate, Buffalo Nation.”²⁸⁴

Animated by the same spirit, two years later came *Tatanka Oyate Mani*—aka the Buffalo Walk.²⁸⁵ Commencing on February 7, 1999, in Rapid City, South Dakota, the walk was a 20-day, 507-mile spiritual journey to Yellowstone's northern entrance (again, in Gardiner, Montana) aimed at raising “awareness of traditional and spiritual teachings of indigenous people and of the plight of the Yellowstone buffalo.”²⁸⁶ “[T]he destinies of the buffalo and the American Indian are inseparable” in many Native cultures, and the route selected for the walk “paralleled a traditional migratory buffalo route followed by generations of Lakota hunters.”²⁸⁷ Upon reaching Yellowstone on February 27, 1999, the walkers held a ceremony near the Roosevelt Arch, in an area for which the Park Service had issued a public assembly permit (*i.e.*, the “Triangle Area”).²⁸⁸ Certain park officials had helped prepare the area for the walkers' arrival, and those officials were invited to attend the ceremony,

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 124–25; see also SARAH TARKA & RICHARD SATTTLER, MY BROTHER THE BUFFALO: DOCUMENTATION OF THE 1999 BUFFALO WALK AND THE CULTURAL SIGNIFICANCE OF YELLOWSTONE BUFFALO TO THE LAKOTA SIOUX AND NEZ PERCE PEOPLES: A DRAFT REPORT 126–27 (2007), http://files.cfc.umt.edu/cesu/NPS/UMT/2006/06_08Sattler_YELL_buffalo%20walk_frpt.pdf [<https://perma.cc/UWB8-P4WR>].

²⁸⁴ NABOKOV & LOENDORF, *supra* note 49, at 125.

²⁸⁵ TARKA & SATTTLER, *supra* note 283, at 102. Rosalie Little Thunder (Rosebud Sioux Tribe) and Joseph Chasing Horse (Lakota, specific tribal affiliation unknown) organized *Tatanka Oyate Mani*. *Id.* at 102–03.

²⁸⁶ *Id.* at 102, 104–06, 110–12.

²⁸⁷ *Id.* at 102, 110; see also *id.* at 109 (“In the United States, the history of the American Indian has paralleled that of the buffalo, from relative peace, to decimation, to placement on government reserves.”). For a map depicting the route, see *id.* at 111 fig.78.

²⁸⁸ *Id.* at 103, 111–12.

including Yellowstone Superintendent Michael Finley.²⁸⁹ After being told by tribal members that words from him would be welcomed at the ceremony, Superintendent Finley spoke from the center of the circle: “I came here out of respect, to pay respect to you. The bison is sacred to you and very special to the National Park Service and the nation. We welcome you to Yellowstone and, more importantly, *we welcome you home.*”²⁹⁰ Well-received by tribal members who were gathered—who had journeyed “back home”—this welcome at the Buffalo Walk ceremony has been described as “a benchmark event in Yellowstone’s effort to redefine past relationships between the [Park Service] and American Indian groups.”²⁹¹

These milestones and others have spurred federal-tribal relationship building over bison management during the past thirty years. Yellowstone-associated and other tribes formed the InterTribal Bison Cooperative in the 1990s—later renamed the InterTribal Buffalo Council (ITBC) in 2009—“[t]o restore bison on Tribal lands for cultural and spiritual enhancement and preservation.”²⁹² The ITBC, Nez Perce Tribe, and Confederated Salish-Kootenai Tribes have worked with the Park Service and several other agencies to implement the current Interagency Bison Management Plan adopted in 2000.²⁹³ At present, the Park Service is preparing a new plan, and the ITBC, Nez Perce Tribe, and Confederated Salish-Kootenai Tribes are cooperating agencies for the environmental impact statement.²⁹⁴ The Park Service is also collaborating with the Fort Peck Assiniboine and Sioux Tribes, as well as the State of Montana, on a Bison Conservation Transfer Program that relocates

²⁸⁹ *Id.* at 113. For a brief, respectful discussion of the Buffalo Walk ceremony, see *id.* at 116–20.

²⁹⁰ *Id.* at 113–14 (emphasis added).

²⁹¹ *Id.* at 114–15. *But see id.* at 115 (“Interestingly, the park’s welcoming attitude stands in direct contrast to its involvement in the killing of buffalo, for political reasons or otherwise. Perhaps many consultants brought up the park’s positive reaction to the Buffalo Walk, because based on Yellowstone’s past actions regarding buffalo, they expected a less friendly reaction.”).

²⁹² *Our History*, INTERTRIBAL BUFFALO COUNCIL, <https://itbcbuffalonation.org/who-we-are/history/> [<https://perma.cc/B4WW-NWD6>] (last visited May 22, 2022); see also *ITBC Member Tribes*, INTERTRIBAL BUFFALO COUNCIL, <https://itbcbuffalonation.org/itbc-member-tribes/> [<https://perma.cc/45V3-8QJE>] (last visited May 22, 2022); *Return of the Native: The 25 Year History of the InterTribal Buffalo Council*, INTERTRIBAL BUFFALO COUNCIL, <https://itbcbuffalonation.org/return-of-the-native-the-25-year-history-of-the-intertribal-buffalo-council/> [<https://perma.cc/8FSZ-UBF4>] (last visited May 22, 2022).

²⁹³ *History of Bison Management*, *supra* note 253. Yellowstone-associated and other tribes engaged in the plan’s preparation. NABOKOV & LOENDORF, *supra* note 49, at 125; YELLOWSTONE CTR. FOR RES., YCR-AR-98, YELLOWSTONE CENTER FOR RESOURCES ANNUAL REPORT 1998, at 3 (1999), <https://www.nps.gov/yell/planyourvisit/upload/ycrar98.pdf> [<https://perma.cc/2K2F-2EHC>]. For the final environmental impact statement and other documents associated with the plan, see *Document Library*, INTERAGENCY BISON MANAGEMENT PLAN, <http://www.ibmp.info/library.php> [<https://perma.cc/HAE6-WLY8>] (last visited Apr. 17, 2022).

²⁹⁴ *History of Bison Management*, *supra* note 253; *Yellowstone National Park Bison Management Plan*, NAT’L PARK SERV., <https://parkplanning.nps.gov/projectHome.cfm?projectId=94496> [<https://perma.cc/WDP2-RXVS>] (last visited May 22, 2022).

Yellowstone bison as an alternative to slaughter.²⁹⁵ Since the program's onset in 2019, 182 bison have been transferred to the Fort Peck Indian Reservation, with 140 of them subsequently sent to the ITBC and given to 20 member tribes.²⁹⁶ Described as yielding “the largest transfer of Yellowstone bison among Native American Tribes in history,” the Park Service estimates about 100 bison will be transferred to tribes annually, once improvements are made to the agency's quarantine facility this year.²⁹⁷ In a related vein, the Park Service's current management strategy for Yellowstone bison also involves organized tribal hunts on Forest Service land just outside the park's northern and western borders.²⁹⁸

Although still a work in progress, federal-tribal relationship building over bison management in Yellowstone has fostered other connections between the Park Service and tribes.²⁹⁹ During the late 1990s, the Park Service invited tribes to biannual consultation meetings that addressed not only bison management, but also issues such as “enhancing diversity recruitment, building the park's tribal heritage program, and updates on its archaeological, ethnographic, and archival projects.”³⁰⁰ The Park Service later tweaked this approach in the early 2000s by organizing one annual meeting in the park and supplementing it with annual visits by park managers “to meet with tribes on their home ground”—presumably, their Indian reservations.³⁰¹ Underlying these intergovernmental meetings are the Park Service's consultation responsibilities under federal law and policy, and the meetings again allow for discussion of a broad scope of matters.³⁰² While emphasizing the

²⁹⁵ *Bison Management: Bison Conservation Transfer Program*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-management.htm> [<https://perma.cc/3JQ7-VTX7>] (last visited May 22, 2022).

²⁹⁶ *Id.*

²⁹⁷ *Id.* The quarantine facility apparently can be traced to a pilot project authorized by the Park Service in 2004 to enable tribes to obtain live bison. 2004 ANNUAL REPORT, *supra* note 276, at 114. The ITBC was also granted a seat on the Greater Yellowstone Interagency Brucellosis Committee in 2004. *Id.* As described by the Park Service, tribes viewed both actions “as evidence that the agencies involved in bison management are beginning to listen to them.” *Id.*; *see also Yellowstone: Brucellosis*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/nature/brucellosis.htm> [<https://perma.cc/JW5U-9E97>] (last visited Apr. 17, 2022).

²⁹⁸ *Bison Management: Success & Controversy*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-management.htm> [<https://perma.cc/3JQ7-VTX7>] (last visited Apr. 17, 2022); Laura Lundquist, *Tribes, Montana FWP Struggle to Control Yellowstone Bison Hunt*, MISSOULA CURRENT (June 14, 2018), <https://missoulacurrent.com/outdoors/2018/06/yellowstone-bison-hunt/> [<https://perma.cc/LA4Q-FLL9>]. For maps of the tribal bison hunt areas, *see Maps*, CONFEDERATED SALISH KOOTENAI TRIBES, <https://csktbisonhunt.org/Orientation/Maps/#westyellowstone> [<https://perma.cc/YW65-64KD>] (last visited Apr. 17, 2022).

²⁹⁹ *See, e.g.*, NABOKOV & LOENDORF, *supra* note 49, at 302 (noting expanded consultation and cooperation between Park Service and tribes galvanized by bison-management issues in late 1990s).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *See, e.g., id.* (describing Park Service welcoming Lower Brule Sioux delegation in 2000 for “four days of discussion on bison management, reintroduction of wolves, sacred sites, fee waivers for religious and other traditional purposes, and employment opportunities”); THE ETHNOGRAPHY

value and importance of this consultation, members of some Yellowstone-associated tribes have expressed interest in the Park Service holding more frequent regular meetings (perhaps quarterly) and orienting the consultation to be more proactive and less reactive.³⁰³ Overall, the Park Service is increasingly realizing through these (and other) meetings that it has shared conservation goals with tribes.³⁰⁴ The sesquicentennial has proven to be a spark for this type of dialogue, hopefully setting a new trajectory for the future.³⁰⁵

Addressed at intergovernmental meetings and elsewhere, one key area of connection between the Park Service and Yellowstone-associated tribes that must be noted, alongside bison management, has been education, interpretation, and research. Building on park historian Tom Tankersley's work in the early 1990s, the Park Service created an ethnography program in 2000 that embarked on several projects to document tribes' ancestral roots to Yellowstone.³⁰⁶ The Park Service temporarily discontinued these projects in 2008, but Yellowstone's Cultural Resources Branch appears to have engaged in similar work since then.³⁰⁷

PROGRAM, YELLOWSTONE NAT'L PARK, COORDINATING INTERGOVERNMENTAL MEETINGS WITH AMERICAN INDIAN TRIBES: AN INSTRUCTION BOOKLET 1 (2006) (on file with authors) (discussing Park Service's consultation responsibilities); INTERGOVERNMENTAL-INTERTRIBAL INFORMATION EXCHANGE MEETING FOR YELLOWSTONE NATIONAL PARK: TRANSCRIPT OF PROCEEDINGS 2 (2008), <https://www.buffalofieldcampaign.org/images/get-involved/students-resource-about-bison/bison-conservation-papers/Intergovernmental-InterTribal-Information-Exchange-Meeting-for-Yellowstone-National-Park-June-5-2008.pdf> [<https://perma.cc/Z4NS-49NP>] (identifying as topics of discussion bison management plan, NAGPRA, comprehensive planning, camping fee waivers, National Historic Preservation Act section 106 compliance and planning, and sacred sites and collection of natural resources).

³⁰³ Wind River Interview, *supra* note 2.

³⁰⁴ Sholly & Roop Interview, *supra* note 273.

³⁰⁵ *Id.*; *Yellowstone National Park Engages with Tribes to Improve Partnerships*, NAT'L PARK SERV. (Aug. 4, 2021), <https://www.nps.gov/yell/learn/news/21023.htm> [<https://perma.cc/BX6T-VXTU>] [hereinafter *Park Engages with Tribes*].

³⁰⁶ SHAW, *supra* note 98, at unpaginated "History" section. Before retiring in 1993, Tankersley "worked towards establishing an advisory committee to assist in the interpretation, research, and protection of Native American history and resources in the park." *Id.* In conjunction with its creation in 2000, the Park Service hired cultural anthropologist Rosemary Sucec to lead the ethnography program, and she also served as the agency's tribal liaison. *Id.*; see also YELLOWSTONE CTR. FOR RES., YCR-AR-2003, YELLOWSTONE CENTER FOR RESOURCES 2003 ANNUAL REPORT: FISCAL YEAR (OCTOBER 1, 2002, TO SEPTEMBER 30, 2003), at 10 (2004), <https://www.nps.gov/yell/planyourvisit/loader.cfm?csModule=security/getfile&PageID=2355162> [<https://perma.cc/4W8X-UFGN>] [hereinafter 2003 ANNUAL REPORT] ("Another first occurred this year as Yellowstone National Park's Ethnography Program partnered with two other Greater Yellowstone Ecosystem (GYE) federal entities to successfully compete for funding of research that contributes to an understanding of American Indian histories and resource uses in Yellowstone and the GYE.").

³⁰⁷ SHAW, *supra* note 98. The Cultural Resource Branch's engagement in such work, both pre-2000 and post-2008, is noted in the "History" section of this unpaginated document.

Archaeological research³⁰⁸ and oral histories³⁰⁹ have been connective threads over the past couple decades. Equally notable is Obsidian Cliff's 1996 designation as a national landmark—again, a “source of tool-making material for nearly twelve thousand years and a dispersal center for intercultural transactions across hundreds if not thousands of miles.”³¹⁰ Proper interpretation of the Bannock Trail and the 1877 Nez Perce Trail has been a focal point, too.³¹¹

Efforts of this sort have laid a foundation for the park's future. Members of some Yellowstone-associated tribes have expressed interest in seeing more information about Native peoples at visitor centers, including the prospect of a new “cultural and heritage” center or the like focusing on Native connections to Yellowstone, as well as a massive monument and an accompanying storyline depicting historical tribal migrations.³¹² Tribal members have shared similar sentiments about the value of having more Native peoples making art and telling stories in the park, the need for additional signage on Native peoples throughout it, and the perceived inadequacy of interpretive materials at Sheepeater Cliff.³¹³ Sesquicentennial events suggest that such input will not place park officials on the defensive. Rather, the Park Service is currently assessing how it is telling the story of Native connections to Yellowstone, soliciting input from Yellowstone-associated tribes, considering what roles tribes may play in storytelling, and recognizing that the key to moving forward in this area is something basic yet transformative—listening.³¹⁴ Illustrative sesquicentennial events on which the Park Service, tribes, and other entities are collaborating include a Tribal Heritage Center at Old Faithful, a large teepee village near the Roosevelt

³⁰⁸ See, e.g., *Park Engages with Tribes*, *supra* note 305 (noting Park Service's recent initiation of multi-year partnership with Native American Studies faculty at Salish Kootenai College on archaeological research); NABOKOV & LOENDORF, *supra* note 49, at 302 (describing Park Service's hosting of “Archaeological Resources Protection Program” in which tribal members participated during 1998, as well as Park Service's invitation to tribal representatives to visit archaeological sites along Tower-to-Canyon highway).

³⁰⁹ See, e.g., 2003 ANNUAL REPORT, *supra* note 306, at 12 (discussing park officials' interviews with Shoshone-Bannock and Lemhi Shoshone elders regarding ancestors' use of Yellowstone region); DIV. OF INTERPRETATION, YELLOWSTONE NAT'L PARK, YELLOWSTONE RESOURCES & ISSUES 125 (2002), <http://npshistory.com/publications/yell/handbook/2002.pdf> [<https://perma.cc/255X-XWB3>] (describing park officials' interviews with Kiowa tribal members about their cultural and spiritual connections to Yellowstone and with Nez Perce elders about their people's 1877 flight through park).

³¹⁰ NABOKOV & LOENDORF, *supra* note 49, at 301.

³¹¹ See *id.* at 302 (noting Park Service's hosting of 2001 roundtable “for Nez Perce elders and park staff to share perspectives about the 1877 Nez Perce trek through the park.”); 2003 ANNUAL REPORT, *supra* note 306, at 11 (describing Shoshone-Bannock Tribe's interest in Park Service interpretation of Bannock Trail).

³¹² Wind River Interview, *supra* note 2.

³¹³ *Id.*; 2003 ANNUAL REPORT, *supra* note 306, at 11; *Sheepeater Cliff*, NAT'L PARK SERV., <https://www.nps.gov/places/000/sheepeater-cliff.htm> [<https://perma.cc/5BCG-X38D>] (last visited Apr. 18, 2022).

³¹⁴ Sholly & Roop Interview, *supra* note 273.

Arch, and a temporary series of Native public art installations titled, “Yellowstone Revealed,” which will be sited throughout the park from June 2022 to May 2023.³¹⁵

Much more could be said about the varied connections formed (or attempted) between the Park Service and Yellowstone-associated tribes since the early 1990s, as well as aspirations for future relationship building. This perspective applies to a wide range of areas: tribal ceremonies within the park,³¹⁶ tribal gathering activities,³¹⁷ federal-tribal consultation under the Native American Graves Protection and Repatriation Act,³¹⁸ tribal engagement in park tourism for economic development,³¹⁹ Park Service employment of tribal members,³²⁰ and fee waivers for tribal members.³²¹ It is our sincere hope, across these areas (and others), that future federal-tribal relations at Yellowstone will continue along the current trajectory—that is, continue leaning in toward connection. Yet not just “continue,” but elevate and evolve, and in ways that not only defy what earlier generations of park officials and tribal leaders thought was possible, but also realize what future generations will see as just. Whether viewed as the next stage in relations between the Park Service

³¹⁵ *Yellowstone National Park Turns 150 in 2022*, NAT’L PARK SERVICE (Jan. 12, 2022), <https://www.nps.gov/yell/learn/news/22001.htm> [<https://perma.cc/4UN6-BUFV>]; *Yellowstone Revealed*, MOUNTAIN TIME ARTS, <https://mountaintimearts.org/yellowstone-revealed> [<https://perma.cc/P2Q2-53CM>] (last visited Apr. 18, 2022).

³¹⁶ Tribal members have expressed interest in performing vision quests and holding Sun Dance events in the park, and park officials have responded to such requests in different ways. WHITE, *supra* note 194, at 36. As of 2005, the overall trend in this regard was described as one where “[m]ore and more Indian cultural events have been organized and staged on park lands.” *Id.* at 39. Tribal members view Yellowstone as an “immensely sacred place”—a “place of prayer” whose spirituality should be experienced and recognized by tourists. *Id.* at 36; *see also* Wind River Interview, *supra* note 2.

³¹⁷ During the connection period, tribal members have requested permission from the Park Service to collect various ceremonial items: buffalo skulls, plants, and obsidian. NABOKOV & LOENDORF, *supra* note 49, at 302. Apparently “[t]he requests have been handled on a case-by-case basis, with some permissions granted and others met by offering alternatives outside the park where such items can be obtained.” *Id.* Tribal members have expressed interest in being able to enter Yellowstone to gather plants, clay, Bear Root, and obsidian. Wind River Interview, *supra* note 2.

³¹⁸ For brief discussions of these consultations, see YELLOWSTONE CTR. FOR RES., YCR–2007–03, YELLOWSTONE CENTER FOR RESOURCES: 2006 ANNUAL REPORT 8 (2007), <https://www.nps.gov/yell/planyourvisit/loader.cfm?csModule=security/getfile&PageID=2126183> [<https://perma.cc/93ZH-RP9A>].

³¹⁹ Perhaps the fundamental query in this space is how can Yellowstone-associated tribes work with the Park Service to benefit from tourism in and adjacent to the park. Wind River Interview, *supra* note 2.

³²⁰ The Park Service has had a Native internship program at Yellowstone for roughly 15 years. Sholly & Roop Interview, *supra* note 273. Tribal members have expressed interest in tribal youth having park employment opportunities involving wildlife and land management positions. Wind River Interview, *supra* note 2.

³²¹ In 2001, the Park Service adopted a policy allowing members of Yellowstone-associated tribes to enter the park for traditional purposes without paying a fee. NABOKOV & LOENDORF, *supra* note 49, at 302. Some tribal members have indicated this fee waiver is not well known and requires better signage. Wind River Interview, *supra* note 2.

and Yellowstone-associated tribes, or as a natural extension of the current period, that space is what we would like to help envision in the pages below.³²²

The power and potential for a revolutionary model of tribal engagement in the management of the world's first national park becomes clear only upon a recognition of the stifling limitations imposed upon tribal interests by the historical and existing federal-tribal relations in Yellowstone. As detailed in this Part, Yellowstone's history gave the world its first recreational and conservation "wonderland," but did so at the expense and exclusion of Indigenous peoples. Similarly, the broader story of Indigenous displacement and dispossession has resulted in public lands that encompass innumerable tribally important places and resources, yet relegate tribal people and tribal interests, making tribes outsiders with few options for expressing or realizing their own views on how places and resources should be managed. Those disconnections, rooted in the physical exclusion of Native peoples from federal lands but now largely embedded in the laws and policies of federal land management, continue to frustrate the potential for federal-tribal relations even where staff and officials may be willing partners.

IV. INDIGENIZING NATURAL RESOURCE MANAGEMENT

The legal landscape mapped out in Part II—comprising the legal doctrines addressing inherent tribal sovereignty, aboriginal title and rights, the treaty relationship, and the trust responsibility—provides a framework for understanding the law and policy of federal-tribal relations over natural resource management. These legal principles are an important starting point when considering the evolution and potential future of federal-tribal relations with regard to public lands and, in particular, the national park system. Despite the birth of the park system, including the 1872 establishment of Yellowstone, in the nadir of those relations and in the heart of decades of federal laws and policies aimed at obliterating tribal existence,³²³ these foundational legal doctrines—inherent tribal sovereignty, the preeminence of treaties, and the resultant federal trust obligations—persist.³²⁴ Now, in the modern era of federal policies committed to supporting tribal self-determination, the exercise of tribal sovereignty, and the ability of tribes and their advocates to expand and express their priorities across the full breadth of policy areas, there exists a wholly new basis from which to reset the relationship between tribes and the federal government, including agency partners like the National Park Service. Rather than maintaining the historical exclusion of tribes, a new relationship can be rooted in honoring the legal landscape encompassing

³²² See *infra* Part V.

³²³ See Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV'T L. REV. 475, 484–85 (2007).

³²⁴ See, e.g., *id.* at 484–85 (analyzing assimilation and allotment policies in the context of the creation of Yellowstone and history of the national park system).

inherent tribal sovereignty, aboriginal title, reserved treaty rights, and the federal government's trust responsibility to tribes.³²⁵

In recent years, the movement toward greater tribal authority in the oversight of federal public lands and resources has been referred to as tribal “co-management,” a term that often results in misunderstandings or a lack of clarity about its precise meaning.³²⁶ “Co-management” is a limited descriptor for myriad ways in which the legal landscape supports increased tribal authority and invigorated federal-tribal partnerships. The universe of approaches to these objectives includes calls for land back,³²⁷ developing new ways for tribal and collaborative land and resource management to grow, enhancing tribal engagement within existing federal land management practices, and expanding the use and incorporation of traditional tribal knowledge and wisdom in ecosystem management.³²⁸ Thus, the path forward to re-indigenizing Yellowstone (or any federal public lands or resources) is not necessarily limited to narrow definitions of “co-management” or other strictly defined silos of federal-tribal collaboration. Rather, as detailed in this Part, the range of opportunities for the park's future is broad and, if rooted in the foundational legal doctrines just noted, presents innovative opportunities for reconsidering the role of Indigenous voices in Yellowstone. In that spirit, this Part begins by contextualizing the outer reaches of the modern movement, demands to return all lands to Native Nations, before considering more collaborative approaches and place-based examples, and the role and benefits of Indigenous ways of knowing in the context of land and resource management.

A. #LandBack as an Inclusive Concept

At its most aggressive forefront, the modern movement in support of tribal resource management demands the return of all lands taken from Indigenous peoples. “#Landback” is a commonly repeated phrase in popular culture that frequently appears on social media but, like “co-management,” the term carries a kaleidoscope of meanings and often the baggage of mis-understanding. The

³²⁵ See 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. 55, 83 (2021).

³²⁶ Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENV'T L. 279, 343–48 (2000). Goodman proposes six fundamental principles of a tribal co-management approach: (1) Recognition of tribes as sovereign governments; (2) Incorporation of the federal government's trust responsibilities to tribes; (3) Legitimation structures for tribal involvement; (4) Meaningful integration of tribes early and often in the decision-making process; (5) Recognition and incorporation of tribal expertise; and (6) Dispute resolution mechanisms). *Id.*; see also Mills & Nie, *supra* note 325, at 55 (“The term ‘co-management’ is subject to inconsistent interpretations, applications, and politics. . . . These core principles can be configured into creative and accountable ways of governing that fit unique historical and legal contexts, political realities, and landscapes.”).

³²⁷ See *LANDBACK*, NDN COLLECTIVE, <https://landback.org> [<https://perma.cc/RLZ9-FPSJ>] (last visited May 25, 2022); Treuer, *supra* note 6.

³²⁸ Mills & Nie, *supra* note 325, at 150.

expression can refer to several divergent outcomes and strategies depending upon the user and the context. For some, #Landback is a simple and sometimes provocative expression to call out the injustice of colonization with no real thought given to a strategic action. For others, land back carries its literal meaning and represents a call for the undoing of the large-scale displacement of tribes from their lands and the returning of the legal title of all previously Native lands to tribes and Indigenous people.³²⁹

But, despite the spectrum of its meanings, at its core, land back is a rallying cry for a more just and equitable future of land and resource management. In practice, the actual effort to transfer legal title to all public and private lands would raise seemingly insurmountable legal, equitable, and practical questions. This would include questions pertaining to the methods and scope of tribal capacity for the acquisition and management of those resources, as well as property rights and potential Fifth Amendment causes of action.³³⁰ Indeed, the mere concept of such a transfer of legal title has been critiqued by some Indigenous peoples as missing the point of decolonization.³³¹ In this view, land back is not a narrow, transactional approach. Instead, it “should be understood not as a return of title but as a full restoration of Indigenous land relationships.”³³² To understand otherwise, that land back is only a simple transfer of title, would ground the concept in colonial notions of land as property—something to be controlled, owned, and transacted. In other words, the transfer of title in this context uses the same “gendered logic”³³³ that birthed the Discovery Doctrine, the very doctrine that compelled and justified the dispossession of Indigenous land and peoples in the first place.

³²⁹ The movement for “land back” happened almost immediately after land was seized by the United States, and decades before Twitter and Instagram. The term #Landback demonstrates just how strong the current social media and cultural movement is. It is very much in conversation. Importantly, the use of #Landback in this article does not intend to diminish the historical and earnest nature of the fight for land restoration. Thus, “land back” and “#Landback” are used interchangeably throughout.

³³⁰ U.S. CONST. amend. V. (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

³³¹ Lindsey Schneider, *Land Back beyond Repatriation: Restoring Indigenous Land Relationships*, in *THE ROUTLEDGE COMPANION TO GENDER AND THE WEST* (Susan Bernardin ed., forthcoming 2022) (manuscript at 451–59) (on file with authors).

³³² *See id.* (manuscript at 452).

³³³ *Id.* (manuscript at 454). Dr. Lindsey Schneider expands on the impact that settler colonialism’s “gendered logic” has had on the land as well as the challenges moving forward:

The return of land-as-property does not address, let alone begin to fix, the myriad ways in which the land itself has been shaped by the highly gendered processes of settler colonialism. . . . Title acquisition may indeed be part of the process, but cannot be its entirety. It is only through the restoration and flourishing of the complex web of Indigenous relationships with land, water, and our more-than-human-kin that we can hope to recover from the damage that settler colonial notions of land-as-property—with all their attendant conceptions of gender, heteropatriarchy, and domination—have done to the land and to Indigenous peoples.

Id. (manuscript at 452).

The Discovery Doctrine, unilaterally imposed upon Indigenous nations by the United States Supreme Court in the famous case of *Johnson v. M'Intosh*,³³⁴ is rooted in the fallacy that “discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”³³⁵ This ethnocentric legal doctrine of European origin wrongly asserted that the “discovery” of North America by settler-colonial nation-states underpinned all land titles across the continent, including those that would ultimately underlie the landscape in and around the Yellowstone region.³³⁶ According to the Supreme Court, the act of European “discovery” vested land title in the colonizer, forever diminishing inherent tribal sovereignty.³³⁷ Although the Court recognized a right of occupancy in Indigenous nations, the doctrine conferred on the European colonizer an exclusive right to extinguish this right to occupancy, and to “acquir[e] the soil from the natives,”³³⁸ “by purchase if the Indians were willing to sell or by conquest.”³³⁹ Further, because European nations asserted “ultimate dominion” over the land inhabited by Indigenous communities, they “claimed and exercised . . . a power to grant the soil, while yet in possession of the natives,” so as to convey title to grantees “subject only to the Indian right of occupancy.”³⁴⁰

European colonizers uniformly told themselves this story, as Chief Justice Marshall described at length in *Johnson v. M'Intosh*.³⁴¹ Rather than reject or redraw the misguided assumptions of that tale, Marshall instead locked the American legal system into the same narrative:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.³⁴²

³³⁴ 21 U.S. (8 Wheat.) 543 (1823). The Discovery Doctrine’s theoretical roots trace to medieval Europe. WILLIAMS, *supra* note 160, at 325 (“*Johnson’s* acceptance of the Doctrine of Discovery into United States law represented the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples.”).

³³⁵ *Johnson*, 21 U.S. at 573 (emphasis added).

³³⁶ *Id.* at 574–84.

³³⁷ *Id.*

³³⁸ *Id.* at 573.

³³⁹ FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 7 (abr. ed. 1986).

³⁴⁰ *Johnson*, 21 U.S. at 574.

³⁴¹ *Id.* at 574–84.

³⁴² *Id.* at 587. Chief Justice Marshall did so while recognizing the doctrine’s incoherence:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and

In light of this legal sleight of hand resulting in the historical and continuing subjugation of Indigenous nations, their rights to land and sovereignty, calls for land back can be seen as a demand to reconsider or reframe these misguided assumptions. Indeed, it demands the rejection of the legal construct of the Doctrine of Discovery, and the restoration of Indigenous relationships with the land. When land back is understood through this broader, non-settler-colonial lens, building structures of collaborative management for Yellowstone and the potential restoration of lands to tribal ownership, whether within or without the park's existing boundaries, are not mutually exclusive concepts. Instead, collaborative management contemplates land back, a return of land to tribal stewardship and a "restoration of Indigenous land relationships,"³⁴³ even where tribal authority and responsibility may be shared with the federal government.³⁴⁴ Thus, for Yellowstone-associated tribes, the choice between pursuing some method of collaborative management at the park or across other public lands and seeking the restoration of those or other lands depends upon a number of factors,³⁴⁵ but all options are rooted in the goal of restoring and empowering Indigenous land relationships.³⁴⁶

Furthermore, the actual restoration of lands to tribal ownership is not unprecedented or unique. The return of Blue Lake to the Taos Pueblo is perhaps the most compelling of these examples. The area around Blue Lake was and continues to be a site for ceremony and spiritual training and reflection, in addition to holding numerous shrines going back to antiquity.³⁴⁷ In 1906, President Theodore Roosevelt designated Blue Lake as a forest reserve, and it subsequently became part of the Carson National Forest.³⁴⁸ Even before its designation as a forest reserve, however, the Taos people advocated for their protected use of Blue Lake.³⁴⁹ In 1904, the tribe sought an exclusive use permit to guarantee privacy for its ceremonies and other

afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring absolute title to others.

Id. at 591; *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832) ("It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.")

³⁴³ Schneider, *supra* note 331 (manuscript at 452).

³⁴⁴ *See, e.g.*, Treuer, *supra* note 6.

³⁴⁵ Mills & Nie, *supra* note 325, at 184. ("Ultimately, enhancing opportunities for tribal co-management of federal public lands is about justice, reconciliation, healing, and sharing.")

³⁴⁶ Treuer, *supra* note 6.

³⁴⁷ CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 208–09 (2005).

³⁴⁸ *Id.* at 209.

³⁴⁹ *Id.* at 210.

religious practices. The Pueblo also “twice requested presidential declarations of exclusive pueblo use.”³⁵⁰ The U.S. Forest Service (Forest Service), in part compelled by its multiple-use mandate as well as a commitment by some within the agency to keep public lands in the public domain, opposed every effort by the Taos Pueblo.³⁵¹

The Taos Pueblo then made a strategic decision to pursue a claim for Blue Lake through the Indian Claims Commission (ICC).³⁵² That decision, however, limited the Pueblo’s remedy to monetary compensation for confiscated tribal lands rather than return of the land.³⁵³ Importantly, the Pueblo did not want money for Blue Lake under the ICC, nor did they want its return for economic development. Instead, the Pueblo wanted to keep Blue Lake “in a natural state for only religious purposes.”³⁵⁴ Thus, while the ICC provided a limited and unsatisfactory legal option, the Pueblo pursued it under the theory that “a strong statement from the commission would clarify the fundamental injustice for Congress, which could then transfer Blue Lake back to the Pueblo.”³⁵⁵

When the Taos Pueblo won a favorable ICC ruling, their strategy proved to be wise.³⁵⁶ The Taos Pueblo leveraged the decision to gain congressional support for the return of Blue Lake.³⁵⁷ After a hard-fought battle that spanned multiple generations, President Nixon ultimately signed a bill returning 48,000 acres of national forest land back to the Pueblo.³⁵⁸ At the time, there was concern within the government that the return of Blue Lake would create a slippery slope of Indian claims for land return.³⁵⁹ This is a legitimate concern for any country whose entire land mass was once under aboriginal use. However, there are compelling arguments that one instance of justice should not preclude future instances of justice. The return of Blue Lake to the Taos Pueblo was never meant to be an isolated instance of land restoration. Today, it serves as a strong and ongoing precedent.

Like the Taos Pueblo, the Lakota people have regarded the Black Hills as a place of both physical and spiritual sustenance for generations.³⁶⁰ The ongoing

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 215.

³⁵⁵ *Id.* at 211.

³⁵⁶ *See id.* at 212–13.

³⁵⁷ *Id.* at 212–13.

³⁵⁸ Blue Lake Restoration Act, Pub. L. No. 91-550, 84 Stat. 1437 (1971).

³⁵⁹ WILKINSON, *supra* note 347, at 214.

³⁶⁰ Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U.L. REV. 317, 318 (1998). In 1993, Lakota medicine man Pete Catches described the Black Hills:

To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There ages ago, before Columbus came over the sea, seven spirits came to the Black Hills. They

movement for the return of the Black Hills is one of the most iconic and largest-scale campaigns. Not only that, current efforts to return the Black Hills have started conversations in Indian Country regarding the tension, coordination, and relationship between land back and federal-tribal collaborative management of public lands.

Notably, the Lakota reserved the Black Hills as part of the Great Sioux Reservation in the Fort Laramie Treaties.³⁶¹ The Lakota's reservation of the Black Hills originally placed the U.S. in the unique position of having “to threaten military force, and occasionally to use it, to prevent prospectors and settlers from trespassing on lands reserved to the Indians.”³⁶² By 1875, however, President Grant had shifted from overt gestures of peace with the Lakota. He instead “began to prepare for war and confiscation” by discretely withdrawing troops from the Black Hills.³⁶³ Unsurprisingly, the withdrawal of troops encouraged many non-Natives to move into the Black Hills, in violation of the treaties. The onslaught of miners and settlers provoked attacks by the Lakota and Cheyenne, attacks subsequently used by the U.S. as the “pretext for a military campaign.”³⁶⁴ The military campaign resulted in one of the most well-known conflicts of the Indian Wars, the Battle of the Little Bighorn (aka Battle of Greasy Grass), where bands of Lakota, along with their Cheyenne and Arapaho allies, defeated Custer.³⁶⁵

Following the humiliation of the Battle of the Little Bighorn, the U.S. committed itself with increased enthusiasm to the seizure of the Black Hills. It preferred, however, “to foster the illusion of assent.”³⁶⁶ William Allison led the first commission to Lakota country to compel relinquishment of the Black Hills. The Allison Commission's efforts to pressure a concession of the Black Hills were

selected that area, the beginning of sacredness to the Lakota people The seventh spirit brought the Black Hills as a whole—brought it to the Lakota forever, for all eternity, not only in this life, but in the life hereafter. The two are tied together. Our people that have passed on, their spirits are contained in the Black Hills. This is why it is the center of the universe, and this is why it is sacred to the Oglala Sioux. In this life and the life hereafter, the two are together.

Id.

³⁶¹ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). The Court described the terms of the Fort Laramie Treaty of 1868:

[T]he United States pledged that the Great Sioux Reservation, including the Black Hills, would be ‘set apart for the absolute and undisturbed use and occupation’ of the Sioux Nation (Sioux), and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths of the adult male Sioux population.

Id. at 371.

³⁶² *Id.* at 377

³⁶³ JEFFREY OSTLER, *THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND* 94 (2010).

³⁶⁴ *Id.*

³⁶⁵ *Sioux Nation of Indians*, 448 U.S. at 378–79.

³⁶⁶ OSTLER, *supra* note 363, at 98.

vehemently opposed by Sitting Bull and other Lakota leaders, and ultimately failed.³⁶⁷ George Manypenny led the second commission. The Manypenny Commission succeeded in reaching an “agreement” with the Lakota to give up the Black Hills, but in reality the so-called agreement completely disregarded the law.³⁶⁸ While the Lakota suffered from disease, hunger from the destruction of the buffalo, threats to withdraw rations, threats of removal to Indian Territory in Oklahoma, all while surrounded by thousands of U.S. troops in Wyoming and Montana, the Manypenny Commission worked to secure Lakota signatures.³⁶⁹ In its haste to capture signatures for the relinquishment of the Black Hills, “the commission ignored the stipulation of the Fort Laramie Treaty that any cession of the lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males.”³⁷⁰ The “agreement” was only presented to agency chiefs and signed by ten percent of the adult male Sioux population.³⁷¹ Nonetheless, Congress enacted the 1876 “agreement” into law by statute, effectively “abrogating the earlier Fort Laramie Treaty.”³⁷²

The Lakota people have since continued to press for the return of the Black Hills, arguing that the Manypenny Commission “agreement” was “signed at the point of a bayonet” and “taken by gun.”³⁷³ Similar to the Taos Pueblo, the Lakota pursued a claim through the ICC that the Black Hills were illegally taken.³⁷⁴ The

³⁶⁷ *Id.* at 101–02.

³⁶⁸ *See Sioux Nation of Indians*, 448 U.S. at 371, 381–82.

³⁶⁹ OSTLER, *supra* note 363, at 99.

³⁷⁰ *Sioux Nation of Indians*, 448 U.S. at 381–82.

³⁷¹ *Id.*

³⁷² *Id.* at 382–83 (“The Act had the effect of abrogating the earlier Fort Laramie Treaty, and implementing the terms of the Mannypenny Commission’s ‘agreement’ with the Sioux leaders.”).

³⁷³ OSTLER, *supra* note 363, at 131–32.

³⁷⁴ *Sioux Nation of Indians*, 448 U.S. at 383–84. Attorney Mario Gonzalez explained the ICC filings by the Sioux tribes:

The 1946 Indian Claims Commission Act required Indian tribes to file their land claims in the Indian Claims Commission (‘ICC’) within five years for monetary compensation. The Sioux tribes filed their Docket 74 land claims in the ICC in 1951. In 1960, the ICC separated Docket 74 into two claims. Docket 74-A was based on a ‘cession’ of 34 million acres of 1851 Treaty land west of the Missouri River and 14 million acres of aboriginal title, non-treaty land east of the Missouri River. The Docket 74 Sioux tribes and their claims attorneys asserted that the language in Article II of the 1868 Treaty, which provided in part that ‘henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories . . .’, constituted a cession of 48 million acres of land for which they were entitled to compensation. Docket 74-A was later changed back to Docket 74. Docket 74-B was not based on a cession under the 1868 Treaty, but was instead based on an unconstitutional ‘taking’ of 7.3 million acres of Black Hills territory 1877 in violation of the Just Compensation Clause of the Fifth Amendment. Docket 74-B was dismissed by the Court of Claims in 1975, and refiled in the Court of Claims as Docket 148-78 under a 1978 Special Jurisdictional Act.

Mario Gonzalez, Opinion, *Clearing up Misunderstanding in Black Hills Case*, INDIANZ.COM (Apr. 16, 2022), <https://www.indianz.com/News/2016/04/12/mario-gonzales-clearing-up-mis.asp> [https://perma.cc/33GM-GJ5F].

Supreme Court affirmed the ICC decision and reiterated that court's remark, in reference to the federal government's taking of the Black Hills, that "a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history"³⁷⁵ Expressing the belief that the Black Hills are "not for sale" the various tribes of Lakota people have continued to refuse the ICC judgment of monetary damages despite its considerable and growing sum.³⁷⁶ In the meantime, various bills have been introduced calling for the return of federal lands to the Sioux Nation modeled after the Blue Lake Restoration Act.³⁷⁷ Although no land restoration bills have been enacted so far, the fight for the Black Hills has set the stage for the return of other ancestral tribal lands.

Since the return of Blue Lake and the introduction of bills for the return of the Black Hills, other ancestral lands that were within the public land estate have been returned to tribes. The Warm Springs Tribes secured the return of the McQuinn Strip, which lay within national forest and wilderness areas.³⁷⁸ Similarly, the Quinault Tribe recovered 11,905 forest acres³⁷⁹ and the Yakama Nation recovered over 120,000 acres that included the eastern half of Mount Adams under their treaties.³⁸⁰ The Siletz and Grand Ronde Tribes, as well as other tribes, were returned lands under restoration legislation even after their federal recognition was terminated.³⁸¹ Alaska Natives secured some land base through the Alaska Native Claims Settlement Act.³⁸² Most recently, the National Bison Range

³⁷⁵ *Sioux Nation of Indians*, 448 U.S. at 388.

³⁷⁶ *Id.* at 390 ("The court thus held that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of \$17.1 million, dating from 1877."); OSTLER, *supra* note 363, at 174; Gonzalez, *supra* note 374 ("The \$102 million award for Docket 148-78 in 1980 and a \$44 million award for Docket 74 in 1989 (minus 10% attorney's fees) have now grown with interest to approximately \$1.3 billion."); New Holy, *supra* note 360, at 352 ("The strength of the Lakota in defining themselves as Lakota in relationship to a lived physical, social, and spiritual relationship with Paha Sapa, as defined by treaties, can be demonstrated by their refusal to accept monetary compensation without a return of Black Hills lands.").

³⁷⁷ For a thorough history of the proposed Bradley Bill, Grey Eagle bill, and the Sioux Nation Black Hills Restoration Act of 1993, see New Holy, *supra* note 360, at 343–47.

³⁷⁸ *The McQuinn Strip Boundary Dispute: The McQuinn Strip Boundary Dispute: 1871–1972*, CONFEDERATED TRIBES OF WARM SPRINGS, <https://warmsprings-nsn.gov/treaty-documents/the-mcquinn-strip-boundary-dispute/> [<https://perma.cc/K347-5EL6>] (last visited Apr. 29, 2022). As a result of a faulty government survey of the Warm Springs Reservation's 1855 treaty boundaries, what became known as the McQuinn Strip was incorrectly placed within the public land domain. *Id.*

³⁷⁹ Quinault Indian Lands Trust Act, Pub. L. No. 100-638, 102 Stat. 3327 (1988).

³⁸⁰ *Confederated Tribes & Bands of Yakama Nation v. Klickitat Cnty.*, 1 F.4th 673, 686 (9th Cir. 2021), *cert. denied*, *Klickitat Cnty. v. Confederated Tribes & Bands of Yakama Nation*, No. 21-906, 2022 WL 1131380 (Apr. 18, 2022).

³⁸¹ Grand Ronde Reservation Act of 1988, Pub. L. No. 100-425, 102 Stat. 1594 (codified at 25 U.S.C. § 713f).

³⁸² Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 20 U.S.C., 25 U.S.C., 33 U.S.C., 38 U.S.C. 42 U.S.C., and 43 U.S.C.).

was returned to the Confederated Salish and Kootenai Tribes.³⁸³ Land back through purchase is also a persistent and growing trend for tribal nations even though not representative of restoration of tribal land from the public domain.³⁸⁴ For instance, Passamaquoddy and Penobscot received a large settlement under the Maine Indians Claims Settlement Act that enabled them to buy back land from willing sellers.³⁸⁵

Like these and other examples, the potential for more collaborative management at Yellowstone National Park can be understood as an inclusive concept that embraces the #Landback movement because it restores “Indigenous land relationships.”³⁸⁶ That collaborative approach need not conflict with or oppose the still persistent, site-specific, and compelling arguments for the full or partial restoration of those or other public lands to certain tribes. Instead, both can be seen as strands within a broader movement rejecting the unilateral imposition of settler-colonial legal constructs and searching for a more just and equitable approach to repairing and empowering long-standing tribal connections to these lands and resources. While federal-tribal collaborative management may prove an effective way to steward the land and prevent litigation and ongoing controversy over public lands that are often regarded sacred lands as well, it is not the ideal solution in every instance.³⁸⁷ Tribes with historical and intimate connections to the public lands have the continued discretion to pursue collaborative management, land restoration, tribal contracting, or a combined strategy of these approaches.

B. Tribal and Collaborative Land and Resource Management

Collaborative management is a salient and emerging trend within public land management supported by law, practicality, best science, and moral consideration. Collaborative management properly regards tribes as “sovereign governmental

³⁸³ *Public Law*, BISON RANGE RESTORATION, <https://bisonrange.org/public-law/> [https://perma.cc/XL7N-UDYW] (last visited Apr. 19, 2022). The legislation was ultimately incorporated into an appropriations bill:

In 2016, the Confederated Salish and Kootenai Tribes drafted the National Bison Range Restoration Act. That legislation was incorporated into S. 3019, the ‘Montana Water Rights Protection Act’, which was introduced on December 11, 2019. After amendments, in December 2020 the Montana Water Rights Protection Act was incorporated into the Consolidated Appropriations Act of 2021 (HR 133), which was passed by the House and Senate on December 21, 2020, and signed into law by the President on December 27, 2020, becoming Public Law 116-260.

Id.

³⁸⁴ Cassandra Profta, *Nez Perce Tribe Reclaims 148 Acres of Ancestral Land in Eastern Oregon*, OPB (Dec. 25, 2020, 2:47 PM), <https://www.opb.org/article/2020/12/25/nez-perce-tribe-eastern-oregon-reclaims-ancestral-land/> [https://perma.cc/3PN2-7GAV]; Erin Adler, *Shakopee Mdewakanton Tribe Applies to Put 295 Acres of Its Scott County Land into Trust*, STARTRIBUNE (Sept. 27, 2020), <https://www.startribune.com/shakopee-mdewakanton-tribe-applies-to-put-295-acres-of-its-scott-county-land-into-trust/572557331/> [https://perma.cc/P3XG-7N4U].

³⁸⁵ Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified as amended at 25 U.S.C. § 1721–1735).

³⁸⁶ Schneider, *supra* note 331 (manuscript at 452).

³⁸⁷ See *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

entities who are beneficiaries and holders of treaty rights” rather than “merely stakeholders.”³⁸⁸ While collaborative management is increasingly a part of public land law, land management itself is nothing new for Native peoples. Tribes have been stewarding the natural world since time immemorial, and they continue to do so both on their own reservations, as well as on public lands.

Historically, the public lands were ancestral homelands and sacred lands to Indigenous people and continue to be so. Indigenous people have an “intimacy of knowledge gathered over generations by people living upon the land” that make them subject matter experts on land management in general but also subject matter experts on the areas now designated as public lands.³⁸⁹ Many tribes, if not most, have sophisticated natural and cultural resources departments, and with “44 million acres, viewed collectively, tribes are the sixth-largest owners of land in the United States.”³⁹⁰ This section provides a brief discussion of Indigenous environmental stewardship as it relates to tribal lands, as well as public lands.

1. Traditional Knowledge, Indigenous Science, and the Gift of Biodiversity

Yellowstone National Park “provides the first example of removing a native population in order to ‘preserve’ nature.”³⁹¹ This is both a historical irony and tragedy. Tribes have always been stewards of the land and have both philosophically and practically excelled at preserving nature.³⁹² According to many statistics, the vast majority of the world’s biodiversity is concentrated on lands that are managed by Indigenous communities.³⁹³ Declining species like sweetgrass, for instance, are routinely concentrated around modern-day reservations and their continued thriving is owed to tribal environmental practices.³⁹⁴

There are countless examples of successful tribal stewardship. One classic and often untold story of Indigenous environmental stewardship is the White Mountain Apache Tribe’s preservation of Apache Trout.³⁹⁵ For many years, non-Native citizens, as well as federal and state agencies, engaged in and promoted land use practices that detrimentally impacted the health, habitat, and spawning

³⁸⁸ U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF THE ARMY, U.S. DEP’T OF JUST., IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 13 (2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf> [<https://perma.cc/K6JJ-4WVY>].

³⁸⁹ Bernhardt, *supra* note 33, at 232.

³⁹⁰ Kevin Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 266–267 (2022). [hereinafter Washburn, *Facilitating Tribal Co-Management*].

³⁹¹ SPENCE, *supra* note 52, at 70.

³⁹² See *infra* notes 393–416 and accompanying text.

³⁹³ *Indigenous Peoples Defend Earth’s Biodiversity—but They’re in Danger*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/environment/article/can-indigenous-land-stewardship-protect-biodiversity-> [<https://perma.cc/2ZLX-EK93>] (last visited Mar. 26, 2022).

³⁹⁴ For more on the “the teachings of grass,” see KIMMERER, *supra* note 34, at 156–66.

³⁹⁵ Bernhardt, *supra* note 33, at 233–35.

of Apache Trout.³⁹⁶ “Although the tribe has still not received full recognition for the gift of biodiversity it gave the American Southwest, its ‘early and visionary action is primarily responsible for preventing the extinction of Apache Trout.’”³⁹⁷

The Bureau of Indian Affairs permitted overgrazing, excessive farm tillage, and aggressive timber cuts of both commercial and non-commercial trees on the Fort Apache Indian Reservation.³⁹⁸ These practices destabilized stream banks and caused severe erosion that choked out the home waters of Apache Trout.³⁹⁹ In addition to land mismanagement, “state and federal wildlife agencies encouraged overfishing and then tried to compensate for population declines by stocking streams with non-native fish”⁴⁰⁰ that preyed upon Apache Trout, hybridized with them, or outcompeted them for habitat.⁴⁰¹

By the 1940s, the tribe recognized the declining Apache Trout population and started closing streams to fishing.⁴⁰² Due to misidentification of the fish by federal authorities, it took years for federal agencies to identify the Apache Trout as a distinct species of fish.⁴⁰³ By 1955, the Tribe closed a large portion of the reservation around Mount Baldy to respect the mountain’s sacredness, and to protect a pure strain of Apache Trout living in the waters there.⁴⁰⁴ To prevent stream erosion, the Tribe also moved to increase self-determination over reservation forests, advocated for a reduced timber yield, and fenced cattle out of riparian areas.⁴⁰⁵ Decades before the Endangered Species Act, tribal employees relocated Apache Trout from compromised waters in “old-time, metal milk containers” to healthier ecosystems.⁴⁰⁶ To protect the native fish, the tribe engaged in aggressive management of non-native species by electroshocking and removing non-native fish and erecting “fish barriers on many creeks to prevent encroachment by the descendants of non-native fish that were introduced generations ago”⁴⁰⁷

³⁹⁶ *Id.* at 234.

³⁹⁷ *Id.* at 233 (quoting Randy Scholfield, *In a Native Place*, TROUT MAGAZINE, Winter 2017, at 44, 49).

³⁹⁸ *Id.* at 234.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ See ARIZ. GAME & FISH DEP’T & U.S. FISH & WILDLIFE SERV., APACHE TROUT (ONCORHYNCHUS APACHE): RECOVERY PLAN 1, 4–5 (2d rev. 2009), <https://www.cabi.org/ISC/FullTextPDF/2013/20137205029.pdf> [<https://perma.cc/W3QK-9D8S>].

⁴⁰⁴ Bernhardt, *supra* note 33, at 234.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 235.

⁴⁰⁷ *Id.* at 234.

Biodiversity abounds on the reservation and its surrounding lands due largely to the White Mountain Apache Tribe's wildlife recovery efforts for Apache Trout and other imperiled species.⁴⁰⁸ Although the tribe still employs strict fishing regulations, the fish recovered enough to be caught for subsistence and recreation.⁴⁰⁹ People now come from all 50 states to hunt and recreate in the tribal forests, but also to fish for the charismatic little fish saved from extinction by tribal stewardship.⁴¹⁰

Isleta's Pueblo elevation of water quality standards on the Rio Grande is another definitive example of tribal stewardship and scientific competence. Isleta Pueblo is located downstream of Albuquerque, New Mexico. For years, Isleta Pueblo suffered from poor water quality because of the city. Ammonia, a byproduct of human waste, was a prevalent contaminant in Isleta Pueblo water because Albuquerque dumped its wastewater just six miles upstream of the reservation.⁴¹¹ Isleta Pueblo also received the arsenic that came out of city wells, which was poisoning fish and "Isleta's centuries old fields of squash and corn."⁴¹² Yet another source of concern was the radioactive waste from upstream Sandia National Laboratories, which had historically been involved in nuclear experimentation and development of weapons that relied upon radioactive materials.⁴¹³

In 1987, Congress amended the Clean Water Act to give tribes "treatment as states," where they could establish water quality standards and have permitting

⁴⁰⁸ See WHITE MOUNTAIN APACHE TRIBE GAME & FISH, <https://wmatoutdoor.org> [<https://perma.cc/MT8D-3FMQ>] (last visited Mar. 20, 2022); *Mexican Wolf Reintroduction Project Monthly Update*, WHITE MOUNTAIN APACHE TRIBE GAME & FISH, https://wmatoutdoor.org/wp_view.html?pageid=29 [<https://perma.cc/T89Z-F3QD>] (last visited Mar. 20, 2022). The Fish and Wildlife Service articulated the capacity of the White Mountain Apache in its determination of critical habitat areas for the loach minnow:

The White Mountain Apache Tribe clearly explained their sovereign authority to promulgate regulations and management plans to protect and manage Tribal trust lands, wildlife, forests, and other natural resources, and cited numerous authorities that confirm their authority over wildlife and other natural resources existing within their ancestral lands. In addition, they have shown a commitment to other federally listed species, such as the Mexican spotted owl (*Strix occidentalis lucida*) and the Arizona willow (*Salix arizonica*). Based on our working relationship with the Tribe, their demonstration of conservation through past efforts, and the protective provisions of the Loach Minnow Management Plan, we conclude that the benefits of excluding the 29.0 km (18.0 mi) of the mainstem White River and 17.2 km (10.7 mi) of East Fork White River outweigh the benefits of including this area.

77 Fed. Reg. 10809, 10864 (2012).

⁴⁰⁹ *Fishing Regulations*, WHITE MOUNTAIN APACHE TRIBE GAME & FISH, https://wmatoutdoor.org/wp_view.html?pageid=8 [<https://perma.cc/K8VH-EAR4>] (last visited Mar. 20, 2022).

⁴¹⁰ Bernhardt, *supra* note 33, at 235.

⁴¹¹ *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); see also Verna Williamson-Teller, *Protecting Water Quality and Religious Freedom at the Isleta Pueblo*, in ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 116, 116–125 (Melissa K. Nelson ed., 2008).

⁴¹² Jason Lenderman, *A Tiny Tribe Wins Big on Clean Water*, HIGH COUNTRY NEWS (Feb. 2, 1998), <https://www.hcn.org/issues/123/3922#:~:text=ISLETA%2C%20N.M.%20%2D%20A%20recent%20Supreme,into%20the%20Rio%20Grande%20River> [<https://perma.cc/PT5D-ZKBY>].

⁴¹³ Williamson-Teller, *supra* note 411, at 118.

authority over those upstream of their reservations.⁴¹⁴ In 1992, the U.S. Environmental Protection Agency (EPA) approved Isleta Pueblo for treatment as a state and Isleta Pueblo used its authority under the Clean Water Act to establish much stricter water quality standards than the federal standard.⁴¹⁵ Isleta Pueblo's water quality standards offended Albuquerque, which complained that it would have to spend considerable money on upgrading its water treatment to meet the standards.⁴¹⁶ Albuquerque sued the EPA on a number of grounds, but the 10th Circuit Court of Appeals ruled against the city. It held the EPA had acted properly in approving Isleta Pueblo's standards, and confirmed that Isleta Pueblo had the authority to enforce water quality standards.⁴¹⁷ Verna Williamson-Teller, Isleta Pueblo's governor, noted that having permitting authority under the Clean Water Act "puts us in a very powerful position" but also "puts us in a position of great responsibility because we have to set up an infrastructure that can enforce the standard that we have established."⁴¹⁸ Tribes are successful environmental stewards, and are at the forefront of improving environmental integrity. Their environmental practices and standards often exceed those set by state governments or the federal government.

2. Tribal-Federal Engagement under Current Law

The renaissance of tribal sovereignty in the last third of the 20th century has fundamentally reshaped the federal government's approach to tribal relations.⁴¹⁹ Rather than developing legal doctrines that serve to exclude and marginalize tribes or whipsaw policy approaches to tribal interests driven by broader national interests or non-tribal concerns, the federal government's shift toward deeper consideration of tribal priorities has fueled the growth of tribal authority since the mid-1960s.⁴²⁰ While that shift continues to evolve in order to more effectively respond to and represent tribal interests at the federal level, it has already reshaped the way federal agencies approach management of the nation's public lands. Still, the legal bases for those management decisions, including the so-called "organic acts" of the major federal public land management agencies, the Bureau of Land

⁴¹⁴ Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251–1375); *City of Albuquerque*, 97 F.3d at 418–19; *Tribes Approved for Treatment as a State (TAS)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> [<https://perma.cc/3U8T-ZDTV>] (last visited Apr. 19, 2022).

⁴¹⁵ *Albuquerque*, 97 F.3d at 418.

⁴¹⁶ Williamson-Teller, *supra* note 411, at 122.

⁴¹⁷ *Albuquerque*, 97 F.3d at 422–24, 429 ("We conclude that the EPA's construction of the 1987 amendment to the Clean Water Act—that tribes may establish water quality standards that are more stringent than those imposed by the federal government—is permissible because it is in accord with powers inherent in Indian tribal sovereignty.")

⁴¹⁸ Williamson-Teller, *supra* note 411, at 122.

⁴¹⁹ See generally WILKINSON, *supra* note 347.

⁴²⁰ See, e.g., Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 566 (July 8, 1970).

Management (BLM),⁴²¹ Forest Service,⁴²² and Park Service,⁴²³ were the product of and reflect earlier eras when tribes were marginalized or not considered. More recent developments require these agencies to take additional steps to work with, listen to, and incorporate the views of their tribal partners.⁴²⁴ In addition, newer authorities resulting from tribal advocacy and support provide additional opportunities for these agencies to empower tribal partnerships. Advances have been made in three primary areas: tribal engagement through more effective consultation, the use of congressionally authorized contracts or cooperative agreements to enhance tribal authority and activities, and the advancement of federal planning processes to better incorporate tribal knowledge and input. These inroads have begun to erase the historically drawn legal lines of exclusion relative to public lands and provide a critical backdrop against which to consider the specific potential of tribal authority in Yellowstone.

a. Consultation

Tribal consultation is central to the modern exercise of the federal government's trust responsibilities.⁴²⁵ The process, substance, and practice of consultation, however, remains a delicate topic for many tribes and their leaders.⁴²⁶ In the context of federal decision-making regarding the management of public lands and resources, tribal consultation is a critical path for ensuring tribes have input.⁴²⁷ But, consultation requirements often remain matters of executive branch policy and therefore subject to broad agency discretion and discrepancy.⁴²⁸ Furthermore, these policies are far newer and less entrenched than the agency purposes and missions embodied in their organic acts, which are much more likely to be deeply embedded in agency identities and practices. In fact, the modern federal commitment to more effective and widespread tribal consultation did not begin in earnest until President Clinton's Executive Order 13175 in 2000. Since then, a series of presidential and departmental directives have sought to clarify and better implement that approach.⁴²⁹

⁴²¹ Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–1782).

⁴²² National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600–1614).

⁴²³ National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C.).

⁴²⁴ See Mills & Nie, *supra* note 325, at 181–82.

⁴²⁵ See, e.g., Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. (Jan. 26, 2021).

⁴²⁶ Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 448–66 (2013) (describing limits on consultation, including the lack of enforceability for and specificity in the broader consultation mandates).

⁴²⁷ See, e.g., Mills & Nie, *supra* note 325, at 94–95.

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 91–94.

The minimal statutory directives for tribal consultation focus on engagement with regard to specific federal undertakings and their potential to affect culturally significant properties,⁴³⁰ or include tribal engagement as a procedural step to be taken along with and on the same basis as engagement with other stakeholders.⁴³¹ This project-specific approach often results in tribal engagement that is narrowly confined to the consideration of an existing project proposal or environmental analysis.⁴³² It does not provide significant opportunity for more effective and empowering tribal engagement.⁴³³

Despite these shortcomings, however, federal agencies and their tribal counterparts continue to rely on consultation as a basis for government-to-government communications and relationship-building. As the policies and practices of consultation continue to evolve, the process can enable the establishment of trust and, through those regular engagements, the building of more common approaches to federal decision-making.

b. Contracting, Compacting, and Cooperative Agreements

Like consultation, the modern era of tribal self-determination has fueled an expansion of the legal authorities available for tribes to seek and enter into agreements with the federal government. The landmark Indian Self-Determination and Education Assistance Act (ISDEAA) is at the heart of these efforts.⁴³⁴ Subsequent congressional expansion of ISDEAA's approach have authorized a far wider range of contracting opportunities.⁴³⁵ The Tribal Self-Governance Act of 1994 (TSGA), for example, allows agencies within the U.S. Department of the Interior (DOI) to contract with Indian tribes to carry out various activities on behalf of federal agencies even where those activities may be on lands outside of Indian reservations.⁴³⁶ While contracting remains at the discretion of agencies, the ability to do so provides a basis for greater tribal authority over resources holding special significance that were previously under the control of federal agencies.⁴³⁷ As described in greater detail below, the Park Service has relied on this contracting authority to enter into agreements with tribes to conduct activities in certain locations.

⁴³⁰ See, e.g., 54 U.S.C. § 306108.

⁴³¹ See, e.g., Apply NEPA Early in the Process, 40 C.F.R. 1501.2 (2022).

⁴³² Mills & Nie, *supra* note 325, at 96–99.

⁴³³ *Id.*

⁴³⁴ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5310).

⁴³⁵ See, e.g., Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1, 18–45 (2015) (reviewing evolution of ISDEAA from 1975 through 2000).

⁴³⁶ Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. §§ 450 note–458hh).

⁴³⁷ See 25 U.S.C. §§ 5363(b)(2), (c).

Similarly, the Department of the Interior has encouraged and prioritized the use of cooperative agreements with tribes on a government-to-government basis to promote collaborative approaches to land management. For example, then-Secretary of the Interior Sally Jewell issued a secretarial order in 2016 that called upon all Interior agencies to explore and expand the use of cooperative agreements with tribes. The order also highlighted the then-extant legal authorities on which the agencies could rely to enter into such agreements.⁴³⁸ That order also cautioned agencies to seek such agreements only within applicable legal and financial constraints and suggested that “it is not expected that all areas managed by various bureaus, *such as units of the National Park System*, will provide such an opportunity” for collaboration.⁴³⁹ More recently, Secretary Deb Haaland, along with her counterpart Secretary of Agriculture Thomas J. Vilsack, issued an unprecedented joint order that again called on agencies within their departments to utilize collaborative agreements.⁴⁴⁰ Still, this updated approach to federal-tribal stewardship of public lands and resources made no distinctions for National Park System units.⁴⁴¹ Regardless of where legal impediments may limit federal-tribal partnerships, the Secretaries called on agencies to “give consideration and deference to Tribal proposals, recommendations, and knowledge that affect management decisions on such lands wherever possible.”⁴⁴²

c. Federal Planning

Planning is a central component of federal land management and provides another avenue through which agencies can enhance and promote tribal engagement and inclusion in their management decisions.⁴⁴³ Consistent with the consultation requirements described above, agencies are required to engage with tribes through their planning and decision-making; however, the evolution of planning practices offers an opportunity for a more effective and deeper engagement with tribal knowledge and priorities to help guide future management plans and decisions.

The 2012 revisions to the Forest Service planning process offer an example of how agencies can better incorporate and enhance tribal engagement in their planning work.⁴⁴⁴ Those revisions included specific provisions requiring consideration of how management could affect “areas of tribal importance,”⁴⁴⁵ and promoting the use

⁴³⁸ ORDER NO. 3342, *supra* note 11, § 3, at 4–5.

⁴³⁹ *Id.* at 5 (emphasis added).

⁴⁴⁰ See ORDER NO. 3403, *supra* note 10.

⁴⁴¹ See *id.*

⁴⁴² *Id.* § 5, at 4.

⁴⁴³ See, e.g., Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 16 U.S.C. § 1338a, 30 U.S.C. § 191, 43 U.S.C. §§ 1701–1753, 1761–1782); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600–1614).

⁴⁴⁴ See, e.g., Mills & Nie, *supra* note 325, at 126–27.

⁴⁴⁵ 36 C.F.R. § 219.10(b)(1)(iii) (2022).

and incorporation of “native knowledge” into the planning process and planning documents.⁴⁴⁶ These regulatory requirements go above and beyond the baseline consultation requirements and, instead, demand a nuanced and more appropriate agency consideration of specific tribal interests, concerns, and contributions when developing broader land management plans. Although their effectiveness in ensuring the adequate, appropriate, and meaningful incorporation of tribal priorities can still be questionable,⁴⁴⁷ these provisions offer potential pathways for all federal land management agencies to better represent tribal voices in their planning practices.

Although each of these three avenues offer the potential for expanding upon and enhancing the government-to-government relationship between federal land management agencies and interested tribes, true partnerships remain elusive. As highlighted by the cautions in Secretary Jewell’s 2016 secretarial order, the potential for conflict between agency mandates and collaboration with tribes is often a disincentive for agencies contemplating how to engage in these opportunities.⁴⁴⁸ Similarly, concern and confusion over tribal calls for the return of public lands or authority to co-manage federal lands and resources further complicate how federal decision-makers approach their tribal counterparts. These concerns are particularly relevant when considering whether and how the world’s first national park might approach a new paradigm of enhanced tribal partnerships. To be successful, such an approach demands a closer examination of the specific legal and policy framework applicable to the Park Service to identify where and how such a new paradigm could find root.

C. Examples of Federal-Tribal Collaborative Management

Although there are still opportunities to build tribal capacity, tribes have a distinct competitive advantage when it comes to land management.⁴⁴⁹ “Tribal land and water management programs, inspired by belief systems that emphasize kinship and respect for nature, have often been able to achieve environmental standards much higher than those of the federal or state governments.”⁴⁵⁰ Tribes also have “deep subject matter expertise” because “much of the federal land in the western United States is ‘ceded land,’ that is, land given up by tribes in treaties . . .”⁴⁵¹

⁴⁴⁶ *Id.* § 219.19 (defining “Native knowledge,” in part, as “generally not solely gained, developed by, or retained by individuals, but is rather accumulated over successive generations and is expressed through oral traditions, ceremonies, stories, dances, songs, art, and other means within a cultural context”).

⁴⁴⁷ *See, e.g.,* Mills & Nie, *supra* note 325, at 119–26 (Badger-Two Medicine case study).

⁴⁴⁸ *Id.* at 132 (Forest Service saying no authority to co-manage).

⁴⁴⁹ Washburn, *Facilitating Tribal Co-Management*, *supra* note 390, at 269 (“Tribes can make the case that they can perform federal 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.”).

⁴⁵⁰ Bernhardt, *supra* note 33, at 233.

⁴⁵¹ Washburn, *Facilitating Tribal Co-Management*, *supra* note 390, at 267.

Not only do tribes have an “ongoing affinity for these lands,” they often have “off-reservation treaty rights to hunt, fish, and gather on federal public lands,” and “federal public lands also encompass places that are sacred to tribal communities.”⁴⁵² Tribes can help the Park Service better meet its “conserve unimpaired” mandate and help other federal land agencies like the Forest Service and BLM meet their “multiple use” mandates.⁴⁵³ As noted above, there are various legal and policy means and approaches by which collaborative management can be achieved, but the fundamental principles of collaborative management include recognition of tribes as sovereign governments, incorporation of federal trust responsibility toward tribes, development of legitimization structures for tribal involvement, integration of tribes early in the decision-making process, recognition and incorporation of tribal expertise, and dispute resolution mechanisms.⁴⁵⁴ These approaches, and how they are playing out on the ground, can help inform how Yellowstone’s future might evolve.

1. Bears Ears National Monument and the Bears Ears Inter-Tribal Commission

Bears Ears is the most recent and widely publicized example of collaborative management because of social media campaigns and extensive news coverage. The protection of the area was predominantly motivated by cultural and environmental preservation rather than wildlife, and tribal expertise is recognized in its collaborative framework.⁴⁵⁵ After years of advocacy, the Bears Ears Inter-Tribal Coalition consisting of the Navajo, Hopi, Zuni, Ute Mountain Ute, and Uintah and Ouray Ute tribes, submitted a proposal to the Obama administration to designate a 1.9 million-acre national monument in Southeastern Utah.⁴⁵⁶ Under the authority of the Antiquities Act,⁴⁵⁷ President Obama signed a proclamation that established the 1.35-million-acre Bears Ears National Monument.⁴⁵⁸ In a controversial move that drew criticism from tribes, archeologists, paleontologists, and recreational interests, the Trump administration slashed the Bears Ears National Monument by 85% of its original acreage.⁴⁵⁹ At the recommendation of current Secretary of Interior Deb Haaland, President Biden restored the original Bears Ears National Monument designation.⁴⁶⁰

⁴⁵² *Id.*

⁴⁵³ See generally Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1 (2020); Robison, *supra* note 270.

⁴⁵⁴ Goodman, *supra* note 326, at 343; see also Mills & Nie, *supra* note 325, at 148–51.

⁴⁵⁵ Mills & Nie, *supra* note 325, at 172–73.

⁴⁵⁶ BEARS EARS PROPOSAL, *supra* note 12, at 1–4.

⁴⁵⁷ Antiquities Act of 1906, Pub. L. No. 59-209, § 2, 34 Stat. 225, 225 (codified at 54 U.S.C. §§ 320301–320303).

⁴⁵⁸ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

⁴⁵⁹ Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017).

⁴⁶⁰ Proclamation No. 10285, 86 Fed. Reg. 57321 (Oct. 8, 2021).

Most notably, the original Bear Ears Proclamation created a commission responsible for management of the National Monument, which consists of the Secretary of Interior, the Secretary of Agriculture, and one representative from each of the five tribes of Inter-Tribal Coalition.⁴⁶¹ According to that proclamation, the Secretaries of Interior and Agriculture “shall meaningfully engage the Commission” and “shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission”⁴⁶² If the Secretaries decide not to incorporate tribal recommendations, they are required to provide a “written explanation of their reasoning.”⁴⁶³ Although the Bears Ears collaborative framework has yet to be fully implemented on the ground, this model provides “a path forward to right the basin’s historical wrongs” and “a path lit by a legal framework that supports direct tribal management in land planning and cultural resources preservation on public lands.”⁴⁶⁴

2. Kasha-Katuwe Tent Rocks National Monument and Use Assistance Agreements Authorized by Statute

The nuances and history of the collaborative management model at the Kasha-Katuwe Tent Rocks National Monument (Kasha-Katuwe) are distinct from Bears Ears National Monument.⁴⁶⁵ The Kasha-Katuwe model, however, provides another inspiring example of “shared authority and responsibility” between tribes and the federal government.⁴⁶⁶ It also demonstrates “there is no bright line that clearly distinguishes congressional and executive powers” to encourage collaborative management.⁴⁶⁷ President Clinton established Kasha-Katuwe in 2001 by proclamation that explicitly commanded that the monument be managed in “close cooperation with the Pueblo de Cochiti.”⁴⁶⁸ The proclamation itself did not establish a formal commission structure like the Bears Ears Proclamation, but instead relied upon “previous actions by the Pueblo and BLM to share power and responsibility as permitted by law and the agency uses assistance agreements that are already authorized by statute.”⁴⁶⁹ The BLM’s consultation and integration of the Tribe early in the decision-making process through the National Environmental

⁴⁶¹ Mills & Nie, *supra* note 325, at 145; *see also Who We Are, THE BEARS EARS INTER-TRIBAL COALITION*, <https://www.bearsarscoalition.org/about-the-coalition/> [https://perma.cc/FE6V-2KMV] (last visited Apr. 29, 2022).

⁴⁶² Proclamation No. 9558, 82 Fed. Reg. at 1144.

⁴⁶³ *Id.*

⁴⁶⁴ Daniel Cordalis & Amy Cordalis, *Civilizing Public Land Management in the Colorado River Basin*, in *VISION & PLACE*, *supra* note 33, at 242, 244.

⁴⁶⁵ *See generally* Sandra Lee Pinel & Jacob Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, 49 ENV’T MGMT. 593 (detailing history of the development of co-management at Kasha-Katuwe).

⁴⁶⁶ *See id.*; Mills & Nie, *supra* note 325, at 55–56.

⁴⁶⁷ Mills & Nie, *supra* note 325, at 55–56.

⁴⁶⁸ Proclamation No. 7394, 115 Stat. 2569, 2571 (Jan. 17, 2001).

⁴⁶⁹ Mills & Nie, *supra* note 325, at 144.

Policy Act process allowed the Tribe to shape the Resource Management Plan for the national monument prior to public comment.⁴⁷⁰ The BLM retains final decision-making power but recognizes the Cochiti Pueblo's role as a sovereign government and ancestral steward of the area.⁴⁷¹

*3. Collaborative Management Self-Determination Contracting:
Grand Portage National Monument, Sitka National Historic Park, and
Yukon Flats National Wildlife Refuge*

The proclamations establishing Bears Ears and Kasha-Katuwe specifically mandated collaboration with their respective tribes.⁴⁷² Yet specific language compelling collaborative management is not necessary for effectuating collaborative land management. Considerable inroads to federal-tribal collaborative management have often been achieved through self-determination contracts.⁴⁷³

For instance, the Grand Portage Band contracted to administer the maintenance program at the Grand Portage National Monument and also has ongoing opportunities to contract for construction projects.⁴⁷⁴ The Sitka Tribe of Alaska has a funding agreement whereby it “direct[s] tours, and oversee[s] the natural and culture history education programs” of Sitka National Historic Park.⁴⁷⁵ The Sitka Tribe’s direct involvement in education helps meet an essential function of the national historic park by “telling history accurately and respectfully”⁴⁷⁶ The Council of Athabaskan Tribal Government (CATG) has a funding agreement with the U.S. Fish and Wildlife Service for co-management of the Yukon Flats National Wildlife Refuge. Due to its “intimate connection to the terrain as aboriginal homelands,”⁴⁷⁷ CATG has a competitive advantage over its federal counterpart in conducting environmental and educational outreach in local villages, surveying moose populations, and collecting other data related to wildlife that Indigenous peoples rely upon for subsistence.⁴⁷⁸ Under ISDEAA, CATG has also developed a wildfire program with the BLM and Alaska Fire Service that includes the training and testing of emergency fire fighters.⁴⁷⁹

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*; Pinel & Pecos, *supra* note 465, at 601.

⁴⁷² Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016); Proclamation No. 7394, 115 Stat. at 2571.

⁴⁷³ Washburn, *Facilitating Tribal Co-Management*, *supra* note 390, at 276–77.

⁴⁷⁴ *Id.* at 292–94.

⁴⁷⁵ *Id.* at 296.

⁴⁷⁶ *Id.* at 297.

⁴⁷⁷ *Id.* at 303.

⁴⁷⁸ *See Self Governance*, COUNCIL OF ATHABASKAN TRIBAL GOVERNANCE, <https://www.catg.org/natural-resources/self-governance/> [<https://perma.cc/T89S-XX84>] (last visited Apr. 16, 2022).

⁴⁷⁹ *Type 2 Wildland Firefighting Crew*, COUNCIL OF ATHABASKAN TRIBAL GOVERNANCE, <https://www.catg.org/natural-resources/fire/> [<https://perma.cc/M5W6-XXJ2>] (last visited Apr. 16, 2022).

4. *Fish and Wildlife Commissions: Columbia River Inter-Tribal Fish Commission, Great Lakes Indian Fish and Wildlife Commission*

Memoranda of Understanding (MOUs) and other types of agreements between federal departments and tribes have often been used both to affirm treaty rights related to hunting, fishing, and gathering, and to enhance wildlife management.⁴⁸⁰ Various Ojibwe tribes have implemented court decisions⁴⁸¹ and consent agreements⁴⁸² with the states of Michigan, Wisconsin, and Minnesota,

⁴⁸⁰ Mills & Nie, *supra* note 325, at 77, 136, 144.

⁴⁸¹ *People v. Jondreau*, 185 N.W.2d 375 (Mich. 1971); *Wisconsin v. Gurnoe*, 192 N.W.2d 892 (Wis. 1972); *People v. LeBlanc*, 223 N.W.2d 305 (Mich. Ct. App. 1974); *People v. LeBlanc*, 248 N.W.2d 199 (Mich. 1976); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); *United States v. Michigan*, 505 F. Supp. 467 (W.D. Mich. 1980); *United States v. Michigan*, 89 F.R.D. 307 (W.D. Mich. 1980); *United States v. Michigan*, 508 F. Supp. 480 (W.D. Mich. 1980); *United States v. Michigan*, 623 F.2d 448 (6th Cir. 1980); *United States v. Michigan*, 520 F. Supp. 207 (W.D. Mich. 1981); *United States v. Michigan*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *United States v. Michigan*, 712 F.2d 242 (6th Cir.1983); *United States v. Michigan*, 12 ILR 3079 (W.D. Mich. 1985); *LCO I*, 700 F. 2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983); *Lac Courte Oreilles v. Wisconsin (LCO III)*, 653 F. Supp. 1420 (W.D. Wis. 1987); *LCO IV*, 668 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles v. Wisconsin (LCO V)*, 686 F. Supp. 226 (W.D. Wis. 1988); *LCO VI*, 707 F. Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles v. Wisconsin (LCO VII)*, 740 F. Supp. 1400 (W.D. Wis. 1990); *Lac Courte Oreilles v. Wisconsin (LCO VIII)*, 749 F. Supp. 913 (W.D. Wis. 1990); *Lac Courte Oreilles v. Wisconsin (LCO IX)*, 758 F. Supp. 1262 (W.D. Wis. 1991); *Lac Courte Oreilles v. Wisconsin (LCO X)*, 775 F. Supp. 321 (W.D. Wis. 1991); *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991); *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994); *Mille Lacs Band v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997); *Mille Lacs Band v. Minnesota*, 124 F.3d 904 (8th Cir. 1997); *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999); *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005); *Lac Courte Oreilles v. Wisconsin (LCO XI)*, 769 F.3d 543 (7th Cir. 2014).

⁴⁸² Stipulation on Biological and Certain Remaining Issues, *LCO VI*, 707 F. Supp. 1034 (W.D. Wis. 1989) (No. 74-C-313), Docket No. 911; Stipulation on Fish Processing, *LCO VI*, 707 F. Supp. 1034 (No. 74-C-313), Docket No. 912; Stipulation on Gear Identification and Safety Marking, *LCO VI*, 707 F. Supp. 1034 (No. 74-C-313), Docket No. 913; Stipulation on Enforcement, *LCO VI*, 707 F. Supp. 1034 (No. 74-C-313), Docket No. 914; Stipulation in regard to the Tribal Harvest of the White Tailed Deer, *LCO VII*, 740 F. Supp. 1400 (W.D. Wis. 1990) (No. 74-C-313), Docket No. 1167; Stipulation for Fisher, Fur Bearers and Small Game, *LCO VII*, 740 F. Supp. 1400 (No. 74-C-313), Docket No. 1289; Wild Rice Regulatory Phase Consent Decree, *LCO X*, 775 F. Supp. 321 (W.D. Wis. 1991) (No. 74-C-313), Docket No. 1222; Stipulation and Consent Decree for Fish Species Other than Walleye and Muskellunge, *LCO X*, 775 F. Supp. 321 (No. 74-C-313), Docket Nos. 1568, 1570; Stipulation and Consent Decree in regard to Tribal Harvest of Black Bear, Migratory Birds and Wild Plants, *LCO X*, 775 F. Supp. 321 (No. 74-C-313), Docket No. 1607; Stipulation and Consent Decree in regard to Tribal Harvest of Miscellaneous Species and Other Regulatory Matters, *LCO X*, 775 F. Supp. 321 (No. 74-C-313), Docket No. 1607; Stipulation as to the Boundaries of the Territory Ceded by the Treaties of 1837 and 1842, *Lac Courte Oreilles v. Wisconsin*, No. 74-C-313 (W.D. Wis. Dec. 11, 1985), Ex. 54; Stipulation for Technical, Management and Other Updates: First Amendment of Stipulations Incorporated into Final Judgment, *LCO X*, No. 74-C-313 (W.D. Wis. Mar. 5, 2009), ECF No. 168; Stipulation for Technical, Management and Other Updates: Second Amendment of the Stipulations Incorporated in the Final Judgment, *LCO X*, No. 74-C-313 (W.D. Wis. Mar. 15, 2011), ECF No. 173; Stipulation for Technical, Management and Other Updates: Third Amendments to the Stipulations Incorporated into Final Judgment, *LCO X*, No. 74-C-313 (W.D. Wis. Oct. 17, 2016), ECF No. 416; Stipulation for Technical, Management and Other Updates: Fourth Amendments to the Stipulations Incorporated into the Final Judgment, *LCO X*, No. 74-C-313 (W.D. Wis. Dec.

and have also entered into important agreements with the federal government.⁴⁸³ The Apostle Islands National Lakeshore General Agreement between Ojibwe tribes and the Park Service and Department of Interior strives to reach consensus among the parties related to ecosystem management, provides protocols for consensus, and specifies dispute resolution procedures when consensus cannot be reached.⁴⁸⁴ The General Agreement is designed to further the “parties’ mutual interests to preserve and sustain the Lakeshore’s natural resources for future generations and to avoid unnecessary disputes.”⁴⁸⁵ The MOU Regarding Tribal-USDA Forest Service Relations similarly affirms federal trust responsibilities and treaty obligations with respect to Ojibwe tribes and represents collaborative land management in the context of national forests in Michigan and Wisconsin.⁴⁸⁶

While collaborative management is done to comply with federal obligations towards tribes, legal compliance is not the only purpose served. The Kuskokwim River Inter-Tribal Fish Commission relies upon a collaborative management MOU that reflects the “Department’s commitment to programs that further tribal self-determination,”⁴⁸⁷ while the Columbia River Inter-Tribal Fish Commission Management Agreement states that it is designed to “enhance upper Columbia river fish runs while providing harvests for both treaty Indian and non-treaty fisheries.”⁴⁸⁸ Tribal co-management of fish and wildlife affirms tribal sovereignty and treaty rights, assists federal agencies in important wildlife management responsibilities, and improves the quality and quantity of wildlife that non-Natives rely upon and enjoy.

As detailed in this Part, Yellowstone-associated tribes may pursue and establish a greater role in the management of the world’s first national park through numerous

23, 2020), ECF No. 421; Stipulation, *Mille Lacs Band v. Minnesota (Mille Lacs IV)*, 952 F. Supp. 1362 (D. Minn. 1997) (No. 3-94-1226), <https://perma.cc/5W79-7V6G>; Inland Consent Decree, *United States v. Michigan*, No. 73-CV-26 (W.D. Mich. 2007), <https://perma.cc/9Q4P-4D7W>; Great Lakes Consent Decree, *United States v. Michigan*, No. 73-CV-26 (W.D. Mich. Aug. 8, 2020), <https://perma.cc/49BM-9RL6>.

⁴⁸³ Memorandum of Agreement: Federal Enforcement of Tribal Migratory Bird Regulations, Ojibwe Tribes-U.S. Fish & Wildlife (Sept. 15, 1990); Memorandum of Agreement Between the Bad River Band of the Lake Superior Tribe of Chippewa Indians and the United States Coast Guard Concerning the Enforcement of Laws Relating to Commercial Fishing Vessel Safety, Bad River Band-U.S. Coast Guard (June 21, 2000); Memorandum of Agreement Between the United States Coast Guard and the Red Cliff Band of the Lake Superior Chippewa Indians Concerning the Enforcement of Laws Relating to Commercial Fishing Vessel Safety, Red Cliff Band-U.S. Coast Guard (May 7, 2008); Memorandum of Understanding: Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842, Great Lakes Indian Fish & Wildlife Comm’n-U.S. Dep’t of Agric.-Forest Serv. (Mar. 1, 2012), https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendix.pdf [<https://perma.cc/TH8X-BB6M>] [hereinafter MOU].

⁴⁸⁴ General Agreement: Comprising Tribal-National Park Service Relations Regarding Apostle Island National Lakeshore, Nat’l Park Serv.-Voigt Intertribal Task Force of the Great Lakes Indian Fish & Wild Comm’n (July 26, 2013).

⁴⁸⁵ *Id.* at 1–2.

⁴⁸⁶ See MOU, *supra* note 483, pt. III.C, at 3.

⁴⁸⁷ Mills & Nie, *supra* note 325, at 139, 147, 149 (internal quotations omitted).

⁴⁸⁸ *Id.* at 155.

avenues and can look to several examples for guidance. Fundamentally, however, progress toward that new future will be rooted in the underlying objective of restoring tribal connections to that Native space and developing meaningful opportunities for those connections to inform the management of the park and its resources. While this goal finds strong basis in the legal principles of inherent tribal sovereignty, aboriginal title and reserved treaty rights, and the federal government's trust responsibility, those principles have often been obscured by the intersecting narrative of the Doctrine of Discovery and consequent marginalization of tribal rights. That same history has played out across Yellowstone's geography.

D. Co-management and the National Park Service

The history of the national park system, like that of all of the nation's public lands, is intertwined with the federal government's policy toward Indigenous peoples.⁴⁸⁹ From the national parks' initial militaristic origins and founding in areas ceded by tribes and from which they were excluded, the national parks have evolved to now include specific programs and commitments to relations with tribes.⁴⁹⁰ In addition, the Park Service has developed guidance to help support both its own approach to tribal relations and to encourage and allow broader tribal rights to be exercised within today's national parks.⁴⁹¹ In some parks, the Park Service is a strong and co-equal partner with tribal owners and managers.⁴⁹² Nevertheless, the long history and continuing challenges posed by the federal government's management of these areas of tribal importance provide an opportunity to reexamine the policies and practices of shared federal-tribal stewardship of national parks. Importantly, that reexamination must start not with the history of national parks but, instead, with the foundations of the broader federal-tribal relationship, especially the inherent and continuing exercise of tribal sovereignty and the federal government's long-standing trust-based and treaty-based commitments to honor and protect that exercise.⁴⁹³

The Park Service is guided by the terms of its 1916 Organic Act and purposes established by Congress that require all management decisions, "means and

⁴⁸⁹ See, e.g., King, *supra* note 323, at 482–88 (analyzing the evolution of NPS policies in the context of the historical eras of federal Indian policy).

⁴⁹⁰ *Id.* at 482–83.

⁴⁹¹ See, e.g., AM. INDIAN LIAISON OFF., NAT'L PARK SERV., THE NATIONAL PARK SERVICE AND AMERICAN INDIANS, ALASKA NATIVES, AND NATIVE HAWAIIANS: EXCERPTS AND IDENTIFIED SECTIONS FROM MANAGEMENT POLICIES, THE GUIDE TO MANAGING THE NATIONAL PARK SYSTEM 2006 (2008), <https://www.nps.gov/history/tribes/Documents/NPSManagementPolicy.pdf> [<https://perma.cc/E9K4-RHYZ>]; Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 Fed. Reg. 45024 (July 12, 2016).

⁴⁹² See, e.g., CONG. RSCH. SERV., R42125, NATIONAL PARK SYSTEM: UNITS MANAGED THROUGH PARTNERSHIPS 5 (2016), https://www.everycrsreport.com/files/20160405_R42125_94eb8585232b03ac0c55767712a1b77bc040a01f.pdf [<https://perma.cc/URZ4-Q8A6>] [hereinafter PARTNERSHIPS].

⁴⁹³ See *supra* Part II.B.

measures” to promote both conservation and enjoyment of those areas to ensure they will remain “unimpaired for . . . future generations.”⁴⁹⁴ This overarching mandate is supplemented by the purposes and directives set forth by the legislation establishing each individual park.⁴⁹⁵

Yellowstone’s establishment, however, pre-dated the development of the Park Service by nearly 50 years and, as a result, Yellowstone’s creation and its subsequent management helped shape the entire national park system.⁴⁹⁶ For example, when establishing Yellowstone, Congress made clear the exclusive control of the Secretary of the Interior,⁴⁹⁷ authorized the Secretary to make appropriate rules and regulations to carry out that authority, and mandated that those regulations ensure the “preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition.”⁴⁹⁸ The connection between Yellowstone’s purpose and that which would eventually inform the entire park system are clear.

In addition to these directives, Congress also sought to manifest its vision of the park as an isolated and protected paradise.⁴⁹⁹ The legislation creating the park specifically and repeatedly directed that no one else enter, occupy, or settle within its boundaries and required that the Secretary “cause all persons trespassing upon [the Park] . . . to be removed therefrom.”⁵⁰⁰ Shortly after the park was established, Congress went further, empowering the Secretary to request assistance from the United States Army to protect and preserve its boundaries from those who may enter the park “for the purpose of destroying the game or objects of curiosity therein.”⁵⁰¹ These strict mandates resulted in the exclusion of those Indigenous

⁴⁹⁴ National Park Service Organic Act, ch. 408, § 1, 39 Stat. 535, 535 (1916) (codified at 54 U.S.C. § 100101).

⁴⁹⁵ See, e.g., NAT’L PARK SERV., MANAGEMENT POLICIES 2006 § 1.4.3.1, at 11 (2006), <https://www.nps.gov/orgs/1548/upload/ManagementPolicies2006.pdf> [<https://perma.cc/H2JC-MAGG>] [hereinafter NPS MANAGEMENT POLICIES] (“Park purposes are found in the general laws pertaining to the national park system, as well as the enabling legislation or proclamation establishing each unit.”). The 2006 edition of Management Policies “is the primary source and foremost authority in the Park Service’s directives system.” *Natural Resource Stewardship Training: National Park Service and Related Policies: Management Policies*, NAT’L PARK SERV., https://www.nps.gov/training/nrs/references/references_policies.html [<https://perma.cc/G2UY-HQPF>] (last visited Apr. 16, 2022).

⁴⁹⁶ See, e.g., NPS MANAGEMENT POLICIES, *supra* note 495, § 1.1, at 8 (“[W]hen Yellowstone National Park was created, no concept or plan existed upon which to build a system of such parks.”).

⁴⁹⁷ Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 32, 32–33 (1872) (codified as amended at 16 U.S.C. § 22).

⁴⁹⁸ *Id.*

⁴⁹⁹ The “wilderness theme” has been perpetuated to deny Tribal rights. See *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (“It was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill.”).

⁵⁰⁰ §§ 1–2, 17 Stat. at 32–33.

⁵⁰¹ Act of Mar. 3, 1883, ch. 143, 22 Stat. 603, 626–27; see also *Yellowstone Game Protection*

to the area and others who had relied on its game and other resources since time immemorial. Additionally, before the turn of the twentieth century, the United States Supreme Court interpreted these mandates to have abrogated any treaty-reserved rights Indian tribes may have previously exercised within that area.⁵⁰²

The legal origins of Yellowstone and the course they set for the creation of the entire national park system complicate the means by which a re-indigenized future for Yellowstone might honor the increasing calls for returning national parks to tribal control.⁵⁰³ Short of new directives from Congress to the Secretary that would substantially reform the legal obligations of the Park Service, the existing legal and policy framework demands that the park be managed in service of those original purposes. Furthermore, as Secretary Jewell's 2016 order cautioned, there are limits on the Park Service's ability and authority to share or delegate those responsibilities.⁵⁰⁴ Nonetheless, in addition to the prospects for improved relationships through consultation, contracting, and planning, additional Park Service-specific authorities suggest the possibility of increased collaboration, federal-tribal partnership, and expanded tribal authority within Yellowstone.

The Park Service has already successfully compacted with tribes under the TSGA to promote tribal activities and build tribal capacity in the fulfillment of what had previously been federal functions.⁵⁰⁵ But the agency has done so in limited instances (only three) and for narrowly defined purposes.⁵⁰⁶ As described

Act, ch. 72, 28 Stat. 73 (1894) (codified as amended at 16 U.S.C. §§ 24–30a) (asserting exclusive federal jurisdiction over wildlife in the park and prohibiting hunting and limiting fishing to hook and line).

⁵⁰² See *Ward v. Race Horse*, 163 U.S. 504, 510 (1896). In *Race Horse*, the Court drew upon the establishment of Yellowstone to articulate the erroneous "temporary and precarious nature" of treaty rights:

[The Court's] view of the temporary and precarious nature of the [treaty] right . . . [as] manifest by the act of Congress creating the Yellowstone Park reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of Congress on the subject. The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the territory where it is now asserted there was a contract right to kill game created by the treaty in favor of the Indians.

Id.

⁵⁰³ Treuer, *supra* note 6.

⁵⁰⁴ See ORDER NO. 3342, *supra* note 11, § 4, at 5 (describing limitations on federal authority to collaborate with tribes, including that "[i]n exercising their legal authorities to implement [collaborations], bureaus should be mindful of legal limits on the delegation of inherently Federal functions to non-Federal entities"); *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18–21 (D.D.C. 1999) (holding unlawful a delegation of management by the NPS to a coalition of interested stakeholders).

⁵⁰⁵ Washburn, *Facilitating Tribal Co-Management*, *supra* note 390, at 292–98.

⁵⁰⁶ See *id.*

by former Assistant Secretary of Indian Affairs Kevin Washburn, the three existing agreements between the Park Service and tribes demonstrate that their use is “rare, financially modest, and limited in scope,” and, while they can be “path-marking for the Park Service . . . much more can be done.”⁵⁰⁷ Indeed, according to the agency itself, over twenty different elements of park programs may be eligible for compacting under the TSGA, although the agency does not identify Yellowstone as a park in “proximity of an identified self-governance Tribe.”⁵⁰⁸ That standard is not mandatory for a tribe to pursue such a compact and, under the terms of the statute itself, many tribes may consider various programs, services, functions, and activities or portions thereof carried out by the Park Service in Yellowstone to be of “special geographic, historical, or cultural significance,” whether in geographic proximity or not.⁵⁰⁹

Beyond compacts under the TSGA, however, the Park Service also enjoys its own unique authority to enter into cooperative agreements with tribal governments “for the purpose of protecting natural resources of System units through collaborative efforts on land inside and outside the System units.”⁵¹⁰ The Park Service has even greater authority to enter into cooperative *management* agreements with states and local governments “where a System unit is located adjacent to or near a State or local park area, and cooperative management between the Service and a State or local government agency of a portion of either the System unit or State or local park will allow for more effective and efficient management of the System unit and State or local park.”⁵¹¹ Though that section makes clear that such agreements may not transfer “administrative responsibilities” for any park unit, the recognition that intergovernmental cooperative management of aspects of the park system supports a broader view of shared federal-tribal authority, particularly where such cooperation would “allow for more effective and efficient management.”⁵¹²

The Park Service has also developed its own policies for more effectively and meaningfully engaging with tribes in its management activities. The agency’s 2006 Management Policies, for example, include its commitment to “pursue an open, collaborative relationship with American Indian tribes to help tribes maintain their cultural and spiritual practices and enhance the Park Service’s understanding of the history and significance of sites and resources in the parks.”⁵¹³ Those policies encourage cooperative approaches to conservation in order to support the Park

⁵⁰⁷ *Id.* at 297–98.

⁵⁰⁸ See List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2021 Programmatic Targets, 86 Fed. Reg. 14147, 14149 (Mar. 12, 2021).

⁵⁰⁹ 25 U.S.C. § 5363(b)(2), (c).

⁵¹⁰ 54 U.S.C. § 101702(d)(1).

⁵¹¹ *Id.* § 101703(a).

⁵¹² *Id.*

⁵¹³ NPS MANAGEMENT POLICIES, *supra* note 495, § 1.11, at 19.

Service mission, making clear the agency's commitment to develop agreements for collaborative management activities:

Therefore, the Service will develop agreements with federal, tribal, state, and local governments and organizations; foreign governments and organizations; and private landowners, when appropriate, to coordinate plant, animal, water, and other natural resource management activities in ways that maintain and protect park resources and values. Such cooperation may include park restoration activities, research on park natural resources, and the management of species harvested in parks. Cooperation also may involve coordinating management activities in two or more separate areas, integrating management practices to reduce conflicts, coordinating research, sharing data and expertise, exchanging native biological resources for species management or ecosystem restoration purposes, establishing native wildlife corridors, and providing essential habitats adjacent to or across park boundaries.⁵¹⁴

Consistent with this use of intergovernmental agreements, the Park Service developed specific regulatory authority for authorizing the gathering of plants or plant parts by tribal members in certain parks.⁵¹⁵ Like the cooperative agreements described above, that framework provides a basis on which individual parks can negotiate and enter agreements with tribes to set the terms on which tribal members can visit a park to gather these materials.⁵¹⁶ With “cooperation and the continuation of tribal traditions at [its] heart,” that rule provides important access for tribal members and another substantive means for strengthening the government-to-government relationship between the Park Service and tribes.

Finally, as noted above, the Park Service is engaged with tribes and other governmental partners in managing a number of parks across the country, a model that may also help demonstrate new collaborative approaches for Yellowstone. These so-called partnership parks are managed and owned in a variety of combinations, and each park unit can develop its own cooperative agreement to provide the basis for day-to-day management, provided those duties are carried out in a manner consistent with congressional direction for that park.⁵¹⁷ According to a Congressional Research Service study of these parks, “[p]artnership arrangements are specific to each unit and vary widely,” including a management structures where “NPS may serve in a supervisory role only, with partners providing all of the day-to-day management, even on federally owned land”⁵¹⁸ These arrangements

⁵¹⁴ *Id.* § 4.1.4, at 38.

⁵¹⁵ See Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 Fed. Reg. 45024 (July 12, 2016).

⁵¹⁶ 36 C.F.R. § 2.6 (2021).

⁵¹⁷ See PARTNERSHIPS, *supra* note 492, at 2.

⁵¹⁸ *Id.*

include federal-tribal partnership parks in which Congress has authorized various collaborative activities, including cooperative agreements between the Secretary of the Interior and a tribe to provide for tribal partners “to protect, preserve, maintain, or operate any site, object, or property in” certain parks.⁵¹⁹ Though the terms of these partnerships vary and are based on the unique circumstances of each park and express authorization or direction from Congress, their cooperative models demonstrate the potential for successful federal-tribal shared stewardship of park units and resources.

Ultimately, envisioning a new management paradigm for the world’s first national park must go beyond the potential of existing collaborative frameworks to ensure it functions effectively in practice. While these existing Park Service-specific and more general authorities provide critical avenues through which those functional relationships may be built, lessons from similar collaborative models can inform the practical implementation of federal-tribal relations at Yellowstone as well.

The intersection of these various strands of law, policy, and government-to-government relations continue to shape Yellowstone and the sovereign relationships that define its boundaries. That legal landscape has also provided a basis on which Indigenous nations and their allies have begun a modern movement to restore and reinvigorate their connections to and interest in the lands and resources that they have relied on since time immemorial. This movement has the potential to revolutionize the federal-tribal relationship and redraw some of the long-standing lines that have separated tribes from their ancestral and aboriginal lands. Beyond simply restoring lost tribal connections, the trend of implementing Indigenous resource management points toward a more just and sustainable future for the nation’s public lands and resources. The next Part offers a focused discussion of a re-indigenized Yellowstone.

V. TOWARD A RE-INDIGENIZED YELLOWSTONE

Yellowstone can once again change the world. In this Part, we provide a range of options through which tribes and their advocates interested in re-asserting a meaningful Indigenous presence in and management approach to Yellowstone can build a new future for the park, for all other national parks, and for federal-tribal management of public resources nationwide. From measured, incremental steps, like tribal compacts for discrete programs, functions, services, and activities within the park, to radical realignments (#Landback), this Part charts a course for both pragmatic and aspirational initiatives. Ultimately, drawing on the successful relationship building represented by the Interagency Bison Management Plan

⁵¹⁹ Act of May 15, 1965, Pub. L. No. 89-19, § 6(a), 79 Stat. 110, 111 (designating Nez Perce National Historic Park); *see also* Act of Oct. 21, 1972, Pub. L. No. 92-525, § 3(a), 86 Stat. 1047, 1047 (establishing the Hohokam Pima National Monument and authorizing the Gila River Indian Community Council to “develop and operate revenue-producing visitor services and facilities” within the Hohokam Pima National Monument).

(IBMP) and other cooperative intergovernmental commissions, the central thrust promotes additional forums for nation-to-nation dialogue focused on identifying and enhancing meaningful and collaborative engagement of tribal knowledge and authority. Ultimately, re-indigenizing Yellowstone can restore the shine to the nation's original crown jewel and help ensure that all Americans can look forward to the park's next 150 years and beyond.

The range of approaches and strategies for envisioning and implementing a new, more "indigenized" approach to the world's first national park is broad. But such breadth provides flexibility for tribal and federal leaders to consider how best to pursue both their own and shared interests. Importantly, as described throughout this article, the success of those measures will rely upon the continuing strength of the relationships built on the ground, as well as the durability of their legal and policy foundations.⁵²⁰ We do not take lightly the oft-repeated concerns that empowering or repossessing tribes with public resources may set a dangerous precedent.⁵²¹ We are also cognizant of the legitimate, if sometimes overblown, legal constraints on the ability of federal agencies to delegate their responsibilities to non-federal actors.⁵²² Despite these concerns, the numerous successful examples of land back and shared management over recent generations, and the numerous legal avenues through which federal agencies like the Park Service can pursue a stronger and more collaborative relationship with tribes, offer a roadmap for engaging a new future for Yellowstone. To meet the potential of this moment and truly re-indigenize the park, this future must go beyond current efforts to engage tribes in service of federal programs and priorities. Instead, Yellowstone's next chapter must empower tribes to take leadership roles in defining those priorities and to act as partners in fulfilling the park's mission for current and future generations. It will be up to tribal leaders and their federal partners to navigate that path by their own compasses, and we do not intend for our ideas to define their course. Rather, we offer the following conceptions in the spirit of supporting that journey.

A. Back to First Principles: #Landback

In April 2021, David Treuer, an Ojibwe author and scholar, published a provocative article in *The Atlantic* entitled, "Return the National Parks to the Tribes."⁵²³ Consistent with its powerful proposal, the article garnered significant attention, and Professor Treuer appeared on various national media outlets to discuss

⁵²⁰ See *supra* Part III.C.

⁵²¹ See, e.g., *supra* Part IV.A; Mills & Nie, *supra* note 325, at 152–53 ("Precedent, and what it means for federal public lands, is one of the most common concerns about tribal co-management. Hundreds of treaties, many with off-reservation use rights, precede the creation of public lands, and these systems are essentially based on aboriginal territory. . . . the question asked is what piece of public land might not be subject to this approach in the future?").

⁵²² See, e.g., ORDER NO. 3342, *supra* note 11, § 4, at 5; Mills & Nie, *supra* note 325, at 140–43.

⁵²³ Treuer, *supra* note 6.

and defend his proposition.⁵²⁴ In the article and throughout those discussions, Treuer forcefully made the claim that the history of dispossession and dislocation of Indigenous peoples as well as the intimate connections and knowledge those peoples would bring to managing our treasured landscapes justified, if not obligated, the seemingly radical proposition of returning the national parks to tribal hands.⁵²⁵ When pressed for details on how this could practically occur, however, Treuer made clear that those details were for others to determine.⁵²⁶ So, what would the purest form of land back look like for Yellowstone?

It begins with Congress. The U.S. Constitution vests Congress with the exclusive “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁵²⁷ The acquisition of the territory and property that would become Yellowstone was borne of the Doctrine of Discovery, but it is this constitutional authority, in conjunction with its constitutionally neighboring language regarding the admission of states, that has shaped the existing ownership in and around the park.⁵²⁸ From 1805 to 1890, the landscape encompassed by Yellowstone National Park was subsumed within parts of various federal territories and properties, including the Louisiana Territory (1805–1812),⁵²⁹ Missouri Territory (1812–1821),⁵³⁰ Unorganized Territory (1821–1848), Oregon Territory (1848–1859),⁵³¹ Washington Territory (1853–1863),⁵³²

⁵²⁴ See, e.g., *id.*; Stephanie Sy & Allison Thoat, *Should Native Americans Control National Parks? Examining an Argument for Reparations*, PBS NEWSHOUR (May 17, 2021, 6:25 PM), <https://www.pbs.org/newshour/show/should-native-americans-control-national-parks-examining-an-argument-for-reparations> [https://perma.cc/4G6L-WVST].

⁵²⁵ Treuer, *supra* note 6 (“For Native Americans, there can be no better remedy for the theft of land than land. And for us, no lands are as spiritually significant as the national parks. They should be returned to us. Indians should tend—and protect and preserve—these favored gardens again.”).

⁵²⁶ See, e.g., *All Things Considered: National Parks Should be Controlled by Indigenous Tribes*, *One Writer Argues*, NPR (Apr. 15, 2021, 4:10 PM), <https://www.npr.org/2021/04/15/987787685/national-parks-should-be-controlled-by-indigenous-tribes-one-writer-argues> [https://perma.cc/2SUN-E2YW] (responding to the question of how parks would be handed over to tribal control, Treuer said, “Well, the great thing about my job is I’m not a government official,” before offering some general ideas).

⁵²⁷ U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

⁵²⁸ *Id.* cl. 1 (“New States may be admitted by the Congress into this Union . . .”). The U.S. Constitution’s Admissions Clause served to superimpose an array of significant lines across the Yellowstone-associated tribes’ traditional homelands once the United States had acquired title pursuant to the foregoing treaties. Federal legislation founded on this provision facilitated creation (admission) of the states whose borders overlie the Yellowstone region.

⁵²⁹ An Act Further Providing for the Government of the District of Louisiana, ch. 31, 2 Stat. 331 (1805).

⁵³⁰ An Act Providing for the Government of the Territory of Missouri, ch. 95, 2 Stat. 743 (1812).

⁵³¹ An Act to Establish the Territorial Government of Oregon, ch. 177, 9 Stat. 323 (1848).

⁵³² An Act to Establish the Territorial Government of Washington, ch. 90, 10 Stat. 172 (1853).

Nebraska Territory (1854–1861),⁵³³ Dakota Territory (1861–1868),⁵³⁴ Montana Territory (1864–1889),⁵³⁵ Idaho Territory (1863–1890),⁵³⁶ and Wyoming Territory (1868–1890).⁵³⁷ Following the acquisition of these territories, Congress used the Property clause in a new way to create Yellowstone to preserve its natural wonder.⁵³⁸ Ultimately, the territorial period ended when Montana gained statehood in 1889,⁵³⁹ and Idaho and Wyoming followed suit the next year,⁵⁴⁰ thereby crystallizing existing state lines. But, either upon statehood or shortly thereafter, Idaho, Montana, and Wyoming all ceded exclusive jurisdiction of Yellowstone National Park to the federal government,⁵⁴¹ and, in Montana's case, any claim to or authority over tribal lands.⁵⁴² Thus, Congress preserved its constitutional prerogatives with regard to the park while also insulating tribes and tribal lands from encroachment by newly created states.

In line with these historical exercises of its authority, Congress continues to possess the overriding power to change or redraw Yellowstone's lines of ownership or influence. Thus, any efforts to revise the current status of the park, its existing mission, or congressional purpose would require navigating the legislative process and demand particular consideration of the intense and divisive political forces that are likely to amass around a flashpoint issue like Yellowstone. These challenges are neither unprecedented nor insurmountable but certainly present different considerations than those endorsed by Congress in the return of Blue Lake to the Taos Pueblo, even if the justifications for such an action might be consistent.⁵⁴³

Similarly, there are lessons to be learned from earlier transfers regarding the ways a legislative compromise might address conflicting views of the public's interest in protecting or continuing access to public lands and resources. In December 2020, for example, Congress authorized the transfer of the National Bison Range,

⁵³³ An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277 (1854).

⁵³⁴ An Act to Provide a Temporary Government for the Territory of Dakota, ch. 86, 12 Stat. 239 (1861).

⁵³⁵ Act of May 21, 1864, ch. 94, 13 Stat. 85 (admitting Nevada into the Union).

⁵³⁶ An Act to Provide a Temporary Government for the Territory of Idaho, ch. 117, 12 Stat. 808 (1863).

⁵³⁷ An Act to Provide a Temporary Government for the Territory of Wyoming, ch. 235, 15 Stat. 178 (1868).

⁵³⁸ See *supra* Part III.A.

⁵³⁹ An Act to Provide for the Admission of the State of Montana into the Union, ch. 180, 25 Stat. 676 (1889).

⁵⁴⁰ An Act to Provide for the Admission of the State of Idaho into the Union, ch. 656, 26 Stat. 215 (1890); An Act to Provide for the Admission of the State of the State of Wyoming into the Union, and for other Purposes, ch. 664, 26 Stat. 222 (1890).

⁵⁴¹ An Act Ceding to the United States Jurisdiction over Certain Lands, § 1, 1890–1891 Idaho Laws 1st Sess. 40, 40–41; An Act Ceding to the United States Jurisdiction over Certain Lands, § 1, 1891 Mont. Laws 2nd Sess. 262, 263; 26 Stat. at 222.

⁵⁴² § 4, 25 Stat. at 677.

⁵⁴³ See Blue Lake Restoration Act, § 4(a), Pub. L. No. 91-550, 84 Stat. 1437, 1437–38

a wildlife refuge then managed by the U.S. Fish and Wildlife Service on behalf of the United States, to the Confederated Salish and Kootenai Tribes.⁵⁴⁴ Although the tribes were long interested in reacquiring the Bison Range, which was carved out of the heart of their reservation during the allotment era, those efforts were stridently opposed by various groups claiming that tribal management or ownership would conflict with the public nature and value of the refuge.⁵⁴⁵

To ameliorate these concerns, and in partnership with the tribes' proposed return of the Bison Range, Congress included provisions in the legislation clarifying that, despite the fact the ownership transfer was in trust for and administered by the tribes, the range would be managed "solely for the care and maintenance of bison, wildlife, and other natural resources . . ." ⁵⁴⁶ It also obligated the tribes to "provide public access and educational opportunities" as well as a publicly available management plan.⁵⁴⁷ In doing so, Congress ensured that its original purpose for and mission of the refuge would remain intact and that the public's connection to the resource would not be severed. A generation earlier, Congress's transfer of the Blue Lake area to the beneficial ownership of the Taos Pueblo included similar conditions.⁵⁴⁸ Like conditions would certainly be necessary if Congress were to consider a legislative approach to restoring tribal interests in or (even beneficial) ownership of the park. The negotiation and development of these terms may be made more challenging by the legislative interests at stake, but these earlier compromises provide helpful guideposts.

In addition to mustering the political will to consider transferring some of Yellowstone to be held in trust for the benefit of its original inhabitants, the overlapping tribal connections to the area further complicate the practical management of those lands. In the cases of Blue Lake and the National Bison Range, restoration to trust status for the benefit of a single tribe was appropriate and, given the compelling historical and continuing connections to each of those

(1971) (recognizing as a basis for the transfer of the area to be held in trust for the Pueblo the facts that "Indians depend and have depended since time immemorial for water supply, forage for their domestic livestock, wood and timber for their personal use, and as the scene of certain religious ceremonials . . .").

⁵⁴⁴ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, tit. V, § 501, div. DD, § 12, 134 Stat. 1182, 3029-33 (Dec. 27, 2020).

⁵⁴⁵ See Brian Upton, *Returning to a Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives*, 35 PUB. LAND & RES. L. REV. 51, 56-58, 72-76 (2014) (describing the history of the Bison Range); Alex Sakariassen, *The Problem of Precedent: National Bison Range Transfer Sparks Opposition and Concern*, BOZEMAN DAILY CHRONICLE (Feb. 23, 2020), https://www.bozemandailychronicle.com/news/the-problem-of-precedent-national-bison-range-transfer-sparks-opposition-and-concern/article_db58dead-1893-52c2-b798-9723ec7e8878.html [<https://perma.cc/SQB6-B9PW>] (highlighting opposition).

⁵⁴⁶ § 12(c)(2)-(3), 134 Stat. at 3031.

⁵⁴⁷ *Id.*

⁵⁴⁸ § 4(b), 84 Stat. at 38 (requiring that the area be managed to maintain its wilderness characteristics and allowing non-tribal member access with the tribe's consent).

landscapes, the subsequent federal and tribal roles in overseeing the transferred lands was clearer. Nonetheless, as described in greater detail below, a coalition or inter-tribal approach could provide an avenue for addressing these practical concerns and, as evidenced by the Bears Ears Inter-Tribal Commission, can be a powerful forum for bringing divergent tribes and tribal interests together.⁵⁴⁹

Legislation to return Yellowstone to tribal ownership, even in part, would certainly be a challenging and contentious proposition. As David Treuer acknowledges, practical and other considerations at each park make the prospects for seeing his vision through dependent on the time, location, and tribes involved.⁵⁵⁰ But, while stopping short of mapping out the procedural and practical details, Treuer's argument presents prime justification for the United States Congress to consider enacting laws to restore tribal ownership of the world's first national park, an argument rooted not just in repairing history, but also focused on healing these treasured landscapes for the benefit of all Americans.⁵⁵¹ What better place to begin than the icon that is Yellowstone.⁵⁵²

B. Government-to-Government Partnerships: Shared Management

Short of congressional redefinition of the federal-tribal relationships at Yellowstone, there remain a number of options for enhancing a partnership approach that operationalizes tribal knowledge and guidance in practical park management partnerships. Clear expectations, requirements, responsibilities, and dispute resolution mechanisms are core to an effective model of shared stewardship.⁵⁵³ Beyond providing clarity to the parties engaged in the relationship, these terms are particularly important to address and demonstrate that any arrangement complied with the legal constraints on the Park Service.⁵⁵⁴ The negotiation of intergovernmental agreements or MOUs would serve to establish these terms and conditions and provide a critical foundation for the federal-tribal relationship going forward.

⁵⁴⁹ See *supra* Part IV.C.

⁵⁵⁰ Treuer, *supra* note 6 (noting that a tribe-by-tribe approach might be complicated and piecemeal). Instead, Treuer advocated for a transfer of all parks to a consortium of tribes that would ensure (and be required to ensure) their management for conservation purposes. *Id.*

⁵⁵¹ *Id.* Professor Treuer elaborated:

Parks, as they've existed for 149 years, have done a decent job of preserving the past. But it's not clear that today's model of care and custodianship best meets the needs of the land, Native people, or the general public. Nor is it clear that the current system will adequately ensure the parks' future. That's something Indians are good at: pushing ahead while bringing the past along with us. We may be able to chart a better way forward.

Id.

⁵⁵² See *id.* (discussing Yellowstone specifically).

⁵⁵³ See Mills & Nie, *supra* note 325, at 150–51 (addressing dispute resolution mechanisms).

⁵⁵⁴ Such agreements could make clear, for example, that the Park Service is not transferring any non-delegable federal responsibilities for park management. See, e.g., *Nat'l Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999).

As highlighted by then-Secretary Jewell's 2016 secretarial order, Congress has already empowered the Park Service to develop such cooperative agreements for "the purpose of protecting natural resources of System units through collaborative efforts on land *inside and outside* the System units."⁵⁵⁵ That authorization aligns with the Park Service's mission and Congress's overarching mandate to the agency to ensure the conservation of park areas and resources for their enjoyment in perpetuity,⁵⁵⁶ but certainly does not exclude the enlistment of tribal partners in fulfilling those objectives.⁵⁵⁷

Still, there are legal limits on the Park Service's ability to engage tribal (and other) partners in its work.⁵⁵⁸ While such constraints motivate clear definitions of the respective responsibilities of the federal and tribal parties to an intergovernmental agreement, the Secretary of Interior and the Park Service both recognize significant room within those legal limits.⁵⁵⁹ Secretary Jewell described the potential scope of tasks that could be subject to such a collaborative arrangement to include a variety of activities.⁵⁶⁰ Similarly, each year, the Park Service publishes a list of programs, functions, services, or activities that may be subject to assumption by tribes under certain circumstances, making clear the agency considers at least some aspects of those duties delegable to, or at least shareable with, outside entities.⁵⁶¹

The distinction between unilateral *delegation* of federal authority to a tribe or tribes to make management decisions and the *sharing* of authority for management or other federal responsibilities is also important when considering the potential for and terms of a collaborative intergovernmental agreement.⁵⁶² To the extent that such an agreement would capitalize upon the Park Service's authority under federal law to enter into collaborative arrangements, it could also ensure that the exercise of the agency's non-delegable authority is clearly defined and reserved, while also preserving the agency's responsibility for fulfilling its mission. Such an agreement could also empower a collaborative protocol for the agency to do so.

How that protocol might be built would be the subject of intergovernmental consultation and negotiation; its details must be defined by the tribal and federal

⁵⁵⁵ 54 U.S.C. § 101702(d)(1) (emphasis added); ORDER NO. 3342, *supra* note 11, § 3, at 4.

⁵⁵⁶ 54 U.S.C. § 100101(a).

⁵⁵⁷ As Secretary Jewell's order noted in 2016, "Cooperative agreements and collaborative partnerships with tribes can help ensure effective management of Federal lands and resources, including managing resources according to the purpose for which the resources are set aside." ORDER NO. 3342, *supra* note 11, § 5(b)(2), at 6.

⁵⁵⁸ See *supra* Parts IV.B.2, IV.D.

⁵⁵⁹ Mills & Nie, *supra* note 325, at 141–43.

⁵⁶⁰ ORDER NO. 3342, *supra* note 11, § 5(a), at 5–6.

⁵⁶¹ 86 Fed. Reg. 14147, 14149 (Mar. 12, 2021) (listing 23 different programs or activities available for tribal assumption); see also NPS MANAGEMENT POLICIES, *supra* note 495, § 4.1.4, at 38.

⁵⁶² See Mills & Nie, *supra* note 325, at 166–68.

leaders most invested in cooperating.⁵⁶³ Furthermore, as briefly noted above, the logistics of such negotiations and agreements—particularly the potential for engaging 27 or more different tribal partners along with a range of interested federal agencies and officials—are daunting. But, to turn once again to lessons offered from other examples, the Park Service already partners with a number of tribes on complicated and contentious park management issues and, in doing so, has been able to support consensus, define respective authorities, and avoid overstepping its legal boundaries.⁵⁶⁴

The development of the IBMP, the involvement and engagement of tribes with treaty connections to the region, and the interagency and intergovernmental approach to consensus-based decision-making in the management of bison provide a model for the Park Service and tribes to extrapolate successful approaches to other challenging management partnerships and activities.⁵⁶⁵ The IBMP's partner protocols commit the agency and its federal, tribal, and state collaborators to standards of engagement and objectives for their work together.⁵⁶⁶ By establishing a set of rotating leadership responsibilities, clearly defining the procedures for making decisions and, ideally, obtaining consensus among participating parties, the protocols make clear how those parties will work together and who will be responsible for decisions or actions that may be made or called for by the consensus of the group.⁵⁶⁷

Through this process, the IBMP has enabled adaptive bison management that incorporates the interests of tribal partners interested in both the exercise of treaty-reserved rights to hunt them outside of Yellowstone and the transfer of bison from the park to tribal lands in Montana and across the country.⁵⁶⁸ The assertion of these interests, their protection and reinvigoration through tribal participation in the IBMP, and their payoff for the tribes and tribal members involved all counsel for the expansion of similar cooperative approaches to challenging resource issues. There is still room for more effectively building federal-tribal partnerships,⁵⁶⁹ but these successes and the framework of partner protocols on which they are built,

⁵⁶³ Even if no terms of agreement are reached, the process of these interactions could serve to promote stronger and more proactive relationships that would enhance shared engagement. *See infra* Part V.D.

⁵⁶⁴ *See supra* Part III.C.

⁵⁶⁵ *See, e.g.*, HILLARY HOFFMAN & MONTE MILLS, *A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION* 154–55 (2020) (describing the history of the IBMP, including the initial exclusion of tribes until the Confederated Salish & Kootenai and Nez Perce Tribes engaged as partners beginning in 2009).

⁵⁶⁶ INTERAGENCY BISON MGMT. PLAN PARTNERS, *IBMP PARTNER PROTOCOLS* (2021), http://www.ibmp.info/Library/PartnerProtocols/PartnerProtocols_211227.pdf [<https://perma.cc/QJ83-Q3J2>].

⁵⁶⁷ *See id.* at 6 (decision-making process flowchart), 4 tbl.2 (respective responsibilities).

⁵⁶⁸ *See* HOFFMANN & MILLS, *supra* note 565, at 154–55.

⁵⁶⁹ *See* Olivia Weitz, *Bison Management Plan Stalls as Tribe Disagrees with State and Federal Agencies on Herd Reductions*, *YELLOWSTONE PUB. RADIO* (Jan. 20, 2022, 4:19 PM), <https://www.>

provide helpful starting points for considering a more collaborative approach to the Park Service's management of Yellowstone.

While numerous tribes and tribal organizations participate as partners and participants in the IBMP, the 27 recognized Yellowstone-associated tribes should also consider whether a more formal tribal commission or coalition related to Yellowstone issues may be appropriate. Models of such inter-tribal organizations abound and, with specific regard to tribal alliances focused on natural resources issues, both the Bears Ears Inter-Tribal Coalition and the Council of Athabascan Tribal Governments could serve as models.⁵⁷⁰ Each of those inter-tribal alliances provide a forum in which the diverse interests of individual tribes can find alignment and, through that coalescence, provide greater influence than that of each single tribe. Like the IBMP partner protocols, a framework for those inter-tribal relations would help ensure that the decision-making process and consistency with the appropriate procedures for each individual tribal government would be critical to ensuring the success and durability of such a group.⁵⁷¹

While tribes clearly have a strong cultural connection to bison, the same can be said regarding other animals. The suggestions that apply to the IBMP are worth considering for other animals not just in Yellowstone National Park but in the broader Greater Yellowstone Ecosystem (GYE). Understanding the ways and natural processes of wildlife that tribes have observed and depended on for generations is a mainstay of traditional ecological knowledge. Yellowstone is iconic because of the “charismatic megafauna”⁵⁷² that call it home, including bison, elk, pronghorn, mule deer, wolves, and bears.⁵⁷³ It is also home to a lesser-acknowledged cast of characters like beavers and sage grouse that play an important role in the ecosystem and also play critical roles in tribal stories and cultural traditions.⁵⁷⁴ As discussed in Part IV, tribes have a strong competitive advantage and a subject matter expertise in wildlife management. For example, the White Mountain Apache Tribe and its stewardship practices are responsible for the survival of the Apache Trout, and tribes play critical ongoing roles in fish co-management in the Great Lakes and Columbia River Basin. Tribal wildlife stewardship has been refined over countless generations and continues today on both tribal, as well as public lands.

When federal-tribal collaborative management is discussed in reference to Yellowstone, it is important to acknowledge that the park is just one component of the GYE. Scientists and land managers have long recognized that the “enclave approach” to biodiversity conservation, which simply sets aside national parks or other types of public lands and manages them in isolation of surrounding

ypradio.org/environment-science/2022-01-20/bison-management-plan-stalls-as-tribe-disagrees-with-state-and-federal-agencies-on-herd-reductions [https://perma.cc/NN8S-3SLE].

⁵⁷⁰ See *supra* Part IV.C.

⁵⁷¹ See, e.g., *Who We Are*, *supra* note 461 (describing memorandum of understanding between the five coalition tribes).

⁵⁷² Keiter, *supra* note 453, at 48.

⁵⁷³ *Id.* at 48–96.

lands, is not an effective strategy.⁵⁷⁵ Large and interconnected land reserves must be managed in coordination to better serve natural processes and to better serve outdoor recreation that depends upon the health and abundance of wildlife. Landscape (or ecosystem) scale management allows ecosystems to absorb the impacts of “disturbances” like fire.⁵⁷⁶ It also protects wildlife movement corridors, allowing for migration to seasonal habitat and connectivity with other populations for greater genetic viability in mating.⁵⁷⁷

Jurisdictional fragmentation leads to habitat fragmentation, which is detrimental to wildlife.⁵⁷⁸ Federal-tribal collaborative management is a powerful strategy to smooth both jurisdictional fragmentation and habitat fragmentation. Some of the Yellowstone-associated tribes have reservations that are located in close enough proximity to Yellowstone (*i.e.*, Wind River, Fort Hall, and Crow) that they may be able to play a role in habitat coordination and even migration corridor conservation. Connectivity and migration corridors are already a part of the recovery strategies for grizzly bears and wolves.⁵⁷⁹ Moreover, the Path of the Pronghorn in the GYE became the nation’s first formal migratory corridor and is the result of “an unlikely federal, state, and private landowner coalition.”⁵⁸⁰ In other words, the Path of the Pronghorn came about because of a type of collaborative management. Mule deer and antelope migration protections are already on the horizon as well.⁵⁸¹ There is space for tribal participation here. Indeed, the Park Service’s 2006 Management Policies specifically authorize agreements and cooperation with tribes for “species management or ecosystem restoration purposes,” “native wildlife corridors,” and natural resource management activities designed to “maintain and protect park resources and values.”⁵⁸² And while Yellowstone elk and bison have their own unique migration concerns due

⁵⁷⁴ See, *e.g.*, *Northeast Wyoming and the Black Hills*, (June 13, 2021), <https://storymaps.arcgis.com/stories/711ba30e40644f009e397077cce53abf> [<https://perma.cc/UM8P-4SKW>] (last visited Apr. 18, 2022).

⁵⁷⁵ Keiter, *supra* note 453, at 32.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 33.

⁵⁷⁸ *Id.* at 7 (“The GYE is best understood in natural, legal, and socioeconomic terms, which suggests the region is ecologically integrated, culturally diverse, and legally fragmented.”)

⁵⁷⁹ Abigail H. Sage et. al., *Paths of Coexistence: Spatially Predicating Acceptance of Grizzly Bears along Key Movement Corridors*, 266 BIOLOGICAL CONSERVATION 1, 1 (2022).

⁵⁸⁰ Keiter, *supra* note 453, at 95; see also *The “Path of the Pronghorn” in Wyoming*, THE CONSERVATION FUND, <https://www.conservationfund.org/projects/the-path-of-the-pronghorn-in-wyoming#:~:text=The%20pronghorn%20has%20the%20longest,migration%20corridor%20in%20the%20nation> [<https://perma.cc/N3KC-WX5Y>] (last visited Apr. 18, 2022).

⁵⁸¹ Office of Governor Mark Gordon, Wyoming Mule Deer and Antelope Migration Corridor Protection, Exec. Order 2020-1 (2020); see also MATTHEW KAUFFMAN ET. AL., U.S. GEOLOGICAL SURV., 2020-5101, UNGULATE MIGRATIONS OF THE WESTERN UNITED STATES, VOLUME I, at 47–79 (2020).

⁵⁸² NPS MANAGEMENT POLICIES, *supra* note 495, § 4.1.4, at 38.

to brucellosis and population concentrations,⁵⁸³ tribal perspectives and habitat lands may bring clarity to these concerns. Expanded tribal participation in wildlife management and habitat and corridor conservation is one of the most obvious ways to enhance ecosystem management in the GYE, particularly when a tribe's reservation is already a part of the extended Yellowstone ecosystem.

“In the GYE, such an ecosystem management approach necessitates coordinating planning and decision processes among the four federal land management agencies, as well as with the three states, their political subdivisions, and local Native American tribes.”⁵⁸⁴ Federal-tribal collaboration should be applied both to Yellowstone National Park and Grand Teton National Park, as well as the five national forests that encircle the parks (Bridger-Teton, Shoshone, Caribou-Targhee, Gallatin-Custer, and Beaverhead-Deerlodge).⁵⁸⁵ To preserve ecological integrity, federal-tribal collaborative management should also extend to the three associated wildlife refuges (National Elk Refuge, Red Rocks Lake National Wildlife Refuge, and Grays Lake National Wildlife Refuge), as well as the lower-elevation BLM lands in the Yellowstone region that provide essential wildlife habitat.⁵⁸⁶

The IBMP incorporates tribal interests, but there may also be opportunities to expand and refine the role of tribes in the co-management of bears, elk, mule deer, pronghorn, sage grouse, and other species. Many of the Yellowstone-affiliated tribes already manage these species on their own reservations.⁵⁸⁷ They could contribute their scientific knowledge and traditional ecological knowledge to the management of these animals in their ancestral territories located in Yellowstone National Park and the GYE. Meaningful consultation on wildlife management plans and formalized roles on interagency commissions focused on species recovery benefit wildlife, ease the burden on federal agencies, and enhance the visitation experience of those who visit the public lands in the GYE to see wildlife.

Bringing together the legal authority of the Park Service to enter into collaborative partnerships with tribes, the lessons learned and examples of both the IBMP and inter-tribal coalitions, and the progress made over recent years to cement federal-tribal partnerships offers significant promise for the expansion of shared stewardship of Yellowstone. Given the complexity and breadth of activities necessary for such stewardship, the process of developing that partnership is likely to take time; however,

⁵⁸³ See P.C. Cross et al., *Probable Causes of Increasing Brucellosis in Free-Ranging Elk of the Greater Yellowstone Ecosystem*, 20 *ECOLOGICAL APPLICATIONS* 278, 279 (2010).

⁵⁸⁴ Keiter, *supra* note 453, at 33.

⁵⁸⁵ *Id.* at 8.

⁵⁸⁶ *Id.* at 9–10, 9 n.12.

⁵⁸⁷ See, e.g., *Natural Resources*, CONFEDERATED SALISH & KOOTENAI TRIBES, <https://csktribes.org/natural-resources> [<https://perma.cc/J3SW-54YV>] (last visited Apr. 18, 2022); *Land Use Department*, SHOSHONE-BANNOCK TRIBES, <http://www.sbtribes.com/land-use/> [<https://perma.cc/9FJ9-V4D5>] (last visited Apr. 18, 2022); *Natural Resources Department Policy*, CROW TRIBE, <http://www.crow-nsn.gov/natural-resources-directory.html> [<https://perma.cc/RV8B-2ZNH>] (last visited Apr. 18, 2022).

there are additional ways in which the Park Service and Yellowstone-associated tribes can begin to build a record of success as that process evolves.

C. A Matter of Trust: Building Tribal Capacity

The history of federal-tribal relations has had many consequences for tribes across the country, both with regard to their connections to territories now owned by the United States and upon their own internal governance, culture, and exercise of sovereignty. The onslaught of federal laws, policies, and power directed at the destruction of tribes, particularly during the allotment and assimilation era of the late 19th and early 20th centuries, continues to reverberate in tribal council chambers, tribal courts, and the lives of individual tribal members.⁵⁸⁸ In the modern era of self-determination, tribes have made unprecedented progress in reversing many of these impacts, and much of that success has been built upon the use of self-determination contracts and self-governance compacts.⁵⁸⁹ Through those agreements, tribes across the country have been able to build staff, expertise, administrative functions and structures, and generally expand their capacity and capability.⁵⁹⁰ Those same opportunities are available right now for the Yellowstone-associated tribes to enhance their abilities with regard to management activities in the park.

As described above, the TSGA authorizes the use of self-governance compacts by agencies across the Department of the Interior, including the Park Service, to empower tribes to take on aspects of agency responsibility.⁵⁹¹ For non-Bureau of Indian Affairs programs, however, the availability of those compacts is limited by the discretion of each agency⁵⁹² and may further be limited by the agency's determinations about which programs are available for tribes to assume.⁵⁹³ Despite Congress's direction that agencies consider compacting with tribes to take on activities that may be of particular importance to a tribe,⁵⁹⁴ the Park Service

⁵⁸⁸ See generally Jessica A. Shoemaker, *No Sticks in my Bundle: Rethinking the Indian Land Tenure Problem*, 63 KAN. L. REV. 383 (2015) (describing the challenges of land use for Indian allottees resulting from allotment era policies); *Indian Boarding School Initiative*, INDIAN AFFAIRS, <https://www.bia.gov/service/tribal-consultations/indian-boarding-school-initiative> [<https://perma.cc/S9GY-5L56>] (last visited Apr. 18, 2022) (establishing tribal consultations regarding the legacy of the boarding school era).

⁵⁸⁹ See, e.g., Strommer & Osborne, *supra* note 435, at 48–49.

⁵⁹⁰ See Mills & Nie, *supra* note 325, at 112.

⁵⁹¹ 25 U.S.C. § 5363.

⁵⁹² See Mills & Nie, *supra* note 325, at 108–09.

⁵⁹³ See 25 U.S.C. § 5363(2) (authorizing funding agreements for programs outside of the Bureau of Indian Affairs “that are otherwise available to Indian tribes or Indians, as identified in section 5365(c) of this title,” which requires the publication of available programs in the federal register).

⁵⁹⁴ *Id.* § 5363(c) (“Each funding agreement negotiated pursuant to subsections (a) and (b) of this section may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the

does not list any programs operated within Yellowstone as available for tribes to compact.⁵⁹⁵ Importantly, however, the listing makes clear that it is “not all-inclusive,” but rather only “representative of the types of programs which may be eligible for Tribal participation through funding agreements.”⁵⁹⁶

Given the “special geographic, historical, or cultural significance” of Yellowstone and many of the programs, functions, services, and activities carried out by the Park Service, the TSGA offers an on-ramp for the building of tribal capacity and direct collaboration between the agency and Yellowstone-associated tribes interested in taking on some aspects of the Park Service’s work. Unlike the broad, cooperative management agreement previously contemplated, the Park Service could work with individual Yellowstone-associated tribes to negotiate self-governance compacts focused on discrete aspects of the agency’s work in the park, such as cultural or wildlife surveys, aspects of park planning, or fire or invasive species control.⁵⁹⁷ These smaller, confined agreements would provide opportunities to build tribal familiarity with park operations and also cultivate the trust, communication, and cooperation necessary to expand federal-tribal collaboration. Although self-governance compacting remains limited to discrete activities, which must also be carried out according to clear and applicable federal (not tribal) standards, these agreements could be an important foundation from which further partnerships could grow.⁵⁹⁸

D. Building Trust: Increased Engagement

Like compacts for specific federal programs, functions, services, and activities pursuant to the TSGA, a renewed focus by the Park Service on consultation and engagement with Yellowstone-associated tribes would also provide an important basis on which to build a new, more collaborative future for the park.

Over the last generation or so, the federal government has recommitted itself to fulfilling its trust obligations to Indian tribes through improved, more consistent, and more effective tribal consultation.⁵⁹⁹ The common impetus, however, for federal

Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”).

⁵⁹⁵ 86 Fed. Reg. 14147, 14149 (Mar. 12, 2021) (listing activities that may be available for compacting and the parks where those activities occur and further qualifying that the “list below was developed considering the proximity of an identified self-governance Tribe to a national park, monument, preserve, or recreation area and the types of programs that have components that may be suitable for administering through a self-governance funding agreement”).

⁵⁹⁶ *Id.*

⁵⁹⁷ *See, e.g., id.* (listing similar representative activities).

⁵⁹⁸ *See, e.g.,* Mills & Nie, *supra* note 325, at 110–11 (describing additional challenges and limitations of compacting for co-management activities under TSGA).

⁵⁹⁹ *See, e.g.,* Enhancing the Intergovernmental Partnership, Exec. Order No. 12875, 58 Fed. Reg. 58093 (Oct. 26, 1993); Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13084, 63 Fed. Reg. 27655 (May 14, 1998); Consultation and Coordination

outreach to engage in consultation is statutory obligations that tie such engagement to specific project proposals or reviews.⁶⁰⁰ This approach necessarily limits the nature of such engagements to consideration of an existing plan, proposal, or undertaking and, in doing so, regularly results in frustration over those limitations.⁶⁰¹ This disincentivizes true engagement on both sides of federal-tribal consultation efforts.

Despite these challenges, the federal commitment to tribal engagement has resulted in important efforts toward building relationships at Yellowstone.⁶⁰² The park's regular efforts to engage Yellowstone-associated tribes continues to provide a basis from which additional activities, interactions, and engagements can and do manifest.⁶⁰³ This foundation can also provide an important avenue toward a more collaborative approach to park management, particularly where federal-tribal engagement can be built upon existing and evolving relationships rather than discussion about a specific project or proposals. The structure of enhanced consultation and relationship building could take many forms, from empowering specific park officials (such as a tribal liaison) with the responsibility to ensure continued and regular correspondence,⁶⁰⁴ to a process and agreement committing to regular dialogue (like that embodied in the IBMP partner protocols).⁶⁰⁵ The effort should focus on continuing to build and mature existing relationships outside of the narrow confines of "formal" consultation mandated in conjunction with a particular project.⁶⁰⁶ That broader approach to tribal engagement is more consistent with the federal government's trust responsibilities and is more likely to result in substantive and meaningful understanding and consideration of tribal input, knowledge, priorities, and preferences in park decision-making.

with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments, 40 WEEKLY COMP. PRES. DOC. 2106-07 (Sept. 23, 2004); Memorandum for the Heads of Executive Departments and Agencies, 2009 DAILY COMP. PRES. DOC. (Nov. 5, 2009).

⁶⁰⁰ See, e.g., NPS MANAGEMENT POLICIES, *supra* note 495, § 1.11.2, at 19 (describing NPS consultation practices broadly but making clear the objective to provide sufficient information so that tribes "may fully evaluate the *potential impact of the proposal* . . .") (emphasis added); Wind River Interview, *supra* note 2; National Historic Preservation Act, Pub. L. No. 89-655, § 106, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C. § 306101); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C.); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1970) (codified as amended at 16 U.S.C. § 1338a, 30 U.S.C. § 191, 43 U.S.C. §§ 1701-1753, 1761-1782); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600-1614).

⁶⁰¹ See, e.g., Routel & Holth, *supra* note 426, at 448-66.

⁶⁰² Sholly & Roop Interview, *supra* note 273.

⁶⁰³ See *supra* Part III.C.

⁶⁰⁴ See Wind River Interview, *supra* note 2.

⁶⁰⁵ See *supra* Part IV.B.2.

⁶⁰⁶ See *supra* Part IV.B.2.

The process of tribal engagement around park planning activities provides a critical opportunity to consider (or reconsider) how consultation might work. As noted above, other federal agencies have sought to comprehensively address tribal engagement and matters of concern in their planning rules.⁶⁰⁷ Similarly, the Park Service's consultation policies are committed to engaging tribes in consultation "at the earliest stages of planning."⁶⁰⁸ Curiously, although the agency specifically recognizes its unique relationship with tribes, the Park Service policies regarding planning lump tribes and tribal engagement in with the agency's broader mandate for "public involvement," which includes consultation with a number of other stakeholders in addition to tribes.⁶⁰⁹ Neither the Park Service consultation nor planning policies provide specific guidance rooted in the federal government's trust responsibilities regarding the expectations of when and how agency officials should engage with tribes in the planning process.⁶¹⁰ Developing more focused and detailed consultation standards for tribal engagement around park processes would provide a firmer foundation from which the Park Service could fulfill its consultation responsibilities and offer a meaningful portal through which tribal voices would have impact on park management and decision-making.

While perhaps not considered collaborative management, a process for more meaningful engagement would nonetheless provide tribal management expertise and knowledge to benefit the park while not presenting the concerns and complexities of a more formal structure of shared authority described above.⁶¹¹ In addition, like the prospect of expanded self-governance agreements, deeper tribal involvement in and engagement with park planning processes and decisions would enhance a mutual-capacity understanding and trust between the Park Service and Yellowstone-associated tribes.

VI. CONCLUSION

Ultimately, the path to a re-indigenized Yellowstone must contemplate all these possibilities, and perhaps others, to maximize opportunities for success. Even more important than the specific strategy employed, however, is the recognition that history, law, and justice demand a new vision for what the park is and, more critically, what it can become. We can no longer afford to ignore, erase, or marginalize the history of Indigenous exclusion, absence, and disconnection that has largely

⁶⁰⁷ See Mills & Nie, *supra* note 325, at 126–32.

⁶⁰⁸ NPS MANAGEMENT POLICIES, *supra* note 495, § 1.11.2, at 19.

⁶⁰⁹ *Id.* § 2.3.1.5, at 24; see also *id.* § 2.1.3, at 22 ("The Service will actively seek out and consult with existing and potential visitors, neighbors, American Indians, other people with traditional cultural ties to park lands, scientists and scholars, concessioners, cooperating associations, gateway communities, other partners, and government agencies.").

⁶¹⁰ *But see id.* § 2.3.1, at 23 (providing that the "basic foundation" for general management planning of a particular park unit "will be developed by an interdisciplinary team, in consultation with relevant NPS offices, other federal and state agencies, local and tribal governments, other interested parties, and the general public").

⁶¹¹ See *supra* Part V.B.

defined Yellowstone's first century and half. But beyond simply acknowledging history and the legal landscape that has shaped it, the future demands a sustained effort to redraw the lines that remain a legacy of Yellowstone's past. Mindful of that legacy, our focus must be on a future where laws, policies, and practices are rooted in first principles of inherent tribal sovereignty, aboriginal title and rights, the treaty relationship, and the federal government's trust responsibility. Relying on these principles, the work to enhance and strengthen tribal connections to the park has already begun. What lies ahead, however, is the hard work of utilizing the tools described above to build a new paradigm. Re-indigenizing Yellowstone will require going beyond connections and toward a future in which tribal voices are empowered to define what Yellowstone means, not just for tribal citizens, but for the citizens of the world.



“Yellowstone Lake, Mt. Sheridan,” Yellowstone National Park, Wyoming, *in* Ansel Adams Photographs of National Parks and Monuments, 1941–1942 (National Archives and Records Administration).