CO-MANAGEMENT AND CO-STEWARDSHIP: 101

Monte Mills & Martin Nie
BRIDGES TO A NEW ERA:
AN REPORT ON THE PAST, PRESENT & POTENTIAL FUTURE OF TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS

Monte Mills & Martin Nie
BRIDGES TO A NEW ERA, PART II:
A REPORT ON THE PAST, PRESENT AND POTENTIAL
FUTURE OF TRIBAL CO-MANAGEMENT ON FEDERAL
PUBLIC LANDS IN ALASKA

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SOVEREIGN-TO-SOVEREIGN COOPERATIVE AGREEMENTS

Introduction

This repository is a work in progress based on a collaboration between The Native American Rights Fund, the Gallagher Law Library and the Native American Law Center at the University of Washington School of Law, the Bolle Center for People and Forests at the University of Montana, the Wilderness Society, the Natural Resources Defense Council, the Henry Luce Foundation, the Wilburforce Foundation, and the First Nations Development Institute. Please send any comments to uwnalc@uw.edu.

Partners

This project is completed in partnership with the Native American Rights Fund (NARF), the University of Washington School of Law, the Henry Luce Foundation, the Wilderness Society, the Bolle Center for People and Forests at the University of Montana, the Native American Law Center at the University of Washington School of Law, the Wilburforce Foundation, and First Nations Development Institute.
Approach to *Bridges* I, II, III
Order No. 3403

Subject: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters

Section 6. Tribal stewardship of lands, waters, including wildlife and its habitat. The Departments recognize that it is the policy of the United States to restore Tribal homelands to Tribal ownership and to promote Tribal stewardship and Tribal self-government. The Departments will support consolidation of tribal landholdings within reservations, including Tribal acquisition of Federal lands and private inholdings, in furtherance of this Order and consistent with applicable law.

The Departments will facilitate Tribal requests to have lands placed into trust status, including for conservation, protection of sacred sites, cultural or religious use, or exercise of subsistence or treaty reserved rights, in furtherance of this Order and consistent with applicable law.
(SOME) LAND BACK...SORT OF: THE TRANSFER OF FEDERAL PUBLIC LANDS TO INDIAN TRIBES SINCE 1970

ABSTRACT

Federal public lands in the United States were carved from the territories of Native Nations and, in nearly every instance, required that the United States extinguish pre-existing aboriginal title. Following acquisition of these lands, the federal government pursued various strategies for them, including disposal to states and private parties, managing lands to allow for multiple uses, and conservation or protection. After over a century of such varied approaches, the modern public landscape is a complex milieu of public and private interests, laws and policies, and patchwork ownership patterns. This complexity depends on—and begins with—the history of Indigenous dispossession but subsequent developments have created additional layers of complication.

Recently, a broad social movement, captured succinctly by the social media hashtag “#Landback” and including some American Indian tribes, has begun calling for the restoration of the nation’s lands to Native ownership, including the transfer of all public lands to tribal hands. This article aims to contextualize and assess the more recent history of the transfer of federal public lands to Indian tribes, which has often taken the form of the United States transferring such lands into trust ownership for the benefit of a particular tribe. The article is the first comprehensive collection and analysis of 44 statutes enacted by Congress from 1970 to 2020 that transfer ownership interests in public lands to federally-recognized Indian tribes. These statutes are bookended by the return of Blue Lake to Taos Pueblo in New Mexico (1970) and the return of the National Bison Range to the Confederated Salish and Kootenai Tribes in Montana (2020). Analysis of these laws surfaces common themes and provisions related to the political dynamics of such congressional actions and the terms of post-transfer tribal or federal management. In particular, the article...
“Bridges” to Tribal Co-Management/Stewardship
“Bridges” to Tribal Co-Management/Stewardship

Using existing legal authorities & processes as bridge to co-management

Strategic links
- Public lands planning
- Enhanced tribal consultation
- NHPA Traditional Cultural Districts
- 638 Contracting/Compacting
BADGER-TWO MEDICINE TRADITIONAL CULTURAL DISTRICT,
HELENA-LEWIS AND CLARK NATIONAL FOREST, MONTANA

PROPOSAL TO ESTABLISH PERMANENT PROTECTIONS

December 5th, 2017

BLACKFEET TRIBAL HISTORIC PRESERVATION OFFICE
BLACKFEET TRIBAL BUSINESS COUNCIL
Plan Components – Badger Two Medicine (BTM)

The area commonly known as the Badger Two Medicine encompasses approximately 129,591 acres at the northern end of the Rocky Mountain Range GA. The majority of this area is located within the Badger-Two Medicine Traditional Cultural District, an area acknowledged for its significance to the oral traditions and culture practices of the Blackfeet people, who have used the lands for traditional purposes for generations and continue to value the area as important to maintaining their community’s continuing cultural identity. This area also falls within the 1895 Agreement with the Indians of the Blackfeet Indian Reservation in Montana, which states that the Blackfeet Nation will retain rights to extract timber, fish, animals, and other resources in the Badger Two Medicine area.
Badger Two Medicine is a sacred land, a cultural touchstone, a repository of heritage, a living cultural landscape, a refuge, a hunting ground, a critical ecosystem, a habitat linkage between protected lands, a wildlife sanctuary, a place of solitude, a refuge for wild nature, an important part of both tribal and non-tribal community values. It is important to the people who rely on it, critical to the wild nature that depends upon it, and has an inherent value and power of its own.
Management activities in the [B2M] shall be conducted in close consultation with the Blackfeet Nation to fulfill treaty obligations, and the federal Indian trust responsibility. Project and activity authorizations shall be protected and honor Blackfeet reserved rights and sacred land. The uses of this area must be compatible with desired conditions and compatibility shall be determined through government to government consultation.
Tribal Co-Management and Co-Stewardship: 101
Tribal Co-Management Is Not:

- The transfer of federal public lands into *tribal (trust) ownership*.

- A *complete and unqualified delegation of authority* to tribes.

- An *abdication* of the federal government’s duty to fulfill the purposes and objectives of federal public lands and environmental laws.

- An *open-ended and discretionary framework* that provides for no political or legal accountability.

- A *one-sided relationship* in which a federal agency dictates the terms on which tribal engagement happens.

- A *restatement or repackaging of existing obligations* and consultation processes that place tribes in a defensive and reaction position.
In contrast to traditional methods of engagement placing Tribes in defensive and reactive positions.
“Co-Management” of marine mammals and migratory birds in Alaska
Marine Mammal Cooperative Agreements in Alaska

16 U.S.C. 1388

Sec. 119. (a) In General. — The Secretary may enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.

(b) Grants. — Agreements entered into under this section may include grants to Alaska Native organizations for, among other purposes—

(1) collecting and analyzing data on marine mammal populations;

(2) monitoring the harvest of marine mammals for subsistence use;

(3) participating in marine mammal research conducted by the Federal Government, States, academic institutions, and private organizations; and

(4) developing marine mammal co-management structures with Federal and State agencies.
Indigenous People’s Council for Marine Mammals

“Indigenous Peoples for Wise Use of Renewable Natural Resources”
Our Mission: To identify and address marine mammal issues of common concern.

IPCoMM Statement on Co-Stewardship

10-26-2023

IPCoMM is the statewide umbrella organization for Alaska Native Organizations (ANOs) co-managing marine mammals with the National Marine Fisheries Service and U.S. Fish and Wildlife Service, and speaks with a unified voice when addressing marine mammal issues of common concern throughout Alaska. IPCoMM is now raising that unified voice to express its concerns with “co-stewardship”.

“Co-stewardship” undermines existing marine mammal co-management relationships. Federal Agencies co-manage marine mammals with ANO’s pursuant to legal authority requiring the delegation of Federal decision making authority through the Marine Mammal Protection Act (MMPA). Despite this legal obligation, existing co-management relationships and programs are already severely underfunded and understaffed. Co-stewardship will ensure the continued underfunding of co-management by reallocating available financial resources towards co-stewardship initiatives. It will also reduce the amount of time that agency personnel are able to focus on existing co-management relationships and improving those relationships.
Roots of Tribal Co-Management in U.S.
Sohappy v. Smith (1969)

“The treaty Indians, having an absolute right to that fishery, are entitled to a fair share of the fish produced by the Columbia River system.”

“Both the state and the tribes should be encouraged to pursue such a cooperative approach.”

-A shared allocation with shared governance

-Restrictions placed on State management; “qualifications and conditions” imposed on Tribes as precondition for tribal regulation of fishery
The purpose of this Management Agreement is to provide a framework within which the Parties may exercise their sovereign powers in a coordinated and systematic manner in order to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-treaty fisheries.

*Sohappy v. Smith* (1969) & *U.S. v. Washington* (1974) compel a more cooperative approach—*the sharing of sovereign authority and responsibility as the defining feature of Tribal Co-Management*
ORDER NO. 3342

Subject: Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources

Sec. 1 Purpose. The purposes of this Order are to: a) encourage cooperative management agreements and other collaborative partnerships between Department of the Interior (Department) resource managers and tribes that will further shared interests in the management of Federal lands and resources; and b) establish a process and provide institutional support to ensure that land and resource managers evaluate and develop opportunities to further establish partnerships that benefit tribes and Federal agencies.

(3) This Order focuses on developing cooperative and collaborative opportunities with tribes and does not address "co-management" which the Department defines as a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decisionmaking or that makes co-management otherwise legally necessary. For example, in some instances, such as management of the salmon harvest in the Pacific Northwest, co-management has been established by law.
MEMORANDUM

To: Assistant Secretaries and Bureau Heads
From: Solicitor

Subject: Inherently Federal Functions under the Tribal Self-Governance Act

This memorandum analyzes and provides general guidance on the meaning of the term "inherently Federal function" as used in Title IV of the Indian Self-Determination and Education Assistance Act (ISDEA), as added by Pub. L. 103-413, Title II, 108 Stat. 4250 (Oct. 25, 1994) ("Tribal Self-Governance Act").

This memorandum cannot, and is not intended to, provide a definitive answer regarding how the inherently Federal function provision applies to a tribal request to perform a specific activity under an annual funding agreement. Each request must be individually analyzed in terms of the specific function to be performed by a tribe, the applicable Federal activity at issue, and the amount of authority the Department. This memorandum outline an agency must conduct, in consultation with a tribe when a tribe submits such a request.

I. INTRODUCTION

A. Impact on Previous Opinions

This opinion supersedes the December 16, 1994 opinion of the Associate Solicitor for General Law on this subject. The Associate Solicitor had relied upon a 1990 opinion of the Department of Justice's Office of Legal Counsel which concluded that the Appointments Clause of the U.S. Constitution prohibits assigning certain Federal functions to non-officers of the United States. On September 25, 1996, the Office of Legal Counsel modified its previous view to conclude that the Appointments Clause (which prohibits the delegation of Federal functions to non-Federal parties) does not apply to the delegation of Federal functions. See also OLC, "The Constitutional Separation of Powers between the President and Congress," 1996, at 20-28. The recent OLC opinions require, in turn, a new analysis for determining whether a function is inherently Federal.
The Subdelegation Doctrine!
C. The Lawful Delegation to the Tribes

Collaborative Management does mean that President Obama is delegating some authority over the public lands to the Tribes, but it is not a delegation of complete authority: the Tribes and agency officials will be working together as equals to make joint decisions. The unlawful delegation doctrine addresses cooperative efforts between Federal agencies and non-Federal entities. In a case where the National Park Service delegated essentially all decision making over the Niobrara National Scenic River, the court found that "NPS cannot, under the unlawful
Enter SO 3403

Tribal “Co-Stewardship”

-Inclusive, umbrella term covering a wide scope of cooperative and collaborative relationships and models of shared decision-making.

-May arise from, and compliment tribal consultation, but consultation does not by itself constitute co-stewardship.

-Pro-active and affirmative direction to federal public land agencies.

Order No. 3403

Subject: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters

Section 1. Purpose. This Secretary’s Order is issued by the Secretary of Agriculture and the Secretary of the Interior (Secretaries) to ensure that the Department of Agriculture and the Department of the Interior (Departments) and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes including the Native Hawaiian Community, that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States’ unique trust obligation to federally recognized Indian Tribes and their citizens.

The Departments are responsible for the management of millions of acres of Federal lands and waters that were previously owned and managed by Indian Tribes. Those lands and waters contain cultural and natural resources of significance and value to Indian Tribes and their citizens, including sacred religious sites, burial sites, wildlife, and sources of indigenous foods and medicines. In addition, many of those lands and waters lie within areas where Indian Tribes have reserved the right to hunt, fish, gather, and pray pursuant to ratified treaties and agreements with the United States.

In managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes. The Departments recognize and affirm that the United States’ trust and treaty obligations are an integral part of each Department’s responsibilities in managing Federal lands. Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities and direction for recreation, range, timber, energy production, and other uses, and conservation of wilderness, refuges, watersheds, wildlife habitat, and other values. Further, in honoring these obligations, the Departments will benefit by incorporating Tribal expertise and Indigenous knowledge into Federal land and resources management.
Tribal Co-Stewardship

-One tool used to achieve the nation’s treaty and trust obligations to tribes, safeguard tribal interests, and to integrate these responsibilities with the laws governing public lands.

-A platform to build more meaningful relationships and models of shared decision-making amongst tribes and federal public land agencies.

-Applied across a broad spectrum of decisions and management actions, from higher-level land planning to lower-level projects and management actions.
§3 Principles of Implementation

To “address matters of mutual interest”

To ensure that “tribes can shape the direction of management,” “play an integral role in decision making,” and to “develop appropriate structures to implement agreements”

To “consider Tribal expertise and/or indigenous knowledge….particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.”
Co-Stewardship Agreements

To “make agreements with Indian Tribes to collaborate in the co-stewardship of Federal lands and waters under the Departments’ jurisdiction, including for wildlife and its habitat.” §1(b)

“Promote the use of collaborative agreements....” §5(a)

“Use agreements as a tool to foster cooperation on protection of treaty, subsistence, and religious rights....” §5(d)
“Co-management narrowly refers to collaborative or cooperative stewardship arrangements that are undertaken pursuant to Federal authority that requires the delegation of some aspect of Federal decision-making or that make co-management otherwise legally necessary, such as management of the salmon harvest in the Pacific Northwest, where co-management has been established by law.”
“[S]ub-delegations involving Tribes may be considered differently than those with private entities.”

“Maintaining final reviewing authority does not prevent other forms of involvement by outside parties in an agency’s decision-making processes.”

“Where Congress gives an agency broad discretion to permit certain activities, the agency may condition its grants on decisions of state, local or tribal government, provided there is a reasonable connection between the two.”
“...Bureaus retain significant latitude to use agreements with outside partners to support their governmental operations without inappropriate transfers of agency authority.”
September 13, 2022

In Reply Refer To:
1118. 8160 (HQ-100) P

EMS TRANSMISSION 09/13/2022
Permanent Instruction Memorandum No. 2022-011

To: BLM State Directors

From: Director, Bureau of Land Management
Principal Deputy Director, Bureau of Land Management

Subject: Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes
Pursuant to Secretary’s Order 3403
“The BLM considers co-stewardship to refer to a broad range of working relationships with Indian and Alaska Native Tribes (as defined in 25 U.S.C. 5130(2) to include all Tribes in Alaska), as well as Tribal consortia and Tribally-led entities exercising the delegated authority of federally recognized Tribes.”

“Co-stewardship can include co-management, collaborative and cooperative management, and Tribally-led stewardship, and can be implemented through cooperative agreements, memoranda of understanding, self-governance agreements (including annual funding agreements), and other mechanisms...”
Tribal Co-Stewardship
Broad Umbrella to Cover:

- Conservation, preservation, management
- Federal lands, waters, wildlife
- From programmatic, plan to project
- Collaboration, cooperation
- Cooperative agreements
- Self-governance agreements (& AFAs)
- Tribal-led stewardship
- MOUs/MOAs
- Use of indigenous knowledge
- Deference to tribal proposals, etc.
- And more
Tribal Co-Stewardship:

- Conservation, preservation, management
- Federal lands, waters, wildlife
- From programmatic, plan to project
- Collaboration, cooperation
- Cooperative agreements
- Self-governance agreements (& AFAs)
- Tribal-led stewardship
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- Use of indigenous knowledge
- Deference to tribal proposals, etc.
- And more

Bounded by Federal public land, resources, environmental, administrative law

Bounded by Subdelegation doctrine
Tribal Co-Management is:

• *Sharing authority and responsibility* among federal and tribal sovereigns.

• Based on a set of *core principles* that can be shaped into creative and accountable ways of governing that address different issues and work in different places.

• An approach in line with the *cooperative federalism* provisions already provided in federal public land laws and extended to State governments.

• *Compatible with the statutory missions and mandates* provided to federal public land agencies by Congress.

• A way to substantively integrate the federal government’s *trust obligation* into the practice of federal public lands management.