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Ethnic Cleansing and America's Creation of National Parks

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Ethnic Cleansing and America's Creation of National Parks

Isaac Kantor[1]

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> "Once we were in our own country and we were seldom hungry, for then the two-leggeds and the four-leggeds lived together like relatives . . . [b]ut the [Americans] came, and they have made little islands for us and other little islands for the four-leggeds, and always these islands are becoming smaller . . . ."
>
> -Black Elk [2]

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1. J.D. expected May 2007 University of Montana School of Law, Missoula, Montana. I would like to thank Professor Raymond Cross for his guidance and encouragement as I wrote this article. I also thank my wife, Rachel, for her support and understanding throughout law school. I dedicate this article to my children, Gabriel and Mayana.

2. John G. Neihardt, *Black Elk Speaks: Being the Life Story of a Holy Man of the Oglala Sioux* 9 (University of Nebraska Press 1988).

I. INTRODUCTION

A. *A Personal Perspective in a Created Landscape*

Glacier National Park is a place where pure snowmelt gushes over rocks green and maroon; its dark forests of conifers are full of bird and animal sound and above the tree line thick flower beds grow beside snow banks. When backpacking there, I lie down and listen through thin tent walls for grizzlies in the night. Glacier's forests are not logged. Gravel pits do not scar its mountains. In a memory predating my second birthday I ride in a green backpack on a parent's back down a forested Glacier trail. I am told I later fell asleep, mouth open to a light rain. The mountains of Glacier National Park are the backbone of the world to the Blackfeet people; in many ways those mountains hold up the sky of my own world.

Glacier and many other national parks, are built upon an illusion. They seem to offer us a rare chance to experience the continent as it was, to set eyes on a vista unspoiled by human activity. This uninhabited nature is a recent construction. The untold story behind our unspoiled views and virgin forests is this: these landscapes were inhabited, their features named, their forests utilized, their plants harvested and animals hunted. Native Americans have a history in our national parks measured in millennia. They were forcibly removed, and later treaty rights to traditional use such as hunting and fishing were erased, often without acknowledgment or compensation. Immediately after these removals, the parks were advertised as a showcase of uninhabited America, nature's handiwork unspoiled.

Our national parks remain the proud symbols of American beauty they were intended to be, but attitudes toward Native American claims have changed. Treaty rights which have lain dormant for over a century are being recognized. Executive mandates recognize areas of spiritual and cultural significance to tribes, setting a policy of recognition, access and protection.

Native American rights in national parks present a dilemma. These lands were wrongfully taken, and recognition of rights owing to treaties and the existence of significant cultural and religious sites or traditional use is the most equitable recourse. Yet the continent has changed greatly since those nineteenth century treaties. The ecosystems found in the parks are fragmented or non-existent beyond their borders. The parks are the best – sometimes only – habitat available for many species. Beset by increasing population and recreational pressure, balancing of ecological and recreational needs is a great challenge for the national park system. What happens if a new set of interests and uses is placed upon the parks? Are these interests to be managerial, or may they be appropriative as well? What if trees are cut for schools or housing, or animals are killed for subsistence? Can the modern national parks withstand the pressure of rightful use by Native Americans and remain reservoirs of wildness and ecological integrity? These are necessary questions I do not fully answer here.

Part one of this essay traces the path of the national park ideal, from an Indian dominated wilderness to that of an uninhabited wilderness. This large, fundamental shift in the paradigm of the national park made dispossession of national park lands from Indian peoples seem necessary. Unfortunately, the fallacy of "unpeopled wilderness" is codified in two of America's most prominent pieces of conservation legislation, the National Park Service Organic Act of 1916[3] and the Wilderness Act of 1964.[4] Part two explores this dispossession via three case studies: Yellowstone, Glacier and Mesa Verde National Parks. Arranged in chronological order, these cases show the changing methods of dispossessing Indian peoples in the late nineteenth and early twentieth centuries. Part three briefly investigates how Indian rights in the national parks are dealt with in contemporary times. Recent statutes require consideration of Indian issues, and consultation with tribes. These statutes have lead to historic agreements. However, at parks like Mesa Verde and Glacier, unrecognized Indian rights, and anger and mistrust of the park service, remain. Part four of this essay explores the very different management of many Alaskan national parks, where subsistence use by native peoples is often allowed. This very different approach is due to the late date of these parks' creation, and the vast and remote character of the lands within them. Finally, I conclude that though we have begun to move in the right direction, a return to the original, inhabited nature of national parks, at least in most locations, is not possible. This is in large part due to the relatively small size of the parks, the developed character of the continent, and the potential for conflict with recreational use interests.

B. *The Unpeopled Fallacy of the National Park Service Organic Act of 1916 and the Wilderness Act of 1964*

My experience of a landscape preserved from human development and habitation in Glacier is consistent with the purpose of the National Park Service Organic Act of 1916 which created the National Park Service (NPS). It states that the "fundamental purpose" of the national parks and monuments "is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of . . . future generations."[5] I strongly agree with the objectives of this statement as management goals, and those of us who enjoy America's wonderful national park system have this Act to thank. Reading on, there are provisions for additions to the national park system,[6] for law enforce-

3. 16 U.S.C. §§ 1-18 (2000).
4. 16 U.S.C. §§ 1131-1136 (2000).
5. 16 U.S.C. § 1.
6. *Id.* at § 1a–5.

ment,[7] timber sales,[8] airports,[9] and promotion of tourist travel,[10] among many others.

The American Indians who historically inhabited the lands within the national park system for millennia receive no concession, acknowledgment or mention within this Act. A read of the National Park Service Organic Act reveals not the slightest clue that the national parks were ever anything other than a pleasuring ground for the American public. As I will explain in the following two sections, this oversight is patently false and likely deliberate.

Indigenous peoples fare no better in another great conservation act, the Wilderness Act of 1964. This Act opens with "[i]n order to assure that an increasing population . . . does not occupy and modify all areas within the United States . . . leaving no lands designated for preservation and protection in their natural condition . . ."[11] clearly implying that there were lands historically unoccupied and unmodified. The suggestion of an unpeopled landscape is stronger still in the most famous language in this Act, the definition of wilderness. "A wilderness . . . is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[12] Further, wilderness is "an area of undeveloped land retaining its primeval character and influence, without permanent improvements or human habitation." [13] This preservation of a "primeval" landscape devoid of "human habitation" completely disregards a long history of indigenous use. The language of this act is the very definition of an unpeopled landscape.

Though there are provisions mentioning, and to some extent preserving such activities as mining,[14] the American Indian peoples who have a long history of occupation of the affected lands go completely unmentioned.

C. *George Catlin's Original National Park Featured Native Americans*

The question of Native American rights in national parks cannot be considered without first developing a historical context. Perhaps the logical beginning point is the genesis of federal Indian law and public lands law, a single opinion written by Chief Justice John Marshall, *Johnson v. M'Intosh*.[15] This opinion established that Native Americans had incomplete title to land they inhabited for generations. Theirs was a title of occupancy only, and due consideration; ultimately, though, the European dis-

7. *Id.* at § 1a–6.
8. *Id.* at § 3.
9. *Id.* at § 7a.
10. *Id.* at § 18.
11. 16 U.S.C. § 1131(a).
12. *Id.* at § 1131(c).
13. *Id.*
14. *Id.* at § 1133(d)(3).
15. 21 U.S. 543 (1823).

coverers had dominion over the land, and the power to grant it away irrespective of the Indian occupancy.[16] Indian title was also incomplete in that it was not freely alienable.[17] The government had the exclusive power to deal with the tribes for their land.[18] This conclusion lead necessarily to the consequence that the government would subsequently own Indian lands, and have the burden of managing and disposing of the vast public domain created when it extinguished Indian title. Thus the groundwork was laid for two very different but oddly related domains: the national parks and the Indian reservation system. The process which would lead to Native Americans and national parks occupying separate "islands" on the American landscape took about a century following *Johnson v. M'Intosh* to complete.

At about the same time *Johnson v. M'Intosh* was written the first articulation of the 'national park' theme was expressed by western artist George Catlin. Catlin was so impressed with what he saw on the Great Plains that he suggested some of it be set aside, to preserve a snapshot of the American West in the early nineteenth century. He wanted to preserve the landscape in its entirety, including the animals and people living upon it. Therefore, he wished for the creation of a "'nation's Park containing man and beast, in all the wild and freshness of their nature's beauty!'"[19] This idea was echoed by other thinkers, writers and explorers of the day. In 1837, Washington Irving called for a preserve which was "'an immense belt of rocky mountains and volcanic plains, several hundred miles in width,'" which "'must ever remain an irreclaimable wilderness, intervening between the abodes of civilization, and affording a last refuge to the Indian.'"[20] Other notable persons expressing similar views include John James Audobon and Osborne Russel.[21]

Conspicuously absent from these observations is the idea that the buffalo and elk and American Indians could co-exist with white settlement. These writers seem to have taken it as a foregone conclusion that if non-Indians used an area, these other entities would be extinguished. Thus, preserving the West necessitated drawing lines on the landscape which would exclude non-Indian settlement and use.

Henry David Thoreau, likely the most influential nature writer in American history, was the last advocate of national preserves which included native peoples. He greatly admired "'Indian wisdom'" as it related to the

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16. *Id.* at 574. Marshall seemed to recognize the unfairness of this result; his explanation of his conclusion is apologetic in places, and his rendering of its justification is at times sarcastic. *See id.* at 589–90.

17. *Id.*

18. *Id.* at 603.

19. Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* 10 (Oxford U. Press 1999).

20. *Id.* at 17.

21. *Id.* at 18–19. Russel in particular was moved by the "'perfectly contented and happy'" Shoshone in their home of "'wild romantic splendor.'" *Id.*

landscape, and his national preserve ideal included "'the bear and panther, and some even of the hunter race . . . .'"[22] His ideas about wilderness outlived him and continue to inspire readers and provoke commentary. Unfortunately, his views of Native Americans in wilderness did not.[23]

D. *The Great Shift to John Muir's "Uninhabited Wilderness"*

Thinking had changed by the time the parks began to be created, beginning with Yellowstone in 1872. No longer were the parks to preserve an inhabited landscape. Rather, they were a pleasuring ground for the people, a preserved landscape which had not known the hand of humanity.

Environmentalists and writers of this later time period conceived of people and nature as very separate, perhaps even fundamentally incompatible. The excesses of exploitation had reached much of the continent. Writers such as John Muir perhaps very naturally felt that preservation of nature and human occupation were incompatible.

Muir's writings are an excellent example of how far removed Native Americans had become from their landscapes for early twentieth century preservationists. When he visited what would become Glacier Bay National Park, he saw his native guides as ignorant and superstitious, and he contrasted the glaciers and mountains as "majestic," and "baptised" by sunbeams.[24] Muir believed humans should connect with nature spiritually though observation.[25] The sustenance Muir sought in wild lands was strictly spiritual. He felt very differently about his guide's hunting. Muir would sometimes deliberately rock the canoe as they aimed their rifles to cause them to miss shots at deer and ducks.[26] Muir's influence may be part of the reason that Glacier Bay National Park does not allow subsistence use by Native Alaskans or locals. Alaskan national parks established later do allow for such use.

Muir's view of native peoples around Yosemite was nothing short of disdainful. In his lengthy essay, *The Mountains of California*, Muir glowingly describes geology, flora and fauna. Of the sixteen chapters in the essay, none are devoted to the resident American Indians. Several encounters are described, though. In the most telling, Muir, having climbed a pass where "in every direction the landscape stretched sublimely away in fresh wilderness – a manuscript written by the hand of Nature alone," encounters a group of Mono Indians traveling the same trail.[27] He notes both men and women "persistently" begged for whiskey and tobacco and "were mostly

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22. *Id.* at 22.
23. *Id.* at 23.
24. Theodore Catton, *Inhabited Wilderness: Indians, Eskimos and National Parks in Alaska* 8–9 (U. of N. Mex. Press 1997).
25. *Id.* at 8.
26. *Id.* at 9.
27. John Muir, *Nature Writings* 372 (William Cronon ed., The Library of America 1997).

ugly, and some of them altogether hideous," having " no right place in the landscape[.]"[28]

Muir's view of Native Americans is a sad blind spot in an otherwise thoughtful writer, and he was not alone in his beliefs. Samuel Bowles, an influential advocate of both the national park system and Indian reservations, saw the two as incompatible. Spectacular landscapes were to be "'the pleasure ground and health home of the nation.'"[29] In contrast, the Indians he advocated removing from these places were doomed to extinction, and thus, the reservations would "smooth and make decent the pathway to [the Indians'] grave."[30] It was in this mindset that Indian removal from the West's "wildest" landscapes, and establishing those places as national parks was justified.

Despite late 19th and early 20th century writers' attempts to justify Indian removal on the grounds of manifest destiny or an ideal of pure wilderness being uninhabited, considerable effort was put into the argument that many of the western parks had never been used by Native Americans, and therefore no removal was taking place. This was most notable in Yellowstone, where it was claimed the Native peoples had never used the park due to superstitious fear of its geothermal features.[31] This ran counter to considerable archeological evidence, some of it still visible today. Similarly, American Indians were supposed not to have used the area near Mt. Rainier, and the interior of the Olympic Peninsula, due to unspecified "fear of spirits."[32] The idea park lands were useless to Indians can even be found in the cession negotiations between the government and the Blackfeet tribe over eastern Glacier National Park.[33]

These are but a few examples. Similar excuses were used in such premier parks as Zion and Banff.[34] Always, these claims rested on thin and vague grounds of Indian superstition or "awe", and always plain evidence to the contrary existed.[35]

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28. *Id.* at 372, 373.

29. Spence, *supra* n. 19, at 26.

30. *Id.* at 27.

31. Robert H. Keller & Michael F. Turek, *American Indians and National Parks* 24 (U. of Ariz. Press 1998). Yellowstone's first superintendent, Philetus Norris, quoted a Shoshone as saying geysers were "heap, heap bad," and claimed other tribes also held geysers in "superstitious awe," apparently without foundation. *Id.*

32. *Id.* It is noted that more Indian history was in a series of stories about Mount Rainier published in 1910 than was available to a park visitor in 1960. *Id.* at 25.

33. *U.S. v. Peterson*, 121 F. Supp. 2d 1309, 1311 (D. Mont. 2000). When negotiating with the Blackfeet, the government agent noted "[the mountains] never furnished you houses; never fed your cattle nor fed you and clothed you ... the mountains offer you nothing but snow and ice and rock." *Id.*

34. Keller & Turek, *supra* n. 31, at 24.

35. *Id.* at 23. Philetus Norris wanted military protection from Indians even though he claimed they did not use the park.

E. *Why Muir's Vision Prevailed*

The magnitude of the change of paradigms from Catlin's wilderness park inhabited by American Indians to the austere and pure uninhabited wilderness of Muir cannot be overemphasized. This shift de-peopled the landscape, not just in fact, but more incredibly, in the minds of the general population. In less than a century, conservation advocates had gone from viewing the Indian peoples inhabiting lands they wished to save as a critical, even admirable component to viewing Indian inhabitants as a blight on the landscape of true wilderness.

Though the existence of this drastic change of paradigms is readily apparent from writings of Catlin and Muir, the more difficult question is why Muir's perspective arose and prevailed in the most prominent pieces of American conservation legislation. The answer may be that a number of factors in the late nineteenth century contributed to increased racism against American Indians. After several decades of relative peace, armed conflict between western Indian tribes and American settlers and the United States Army became frequent from the mid-1850's through the 1870's.[36]

This increase in hostilities may be due to the fact that American westward expansion was accelerating. Manifest destiny ideology, combined with physical migration of settlers, meant western lands were no longer a distant realm. The goal was to people the West with non-Indian settlers. Western tribes stood in the way, and this caused a departure from the favorable view of western Indian tribes held by Catlin and others. "No longer picturesque and 'noble' Indians who freely roamed through a distant region, the western tribes now lived on coveted lands within the national domain and regressed into 'treacherous, blood thirsty savages.'"[37] There was no longer a place for American Indians in America, even in the most remote reaches of the West, and Catlin's idea for a peopled national park was doomed.

The depth of racism toward American Indians during this period may be seen in an action by President Ulysses S. Grant. In 1874, two years after signing Yellowstone National Park into existence, Grant pocket vetoed a Congressional bill outlawing bison killing.[38] Grant would have seen the remnants of the bison herds hunted to extinction, so long as the western tribes would starve as a result. Given this context, it comes as no surprise that Indian tribes received no consideration when Yellowstone was created.

I have often heard it said that wilderness does not feel as wild without grizzly bears. I can personally attest that the dark of the night forest, or the blind bend in the overgrown trail, feel much different when one knows a

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36. Spence, *supra* n. 19, at 29.

37. *Id.* at 30.

38. Reed F. Noss & Allen Y. Cooperrider, *Saving Nature's Legacy: Protecting and Restoring Biodiversity* 25 (Island Press 1994).

grizzly may wait there unseen. How different, then, does wilderness feel without a human history? With its landscape a de-animated figment of the imagination? Does the Wilderness Act of 1964, in stating wilderness is a place "where man himself is a visitor who does not remain,"[39] codify a historic fallacy, or merely recognize a modern condition?

II. REMOVING AMERICAN INDIANS FROM THE NATIONAL PARKS

At the outset, I note that every national park was once Native American land, and each instance of dispossession is unique. Here, as abbreviated examples, are three of those instances.

A. *Yellowstone National Park*

Our (and the world's) first national park was created by President Ulysses S. Grant in 1872. This early date makes Yellowstone unique as it predates the last of the armed conflicts between Indian peoples and the military in the American West. Yellowstone received national attention in 1877 when the Nez Perce, led by Chief Joseph, crossed the park, pursued by 2,000 soldiers.[40] The Nez Perce accosted several tourist parties for supplies.[41] The Nez Perce hoped to reach Canada, but fell just short, surrendering in Montana's Bear's Paw mountains in October 1877.

Crow,[42] Shoshone, Bannock and Sheep Eater peoples frequented Yellowstone as they long had during the park's early years.[43] Because these tribes had conflicts with white settlers and the military, mostly outside of Yellowstone, for the first decade of the park's life the early park headquarters resembled a military fort.[44] Fear of Indians, or more specifically, fear of the effect word of Indian troubles would have on tourism, seems to have been a constant concern during Yellowstone's first years.[45]

A complete reversal of Catlin's view of Indians in the wilderness had occurred by this time. Secretary of the Interior Lucius Lamar felt the new national parks should be managed to preserve "wilderness," in his mind defined as uncut forests and plentiful game animals.[46] Because Indians hunted animals and set fires, preservationists came to view them as incapable of appreciating the natural world.[47] The last of Yellowstone's human inhabitant's, a band of Sheep Eaters, were removed in 1879.[48] However,

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39. 16 U.S.C. § 1131(c).
40. Spence, *supra* n.19, at 56.
41. *Id.*
42. The original Crow reservation included land which is today the northeastern portion of Yellowstone National Park. *Id.* at 59.
43. *Id.* at 58.
44. *Id.* at 57.
45. *Id.* at 56, 57.
46. *Id.* at 61.
47. *Id.* at 62.
48. *Id.* at 58.

bands from various tribes continued to use the park seasonally. Early Yellowstone managers saw what the Indians did in the park as undermining everything the park was meant to accomplish. According to Lamar himself, the park was to preserve an Eden, "'in as nearly the condition in which we found [it] as possible.'"[49] This meant fire suppression and no hunting.

Thus, an obsession with halting Indian use of Yellowstone began, despite authorization of much of this use by off-reservation treaty rights. The fact that Native hunters had little to do with the dramatic declines in wildlife populations of the West seems lost on early park management. The incredible irony[50] that early managers were disregarding an integral part of the idealized Eden early white explorers found, its human inhabitants, seems overlooked by people trying to preserve part of what those explorers experienced.[51]

Both forcible and legal efforts were pursued to end Indian use of Yellowstone. In July of 1895, when pressure from park officials and Indian agents proved inadequate, a Jackson Hole area lawman, William Manning, decided on a violent approach to "'get the matter to the courts.'"[52] With a posse of twenty-six, he discovered a Bannock encampment, and confiscated their tipis, saddles, horses, rifles, and elk meat. The Bannocks were arrested and marched out at gunpoint for violating Wyoming game laws.[53] As the procession neared a heavily forested area, Manning told his posse to load their weapons.[54] Some of the Bannock bolted in fear; an old man was killed and two children lost.[55]

Tribal leaders were outraged. However, meetings with government officials, combined with promises to punish crimes by whites, caused them to agree to pursue legal settlement of their hunting rights. A Bannock leader, Race Horse, killed elk near Jackson Hole and turned himself in for violating Wyoming game laws.[56] This test case was heard by Judge John Riner for the U.S. District Court. On November 21, 1895, he concluded that the treaty rights (to off-reservation hunting) of 1868 trumped the laws of Wyoming, which became a state in 1890.[57]

The Bannock and Shoshone court victory was short lived. On May 25, 1896, the Supreme Court reversed Judge Riner in a decision titled *Ward v.*

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49. *Id.* at 61.

50. Speaking of irony, even as managers struggled to exclude native use, an early park brochure reported that superstitious fear of the park had kept it historically free of the "red man's yell." *Id.* at 60.

51. In fact, what Yellowstone was creating was a profoundly unnatural place. Fire suppression in fire dependent forests, and predator elimination greatly changed how much of the West, including Yellowstone, functioned ecologically as compared to historic times. The effects of a century of fire suppression is currently one of the most challenging issues concerning land managers across the West.

52. Spence, *supra* n.19, at 66.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 67.

57. *Id.*

Race Horse.[58] The court found that Congress had, and could, unilaterally terminate the treaty rights in question by admitting Wyoming as a state.[59] The Court noted the creation of Yellowstone in 1872 as an illustration of Congress' authority to nullify hunting rights promised by treaty, a "remarkable acknowledgment of the intimate link between national parks and native dispossession."[60]

While limited Indian use of Yellowstone continued in secret, the *Racehorse* decision had ended any chance Indian peoples had to exercise their treaty hunting rights in the park. America had created its first uninhabited wilderness. The process had been complicated by the fact that Indian use was entirely ignored when the park was created, and because tribes were not as confined to their reservations as they would be just a few years later. Extinguishing Indian use in subsequent national parks would be simpler. Yellowstone became the template for the national park, and that template did not include recognition of treaty rights.

B. *Glacier National Park*

Befitting the powerful tribe in Montana, the original Blackfeet reservation covered two-thirds of that part of the state east of the continental divide.[61] As disease and the decimation of the bison weakened the Blackfeet (actually three semi-independent tribes, the Piegan, Blood, and Northern Blackfeet),[62] their reservation, like many others, was reduced in size. By 1888, it consisted of the current reservation plus the eastern half of modern Glacier National Park.[63]

Even this greatly reduced reservation was not let alone for long. The government suspected the region's mountains contained mineral wealth. In 1895, the United States dispatched three commissioners, led by George Bird Grinnel, to negotiate the purchase of the mountain lands on the western side of the reservation.[64] The commissioners offered the small sum of one million dollars.[65] The Blackfeet did not want to sell. However, the

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58. 163 U.S. 504 (1896). This decision came one week after the notorious "separate but equal" ruling in *Plessy v. Ferguson*. Spence, *supra* n. 19, at 67.

59. *Id.* at 68.

60. *Id.*

61. This was a result of the Lame Bull Treaty of 1855, and included the Blackfeet allied Gros Ventre. William L. Bryan, Jr., *Montana's Indians, Yesterday and Today* 56 (2d ed., American World & Geographic Pub. 1996).

62. *Id.* at 54.

63. *Id.* at 61.

64. *Peterson*, 121 F. Supp. 2d at 1310. (Ironically, George Bird Grinnel was a long time friend of the Blackfeet, who recorded many of their legends. In fact, Grinnel did not even think minerals existed in the "mineral strip," and had his hopes set on a National Park all along. Grinnel had a classic John Muir type view of mountains, and saw the fates of this wilderness and the Blackfeet as very separate). Spence, *supra* n.19, at 78–79.

65. *Peterson*, 121 F. Supp. 2d at 1310.

tribe was in danger of starving the following winter, and had little choice but to negotiate. The Blackfeet countered with a three million dollar offer.[66]

Eventually, the land was sold for $1.5 million, in what a modern day judge notes was "plainly ... an adhesion negotiation."[67] However, hunting, fishing, and timber cutting rights were expressly reserved, for "so long as the same shall remain public lands of the United States . . . ."[68] It seems plain that without these reserved rights, even in their difficult situation, the Blackfeet were unwilling to sell. The agreement was accepted bitterly on behalf of the tribe by Chief White Calf, who stated, "'Chief Mountain is my head. Now my head is cut off. The mountains have been my last refuge.'"[69]

As it turned out, the lands ceded did not have significant mineral value. As he had hoped all along, Grinnel was able to form a coalition which successfully pushed for the creation of Glacier National Park in 1910.[70] The bill creating Glacier does not mention the Blackfeet reserved rights.[71] From the park's creation to the present, the Blackfeet have maintained they have hunting, fishing, and timber rights in the park.[72] As early as February, 1912, a park ranger arrested Blackfeet for hunting in the park, with a warning that "'they will no longer be permitted in Glacier National Park, and if found within the [park] they will be summarily ejected.'"[73]

From that time forward, hunting and fishing[74] rights in the park have been denied the Blackfeet. In fact, for about thirty years, the National Park Service pushed to extend the park boundary some six miles further east onto the reservation, so that the Blackfeet would not kill animals which also spent part of the year in the park.[75] This effort was eventually abandoned.

At the same time the Park Service was denying Blackfeet treaty rights, hotel entrepreneur Luis Hill, owner of the Great Northern Railroad, began employing the Blackfeet as hosts in his hotels.[76] These "Glacier Park Indians" were widely used by the tourism industry, and the Park Service itself, in promoting the park.[77]

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66. *Id.* at 1310.
67. *Id.* at 1311-1312.
68. *Id.* at 1316 (citing 29 Stat. 354).
69. Spence, *supra* n.19, at 80.
70. *Id.* at 82.
71. An inholder provision was created for white settlers in the western half of the park, even though they had much less at stake. The first superintendent, William R. Logan, approved white hunting at homestead sites in the park. Keller & Turek, *supra* n. 31, at 50–51.
72. Bryan, *supra* n. 61, at 62.
73. Keller & Turek, *supra* n. 31, at 52.
74. Luis Hill, president of the Great Northern Railroad, was allowed to commercially fish whitefish, a prize item on menus at his hotels, from park lakes until 1939, when the practice was banned on ecological grounds. *Id.* at 59.
75. *Id.* at 53.
76. *Id.* at 57.
77. *Id.*

C. *Mesa Verde National Park*

Mesa Verde represents the most recent and evolved taking of lands on our spectrum of Native American removal and dispossession. In Yellowstone, Indian use went unacknowledged and uncompensated. In Glacier, monetary compensation and reserved rights (later abrogated) were given to the Blackfeet as compensation for their lands. Mesa Verde preserves the most recently de-peopled lands of the three. The land agreements for Mesa Verde were more thoroughly negotiated than at Glacier, and based in part on land exchanges. Nonetheless, the negotiations were between parties of unequal bargaining power, and the results have been problematic.

The high, dry and spectacular red rock country of the Colorado plateau contains well-known National Parks such as Zion, Arches and Canyonlands. It has been home to various Indian tribes for centuries, among them the Ute and Anasazi.[78] The Anasazi, or "Ancient Ones" no longer inhabited the region when white settlement began, but left fascinating archeological sites behind. Best known are the ruins of their dwellings built into the sides of cliffs at Mesa Verde National Park.[79] Mesa Verde was once part of the Ute Mountain Ute Reservation in southwest Colorado.[80]

Interest in, and eventual plunder of, the Anasazi sites on the land of the Wiminuche band of Utes (later Ute Mountain Reservation) led a group of women calling themselves the Cliff Dwelling Association to push for protection.[81] The Utes refused to trade or sell the Mesa Verde lands.[82] However, in 1906, pursuant to the newly minted Antiquities Act, President Theodore Roosevelt signed the Mesa Verde National Park bill.[83] In total, Mesa Verde covered 217,000 acres, much of it on the Ute Mountain reservation.[84]

Surveys found that many of the highest quality Anasazi ruins were on Ute land outside of the park. The government thus began a long process of trying to acquire these lands from the Utes through land trades. The first of these efforts was spearheaded by James McLaughlin, a tough but honest BIA "troubleshooter."[85] The Utes had no interest in trading. However, government negotiators eventually pointed out that Congress could simply take their land for nothing, and the Utes reluctantly agreed to exchange 10,000 acres for 19,500 acres on Ute Mountain.[86] When a later USGS sur-

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78. *Id.* at 30.
79. *Id.*
80. *Id.*
81. *Id.* at 32-34.
82. *Id.* at 34.
83. *Id.*
84. *Id.*
85. *Id.* at 35.
86. *Id.* at 38. Nathan Wing, Ute Interpreter, thought this portion of Ute Mountain was already included on the reservation. It turned out he was correct, and the Utes had traded "a contribution of

vey found that the park still excluded an important site, Congress passed a bill unilaterally taking 1,320 more acres for Mesa Verde, without notification to the Utes.[87]

In subsequent lawsuits, the Utes received $32 million in compensation for some of this wrongfully taken land.[88] The Park Service continued to press for more exchanges of tribal land, but the Utes refused. Instead, the Utes created Ute Mountain Tribal Park out of 125,000 acres of land on their reservation in 1981.[89] The park is tribally managed and uses native guides.

III. CONTEMPORARY ISSUES

The contemporary pursuit of rights in national parks and other lands by Indian tribes is far too large to be covered in depth here. A number of statutes, such as the National Historic Preservation Act,[90] the Native American Graves Repatriation Act,[91] and the American Indian Religious Freedom Act[92] call for consultation with Native Americans by entities such as the National Park Service. These statutes, as well as individual actions, have spawned collaboration and litigation.

I offer here a selective look at contemporary issues regarding Native American rights on land. With regard to the national parks, it is important to bear in mind the great significance of Indian use and access issues. Each collaboration, each lawsuit, and every tension is a challenge to the flawed premise of uninhabited wilderness. It is here that the importance of these actions lie. Successful or not, each instance briefed below illuminates the fallacy many of our national parks preserve: that wilderness primeval must be a de-animated, de-peopled landscape.

A far longer story than that we are told underlies our national park landscapes. Like any other feature of the natural landscape, Rising Wolf Mountain, to pick one example, is far more than a 9,500 foot high hulk of argillite brooding over the Two Medicine Valley on Glacier's eastern flank. As its name indicates, it was, and is, far more. Before this mountain was part of the Lewis Range in Glacier National Park, it was a vertebra of the backbone of the world. The slow realization of this fact is what the situations below are about.

10,080 acres, more or less, of their own deeded lands to Mesa Verde National Park for the privilege of reclaiming 20,160 acres, more or less, of their own deeded lands." *Id.* at 40.

87. *Id.* at 38.
88. *Id.* at 40.
89. *Id.* at 41.
90. 16 U.S.C. § 470.
91. 25 U.S.C. § 3001-3013.
92. 42 U.S.C. § 1996.

A. *Glacier National Park*

The Blackfeet have never conceded their lost treaty rights in Glacier. Their persistence provides "one of the strongest challenges to the American preservationist ideal."[93] The relationship between the Blackfeet and the NPS has undergone a number of interesting permutations. These include the use of the "Glacier Park Indians" to popularize the Park, and a brief period of tacit encouragement of Blackfeet elk and deer hunting in the 1940's to control a herd which grew and over-grazed the range due to reduction of natural predators and winter feeding programs.[94] There has even been acknowledgment by some Blackfeet that the Park has served the tribal interest in a limited respect, by preserving ground they hold sacred.[95]

The Blackfeet claim to hunting, fishing, and limited purpose timber rights in the eastern half of the Park carries a certain weight. Only Congress has the power to abrogate treaty rights, and theoretically, those rights survive unless the abrogation is express. Two cases, *United States v. Kipp*,[96] and *United States v. Peterson*,[97] have explored this issue in some depth.

In *Kipp*, the defendant, a Blackfeet, was arrested for entering Glacier without purchasing the requisite entrance permit.[98] The court noted that the Blackfeet retained the right to entry, hunting, fishing, and timber when they ceded the mountainous western part of their reservation.[99] These rights were to be retained so long as the ceded strip remained "public lands."[100] The court found that Glacier Park remained public lands, in that this was clearly the Blackfeet understanding of the cession. Thus, Congress would have to "indicate an intention . . . to exclude Indians from that part of Glacier Park which had been a part of the reservation . . ." in order for these rights to be extinguished. [101] Examining the Act which created the park,[102] the court found no such intention.[103] The court held that Kipp had a right to enter the park as he had, because "the reserved rights were not extinguished

93. Spence, *supra* n. 19, at 70.
94. *Id.* at 99.
95. *Id.* at 139. One might contrast Glacier with the Badger Two Medicine area, a mountainous region immediately south of the park, which has similar importance to the Blackfeet and is threatened by extractive and recreational pressures.
96. 369 F. Supp. 774 (D. Mont. 1974).
97. 121 F. Supp. 2d 1309 (D. Mont. 2000).
98. 369 F. Supp. 774, 775 (D. Mont. 1974).
99. *Id.* at 775.
100. *Id.*
101. *Kipp*, 369 F. Supp. at 778.
102. 16 U.S.C. §§ 161-181 (2000).
103. *Kipp*, 369 F. Supp. at 778 (controlling precedent notes such intention is "not to be attributed lightly" to Congress).

by the Act creating Glacier Park."[104] In a footnote, the opinion reserved judgment on any right but the bare right of entry.[105]

Some twenty-six years later, another of the reserved rights, that of hunting, came before a Montana court. In *Peterson*, two Blackfeet were prosecuted for killing three bighorn sheep within Glacier National Park.[106] The facts were not those advocates of treaty rights would wish for: it was apparent that the sheep had been killed only for their heads, the defendants lacked permits, and no season was open.[107] Thus, even on reservation lands, the killing of the sheep would have been illegal.[108] On the question of whether the Blackfeet retained treaty rights to hunt, the court found that while such rights were retained initially in the ceded lands, the right to hunt was extinguished by the creation of the National Park.

While the court noted the rule that abrogation does not occur unless evidence shows Congress "actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other," the court "chose to resolve that conflict by abrogating the treaty."[109] Such a resolution requires explicit language.[110] The court found that the Act, in prohibiting *all* hunting, did in fact abrogate the Blackfeet right to hunt on their ceded lands.[111] The court distinguished its holding from that of *Kipp* by stating that the "purpose of the Park was not incompatible with tribal members' right of entry. By contrast, the purpose of the Park is incompatible with tribal members' right to hunt."[112]

Peterson's holding is unfortunate. The court's application of the treaty abrogation rule as set forth in *United States v. Dion* is suspect. While a prohibition on all hunting is certainly explicit language, there is no indication that the treaty right of the Blackfeet to hunt was "actually considered" by Congress, and the clear choice made to abrogate those rights.[113] It is

104. *Id.*

105. *Id.* at n. 15.

106. *Peterson*, 121 F. Supp. 2d at 1319.

107. *Id.*

108. This means the court could have found the defendants guilty of violating the Lacey Act, 16 U.S.C. §§ 3371–3378 (2000), which prohibits the transport of wildlife taken or possessed in violation of United States laws and regulations or any Indian tribal law or regulation, without reaching the issue of treaty rights in the park.

109. *U.S. v. Dion*, 476 U.S. 734, 740 (1986).

110. *Id.* at 745.

111. *Peterson*, 121 F. Supp. 2d at 1319.

112. *Id.* at 1320.

113. This principle of treaty construction from *Dion* was recently affirmed by *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). In *Mille Lacs Band*, the Court found that usufructory rights guaranteed in an 1837 treaty were not relinquished in an 1855 treaty where all "right, title and interest" in lands in Minnesota were released by the Tribe in exchange for payment, but usufructory rights were not mentioned. *Id.* at 202. This case indicates that the Blackfeet usufructory rights in eastern Glacier Park were also not relinquished when Glacier was created without expressly abrogating those rights. Additionally, the payment to the Blackfeet for their cession in 1895 was clearly not intended to compensate for usufructory rights, as those rights were not taken at that time. Under *Mille Lacs Band*, the Blackfeet should either retain their treaty rights in Glacier, or would be entitled to additional payment for relinquishing those rights.

often observed that bad facts make bad law. Confronted with what can only be described as head poaching in a treasured national park, the district court's decision, if not correct, is understandable.

Recognition of Blackfeet rights in Glacier now stands about where these cases leave it. The Blackfeet may enter or camp in the park for free, but have no further special rights. Tensions have continued over such things as a park proposal to fence portions of the eastern border to prevent trespass by livestock,[114] and sacred sites, notably Chief Mountain.[115] Where these conflicts will proceed is unknowable. Pursuant to the law of treaty abrogation as outlined in *Peterson*, tribes can demand compensation for taken treaty rights.[116] While the Blackfeet may fear this would amount to a tacit recognition those rights were taken, a demand for compensation could still be a fine place from which to begin negotiating with the National Park Service.

B. *Mesa Verde National Park*

Around 1970, the NPS at last abandoned its attempts to procure more Ute Mountain Reservation lands for Mesa Verde National Park. The Utes turned down a NPS suggestion that the two parties co-manage Mancos Canyon, an area on the Ute Reservation rich in archeological sites.[117] The Utes instead established a tribal park at the site in 1981.[118]

The Utes continue to feel slighted by the NPS. Mesa Verde emphasizes the Navajo, Anasazi and Pueblo peoples in its cultural program, with little regard for the Utes,[119] on whose former reservation lands the park sits. Litigation was necessary to shut down a public display of human remains by the National Park Service,[120] another source of hard feelings for the Utes. Finally, Mesa Verde has done little to promote its sister tribal park.[121] Perhaps the situation is best summed up by this: "Utes remember. At Ute Mountain, the Weminuche recall that they once traded ten thousand acres and received their own land in return, and that Congress took another thirteen hundred acres without their consent."[122]

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114. Spence, *supra* n. 19, at 100.

115. Keller & Turek, *supra* n. 31, at 64. This mountain is dramatic peak which stands alone to the east of the main park ranges. The park/reservation border bisects its top. The NPS has not heeded requests to halt non-Indian climbing, though at least some climbers voluntarily honor Blackfeet wishes and avoid the mountain.

116. 121 F. Supp. 2d 1309, 1318 n. 12.

117. Keller & Turek, *supra* n. 31, at 41.

118. *Id.*

119. *Id.* at 42.

120. *Id.*

121. *Id.*

122. *Id.*

C. *Federal Statutes: A Tacit Admission of Guilt*

Native American rights have gained increasing consideration in lawmaking over the past quarter century. In some instances, these laws are relevant to Indian rights in the National Parks. Among these statutes is the American Indian Religious Freedom Act of 1978 (AIRFA).[123] AIRFA states that it shall be the policy of the United States "to protect and preserve" the rights of native peoples to "exercise ... traditional religions" including "access to sites."[124] AIRFA then specifies that the President "shall direct . . . federal agencies . . . to evaluate their policies and procedures in consultation with native traditional religious leaders . . . to protect and preserve Native American religious cultural rights and practices."[125]

On its face, this statute would appear to support American Indian use in National Parks, to the extent such use is tied to traditional religious practices. Unfortunately, AIRFA is simply a policy statement. Thus, it sounds nice, but has "no teeth in it" to quote Justice O'Connor.[126] To elaborate further, "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[127] Thus, in *Lyng v. Northwest Indian Cemetery Protective Assn.*, the Court declined to enjoin timber harvest and road building on National Forest land which was of traditional religious importance to three Indian tribes.[128]

Similarly, the 1992 Amendments to the National Historic Preservation Act (NHPA)[129] require consultation with Indian tribes, and that agencies "shall . . . assist Indian tribes in preserving their particular historic properties."[130] The NHPA also provides that "properties of traditional religious or cultural importance" to Native American tribes may be included in the National Register.[131] Further, the federal agency has an affirmative duty to consult with any Native American tribe "that attaches religious and cultural significance to properties" described in the above section.[132] The NHPA goes further than AIRFA as it imposes an affirmative duty on federal agencies which manage properties of significance to Native Americans to consult with interested tribes regarding management. This consultation has led to several historic agreements between federal entities and Indian tribes.[133]

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123. 42 U.S.C. § 1996 (2000).
124. *Id.*
125. *Id.* at § 1996, sec. 2.
126. *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 455 (1988).
127. *Id.* at 455.
128. *Id.*
129. 16 U.S.C. § 470 (2000).
130. *Id.* at § 470(a)(d)(1)(A).
131. *Id.* at § 470(a)(d)(6)(A).
132. *Id.* at § 470(d)(6)(B).
133. David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 752 (5th ed., West 2005).

Such agreements between the government and Indian tribes have not gone unchallenged by other parties. Probably the highest profile of these agreements has been the ban on climbing at Devil's Tower National Monument. Devil's Tower has great significance to several tribes, among them the Kiowa. N. Scott Momaday, a Kiowa and Pulitzer prize winning author, puts this significance best. "There are things in nature that engender an awful quiet in the heart of man; Devil's Tower is one of them."[134] Momaday relates a story told by his grandmother:

> Eight children were there at play, seven sisters and their brother. Suddenly the boy was struck dumb; he trembled and began to run upon his hands and feet. His fingers became claws, and his body was covered with fur. Directly there was a bear where the boy had been. The sisters were terrified; they ran, and the bear after them. The came to the stump of a great tree, and the tree spoke to them. It bade them climb upon it, and as they did so it began to rise into the air. The bear came to kill them, but they were just beyond its reach. It reared against the tree and scored the bark all around with its claws. The seven sisters were borne into the sky, and they became the stars of the Big Dipper.[135]

This story may begin to explain the importance of Devil's Tower to Indian tribes. In accordance with this importance, in 1995 the NPS released a plan closing Devil's Tower to commercial rock climbing in the month of June, the time most important for tribal ceremonies at the tower.[136]

Climbers, who value Devil's Tower, sued and won an injunction.[137] The NPS then revised its plan, enacting a voluntary climbing ban during the month of June. The same judge who dismissed a subsequent lawsuit by climbers, found the voluntary ban to be constitutional.[138] The 10th Circuit Court of Appeals affirmed, noting Congressional actions such as AIRFA and NHPA which encourage the protection of Indian religious rights and sacred sites.[139] Other notable Indian sacred sites which have been the subject of agreed management plans include Rainbow Bridge National Monument and Medicine Wheel National Historic Landmark.[140] Both have been

134. N. Scott Momaday, *The Way to Rainy Mountain* 8 (U. of N.M. Press 1969).
135. *Id.*
136. Getches et al., *supra* n. 133, at 753.
137. *Id.*
138. *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999).
139. *Id.*
140. Getches et al., *supra* n. 133, at 754-55.

challenged by third parties and thus far upheld.[141] While AIRFA and the relevant NHPA provisions are not strict action forcing statutes such as the Endangered Species Act, they are not valueless. The NHPA in particular makes substantive changes in the way federal agencies make land management decisions, imposing mandatory procedural duties.[142] It may be seen as a tacit admission that earlier Indian policy in the national parks was wrong, and an attempt, though not strong, to make amends.

These statues represent a gradual, if very inadequate, recognition of a human history predating the establishment of a national park or monument. They allow for recognition of the inhabited nature of the "wilderness" the national park system protects. Perhaps most important, AIRFA and NHPA allow Indian tribes an important opportunity to be heard in the management of public lands of cultural significance, both within and outside the National Parks. This is not a full return to the inhabited national park described by Catlin and others. However, AIRFA and NHPA may fairly be regarded as acknowledging the validity of Catlin's vision, and what transpired in its place as a wrong. Of course, policy statements, consultation, and voluntary climbing bans are weak consolation in light of what Native Americans endured and lost in the creation of our national parks.

IV. A CONTRAST: THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT OF 1980

National parks in Alaska stand in contrast to their lower forty-eight peers in that many allow traditional subsistence use by native peoples. Due to the remoteness of many areas of the state, and correspondingly high food prices, this use is very important from a survival standpoint, even today.[143] However, such use is not restricted solely to native peoples, and does not apply to all of the parks. Native title to Alaska was not extinguished until the Alaska Native Claims Settlement Act of 1971 (ANSCA), which conveyed forty-five million acres to Native Alaskans, and included payment of $962.5 million.[144] The parks existing prior to this settlement, Glacier Bay, Katmai and a portion of Denali, do not permit subsistence use.[145]

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141. *Natural Arch & Bridge Society v. Alston*, 209 F. Supp. 2d 1207 (D. Utah 2002), *aff'd*, 98 Fed. Appx. 711 (10th Cir. 2004); *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 179 F. Supp. 2d 1279 (D. Wyo. 2001), *aff'd*, 383 F.3d 1241 (10th Cir. 2004).

142. *See* Raymond Cross & Elizabeth Brenneman, *Devil's Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 Pub. Land & Res. L. Rev. 5, n. 77 (1997) (noting these procedural duties have been interpreted as mandatory by the courts).

143. *See* Don Callaway, *Stewards of the Human Landscape*, in *Common Ground: Archeology and Ethnography in the Public Interest* (Spring 2001) (noting that one study estimates it would take over 75% of one rural Alaska community's total cash income to replace the wildlife they consume annually).

144. Spence, *supra* n. 19, at 136.

145. *Id.* at 137.

Just two years after passage of ANSCA, the Alaska National Interest Lands Conservation Act of 1980 was passed (ANILCA).[146] ANILCA added more than 100 million acres of Alaska to the federal lands. Of these, fifty-one million were added to the national park system in ten units.[147] The Act specifically recognizes the importance of subsistence use. However, the protection of such subsistence use applies to all rural Alaskans, both Native and non-Native.[148] The Act allows for continued subsistence use by rural Alaskans, and for rural residents to have a "meaningful" role in the management of fish, wildlife and subsistence uses.[149]

Native Alaskans are able to continue their traditional subsistence use of many National Park lands in Alaska. However, they have no special rights beyond those of other rural residents. Even on ANSCA lands in the parks, Alaska Natives lack the control Indian tribes of the contiguous states wield over their reservation lands.[150] Rather, they have the same rights a pre-existing homesteader would have in these parks.[151] Even as Native Alaskans have retained rights in the National Parks under ANILCA, they have not necessarily received special consideration. Alaskan National Parks do not treat Native rights differently; these parks treat human use differently.

Despite the fact Native Alaskans did not receive special consideration in ANILCA, they did nonetheless retain far greater usufructory rights in national parks than their lower forty-eight counterparts. Thus, ANILCA should not be dismissed lightly in regard to Native rights of use in national parks.

Equally significant, ANICLA represents a great concession to the idea of inhabited wilderness. The first stirrings of this notion in Alaska came from Bob Marshall in the 1930's. Marshall hiked widely in Alaska, and was a great advocate of wilderness preservation, both in Alaska and the rest of the United States. Marshall made it clear that in Alaska, he wanted the wilderness to be large enough for the Native inhabitants to avoid "the disturbances of the white race" if they so chose.[152] The wilderness Marshall wished to create was inhabited. This concept informed the Alaska wilderness movement of the 1970s.[153]

The National Park Service was not enthusiastic about Marshall's ideas at the time. Parks preserved nature, not culture.[154] Initial indifference notwithstanding, the new Alaska National Park system of the 1970's followed many of Marshall's ideas, beginning with a national wilderness park in the

146. 16 U.S.C. §§ 3101-3233 (2000).
147. Catton, *supra* n. 24, at 3.
148. 16 U.S.C. § 3111.
149. *Id.*
150. Spence, *supra* n. 19, at 137.
151. *Id.*
152. Catton, *supra* n. 24, at 142.
153. *Id.* at 143.
154. *Id.*

Brooks Range, along with the Nunamiut National Wildlands, which was "specifically directed at preserving a native group's way of life."[155]

ANILCA is more than just a concession to inhabited wilderness. It was a concession to the traditional Native lifestyle. As Yup'ik Eskimo Yupiktak Bista put it in a report on conserving his people's way of life, "'[d]oes one way of life have to die, so that another can live?'"[156] Was ANILCA an implicit repudiation of the turn of the century notion of "killing the Indian to save the man?" Perhaps not put so strongly. ANILCA is, if nothing else, a statutory recognition of the right of Native peoples to continue their traditional uses on public lands, including national park lands. And that is certainly something.

V. CONCLUSION

The virgin land of the national park, showcasing nature alone, is an illusion. National parks do not preserve what the West was; they preserve a West which never was. Their creation required a complete shift of the cultural paradigm of wilderness. The original national park was to preserve the western wilderness complete as the earliest white explorers saw it. American Indian inhabitants were an important part of this vision. However, the great shift occurred, and wilderness grew apart from humans in the view of the American preservation movement. In fact, American Indians, in their subsistence use, were seen as even less capable of appreciating nature than non-whites. Justified, albeit poorly, by manifest destiny, Indian tribes were sent to their reservation "islands" to die a slow death. Meanwhile, the national park became a potent symbol of natural beauty and national pride.

Indian peoples did not consent to die; however, nor did they consent to the loss of their rights to national park lands. The question is then: what is to be done?

Statutes such as NHPA and AIRFA are a beginning. They require federal land management agencies to consult with Indian tribes, and require the consideration of the needs and values of those tribes. Tribes now have a greater opportunity to share in creating management policies in the national parks. Increased recognition and appreciation of the American Indian history and role in the national park lands is likely to follow. Even so, I find these statutes are a feeble bridge across a deep, wide chasm. The final result will be an improvement regarding Indian rights and roles in the parks as compared to the recent past. However, there is little possibility of anything closely resembling George Catlin's ideal of a national park occurring. The parks are simply too small, and too heavily developed to fully be what we set them out to be, a picture of what America once was.

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155. *Id.* at 144.
156. *Id.* at 205.

ANILCA is more intriguing. It has shortcomings, but does give Alaskan Natives essentially what dispossessed tribes like the Blackfeet want from the national parks. The difficulty is that the contiguous states are a very different place than they were 150 years ago, and a very different place than Alaska is now. The Alaskan parks are vast, remote and visited little. Wildlands are not so limitless in the contiguous states anymore. The parks provide a critical, in come cases final, refuge for species which require large amounts of relatively undisturbed land. In many cases, appropriative uses in non-Alaskan national parks may be inconsistent with those parks' remaining relatively intact ecosystems, containing many or most of their indigenous species.

My proposal is this. Indian tribes who were dispossessed by the creation of national parks should have an active role in the management of those parks. They should also share a portion of the financial proceeds those parks generate, as those proceeds would have belonged to them were it not for wrongful dispossession.

Regarding specific rights, such as hunting and fishing: those rights should be carefully honored, where they will not jeopardize the important role parks now play as ecosystems and final refuges for some species. A fine example of where hunting would be appropriate is in Yellowstone National Park. The bison herd of the park is at an all time high, and likely exceeding the carrying capacity of the range. Some hunting of these bison would benefit both the Indian tribes who deserve the right to do so, and the park itself in reduction of overgrazing.

Where specific hunting and fishing rights which have been abrogated by a national park cannot, in the interest of the integrity of the park ecosystem or size of the park, be exercised, compensation is due. Specifically, in parks such as Glacier, where express treaty rights were (possibly) extinguished, if such rights cannot be exercised today to the extent those rights could have been when the treaty was signed, the NPS needs to negotiate some sort of a settlement, as required by judicial doctrine surrounding treaty rights.

One of the greatest barriers to a realization of Indian rights in national parks is likely to be recreation. It has been suggested that in our recreation, indeed in our very self-image, we consume wilderness.[157] This is true of backpackers on mountain trails, sport utility vehicle commercials, and everything in between. The variety of popular uses of wildlands today indicates the depth of the importance nature holds for us. Unfortunately, each recreational interest and user consumes a little bit of wilderness. It may be there is no wilderness capital left in the national parks for American Indian use. The conflict over the proposed mandatory, now voluntary, June climb-

157. For an interesting and much expanded look at these ideas, *see also* Sarah Krakoff, *Mountains Without Handrails . . . Wilderness Without Cellphones*, 27 Harv. Entl. L. Rev. 417 (2003).

ing ban at Devil's Tower is an excellent example of the type of conflict likely to spring up when Indian interests are given use priority or management consideration. Will Indians simply join the line of interest groups, from snowmobilers to skiers to wilderness activists, clamoring to be heeded and catered too by the national parks?

Whatever form it may take, in the end I hope for a simple thing: that recognition of the inhabited wilderness which was our national park system occurs. Recognition that the human story of these landscapes goes far deeper into the past than the date the park was created, and recognition of the wrong which underlies our national treasures. Catlin's vision has passed us by; perhaps that ideal is now unattainable. I still believe that recognition of this deeper history of the parks might yet help us know the land today. I have heard there are bison skulls atop Chief Mountain, some of them very old. The skulls were brought there during vision quests. I have not seen them. The mountain does look a bit different, though, now that I know the skulls are up there.