

Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives

Brian Upton

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Brian Upton*

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I. INTRODUCTION

The National Bison Range (Range) is an unforgettable place for many reasons. Home to its namesake bison as well as to a variety of other wildlife, it is one of the nation’s premier wildlife refuges. Established over one hundred years ago in western Montana, it was among the first such refuges in the country—predating the present-day National Wildlife Refuge System (Refuge System) of which it is now a part. The Range is further distinguished by its location in the center of the Flathead Indian Reservation (Flathead Reservation), where the spectacular scenery

includes mountain ranges in every direction. The Range bison descend largely from wild bison that had been saved by members of the Confederated Salish and Kootenai Tribes (CSKT) at a time when the animals were on the verge of extinction.

The Range anchors a complex of refuges on tribal and federal lands, collectively referred to as the National Bison Range Complex (NBRC).¹ Included within the NBRC are two ancillary refuges located on federally-held trust lands for which the CSKT are the beneficial owner: the Ninepipe and Pablo National Wildlife Refuges.² Like the Range, the Ninepipe and Pablo Refuges, as well as almost all of the other NBRC lands, are located in the heart of the Flathead Reservation.³

Since 1994, the Range has been the subject of ongoing partnership efforts between the Confederated Salish and Kootenai Tribes (CSKT), upon whose reservation the Range is located, and the United States Fish &

1. The National Bison Range Complex consists of the following properties: the National Bison Range; Ninepipe National Wildlife Refuge; Pablo National Wildlife Refuge; Lost Trail National Wildlife Refuge; and the Northwest Montana Wetlands Management District (consisting of Waterfowl Production Areas). U.S. Govt., *About the Complex*, http://www.fws.gov/refuge/National_Bison_Range/About_the_Complex.html (last updated Mar. 24, 2014). All of the NBRC properties are within CSKT's Treaty-ceded territory. Hellgate Treaty, *infra* n. 5, at art. I.

2. The United States holds most tribally- and individually-owned land in trust for such tribes or tribal members. As described by the Bureau of Indian Affairs:

In the United States there are three types of reserved federal lands: military, public, and Indian. A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.

U.S. Govt., *Frequently Asked Questions*, (last updated Apr. 21, 2014). The Ninepipe and Pablo Refuges are located on lands beneficially owned by CSKT and held in trust by the United States. Exec. Or. 3503, (1921) (reserving the Ninepipe reservoir site for use "as a refuge and breeding grounds for native birds."), and Exec. Or. 3504, (1921) (reserving the Pablo reservoir site for use "as a refuge and breeding grounds for native birds.") [copies of Executive Orders on file with *Public Land & Resources Law Review*].

3. One refuge, the Lost Trail Wildlife Refuge, is located off of the Flathead Reservation but is also administered as part of the NBRC, as are the parcels of land constituting the Flathead County portions of the Northwest Montana Wetland Management District. *About the Complex*, *supra* n. 1.

Wildlife Service (FWS), the United States Department of Interior (DOI) agency that administers the Range. CSKT's ongoing connections to the bison and the land fuel their desire to continue their role as stewards for both.

These efforts take place under the auspices of the Tribal Self-Governance Act (TSGA).⁴ The TSGA is a federal law that authorizes Indian tribes to contract for the operation of DOI programs of specific significance to tribes. Thousands of agreements have been executed under the TSGA, but so far very few have involved DOI agencies outside of the Bureau of Indian Affairs (BIA). Of those agreements involving non-BIA agencies, most are limited in scope, despite the expansive authority provided under the TSGA.

Congress intentionally wrote the TSGA broadly, providing the Secretary of the Interior with much latitude for entering into Self-Governance partnerships with tribal governments and organizations. This latitude has been consistently confirmed in a number of Solicitor Opinions. To date, CSKT and FWS have entered into two Tribal Self-Governance agreements at the Range, the last of which was rescinded by a federal court on procedural grounds. These partnerships have included a greater extent of contracting than any other TSGA agreement to date. The CSKT and FWS are presently in the process of returning to a Self-Governance partnership there.

The basis for this CSKT-FWS collaboration at the Range has deep roots in both history and the law. It also finds parallels and precedent in other partnerships between federal governments and tribes or Indigenous communities, both in the United States and abroad.

This article examines: 1) CSKT's historic relationship with bison and the Range; 2) the legislative history and legal interpretations of the TSGA; and 3) other Federal-Tribal cooperative efforts involving protected areas, both in the United States and abroad. Through these perspectives, the article then looks at the logic of returning to a Self-Governance partnership at the Range, and the sources of support for such a cooperative venture. First, however, the article provides some general background regarding both CSKT and the NBRC.

4. Pub. L. No. 103-413, § 204, 108 Stat. 4250, 4270 (1994) (codified at 25 U.S.C. §§ 458aa *et seq.* (2012)).

II. A BISON REFUGE CARVED OUT OF TREATY-RESERVED LAND: BACKGROUND ON THE CONFEDERATED SALISH AND KOOTENAI TRIBES AND THE NATIONAL BISON RANGE COMPLEX

As a beginning point for the history of the Range, 1855 is a good place to start. That was the year the United States and the Salish, Pend d'Oreille, and Kootenai Tribes, in what is now western Montana, entered into the Treaty of Hell Gate (Hellgate Treaty), under which they ceded the majority of their traditional lands.⁵ Under the Hellgate Treaty, CSKT reserved for themselves the land now known as the Flathead Reservation, located west of the Continental Divide. The subsequent decades brought seismic changes to tribal life. Two of those changes directly led to the establishment of the Range. The first was the slaughter of this country's bison population to near extinction. The second was the division by the Federal Government of the CSKT's Flathead Reservation into "allotments" of land for tribal members, with remaining lands allotted to non-Indian homesteaders. Both changes were the result of federal policies that converged at the time of the Range's creation.⁶

As discussed later in this article, the virtual extirpation of bison resulted in CSKT tribal members introducing bison to the Flathead Reservation in the late 1800's, creating what was essentially a conservation herd. This took place prior to the allotment of tribal lands that was intended by the Federal Government to speed the assimilation process of Indians into the dominant society. In 1908, soon after the Flathead Reservation had been broken up into allotments for individual Indians, the United States unilaterally appropriated over 15,000 acres from the center of the Reservation to establish the Range.

5. Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians (July 16, 1855), 12 Stat. 975 [hereinafter Hellgate Treaty].

6. Pub. L. No. 58-159, 33 Stat. 302 (1904). Commonly referred to as the Flathead Allotment Act, this legislation followed the General Allotment Act (also referred to as the "Dawes Act") Pub. L. No. 119, 24 Stat. 388 (1887), which enacted general federal allotment policies. For general discussion of federal policy or actions, supporting slaughter of bison, see David D. Smits, *The Frontier Army and the Destruction of the Buffalo: 1865-1883*, *The Western Historical Quarterly*, 312 (Autumn, 1994).

Despite the objectives behind the federal allotment policies of the late nineteenth and early twentieth centuries, CSKT tribal members did not melt into the dominant society. Instead, they maintained their culture, community, and government through very challenging times, and they continue to thrive today. The Flathead Reservation continues to be the official homeland of the CSKT, and continues to surround the Range. The following sections provide some initial background on the CSKT and the NBRC.

A. The Confederated Salish and Kootenai Tribes: A People of Vision

The CSKT are widely viewed as progressive, forward-looking people, known for their cooperative efforts with numerous governments and organizations.⁷ Official Tribal documents, as well as the Tribal government's official website, often include the informal CSKT motto identifying them as "A People of Vision."⁸ CSKT consists of the Bitterroot Salish,⁹ the Pend d'Oreille, and the Ksanka (Ktunaxa) Band of Kootenai, whose ancestors signed the Hellgate Treaty.¹⁰ In the Hellgate Treaty, the CSKT reserved for themselves homelands located on and near Flathead Lake, as well as homelands farther south in the Bitterroot Valley.¹¹ In 1891, the CSKT were forced to give up their Bitterroot

7. Ltr. from Nick Rahall, Chairman, H. Nat. Resources Comm., Don Young, Ranking Minority Member, H. Nat. Resources Comm., to Dirk Kempthorne, Sec. of the Int., U.S. Dept. of the Int., *Tribal Self-Governance*, 3 (May 15, 2007) (copy on file with *Public Land & Resources Law Review*); Editorial, *The National Bison Range*, N.Y. Times (Sept. 3, 2003); Ltr. from Larry Schweiger, Pres. & C.E.O., Natl. Wildlife Fedn., to Jeff King, Refuge Manager, National Bison Range Complex, *Scoping Comments*, 1 (undated) (copy on file with *Public Land & Resources Law Review*).

8. E.g., CSKT Govt., *Confederated Salish & Kootenai Tribes*, <http://cskt.org> (2004); CSKT Govt., *The Rez We Live On*, <http://therezweliveon.com>, (2014); CSKT Govt., *2011 Annual Report*, (2011) (footer throughout the document titled "Confederated Salish & Kootenai Tribes Annual Report 2011 – A PEOPLE OF VISION") (copy on file with *Public Land & Resources Law Review*).

9. The Bitterroot Salish have also been referred to as "Flatheads," a term first used by early European visitors in the years after the Lewis and Clark expedition. Salish-Pend d'Oreille Culture Committee and Elders Cultural Advisory Council, *The Salish People and the Lewis and Clark Expedition*, xiii (Univ. of Neb. Press 2005) [hereinafter *Salish People*].

10. Hellgate Treaty, *supra* n. 5.

11. *Id.* at art. 2.

Valley lands, retaining only the lands near Flathead Lake for their reservation.¹²

The current Flathead Reservation consists of 1,250,000 acres¹³ encompassing the lower half of Flathead Lake, the largest natural freshwater lake in the country west of the Mississippi, as well as lands to the south of the lake.¹⁴ The Reservation is otherwise surrounded by mountains, with the Mission Mountain Range forming much of the Reservation's eastern boundary.¹⁵ The southernmost portion of the Reservation is located less than 15 miles from Missoula, a city of approximately 70,000 people that is home to the University of Montana.¹⁶ The Reservation is also home to Salish Kootenai College, one of the most prominent tribal colleges in Indian country.¹⁷

The CSKT currently consist of around 7,900 tribal member citizens.¹⁸ The total population of the Flathead Reservation is around

12. Alyssa Neemay, *Medicine Tree's Historic Past Honored by Travelers*, Char-Koosta News, http://www.charkoosta.com/2013/2013_05_02/Medicine_Tree-spring_2013.html (May 2, 2013).

13. Burton M. Smith, *The Politics of Allotment on the Flathead Indian Reservation*, 24, *Salish and Kootenai Papers*, Number 2 (Salish Kootenai College Press 1995).

14. U.S. Govt., *National Park Service Archeology Program*, <http://www.nps.gov/history/archeology/SITES/stateSubmerged/montana.htm> (accessed on May 19, 2014).

15. CSKT Govt., *Mission Mountain Tribal Wilderness: A Case Study*, 7 (2005) [hereinafter *Mission Mountain Tribal Wilderness*].

16. U.S. Govt., *Missoula (city), Montana*, <http://quickfacts.census.gov/qfd/states/30/3050200.html> (last revised Mar. 27, 2014).

17. E.g. Vince Devlin, *DePoe Inaugurated as New President of Salish Kootenai College*, *Missoulia*, http://missoulia.com/news/state-and-regional/depoe-inaugurated-as-new-president-of-salish-kootenai-college/article_297233ee-5247-11e3-8382-0019bb2963f4.html (Nov. 20, 2013). For more information on Salish Kootenai College, see CSKT, *Salish Kootenai College*, <http://www.sk.edu>.

18. CSKT Govt., *2012-2013 Annual Report* 5, <http://www.cskt.org/gov/docs/2012AnnualReport.pdf> (2013).

The term "tribal member" is more common than "tribal citizen," but is perhaps misleading to people unfamiliar with Indian tribes, who may be inclined to view tribes as membership "clubs" or "associations" rather than the independent nations and governments which they are and to which tribal citizenship accrues. U.S. Govt., *Frequently Asked Questions*, <http://www.bia.gov/FAQs> (last updated Apr. 21, 2014) ("Tribes, therefore, possess the right to form their own governments; to make and enforce laws, both civil and criminal; to tax; to establish and determine membership (i.e., tribal citizenship. . .)"). For general discussion regarding tribal citizenship, see

30,000, with a majority being non-Indian—a legacy of federal land allotment and homesteading laws.¹⁹

The CSKT have a history of enterprise. In addition to revenue from timber and hydropower resources, the CSKT own a number of businesses in the fields of information technology, electronics, gaming, banking, environmental remediation, and tourism.²⁰ A 2007 report commissioned by the State of Montana found that the Flathead Reservation contributed \$317,414,674 to the State economy, with the CSKT Tribal government and its associated enterprises accounting for the largest portion of that amount at \$182,931,610.²¹ Currently, the CSKT Tribal government annually administers approximately: \$25 million in Self-Governance funds; \$150 million in contracts and grants; and \$44 million in tribal revenue.²² The Tribal government alone has 1,000 full-time employees.²³

Part of the CSKT's vision has been to increase tribal autonomy through extensive assumption of federal programs. The CSKT enter into contracts for the operation of these programs under the authority of the TSGA, as well as the Indian Self-Determination and Education Assistance Act (ISDEAA).²⁴ CSKT's success with such contracting has been widely acknowledged.²⁵ Its record in partnering with other governments,

Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 Wyo. L. Rev. 295 (2011); see also *infra* n. 149.

19. CSKT Govt., *American Indian and Total Population for Flathead Reservation and Related Areas*, Flathead Reservation: Demographic and Economic Information 7–8 (Oct. 2013) (copy on file with *Public Land & Resources Law Review*).

20. *2012-2013 Annual Report*, *supra* n. 18, at 15, 31–33.

21. Eleanor YellowRobe, *Monetary Contributions of Reservations to the State of Montana* 1, 9 (Bureau of Business and Economic Research, The Univ. of Mont. 2007).

22. *Testimony of Ronald Trahan, Chairman, Confederated Salish and Kootenai Tribes before the Senate Committee on Indian Affairs*, 2 (Jan. 29, 2014) (hereinafter *Testimony*) (written testimony submitted in association with Committee hearing on S. 919, the Department of the Interior Tribal Self-Governance Act of 2013) (copy on file with *Public Land & Resources Law Review*).

23. *Id.*

24. *Infra* pt. III (discussion of ISDEAA and the TSGA).

25. *E.g.* Ltr. from Nick Rahall, Don Young, *supra* n. 7, at 3 (“The CSKT have demonstrated a high level of performance in contracting a wide variety of other federal programs.”); Editorial, *The National Bison Range*, *supra* n. 7 (“The

including for conservation and natural resources management, is similarly well established. On this point, the National Wildlife Federation, in a letter supporting a Self-Governance partnership at the Range, endorsed CSKT's record as follows:

Known throughout the country for their scientific and cultural knowledge, their partnerships with other governments and long history of conserving, managing and restoring wildlife habitat, the CSKT Division of Fish, Wildlife, Conservation and Recreation are more than qualified to partner with the [U.S. Fish & Wildlife] Service to manage [National Bison Range] resources.²⁶

One of CSKT's most well known, and visionary, achievements in natural resources management was the establishment of the 90,000 acre Mission Mountains Tribal Wilderness in 1982.²⁷ As early as 1936, the CSKT originally proposed to establish the area as a tribally run national park.²⁸ The plan found support with the BIA's Flathead Agency Superintendent, but ultimately did not gain sufficient traction within higher levels of the DOI, which at the time exercised a more stifling level of control over tribal government decision-making.²⁹ Decades later, the CSKT unilaterally protected the lands as a tribally designated wilderness area, becoming the first tribe in the country to establish such a wilderness and support it with significant policy and personnel.³⁰

Confederated Salish and Kootenai Tribes have been among the first to seize the opportunity to run programs that were formerly administered by the [federal] government, and run them well.”)

26. Ltr. from Larry Schweiger, *supra* n. 7. The letter was in response to FWS' May 2012 “Notice of Intent to Prepare an Environmental Assessment Regarding the Interest of the Confederated Salish and Kootenai Tribes to enter into an Annual Funding Agreement with the Department of the Interior, U.S. Fish & Wildlife Service, for the Operation and Management of Programs at the National Bison Range Complex.”

27. *Mission Mountain Tribal Wilderness* at 8.

28. *Id.* at 3–4.

29. *Id.* at 4.

30. *Id.* at 10–11. The Mission Mountain Tribal Wilderness was created under CSKT Tribal Ordinance 79A.

CSKT's Natural Resources Department has an extensive record of cooperation specifically with the FWS.³¹ Given this background, it is not surprising that CSKT, as a People of Vision, would seek meaningful involvement in the Range and its associated Refuge System properties. In addition to cultural and historical reasons, the CSKT have asserted that wildlife knows no boundaries and that the NBRC properties, due to their central location within the Flathead Reservation, are important components of the natural resources managed by the CSKT.³²

B. The National Bison Range Complex

The Refuge System, administered by FWS, is a nation-wide collection of lands set aside strictly for wildlife, a fundamental distinction from the National Park system, which includes human uses amongst its primary purposes.³³ Rachel Carson, former FWS scientist and author of *Silent Spring*,³⁴ described the Refuge System as follows:

If you travel much in the wilder sections of our country, sooner or later you are likely to meet the sign of the flying goose - the emblem of the National Wildlife Refuges. You may meet it by the side of a road crossing miles of flat prairie in the middle West, or in the hot deserts of the Southwest. You may meet it by some mountain lake, or as you push your boat through the winding salty creeks of a coastal marsh.

31. Open Ltr. from James Steele, Jr., Tribal Chairman, CSKT, *An Open Letter to Environmental and Conservation Organizations Concerning the National Bison Range* 4-5 (Sept. 12, 2006) (referencing attachment *Wildlife management projects for which CSKT has cooperated with FWS*) (copy on file with *Public Land & Resources Law Review*).

32. Memo., *Points and Authorities in Support of CSKT's Mot. to Intervene*, Doc.11-2, 11, *Blue Goose Alliance v. Salazar* (D.D.C. Civil Action No. 09-0640 (CKK)), (citing CSKT's interest in "holistic wildlife management and protection due to NBRC's central location within the Flathead Reservation and the trans-boundary nature of most of the wildlife.").

33. Compare National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. § 668dd *et seq.* (2006), with National Park Service Organic Act, 16 U.S.C. §1 *et seq.* (2006).

34. Rachel Carson, *Silent Spring* (Houghton Mifflin 1962).

Wherever you meet this sign, respect it. It means that the land behind the sign has been dedicated by the American people to preserving, for themselves and their children, as much of our native wildlife as can be retained along with our modern civilization.

Wild creatures, like men, must have a place to live. As civilization creates cities, builds highways, and drains marshes, it takes away, little by little, the land that is suitable for wildlife. And as their space for living dwindles, the wildlife populations themselves decline. Refuges resist this trend by saving some areas from encroachment, and by preserving in them, or restoring where necessary, the conditions that wild things need in order to live.³⁵

Congress established the Range, now a part of the Refuge System, in 1908³⁶ in response to the North American plains bison being on the verge of extinction in the continental United States.³⁷ Founded in the dawn of the Nation's conservation history, the Range was one of the first wildlife refuges in the country.³⁸ The Range is bounded on two sides by the Jocko River and Mission Creek, tributaries to the Flathead River that

35. Rachel Carson, *Introduction: U.S. Fish & Wildlife Service National Wildlife Refuge System*, http://www.fws.gov/refuges/history/over/over_main_fs.html (accessed May 11, 2014).

36. Pub. L. No. 192, § 60, 35 Stat. 251, 267–68 (1908) (codified at 16 U.S.C. § 671).

37. Dale F. Lott, *American Bison: A Natural History* 187 (University of California Press 2002). Today, the continent's bison population has been reported to be around 450,000, although few of these are free ranging and many contain genes from cattle. Wildlife Conserv. Socy., *Bison*, <http://www.wcs.org/saving-wildlife/hoofed-mammals/bison.aspx> (2014).

38. The first area set aside partly for conservation of plains bison is the Wichita Mountains Wildlife Refuge in Oklahoma, established in 1905. 16 U.S.C. § 684 (2006); see also U.S. Govt., *About the Refuge*, http://www.fws.gov/refuge/Wichita_Mountains/about.html (last updated June 28, 2012); and Wildlife Conserv. Socy., *The American Bison Society*, <http://www.wcs.org/saving-wildlife/hoofed-mammals/bison/the-american-bison-society.aspx> (2014) (noting “the Bronx Zoo's earliest conservation efforts in 1907, when staff sent 15 bison by railway to Wichita Mountains Wildlife Preserve in Oklahoma to restore the western Plains' depleted bison population.”).

bisects the Flathead Reservation. While the size of its bison herd has fluctuated somewhat over the decades, it presently consists of 325–350 animals.³⁹ The Range is also home to a host of other wildlife including elk, deer, bighorn sheep, pronghorn antelope, black bears, and mountain lions.⁴⁰

The Range first became the subject of tribal partnership requests immediately after the TSGA was enacted in 1994, when CSKT Tribal Chairman Michael (“Mickey”) T. Pablo requested negotiations with DOI and FWS for a Tribal Self-Governance agreement at the NBRC.⁴¹ Ten years later, after multiple difficult negotiation attempts, the parties reached an agreement in December 2004, covering fiscal years (FY) 2005–06.⁴² Under that agreement, CSKT contracted portions of the NBRC’s visitor services, biology, maintenance, and fire control programs, and placed Tribal staff at the NBRC to perform the work under a newly created Coordinator position.⁴³ The agreement was extended in 2006 pending negotiation of a successor agreement.⁴⁴ Months later, however, it was abruptly cancelled by FWS largely due to acrimony on the part of individual FWS employees who had opposed the agreement even before it had been signed.⁴⁵ Recognizing this, DOI and FWS leadership

39. U.S. Govt., *Bison*, http://www.fws.gov/refuge/national_bison_range/wildlife_and_habitat/bison.html (last updated Mar. 12, 2013).

40. U.S. Govt., *Mammals*, http://www.fws.gov/refuge/national_bison_range/wildlife_and_habitat/Animals.html (last updated Feb. 6, 2013).

41. Ltr. from Michael T. Pablo, Chairman, CSKT, to Dan Ashe, Deputy Director-External Affairs, FWS, *Negotiations Request 1* (Apr. 4, 1995) (copy on file with *Public Land & Resources Law Review*).

42. FWS, CSKT, *Fiscal Years 2005-2006 Annual Funding Agreement Between the United States Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Reservation* (signed Dec. 15, 2004) [hereinafter *2004 Agreement*] (copy on file with *Public Land & Resources Law Review*).

43. *Id.* at §§ 6.A, 7.C.

44. For history of this agreement, extension of its term, and subsequent cancellation, see *Amend. Memo. of Points and Authorities in Support of the Confederated Salish and Kootenai Tribes’ Mot. for S.J.*, Docket No. 49, 5-15, *Reed v. Salazar* (D.D.C. Civil Action No. 08-2117 (CKK)).

45. Ltr. from Federal NBRC Employees to Ralph Morgenweck, Regional Director, FWS, *Opposition 4* (Oct. 8, 2004) (“This [Self-Governance agreement] would convert the special purpose of the [National Wildlife Refuge System] from ‘Wildlife First’ to a social program for a select segment of society.”) (copy on file with *Public Land & Resources Law Review*).

immediately agreed to enter into a new agreement with CSKT in order to rectify the situation.⁴⁶

Following extensive negotiations, which were moderated by outside facilitators, CSKT, DOI, and FWS signed a new agreement in 2008 for a second Self-Governance partnership at the NBRC for FY 2009–11.⁴⁷ Like the first agreement, it involved tribal contracting of the NBRC’s visitor services, biology, maintenance, and fire control programs, but under the new agreement CSKT contracted the entirety of most of those programs rather than just portions.⁴⁸ The 2008 agreement therefore involved a more extensive scope of program contracting, and also included the contracting of a Deputy Refuge Manager position to oversee CSKT’s contracted work at the NBRC.⁴⁹ The 2008 agreement also differed from the 2004 agreement in that the 2008 contract established a “Refuge Leadership Team” that encouraged more coordinated and consensus-based decision-making at the NBRC.⁵⁰ The team consisted of FWS’ Refuge Manager and Deputy Refuge Manager, and CSKT’s Deputy Refuge Manager and Lead Biologist.⁵¹

At the signing ceremony in Washington, D.C. for the second agreement, Secretary of the Interior Dirk Kempthorne stated that

the Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes are entering into a new era of partnership and cooperation that will enhance the National Bison Range and its fish and wildlife resources for all Americans. . . . I commend Service and Tribal staff for

46. Memo. from Lynn Scarlett, Deputy Secretary of the Interior, DOI, to Dale Hall et al., Director, FWS, *New Agreement 4* (Dec. 29, 2006) (“[W]e will immediately reestablish [*sic*] a working relationship with CSKT to include authorization of a new FY 2007 [Self-Governance agreement] . . .”) (copy on file with *Public Land & Resources Law Review*).

47. FWS, CSKT, *Fiscal Years 2009-2011 Funding Agreement Between the United States Department of the Interior Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Reservation* (signed June 19, 2008) [hereinafter *2008 Agreement*] (copy on file with *Public Land & Resources Law Review*).

48. *Id.* at § 6.A.

49. *Id.* at § 6.A.1.

50. *Id.* at § 7.D.

51. *Id.* at § 7.D.1.

moving forward and building on the expertise and strengths of both organizations to conserve this special place.⁵²

True to Secretary Kempthorne's words, CSKT and FWS built a highly constructive partnership at both the field and policy levels over the course of the next several years, which was reflected in many ways, including: positive status reports; successful annual bison round-ups; positive visitor feedback; and increased general communication and coordination between federal and tribal staffs.⁵³

Despite the growing progress, opponents to CSKT's participation at the NBRC filed suit in federal court over the partnership, alleging that it violated, *inter alia*, the TSGA, the National Wildlife Refuge System Administration Act (Refuge Act), and provisions of the National Environmental Policy Act (NEPA).⁵⁴ Almost two years into the 2008 agreement's term, the court rescinded the agreement on strictly procedural grounds, holding that FWS had not properly explained its invocation of a categorical exclusion under NEPA when it approved the agreement.⁵⁵ Basing its decision solely on that procedural deficiency, the court did not

52. U.S. Govt., *U.S. Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes Sign Annual Funding Agreement for National Bison Range Complex 1* (June 19, 2008) (copy on file with *Public Land & Resources Law Review*).

53. *E.g.*: Email from Dean Rundle, Refuge Supervisor, FWS, to James Steele, Jr., Tribal Chairman, CSKT (Sept. 10, 2009) ("Our partnership is getting a lot of very good work done. I was impressed in the August accomplishments on all fronts, from the biological program – particularly the work addressing invasive weeds, and bison research – to the public use program where visitation was up significantly over the same period in 2008.") (copy on file with *Public Land & Resources Law Review*); and *Testimony of Laura Davis, Associate Deputy Secretary, U.S. Dept. of the Int., before the H. Nat. Resources Comm. on H.R. 4347 – the Department of the Interior Tribal Self-Governance Act*, 4 (June 9, 2010) [hereinafter *Testimony of Laura Davis*] (copy on file with *Public Land & Resources Law Review*).

54. Compl. ¶¶ 72-91, *Reed v. Salazar* (D.D.C. Civil Action No. 08-2117 (CKK)); Compl. at ¶¶ 96-131, *Blue Goose Alliance v. Salazar* (D.D.C. Civil Action No. 09-0640 (CKK)).

55. *Reed v. Salazar*, 744 F.Supp. 2d 98, 118 (D.D.C. 2010). The district court consolidated both the *Reed v. Salazar* and *Blue Goose Alliance v. Salazar*, cases in this opinion.

rule on the plaintiffs' underlying claims that the agreement violated the TSGA, the Refuge Act, and other laws.⁵⁶

In response to the court decision, CSKT and FWS negotiated a new Self-Governance agreement and FWS agreed to prepare an environmental assessment to accompany the draft agreement. As of this writing, FWS is still in the final stages of preparing that assessment, after having solicited scoping comments in May of 2012.⁵⁷

The Tribal-Federal relationship at the NBRC has thus far had a somewhat limited treatment in the form of law review analysis, yet clearly has a history—and future—warranting more in-depth examination.⁵⁸ CSKT's 20-year effort to secure a stable Tribal Self-Governance agreement with FWS for NBRC operations has its own interesting and often difficult history, which will require a separate article to adequately recount and analyze.⁵⁹ The focus of this article is an examination of historical and legal background relevant to the NBRC partnership issue, as well as examples of similar Federal-Tribal cooperation in the United

56. *Reed*, 744 F.Supp 2d. at 118. After the court decision, the Interior Office of Inspector General (OIG) issued a report finding no merit to allegations, made by one of the plaintiff organizations, claiming performance and management deficiencies at the NBRC under the agreement. Transmittal Memo. for Rep., Office of the Inspector General, DOI, *The National Bison Range*, Rep. No. NM-EV-FWS-0001-2010 (Mar. 2011) (un-paginated first page of Report) (e.g., “We did not find any current evidence to support allegations of operational deficiencies in the other programs included in the [Public Employees for Environmental Responsibility] allegations.”).

57. U.S. Govt., *Notice of Intent to Prepare an Environmental Assessment Regarding the Interest of the Confederated Salish and Kootenai Tribes to enter into an Annual Funding Agreement with the Department of the Interior, U. S. Fish and Wildlife Service, for the Operation and Management of Programs at the National Bison Range Complex*, http://www.fws.gov/bisonrange/AFA/Final_Public_Notice_AFA.pdf (accessed May 11, 2014).

58. CSKT's efforts to secure a Tribal Self-Governance Agreement with FWS at the NBRC have been addressed in two articles: Erin Patrick Lyons, *Give Me a Home Where the Buffalo Roam: The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation* (Student Note), 8 J. Gender Race & Just. 711 (2005); 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. Envtl. L. Rev. 475, 507 (2007).

59. Some background on this history can be found in CSKT's *Amend. Memo. of Points and Authorities in Support of the Confederated Salish and Kootenai Tribes' Mot. for S.J.*, *supra* n. 44, at 1–21.

States and abroad that can help provide context for the tribal participation at the NBRC.

III. THE IMPORTANCE TO TRIBAL CITIZENS OF BISON AND THE NATIONAL BISON RANGE COMPLEX

Insight into CSKT's historical relationship with bison is critical for understanding the NBRC's importance to CSKT citizens, as is familiarity with the history of the Range's establishment, location, and acquisition of its initial bison herd. The extensive intertwining of tribal and federal activities regarding bison and the NBRC sets the stage for the partnership efforts sought under the TSGA.

A. Traditional Significance of Bison to CSKT

While commonly referred to as "buffalo," the scientific name for the North American bison is *Bison bison*.⁶⁰ The Salish and Pend d'Oreille word for bison is *q'weyq'way*, while the Kootenai word is "kamququku# ?iyamu".⁶¹ The Salish and Pend d'Oreille tribes historically occupied lands both east and west of the Continental Divide in what is now Montana.⁶² The east side was prime bison habitat, and for centuries CSKT relied on the bison for food, blankets, tools, and many other necessities. The Salish-Pend d'Oreille Culture Committee (SPCC) describes the CSKT's reverence for, and uses of, the bison as follows:

The respect held for the buffalo was reflected in the way the people used all parts of the animal and wasted nothing. In almost every oral history account, the elders spoke in detail and with great feeling about how the people did their best to waste nothing. There are names in the Salish language for all of the cuts of meat and for all

60. *The American Heritage Dictionary of the English Language* 135 (New College Edition, Houghton Mifflin 1976) (definition of "bison").

61. For the Salish-Pend d'Oreille translation, see Salish-Pend d'Oreille Culture Committee, *q'weyq'way* 1 (2008) (copy on file with *Public Land & Resources Law Review*); for the Kootenai translation, see *First Voices*, <http://www.firstvoices.com/en/Ktunaxa/word-query-results?q=buffalo&btn=Search&archive=Ktunaxa&lang=en> (2013).

62. *Salish People*, *supra* n. 9, at xiii-xiv, 19.

the inside parts. . . . The meat would be dried, pounded, and then packed into parfleches, often mixed with mint leaves to deter bug infestations. Even the hooves were boiled for food. The people knew certain ways to prepare and bake the intestines and the organs. The brains would be prepared and stored, and could keep for as long as five years. The neck hide of the bulls would be formed over stumps and then used for buckets, or sometimes it would be made into strong ropes by cutting it into long strips and then pounding it with stone hammers. The hair of the bulls would be braided for horse halters or bridles. The bones would be chopped and pounded, and bone marrow would be extracted and stored in hollowed out elderberry branches, and later used for lubricating oil. The horns would be used for drinking cups or, in later times, for storage of gun powder. The robes were used for warm clothing and bedding, and were regarded as one of the most important of all personal belongings, to be treated with great care.⁶³

The importance of the bison to the Salish, Pend d'Oreille, and Kootenai Tribes would be difficult to overstate from cultural, spiritual, or subsistence perspectives.⁶⁴ One Montana newspaper offered a glimpse of the scale of the traditional Salish-Pend d'Oreille bison hunts, reporting in 1877 that "Chief Charlos [*sic*] of the Flathead nation, and 40 lodges, numbering about 200 bucks, squaws and papooses, made their appearance yesterday, and are now encamped on the Hot Springs road, three miles

63. *q'eyq'ay*, *supra* n. 61, at 3.

64. For further descriptions of the extensive uses made of the bison, see Bon I. Whealdon, *I Will Be Meat for My Salish* 23 (Robert Bigart, Salish Kootenai College Press 2001, Montana Historical Society Press 2001) ("The buffalo furnished them meat, robes for bedding, skins for teepee coverings, clothing, foot gear, sinew for sewing, bone splinters for sewing awls, and many other articles they required. . . . To needlessly kill buffalo was a very grave crime. Then, too, before the good Fathers came, our Indians believed the buffalo was a very strong power, and was a good friend to Indians who protected the herds."). See also *q'eyq'ay*, *supra* n. 61.

from Helena. They are from Missoula, and *en route* to the Muscleshell [*sic*] on a buffalo hunt.”⁶⁵

CSKT’s relationship with bison set the stage for the Range’s establishment on the Flathead Reservation. Neither the location of the Range, nor the specific bison procured for the Range’s original herd, were the result of accident or chance. As discussed in the next sections, a reservation-based bison herd, located near the Flathead River, predated the creation of the Range, which was also established near the same river.⁶⁶ It was this reservation bison population that was the primary source for the Range’s initial bison herd.

*B. Tribal Members Bring Bison Across the Continental Divide as
Conservation Measure*

The story of how tribal members brought bison across the Continental Divide to the Flathead Reservation is one of conservation, adaptation, and cultural transition. It is primarily recorded in oral history. Some of the written accounts of that oral history, which were often transcribed by non-Indians, contain differences, but their general theme remains the same.⁶⁷ The backdrop of this history is against the near total extirpation of plains bison by European-Americans—an unprecedented

65. *The Weekly Missoulian* (citing the *Herald* newspaper) (Oct. 26, 1877) (copy on file with *Public Land & Resources Law Review*).

66. Ltr. from ____, to Mr. A. M. Cleland, General Passenger Agent, U.S. Reclamation Service, *Reclamation* 4 (Apr. 1, 1909) (the “Flathead Reservation has been for a great many years the home of the largest buffalo herd in the world.”) (copy on file with *Public Land & Resources Law Review*).

67. Whealdon, *supra* n. 64, at 103, 113. Most of the recorded accounts in this book were collected and transcribed by non-Indians in the early part of the twentieth century, giving rise to a precautionary disclaimer by the Salish-Pend d’Oreille Culture Committee at the beginning of the book. The disclaimer notes, among other things, that, while the interviews recorded in the book “are a valuable source of information from Salish elders,” the translation from Salish to oral English and the subsequent stage of writing the stories have altered the information. This, combined with the non-Indian lens through which the information was received at the time (*e.g.*, references to “squaws,” “savage,” etc. being only the most obvious subjective distortions) prompted the disclaimer.

situation with far reaching implications for many tribes, including CSKT.⁶⁸

The SPCC⁶⁹ sets the stage for the story as follows:

The elders say that in the second to last year of the buffalo hunts, tribal hunters were able to kill only 27 bison. The following year, they killed only seven. The buffalo that had once blanketed the plains, and fed and clothed the people for thousands of years, were gone by the early 1880's. Fortunately, however, the Pend d'Oreille had already saved the buffalo from total extinction. The elders have told how some years earlier, a man named ?ataticé?, or Falcon Robe, had proposed to the chiefs that the people herd some of the orphaned calves back west of the mountains to begin a herd on the Flathead Reservation. The people could see that the numbers of buffalo [east of the Divide] were already declining, and inter-tribal conflicts over the dwindling resource were intensifying. But ?ataticé? was suggesting a fundamental change in the traditional way of life. After three days in council, the leaders remained divided, so ?ataticé? withdrew his proposal.⁷⁰

At the time, ?ataticé?'s proposal was undoubtedly a radical concept given the untold number of generations that had always traveled to, or lived on, the east side of the Continental Divide to hunt bison. Even

68. Whealdon, *supra* n. 64, at 26 ("You will scarcely understand me when I tell you just what the buffalo gave my people in the days before the white man came"); *id.* at 37-38 ("The fur traders with their insatiable demands for robes, and then, more robes, were of course responsible for this wholesale slaughter of the [bison] herds. . . . I am sure that was the beginning of the end for the old way of life - the buffalo."). See also Salish-Pend d'Oreille Culture Committee, *A Brief History of the Salish and Pend d'Oreille Tribes* 16-17 (SPCC, rev'd 2003) [hereinafter *Brief History*] (copy on file with *Public Land & Resources Law Review*).

69. For background/history on the Salish-Pend d'Oreille Culture Committee, see CSKT, *Salish-Pend d'Oreille Culture Committee*, <http://www.cskt.org/hc/salish.htm> (2004).

70. *Brief History*, *supra* n. 68, at 53.

so, the rapidly diminishing number of bison there must have been a concern for those chiefs who had endorsed ?atatice?'s idea. While tribal leaders could not at that time gain the traditionally required consensus for approving ?atatice?'s idea of bringing bison over the Continental Divide back to the Flathead Reservation, his idea did not die. To the contrary, the SPCC relates how the idea lived on and was ultimately approved by tribal leaders:

In the late 1870's, however, the chiefs, seeing that the slaughter of the buffalo would not stop, allowed the son of ?atatice?, Łatati (Little Falcon Robe), to carry out [?atatice?'s] idea [of bringing bison back to the Reservation]. About six calves survived the journey west [to the Reservation]. Some years later, Łatati's stepfather, Samwell, sold the growing herd to [tribal members] Michel Pablo and Charles Allard. Pablo and Allard ranged the buffalo in the grasslands along the Flathead River, where the herd quickly grew to hundreds of animals.⁷¹

This chain of events, from ?atatice?'s initial proposal to Michel Pablo and Charles Allard's growing of the bison herd, is an important part of CSKT's history. As the next section illustrates, it is also crucial to the origin of the Range and to Yellowstone National Park's bison population.

C. Stewardship of the Flathead Indian Reservation Bison Herd

Once the herd was acquired, and subsequently enlarged, by Michel Pablo and Charles Allard, the bison continued to be free ranging and grazed on both sides of the Flathead River in the center of the Flathead Reservation—south of Flathead Lake and north of the present-day Range.⁷² The two men's partnership lasted until Allard's death in

71. *Id.*

72. Whealdon, *supra* n. 64, at 85–86.

1896, at which point his share of the herd was divided amongst his heirs and subsequently sold to various parties.⁷³

In 1901, some bison from Allard's portion of the herd were sold to the Conrad family of Kalispell.⁷⁴ Other portions of the Allard herd were sold to Howard Eaton, a friend of famed artist Charles Russell.⁷⁵ Eaton, in turn, later sold some of his animals to Yellowstone National Park, which at the time had a dwindling number of bison.⁷⁶ The modern-day Yellowstone bison herd therefore descends, in part, from the bison originally saved by Łatatí and later tended by Pablo and Allard.⁷⁷ Throughout the years that Allard's portion of the bison herd was being distributed and redistributed, Pablo continued grazing his remaining herd on the Flathead Reservation.⁷⁸

D. Creation, and Initial Population, of the National Bison Range

Simultaneous to the latter years of Pablo's bison stewardship, another outgrowth of the dominant society's wanton slaughter of the bison was the birth on the East Coast of a bison conservation movement that culminated in the creation of the American Bison Society (ABS). The ABS was founded in 1905 by William T. Hornaday and Theodore Roosevelt for the purpose of conserving the plains bison and stemming their extinction.⁷⁹ The ABS's role in the creation of the Range is reflected in the statute creating it, which stated that the Range would be populated with bison provided by ABS.⁸⁰ The ABS followed through with bison acquisitions that formed the share of the Range's initial herd.⁸¹ As will be discussed later, most of the bison acquired by the ABS actually

73. *Id.* at 87.

74. *Brief History*, *supra* n. 68, at 53. *See also* Whealdon, *supra* n. 64, at 87. One account states that this sale of the bison to the Conrad family took place in 1902. *Id.* at 88.

75. *Brief History*, *supra* n. 68, at 53; Whealdon, *supra* n. 64 at 87.

76. *Brief History*, *supra* n. 68, at 53; Whealdon, *supra* n. 64 at 87.

77. *Brief History*, *supra* n. 68, at 53; Whealdon, *supra* n. 64, at 89.

78. Whealdon, *supra* n. 64, at 87.

79. Lott, *supra* n. 37, at 187; *see also* *Brief History*, *supra* n. 68, at 54.

80. 16 U.S.C. § 671.

81. *E.g.* Whealdon, *supra* n. 64, at 88 ("Thirty-six [bison] were sold to the American Bison Society in 1909 for more than \$10,000 and moved to the National Bison Range. . .").

originated, or descended, from the Pablo-Allard herd.⁸² The SPCC recalls this time as follows:

In 1905, some wealthy non-Indians formed the American Bison Society in New York. In [1908], they convinced Congress in effect to seize over 16,000 acres of the Flathead Reservation, which was about to be opened for white settlement, in order to form a National Bison Range. Pend d'Oreille oral historian Blind Mose Chouteh told of the meeting that was held in St. Ignatius, where tribal leaders told the U.S. Indian Agent they did not want to give up that land, because it was some of their good hunting grounds. But the Agent told them they had no choice in the matter, and a price for the land was dictated to the Tribes. The government then expended most of this money to cover the administrative and surveying costs involved in opening the Reservation to white settlement. The supposed "payment" for the seizure of one tribal resource was actually used to subsidize the taking of another tribal resource.⁸³

As noted earlier, the creation of the Range coincided with the Federal Government's allotment of reservation land to CSKT tribal members and subsequent "opening" of the Flathead Reservation to non-Indians for homesteading, farming, and grazing.⁸⁴ This was accomplished over the protests of tribal members.⁸⁵ In response to the federal request for consent to such opening, Chief Charlo of the Salish said, "I won't sell a foot!"⁸⁶ Chief Isaac of the Kootenais told the federal agents that "[y]ou told me I was poor and needed money, but I am not poor. What is valuable to a person is land, the earth, water, trees . . . and all these belong to us. . . . We haven't any more land than we need, so you had better buy

82. *Brief History*, *supra* n. 681, at 53, 55. *See also* Whealdon, *supra* n. 64, at 87–88.

83. *Brief History*, *supra* n. 68, at 53–55

84. *Supra* n. 3.

85. *Brief History*, *supra* n. 68, at 48.

86. Smith, *supra* at n.13, at 25.

from somebody else.”⁸⁷ Despite this opposition, the Flathead Reservation was opened and lands were allotted to Tribal members and, later, to non-Indian homesteaders.⁸⁸

The opening of the Flathead Reservation necessitated the fencing of land parcels, which, among other impacts, resulted in the death knell for Michel Pablo’s free ranging bison herd.⁸⁹ Consequently, Pablo, who by this time was the sole owner of the reservation herd, was forced by the federal Indian agent to get rid of it.⁹⁰ He ultimately sold his bison to the Canadian government after the United States government failed to accept his offer of sale.⁹¹ In 1907, a Helena, Montana newspaper reported as follows:

Howard Eaton, of Wolf, Mont., the famous guide and personal friend of President Roosevelt, announced to-day that he had received information that the herd of between 400 and 500 bison owned by Michael Pablow [*sic*], and now on the Flathead reservation, 35 miles west of Missoula, Mont., is about to pass into the possession of the Canadian government, to whom Pablow has given an option for the purchase of the animals.

Some time ago Mr. Eaton secured an option on the herd at a valuation of \$300 a head and presented it to the United States government. President Roosevelt was desirous of preserving to the United States the herd, comprising one-half of all the bison surviving in this

87. *Id.* at 25.

88. *Supra* at n. 6 and Smith at 10.

89. *Infra* at n. 91.

90. *Brief History*, *supra* n. 68, at 53–55.

91. Whealdon, *supra* n. 64, at 113.

“Then Pablo was assured by a man in authority, that the whites were actually coming. He realized that the days of free, open range for his buffalo were ending. He was heartbroken. After some consideration, he decided to sell the herd to the U.S. Government. Influential persons, including Theodore Roosevelt, advised Congress to appropriate a purchasing fund, but they were unsuccessful in arousing public opinion to buy the herd and place them in a permanent refuge. Sadly disappointed, Pablo sold them to agents of the Canadian government.” *Id.*

See also Brief History, *supra* n. 68, at 53, 54.

country, Mr. Eaton said, but no appropriation was made for the purpose.⁹²

The official who had purchased the option on behalf of the Canadian government was Howard Douglas, Superintendent of western Canada's national parks. Douglas inspected Pablo's bison and made an offer of \$180,000 for the entire herd, which Pablo accepted.⁹³

In 1908, Congress took lands from within the Flathead Reservation "for a permanent National Bison Range for the herd of bison presented by the American Bison Society."⁹⁴ The Act originally authorized Congress to acquire up to 12,800 acres for the Range, but was amended in 1909 to authorize up to 20,000 acres.⁹⁵ At the time of its establishment by the Federal Government, tribal members did not agree with the creation of the Range, but were given no real choice in the matter.⁹⁶ The land for the Range was taken from properties that the United States held in trust for CSKT and its citizens as beneficial owners under the Hellgate Treaty, and was subsequently placed into sole federal ownership for bison conservation purposes.⁹⁷ Establishment of the Range further displaced several tribal members who had only recently been

92. *Flathead Buffalo Herd to be Sold; Michael Pablow has Given Option to Government of Canada*, Helena Independent (Apr. 9, 1907) (copy on file with *Public Land & Resources Law Review*). While this article ascribes Howard Eaton to Wolf, Montana, another places Mr. Eaton in Wolf, Wyoming. Cf. *All But Outlaws of Great Buffalo Herd Moved from Flathead to Make Room for the Settler*, The Daily Missoulian 1 (July 4, 1909) (copy on file with *Public Land & Resources Law Review*).

93. *All But Outlaws of Great Buffalo Herd Moved from Flathead to Make Room for the Settler*, The Daily Missoulian 1 (July 4, 1909) (copy on file with *Public Land & Resources Law Review*).

94. 16 U.S.C. § 671. Later, Montana state statutes enacted in 1953 consented to further federal acquisitions that would be used "for the display of such native big game animals as are available on the national bison range." See Mont. Code Ann. §§ 87-1-711, 87-1-712.

95. 35 Stat. 267-68 (May 23, 1908). Expansion of the authorized acquisition to 20,000 acres was effected by the Act of March 4, 1909, c.301, 35 Stat. 1039, 1051.

96. See generally Smith, *supra* n. 13; the SPCC account of the National Bison Range's creation, *supra* nn. 79-83. See also *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458, 465 (Ct. Cl. 1971) (finding that the taking of the land for, *inter alia*, the National Bison Range constituted a taking under the Fifth Amendment of the U.S. Constitution).

97. *Supra* at n. 94.

provided allotments of Indian land within what became the Range's exterior boundaries.⁹⁸

Michel Pablo's bison herd—later reported to consist of nearly 600 animals and referred to as “the largest herd of wild bison in the United States”—were rounded up and transported by train to their new home in Canada in order to, as one newspaper phrased it, “make way for the advancing march of progress and development.”⁹⁹ The bison were rounded up in stages from 1907 through 1909, creating both a logistical challenge and a media spectacle.¹⁰⁰ As bluntly stated by a Missoula newspaper:

And this is all done to make room for the white man – the man with the plow and the hoe, whose conquest of the soil has swept the red man, the buffalo and other wild game before him like mist before the wind. The settler, in the great battle of development, needed more lands to conquer. The Flathead reservation offered an enticing field for his activities. But there was not room for the red man's buffalo and the white man's cattle, perforce the bison had to make way for the munching cow, the toiling horse and the ravenous sheep and swine¹⁰¹

Once the Range was established, it needed to be populated with bison—of which very few were left in North America. One of the enduring ironies of the Range is that its initial bison herd consisted largely

98. *Bison*, *supra* n. 39 (“Range land was purchased by the Government from five allotments and from the Flathead Nation in 1908, removing it from lands to be made available in 1910 to non-Indian settlers.”).

99. *All But Outlaws of Great Buffalo Herd Moved from Flathead to Make Room for the Settler*, *supra* n. 93, at 1.

100. *Id.* (Describing the time frame of the multiple bison round-ups, the newspaper reported as follows: “[T]wo years ago 400 of the herd were successfully rounded up and then driven down the Mission valley into the corrals at Ravalli. From these corrals the animals were pulled and dragged by means of block and tackle into the railroad cars. Last year another round-up was made, but just when the riders were about to drive the herd to Ravalli the band stampeded and made its escape from the corral at Ronan.”). For an additional account of the Pablo herd bison round-up, see Whealdon, *supra* n. 64, at 91–98.

101. *All But Outlaws of Great Buffalo Herd Moved from Flathead to Make Room for the Settler*, *supra* n. 93, at 1.

of animals that originated in the freshly evicted Pablo-Allard herd. Specifically, the ABS purchased bison back from the Conrad Ranch near Kalispell, Montana and from the Canadian government, both of which had just bought their bison from the Pablo-Allard herd.¹⁰² The animals were then brought (back) to the Flathead Reservation to become the initial herd at the Range.

Decades later, one of Michel Pablo's descendants, Michael T. ("Mickey") Pablo, became CSKT's Tribal Chairman. Chairman Pablo advocated in the 1980's and 1990's for Tribal Self-Governance policies and, once Congress enacted the TSGA, the Chairman initiated CSKT's efforts to partner with FWS at the NBRC.¹⁰³

E. The Ongoing Tribal Relationship with the National Bison Range Complex

Despite its opposition to the taking of its land for the Range, CSKT maintained connections to the Range, its bison, and the other refuges in what would become the NBRC. These connections took various forms ranging from cultural/spiritual¹⁰⁴ to legal,¹⁰⁵ but they all evince the depth of tribal ties to the NBRC and its resources. They also undoubtedly informed CSKT's later decision to seek Tribal Self-Governance participation at the NBRC.

1. Ninetripes and Pablo: Refuges on Tribal Land

Tribal citizenry's resistance to the taking of their land for the Range should not be seen as a general opposition to federal conservation measures. As early as 1917, CSKT urged the Federal Government to place conservation protections on two Flathead Reservation reservoirs, which had been created by the BIA for irrigation purposes.¹⁰⁶ The United

102. *Brief History*, *supra* n. 68, at 53, 55. *See also* Whealdon, *supra* n. 64, at 87–88.

103. *Supra* at n. 41, and *infra* at n. 141.

104. *E.g., infra* at n. 121.

105. *E.g., infra* at nn. 111, 126-127.

106. Ltr. from Flathead Agency Superintendent, to Commissioner of Indian Affairs Affairs, *Reservoirs* (Apr. 7, 1917) (unsigned) (conveying the recommendation of the Flathead Business Committee, CSKT's governing body at the time, "that the

States eventually responded in 1921 with Executive Orders creating what are now known as the Pablo and Ninepipe National Wildlife Refuges, for use as “refuge[s] and breeding grounds for native birds.”¹⁰⁷ Both of these refuges are now administered as part of the NBRC and are important components of the Tribal-Federal relationship there.

The Ninepipe and Pablo Refuges are each on lands that are beneficially owned by CSKT and held in trust by the United States. In 1948, Congress compensated CSKT claims for past federal uses of these lands and purchased from CSKT perpetual easements for the two refuges.¹⁰⁸ At the same time, Congress explicitly recognized and preserved CSKT’s reserved rights in both properties. The legislation that was signed into law provided that “[t]he said tribes shall have the right to use such tribal lands, and to grant leases or concessions thereon, for any and all purposes not inconsistent with such permanent easement.”¹⁰⁹ This statutory language is identical to the text that had been proposed for the legislation by CSKT’s attorneys.¹¹⁰ Thereafter, CSKT, the BIA, and FWS (or its predecessor, the Biological Survey) continued to coordinate regarding tribal uses of the lands, including agricultural uses.¹¹¹

2. Big Medicine: Local and National Icon

Tribal citizens’ cultural and spiritual connections with the bison and the Range were further evident throughout the life of a white bison

reservoirs on the Flathead Reservation be established as a game or bird preserve.”) (copy on file with *Public Land & Resources Law Review*).

107. Exec. Or. 3503, *supra* n. 2; Exec. Or. 3504, *supra* n. 2.

108. Act of May 25, 1948, 62 Stat. 269, 272, at § 5(b).

109. *Id.*

110. Ltr. from John W. Cragun, Attorney, CSKT, to Wesley D’Ewart, Congressman, H.R., *Proposed Language* (Mar. 1, 1948) (available at Sen. Rpt. 80-1234 (May 4, 1948) (reprinted at 1948 U.S.C.C.A.N. 1597, 1602–1603)).

111. *E.g.*: Memo. of Understanding between Superintendent of the Flathead Agency, CSKT, and FWS (1987) (regarding tribal economic use of croplands for the period of Jan. 1, 1987 through Dec. 31, 1991) (copy on file with *Public Land & Resources Law Review*); Supp. to Memo. of Agreement between the Superintendent of the Flathead Agency, CSKT and FWS, regarding experimental grazing at Ninepipe and Pablo Refuges (executed on Sept. 24, 1945) (copy on file with *Public Land & Resources Law Review*).

bull that was born on the Range on May 3, 1933.¹¹² White bison hold great significance to numerous Indian tribes, including the Salish, Pend d'Oreille, and Kootenai Tribes.¹¹³ The white bull, which became known as "Big Medicine" due to his importance to Indians, was not a true albino, but was nonetheless almost completely white, save for a brown topknot.¹¹⁴ A typical bison's lifespan is about twenty years, but Big Medicine was given special care due to his stature and thus lived to be twenty-six years old, dying on August 25, 1959.¹¹⁵ While Big Medicine held great spiritual and cultural significance for CSKT and citizens of other tribes, non-Indians also admired him, although this was likely due to his status as a rare curiosity.¹¹⁶ During his lifetime on the Range, he was sometimes referred to as the most photographed bison in America.¹¹⁷

After his death, Big Medicine was conveyed to the Montana Historical Society (Society), which preserved the bull through taxidermy and placed him on public display at the Society's museum in Helena, Montana, where he remains as of this writing.¹¹⁸ The individual who prepared Big Medicine for display, Bob Scriver, was a well-regarded taxidermist located on the Blackfeet Indian Reservation who employed Blackfeet assistants.¹¹⁹ The Society's acquisition of the famous bison has been the subject of some controversy, as well as requests for the Society to

112. Dave Walter, *Big Medicine: Talisman for all Montanans*, Montana Magazine vol. 158, 68, 70–71 (Nov.-Dec. 1999). See also Montana Historical Society, *Big Medicine – A Treasure-State Treasure* (undated) (copy on file with *Public Land & Resources Law Review*).

113. Walter, *supra* n. 112, at 68.

114. *Big Medicine – A Treasure-State Treasure*, *supra* n. 112.

115. *Id.*

116. Walter, *supra* n. 112, at 71–72.

117. *Id.* at 68, 72. See also *Remains of Montana's White Buffalo Enshrined*, Montana Standard (July 14, 1961) (copy on file with *Public Land & Resources Law Review*); *Big Medicine 'Sifts Across the Range'; Death Occurs on Tuesday; Pelt To Be Mounted for State Historical Museum*, The Times, Missoula, Montana 4 (Sept. 4, 1959) (copy on file with *Public Land & Resources Law Review*).

118. *Id.*

119. Walter, *supra* n. 112, at 74. A photo of Scriver and his Indian colleagues appeared in the *Glacier Reporter* (Feb. 2, 1961). Scriver's colleagues are identified in the photo as: Carl Cree Medicine; James Scriver; Sam Cut Finger; Henry Guardipee; and Arlene Lightfield (copy on file with *Public Land & Resources Law Review*).

return Big Medicine to the Flathead Reservation.¹²⁰ Reflecting its iconic status, CSKT citizens continue to honor the memory of Big Medicine even to this day.¹²¹

3. *Judicial Compensation for Federal Takings of Bison Range Lands*

The Range continued to be a focus of tribal attention in the 1960's, when CSKT prosecuted claims against the United States for various takings of reservation lands. That litigation culminated in a 1971 United States Court of Claims decision holding that the United States had exercised its power of eminent domain when it took lands for, among other purposes, the Range.¹²² After summarizing minimum standards for compensated takings as well as for general trustee responsibilities, and after summarizing evidence submitted at trial, the court found that

there is at the very least grave doubt as to [the existence of:] “a good faith effort [on the part of the United States] to give the Indians the full value of the land”; “a mere substitution of assets or change of form”; and the exercise, in good faith and for the welfare of the Tribes, of a “traditional function of a trustee.”¹²³

More specifically, the court held that tribal lands “reserved by [the United States] for the National Bison Range . . . were taken by [the United States], within the meaning of the Fifth Amendment.”¹²⁴ The court awarded compensation to CSKT for the Range lands in an amount equal to the fair market value of the lands as of January 1, 1912, less compensation

120. E.g. Ltr. from Sam Gilluly, Director, Montana Historical Society, to L. Doug Allard, *Society's Response to Request for Return* (May 20, 1974) (copy on file with *Public Land & Resources Law Review*).

121. E.g., Staff Reports, *Confederated Salish & Kootenai Tribes fo the Flathead Reservation, Montana*, <http://indiancountrytodaymedianetwork.com/2000/06/14/confederated-salish-kootenai-tribes-flathead-reservation-montana-86153> (June 14, 2000).

122. *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana*, 437 F.2d at 465.

123. *Id.* at 469 (citing *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (1968)).

124. *Id.* at 485.

previously received, along with interest thereon “not as interest but as a part of just compensation.”¹²⁵ The court thereby settled the legal compensation issues surrounding the federal government’s seizure of the Range lands. It did not, however, put an end to CSKT’s ongoing interests in, and connections to, the Range and its associated properties.

4. Continuation of Inter-Governmental Agreements at the National Bison Range Complex

After the Court of Claims decision, there was continued Tribal-Federal cooperation at the NBRC, on issues such as grazing, agricultural, and wildlife management activities on the Ninepipe and Pablo Refuges. Such cooperation often took the form of memoranda of understanding and continued upon similar communication and cooperation in earlier decades.¹²⁶

As mentioned earlier, with the enactment of the TSGA in 1994, CSKT initiated discussions with DOI regarding a Tribal Self-Governance agreement with FWS for NBRC programs. Since that time, much of CSKT’s interests in the NBRC have revolved around efforts to establish a Self-Governance partnership there. Multiple iterations of negotiations ensued throughout the 1990’s and early 2000’s, with the first agreement signed in December 2004, and the second in June 2008.¹²⁷ As mentioned above, the parties have negotiated a third agreement and are, as of this writing, in the process of finalizing environmental review for it.¹²⁸

IV. THE INTERWEAVING OF INDIAN SELF-DETERMINATION, TRIBAL SELF-GOVERNANCE AND REFUGE MANAGEMENT LAW

The Federal policy of Tribal Self-Governance was conceived and nurtured by Indian Tribes and their able

125. *Id.*

126. *Supra* n. 111 (memoranda of understandings between the BIA, CSKT, and FWS concerning farming and grazing at the Pablo and Ninepipe Refuges).

127. *2004 Agreement, supra* n. 42; *2008 Agreement, supra* n. 47.

128. *Testimony, supra* n. 22, at 4.

*leaders. It is a policy seasoned by experience and matured by time.*¹²⁹

The TSGA is best understood in the context of the evolution it represents in federal Indian policy. Students of federal Indian law or policy have often observed the cyclical nature of the United States' policies towards Indian tribes over the last 200 years. Periods of federal government recognition of tribal autonomy interspersed with periods of federal encouragement of assimilation, relocation of tribal members, and/or termination of Federal-Tribal governmental relationships.¹³⁰ The Federal Government pursued policies in the 1950's–1960's calling for termination of federal recognition of Tribal governments, and concomitant efforts to encourage assimilation.¹³¹ After those policies proved to be failures, the United States then did an about-face and embarked on a policy of encouraging tribal self-determination and increasing tribal autonomy. The first step in this still-evolving process was the 1975 enactment of ISDEAA, the parent Act of the TSGA.¹³²

A. Congressional Adoption of Self-Determination and Self-Governance Legislation

1. The Birth of Indian Self-Determination as Federal Policy

The broad objectives of Self-Determination policies are to increase tribal control and decision-making authority over federal programs and resources intended to serve Indian country. ISDEAA achieves this through tribal contracting of federal programs that were

129. Sen. Rpt. 103-205 at 4 (Nov. 22, 1993) (accompanying S. 1618).

130. See e.g., David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., & Matthew L.M. Fletcher, *Cases and Materials on Federal Indian Law: Centuries of Shifting Law and Policy* ch. 4 (6th ed., West 2011).

131. For more background on these federal policies, see generally Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* 183 (Univ. of New Mexico Press 1986). For a personal recollection of federal termination and relocation policies, as experienced by a young girl who would later become one of the great Tribal leaders of the 20th century (as well as a passionate advocate for Self-Determination and Self-Governance policies), see Wilma Mankiller & Michael Wallis, *Mankiller: A Chief and Her People* 63–77, 98–116 (St. Martin's Press, 1993).

132. Pub. L. No. 93-638, 88 Stat. 2203 (January 4, 1975).

historically administered by the BIA and the Indian Health Service (IHS) (an agency of the Health and Human Services Department). In this sense, ISDEAA is a logical progression from the Indian Reorganization Act of 1934, which was the first broad federal initiative to encourage tribal sovereignty and autonomy.¹³³ Like many other major federal legislative advances such as the Civil Rights Act, the Voting Rights Act, and numerous environmental protection statutes, ISDEAA was a product of the progressive policies that arose from the shifting national consciousness of the 1960's and early 1970's.

The Self-Determination paradigm received a high profile launch via President Richard Nixon's "Special Message to the Congress on Indian Affairs," which he delivered in 1970. In his message, he made the following observation:

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. . . . [One] reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a federal agency.¹³⁴

133. The Indian Reorganization Act, 25 U.S.C. § 461 (2006) *et seq.*, is one of the seminal pieces of federal legislation concerning Indian tribes. It essentially repudiated the decades-old federal policy of allotting tribal trust lands and, instead, encouraged the development of autonomous tribal governments as well as retention of tribal trust land. For more background on the Indian Reorganization Act and its chief architect, Commissioner of Indian Affairs John Collier, see Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251, 1258–60 (1995) (“In Collier’s own words, ‘the Indian societies, whether ancient, regenerated or created anew, must be given status, responsibility, and power.’”).

134. Sen. Rpt. 103-374 at 1–2 (Sept. 26, 1994) (accompanying S. 2036).

Congress supported the Self-Determination paradigm described by Nixon. With passage of ISDEAA, and President Gerald Ford's subsequent signing of the bill into law in 1975, Indian country proceeded to put capital letters on Self-Determination as its "new" path forward.¹³⁵ In reality, and as a historical matter, this was nothing "new." Increased tribal autonomy simply represented a step towards returning to the millenia-long state of self-government and resource management that, for many western and midwestern tribes, had only recently been interrupted a few generations earlier.¹³⁶ However, for the Federal Government, as well as for contemporary tribal leaders, the federal policy of Self-Determination was both new and bold. It was viewed as a progressive policy sensibly "premised on the notion that Indian tribes are the basic governmental units of Indian policy."¹³⁷

The new federal Self-Determination policies were an unequivocal success. Congress recognized these successes, marveling at the fact that the tribal achievements had taken place both in a short time and against the backdrop of specific challenges faced by most rural communities, be they Indian or non-Indian:

Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act. In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development. All of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources. Most Indian communities share with rural non-Indian communities

135. 88 Stat. 2203.

136. One example of such traditional tribal governance and resource management is the previously discussed CSKT Tribal leaders' approval of ?ataticé? and Łatati's proposal to bring bison to the Flathead Indian Reservation at a time when they were literally on the verge of extinction. *Supra*, nn. 70-71.

137. Sen. Rpt. 100-274 at 2 (Dec. 21, 1987) (reprinted in 1988 U.S.C.C.A.N. 2620, 2621) (accompanying S. 1703).

problems of inadequate infrastructure and lack of access to managerial talent. Nevertheless, compared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by tribal governments over the past twelve years is remarkable. This progress is directly attributable to the success of the federal policy of Indian self-determination.¹³⁸

With these sorts of glowing evaluations of tribal accomplishments, the stage was set for expansion of ISDEAA policies.

2. *Indian Self-Determination Evolves into Tribal Self-Governance*

Working with tribal leaders and the DOI to improve and expand Self-Determination policies, Congress approved the Tribal Self-Governance Demonstration Project (Project) in 1988.¹³⁹ The Project permitted twenty Tribal governments to develop tribally designed budgets and to draft contracting agreements with the DOI, based upon tribal needs and priorities, for BIA programs.¹⁴⁰ The Project provided tribes with increased autonomy over how funds were allocated and used amongst various programs, and allowed flexibility for tribes to better—and more quickly—direct resources to tribal priorities. CSKT, and CSKT Tribal Chairman Mickey Pablo in particular, were integral players in the development of this Tribal Self-Governance framework, and CSKT was one of the first ten tribes to participate in the Project.¹⁴¹ Based upon early successes, the Project was expanded in 1991 to: 1) increase the number of participating tribes to 30; and 2) study the feasibility of applying Tribal Self-Governance policies to the IHS.¹⁴²

138. *Id.* at 4.

139. Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296 (Oct. 5, 1988).

140. *Id.* at § 302(a).

141. 53 Fed. Reg. 49608, 49609 (Dec. 8, 1988). For one example of CSKT involvement in the development of Self-Governance, see CSKT, *Testimony to the Senate Indian Affairs Committee: Regarding Title III of Public Law 100-472 Self-Governance Demonstration Project* (June 9, 1989) (copy on file with *Public Land & Resources Law Review*).

142. Pub. L. No. 102-184, 105 Stat. 1278 (Dec. 4, 1991). Self-Governance was later permanently extended to include the Indian Health Service. Tribal Self-

Tribes continued to impress Congress with the successes of this next phase of Self-Determination, and the ensuing support for Tribal Self-Governance legislation was bipartisan. In remarks on the House floor, Democratic Congressman Bill Richardson of New Mexico, after noting the historic importance of the Self-Governance legislation, declared that the Project “has been an overwhelming success.”¹⁴³ The Senate Indian Affairs Committee (Committee) similarly observed the “measurable success” of the Project.¹⁴⁴ The Committee concurred with tribal assertions that, under the Self-Governance paradigm, the programs were administered more effectively and in a manner more responsive to their respective communities than had been the case when the BIA operated the same programs.¹⁴⁵

Lauding the general concept of Self-Governance, the Committee praised the policy’s actualization of the oft-expressed goals of increasing tribal autonomy.¹⁴⁶ Noting that it had heeded the advice of tribal leaders in incrementally advancing the Self-Governance phase of ISDEAA, the Committee telegraphed its intentions to consider further extension of the Self-Governance model to other federal departments and agencies.¹⁴⁷ It also made clear that Self-Governance contracting was a very different animal than the Federal Government’s standard (non-Indian) contracting regimens:

Conceptually, Self-Governance reflects the unique relationship between the United States Government and the individual Indian Tribes. Self-Governance recognizes that Tribes are governments with the inherent rights to govern themselves. The Tribal Self-Governance Project was designed to reduce Federal control over decision-

Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (Aug. 18, 2000) (codified at 25 U.S.C. §§ 458aaa–458aaa-18).

143. 140 Cong. Rec. 22561, 22563 (1994).

144. Sen. Rpt. 103-205 at 5 (Nov. 22, 1993).

145. *Id.* at 3.

146. *Id.*

147. *Id.*

making, and to enhance fiscal control, resource allocations, and management at the tribal level.¹⁴⁸

The Committee addressed both the fundamental shift in federal policy represented by Self-Governance and the basis for the policy itself. In its report, it stated that

[a] new chapter in Federal-Indian relations is being written by Tribal Self-Governance. Indian Tribes have been and will continue to be permanent governmental bodies exercising basic powers of government, as of Federal and State governments, to help meet the needs of their citizens.¹⁴⁹

In deference to tribal leaders, the Committee took pains to highlight their common request regarding the characterization of Self-Governance and any perceived limitations of its scope:

Tribal governments participating in the Self-Governance Demonstration Project have expressly requested that the term “program” not be utilized in reference to Self-Governance. The fundamental nature of Tribal Self-Governance in establishing government-to-government relationships with the United States extends beyond Federal programmatic description and reference. Tribal governments envision that the Self-Governance concept broadly encompasses Department and Agency programs in a general federal policy framework. Although rules and regulations will be bilaterally negotiated . . . , the Committee expects cognizant Departments to recognize the broad context of this historic initiative.¹⁵⁰

In evaluating the broad policy shift of making Tribal Self-Governance permanent, Congress took note of problems that tribes were

148. *Id.* at 3–4.

149. *Id.* at 4.

150. *Id.* at 6.

encountering with the federal agencies whose programs they contracted. Such difficulties included federal staff holding tribes to higher standards than had been applied to the programs when they were federally operated.¹⁵¹ They further included federal agencies' resistance to accept even the concept of Self-Governance.

In remarks on the Senate floor, Republican Senator John McCain from Arizona, in a blunt response to reports of federal agency resistance to Tribal Self-Governance, stated that there was "no doubt in my mind that self-governance has been a success. One of the ways I measure the success of self-governance is to see how hard the Federal bureaucracy will fight to maintain the old ways."¹⁵² Senator McCain went on to take note of what would be an ongoing dynamic in the implementation of Self-Governance—federal agency resistance to the policies supported by Congress and the Secretary of the Interior.¹⁵³

Further along these lines, the Committee described reports that IHS officials were refusing to make necessary adjustments under the Self-Governance policies due to a perception, or hope, within the agency that the Self-Governance paradigm was simply a passing fad; the Committee disabused them of that opinion, but noted that the IHS viewpoint "is also pervasive within the Department of the Interior."¹⁵⁴ Other problems involved unwillingness by federal agencies to transfer the full amount of funding to Self-Governance tribes.¹⁵⁵ Even at this early stage of Self-Governance, the Committee made clear that federal funding obligations under the legislation would include, when appropriate, funds held by non-BIA agencies, including FWS.¹⁵⁶

151. Sen. Rpt. 103-374 at 2 (Sept. 26, 1994).

152. 139 Cong. Rec. 32425–32426 (1993).

153. *Id.* at 32426 (Based upon this demonstrated federal agency resistance, McCain even anticipated agency "sabotage" of enactment of permanent Self-Governance authority.).

154. Sen. Rpt. 103-205 at 5.

155. *Id.* at 9–11 (The Committee discussed how Self-Governance required federal agencies to provide tribes with all funding that is functionally related to DOI administration of the contracted program. It emphasized that the DOI's obligation is to "include all funds and resources regardless of the geographic location or administrative level at which the Department of the Interior would have expended funds in lieu of a Self-Governance agreement.").

156. *Id.* at 10 ("The Committee intends that the Secretary should interpret this . . . bill to mean that all funds specifically or functionally related includes funds

As an additional statement on its commitment to Self-Governance, Congress did not settle with simply making the Self-Governance policy permanent as it existed under the Project. Rather, based upon the tribal record of performance under the Project, Congress extended the policy to authorize, for the first time, direct tribal contracting of DOI programs outside of the BIA.¹⁵⁷ This included authorization for the Secretary of the Interior to enter into contracting agreements for programs of geographic, historical, or cultural significance to tribes—regardless of which DOI agency administered the programs.¹⁵⁸ Responding to hyperbolic concerns that had apparently been expressed about this new authority, Congressman Richardson, in comments on the House floor, assuaged such fears by emphasizing that such authority “does not mean that Indian tribes will take over the Washington Monument or the Gettysburg Battlefield.”¹⁵⁹ Congressman Richardson also noted that such program contracting to tribes would not be mandatory and that the legislation leaves any decision on contracting for such programs up to the discretion of the Secretary of the Interior.¹⁶⁰

While the legislation intentionally opted not to limit tribal contracting of programs of geographic, historic, or cultural significance to only those that are located on an Indian reservation, the House Natural

appropriated or administered, not just by the Bureau of Indian Affairs, but also by every office or agency or bureau within the Department of the Interior, including, but not limited to, the Bureau of Reclamation, the U.S. Fish & Wildlife Service, the Office of Policy Management and Budget, the National Park Service, the Bureau of Land Management, the Minerals Management Service, the U.S. Geological Service, the Office of Surface Mining and Enforcement, and Bureau of Mines. Neither the source of the appropriated funds, nor the location in which it would have been otherwise spent, may limit the negotiability of these funds.”) (emphasis added). The Committee was referring to funds associated with BIA contracts but involving monies that originated from, or were otherwise administered by, other DOI agencies. The Committee was not here referring to direct tribal contracts with non-BIA agencies—a subject the Committee addressed in a separate provision, as discussed in the next passages of this article. *Infra* nn. 157-158.

157. Pub. L. No. 103-413 at § 204 Secs. 403(b)(2), 403(c) (codified at 25 U.S.C. §§ 458cc(b)(2), (c)).

158. *Id.* at § 204 Sec. 403(c) (codified at 25 U.S.C. §§ 458cc(c)).

159. 140 Cong. Rec. 22561, 22563 (1994).

160. *Id.* (Specifically, Congressman Richardson stated that if a tribe “over-reaches and requests to negotiate for program [*sic*] or functions which have no relevance to Indian affairs, the Secretary can simply say ‘no’.”).

Resources Committee made clear that it intended such programs within a reservation to be “presumptively” eligible for Self-Governance agreements. The House Natural Resources Committee stated that it designed the legislation:

to authorize the Indian tribe to include programs or portions of programs administered by the National Park Service, the U.S. Fish and Wildlife Service or the Bureau of Land Management which have special significance to the tribe. The Committee intends this [provision] in conjunction with the rest of the Act, to ensure that any federal activity carried out by the Secretary within the exterior boundaries of the reservation shall be presumptively eligible for inclusion in the Self-Governance funding agreement.¹⁶¹

Years later, former Congressman Pat Williams, who as Montana’s sole House Representative had voted to approve the TSGA in 1994, confirmed that this legislative provision was intended to allow for tribal contracting of programs such as those at the NBRC. In his words:

Managed by the federal Fish and Wildlife Service, the Bison Range remains a prime candidate for collaborative operations between that agency and the Salish and Kootenai Tribes under the Tribal Self-Governance Act. That is precisely what we in the Congress intended.¹⁶²

161. H.R. Rpt. 103-653 at 10 (Aug. 3, 1994); see Johnson and Hamilton, *supra* n. 133, at 1272 (Shortly after enactment of the TSGA, this law review article, co-authored by Tadd Johnson, the former Staff Director and Counsel to the House Natural Resources Subcommittee on Native American Affairs, and James Hamilton, further illuminated the congressional intent behind this portion of the Act: “In the past, Bureaus other than the BIA refused to cooperate with tribes, but their cooperation is now compelled. It was the intent of the Committees of jurisdiction that any activities performed by any division or agency of the Interior Department on or near the reservation were negotiable items for self-governance tribes.”).

162. Pat Williams, *Congress Intended to Encourage Tribal, Interior Contracts*, Missoulian E4 (May 20, 2007); see also Ltr. from Nick Rahall, Don Young, *supra* n. 7.

Wanting to maintain and institutionalize the direction in which the United States and Self-Governance tribes were going, Congress passed bipartisan legislation making the Tribal Self-Governance policy permanent within the DOI.¹⁶³ President Clinton signed the bill into law on October 25, 1994.¹⁶⁴ In the TSGA's findings and declaration of policy sections, Congress made clear that the policy is: grounded in inherent tribal sovereignty; designed to increase tribal autonomy; and intended to allow tribes to decide the extent of their Self-Governance participation.¹⁶⁵ Congress embedded in the TSGA itself the requirement for the TSGA to be construed liberally in favor of both including federal programs in tribal contracting agreements and implementing such agreements.¹⁶⁶

3. Self-Governance Thrives Within the BIA, But Struggles for Support Within Other Interior Agencies

Nationally, Tribal Self-Governance policies and contracting have flourished and, as of 2010, nearly 40 percent of the country's 566 federally recognized tribes were participating in Self-Governance, giving it a well-established track record.¹⁶⁷

Self-Governance agreements involving DOI agencies other than the BIA, however, have been relatively rare occurrences.¹⁶⁸ Of the few agreements with non-BIA agencies, the only one that has involved more than the contracting of a limited scope of project work has been the agreement between the Grand Portage Band of Chippewa Indians (GPB) and the National Park Service (NPS) for the Grand Portage National Monument (GPNM). As discussed later in this article, under that

163. 108 Stat. 4250.

164. *Id.*

165. *Id.* at § 202.

166. *Id.* at § 204 Sec. 403(i) (codified at 25 U.S.C. § 458cc(i)).

167. U.S. Govt., *Office of Self-Governance*, <http://www.bia.gov/WhoWeAre/AS-IA/OSG/index.htm> (accessed Jan. 2014) (Self-Governance tribal participation rate); U.S. Govt., *Tribal Directory*, <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm> (accessed Jan. 2014) (number of federally recognized tribes and Alaskan Native Villages).

168. *E.g. List of Programs Eligible for Inclusion in Fiscal Year 2013 Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs*, 78 Fed. Reg. 4861, 4861–4865 (Jan. 23, 2013) (non-exclusive listing of DOI programs eligible for Self-Governance agreements).

agreement the GPB assumes responsibility for the GPNM maintenance program, as well as other projects and activities.¹⁶⁹

CSKT's efforts to negotiate an agreement with FWS for the NBRC span the life of the TSGA. Shortly after the TSGA was signed into law, CSKT Tribal Chairman Mickey Pablo, a descendant of the aforementioned Michel Pablo, sent a written request to initiate negotiations with the DOI for contracting programs at the NBRC, citing the TSGA'S provision authorizing agreements for programs of geographic, historical, or cultural significance.¹⁷⁰ The issue of whether NBRC programs are eligible for contracting has never been in doubt. The TSGA requires the Secretary of the Interior to annually publish programs which are eligible for Self-Governance contracting in the *Federal Register*; the Range, as well as the Ninepipe and Pablo Refuges, are consistently listed as eligible programs.¹⁷¹ As previously mentioned, CSKT's ensuing efforts to obtain a contracting agreement consisted of numerous chapters and conflicts, which are better recounted in a separate article.

To date, none of the Self-Governance agreements with non-BIA agencies involve the scale of contracting that existed under CSKT's FY 2005–06 and FY 2009–11 agreements with the FWS for NBRC programs. Echoing Senator McCain's above-referenced observations of federal agency resistance to Self-Governance, it is worth noting that both of those NBRC agreements only came into being after years of contentious dealings between CSKT and FWS.¹⁷²

In acknowledgment of that past contention, and in recognition of cooperation overcoming conflict at the NBRC, the DOI's Associate Deputy Secretary Laura Davis, in her June 2010 testimony before the House Natural Resources Committee, characterized the then-existing Tribal-Federal partnership as follows:

169. *Infra* n. 241 (discussion of the Grand Portage Band's 2013 Annual Funding Agreement, which includes activities at nearby Isle Royale National Park).

170. Ltr. from Michael T. Pablo, *supra* n. 41.

171. *E.g.* 78 Fed. Reg. at 4861–4865 (As in previous years' listings, the National Bison Range, Ninepipe National Wildlife Refuge, and Pablo National Wildlife Refuge are all listed as eligible for contracting.). 25 U.S.C. § 458ee(c)(3) (requirement to publish the listing).

172. *See* Memo., *supra* n. 44, at 3–21.

A true partnership and spirit of cooperation has developed from the history of controversy between the FWS and the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation over the National Bison Range Complex in Montana. Effective on October 1, 2008, a funding agreement for fiscal years 2009-2011 provides for an on-the-ground partnership in the management of programs by the CSKT on 4 units of the Refuge System, located on the Flathead Indian Reservation in Montana. In January 2009, under the direction and decision-making authority of the Refuge Manager, CSKT assumed management of the biological, maintenance, fire management and portions of the visitor services programs. CSKT staff have participated in a variety of FWS sponsored trainings and the bison round-up event in October 2009 was highly successful. In fiscal year 2009, FWS provided approximately \$1.7 million to CSKT, including a \$650,000 [sic] for a[n] [American Recovery and Reinvestment Act of 2009]-funded bridge replacement project. Approximately \$986,000 will be transferred to the CSKT for operations in fiscal year 2010.¹⁷³

For the past several years, the CSKT have been in the process of trying to return to that successful partnership. As with its prior Self-Governance agreements, and as discussed in the next section of this article, the negotiations and discussions with FWS have taken place against an extensive backdrop of legal guidance from DOI's Office of the Solicitor.

B. Interpretation of the Tribal Self-Governance Act

The TSGA leaves the implementation responsibility for non-BIA negotiations and agreements to the Secretary of the Interior, the practical effect of which is for the Secretary to typically delegate such responsibility to agency heads, regional directors, and/or field-level officials. While this lack of statutory micro-managing can be

173. *Testimony of Laura Davis, supra* n. 53, at 4.

empowering, it can also result, and has in the past resulted, in frustration and death-by-bureaucracy for Self-Governance negotiations.¹⁷⁴

1. Initial Solicitor Analysis and Interpretation of the Tribal Self-Governance Act

Immediately upon passage of the TSGA, DOI officials enlisted legal assistance in ascertaining the DOI's responsibilities and authorities as outlined under the TSGA. Since 1994, the scope of the Secretary of the Interior's authority to contract with Indian tribes under the TSGA has been the subject of a number of solicitor memoranda, most of which address the TSGA's prohibitions on contracting programs or activities that are either: 1) "inherently Federal"; or 2) contained in statutes that do not authorize the "type of participation" sought by a tribe.¹⁷⁵ Throughout this body of legal guidance, the Solicitor's Office consistently interprets those TSGA provisions as affording a broad range of contracting opportunity within the DOI outside of the BIA—including for National Wildlife Refuges.¹⁷⁶

a. The December 16, 1994 Memorandum

The initial Solicitor's Memorandum, authored by Associate Solicitor Wilma A. Lewis and dated December 16, 1994, focused on what may constitute an "inherently Federal function" under the TSGA and consequently be ineligible for inclusion in a Self-Governance agreement.¹⁷⁷ That portion of the statute reads as follows:

Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any

174. E.g. Ltr. from Nick Rahall, Chairman, H. Nat. Resources Comm., Don Young, Ranking Minority Member, H. Nat. Resources Comm., to Dirk Kempthorne, Sec. of the Int., DOI, Lynn Scarlett, Dep. Sec., DOI, *Reluctance from FWS not Tribes* 1 (Nov. 2, 2007).

175. E.g., *infra* at nn. 176-177, 180-181, and 211..

176. Copies of the referenced solicitor opinions are on file with the Public Land & Resources Law Review.

177. Memo. from Wilma A. Lewis, Assoc. Solicitor, DOI, to Tom Collier, Chief of Staff, DOI, *Inherently Federal Functions* (Dec. 16, 1994) (copy on file with *Public Land & Resources Law Review*).

agreement under subsection (b)(2) of this section and section 458ee(c)(1) of this title with respect to **functions that are inherently Federal** or where the **statute establishing the existing program does not authorize the type of participation sought by the tribe: *Provided, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a [Self-Governance agreement]*** under subsection (b)(2) of this section.¹⁷⁸ [*boldface added*]

In her memo, Associate Solicitor Lewis analyzed this issue within the context of the Supreme Court's decision in the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), a case dealing with the Appointments Clause of the Constitution and the separation of powers, and associated interpretation of that case by the Department of Justice's Office of Legal Counsel.¹⁷⁹ Utilization of this analysis resulted in a later Solicitor's Memorandum, dated May 17, 1996, expressly superseding Associate Solicitor Lewis' December 16th memo.¹⁸⁰

b. The May 8, 1995 Memoranda Package

In the interim, on May 8, 1995, Solicitor John Leshy issued a memorandum titled "Indian Self-Governance" which also addressed the questions of: 1) what activities may be deemed "inherently Federal" for purposes of the TSGA; and 2) whether "generic" statutes authorizing general agency management authority (*e.g.*, National Park Service organic statutes) should be interpreted as prohibiting the "type of participation" sought by a tribe requesting a Self-Governance contract with a non-BIA agency.¹⁸¹ Of relevance to the NBRC, the memorandum specifically cited the Refuge Act as an example of such a "generic" statute, which in this

178. 25 U.S.C. § 458cc(k) (*italics in original*).

179. Memo. from Wilma A. Lewis, *supra* n. 177, at 4.

180. Open Memo. from John Leshy, Solicitor, DOI, to Assistant Secs. & Bureau Heads, DOI, *Inherently Federal Functions under the Tribal Self-Governance Act 1* (May 17, 1996).

181. Memo. from John Leshy, Solicitor, DOI, to Glynn Key, Assist. to the Sec. of the Int., DOI, *Indian Self-Governance 1* (May 8, 1995).

case requires that the Refuge System be administered by the Secretary of the Interior through FWS.¹⁸²

Solicitor Leshy stated that, if the Refuge Act were to be interpreted as being a statute that “does not authorize the type of participation sought by the tribe” within the meaning of the TSGA, then “very little if anything that has to do with Refuge management would be [contractible].”¹⁸³ After additional analysis, Solicitor Leshy concluded that there was “no evidence Congress intended such a sweeping result” when it enacted the TSGA.¹⁸⁴ He pointedly noted that the TSGA itself explicitly stated that tribes “need not be identified in an authorizing statute in order for a program or element of a program” to be contractible.¹⁸⁵ He then determined that “Congress did not want breadth of scope or lack of specificity in a statute by itself to create a blanket exclusion from [TSGA] compactibility.”¹⁸⁶

Solicitor Leshy’s conclusions were buttressed by an attached memorandum, also dated May 8, 1995, from Robert L. Baum, Associate Solicitor for Conservation and Wildlife. Associate Solicitor Baum’s memo specifically analyzed the question of TSGA contractibility of National Wildlife Refuges and concluded that many refuge management functions may be contracted under the TSGA.¹⁸⁷

Instructive for the NBRC, on the final page of Solicitor Leshy’s May 8th memorandum, he gave some examples of what sorts of DOI programs may be of geographic, historical, or cultural significance to a tribe for purposes of the TSGA. His examples included: Canyon de Chelly National Monument on the Navajo Nation’s Reservation; Badlands National [Park], part of which is located on the Pine Ridge Sioux [Oglala Lakota] Reservation; and Bighorn Canyon National Recreation Area, part of which is located on the Crow Indian Reservation.¹⁸⁸ Of these three

182. *Id.*

183. *Id.*

184. *Id.* at 3.

185. *Id.* at 2. *See also* 25 U.S.C. § 458cc(k).

186. Memo. from John Leshy, *supra* n. 181, at 2.

187. Memo. from Robert L. Baum, Associate Solicitor, DOI, to Glynn Key, Assist. to the Sec. of the Int., DOI, *Attachment to Memo. from John Leshy* 3 (May 8, 1995) (“It is our opinion that many of the management functions, programs, and activities at refuges and parks may be compacted.”).

188. Memo. from John Leshy, *supra* n. 181, at 4 (The memorandum premised its examples on the condition that the named tribes were to become Self-

examples, perhaps the most analogous to the NBRC are: Canyon de Chelly National Monument (Canyon de Chelly) which, like the Range and its ancillary Ninepipe and Pablo Refuges, is located within the center of an Indian reservation; and the South Unit of the Badlands National Park (South Unit), which is also located within the Pine Ridge Indian Reservation. Both Canyon de Chelly and the South Unit are, like the NBRC's Ninepipe and Pablo Refuges, located on lands held in trust by the Federal Government for Indian tribes.¹⁸⁹ Canyon de Chelly and the South Unit are both discussed in more detail later in this article.

c. The May 17, 1996 Memorandum

As mentioned above, Solicitor Leshy's next memorandum, dated May 17, 1996, explicitly superseded the December 16, 1994 memorandum from Associate Solicitor Lewis regarding inherently federal functions under the TSGA.¹⁹⁰ The purpose of Solicitor Leshy's May 17th memo was to identify the analysis that an agency should employ in determining what may constitute an "inherently Federal function" as referenced in the TSGA. Since the TSGA does not define that term, Solicitor Leshy looked to general guidance issued by the Office of Management and Budget (OMB) regarding what may constitute an inherently "governmental" function.¹⁹¹

After identifying selected portions of this OMB guidance in his memo, Solicitor Leshy noted that such guidance predated the TSGA and had been drafted for the purpose of drawing distinctions between government agencies and private commercial contractors.¹⁹² In other words, the OMB guidance was not designed to distinguish "federal" government functions from "state" or "tribal" government functions. Instead, the OMB guidance was simply designed to distinguish activities that were governmental in nature from those that could be characterized as either private/commercial or susceptible to private/commercial operation.

Governance tribes. As of the writing of this article, none of these three named tribes have opted to become Self-Governance tribes.).

189. See *infra* pt. V.B.1 (discussing Canyon de Chelly National Monument).

190. Memo. from John Leshy, *supra* n. 180, at 1.

191. *Id.* at 2.

192. *Id.* at 2, 12.

Because of this, Solicitor Leshy stressed that there were “important qualifications in applying that [OMB] guidance” to TSGA contracting requests.¹⁹³ Specifically, he stated that “federal law makes clear that tribes are not analogous to private contractors because they possess a substantial measure of independent sovereign authority.”¹⁹⁴ For this reason, the OMB guidance is imperfect in the TSGA context and is necessarily limited when applied to tribal governments to determine what may constitute an “inherently Federal” function within the meaning of the TSGA.

In a later section of his May 17th memo, Solicitor Leshy addressed the potential relevance of the non-delegation doctrine, which generally concerns the constitutional limits on Congress’ ability to delegate its legislative powers.¹⁹⁵ Solicitor Leshy noted that there are unique considerations when evaluating the applicability of the non-delegation doctrine to tribal governments. He cautioned that “[t]o the extent the doctrine contains limits [regarding the contracting of federal programs to tribes], the courts, starting with the Supreme Court, have determined that those limits are relaxed where the delegation is to a tribe in an area where the tribe exercises sovereign authority.”¹⁹⁶

Solicitor Leshy further stated that the “more a delegated [federal] function relates to tribal sovereignty over members or territory, the more likely it is that the inherently Federal exception [within the TSGA] does not apply. This is so, moreover, even in circumstances where the OMB guidance would counsel against delegation.”¹⁹⁷ He further stated that

“close calls should go in favor of inclusion [of programs into Self-Governance agreements] rather than exclusion,” citing the statutory provision directing the Secretary of the Interior to interpret each federal law and regulation “in a manner that will facilitate . . . the inclusion of programs [into Self-Governance agreements].”¹⁹⁸

193. *Id.* at 2.

194. *Id.*

195. *Id.* at 7–8.

196. *Id.* at 8 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)).

197. *Id.* at 12.

198. *Id.* at 13, (citing 25 U.S.C. § 458cc(i); Sen. Rpt. 103-205 (1993)).

The above-referenced Solicitor memoranda constitute a fairly extensive, and consistent, body of legal interpretation that was created contemporaneously with the initial implementation of the TSGA. They also formed the foundation for subsequent Solicitor Office interpretation, as discussed in the next section.

2. *Self-Governance vis-à-vis National Wildlife Refuge System Legislation*

a. Solicitor Analysis of the Federal Court Holding in *Trustees for Alaska*

Nearly two decades after passage of the TSGA, there has been no federal case law defining the term “inherently Federal function,” as contained in the TSGA. Very little case law exists otherwise defining what may generally constitute an “inherently federal” activity. However, the Solicitor’s above-referenced May 8, 1995 memo considered the question of whether Self-Governance contracting of refuge programs infringes upon the statutory requirement for refuges to be “administered” by the Secretary of the Interior through FWS. In so doing, the Solicitor specifically addressed the federal district court opinion in the case of *Trustees for Alaska v. Watt*.¹⁹⁹

Trustees for Alaska dealt with a situation in which former Secretary of the Interior James Watt²⁰⁰ transferred substantial authority and oversight concerning oil and gas exploration within the Arctic National Wildlife Refuge from FWS to the United States Geological Survey (USGS).²⁰¹ The court considered the question of whether such transfer violated the Refuge Act’s requirement for refuges to be administered by the FWS.²⁰² As part of its analysis, the court took notice of the Refuge Act’s legislative history, which, in part, sought to eliminate the ability of the Secretary of the Interior to delegate her or his authority for refuge administration to any other DOI agency.²⁰³

199. *Trustees for Alaska v. Watt*, 524 F.Supp. 1303 (D.Ak. 1981), *aff’d*, 690 F.2d 1279 (9th Cir. 1982).

200. George Cameron Coggins & Doris K. Nagel, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. Envtl. Aff. L. Rev. 473 (Spring 1990) (reviewing James Watt’s tenure as Secretary of the Interior).

201. *Trustees*, 524 F.Supp. at 1305–1307.

202. *Id.* at 1308.

203. *Id.* at 1309.

After evaluating Secretary Watt's transfer of certain refuge-related responsibilities from FWS to USGS, the district court held that "[i]n giving USGS responsibility for approving exploration plans with FWS concurrence, the Secretary provided for joint administration" and that the transfer of those and other duties to USGS "was a clear error of judgment and beyond [the Secretary's] statutory authority."²⁰⁴ Put another way, due to the scope of authority given to the USGS, as well as the gravity of the subject matter (oil and gas exploration in a wildlife refuge) the court "reasoned that the development of exploration guidelines constituted refuge management, a function entrusted by statute exclusively to the FWS."²⁰⁵

The Solicitor's 1995 memo analyzed the *Trustees for Alaska* decision to address the question of whether the Refuge Act statutes do "not authorize the type of participation sought by the tribe," and would therefore render refuge programs ineligible for Self-Governance contracting under 25 U.S.C. § 458cc(k).²⁰⁶ The Solicitor identified several reasons for rejecting such a contention, and concluded that his interpretation was consistent with the court's holding in *Trustees for Alaska*.²⁰⁷

Specifically, he said that "it is not an adequate ground to refuse to compact specific functions that are not inherently federal in character, simply because an organic statute vests an agency with generic management authority over a broad category of land."²⁰⁸ Distinguishing between the underlying facts of the *Trustees for Alaska* case and those of Self-Governance contracts, the Solicitor found that Self-Governance contracting of non-inherently federal functions would not rise to the level of refuge "administration" so as to run afoul of either the Refuge Act, the TSGA, or the court's holding in *Trustees for Alaska*.²⁰⁹ Generally speaking, the Solicitor recognized that the structure of Self-Governance contracting does not divest federal agencies of ultimate administrative authority over their programs as did the wholesale transfer of authority

204. *Id.* at 1310.

205. Coggins & Nagel, *supra* n. 200, at 514.

206. Memo. from John Leshy, *supra* n. 181, at 1.

207. *Id.* at 3 ("This holding is not inconsistent with our interpretation of the Self-Governance Act.").

208. *Id.*

209. *Id.* at 2-3.

from the FWS to the USGS concerning oil and gas exploration in the *Trustees for Alaska* situation.

Since *Trustees for Alaska*, no other federal court opinion has addressed a similar question of whether FWS has ceded its administrative responsibility in violation of the Refuge Act. The Solicitor's analysis of *Trustees for Alaska*, through the lens of the TSGA, remains undisturbed.

b. The December 31, 2012 Memorandum Addressing the Refuge Improvement Act

Shortly after Solicitor Leshy's 1996 memorandum, Congress passed the National Wildlife Refuge System Improvement Act of 1997 (Refuge Improvement Act), which amended the Refuge Act and is sometimes referred to as the Refuge System's "Organic Act."²¹⁰ To address the Refuge Improvement Act in relation to the TSGA and the prior Solicitor memoranda, Associate Solicitor for Parks and Wildlife Barry Roth and Regional Solicitor Matthew McKeown jointly issued a December 31, 2012 memo to the FWS Rocky Mountain Regional Director.²¹¹

This December 31st memorandum determined that nothing in the Refuge Improvement Act prohibited the Secretary "from entering into [agreements] with self-governance tribes for management of programs on a refuge."²¹² In addressing the fact that the 1997 amendments specifically authorized FWS to enter into cooperative agreements with state (but not tribal) fish and wildlife agencies for management of refuge programs, the Solicitors cited a May 15, 2007 letter to the Secretary of the Interior from the Chairman and Ranking Minority Member of the House Natural Resources Committee which, in addressing CSKT's efforts to contract NBRC programs, stated that FWS' "[w]orking with Tribal governments . . . under the Tribal Self-Governance Act should not be viewed any differently than partnering with State governments especially

210. U.S. Govt., *National Wildlife Refuge System Improvement Act of 1997: Public Law 105-57*, http://www.fws.gov/refuges/policiesandbudget/hr1420_index.html (last updated Aug. 19, 2009). For citations to statutes, see *supra* n. 33.

211. Memo. from Barry Roth, Associate Solicitor, DOI, Matthew McKeown, Regional Solicitor, DOI, to Regional Director, DOI, *Tribal Self-Governance Annual Funding Agreements for Management of Refuge Programs* (Dec. 31, 2012).

212. *Id.* at 2.

in this instance where the [CSKT] owns the land on which the ancillary facilities of the . . . National Bison Range Complex are located.”²¹³

That same bipartisan letter from the House Natural Resources Committee leaders put them on record as seeing no conflict between the TSGA and the Refuge Improvement Act with respect to the NBRC partnership. Specifically, they stated that they saw the partnership as “a logical partnership under both the [Refuge] Act and the Tribal Self-Governance Act. Although the Refuge System’s organic Act was significantly amended by the 1997 National Wildlife Refuge System Improvement Act, this law did not prohibit Tribal Self-Governance agreements.”²¹⁴ The House Natural Resources Committee leadership’s letter also directly addressed claims that such a partnership amounted to privatization, unequivocally stating that

[a]greements with other governments – be they State or Tribal – are not comparable to privatization schemes where for-profit entities take over federal programs. A Tribal government is not a corporate entity any more than a federal, state or local government is a corporate entity. Under the [Self-Governance agreement] and the Tribal Self-Governance Act, the NBRC remains a federally-owned Refuge and all applicable federal statutes and regulations that apply to the Refuge System continue to apply under the [agreement].²¹⁵

213. *Id.* at 2–3 (citing Ltr. from Nick Rahall, Don Young, *supra* n. 7 at 1; On the first page of the May 15th letter, the House Natural Resources Committee leaders also registered their concern that “the lack of support of this [Self-Governance] agreement by some individuals within the FWS may have resulted in a distorted record concerning NBR activities under the [agreement].”).

214. Ltr. from Nick Rahall, Don Young, *supra* n. 7, at 2.

215. *Id.* at 3 (The Congressmen concluded their letter to the Secretary of the Interior by expressing their hope that the Secretary would agree that “promoting a fair implementation of a Tribal Self-Governance [agreement] at the National Bison Range furthers important congressional and federal objectives as identified in both the [Refuge] Administration Act and the Tribal Self-Governance Act.”). Once the 2008 Self-Governance agreement was signed by FWS and CSKT, Congressmen Rahall and Young issued a statement. Press Release from H. Nat. Resources Comm., *Rahall and Young Commend Signing of National Bison Range Agreement 1* (June 19, 2008) (“We are pleased that the FWS and the CSKT were able to reach this agreement, and we

The solicitors concluded their December 31st memo by saying that they “see nothing in the [Refuge Improvement Act] that changes the advice provided in [the May 8, 1995 memoranda from Solicitor John Leshy and Associate Solicitor Robert Baum] concerning implementation of the Tribal Self-Governance Act within the Refuge System.”²¹⁶ More specifically, the solicitors stated that “under the Tribal Self-Governance Act and his broad cooperative authorities, the Secretary may enter into [agreements] with tribes for the management of refuge programs, so long as they do not involve the transfer of inherently federal functions or administrative functions that are statutorily prohibited from such transfer.”²¹⁷

C. A Firm Foundation for Tribal Self-Governance in the Executive and Legislative Branches

Taken as a whole, these Solicitor memoranda, which span a period of eighteen years, repeatedly and consistently recognize the validity of Self-Governance contracting agreements with tribes regarding National Wildlife Refuge programs. When viewed against the backdrop of the TSGA statutes and regulations, the memoranda confirm the common understanding of, and support for, the TSGA on the parts of the federal government’s executive and legislative branches. Consequently, from a legal standpoint as well as from the broader geographic, historical, and cultural perspectives, the NBRC is well positioned for a robust Self-Governance agreement between FWS and CSKT.

commend the leadership of both entities – as well as the leadership of the Interior Department – for this progressive action. This Annual Funding Agreement is entirely consistent with what the Congress had envisioned when we enacted the Tribal Self-Governance Act of 1994, and we are convinced that the FWS and the CSKT will make for a great team in the management and operation of the National Bison Range. In the long run, the public will benefit by this historic agreement as both parties seek to ensure that this site remains an icon of the entire National Wildlife Refuge System, now and in the future.”) (copy on file with *Public Land & Resources Law Review*).

216. Memo. from Barry Roth, Matthew McKeown, *supra* n. 211, at 5.

217. *Id.*

V. DRAWING LESSONS FROM OTHER FEDERAL-TRIBAL
PARTNERSHIPS FOR PROTECTED AREAS MANAGEMENT IN
THE UNITED STATES AND ABROAD

There are many government-to-government agreements between the United States and Indian Tribal governments. Relatively few of them concern protected area management and, of those, almost all of them involve a limited scope of work rather than a broader management partnership. Some, but not all, of these examples involve Self-Governance agreements.

Currently, one must look outside the United States for examples of broader collaborations between federal governments and Indigenous nations, tribes, and communities regarding protected areas such as national parks and wildlife sanctuaries. As shown later in this section, Canada and Australia are two countries on the vanguard of such cooperative efforts.

A brief survey of the partnerships in the United States and abroad is helpful in providing context for the past, and proposed, Self-Governance partnerships at the NBRC.

A. Other Non-BIA Self-Governance Agreements

As noted earlier, while Self-Governance agreements with non-BIA agencies within the DOI exist, there are relatively few and they are fairly limited in scope, typically contracting discrete projects as opposed to broader management of programs.²¹⁸ However, true to Self-Governance objectives, each agreement is uniquely tailored to the situation of the relevant tribe and the subject federal program.

Representative of agreements involving discrete projects are several with the NPS. An NPS agreement with the Tanana Chiefs Conference, Inc. (TCC) involved NPS transferring funding for the TCC to hire a Project Manager who would oversee interpretive design, architectural team coordination, and economic analyses for a cultural and visitor center in Fairbanks, Alaska.²¹⁹ The agreement did not involve any

218. See 78 Fed. Reg. at 4861 (January 23, 2013) (most recent listing of the non-BIA Self-Governance agreements). Note that the list incorrectly includes a CSKT agreement with FWS although there was no such agreement in effect on that date, as discussed in Section II.B of this article, *supra* n. 55.

219. U.S. Natl. Park Serv., Tanana Chiefs Conference, Inc., *Self Governance Annual Funding Agreement between Tanana Chiefs Conference, Inc., and U.S.*

sort of ongoing NPS program management. Other NPS Self-Governance agreements involved: watershed restoration project work at Redwood and State Parks in California, contracted by the Yurok Tribe;²²⁰ and river ecosystem and fisheries restoration for the Elwha River in Washington's Olympic Peninsula, contracted by the Lower Elwha Klallam Tribe.²²¹ These agreements, while likely meeting tribal and federal needs for the subject programs, have not approached the scope of the NBRC agreements.

1. A Thriving Partnership at Grand Portage National Monument

By far, the most extensive Self-Governance agreement entered into by NPS to date involves the Grand Portage National Monument in Minnesota. Similar to the placement of most NBRC lands in the center of the Flathead Reservation, the GPNM is centrally located within the Grand Portage Band of Chippewa Indians Reservation on Lake Superior.²²²

National Park Service (2001) (copy on file with *Public Land & Resources Law Review*). For information on the Morris Thompson Cultural and Visitor Center, which was the subject of the agreement, see Morris Thompson Cultural and Visitors Center, *Mission and History*, <http://www.morristhompsoncenter.org/our-story/>. For information on the Tanana Chiefs Conference, Inc., see Tanana Chiefs Conference, *Tribal Empowerment Through Health, Employment, Economic Development and Family Services*, <http://www.tananachiefs.org/> (2007).

220. DOI, The Yurok Tribe, *Self-Governance Annual Funding Agreement Between the Yurok Tribe and the United States Department of the Interior, National Park Service* (2001) (copy on file with *Public Land & Resources Law Review*). For more information on the Yurok Tribe, see The Yurok Tribe, *Yurok Home*, <http://www.yuroktribe.org/>.

221. DOI, The Lower Elwha Tribal Community a.k.a. The Lower Elwha Klallam Tribe, *Fiscal Year 2004 Annual Funding Agreement Between U.S. Department of the Interior, National Park Service and the Lower Elwha Tribal Community, a.k.a. the Lower Elwha Klallam Tribe* § 6 (2003) (copy on file with *Public Land & Resources Law Review*) (Activities covered by the agreement include: planning/design/construction of fish hatchery modifications; revegetation of hill slopes and floodplains; levee modifications; hydrograph studies addressing waste water mitigation; near-shore marine monitoring; and cultural resource work with NPS.). For more information on the Lower Elwha Klallam Tribe, see Lower Elwha Klallam Tribe, *The Strong People*, <http://www.elwha.org/>.

222. 16 U.S.C. § 4500o (2006). For more information on the Grand Portage Band, see State of MN, *Tribes: Grand Portage*, http://mn.gov/indianaffairs/tribes_grandportage.html (2012).

Unlike the NBRC, the GPNM lands were willingly donated by the GPB in the 1950's.²²³

In sharp contrast to the 1908 statute that had established the Range, the 1958 statute creating the GPNM specifically recognizes, or provides, rights held by GPB and GPB citizens vis-à-vis the GPNM. These include: preferences for providing visitor accommodation and services;²²⁴ employment preferences for construction, maintenance, or other services for the GPNM;²²⁵ production and sale of handicrafts;²²⁶ access rights and privileges;²²⁷ and economic development advisory assistance.²²⁸ The 1958 statute provides for reversion of the GPNM properties to the GPB in the event the GPNM is abandoned.²²⁹

In 1998, against the backdrop of those statutes, NPS and GPB entered into the DOI's first non-BIA Self-Governance agreement, under which GPB contracted GPNM's entire maintenance program.²³⁰ That agreement, which has since been renewed annually, serves as the foundation for the highly successful partnership between NPS and GPB.²³¹ While the circumstances at Grand Portage are unique, in large part due to the GPNM-specific legislation that explicitly addresses tribal rights, the success may be primarily due to the individual personalities and

223. 16 U.S.C. § 4500o-1.

224. *Id.* at § 4500o-3.

225. *Id.* at § 4500o-4.

226. *Id.* at § 4500o-5.

227. *Id.* at §§ 4500o-6, 4500o-7.

228. *Id.* at § 4500o-8.

229. 16 U.S.C. at § 4500o-10. The statute establishing the National Bison Range includes no such reversionary provisions. *See* n. 36, *supra*.

230. DOI, GPB, *Fiscal Year 1999 Annual Funding Agreement between U.S. Department of the Interior, National Park Service, and Grand Portage Band of Chippewa Indians* (1998) (copy on file with *Public Land & Resources Law Review*).

231. *Testimony of Laura Davis, supra* n. 53, at 4. *See also* Bob Kelleher, *MPRnews*, Radio Broad., "Grand Portage: A Model of Cooperation" (Minn. Pub. Radio Sept. 28, 2009) (transcript and audio available at <http://www.mprnews.org/story/2009/09/25/grandportage>) ("Today, the monument serves as a national bellwether for cooperation between the federal government and American Indians. . . . There's a uniquely warm relationship between the local tribe and the National Park service [*sic*]."). *See* Melissa Hendricks, *A Turnaround at Grand Portage*, National Parks Conservation Association Magazine (Spring 2008) (available at <http://www.npca.org/news/magazine/all-issues/2008/spring/a-turnaround-at-grand-portage.html>).

leadership within the tribal and federal governments that sought common ground.²³² Initially, NPS employees did not universally support the Self-Governance partnership. The GPNM's NPS Superintendent Tim Cochrane said, in the beginning, he went to some NPS meetings "where I felt like a pariah."²³³

Superintendent Cochrane was nevertheless supportive of both the agreement and the underlying concept of cooperation as equals, and his leadership has been critical to the Self-Governance partnership's success. In confronting resistance within NPS to the idea of the partnership, he understood that some of the opposition came not from policy principles, but from self-interest. "There were a few people on staff that were concerned they were going to lose their job [if a Self-Governance agreement were to be signed], said park superintendent Tim Cochrane. "We were able to deal with that pretty effectively. They did not lose their jobs."²³⁴ The importance of leadership support, and support of key field staff, to Federal-Tribal partnerships cannot be overstated.²³⁵ However, in

232. Notes from Telephone Interview with Tim Cochrane, Superintendent of Grand Portage National Monument (Mar. 3, 2014) (copy on file with *Public Land & Resources Law Review*) (Quoting Superintendent Cochrane as saying that, with respect to Self-Governance relationships, the "parties need to have a real desire to work together" and "that's what's going on here" at GPNM. Cochrane also noted the support of the NPS Regional Director and Deputy Regional Director for the GPBM Self-Governance partnership.).

233. Hendricks, *supra* n. 231.

234. Kelleher, *supra* n. 231. The NBRC agreements similarly safeguarded federal staff employment, providing a range of options for continued employment with either FWS or CSKT. See *2004 Agreement*, *supra* n. 42, at § 11.E; *2008 Agreement*, *supra* n. 47, at § 12.E (These employment options were the unilateral choice of the federal employees whose positions were affected by the Self-Governance agreement.). Similar to the NPS staff opposition to the GPNM AFA, the first NBRC agreement was also opposed by a number of FWS staff for reasons that included employment concerns. See Ltr. from Employees, *supra* n. 45, at 2–3.

235. See e.g., Toni Bauman, Chris Haynes & Gabrielle Lauder, *Pathways to the Co-Management of Protected Areas and Native Title in Australia* 11, AIATSIS Research Discussion Paper No. 32 (May 2013) ("Co-management is not only a matter of arrangements and their expression in formal institutionalized cooperation * * *. It is also a human capability and an ongoing process of negotiation, the brokering of partnerships, and the building and maintaining of relationships."). See also discussion *infra* pt. V.C (regarding the importance in Canada and Australia of top officials setting the tone for substantive cooperation with Indigenous groups in those countries regarding protected areas management).

addition to parochial opposition arising from individual employment concerns, Superintendent Cochrane had the impression that, generally, “most Park Service people thought that [the Self-Governance agreement] was not a good idea,” in part simply because it could set a precedent that could lead to more Federal-Tribal partnerships.²³⁶ Superintendent Cochrane himself, however, did not share that perspective. In his view, as expressed after the agreement was first signed in 1998, the partnership promised to build “a good working relationship [that will] have the Grand Portage Band involved in what we do rather than divorced from the operations. It is a part of their history and a part of who they are.”²³⁷ Ten years later, his support remained strong and he noted that the Self-Governance agreement was only one aspect of a larger partnership. “There is a merger of fortunes and perspectives going on at this tiny little park that usually doesn’t go on,” says Cochrane. “It’s been mutually beneficial.”²³⁸

The current, and long-time, GPB Tribal Chairman, Norman Deschampe, has been the other key leader who has supported the partnership alongside the NPS Superintendent. “Here’s a monument located right within the boundaries of a reservation; the two are intertwined,” says Deschampe. “We thought maybe we could play a role here, co-manage the park”²³⁹

The partnership at GPNM has flourished and, at the 2008 opening of a new GPNM Heritage Center, for which NPS and GPB had collaborated on the design and construction, officials repeatedly lauded the increasing cooperation between the federal and tribal governments.²⁴⁰ The success is further reflected in the fact that an additional NPS unit, Isle Royale National Park in neighboring Michigan, recently requested to be included in the Grand Portage Self-Governance agreement.²⁴¹ This

236. Kelleher, *supra* n. 231.

237. Robyn Dalzen, *Historic Agreement at Grand Portage National Monument*, 22.4 Cultural Survival Q., (Winter 1998) (available at: <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/historic-agreement-grand-portage-national-mon>).

238. Hendricks, *supra* n. 231.

239. *Id.*

240. *Id.*

241. See notes from Telephone Interview with Tim Cochrane, *supra* n. 232, at 1. For incorporation of Isle Royale National Park activities within the GPNM Annual Funding Agreement, see DOI, GPB, *Fiscal Year 2013 Annual Funding*

addition again makes the GPB agreement a path breaker in that it is the first Self-Governance agreement to include two distinct NPS units in two different states. At Grand Portage, federal and tribal parties appear to have realized a true cooperative relationship, rather than viewing the world through an “us” and “them” perspective that could preclude or otherwise stymie such partnerships.²⁴² The success at Grand Portage is perhaps best attributed to the fact that, in the words of Superintendent Cochrane, “the parties here believe this is a partnership of equals.”²⁴³

2. Yukon Flats: the First Self-Governance Agreement at a National Wildlife Refuge

In contrast to NPS, FWS has, aside from the previously referenced NBRC agreements, entered into only one other Self-Governance relationship. That agreement was with the Council of Athabascan Tribal Governments (CATG) in Alaska, and involved the Yukon Flats National Wildlife Refuge, the third-largest refuge in the country.²⁴⁴ The agreement, signed on April 30, 2004, was FWS’ first under the TSGA and had been renewed annually until recently.²⁴⁵ Under the agreements, CATG contracted projects such as: environmental education/outreach; easement location; wildlife harvest data collection; and moose population surveys.²⁴⁶ CATG did not contract any programs that entailed

Agreement Between U.S. Department of the Interior, National Park Service and Grand Portage Band of Chippewa Indians §§ 2.A, 2.B.2, 6.B, 7.C, Amendment #1 (2013) (copy on file with Public Land & Resources Law Review).

242. The need for this evolution in perspective cuts across national boundaries and cultures. See Bauman, Haynes & Lauder, *supra* n. 235, at 11 (recognizing “a need to normalize a culture in which co-management is conceived as an ongoing process of the negotiation of meaning and relationships within and across parties, rather than as a partnership made up of distinct entities of ‘us’ and ‘them’.”).

243. Notes from Telephone Interview with Tim Cochrane, *supra* n. 232, at 2.

244. For information on CATG, see Council of Athabascan Tribal Governments, *A Grassroots Organization Founded in 1985 Promoting Tribal Self-Governance*, <http://www.catg.org/> (2014). For information on the Yukon Flats National Wildlife Refuge, see U.S. Govt., *Yukon Flats*, http://www.fws.gov/refuge/yukon_flats/ (last updated Apr. 16, 2014).

245. 69 Fed. Reg. 41838-01 (July 12, 2004).

246. FWS, CATG, *2004-05 Annual Funding Agreement Between the United States Fish and Wildlife Service and the Council of Athabascan Tribal Governments* § 6 (2004) (copy on file with *Public Land & Resources Law Review*).

replacement of FWS staff with tribal staff, making the Yukon Flats agreements very different from the NBRC agreements between CSKT and FWS.

3. *After Two Decades, Limited Self-Governance Engagement Outside of the BIA*

Similar to most of the above-described agreements, the few other Self-Governance agreements with the Bureau of Reclamation, Bureau of Land Management, and the Office of the Special Trustee largely involve discrete project work rather than the more extensive contracting of facility operations and activities that have characterized the current GPNM agreement or the past (and proposed) NBRC agreements.²⁴⁷ A listing of these agreements with non-BIA agencies can be found in the Secretary's annual *Federal Register* notices.²⁴⁸

B. *Other Federal-Tribal Partnerships in the United States*

Outside of the Self-Governance arena, the concept of collaboration between federal and tribal governments has a decades long, albeit limited, history—and an evolving future. The primary examples involve the Navajo and Oglala Lakota Nations, both of which provide additional precedent for the NBRC partnership.

1. *Navajo Nation and Canyon de Chelly National Monument*

While it may not necessarily be characterized as progressive by today's standards, the cooperation between the Navajo Nation and NPS at the Canyon de Chelly National Monument was novel at the time of its creation in the 1930's, and still represents a unique partnership today.²⁴⁹ Canyon de Chelly is a magnificent canyon system housing ancient buildings and archaeological ruins.²⁵⁰ In the early part of the 1900's, the

247. See 78 Fed. Reg. at 4861 (most recent *Federal Register* listing of these other Self-Governance agreements).

248. *Id.*

249. For information on the Navajo Nation, see Navajo Nation Government, *Official Site of the Navajo Nation*, <http://www.navajo-nsn.gov/> (2011).

250. For information on Canyon de Chelly, see NPS, *Canyon de Chelly National Monument*, <http://www.nps.gov/cach/index.htm> (last updated Apr. 21, 2014).

NPS was highly interested in protecting those ruins from depredations while also encouraging tourists to see the historical, geological, and natural wonders.

Like the Range's central placement within the Flathead Reservation, Canyon de Chelly is located in the heart of the Navajo Nation's Reservation. Like the Ninepipe and Pablo Refuge components of the NBRC, Canyon de Chelly is located on tribally owned land. The legislation creating Canyon de Chelly was passed by Congress and signed into law on February 14, 1931.²⁵¹

Perhaps presaging both the Federal Government's shifting approach towards tribes and the coming of the 1934 Indian Reorganization Act, the establishment of Canyon de Chelly explicitly recognized the rights and participation of the Navajo Nation. In marked contrast to the federal statute that unilaterally created the Range, Congress authorized the President to establish Canyon de Chelly by presidential proclamation—but only with the consent of the Navajo Nation Tribal Council.²⁵² The reality was that, prior to passage of the statutes, the Navajo Nation had already approved establishment of Canyon de Chelly, following years of dialogue between federal and tribal government officials.²⁵³ Foreshadowing the tribal-specific provisions in the later GPNM statute, the authorizing law for Canyon de Chelly recognized the following “rights and privileges of Navajo Indians:”

Nothing herein shall be construed as in any way impairing the right, title, and interest of the Navajo Tribe of Indians which they now have and hold to all lands and minerals, including oil and gas, and the surface use of such lands for agricultural, grazing, and other purposes, except as defined in section 445b of this title; and the said tribe of Indians is granted the preferential right, under regulations

251. 16 U.S.C. § 445 (2006).

252. *Id.*

253. Pres. Procl. No. 1945, 47 Stat. 2448, ¶ 2 (Apr. 1, 1931). For additional background on the discussions leading up to the Canyon de Chelly's establishment, see David M. Brugge & Raymond Wilson, *Administrative History: Canyon de Chelly National Monument, Arizona* ch. 2 (National Park Service 1976) (available at http://www.nps.gov/cach/historyculture/upload/CACH_adhi.pdf).

to be prescribed by the Secretary of the Interior, of furnishing riding animals for the use of visitors to the monument.²⁵⁴

As the NPS itself notes, when Canyon de Chelly was created,

[t]he Navajos . . . were promised that they would lose no rights whatever and gained one privilege[:] that of furnishing horses to visitors. In the future the rights and duties of the National Park Service would become more precisely established by administrative needs and by both formal and informal agreements with the local Navajos and various Government agencies.²⁵⁵

Indeed, like CSKT's specific retention of leasing and other rights at the NBRC's Ninepipe and Pablo Refuges, the Navajo Nation had conditioned its initial approval of the Canyon de Chelly National Monument's establishment upon the condition that it would not interfere with grazing and other rights held by the Navajo Nation.²⁵⁶ The Navajo also requested the exclusive right for furnishing horses to tourists, which was incorporated into the statute.

Aside from its intrinsic value, the Canyon de Chelly National Monument is significant for the NPS because it is the only monument that NPS does not own.²⁵⁷ Despite this fact, or possibly because of it, the partnership has remained intact for over eighty years.

2. Oglala Lakota Nation and the South Unit of Badlands National Park

A more contemporary example of Federal-Tribal partnership in the management of protected areas, and possibly a new direction in

254. 16 U.S.C. § 445a.

255. Brugge & Wilson, *supra* n. 253, at 6.

256. *Id.* at Ch. 2, at 2. See *supra*, nn. 108-111 (CSKT protection of its rights in the Ninepipe and Pablo Refuges).

257. Brugge & Wilson, *supra*, n. 253, at 6. NPS does, however, administer part of a national park on tribally owned land: the South Unit of Badlands National Park, which is located on land primarily owned by the Oglala Sioux Tribe and which is discussed in the next section of this article.

Federal-Tribal resource management, may be found in the Badlands National Park's South Unit in South Dakota. The South Unit is located on the Pine Ridge Indian Reservation, home of the Oglala Lakota Nation—also known as the Oglala Sioux Tribe (OST).²⁵⁸ Since the 1970's, NPS and OST have partnered in management of the South Unit. Most recently, they have discussed the possible transformation of the South Unit into a tribally operated national park.²⁵⁹ As OST and NPS explain at the beginning of their April 2012 joint environmental impact statement (EIS) evaluating the proposal for a tribally operated national park:

[o]nce the history of how the South Unit came to be incorporated into Badlands National Park is understood, it is possible to understand why promoting the “NPS idea” through tribal management is compelling and publicly supported.²⁶⁰

As the above passage alludes, the South Unit has a singular history. It begins with the United States taking 341,725 acres of OST reservation lands during World War II for purposes of establishing an aerial gunnery range (*i.e.*, bombing range).²⁶¹ As with the creation of the National Bison Range, albeit on a larger scale, these Pine Ridge land takings resulted in the forced relocation of numerous tribal citizens.²⁶²

258. For information on the OST, see Oglala Lakota Nation, *Home*, <http://www.oglalalakotanation.org/oln/Home.html> (2012).

259. NPS/Oglala Sioux Tribes Parks and Recreation Authority, *South Unit, Badlands National Park, Final General Management Plan & Environmental Impact Statement* (Apr. 2012) [hereinafter EIS] (includes Appendix A: 1976 Memorandum Of Agreement Between the Oglala Sioux Tribe of South Dakota and the NPS to Facilitate Establishment, Development, Administration, and Public Use of the Oglala Sioux Tribal Lands, Badlands National Monument, at §§ 1–2 [hereinafter MOA]).

260. EIS, *supra* n. 259, at 3 (*italics in original*).

261. *Id.* at 6.

262. *Id.* (The EIS recounted the takings and relocations as follows: “The lands were acquired through declarations of taking filed in condemnation proceedings under the pressures of a wartime emergency. Individuals and families were forced to vacate the area on very short notice, and the value of the lands was at an all-time low as a result of the Depression. The acquisition of the Bombing Range increased competition for land in the area and inflated the price of replacement sites to the point that the relocated persons were not able to buy substitute land with the compensation they had been paid. In many cases, individuals were forced to dispose of their

Decades later, in 1968, the federal government declared the bombing range to be surplus and authorized it to be returned to the OST, minus 2,486 acres that were retained by the United States Air Force.²⁶³

This federal declaration resulted in competition for the returned lands amongst former individual land-owners, the OST, FWS (which wanted to use lands for refuge purposes), and the NPS (which wanted to enlarge its nearby Badlands National Monument, as the park was then known).²⁶⁴ In a dynamic all too familiar to tribes, Congress settled the matter by authorizing a land exchange under which the Department of Defense returned the acreage to the DOI, to be held in trust for OST—but only if OST agreed to allow NPS to operate the returned acreage as a new South Unit of nearby Badlands National Monument.²⁶⁵ If the OST had refused to accept the land with these conditions, it would have forfeited the opportunity to regain the lands that had been held in individual trust ownership prior to the United States' appropriation of those properties in 1942, and those lands would have been declared surplus property and “permanently lost to the Tribe.”²⁶⁶

That arrangement, amounting to little more than extortion, laid the foundation for the 1976 Memorandum of Agreement (MOA) between the OST and NPS, under which NPS would administer the lands as the South Unit of Badlands National Monument.²⁶⁷ Perhaps unsurprisingly, due to the manner in which NPS administration was essentially forced upon the OST, the addition of this South Unit has been controversial amongst residents of the Pine Ridge Indian Reservation.²⁶⁸

livestock because their rangeland had been taken. There is evidence that many of the Tribal members were told they would be given preferential status to repurchase their lands at the end of the war.”).

263. *Id.* at 6, 219, 245 (The text of the public law authorizing the return of the land to the OST is contained in Appendix B of the EIS [Pub. L. No. 90-468, 82 Stat. 663 (Aug. 8, 1968)]).

264. *EIS, supra* n. 259, at 6.

265. *Id.*

266. *Id.*

267. *Id.* at 219 *et seq.*

268. *Id.* at 6. For further background on the differing views of OST tribal citizens, as well as background on the South Unit's history and the proposal for the first tribally-run National Park, see Brendan Borrell, *Can a Tribe Make Good on its Badlands?*, High Country News 10–16 (Feb. 4, 2013).

Like the tribally reserved rights at the NBRC's Ninepipe and Pablo Refuges, as well as at the Canyon de Chelly and Grand Portage National Monuments, the MOA recognized a number of tribal rights in the South Unit lands. These include: disclaimer of impairments on OST's ownership of the lands;²⁶⁹ hunting rights;²⁷⁰ rights to surplus animals, including bison;²⁷¹ preferences for concessions operations;²⁷² grazing and other agricultural uses;²⁷³ employment preferences for tribal citizens;²⁷⁴ rights to sell products by Native craftsmen within the Badlands National Monument facilities;²⁷⁵ free entry to the Monument for tribal citizens;²⁷⁶ and unrestricted access "in perpetuity" to "all areas of spiritual importance," none of which may be developed by NPS without OST's consent.²⁷⁷

Several aspects of the MOA resemble portions of Federal-Tribal agreements in Canada and Australia regarding protected area management, as discussed later in this article. For example, like some agreements in those countries, the MOA provides for mutual consent to any amendments to the Monument's Master Plan.²⁷⁸ The MOA authorizes Tribal shares of any federally assessed entrance fees, as well as federal approval of any tribally assessed entrance fees that may be proposed.²⁷⁹ It calls for cooperative approaches to interpretive programs, including, "when possible," use of qualified Tribal citizens.²⁸⁰ It also requires agreement on wildlife control measures and land use practices designed to preserve indigenous species.²⁸¹

In 1978, the Badlands National Monument was officially redesignated as Badlands National Park, but still administered under the

269. MOA, *supra* n. 259, at §§ 1–2.

270. *Id.* at § 2(c)-3.

271. *Id.* at § 3.

272. *Id.* at § 4.

273. *Id.* at § 5.

274. *Id.* at § 7 (The employment preference was specifically noted to be in compliance with Section 703(i) of the Civil Rights Act of 1964, as amended.).

275. MOA, *supra* n. 259, at § 8.

276. *Id.* at § 11.

277. *Id.* at § 14.

278. *Id.* at §§ 9-10.

279. *Id.* at § 17.

280. *Id.* at § 19.

281. *Id.* at § 20.

same MOA.²⁸² Over the intervening decades, the relationship between the NPS and the OST has matured to the point where they have been able to have honest and in-depth discussions with each other, and the public, about future park management. The parties jointly prepared the April 2012 EIS to examine different management options and resource/visitor alternatives.²⁸³ The EIS identifies the preferred management option as being congressional authorization for operation of the South Unit as the country's first "tribal national park,"²⁸⁴ along with a corresponding preferred resource/visitor alternative focusing on restoration of South Unit lands and promotion of Oglala history, culture, and land management through education and interpretive programs.²⁸⁵ The NPS signed the Record of Decision (ROD) for the EIS on June 2, 2012.²⁸⁶

Since the release of the EIS and the signing of the ROD, NPS and OST have worked on development of legislation authorizing the proposed Tribal National Park. As of this writing, one newspaper account reports that Democratic Senator Tim Johnson is the only member of South Dakota's congressional delegation who has endorsed the proposal.²⁸⁷ The

282. Pub. L. No. 95--625 at § 611, 92 Stat. 3521 (month day, 1978) (codified at 16 U.S.C. § 441--441o (2006)).

283. EIS, *supra* n. 259, at iv--xii, 33--94.

284. While the Badlands proposal, if realized, would indeed create the country's first tribal national park, the idea is not new. CSKT first proposed a tribal national park, in the Mission Mountains on the Flathead Indian Reservation, in the mid-1930's. *Supra* at nn. 28-29.

285. EIS, *supra* at n. 259, at v, 37--39 (preferred management option); xi, 71--76 (preferred resource/visitor alternative). The preferred alternative regarding resource/visitor management that focuses on "restoration" of lands is particularly challenging for the South Unit given the federal government's history of extensive bombing there. The EIS notes that there is an ongoing clean-up effort still being undertaken by the U.S. Army Corps of Engineers and the OST, but that the South Unit "will probably never be cleared of unexploded ordnance with today's technology." *Id.* at 17.

286. Press Release from Badlands National Park, *South Unit General Management Plan, Record of Decision Signed*, <http://www.nps.gov/badl/parknews/south-unit-general-management-plan-record-of-decision-signed.htm> (June 7, 2012). U.S. Dept. Int. Natl. Park Serv., *Record of Decision* (June 7, 2012) (available at http://www.ostdot.org/Related_Projects/Badlands_National_Park_South_Unit/GMP-EIS_Record_of_Decision.pdf).

287. Juliet Eilperin, *In the Badlands, a Tribe Helps Buffaloes Make a Comeback*, *The Washington Post* (June 23, 2013) (available at <http://www.washingtonpost.com/national/health-science/in-the-badlands-a-tribe-helps->

same news article discusses the NPS-OST plans to return bison to the South Unit where, unlike the North Unit of Badlands National Park, they are currently absent.²⁸⁸

In addition to bison reintroduction, supporters of the tribal national park proposal have discussed the establishment of a museum of Lakota culture, creating a bazaar for the sale of Lakota-made goods, and making Lakota park interpreters available to visitors.²⁸⁹ While economic development in the form of tourism is always at the forefront of the tribal national park discussions, so too is a many pronged initiative to preserve, promote, and educate people about Lakota ways of life.

C. Indigenous Partnerships Abroad in Protected Areas Management

With the potential exception of the evolving NPS-OST relationship, cooperative management of parks or refuges is not an area where the United States is leading. A comprehensive survey of partnerships between national governments and Native/Indigenous nations or communities around the world regarding protected areas management—still somewhat of an emerging field over recent decades—is outside of the scope of this article. However, countries such as Canada and Australia have far outpaced the United States in this area, and some examples from those countries are illuminating for the nascent NBRC Self-Governance partnership.

These examples indicate how essential both high-level and field-level federal support and leadership are for the success of partnerships with Indigenous groups. For instance, as stated in 2011 by the Chief

buffalo-make-a-comeback/2013/06/23/563234ea-d90e-11e2-a016-92547bf094cc_story.html).

288. *Id.* See also Press Release from NPS, *Salazar, Jarvis Announce Proposal to Establish Nation's First Tribal National Park in Badlands*, <http://home.nps.gov/news/release.htm?id=1327> (Apr. 26, 2012) (“Continuing our long-standing partnership with the Tribe, we plan to focus on restoration of the landscape, including the reintroduction of bison that are integral to the cultural stories and health of the Oglala people,” said NPS Director Jon Jarvis.”). Bison had been reintroduced to the North Unit of the Park in 1963. Borrell, *supra* n. 268, at 16. See also MOA, *supra* n. 259, at § 3 (reciting NPS intention to reintroduce “buffalo” to the South Unit); MOA, and at § 6 (addressing a study regarding “reintroduction of the buffalo”).

289. Borrell, *supra* n. 268, at 14.

Executive Officer of Parks Canada (Canada's equivalent to the United States' NPS):

Today, we cannot imagine creating a new park, site or marine conservation area without the support and collaboration of the public, especially Aboriginal peoples. In the past few decades, we have strived to build meaningful relationships with First Nations, Inuit and Métis peoples to ensure a more holistic stewardship of the land that include the cultural values and knowledge of its people. We have learned that by working together we can respect our differences and strengthen our common values. This, in itself, is the definition of true partnerships.²⁹⁰

As the following examples of this approach demonstrate, substantive—as opposed to limited or superficial—partnering with Indigenous communities has been shown to reap benefits for all involved.

1. Canada

Parks Canada considers Indian tribes there, commonly referred to as First Nations or Aboriginal groups, “not as stakeholders but as privileged partners. This relationship has resulted in the cooperative management of over half our national parks through arrangements with surrounding Aboriginal groups.”²⁹¹ This approach is relatively new.²⁹² It

290. Aboriginal Affairs Secretariat, Parks Canada, *Working Together: Our Stories – Best Practices and Lessons Learned in Aboriginal Engagement 2* (Parks Canada 2011) (“Message from Alan Latourelle, Chief Executive Officer, Parks Canada Agency”).

291. Parks Canada, *Wood Buffalo National Park of Canada Management Plan 37* (2010) [hereinafter *Wood Buffalo Management Plan*] (copy on file with *Public Land & Resources Law Review*).

292. See generally, Steve Langdon, Rob Prosper & Nathalie Gagnon, *Two Paths One Direction: Parks Canada and Aboriginal Peoples Working Together* vol. 27, no.2, p. 1 (The George Wright Forum 2010) (copy on file with *Public Land & Resources Law Review*) (“Parks Canada has since undergone significant corporate shifts. This has been driven by societal changes in relation to governments that have helped change the legal landscape in Canada with respect to Aboriginal rights and title. Further policies recognize that effective management of heritage sites requires

is consistent with shifts in approach recognized by the Supreme Court of Canada, which recently asserted that “[t]he fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”²⁹³

Parks Canada’s change in approach appears to have been very much driven from the top of the agency.²⁹⁴ This is consistent with similar federal management shifts towards Indigenous groups in Australia, discussed later in this article.²⁹⁵ Recent data shows that, years after this evolution in agency approach towards First Nations, Aboriginal persons constitute over 8 percent of Parks Canada staff.²⁹⁶ This is roughly double the percentage of the total Canadian population that identified as Aboriginal in 2011 (4.3%).²⁹⁷

working in cooperation with partners, particularly those with a unique perspective stemming from, in some cases, over 50 generations of land stewardship.” The three authors of this paper are all Parks Canada officials.)

293. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 S.C.C. 69, ¶ 1 (2005) (involving inadequate tribal consultation on a road to be constructed across property upon which the Mikisew Cree First Nation held treaty rights. Immediately after the quoted passage, the Supreme Court of Canada went on to say that “[t]he management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. As so it is in this case.”).

294. Langdon, Prosper & Gagnon, *supra* n. 292, at 225–227.

295. *Infra* at nn. 409–412 (support for Aboriginal partnership at Kakadu National Park in Australia on the part of John Derrick Ovington, Interim Director of the Australian National Parks and Wildlife Service).

296. Langdon, Prosper & Gagnon, *supra* n. 292, at 227 (according to 2010 data).

297. Statistics Canada, *National Aboriginal Day . . . by the Numbers: 2013*, http://www42.statcan.gc.ca/smr08/2013/smr08_176_2013-eng.htm (last modified June 19, 2013). By comparison, according to 2006 data, just under 3 percent of NPS employees were Native American (470 out of a total NPS workforce of 15,955), and just under 3.4 percent of FWS employees were Native American (280 out of a total FWS workforce of 8,262). U.S. Bureau of Reclamation, *Report of DOI Statistics*, http://www.usbr.gov/cro/pdfplus/demographics_FY06.pdf (Sept. 30, 2006). These numbers are also roughly double the percentage of the total U.S. population that identified as American Indian or Alaska Native in the 2000 and 2010 censuses. In the 2000 census, 1.5 percent of the total U.S. population identified as American Indian or

As mentioned above, an in-depth analysis of the experiences, successes, and challenges of such cooperative management experiences, along with both Aboriginal and federal assessments of their efficacy, would entail a separate article or, to do justice to the subject matter, a book.²⁹⁸ For purposes of this article, some of the approaches of Parks Canada towards Aboriginal groups and parks management are worth noting and contrasting to Federal-Tribal approaches/activities, or the absence thereof, at the NBRC.

a. Wood Buffalo National Park: Canada's Premier Bison Reserve

Like the NBRC, one example of Canadian-Aboriginal partnerships also includes bison: Canada's Wood Buffalo National Park (Wood Buffalo).²⁹⁹ Wood Buffalo is home to wood bison, a different subspecies than the plains bison which are found in the continental United States and on the Range.³⁰⁰ Wood Buffalo calls itself home to the "world's largest free-roaming and most genetically diverse herd of wood bison."³⁰¹

Wood Buffalo is Canada's largest national park, a United Nations Educational, Scientific and Cultural Organization (UNESCO) World

Alaska Native; in the 2010 census, 1.7 percent so identified. U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States* 1 (2006); U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* 3 (2012).

298. For anyone wishing to explore this subject in more depth, a valuable starting point for literature may be found in the Australian Institute for Aboriginal and Torres Straits Islander Studies' Native Title Research Unit's *International Joint Management Bibliography* (available at http://www.aiatsis.gov.au/_files/ntru/240713%20Combined%20joint%20management%20bibliography.pdf). This 58-page document lists various reports, theses, and papers addressing joint management around the world. The literature covering Canada and the United States consists of only 3 pages (47–49), almost all of which addresses joint management activity in Canada.

299. For information on Wood Buffalo National Park, see Parks Canada, *Wood Buffalo National Park of Canada*, <http://www.pc.gc.ca/pn-np/nt/woodbuffalo/index.aspx> (last modified Feb. 19, 2014).

300. For information on the difference between wood bison and plains bison, see Parks Canada, *Elk Island National Park of Canada: Bison Management*, <http://www.pc.gc.ca/pn-np/ab/elkiland/natcul/natcul1/b/iii.aspx> (last modified Aug. 17, 2009).

301. *Wood Buffalo Management Plan*, *supra* n. 291, at 13.

Heritage Site, and the second-largest national park in the world.³⁰² Similar to the conservation purposes of the Range, Wood Buffalo was “originally created in 1922 to protect the last free roaming herds of wood bison in northern Canada.”³⁰³ Similar to the NBRC’s Ninepipe and Pablo Refuges, Wood Buffalo also provides essential bird habitat: it currently protects the only wild self-sustaining population of whooping cranes in the world.³⁰⁴

Echoing the NBRC’s ongoing Tribal Self-Governance partnership efforts, Wood Buffalo is also in the process of recalibrating its relations with area Aboriginal communities. Unlike the NBRC, some of the Wood Buffalo issues include Aboriginal land title claims. A recent federal action withdrew lands from Wood Buffalo in order to add such lands to the Salt River First Nation Indian Reserve.³⁰⁵

Wood Buffalo’s Management Plan (Management Plan) is “[setting] the stage for Parks Canada to establish a management structure with local Aboriginal groups and build stronger relationships with stakeholders.”³⁰⁶ Specifically, one of the key elements of the Management Plan, titled “Towards a Shared Vision,” is geared towards such relationship building. The Management Plan states that “Parks Canada will work towards the establishment of a management structure with local Aboriginal groups and ecological integrity and cultural

302. *Id.* at 1. The largest national park in the world is Greenland’s National Park, which includes 972,000 square kilometers, making it nearly the size of France and Spain combined. Visit Greenland, *National Park*, <http://www.greenland.com/en/explore-greenland/nationalparken.aspx>.

303. *Wood Buffalo Management Plan*, *supra* n. 291, at 1. While the bison at the National Bison Range are nominally free ranging, they are rotated amongst different fenced grazing areas within the Range, which is much smaller than Wood Buffalo National Park. U.S. Govt., *Bison*, http://www.fws.gov/refuge/national_bison_range/wildlife_and_habitat/bison.html (last updated Mar. 12, 2013).

304. *Wood Buffalo Management Plan*, *supra* n. 291, at 1.

305. Government of Canada, *Order Amending the Description of Wood Buffalo National Park of Canada in Schedule 1 to the Canada National Parks Act*, P.C. 2013-25, Canada Gazette, Vol. 147, No. 4 (Jan. 31, 2013) (copy on file with *Public Land & Resources Law Review*) (This return of Park land to the Salt River First Nation was done in accord with the Salt River First Nation Settlement Agreement ratified by the Salt River First Nation in December 2001; *see* “Rationale” section of the Order.).

306. *Wood Buffalo Management Plan*, *supra* n. 291 at 2.

resources will be improved with support from local Aboriginal groups.”³⁰⁷ A separate strategic element of the Management Plan, titled “Bison Management in the Greater Wood Buffalo National Park Ecosystem,” identifies as a key action working with Aboriginal partners “to bridge traditional knowledge with western science in wood bison management and communication strategies.”³⁰⁸ As with the Federal-Tribal experience at the NBRC,³⁰⁹ Parks Canada acknowledges rockier times in its relations with the area Aboriginal people, but the agency now evinces a perspective that such relations are on an upward trajectory in terms of Wood Buffalo management:

Over the life of the park, the management and regulation of traditional use has been a contentious right-versus-privilege based issue. This was clarified with the Supreme Court of Canada decision, which recognized Treaty rights. More recently, the collaborative revision of the park’s Game Regulations with local Aboriginal people has contributed to the development of a more cooperative environment and this process has set a precedent for the constructive resolution of park-related issues with local Aboriginal groups.³¹⁰

Compared to the NBRC, Aboriginal relations at Wood Buffalo are a relatively more complex proposition, given that there are eleven distinct Aboriginal groups in and around Wood Buffalo, including no less than eight Indian Reserves within its boundaries.³¹¹ Recent changes in the

307. *Id.* at *x*.

308. *Id.* at *xi*. This objective is shared at Canadian and Australian protected areas. *Cf. infra* at n. 337 (integration of traditional Aboriginal knowledge with western science at Gwaii Haanas National Park Reserve); *infra* at n. 353-359 (incorporation of Inuit Qaujimajatuqangit in Nunavut National Wildlife Areas); *infra* at nn. 393-394 (recognition of importance of Indigenous management practices regarding traditional burning activities and wetlands management at Kakadu National Park).

309. *Testimony of Laura Davis, supra* n. 53, at 4, (“A true partnership and spirit of cooperation has developed from the history of controversy between the FWS and the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation over the National Bison Range Complex in Montana.”).

310. *Wood Buffalo Management Plan, supra* n. 291, at 7 (Neither this passage nor the surrounding text identified the specific Supreme Court of Canada decision referenced here.).

311. *Id.* at 7, 52.

legal and social landscape reinforced the need for a progressive change in Wood Buffalo's institutional management philosophy.³¹² Parks Canada, and Wood Buffalo specifically, are taking concrete changes to evolve correspondingly.

While Wood Buffalo notes that some cooperation with First Nations is occurring "at an opportunistic level," it recognizes the practical and functional deficiencies of employing such a haphazard approach, saying that it "requires the park and Aboriginal groups to develop a new working approach for each opportunity."³¹³ Parks Canada credits its current focus on relationship building to a consultation effort that was initiated in 2006 in response to Aboriginal requests.³¹⁴ Through an enhanced partnership, Wood Buffalo sees great potential for shrinking, if not eliminating, the divide between traditional Aboriginal knowledge and western science when it comes to both bison stewardship and natural resources management generally.³¹⁵ From a more quotidian perspective, Wood Buffalo recognizes the value and importance of sharing traditional knowledge with park visitors through "[p]ersonal connection and meaningful interactions."³¹⁶

312. *Id.* at 9 ("A management structure that reflects the change from the past relationship of park privilege to the new rights-based environment is required.").

313. *Id.* at 10.

314. *Id.* at 8 ("In 2006, a Game Regulations consultation process was undertaken at the request of Aboriginal groups. This marked the first step in rebuilding key relationships for shared management of Wood Buffalo National Park.").

315. *Id.* at 14 ("The overwhelming size and level of protection enjoyed by Wood Buffalo National Park support an exceptional opportunity for bridging traditional knowledge and western science."). *Working Together: Our Stories – Best Practices and Lessons Learned in Aboriginal Engagement*, *supra* n. 290, at 11 (The objective of combining the traditional and western science knowledge bases is part of a broader effort on the part of Parks Canada: "While signed agreements provide the legal framework for cultural reintegration, decades of alienation require additional efforts. Healing Broken Connections is a multi-year project organized with [First Nations in the Yukon's Kluane National Park and Reserve of Canada] to encourage reconnection to their traditionally used territories through the participation of elders and youth in culture camps and science camps. It supported their efforts to collect, stabilize and store their knowledge about the park and use it to improve the park's management and ecological integrity.").

316. *Wood Buffalo Management Plan*, *supra* n. 291, at 14.

While still relatively new, some of the specific actions that have resulted from Wood Buffalo's shift in approach towards cooperative management with Aboriginal groups include the following:

- for certain areas of Wood Buffalo, the Management Plan incorporates a management approach regarding land use that is specifically geared to meeting Canadian treaty obligations with First Nations;³¹⁷
- cooperation between Parks Canada and the Athabasca Chipewyan First Nation on a project to locate all historic settlements and associated cemeteries in the area;³¹⁸
- collaborative development of game regulations;³¹⁹
- Aboriginal training of Parks Canada staff in place name research methodology, so as to enable collaborative research within Wood Buffalo on such place names;³²⁰ and
- increased sensitivity towards cultural resources within Wood Buffalo that "require special actions for their protection."³²¹

Possibly as a result of this new cooperative approach, Wood Buffalo, in addressing pending Aboriginal land claims and related negotiations, evinces a perspective recognizing opportunities for the Park rather than anticipating losses, detriment, or liabilities.³²² Taking this sort

317. *Id.* at 33 ("The Pine Lake Area Management Approach will provide opportunities for sustainable land-use that meet the needs and requirements of the Smith's Landing First Nation and the Salt River First Nation as defined in their Treaty Land Entitlement Agreement and Parks Canada as defined under the *Canada National Parks Act*."). *Id.* at 64 (Appendix B, describes Treaty Land Entitlement claims as those that "are intended to settle the land debt owed to those First Nations who did not receive all the land they were entitled to under historical treaties signed by the Crown and First Nations.).

318. Hans Tammemagi, *Many of Canada's National Parks Now Honor First Nations Peoples*, [http://indiancountrytodaymedianetwork.com/2012/07/13/many-canadas-national-parks-now-honor-first-nations-peoples-123279_\(July 13, 2012\)](http://indiancountrytodaymedianetwork.com/2012/07/13/many-canadas-national-parks-now-honor-first-nations-peoples-123279_(July 13, 2012).).

319. *Wood Buffalo Management Plan*, *supra* n. 291, at 38.

320. *Id.*

321. *Id.* at 43.

322. *Id.* at 51–52 ("Canada continues to negotiate three outstanding land claims processes with the Northwest Territories Métis Nation, the Akaitcho Dene and the Dechco Dene and Métis. Each of these negotiations will have some impact on the management of the park and based on precedent they are expected to produce new

of positive tack towards issues, which could be divisive or otherwise fraught with conflict, undoubtedly helps to minimize the “us” versus “them” mindset that too often pervades Federal-Tribal relations.³²³

b. Gwaii Haanas: Showcase of Canadian and First Nation Partnership

Lauded as one of the best national parks in Canada for incorporating and showcasing Indigenous culture, Gwaii Haanas National Park Reserve (Gwaii Haanas) is one of Parks Canada’s showcase efforts regarding Federal-Tribal cooperative management.³²⁴ Gwaii Haanas consists of a group of islands off the coast of central British Columbia, north and west of Vancouver Island, formerly known as the Queen Charlotte Islands.³²⁵ Gwaii Haanas is interesting because of the agreement between the Government of Canada and the Haida Nation which, among other things, memorializes each party’s competing claim to ownership of the land.³²⁶ Despite this very fundamental conflict over

opportunities for collaboration on park ecological and cultural resource management and the development of the park’s visitor experience offer [*sic*]. Canada is also negotiating regional land and resource agreements with other groups, such as the Deninu K’ue First Nation in Fort Resolution, K’átl’odeeche First Nation in Hay River and the Northwest Territories Métis Nation.”).

323. See later discussion in this article regarding the “us” versus “them” dichotomy, *infra* at nn. 406-407.

324. Tammemagi, *supra* n. 3181; Bruce Kirkby, *Raising a Pole on the “Islands of the People,”* N.Y. Times (Jan. 2, 2014). For information on Gwaii Haanas National Park Reserve, see Parks Canada, *Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site*, <http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/index.aspx> (last modified Mar. 16, 2014).

325. Archipelago Management Board, *Gwaii Haanas National Park Reserve and Haida Heritage: Site Management Plan for the Terrestrial Area 2* (§ 1.1), 4 (undated) [hereinafter *Gwaii Haanas Management Plan*] (available at http://www.pc.gc.ca/eng/pn-np/bc/gwaiihaanas/plan/~media/pn-np/bc/gwaiihaanas/pdfs/plans/GHNMCAR_IMP.ashx).

326. Canada, Haida Nation, *Gwaii Haanas Agreement between the Government of Canada and the Haida Nation* § 1.1 (signed in 1993) [hereinafter *Gwaii Haanas Agreement*] (available at <http://www.pc.gc.ca/eng/pn-np/bc/gwaiihaanas/plan/~media/pn-np/bc/gwaiihaanas/pdfs/GwaiiHaanasAgreement1993-EN.ashx>). The term “Park Reserve” is a term of art in Canadian law. Under a 1974 amendment to the Canada National Parks Act, national parks may be established under a “reserve” designation, meaning that they may be set aside and managed as national parks until resolution of pending land claims. *Working Together: Our Stories – Best Practices and Lessons Learned in Aboriginal Engagement*, *supra* n. 290, at 7.

Gwaii Haanas' land title and jurisdictional status, the parties nevertheless agreed in 1993 to establish "a management board . . . whereby both parties will share and co-operate in the planning, operation and management of the Archipelago."³²⁷

The parties implement such cooperation through the Archipelago Management Board (AMB), which is comprised of two representatives of the Government of Canada and two representatives of the Council of the Haida Nation.³²⁸ The list of matters overseen by the AMB is expansive and includes such issues as: Gwaii Haanas' management plan; traditional resource harvesting; protection and management of cultural and spiritual sites; inter-agency coordination; annual work plan development; and Aboriginal employment and economic development.³²⁹ AMB's stated objective is consensus decision-making.³³⁰

This joint approach towards management marked the "first time a management board comprised of Indigenous and Government of Canada representatives has worked on an equal and cooperative basis to produce a management plan."³³¹

Some of the tangible outcomes yielded by this joint management approach include the following:

- discussion of a year-round cultural camp within Gwaii Haanas, allowing visitors to experience the landscape, water, and wildlife through the lens of Haida culture, including canoe trips, fishing, and Haida stories, songs, and music;³³²
- Park support for cultural site management through the "Haida Gwaii Watchmen Program", which both protects sensitive sites and educates visitors about Haida culture;³³³

327. *Gwaii Haanas Agreement*, *supra* n. 326, at § 3.4.

328. *Id.* at §§ 4.1, 4.4.

329. *Id.* at §4.3.

330. *Id.* at § 5.1.

331. *Gwaii Haanas Management Plan*, *supra* n. 325, at 5 (§ 1.5).

332. *Id.* at 8 (§ 2.2).

333. *Id.* at 15 (§ 3.2), 18 (§ 3.3). The Haida Gwaii Watchmen Program was originally established in 1981 by the Skidegate Band Council in response to an increase in visitors to the Haida Gwaii islands. Patrick T. Maher, Chelsea Brekkaas, Dean Labonte & Alex Maud, *Evaluating Visitor Orientation Programs at Gwaii Haanas National Park Reserve and Haida Heritage Site* 11, Publication Series 2007-01, Outdoor Recreation and Tourism Management Program (University of North

- research in Gwaii Haanas documenting past environmental conditions, including a chronology of sea level changes and plant colonization history;³³⁴
- discovery and inventory of 500 Haida archaeological and historical features, and recordation of Haida oral history, language, songs, and stories;³³⁵
- retooling of a business permitting/licensing regimen for Gwaii Haanas;³³⁶
- integration of scientific inventories and databases (*e.g.*, mining, logging, archaeology, etc.) with traditional Aboriginal knowledge;³³⁷ and
- establishment of a mandatory visitor orientation program, including a video, oral presentation, and a visitor handbook.³³⁸

In 2006, Parks Canada cooperated with the University of Northern British Columbia to conduct a survey of visitor orientation programs at Gwaii Haanas.³³⁹ The survey found that Haida culture was one of the four primary motivations for visitors coming to Gwaii Haanas.³⁴⁰ The partnership approach, and the emphasis on cooperation even while disagreeing on such fundamental issues as underlying title to Gwaii Haanas, has proven successful.³⁴¹ One symbol of this success—and progress—may be found in the potlatch, a ceremonial feast, that was jointly hosted in 2013 by the Haida Nation and Parks Canada to

British Columbia 2007) (available at source http://www.unbc.ca/assets/pat_maher/report_2007_01_gwaii_haanas.pdf) (Historically, Haida Watchmen were located strategically around villages to watch for enemies. Under the contemporary Watchmen Program, the guardians help monitor and protect the historic Haida villages and sites around the Gwaii Haanas archipelago. While they do not function as tour guides, they do provide information for visitors.)

334. *Gwaii Haanas Management Plan*, *supra* n. 325, at 15 (§ 3.2).

335. *Id.*

336. *Id.* at 26 (§ 3.6).

337. *Id.* at 31 (§ 3.8). This objective is shared by other parks in Canada and Australia. *See* nn. 308, 353-359, and 393-394.

338. Maher, Brekkaas, Labonte & Maud, *supra* n. 333, at 12.

339. *Id.*

340. *Id.* at 12.

341. *See* news articles cited, *supra* at n. 324.

commemorate the raising of a “monumental pole” (commonly called a totem pole), that itself celebrated the 20th anniversary of Gwaii Haanas’ establishment.³⁴² Canada had outlawed potlatches from 1884 to 1951.³⁴³

c. Nunavut: Incorporating Indigenous Knowledge and Involvement in National Wildlife Areas and Migratory Bird Sanctuaries

Outside of the national park arena, yet another example of Canadian cooperation with First Nations can be found in the relatively new Territory of Nunavut and the Canadian equivalent of National Wildlife Refuges.³⁴⁴ The 2006 Inuit Impact and Benefit Agreement (IIBA) for National Wildlife Areas and Migratory Bird Sanctuaries in the Nunavut Settlement Area institutionalizes cooperative management of National Wildlife Areas and Migratory Bird Sanctuaries between the Canadian Wildlife Service, and relevant Inuit governments within the autonomous Nunavut Settlement Area. IIBA’s such as that for Nunavut’s National Wildlife Areas and Migratory Bird Sanctuaries are required for various areas under Canada’s Nunavut Land Claims Agreement.³⁴⁵

This cooperative management takes place through the formation of Area Co-Management Committees for each National Wildlife Area or Migratory Bird Sanctuary identified in the IIBA.³⁴⁶ These Co-Management Committees are charged with preparing, amending and recommending management plans for the subject wildlife areas, as well as generally advising the Minister of the Environment on “all aspects” of management.³⁴⁷ The management plans are broad, and encompass

342. Kirkby, *supra* at n. 324.

343. *Id.*

344. The Territory of Nunavut, which means “our land” in the Inuit Inuktitut language, was officially created on April 1, 1999. Canadian Tourism Development Corporation, *Destinations: Nunavut*, <http://www.officialtourism.ca/NU.aspx> (2009).

345. Canada, Inuit, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, as amended* §§ 9.4.1–9.4.3 (1993) [hereinafter *Nunavut Land Claims Agreement*] (available at <http://nlca.tunnigavik.com/>).

346. *Inuit Impact and Benefit Agreement for National Wildlife Areas and Migratory Bird Sanctuaries in the Nunavut Settlement Area* § 3.2, Schedule 3-1 (2006) [hereinafter *Nunavut Settlement Area Agreement*] (available at <http://www.tunnigavik.com/files/2010/02/inuit-impact-and-benefit-agreement-for-national-wildlife-areas-and-migratory-bird-sanctuaries-in-the-nunavut-settlement-area.pdf>).

347. *Id.* at § 3.2.3.

everything from general management goals and objectives to implementation schedules for discrete action items.³⁴⁸ Apart from their role in broader management and policy decisions, the Co-Management Committees also advise on more specific actions such as: permit applications;³⁴⁹ removal of carving stone from wildlife areas;³⁵⁰ resource inventories;³⁵¹ and visitor use of individual wildlife areas.³⁵²

Consistent with Canada's federal objectives of bridging Indigenous and western scientific knowledge in other protected areas, the IIBA formally incorporates into the federal management regimen the concept of *Inuit Qaujimagatunqangit*, which is defined as

that traditional, current and evolving body of Inuit values, beliefs, experience, perceptions and knowledge regarding the environment, including land, water, wildlife and people, to the extent that people are part of the environment[.]³⁵³

Consideration of *Inuit Qaujimagatunqangit* is required for: general wildlife area decision-making;³⁵⁴ Co-Management Committee training workshops;³⁵⁵ Minister of the Environment policy decisions;³⁵⁶ and Canadian Wildlife Service strategic plan development.³⁵⁷ If the Minister of the Environment opts to reject advice from a Co-Management Committee, she or he is required to provide written reasons for such rejection within sixty days.³⁵⁸ Such written reasons must address any

348. *Id.* at § 3.5.7(b), (e).

349. *Id.* at § 3.3.4(c).

350. *Id.* at § 3.3.4(d).

351. *Id.* at § 3.3.4(f).

352. *Id.* at § 3.3.4(k).

353. *Id.* at § 1.2.

354. *Id.* at §§ 3.1.1(b), 3.3.3, and 3.5.4.

355. *Id.* at § 3.2.14(b).

356. *Id.* at § 3.3.5.

357. *Id.* at § 3.4.3.

358. *Id.* at § 3.3.7(a).

relevant *Inuit Qaujimajatunqangit* that had been documented and submitted to the Minister.³⁵⁹

Particularly instructive for the NBRC, which includes refuges located on tribally owned lands, the IIBA devotes a separate article to Inuit owned lands that lie within the boundaries of National Wildlife Areas or Migratory Bird Sanctuaries.³⁶⁰ The IIBA sets forth a framework for Federal-Aboriginal coordination and communication in management of those wildlife areas.³⁶¹ The framework includes a requirement for the Canadian Wildlife Service to address any *Inuit Qaujimajatunqangit* that had been submitted to it by either the relevant Inuit association or Co-Management Committee.³⁶² The IIBA also includes a section addressing Inuit rights and uses of the wildlife areas.³⁶³ These include rights regarding: free and unrestricted access to “all lands, waters and marine areas” within National Wildlife Areas and Migratory Bird Sanctuaries;³⁶⁴ wildlife harvest;³⁶⁵ sports hunting guide services;³⁶⁶ removal of stone for carving;³⁶⁷ and setting up camps.³⁶⁸

Throughout the IIBA, the parties incorporate inclusive provisions for Inuit language, thereby encouraging broader Inuit participation as well as promoting equilibrium in the Federal-Aboriginal partnership.³⁶⁹ The agreement also provides for documentation of oral history concerning the

359. *Id.* at § 3.3.7(e).

360. *Id.* at Article 4 (§§ 4.1-4.7).

361. *Id.* at § 4.4.1.

362. *Id.* at §§ 4.3.7, 4.4.1.

363. *Id.* at Article 5 (§§ 5.1-5.5).

364. *Id.* at § 5.2.1.

365. *Id.* at § 5.2.2.

366. *Id.* at § 5.3.

367. *Id.* at § 5.4.

368. *Id.* at § 5.5.

369. *E.g., id.* at §§ 2.1.6 (language preservation and promotion in wildlife areas management); 3.2.20 (Co-Management Committees conducting business in the Inuit language and providing interpretation/translation as necessary); 3.3.4(f), 6.1.1(e), 6.4.3 (identification of Inuit place names); 6.2.1 (Canadian Wildlife Service, at its own cost, translating and making available in the Inuit language all public information it produces on the wildlife areas); 6.8.8(b) (English-Inuit glossary of terms useful to visitors); 10.2.2(b) (researchers translating research summaries into Inuit language).

wildlife areas.³⁷⁰ To help ensure effective staffing, IIBA provisions concerning education and employment require the Canadian Wildlife Service to include the specific criterion of “knowledge of Inuit culture, society and economy” in any job descriptions for positions in the Nunavut Settlement Area.³⁷¹

While still very new, the provisions of the IIBA speak for themselves in terms of the commitments made to the Federal-Aboriginal co-management partnerships. As for the resources necessary to implement those provisions, the Canadian Wildlife Service provides \$8,300,000 over a seven-year period under the agreement, broken down into the various programmatic areas.³⁷²

2. Australian-Aboriginal Joint Management of Kakadu National Park

In Australia, there are a wide variety of co-management partnerships between Indigenous governments and the federal (Commonwealth) or state governments involving national parks and other protected areas.³⁷³ In a number of cases, management partnerships were negotiated or created as part of an exercise in settling legal land title issues.³⁷⁴ However, even a limited examination of Australian partnership

370. *Id.* at §§ 6.1.1(a), 6.5., 6.5.2 (The agreement encourages taking interested elders onto the subject lands to visit sites and provide “opportunity to obtain additional stories and information.”).

371. *Id.* at § 9.3.2(a). This provision is anteceded by the effort of the Director of the Australian National Parks and Wildlife Service to recruit people who had experience working with Aboriginal people when he was staffing the jointly managed Kakadu National Park. *Infra* n. 411.

372. *Id.* at § 15.2.1, Schedule 15-1.

373. To cite just two examples of the numerous legal frameworks for these partnerships, some collaborations with Indigenous (Aboriginal) governments arise under federal auspices such as the Indigenous Protected Area program administered by the Commonwealth’s Department of Sustainability, Environment, Water, Population and Communities, while others are authorized by State/Territorial legislation such as the Northern Territory’s Territory Parks and Wildlife Conservation Act 2005. *See generally* Bauman, Haynes & Lauder, *supra* n. 238. *See also International Joint Management Bibliography, supra* n. 298.

374. *See e.g.*, Bauman, Haynes & Lauder, *supra* n. 235, at 10 (“Since the passage of the *Native Title Act 1993*(Cth)(NTA), co-management arrangements have become relatively commonplace as they often constitute the only substantive native title outcomes for traditional owners through Indigenous Land Use Agreement (ILUA)

experiences is enlightening for what it reveals about the general scope and experience of such relationships. Australia, like Canada, is well ahead of the United States when it comes to the development of management partnerships with Indigenous governments regarding parks and protected areas. More to the point, and perhaps more importantly, Australia and Canada have both surpassed the United States in substantively institutionalizing Native participation, communication, and involvement in management of protected areas.

Among the many different co-management arrangements in Australia, the partnership involving Kakadu National Park (Kakadu) in the Northern Territory is one of the more extensive and well developed.³⁷⁵ Both the partnership and Kakadu are relatively new. Kakadu itself was established in three stages starting in the 1970's and ending in the 1990's.³⁷⁶ This process was the product of a great deal of "struggle and persistence" on the part of Aboriginal governments, which had prompted the federal government to enter into agreements with them for the creation of parks such as Kakadu.³⁷⁷ Kakadu has been characterized as the first national park in the world to diverge from what has been called the "Yellowstone model," where the national government owns the park land.³⁷⁸

negotiations with governments." [noting that ILUA's are prescribed under the Native Title Act 1993]).

375. For more information on Kakadu National Park, see Parks Australia, Kakadu, <http://www.parksaustralia.gov.au/kakadu/index.html> (2013). The terms "co-management" and "joint management", while sometimes used interchangeably in Australia, can have independent meanings there relative to individual partnerships under the various legal authorities and among the various governments. Bauman, Haynes & Lauder, *supra* n. 235, at 12 ("Each [term] may also signify specific co-management arrangements in particular jurisdictions, though such usages are not standardized across them.").

376. Parks Australia, *Amazing Facts*, <http://www.parksaustralia.gov.au/kakadu/people/amazing-facts.html> (2013).

377. Bauman, Haynes & Lauder, *supra* n. 235, at 14.

378. Christopher David Haynes, *Defined by Contradiction: The Social Construction of Joint Management in Kakadu National Park* 5 (thesis, Charles Darwin University, 2009) ("In Kakadu, the traditional Aboriginal owners, people who can claim rights and responsibilities for particular estates on the basis of legally interpreted Aboriginal custom, were granted ownership of the land on the condition that it was leased back to the state for the purposes of the national park."). Mr. Haynes is a unique source of observations at Kakadu. He served as Park Manager there during Kakadu's earliest years, as well as working there decades later starting in

At 20,000 square kilometers, Kakadu is Australia's largest national park.³⁷⁹ Kakadu's uniqueness is further reflected in its status as a UNESCO World Heritage Site, and as one of only twenty-three such sites selected for both natural as well as cultural importance.³⁸⁰ It is managed through a joint Board of Management that currently consists of fifteen members, ten of whom are nominated by the traditional owners of land in the Park.³⁸¹ The term "traditional owners" refers to the traditional Aboriginal owners as defined in Australia's Land Rights Act.³⁸²

Reflective of the joint management relationship, local Aboriginal values and considerations are woven throughout the Kakadu National Park Management Plan (Kakadu Management Plan). To some extent, such incorporation is required under Australia's Environment Protection and Biodiversity Conservation Act of 1999 (EPBC Act).³⁸³ These considerations include Kakadu's Management Plan incorporating local Aboriginal language/dialect, referring to traditional owners of Aboriginal and other land in Kakadu as "Bininj" (pronounced Binn-ing), which is a Kunwinjku and Gundjeihmi word similar to the English word "man."³⁸⁴ The Kakadu Management Plan refers to non-Aboriginal people using the Aboriginal term "Balanda."³⁸⁵

2002. *Id.* at 17. Note the similarity between how Kakadu lands were returned to Aboriginal ownership on the condition they lease them back to the state for park purposes, and how the South Unit lands of Badlands National Park were returned to the Oglala Lakota Nation on the condition that the Nation allow NPS to use them for park purposes. *See supra* nn. 265-267.

379. Parks Australia, *About Kakadu*, <http://www.parksaustralia.gov.au/kakadu/people/about-kakadu.html> (2013).

380. Australian Government, Director of National Parks, *Kakadu National Park Management Plan 2007-2014*, 13 [hereinafter *Kakadu Management Plan*] (available at <http://www.environment.gov.au/system/files/resources/b2a20560-df55-4487-8426-21b4cd4c110f/files/management-plan.pdf>). UNESCO describes Australia's partnership with Aboriginal government in managing Kakadu National Park as "essential". UNESCO, *Kakadu National Park*, <http://whc.unesco.org/en/list/147> (accessed Mar. 24, 2014).

381. *Kakadu Management Plan*, *supra* n. 380, at 7.

382. *Id.* at 22 (citing Aboriginal Land Rights Act (Northern Territory) 1976).

383. *Id.* at 27 ("In preparing a management plan the EPBC Act (s.368) also requires account to be taken of various matters. In respect to Kakadu National Park, these matters include: . . . the interests of: . . . the traditional owners of the Park.").

384. *Id.* at 20.

385. *Id.*

Other examples of Bininj objectives, values and involvement in Kakadu management include the following:

- Kakadu's Board of Management directing that consultations with Bininj be undertaken on a clan-by-clan basis when seeking comments on Kakadu management issues;³⁸⁶
- Bininj cultural protocols and practices being used in decision-making and management where consistent with the Kakadu Management Plan and applicable law, and all Kakadu land being managed as if it is Aboriginal land (which most of it is);³⁸⁷
- assumption by Bininj of more responsibility for Kakadu management, including employment and business contracting. Measurement of success under these objectives is by the number of Bininj employed directly or indirectly in Kakadu management activities, as well as by the type and level of management positions filled by Bininj;³⁸⁸
- Bininj customary use of resources, and recognition that such "customary economy continues to contribute to the maintenance of culture and to meeting conservation goals for Kakadu, in accordance with Aboriginal cultural practices.";³⁸⁹
- Bininj rights to living in traditional and other locations within Kakadu (referred to as living "on country");³⁹⁰
- provisions for management of Bininj cultural heritage, including protection of the ancient rock art, recording of place names, collection of personal oral histories, and promotion of Bininj languages and language training;³⁹¹
- recognition of historical/traditional Bininj fire management practices and their importance for maintenance of species and

386. *Id.* at 18 (§ 1.3).

387. *Id.* at 35 (§§ 4.1.5 and 4.1.4)

388. *Id.* at 39 (§ 4.2). These portions of Kakadu's Management Plan are perhaps the most analogous to the substance of the Tribal Self-Governance Act in the United States, which seeks to integrate and promote tribal involvement in federal programs through contracting mechanisms.

389. *Id.* at 40 (§ 4.3).

390. *Id.* at 42–44 (§ 4.4).

391. *Id.* at 45–47 (§ 5.1).

habitat diversity. The Kakadu Management Plan notes that Kakadu tries to “mimic traditional burning practices to look after country and to protect people and Park assets.”;³⁹²

- Kakadu management’s compliance with the guiding principle in Australia’s Wetlands Policy, recognizing the importance of Indigenous knowledge and practices regarding wetlands, and promotion of a cooperative approach with Indigenous Australians towards wetlands management;³⁹³
- weed management; the Kakadu Management Plan states that weeds “are one of the most significant threats to all habitats within the Park” and that weeds also “directly affect how Bininj are able to access and collect various food resources.” The Kakadu Management Plan further notes that, due to their visitation of parts of Kakadu rarely visited by Balanda, “some Bininj are also able to assist with the early detection of new infestations”;³⁹⁴
- coordination with Bininj in developing Kakadu “bushwalking” [hiking] policies, and recognizing culturally-sensitive areas in the process;³⁹⁵ and
- coordination with Bininj in developing visitor information, education and interpretation, including increasing opportunity for Bininj to conduct more interpretive activities.³⁹⁶

The Kakadu Management Plan also addresses subleases and permits in Kakadu, specifying that consideration and approval of such actions will be conducted jointly in accordance with Plan provisions that extensively incorporate Bininj considerations.³⁹⁷

392. *Id.* at 63-67 (§ 5.7).

393. *Id.* at n. 380, at 11. For similar objectives regarding the bridging of traditional Indigenous knowledge with western science, see *supra* nn. 308, 337, and 353-359.

394. *Kakadu Management Plan*, *supra* n. 380, at 76-79 (§ 5.11).

395. *Id.* at 96-99 (§ 6.7).

396. *Id.* at 108-109 (§ 6.11).

397. *Id.* at 140-141 (§ 8.5). These protections regarding permits and subleases, along with Bininj-reserved rights at Kakadu, recall the leasing and other reserved rights held by tribes in the United States. *Supra* nn. 108-111 (the NBRC’s Ninepipe and Pablo Refuges); *supra* nn. 254-256 (Canyon de Chelly National Monument); *supra* nn. 269-273 (the South Unit of Badlands National Park).

As a result of its joint management approach, Kakadu has enjoyed approbation from many quarters over recent decades.³⁹⁸ Such wide spread acceptance and celebration has quelled the initial opposition to the joint management approach.³⁹⁹ As is so often the case when issues of shared resource management, institutional change, and racism intersect, the fears undergirding that opposition turned out not to be justified. As people had the opportunities to experience Kakadu under joint management, and to acclimate to the general reality of Federal-Aboriginal partnerships, the prior opposition and hostility towards the idea—on the part of government workers as well as members of the public—subsided.⁴⁰⁰ In short, once people see that their fears about greater Indigenous involvement are unwarranted, or that their prejudices are not borne out by evidence, their attendant opposition tends to dissipate even if it does not disappear entirely.

Kakadu's joint management regimen has also weathered challenges that can naturally arise in cross-cultural situations. This is an important point since these challenges are often the bases of opposition within federal government circles towards a joint management approach. Since federal government employees and officials are on the front line of joint management, and since they are the ones that are in the position of dealing with cross-cultural situations on a daily basis, discomfort with that sort of paradigm shift can be a source of employee resistance.⁴⁰¹

Cross-cultural environments can sometimes include difficult situations involving competing philosophies and cultural values that may

398. See e.g. International Union for Conservation of Nature's World Parks Congress, *Kakadu and Nitmiluk National Parks: Joint Management at Work* http://worldparkscongress.org/programme/field_trip_kakadu_and_nitmiluk_national_parks.html (2014); UNESCO, *Kakadu National Park*, <http://whc.unesco.org/en/list/147> (2014) ("The property is well protected by legislation and is co-managed with the Aboriginal traditional owners, which is an essential aspect of the management system.").

399. Haynes, *supra* n. 378, at 190 ("Yet many longer standing [Northern Territory] residents had a contrary view [to Aboriginal persons wearing the Kakadu Park uniform]. Rankled, they expressed deep suspicions about this new situation in which Aboriginal people were to be treated as equal.").

400. Bauman, Haynes & Lauder, *supra* n. 235, at 10.

401. See e.g., Ltr. from Employees, *supra* n. 45. See also Bauman, Haynes & Lauder, *supra* n. 235, at 70 ("Staff – both Indigenous and non-Indigenous – carry a burden of responsibility to make co-management work as they go about the business of delivering agreements at the day-to-day level [citation omitted].").

play out in protected area management. They can manifest in ways both big and small, and in circumstances both unusual and routine. Former Kakadu Park Manager Chris Haynes addressed one example of cross-cultural considerations informing daily interactions at Kakadu—eye contact. Haynes talks about how, for Western Desert Aboriginal people, sharing the direction of one’s gaze is a sign of closeness and familiarity, whereas looking directly at someone can be experienced as confrontational in their culture.⁴⁰² Haynes contrasts this with the observed norm that, for Western (European-based) cultures, averting one’s eyes when addressing others is considered bad manners.⁴⁰³ Since the opposite is true amongst Aboriginal people, just the simple practice of how and when to make eye contact—a manner often practiced by habit rather than conscious thought—can be the source of misunderstandings or conflicts.⁴⁰⁴ Similar norms and dynamics exist within Indian country in the United States.⁴⁰⁵

The reality of conflicts arising under joint management more often involves the many situations that arise in any workplace: personnel

402. Haynes, *supra* n. 378, at 252.

403. *Id.* at 253.

404. *Id.* at 251–255, 289 (Haynes takes the eye contact issue of “gazing with” versus “looking at” and expands it into a broader principle of interacting cooperatively (gazing with) as opposed to confrontationally (looking at).).

405. By way of example, on its website page addressing cultural considerations when dealing with Indian people, the Indian Health Service includes the following advice regarding eye contact:

Eye Contact

Many communication courses teach that effective, engaged conversations include direct eye contact as a form of feedback from an individual who is interested in what you are saying. However, some communities engage with their ears and will look down or away as a form of respect and interaction. This is particularly true of elders and more traditional American Indians/Alaskan Natives. In fact, in some communities, to look directly in someone’s eyes while talking to them can be disrespectful. Actively assess your response with the individual and keep in mind that eye contact might be appropriate if the person is young and “modern”. Please keep in mind that everyone is different and up to 80% of communication can be non-verbal cues.

U.S. Govt., *Cultural Considerations: While Serving the Indian Health Population*, <http://www.ihs.gov/pharmacy/index.cfm?modu,%20le=awareness>.

grievances; competing priorities; varying levels of staff performance; etc. However, in cross-cultural situations, even garden-variety conflicts can be exacerbated due to perceptions of an “us” and “them” environment.⁴⁰⁶ It is primarily the staff workers on the ground, both Native and non-Native, who protect against, or create, the toxic “us” versus “them” atmosphere.

Within the context of such cross-cultural challenges, and guarding against the “us” vs. “them” dichotomy, Kakadu’s recognition of the importance of interpersonal communication and cross-cultural sensitivity has undoubtedly been essential to its successes to date. As stated in a paper co-authored by former Kakadu Park Manager Chris Haynes, “Sustainable outcomes depend upon the micro processes of communication and whether they enable Indigenous voices. Co-management is not an ‘object’ with a finite end, but an ongoing process and practice of partnership”⁴⁰⁷ Focusing on the importance of individual employees to such partnership, Hayes notes that

[e]ven after co-management has been bedded down for a while, changes in personnel can cause significant disruption and reorientation. Changes to protected area staff at all levels can mean that the relationships – so integral to co-management success – are lost and that new relationships have to be built and negotiated over time. . . . In short, the most elaborate administrative structures and legal arrangements can be totally undermined by ‘bad blood’ in relationships; and, conversely, inadequate legal safeguards can be ameliorated by positive interpersonal relationships.⁴⁰⁸

In Kakadu’s early years, it had benefitted from the perspectives of then-Interim Director of the Australian National Parks and Wildlife Service John Derrick Ovington.⁴⁰⁹ Ovington was said to have understood

406. Bauman, Haynes & Lauder, *supra* n. 235, at 11 (“[T]here is a need to normalise a culture in which co-management is conceived as an ongoing process of the negotiation of meaning and relationships within and across parties, rather than as a partnership made up of distinct entities of ‘us’ and ‘them’.”).

407. *Id.* at 74.

408. *Id.* at 70.

409. Haynes, *supra* n. 378, at 60.

“the world view of the Aboriginal people with whom he was dealing better than most senior officials, entering their universe in which long-term personal relationships hold sway.”⁴¹⁰ He took key concrete actions towards the shaping of Kakadu personnel, seeking out non-Aboriginal staff “with proven experience in working with Aboriginal people, privileging this ahead of park management experience.”⁴¹¹ He also instituted Australia’s first ranger training program geared to Aboriginal people, and made a point of providing the same housing for Aboriginal and non-Aboriginal rangers.⁴¹² Each of those actions, and their collective impact, not only sent a high-level message of support to the Aboriginal owners of Kakadu, but also set the stage in the field for a successful model of partnership.

In addition to those fundamental steps towards high-functioning partnership, it bears mentioning that, sometimes, it is an action which some may perceive as more symbolic than substantive that bears fruit in bringing people together and reducing the feeling of “us” versus “them” amongst staff. Early on in the Kakadu partnership, the sharing of a common park uniform gained outsize importance in fostering a sense, and a reality, amongst Aboriginal and non-Aboriginal staff that they were all on the same team. As observed by former Kakadu Park Manager Haynes

[F]or these [Aboriginal] men who had never had a public face in the [Northern Territory] parks and wildlife group, now they *were* a public face, the public face of joint management, wearing the same clothes with the same badge as the white rangers, representing *Kakadu*, itself a significant new creation. Now they were recognizable Aboriginal people of status, not just those blackfellas who white people saw occasionally in the shops, or drinking in their own group in the pub. . . . The uniform was thus much more than some mere piece of symbolic action. It mobilized coalescence and identity.⁴¹³

410. *Id.* at 62.

411. *Id.* at 64.

412. *Id.*

413. *Id.* at 189–90 [*italics in original*]. To read more about the significance of the park uniform for Aboriginal and non-Aboriginal staff, see *id.* at 187–193.

The Kakadu uniform experience is one illustration of how conscious choices to cultivate equity and true partnership resulted in tangible improvements at the Park. While not minimizing the challenges of maintaining an effective partnership ethic, the example of Kakadu demonstrates that larger, positive ripples emanate from this kind of co-management, and that those ripples often reinforce the joint-management model.⁴¹⁴

3. Commonalities Between Partnerships Abroad and the NBRC

The above examples of protected area partnerships are in many ways different from the NBRC situation, but they are also in many ways the same. Among the similarities are the core geographic, spiritual, and cultural connections of tribal and Indigenous communities to the lands at issue, connections that predate the respective federal governments by centuries or millennia. The examples also seem to share common experiences demonstrating that, even though there may be challenges in pursuing joint management of shared natural resources, efforts to further all stakeholders' interests in a protected area result in better outcomes for the natural resources and cultural resources, as well as visitor experiences.

While making no statement of endorsement in this article, it should be noted that the terms “blackfellas” and “whitefellas” are terms apparently used by both Aboriginal and non-Aboriginal people and do not appear to be, as typically used, pejorative in nature. See e.g. Haynes, *supra* n. 378, at 246 (quoting a non-Aboriginal ranger as saying “It basically became very much the way of the whitefella run park, you know, with that whitefella type bureaucracy. . . .”); 261 (reciting conversation in which Aboriginal person refers to “whitefella” and non-Aboriginal person refers to “blackfella”); 22 (“As many traditional owners told me in the early 1980s, they were used to being called, and used to calling themselves, *blackfellas* [citation omitted].” [italics in original]). Cf. New South Wales Dept. of Health, *Communicating positively: A guide to appropriate Aboriginal terminology*, http://www0.health.nsw.gov.au/pubs/2004/pdf/aboriginal_terms.pdf (2004) (This NSW Dept. of Health booklet does not include “whitefella” or “blackfella” in either its lists of acceptable terms (pp. 9–13) or unacceptable terms (pp. 2930) for identification of people, and is silent as to use of these words.).

414. E.g., Bauman, Haynes & Lauder, *supra* n. 235, at 26 (“In the Northern Territory, as elsewhere, co-management initiatives generally provide opportunities for traditional owners to reconnect with their traditional estates, in an otherwise increasing drift towards towns and cities.”).

VI. THE LOGIC OF RETURNING TO A SELF-GOVERNANCE PARTNERSHIP AT THE NATIONAL BISON RANGE COMPLEX

In evaluating the TSGA as a partnership vehicle at the NBRC, one can start with the TSGA requirement that the programs to be contracted must have geographic, historical, or cultural significance to the candidate tribe. The CSKT have demonstrably strong and deep ties to the NBRC in all three of those categories. CSKT's connections to the lands occupied by the NBRC, as well as to the bison there, are well documented. The CSKT therefore meet this threshold qualification for Self-Governance contracting.

CSKT's ability to manage programs is similarly difficult to contest. CSKT's many successes as a contractor of federal programs, particularly in the area of natural resources management, is a matter of record. As a partner to the Federal Government in refuge management, the CSKT are uniquely well qualified. CSKT's extensive qualifications are likely the primary reason for the wide spectrum of supporters for the Self-Governance agreements at the NBRC, including numerous conservation and environmental groups, elected officials, editorial boards, and other organizations.

The *New York Times*, in a September 2003 editorial supporting CSKT tribal program management at the Range, made the following observation:

The National Bison Range is an unusual case. It offers a rare convergence of public and tribal interests. If the Salish and Kootenai can reach an agreement with the Fish and Wildlife Service, something will not have been taken from the public. Something will have been added to it.⁴¹⁵

Montana Senator Jon Tester and former Montana Senator Max Baucus, have each repeatedly echoed this sentiment while expressing support for a meaningful Self-Governance agreement at the NBRC.⁴¹⁶

415. Editorial, *The National Bison Range*, N.Y. Times (September 3, 2003) (copy on file with *Public Land & Resources Law Review*).

416. Ltr, from Senators Max Baucus and Jon Tester to Interior Secretary Kempthorne (November 29, 2007) ("We look forward to working with you in crafting a workable [Self-Governance agreement] between the CSKT and the Department to

The sentiment has also been shared by the Missoulian, the leading daily newspaper in western Montana, which declared that “the tribes deserve the opportunity to help manage the Bison Range.”⁴¹⁷ Environmental and conservation groups both large and small have voiced support for the partnership, including: the Sierra Club’s Bitterroot-Mission Group;⁴¹⁸ Hellgate Hunters and Anglers;⁴¹⁹ Mission Mountain Audubon;⁴²⁰ Friends of the National Bison Range;⁴²¹ and the National Wildlife Federation.⁴²²

successfully manage the Bison Range.”) *See also*: Ltr. from Max Baucus, Sen., U.S. Sen., Jon Tester, Sen., U.S. Sen., to Lyle Laverty, Asst. Sec. for FWS, DOI, *Thank You* (Jan. 28, 2008) (“We appreciate your leadership and commitment to ensuring that the Confederated Salish and Kootenai Tribes play a substantive role in [NBRC] management functions.”); Ltr. from Max Baucus, Sen., U.S. Sen., to Ken Salazar, Sec. of the Int., DOI, *AFA Support 2* (May 1, 2009) (“This emerging partnership is a progressive example of government-to-government relations authorized under the TSGA and the National Wildlife Refuge System Administration Act (NWRSA).”); Ltr. from Jon Tester, Sen., U.S. Sen., to Dirk Kempthorne, Sec. of the Int., DOI, *CSKT Support 1* (June 29, 2007) (“Because of their strong connection to managing bison herds and their demonstrated ability to successfully manage historically federal functions, I support the tribe managing the [National Bison] Range at the local level.”) (copies on file with *Public Land & Resources Law Review*).

417. Editorial, *Tribes Deserve Chance with Bison Range*, Missoulian B4 (Jan. 29, 2009). *See also* Editorial, *Ugly Feud Now Threatens Bison Range*, Missoulian (Apr. 25, 2007) (“It just can’t be all that hard to come up with a workable management agreement in which the tribes play a legitimate role.”).

418. Ltr. from R. Kiffin Hope, Chair, Sierra Club Bitterroot-Mission Group, to Dirk Kempthorne, Sec. of the Int., DOI, *Support for Tribal Management of the National Bison Range* (Nov. 20, 2007) (“I would like to extend our support for the Confederated Salish and Kootenai Tribes’ objective to secure a [Self-Governance] agreement . . . for the management and operation of the National Bison Range in Montana.”) (copy on file with *Public Land & Resources Law Review*).

419. Ltr. from Pelah Hoyt, Pres., Hellgate Hunters & Anglers, to Dirk Kempthorne, Sec. of the Int., DOI, *Support for Tribal Management of the National Bison Range* (Sept. 20, 2007) (“HHA requests your support for the Confederated Salish and Kootenai Tribes’ contracting of local operations at the National Bison Range under the Tribal Self-Governance Act.”) (copy on file with *Public Land & Resources Law Review*).

420. Ltr. from Jim Rogers, Pres., Mission Mountain Audubon, to Dirk Kempthorne, Sec. of the Int., DOI, *Support for Tribal Management of the National Bison Range* (Dec. 12, 2007) (“We believe the U.S. Fish & Wildlife Service should embrace the opportunity for partnering with the Tribes for the benefit of the Bison Range.”) (copy on file with *Public Land & Resources Law Review*).

421. Ltr. from Paul Bishop, Member, Friends of the National Bison Range, to Dirk Kempthorne, Sec. of the Int., DOI, *National Bison Range Management* (Sept.

The partnership has also had the support of tribes across the country, including the Montana-Wyoming Tribal Leaders Council and the National Congress of American Indians, the oldest and most influential national tribal organization.⁴²³

The concept of a Tribal-Federal partnership at the NBRC may strike some as precedential. However, as illustrated by the previously discussed examples from this country and abroad, these types of collaborative relationships are not new. Substantial activity with respect to such partnerships has taken place over the past several decades—including, in recent years, at the NBRC. The cooperative experiences in other countries hold lessons for federal and tribal leaders in the United States since this country has not yet embarked upon partnerships of the scale seen in places such as Canada and Australia.

One lesson to be drawn from these experiences is the importance of tailoring the partnerships to the unique circumstances presented by individual tribal nations or Indigenous communities, as well as the subject protected area. What works for one tribe may not suit another; just as a model partnership for one protected area may be neither appropriate nor effective in a different park or refuge. Even within the United States, Indian tribes and their respective reservations, histories, languages, cultures, and capabilities are highly diverse. Assuming one tribe's characteristics, capacities, and situation to be representative of that of another tribe would result in mistaken apprehensions somewhat analogous to viewing the citizens and government institutions of Alabama as being

18, 2007) (“We respectfully ask that you step forward to advocate for local management of the National Bison Range by the Confederated Salish and Kootenai Tribes under the Tribal Self-Governance Act.”) (copy on file with *Public Land & Resources Law Review*).

422. Ltr. from Larry Schweiger, *supra* n. 7, at 1 (“NWF strongly believes that a partnership between the Service and the CSKT should be formalized through a new self-governance [agreement] . . .”).

423. Ltr. from Carl E. Venne, Chairman, Montana-Wyoming Tribal Leaders Council, to Dirk Kempthorne, Sec. of the Int., *Support for Tribal Management of the National Bison Range* 1 (Mar. 12, 2007) (extending the Council's “strongest support for the efforts of [CSKT] to manage the National Bison Range pursuant to a Tribal Self-Governance contracting agreement.”) (copy on file with *Public Land & Resources Law Review*); N.C.A.I. Resolution #ANC-07-034 (2007) (“Support for the Confederated Salish and Kootenai Tribes’ Proposal to Manage the National Bison Range Pursuant to a Tribal Self-Governance Agreement with the U.S. Fish & Wildlife Service”) (copy on file with *Public Land & Resources Law Review*).

representative of those in Hawaii, or conflating the State of New Jersey with the State of Alaska. Due to differences in language and religious beliefs (as well as cultures), the differences amongst some tribes within the United States could even be more analogous to the differences between the people of England and Turkey, or China and Indonesia. Along the same lines, federally administered lands and facilities also come with their own highly unique circumstances and needs.

Understanding this necessity for case-by-case evaluations of such partnerships, one can still look to what has been done in other countries, and what is beginning to be done here in this country, as being instructive in the fields of both federal lands policy and Federal-Tribal relations. Much can be gained by drawing from the successes, as well as the lessons learned, elsewhere.

The examples of shared management discussed in this article demonstrate the importance of effective and open communication in these partnerships, placing a premium on eliminating an “us” versus “them” paradigm on the part of the people involved. This, in turn, requires careful attention to staff hiring and management since the field staff are crucial in making the partnership functional and successful.

With respect to the vehicle for creating these collaborative arrangements in the United States, legislative history and subsequent solicitor opinions confirm that the TSGA provides very broad authority for federal contracting partnerships with Indian tribes and Alaska Native communities. This includes the ability of tribes to contract for management of refuge programs. While other vehicles for limited collaboration may exist, the TSGA provides the strongest foundation, as well as the most well defined in the form of existing federal law, for the type of partnership the CSKT seek.

The legislative history and objectives of the TSGA, as set forth in the TSGA itself as well as in its accompanying regulations, make clear that both the federal legislative and executive branches strongly encourage these sorts of Self-Governance partnerships as a matter of policy. Consistent with congressional intent, federal policy evinces deference to a tribe’s choice regarding the extent of its Self-Governance activity. While providing for secretarial discretion with respect to programs contracted due to geographic, historical or cultural significance, Congress requires the Secretary of the Interior to interpret the TSGA liberally in favor of including programs within Self-Governance agreements. Under this

authority, CSKT and FWS have already initiated partnerships at the NBRC and are in the process of re-establishing a new one.

The experience thus far at the National Bison Range Complex has shown not only that the Tribal Self-Governance Act works as a partnership vehicle, but that it also holds great promise for being the basis of successful long-term collaboration. Both CSKT and FWS have demonstrated, particularly under their most recent Self-Governance agreement, that refuge management can thrive under their collaborative efforts. The experience of other countries regarding joint efforts in protected areas management shows that such teamwork can yield great benefits that accrue to government agencies, the general public, tribal communities and—most importantly—the natural resources themselves. In the end, it is this benefit that speaks most loudly to natural resource managers and people of vision.