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Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress

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SUMMARY

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Mariel J. Murray
Specialist in Natural Resources Policy

Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress

In recent decades, congressional interest in federal-tribal collaboration, or *co-management*, on federal lands has grown, especially as some tribes have sought more input into federal land management. *Co-management* and *tribal co-management* are not defined terms in law. Accordingly, Members of Congress, tribes, and federal agencies may use and apply these terms in different ways. As a result, federal-tribal co-management on federal lands can take many forms and cover many activities. In general, tribal co-management involves varying degrees of tribal influence in federal decisionmaking, as shown in the types of co-management outlined below:

Figure 1.Federal-Tribal Co-management Spectrum

Source: Congressional Research Service.

Tribal co-management of federal lands is different from management partnerships with other entities due, in part, to federally recognized tribes' unique, government-to-government relationship with the federal government. In addition, many of today's federal lands are located on or near tribal ancestral homelands and are often close to current tribal lands. Many tribes maintain ongoing physical, cultural, spiritual, and economic relationships with their ancestral homelands.

Historically, the Senate ratified treaties in which tribes reserved rights to access resources on federal lands. In addition to tribal treaties, Congress has provided for tribal participation in federal land management through various authorities, including both nationwide and site-specific statutory mandates. Congress has enacted statutes requiring tribal consultation, authorizing partnerships with nonfederal entities such as tribes, and authorizing the delegation of agency directives to tribes to manage certain programs or regulate certain activities.

The U.S. Departments of the Interior (DOI), Agriculture (USDA), Commerce (DOC), and Defense (DOD) are among the federal executive agencies that have implemented tribal co-management of natural, historical, and cultural resources on federal lands. This has ranged from upholding tribal treaty fishing rights in the Pacific Northwest to managing subsistence wildlife in Alaska to restoring watersheds within national forests and maintaining historical resources and facilities as national monuments.

Congress may continue to consider the suitability and effectiveness of federal-tribal co-management of federal lands. Federal-tribal co-management on federal lands may help federal agencies achieve congressional priorities. It can provide an opportunity to integrate unique tribal traditional knowledge with contemporary resource management policies to meet mutual objectives. At the same time, Congress and agencies can find it challenging to balance various tribal interests with other statutory mandates and interests. For example, Congress may continue to consider whether certain federal lands should be developed or protected through co-management agreements. Congress also may consider the scope of activities allowed under co-management agreements on federal lands, including whether agencies should delegate certain activities to tribes. In addition, Congress may consider the administrative and financial benefits and challenges facing agencies and tribes in these agreements.

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Introduction

Many of today's federal lands are located on the ancestral homelands of *federally recognized tribes*.[1] Many tribes maintain ongoing physical, cultural, spiritual, and economic relationships with their ancestral homelands. Tribes may seek access to federal lands or input into federal land management decisions because of the large amount of land currently owned by the federal government that once was tribal land.[2] In addition, tribes with tribal lands close to federal lands also may seek to influence federal land management.[3]

Tribes have historically had the opportunity to provide input on federal land management decisions through a variety of mechanisms, including formally consulting on specific decisions. In recent decades, many tribes have advocated for a more robust, long-term, and formal role in managing federal lands to which they have a connection. This type of tribal involvement in federal land management is referred to as *federal-tribal co-management*, though different entities use the term to refer to different types of involvement.

Co-management of federal lands differs from federal partnerships with other entities, in part due to tribes' unique, government-to-government relationship with the federal government. Tribes also have historic cultural, spiritual, and subsistence ties to their ancestral lands that differentiate them from other entities. In addition, the federal government may have certain responsibilities with respect to tribes that affect co-management, such as the federal trust responsibility and certain treaty tribal hunting, fishing, and gathering rights. Tribal treaties with the federal government may be a basis for certain types of federal-tribal co-management on federal lands.

In addition, Congress has provided federal land management agencies with broad partnership authorities to cooperate with nonfederal entities, as well as with specific authorities to partner with tribes.[4] At times, Congress also has established site-specific statutory mandates for federal-

[1] A *federally recognized tribe* is an American Indian or Alaska Native entity that is recognized as having a government-to-government relationship with the United States. Under current federal law, a group of Indians may obtain federal recognition through the Department of the Interior (DOI)'s administrative process, legislation, or a court decision. For more information, see CRS Report R47414, *The 574 Federally Recognized Indian Tribes in the United States*, by Mainon A. Schwartz. For the 2023 list of federally recognized tribes, see DOI, Bureau of Indian Affairs (BIA), "Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs," 88 *Federal Register* 2112-2116, January 12, 2023, at https://www.govinfo.gov/content/pkg/FR-2023-01-12/pdf/2023-00504.pdf.

[2] As of May 2023, the federal government owns more than a quarter of the land in the United States. This report is limited to examining co-management agreements between DOI's Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS); the U.S. Department of Agriculture (USDA)'s Forest Service (FS); the U.S. Department of Commerce (DOC)'s National Oceanic and Atmospheric Administration (NOAA); and the Department of Defense (DOD)'s U.S. Army Corps of Engineers (USACE). Due to the Bureau of Reclamation (BOR)'s unique authorities, many of which are project-specific, a discussion of BOR projects is beyond the scope of this report. In addition, because this report focuses on the incorporation of tribes into federal land management, it will not address tribal trust lands managed by the DOI's BIA on behalf of tribes. See also CRS Report R42346, *Federal Land Ownership: Overview and Data*, by Carol Hardy Vincent and Laura A. Hanson.

[3] For reference, DOI manages roughly 6.5 million acres of land within 50 miles of tribal lands, and FS and tribes share approximately 4,000 miles of contiguous boundaries. See DOI, "Interior Department and Intertribal Timber Council Strengthen Wildland Fire Management Collaboration," press release, September 15, 2021, at https://www.doi.gov/pressreleases/interior-department-and-intertribal-timber-council-strengthen-wildland-fire-management. See also U.S. Congress, Senate Committee on Indian Affairs, *Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires and S. 3014, A Bill to Improve the Management of Indian Forest Land, and for Other Purposes*, 114th Cong., 2nd sess., June 8, 2016, S.Hrg. 114-361 (Washington: GPO, 2016). For more on tribal lands, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Mariel J. Murray.

[4] See, for example, National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.); American Indian (continued...)

tribal collaboration on particular federal lands. These historical foundations inform how federal-tribal co-management may differ from other entities, as well as how tribes may claim access to, or inform the management of, resources on federal lands in a co-management arrangement.

Federal-tribal co-management on federal lands may help federal land management agencies achieve congressional priorities.[5] It can provide an opportunity to integrate unique tribal traditional knowledge into contemporary resource management policies to address issues and meet mutual objectives. At the same time, Congress and agencies can find it challenging to balance various tribal interests with other statutory mandates and interests. For example, some tribes may want to co-manage a federal land area to limit development or limit access to non-tribal members, whereas other stakeholders may want to access and/or develop the area.[6]

This report provides an overview of co-management by explaining the historical underpinnings of tribes' interest in, and potential rights to, co-manage federal lands; the spectrum of co-management types and their underlying authorities; and examples of how co-management has been used with respect to certain natural and cultural resources. The report concludes with potential considerations for Congress, including an overview of recent congressional activities and legislative issues and options regarding the suitability and effectiveness of federal-tribal co-management on federal lands.

Co-management: Historical Foundation

Tribes have inhabited North America for millennia, developing deep cultural, spiritual, and subsistence ties to the landscape, which many tribes have attempted to maintain.[7] Tribal support for increased co-management of federal land generally stems from this history of tribal connection to lands now owned by the federal government and tribes' unique relationship to the federal government. These historical foundations inform how tribes may claim access to, or inform the management of, resources on federal lands in a co-management arrangement.

The federal government removed many tribes from their ancestral homelands in the 18th and 19th centuries through treaties and other means. From 1774 to about 1871, the United States negotiated 375 tribal treaties.[8] In some of these treaties, tribes ceded lands but sought to retain the

Religious Freedom Act (AIRFA; 42 U.S.C. §§1996 et seq.); Archeological Resources Protection Act of 1979 (ARPA; 16 U.S.C. §470aa-mm); and Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.).

[5] National Congress of American Indians (NCAI), "Tribal Cultural Rights and Homeland Protection," p. 1, at https://www.ncai.org/FINAL_2021_ECWS_Days_One_Pager_-_Tribal_Cultural_.pdf.

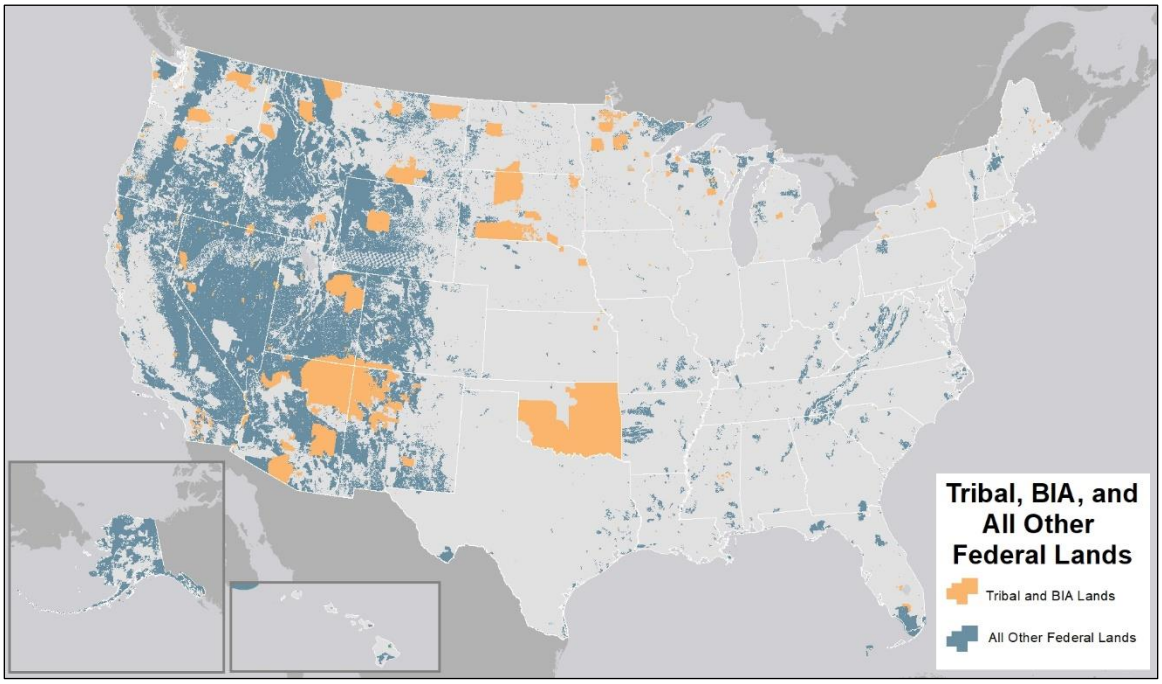
[6] NCAI, "Supporting Legislation to Improve Protections and Authorize Restoration of Native Sacred Places on Federal Lands," NCAI Resolution #DEN-18-035, 201, p. 2, at https://www.ncai.org/attachments/Resolution_PYCnwKpRbfWPiYzlKHPLmgHJMNoHiIZVffWZqBIifEouNkSdFeS_DEN-18-035%20Final.pdf. See also Statement of Suzan Shown Harjo, President, Morning Star Institute, in U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, hearings, 108th Cong., 1st sess., June 8, 2003, S. Hrg. 108-197 (Washington: GPO, 2003), p. 8.

[7] Monte Mills and Martin Nie, "Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-management on Federal Public Lands," *Public Land & Resources Law Review*, vol. 44 (2021), p. 1, at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1741&context=plrlr (hereinafter Mills and Nie, "Bridges").

[8] See National Archives, "Native American Heritage: American Indian Treaties," at https://www.archives.gov/research/native-americans/treaties. See also U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, briefing report, December 2018, p. 4, at https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf.

rights to hunt, fish, trap, and gather on those lands.[9] In addition, tribes may retain interests and rights on their ceded lands even if they are not currently located near their ceded lands.[10] Therefore, even if tribes are not currently located near federal lands, they may have rights to access those lands. See **Figure 2** for a map of federal and tribal lands.

Figure 2. Tribal, Bureau of Indian Affairs (BIA), and Federal Lands in the United States



Source: Congressional Research Service (CRS), using data from BIA and the U.S. Geological Survey.

Notes: The BIA and Tribal Lands layer reflects lands held in trust by the United States, federal Indian reservations, and other tribal lands but does not include all tribal land holdings, statuses, or designations.

In addition to treaty rights influencing co-management of federal lands, some tribes assert that federal land management agencies should obtain tribal consent for federal actions due to the *federal trust responsibility*. The *federal trust responsibility* is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.[11] It can include obligations to protect tribal treaty rights, lands, assets, and resources on behalf of tribes and tribal members. The National Congress of American Indians (NCAI), a national organization of American Indian and Alaska Native tribal governments, has argued that acting in the best interests of tribes, as determined by tribes, is critical to fulfilling the federal trust responsibility.[12] Therefore, obtaining tribal consent for federal actions that affect them is "the clearest way to

[9] Nell Jessup Newton, ed., *Cohen's Handbook of Federal Indian Law*, §18.02. 2019 ed. (Albuquerque, NM; LexisNexis, 2019) (hereinafter Newton, *Cohen's Handbook*).

[10] See the Indian Removal Act of 1830, Act of May 28, 1830, 4 Stat. 411.

[11] Seminole Nation v. U.S., 316 U.S. 286, 296-297 (1942). For a general overview of the trust relationship, see U.S. v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

[12] NCAI, "NCAI Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making," November 30, 2016, p. 11, at https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/idc2-055647.pdf.

uphold the trust responsibility."[13] NCAI claimed that the government historically has not been inclusive of tribes in federal land management decisionmaking; according to NCAI, "this systemic injustice should be addressed at the forefront of all co-management and/or shared stewardship discussions."[14]

Regardless of treaty or trust obligations, many tribes maintain ongoing physical, cultural, spiritual, and economic relationships with their ancestral homelands now under the jurisdiction of the federal government. This federal-tribal relationship can provide the basis for co-management arrangements. Tribes may seek access to federal lands or input into federal land management decisions to continue using the lands for historic cultural, religious, or subsistence purposes.

Co-management Framework

Generally, *co-management* refers to the sharing of management power and responsibility between the federal government and nonfederal entities, typically through a formal agreement.[15] Federal-tribal collaboration on federal lands can take many forms and cover many activities. Tribal co-management typically involves varying degrees of tribal influence in federal decisionmaking (see "Types of Co-management," below). The terms, requirements, and responsibilities that define tribal co-management agreements may vary depending on the situation. Accordingly, there is no single, statutory definition of co-management, and Members of Congress, tribes, and federal land management agencies have interpreted and used the term in different ways.[16] This section presents a framework for understanding the various types of arrangements and agreements categorized as co-management, depending on the situation.

Types of Co-management

Federal land management agencies can collaborate with tribes in different ways. As a result, the concept of co-management has been used to refer to a wide variety of federal-tribal collaborations on federal lands, generally shaped by the context of the resource to be managed and the tribes' relation to it. Given that there is no one legal definition of co-management, parties may not agree as to what qualifies as co-management in any particular circumstance. There may be situations in which an agency would consider a partnership on federal lands to be an example of co-management but the partnering tribe(s) would not. This section presents a spectrum of potential types of co-management arrangements, as illustrated in **Figure 3.**

[13] Ibid.

[14] NCAI, "Calling for the Advancement of Meaningful Tribal Co-management of Federal Lands," NCAI Resolution #PDX-20-003, 2020, p. 2, at https://www.ncai.org/resources/resolutions/calling-for-the-advancement-of-meaningful-tribal-co-management-of-federal-lands (hereinafter NCAI, #PDX-20-003).

[15] Sibyl Diver, "Co-management as a Catalyst: Pathways to Post-colonial Forestry in the Klamath Basin, California," *Human Ecology*, vol. 44 (October 7, 2016), pp. 533-546, at https://link.springer.com/article/10.1007/s10745-016-9851-8.

[16] In a 2016 secretarial order, DOI defined *co-management* as "a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decision-making" but did not define *delegation* in that context (Sally Jewell, Secretary, DOI, Secretarial Order (S.O.) No. 3342, "Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources," October 21, 2016, §2(c)(3), at https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf [hereinafter S.O. 3342]). The U.S. Department of Agriculture (USDA), U.S. Department of Commerce (DOC), and the U.S. Army Corps of Engineers (USACE) have not publicly defined the term *co-management*.

Figure 3. Federal-Tribal Co-management Spectrum

Source: CRS.

Note: These categories are not defined in statute and are meant to be illustrative of different types of co-management activities, ranging from less to more tribal involvement. The categories are not mutually exclusive.

No Tribal Input

Historically, federal agencies generally had discretion regarding how much to involve tribes in federal decisionmaking. Many tribes assert that, in practice, there was generally little to no tribal input in many decisions.[17] The absence of tribal input in federal land management is the baseline against which other types of co-management arrangements are compared.

Consultation

One way Congress and agencies have provided for tribal input in agency decisionmaking is through federal-tribal consultation requirements for federal land management decisions. In certain instances, Congress has passed federal statutes requiring federal agencies to consult with tribes before undertaking certain activities on federal lands.[18]

For example, the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of projects they carry out, license, or financially assist (collectively referred to as *undertakings*) on historic properties.[19] As part of that consideration, federal agencies must consult with any tribe that "attaches religious and cultural significance" to historic properties that may be affected by the undertaking.[20] In its NHPA implementing regulations, the Advisory Council on Historic Preservation defined *consultation* as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement" with them through this process.[21]

Some federal land management agencies, such as DOI and USDA, have entered into formal agreements with tribes to ensure that agency decisionmaking complies with NHPA Section 106. Consultation-related agreements have the potential to both ensure statutory compliance and increase collaboration between tribes and federal land management agencies in decisionmaking.

[17] See NCAI, #PDX-20-003, p. 2.

[18] Examples include the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.); American Indian Religious Freedom Act (14 U.S.C. §§1996 et seq.); Archeological Resources Protection Act of 1979 (16 U.S.C. §§470aa-470mm); and Native American Graves Protection and Repatriation Act (25 U.S.C. §§3001 et seq.). Congress has, at times, also considered legislation that would establish a general statutory mandate for federal agencies to consult with tribes, See Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (H.R. 2689), 115th Cong., 1st sess., 2017.

[19] 54 U.S.C. §306108. See also CRS Report R45800, *The Federal Role in Historic Preservation: An Overview*, by Mark K. DeSantis.

[20] 54 U.S.C. §302706(b).

[21] 36 C.F.R. §800.16.

For example, the FS's Ozark-St. Francis National Forests and Ouachita National Forest maintain an NHPA Section 106 Programmatic Agreement (PA) with partners, including local tribes and tribes with historical connections to the lands.[22] Among other things, this PA provides a framework for managing cultural resources, including a process for addressing the discovery of human remains and any associated funerary objects.[23]

In other instances, the executive branch has directed agencies—through executive orders, regulations, agency guidance, and other administrative actions—to consult with tribes in the development of federal policies with tribal implications.[24] This has included requiring agencies responsible for administering federal lands and waters to establish consultation procedures with tribes. For example, both USDA and DOI have tribal consultation policies that direct their agencies to provide tribes the opportunity for government-to-government consultation and coordination in policy development and program activities that have tribal implications.[25] However, each agency has different consultation policies and processes, which can result in inconsistent levels and types of tribal consultation in federal decisionmaking on federal lands.[26]

Formal Agreements

A co-management approach with more direct tribal involvement in the decisionmaking process entails agencies entering into agreements with tribes to enable tribes to conduct specific activities on federal lands. Congress has both mandated this type of co-management and provided agencies with discretion to engage in this type of co-management on federal lands. For example, in the enabling legislation for the Grand Portage National Monument, Congress provided a specific preference for employing tribal members in construction, maintenance, visitor services, "or any other service within the monument for which they are qualified."[27] In addition, using authority from the Tribal Forest Protection Act (TFPA), FS has entered into a TFPA contract with the

[22] "Programmatic Agreement Among U.S.D.A. Forest Service, Ozark-St. Francis National Forests; U.S.D.A. Forest Service, Ouachita National Forest; Arkansas State Historic Preservation Officer; Oklahoma State Historic Preservation Officer; Arkansas State Archeologist; Oklahoma State Archeologist; Cherokee Nation; Coushatta Tribe of Louisiana; Delaware Nation; Osage Nation; Thlopthlocco Tribal Town; and the Advisory Council on Historic Preservation Regarding the Process for Compliance with Section 106 of the National Historic Preservation Act for Undertakings on the Ozark-St. Francis and Ouachita National Forests," 2018, at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd589183.pdf.

[23] Ibid. p. 17. For more analysis on this Programmatic Agreement, see David H. Jurney et al., "Lessons from a Programmatic Agreement and Heritage-Based Consultations between Tribes and the National Forests of Arkansas and Oklahoma," *Journal of Forestry*, vol. 115, no. 5 (September 2017), pp. 458-467, at https://doi.org/10.5849/jof.16-040.

[24] See Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 *Federal Register* 67249 (2000) (hereinafter E.O. 13175); U.S. President (Obama), "Memorandum of November 5, 2009: Tribal Consultation," 74 *Federal Register* 57879, November 5, 2009; U.S. President (Biden), "Tribal Consultation and Strengthening Nation-to-Nation Relationships," 86 *Federal Register* 7491, January 29, 2021; and U.S. President (Biden), "Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation," 87 *Federal Register* 74479, December 5, 2022 (hereinafter Biden, "Standards for Tribal Consultation").

[25] USDA, "Departmental Regulation, Tribal Consultation, Coordination, and Collaboration," January 18, 2003, p. 4, at https://www.usda.gov/sites/default/files/documents/USDA_DR_Tribal_Consultation_Coordination_and_Collaboration_OTR_final_1_18.pdf; See also DOI, *Departmental Manual- Department of the Interior Policy on Consultation with Indian Tribes*, November 30, 2022, p. 3, at https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf (hereinafter DOI, "Consultation DM").

[26] Mills and Nie, "Bridges," pp. 57, 89, and 94; and U.S. Government Accountability Office (GAO), *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO-19-22, March 2019, p. 20, at https://www.gao.gov/assets/gao-19-22.pdf. Note that President Biden issued a 2022 presidential memorandum to establish uniform minimum standards for tribal consultation across all agencies (Biden, "Standards for Tribal Consultation").

[27] P.L. 85-910, Section 5.

Tulalip Tribes for the tribes to set up a multiyear seasonal crew to reintroduce beavers on the Mt. Baker-Snoqualmie National Forest.[28] For more on these examples, see "Co-management of Different Resources."

Long-Term Partnerships

Another type of co-management, entailing still more tribal involvement, entails federal land management agencies and tribes collaborating beyond specific projects to foster longer-term partnerships in agency decisionmaking. In certain instances, federal agencies have entered into agreements to facilitate consistent coordination and cooperative management with tribes based on tribal treaties and tribes' historical ties to agency lands. On a regional scale, DOI, DOC, and DOD have worked with tribes to give effect to tribal treaty fishing rights in the Pacific Northwest and DOI has worked with Alaska Natives to manage subsistence wildlife on federal lands in Alaska (for more on these examples, see "Co-managing Natural Resources"). At a local level, the FS and federally recognized tribes of Lake Superior Chippewa Indians used a memorandum of understanding to establish standards by which the parties would "act consistently across national forest lands within areas ceded in the treaties of 1836, 1837, and 1842."[29] In particular, the parties sought to ensure "the meaningful exercise" of tribal treaty rights, facilitate "consistent and timely communication," and foster effective tribal participation in relevant forest plans.[30]

During the Biden Administration, USDA and DOI have encouraged this third type of co-management through a so-called *co-stewardship* approach.[31] Although federal-tribal partnerships negotiated prior to the Biden Administration included a range of collaborative arrangements, the Biden Administration has expressed that its co-stewardship approach focuses on proactively identifying and entering into agreements with tribes and providing more specific guidance on what those agreements should contain.[32] In November 2021, USDA and DOI issued Secretarial Order (S.O.) 3403, which directed agencies to collaborate with tribes based on the treaty, religious, subsistence, and cultural interests of tribes in the co-stewardship of federal lands and waters.[33] In 2022, DOI included this direction in departmental guidance, and NPS, BLM, and FWS released a series of follow-up policy memoranda encouraging co-stewardship.[34] In addition,

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[28] Tribal Forest Protection Act of 2004 (TFPA), 25 U.S.C. §3115(a). FS, "Monumental 638 Agreement: Forest Service Partners with Tulalip Tribes," press release, October 8, 2020, at https://www.fs.usda.gov/inside-fs/delivering-mission/sustain/monumental-638-agreement-forest-service-partners-tulalip (hereinafter FS, "Monumental 638 Agreement").

[29] FS, "Memorandum of Understanding Regarding Tribal- USDA-Forest Service Relations On National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842," at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5309366.pdf.

[30] Ibid.

[31] This report will use a single term (*co-management*) for the sake of consistency and simplicity.

[32] Personal communication between CRS and DOI, March 14, 2023.

[33] DOI Secretarial Order (S.O.) No. 3403, "Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters," November 15, 2021, at https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf. In November 2022, the DOC officially announced that it would join S.O. 3403 to "further the administration's co-stewardship goals in their management of waters, fisheries and other resources of significance and value to Tribes."

[34] DOI, *Departmental Manual Part 502;* BLM, "Co-stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403," *Permanent Instruction Manual* No. 2022-011, September 13, 2022, at https://www.blm.gov/policy/pim-2022-011; FWS, "Fulfilling the Trust Responsibility to Tribes and the Native Hawaiian Community, and Other Obligations to Alaska Native Corporations and Alaska Native Organizations, in the Stewardship of Federal Lands and Waters," Director's Order No. 227, September 8, 2022, at https://www.fws.gov/media/directors-order-no-227; and NPS, "Fulfilling the National Park Service Trust Responsibility to Indian Tribes, (continued...)

FS's 2022 "Strengthening Tribal Consultations and Nation to Nation Relationships" action plan committed to a co-stewardship strategy.[35] This strategy includes "expanding scope and scale of Tribal involvement in agency work, planning, and decision making, as well as Tribal self-determination."[36]

Co-management Authorities

Congress has enacted various authorities that would require or allow federal agencies to share management responsibilities with tribes, including statutes requiring tribal consultation, authorizing partnerships with nonfederal entities such as tribes, and authorizing the delegation of specific statutory directives. In addition, historically Congress ratified treaties in which tribes reserved rights to access resources on federal lands. These treaties also can provide the basis for co-management of federal lands. DOI and USDA have concluded that these authorities may be used to enable collaboration with tribes on federal lands.[37]

- **Consultation Authorities.** Various federal statutes require agencies to consult with tribes before undertaking certain activities on federal lands.[38] These statutes typically provide the authority for one type of co-management, whereby agencies consult with tribes and other stakeholders to ensure agency decisionmaking on specific projects complies with statutory consultation requirements (e.g., consultation under the NHPA).
- **Tribal Treaties.** Some treaties may provide the basis for tribal co-management of federal lands if the tribes ceded lands that became federal lands but retained rights to conduct certain activities on those lands, such as hunting, fishing, and gathering. Treaties also may provide for long-term, collaborative co-management arrangements on federal lands. Although the Senate ratifies treaties, whether or the degree to which a specific treaty provides a basis for co-management is a matter of legal interpretation for federal agencies and courts. The federal government no longer enters into treaties with tribes, so any co-management authority derived from treaty rights would be based on existing treaties.
- **Partnership Authorities.** Congress has passed legislation providing federal agencies with the authority to cooperate with nonfederal entities, including tribes, on land management activities. These statutes may include authorization to enter into cooperative agreements, memoranda of agreement and understanding, or other arrangements. Whereas some laws provide broad authority to agencies to

Alaska Natives, and Native Hawaiians in the Stewardship of Federal Lands and Waters," September 13, 2022, at https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf.

[35] USDA, "Strengthening Tribal Consultations and Nation to Nation Relationships," p. 19, February 2023, at https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Strengthening-Tribal-Relations.pdf (hereinafter USDA, "Strengthening").

[36] Ibid.

[37] See DOI, Office of the Solicitor, *Final Report: Current Land, Water, and Wildlife Authorities That Can Support Tribal Stewardship and Co-stewardship*, November 2022, at https://www.doi.gov/sites/doi.gov/files/-final-legal-rvw-v-final-pdf-508.pdf (hereinafter DOI, *Final Report*, 2022). See also DOI, *Departmental Manual Part 502: Collaborative and Cooperative Stewardship with Tribes and the Native Hawaiian Community*, pp. 1-2, at https://www.doi.gov/sites/doi.gov/files/elips/documents/502-dm-1.pdf (hereinafter DOI, *Departmental Manual Part 502*), and USDA, Office of the General Counsel, "Joint Secretarial Order 3404 and Stewardship," at https://www.usda.gov/sites/default/files/documents/co-stewardship-authorities-november-508.pdf (hereinafter USDA, JSO 3403).

[38] Congress has considered, but not passed, a general mandate requiring federal agencies to consult with tribes, See Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (H.R. 2689), 115th Cong., 1st sess., 2017.

partner with nonfederal entities on a range of management areas, others provide for partnering with entities or tribes to perform particular activities.[39] As outlined in the next section ("Co-management of Different Resources"), Congress also has passed site-specific laws encouraging co-management on particular federal lands, such as a national monument.

- **Indian Self-Determination and Education Assistance Act (ISDEAA).** Congress also has allowed agencies to delegate their authority to tribes to manage certain programs or regulate certain activities.[40] In these situations, tribes must demonstrate certain qualifications to be eligible to perform the activity and the federal agency retains some oversight. For example, ISDEAA, as amended, enables tribes to manage certain agency programs with federal funds.[41] Under this authority, tribes can request the authority to conduct certain programs or activities—including activities related to federal land management—that otherwise would be conducted by the federal agencies.[42] If granted, tribes manage the programs or activities through self-determination contracts or self-governance compacts, hereinafter referred to as *ISDEAA agreements*.[43]

  Tribes have used ISDEAA agreements extensively to manage federal programs, although most of these programs are not lands-related.[44] In 2022, 360 out of 573 federally recognized tribes participated in ISDEAA agreements that implemented more than half of all federal programs on Indian reservations, including 288 tribes using self-governance compacts with DOI.[45] The majority of these agreements are between the Indian Health Service (IHS) or BIA and tribes rather than with the DOI land management agencies or FS. However, ISDEAA encourages other agencies to enter into ISDEAA agreements, and both DOI and USDA have entered into co-management-related ISDEAA agreements, as outlined in "Co-management of Different Resources."[46]

[39] USDA, JSO 3403, p. 7.

[40] The regulatory delegation is sometimes known as *cooperative federalism*, but is beyond the scope of federal-tribal co-management of federal lands. For reference, the Environmental Protection Agency may delegate its authority to states and tribes under several federal environmental laws when tribes request "treatment as a state" status (33 U.S.C. §125 and 42 U.S.C. §7601(d)(1)(A)). In addition, DOI may delegate its authority to manage tribal energy projects through Tribal Energy Resource Agreements (Indian Tribal Energy and Self-Determination Act Amendments of 2005, as amended (P.L. 115-325)). See also CRS Report R46446, *Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress*, by Mariel J. Murray.

[41] Indian Self-Determination and Education Assistance Act (ISDEAA; P.L. 93-638, as amended).

[42] 25 U.S.C. §5321 (self-determination contracts) and 25 U.S.C. §5363 (self-governance compacts).

[43] Ibid.

[44] U.S. Congress, House Committee on Natural Resources, *Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019*, report to accompany S. 209, 116th Cong., 2nd sess., H.Rept. 116-422, May 22, 2020, p. 3 (hereinafter H.Rept. 116-422); Statements of Senators Hoeven and Udall U.S. Congress, Senate Committee on Indian Affairs, *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30th Years*, hearings, 115th Cong., 2nd sess., 2018, S.Hrg. 115-403 (Washington: GPO, 2019), pp. 1-25 (hereinafter S.Hrg. 115-403).

[45] Statement of Senator Udall in S.Hrg. 115-403, p. 2. See also DOI, Office of Self-Governance, "OSG Update," presentation at the Self-Governance Communication and Education Tribal Consortium Advisory Committee Meeting, November 10, 2022, at https://www.tribalselfgov.org/wp-content/uploads/2023/03/OSG-Update-SGAC-March-2023.pptx.

[46] 25 U.S.C. §5372 (c).

ISDEAA's "Inherently Federal Function" Limitation

The Indian Self-Determination and Education Assistance Act (ISDEAA) authorizes federal agencies and tribes to enter into self-governance compacts for activities so long as tribes do not assume an *inherently federal function*. ISDEAA defines the term as "a Federal function that cannot be legally delegated to a tribe." In the act's legislative history, Congress explained that inherently federal functions are "federal responsibilities vested by the Congress in the Secretary which are determined by the courts not to be delegable under the constitution." Members cited the following as examples of inherently federal functions: the administration of federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of federal funds, and exercise of certain prosecutorial powers.

Neither the Department of the Interior (DOI) nor the U.S. Department of Agriculture (USDA) has defined the term *inherently federal function*. In a 1996 legal memorandum, DOI explained that ISDEAA's inherently federal restriction could be applied only on a case-by-case basis. A 2022 DOI solicitor's memorandum affirmed this case-by-case approach. According to the 2022 memorandum, these functions involve "the exercise of substantial discretion while applying government authority, use of value judgment when making decisions for the government, or both." The memorandum also noted that DOI would consider the activities the tribe seeks to assume, the applicable federal law governing the activities, and the amount of authority DOI would retain. USDA came to a similar conclusion in its companion 2022 legal memorandum on federal-tribal co-stewardship of federal lands, explaining that "inherent governmental activity" means that, "absent some other authority, Federal employees may not transfer official responsibility to other parties." Nonetheless, DOI and USDA memoranda noted that staff retain "significant latitude" to enter into co-stewardship agreements or other arrangements with tribes.

Sources: ISDEAA, P.L. 93-638; "Indian Self-Determination Act Amendments of 1994," S. 14677, *Congressional Record*, daily edition, October 2, 1994, p. S 14678; DOI, Office of the Solicitor, "Inherently Federal Functions Under the Tribal Self-Governance Act" memorandum, May 17, 1996; DOI, Office of the Solicitor, *Final Report: Current Land, Water, and Wildlife Authorities That Can Support Tribal Stewardship and Co-stewardship*, November 2022; and USDA, Office of the General Counsel, "Joint Secretarial Order 3404 and Stewardship."

Co-management of Different Resources

Federal land management agencies have entered into co-management arrangements for a variety of different resources. The type of co-management and the relevant authorization often depend on the type of resource being managed. This section provides selected examples of DOI, USDA, DOC, and DOD co-management with tribes of natural, cultural, and historic resources on federal lands. The examples below are categorized based on the primary activity, although many co-management agreements include a range of activities.

Co-managing Natural Resources

Many tribes maintain *traditional knowledge* about their ancestral lands and associated plants, fish, and wildlife, having relied on harvesting these resources for thousands of years. Some communities are more reliant on certain resources due to their geographic location, seasonality, and cultural traditions. Co-management of federal lands can provide tribes with the opportunity for input on federal decisions affecting these natural resources and advocate for access to them. In addition, through co-management, environmental policymakers can potentially learn about traditional knowledge, including tribal values, culture, and ways of life, which could improve land management outcomes.[47]

[47] See Fikret Berkes, Johan Colding, and Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management," *Ecological Applications*, vol. 10, no. 5 (2000), p. 1252, at https://www.jstor.org/stable/2641280 (hereinafter Berkes, "Rediscovery").

Fish in the Pacific Northwest

Pacific fish, especially salmon, have been characterized as "irreplaceable and core to the identities and ways of life" of Indigenous communities throughout the Pacific Northwest.[48] For this reason, many tribes in the Pacific Northwest reserved fishing rights on lands they ceded to the federal government through treaties or other agreements subsequently ratified by Congress.[49] Courts have recognized many Pacific Northwest tribes' right to fish in "usual and accustomed" fishing areas.[50] The Ninth Circuit also held that a series of treaties commonly known as the Stevens Treaties reserved the Pacific Northwest tribes' right to fish, which by extension included a right to protection of the habitat on which the fish rely.[51]

In addition to reserving rights to access fish, many Pacific Northwest tribes have sought to influence regional fish management. Tribes and others have argued that effective conservation of salmon, in particular, would require co-management.[52] This co-management would involve agencies and tribes applying holistic principles that draw on both indigenous and Western science.[53] DOI and other federal agencies have increasingly collaborated with these tribes to ensure compliance with tribal treaty rights and other laws providing for tribal management of fisheries and access to fish harvests, as outlined below.[54]

Congress also has acknowledged or protected tribal fishing rights, including a tribal role in managing fish in federal waters, in several statutes. For example, the Magnuson Stevens Act established eight Regional Fishery Management Councils to manage fisheries nationwide.[55] The Pacific Fishery Management Council has designated tribal representation due to tribal treaty rights. The act specifies that the Secretary of Commerce (or designee) shall appoint at least one Pacific Fishery Management Council member "from an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho."[56] This tribal representation rotates among tribes in the area, taking into account "the various rights of the Indian tribes involved and judicial cases that set forth how those rights are to be exercised."[57] Due to this tribal representation, the Pacific Fishery Management Council has described the tribes as co-managers of the fisheries overseen by the council, alongside the states and federal government.[58]

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[48] Earth Economics, *The Sociocultural Significance of Pacific Salmon to Tribes and First Nations- Special Report to the Pacific Salmon Commission*, June 8, 2021, p. 4, at https://www.psc.org/publications/workshop-reports/psc-special-reports/ (hereinafter Earth Economics, *Report*).

[49] Newton, *Cohen's Handbook,* §18.04. Some tribes with treaty-reserved fishing rights created fish commissions to coordinate regional fish management, including the Northwest Indian Fisheries Commission and the Columbia River Inter-Tribal Fish Commission (Pacific Fishery Management Council, "Tribes," at https://www.pcouncil.org/fishing-communities/tribes/).

[50] See, for example, *United States v. Washington*, 384 F. Supp. 312 (1974), aff'd, 520 F.2d 676 (1975) ("the Boldt Decision").

[51] *United States v. Washington*, 853 F.3d 946, 963 (9th Cir. 2017).

[52] Earth Economics, *Report,* p. 4.

[53] Ibid. p. 5.

[54] See CRS Legal Sidebar LSB10138, *UPDATE: Extent of Habitat Protection Required for Indian Treaty Fishing Sites: Washington v. United States,* by M. Maureen Murphy.

[55] 16 U.S.C. §1852.

[56] 16 U.S.C. §1852(a)(1)(F).

[57] 16 U.S.C. §1852(b)(5)(B)(ii).

[58] Pacific Fishery Management Council, "Tribes," at https://www.pcouncil.org/fishing-communities/tribes/.

In 1985, Congress provided for the implementation of the Pacific Salmon Treaty between the United States and Canada through the Pacific Salmon Treaty Act.[59] The treaty governs the overall harvest and allocation of salmon stocks in the region, and the statute established the Pacific Salmon Commission to implement the treaty.[60] The act mandated that regional "treaty Indian tribes" have representatives on the commission.[61] The act defined a *treaty Indian tribe* as "any of the federally recognized Indian tribes of the Columbia River basin, Washington coast or Puget Sound areas having reserved fishing rights to salmon stocks subject to the Treaty under treaties with the United States Government."[62] Each year, commission representatives from the Canadian and U.S. governments, U.S. states, First Nations (i.e., Canadian Indigenous peoples), and treaty Indian tribes meet to discuss and review management of commercial, sport, and subsistence fisheries relative to the Pacific Salmon Treaty requirements.[63]

In addition to co-managing fishery resources at a regional scale, the federal government and tribes have co-managed fishery resources at the project level. For example, throughout the 20th century, the Nez Perce Tribe (NPT), the United States, the State of Idaho, and local communities and water users in Idaho worked to resolve the tribe's water rights claims in the Snake River Basin.[64] NPT claimed water rights for instream flows to protect the tribe's treaty-reserved fisheries.[65] In 2004, Congress enacted a law to implement a tribal water rights settlement and authorize tribal co-management of federal fisheries in the Pacific Northwest.[66] The 2004 law specifically provided for tribal co-management of the basin's Dworshak National Fish Hatchery and authorized funding for that purpose.[67] The hatchery, which USACE built in the late 1960s, is located within the NPT Reservation.[68]

To implement the act, in 2014 FWS and NPT signed a memorandum of agreement to jointly manage the hatchery, among other outcomes.[69] FWS and NPT agreed to set salmon production goals for and enhance the fishery resources of the Clearwater River Basin, which produces over 5 million salmon annually.[70] The agreement stated that FWS and NPT would initially each provide half of the personnel at the facility.[71] The 2014 memorandum of agreement also included

[59] Pacific Salmon Treaty Act, P.L. 99-5.

[60] Ibid. See also Jason S. Link and Anthony R. Marshak, "Regional Fishery Management Organizations," in *Ecosystem Based Fisheries Management: Progress, Importance, and Impacts in the United States* (Oxford: Oxford University Press, 2021), p. 553, at https://doi.org/10.1093/oso/9780192843463.001.0001.

[61] 16 U.S.C. §3632.

[62] 16 U.S.C. §3631.

[63] NOAA Fisheries, "Pacific Salmon Treaty and the Pacific Salmon Commission," at https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/pacific-salmon-treaty-and-pacific-salmon-commission.

[64] DOI, "Idaho, Nez Perce Tribe, and Federal Government Finalize Snake River Water Settlement," press release, May 1, 2007, at https://www.bia.gov/as-ia/opa/online-press-release/idaho-nez-perce-tribe-and-federal-government-finalize-snake-river.

[65] Idaho Department of Water Resources, "Nez Perce Agreement Summary," p. 1, at https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/2004/20040515-Nez-Perce-Agreement-Summary.pdf.

[66] Consolidated Appropriations Act, 2005, P.L. 108-447.

[67] P.L. 108-447. It authorized $95.8 million over seven years in three BIA-managed tribal trust funds for tribal water and fisheries projects.

[68] FWS, "Dworshak National Fishery," at https://www.fws.gov/fish-hatchery/dworshak.

[69] Memorandum of agreement available to congressional clients upon request to the author.

[70] FWS, "Dworshak National Fishery," at https://www.fws.gov/fish-hatchery/dworshak.

[71] Personal communication between CRS and USACE, January 6, 2023.

a transition plan for NPT to assume full responsibility for fish production at the Dworshak National Fish Hatchery no later than September 30, 2024.[72]

In 2022, the USACE, FWS, and NPT signed a collaborative management agreement, which defined *collaborative management* as the parties "working together to fund, manage, and operate the Hatchery."[73] Under the agreement, USACE maintains and funds the hatchery site but the tribe assumes responsibility for all USACE mitigation requirements for production of steelhead trout (fish hatchery production).[74] USACE provides funding to FWS, which then transfers a portion of that funding to the NPT for tribal activities.[75] FWS continues to provide administrative services, public outreach, fishery research, and fish health monitoring.[76] When FWS transferred fish production to NPT, about 85% of staff were NPT members.[77]

Subsistence Harvesting in Alaska

Alaska Natives have been treated distinctly from other tribes because Congress has recognized that Alaska and its inhabitants are distinct from the rest of the country—for example, due to Alaska's late joinder to the union, size, distinct geography, and separation from the contiguous United States. One example of this distinct treatment is that, rather than treaties and reservations, Congress resolved native land claims in Alaska via a settlement mechanism: the Alaska Native Claims Settlement Act (ANCSA) of 1971 settled outstanding Alaska Native lands claims by providing Alaska Natives with 45 million acres and a monetary payment.[78] ANCSA divided the majority of that land among more than 200 village corporations and 12 regional corporations (Alaska Native Corporations).[79]

Through many laws, Congress has directed federal agencies to ensure Alaska Native access to fish and wildlife on federal lands.[80] For example, the Alaska National Interest Lands Conservation Act (ANILCA) aimed to provide access to fish and wildlife on federal lands for rural subsistence needs, including for Alaska Natives.[81] Generally, a *subsistence use* is when rural Alaskan residents use fish and wildlife resources for traditional purposes such as consumption, shelter, transportation, or some commerce.[82] The act acknowledged Alaska Native subsistence use in particular as "essential to Native physical, economic, traditional, and cultural existence."[83] ANILCA also established multiple federally protected areas in Alaska, including the Yukon Flats

[72] Memorandum of agreement available to congressional clients upon request to the author.

[73] Collaborative management agreement available to congressional clients upon request to the author.

[74] Personal communication between CRS and USACE, January 6, 2023.

[75] Personal communication between CRS and USACE, January 6, 2023.

[76] DOI, "Secretary Haaland Joins Nez Perce Tribe, Army Corps of Engineers to Commemorate Transfer at Dworshak National Fishery," press release, June 16, 2022, at https://www.doi.gov/pressreleases/secretary-haaland-joins-nez-perce-tribe-army-corps-engineers-commemorate-transfer.

[77] Ibid.

[78] The Alaska Native Claims Settlement Act (ANCSA), P.L. 92-203, 85 Stat. 688, 43 U.S.C. §§1601 et seq.

[79] Ibid. ANCSA also created a 13th ANRC for non-residents (43 U.S.C. §1606(c)).

[80] See U.S. Congress, House Committee of Conference, *Alaska Native Claims Settlement Act*, report to accompany H.R. 10367, 92nd Cong., 2nd sess., H.Rept. 92-746, 1971 p. 37. See also Statement of Robert T. Anderson, Director, Native American Law Center, University of Washington School of Law, in U.S. Congress, Senate Committee on Indian Affairs, *Alaska Native Subsistence and Fishing Rights, To Receive Testimony on Subsistence Hunting and Fishing by the Native Alaskans*, hearings, 107th Cong., 2nd sess., S.Hrg. 107-456 (Washington: GPO, 2002), page 51.

[81] Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§3101 et seq.

[82] 16 U.S.C. §3113.

[83] 16 U.S.C. §3111(1).

National Wildlife Refuge, which is the third-largest refuge in the National Wildlife Refuge System.[84]

The proximity of the Yukon Flats National Wildlife Refuge to certain Alaska Native communities has enabled co-management through ISDEAA agreements. Under ISDEAA, the FWS may enter annual or multiyear funding agreements for tribes to assume administrative duties for the preservation of resources on units of the National Wildlife Refuge System or the National Fish Hatchery System.[85] Several Alaska Native villages lying within or adjacent to the refuge maintain long-standing hunting and fishing (subsistence) uses.[86] Since the refuge was established, FWS has entered into ISDEAA agreements with a regional consortium of Alaska Natives known as the Council of Athabascan Tribal Governments.[87] In 1998, the council requested an expanded role in management of the Yukon Flats National Wildlife Refuge through an ISDEAA agreement.[88] In 2004, after years of negotiations, FWS entered into an ISDEAA agreement with the council to conduct refuge activities, including subsistence-related activities.[89] For example, the ISDEAA agreement helped fund community-based surveys from 2010 to 2011 to determine the customary traditional harvests and uses of moose, caribou, black bear, brown bear, wolf, lynx, and marten.[90] The 2020-2022 Annual ISDEAA Agreements included federal-tribal collaboration on Yukon Flats moose management, among other activities.[91]

Congress also provided some Alaska Natives with an exemption allowing for the subsistence use of marine mammals through the Marine Mammal Protection Act of 1972 (MMPA).[92] The MMPA also allows the Secretaries of Commerce and the Interior to enter into cooperative agreements with Alaska Native organizations "to conserve marine mammals and provide co-management of subsistence use by Alaska Natives."[93] These agreements can include grants to collect and analyze data on marine mammal populations (including monitoring the harvest of marine mammals) for subsistence uses, and to develop "marine mammal co-management structures" with federal and state agencies.[94]

The MMPA does not define *co-management*, but the agencies and Alaska Natives have delineated the term through implementation. For example, the Marine Mammal Commission (comprising representatives of FWS, NOAA Fisheries, and Alaska Natives) characterized its work implementing the MMPA as an example of co-management: "two or more entities, each having legally established management responsibility, working together to actively protect, conserve,

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[84] 16 U.S.C. §668dd note. Personal communication between CRS and FWS, April 5, 2023.

[85] Personal communication between CRS and FWS, April 5, 2023.

[86] FWS, "Yukon Flats National Wildlife Refuge," at https://www.fws.gov/refuge/yukon-flats/about-us.

[87] Kevin Washburn, "Facilitating Tribal Co-management of Federal Public Lands," *Wisconsin Law Review*, vol. 263 (April 2022), p. 300 (hereinafter Washburn, "Facilitating").

[88] Ibid.

[89] Ibid, p. 302.

[90] Carrie Stevens and Karonhiakta'tie Bryan Maracle, *Subsistence Harvest of Land Mammals, Yukon Flats, March 2010-February 2011*, Council of Athabascan Tribal Governments, 2011, pp. 2 and 5, at https://www.catg.org/wp-content/uploads/2021/02/2011-traditional.pdf.

[91] DOI, *Tribal Self-Governance 2020 Annual Report to Congress*, p. 12, at http://osgdb.org/OSG/InformationFiles/FileLibrary/Broadcasts/FY2022_Broadcast%20News/2020%20Self%20Governance%20Annual%20Report%20to%20Congress%20&%20Signed%20Transmittal%20Letters.pdf (hereinafter DOI, *Tribal Self-Governance)*. Personal communication between CRS and FWS, April 5, 2023.

[92] Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. §1361.

[93] 16 U.S.C. §1388.

[94] Ibid.

enhance, or restore fish and wildlife resources."[95] In the 2006 memorandum of agreement on negotiating individual co-management cooperative agreements, NOAA Fisheries, FWS, and the Indigenous Peoples Council for Marine Mammals included a goal of "shared decision-making" for agreements that would be reached "through consensus, based on mutual respect."[96] In addition, the parties agreed to use the best available scientific information and traditional and contemporary Alaska Native knowledge and wisdom for all decisions regarding Alaska marine mammal co-management.[97]

Congress also provided some Alaska Natives with an exemption allowing for the subsistence use of migratory birds in the Migratory Bird Treaty Act (MBTA).[98] The MBTA implements four bilateral treaties governing migratory birds. Although the law generally prohibits the taking of migratory birds, the MBTA authorizes FWS to issue regulations as needed to ensure Alaska Natives may take migratory birds and collect their eggs for their own nutritional and other essential needs during seasons established by FWS.[99]

In 1997, Congress ratified a protocol amending the MBTA treaty with Canada to provide for co-management of migratory birds by Alaska Natives, the State of Alaska, and the federal government.[100] The protocol stated that Alaskan Indigenous inhabitants "shall be afforded an effective and meaningful role in the conservation of migratory birds" through participating in "management bodies."[101] This protocol led to the creation of the Alaska Migratory Bird Co-Management Council, which comprises representatives from the federal government, the State of Alaska, and Alaska Natives, "as equals," from 12 regional management areas.[102] This council develops recommendations identifying certain subsistence harvest areas, which the FWS considers in developing its regulations on spring and summer subsistence harvesting of migratory birds and their eggs in Alaska.[103] In line with the protocol's acknowledgement that indigenous knowledge should be considered in managing migratory birds, the council also is authorized to develop recommendations for the research and use of traditional knowledge related to the subsistence harvest of migratory birds.[104]

Forests and Watersheds in Washington

Tribes have coordinated with FS to manage forests and associated watersheds. For example, FS has collaborated with the Tulalip Tribes of Washington for many years to manage the Mt. Baker-

[95] Marine Mammal Commission, *Report of the Marine Mammal Commission- Review of Co-management Efforts in Alaska*, 2008, p. 39, at https://www.mmc.gov/wp-content/uploads/mmc_comgmt.pdf (hereinafter Marine Mammal Commission, *Report*).

[96] FWS and NOAA, "Memorandum of Agreement for Negotiation of Marine Mammal Protection Act Section 119 Agreements," October 30, 2006, p.4, at https://media.fisheries.noaa.gov/dam-migration/ipcomm-umbrellaagr06-akr.pdf.

[97] Ibid.

[98] Migratory Bird Treaty Act (MBTA), 16 U.S.C. §1371(b).

[99] 16 U.S.C. §712. This section was added by P.L. 95-616.

[100] "Treaties," *Congressional Record*, daily edition, vol. 143, part 144 (October 23, 1997), p. 11167. See also U.S. Congress, Senate, *Protocol Amending the 1916 Convention For the Protection of Migratory Birds*, Message from the President of the United States, 104th Cong., 2nd sess., 104-28 (Washington: GPO, 1996), at https://www.congress.gov/104/cdoc/tdoc28/CDOC-104tdoc28.pdf (hereinafter *Protocol*).

[101] *Protocol*, Article II 4(b)(ii), p. 5.

[102] 50 C.F.R. §§92.10, 92.11.

[103] 16 U.S.C. §712; 50 C.F.R. §92.10(c)(2). See also FWS, "History and Establishment of AMBCC," at https://www.fws.gov/node/269356.

[104] *Protocol*, Article II pp. 3-4; 50 C.F.R. §92.10(c)(3).

Snoqualmie National Forest, which FS has recognized as the tribes' ancestral homeland.[105] FS has noted that its goal is to "create and maintain meaningful relationships between the Forest Service and local Indigenous communities."[106] The agency has worked with the tribes on wildlife reintroduction, huckleberry enhancement, and watershed enhancement.[107]

The parties have formalized their partnership through specific agreements. In 2007, the agency signed a memorandum of agreement with the Tulalip Tribes.[108] Among other things, the agreement lays out the parties' intent to "identify opportunities for collaboration between the Parties; so as to further the protection and conservation of natural, cultural, and archaeological resources for future generations."[109]

More recently, the parties used a new contracting authority provided by the Tribal Forest Protection Act (TFPA) to collaborate on the forest. Under the TFPA, a tribe may propose a project on FS- or BLM-managed land that borders, or is adjacent to, tribal trust land to protect the tribal land from threats such as fire, insects, and disease.[110] The Agriculture Improvement Act of 2018 (P.L. 115-334), known as the "2018 farm bill," expanded the TFPA to allow tribes to conduct TFPA demonstration projects using ISDEAA agreements.[111] The act did not define *demonstration project* or outline the scope of these potential projects. The main change to the TFPA authority was the authorization to use ISDEAA agreements.

In 2020, the Tulalip Tribes became the first tribe to use the new farm bill authority to enter into an ISDEAA agreement with FS.[112] The TFPA contract focuses on watershed restoration through efforts to capture, relocate, and monitor beavers in the South Fork Stillaguamish watershed.[113] Under the contract, the Tulalip Tribes agreed to set up a multiyear seasonal crew to reintroduce beavers in the South Fork Stillaguamish watershed.[114] FS explained that beaver dams can help maintain healthy habitat and water quality.[115] Furthermore, improving instream and riparian landscapes could help support endangered salmon, which the agency and tribe claim are a tribal treaty resource.[116]

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[105] FS, Mt. Baker-Snoqualmie National Forest, "Tribal Relations," at https://www.fs.usda.gov/main/mbs/workingtogether/tribalrelations.

[106] Ibid.

[107] Ibid.

[108] FS, "Memorandum of Agreement by and Between the Tulalip Tribes of Washington and the Mt. Baker-Snoqualmie National Forest," p. 3, at https://nr.tulaliptribes.com/Base/File/NR-PDF-TopicsLandBasedTreatyRights-MOA.

[109] Ibid.

[110] Tribal Forest Protection Act of 2004 (TFPA), 25 U.S.C. §3115(a).

[111] Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334), §8703, 25 U.S.C. §3115b. Whereas Congress granted DOI the authority to make ISDEAA agreements more than 20 years ago, Congress first granted that authority to FS in the 2018 farm bill.

[112] FS, "Monumental 638 agreement: Forest Service partners with Tulalip Tribes," press release, October 8, 2020, at https://www.fs.usda.gov/inside-fs/delivering-mission/sustain/monumental-638-agreement-forest-service-partners-tulalip.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] Ibid. See also Tulalip Tribes, "The Tulalip Tribes-Frequently Asked Questions," p. 2, at https://www.tulaliptribes-nsn.gov/Base/File/TTT-PDF-WhoWeAre-FAQ.

Co-managing Historic and Cultural Resources

Many tribes maintain ongoing cultural and spiritual relationships with their ancestral homelands. Tribes may seek access to federal lands to continue practicing traditional ceremonies, and they may argue against certain activities on federal lands that may impede their ability to continue those practices or may affect lands they hold sacred.[117] In contrast to co-management of natural resources, which generally focuses on the use and development of natural resources, co-management of federal lands for historical and cultural purposes aims to provide tribes with the opportunity to weigh in on federal decisions to advocate for protection of federal areas and ensure their continued access to them.

Historic Ties in Minnesota

The federal government and the Grand Portage Band of Lake Superior Chippewa have collaborated for almost a century to preserve the unique heritage around Grand Portage, MN. In addition to being tribal traditional homelands, Grand Portage is a historical fur trading area.[118] The Band advocated for the creation of the Grand Portage National Monument, and the Band donated about half of the land that became the monument.[119] In the enabling legislation for the monument, Congress acknowledged that the area contained "unique historical values," and provided a specific preference for tribal employment in construction, maintenance activities, and "any other service within the monument for which they are qualified."[120]

After the monument's establishment in 1958, NPS collaborated with the Band through various agreements. In 1999, the Band and NPS reached an initial ISDEAA agreement for the tribe to conduct maintenance on the monument.[121] Since then, NPS and the Band have completed more than 200 projects together.[122] The Band's construction program has helped build park housing, a maintenance facility, a heritage center, and park administration offices.[123] In a 2022 report, DOI noted that the parties have "extended collaborative stewardship" of the monument to include other activities, such as resource management through a Grand Portage Conservation Crew.[124] The crew works on preservation of historic structures, archaeological and wildlife surveys, plant restoration, and timber stand improvement.[125]

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[117] NCAI, "Supporting Legislation to Improve Protections and Authorize Restoration of Native Sacred Places on Federal Lands," NCAI Resolution #DEN-18-035, 201, p. 2, at https://www.ncai.org/attachments/Resolution_PYCnwKpRbfWPiYzlKHPLmgHJMNoHiIZVffWZqBIifEouNkSdFeS_DEN-18-035%20Final.pdf. See also Statement of Suzan Shown Harjo, President, Morning Star Institute, in U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, hearings, 108th Cong., 1st sess., June 8, 2003, S. Hrg. 108–197 (Washington: GPO, 2003), p. 8.

[118] 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," *Harvard Environmental Law Review.*, vol. 31, no. 2 (January 2007), pp. 508-509 (hereinafter King, "Co-management").

[119] NPS, Grand Portage National Monument, Minnesota, "History and Culture," at https://www.nps.gov/grpo/learn/historyculture/index.htm. See also P.L. 85-910.

[120] P.L. 85-910.

[121] DOI, *Final Report*, 2022, pp. 6-7

[122] NPS, *Foundation Document: Grand Portage National Monument*, p. 16, at http://npshistory.com/publications/foundation-documents/grpo-fd-2016.pdf.

[123] Ibid.

[124] Ibid.

[125] Ibid.

Cultural Landscapes in the Southwest

The Bears Ears National Monument is an example of the consultative and co-management role of multiple tribes with cultural and historical ties to the area. The Bears Ears area in southern Utah is sacred to some tribes and was initially established as a national monument by presidential proclamation in December 2016, with additional related presidential proclamations modifying the national monument in 2017 and 2021.[126] With over 13,000 years of recorded human occupation, the region has many culturally and historically unique sites that many tribes in the area still use for traditional purposes.[127] President Biden's Presidential Proclamation 10285 referred to the area as a "cultural living space," a landscape where tribal traditions began and where tribes developed protocols for caring for the land.[128] The proclamation outlined the "unique density of significant cultural, historical, and archaeological artifacts," including ancient cliff dwellings, a prehistoric road system, petroglyphs, and pictographs.[129] The proclamation also recognized that tribes still use the area as a sacred and ceremonial site.[130]

Due to these historical connections, the proclamation that first designated the monument—President Obama's Presidential Proclamation 9558—provided for tribal input in managing the monument. That proclamation acknowledged the "importance of tribal participation to the care and management" of the monument and sought "to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge."[131] To that end, Presidential Proclamation 9558 established an intertribal Bears Ears Commission to provide recommendations regarding management of the monument.[132] The commission consists of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe.[133] The proclamation also directed that the monument's management plan set forth parameters for continued meaningful engagement with the commission or comparable entity in plan implementation.[134]

In June 2022, BLM and FS signed an intergovernmental cooperative agreement with the Bears Ears Commission.[135] The agreement provides the tribe with a co-management role,

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[126] Bears Ears National Monument was created through three presidential proclamations. See White House, "Presidential Proclamation #9558: Establishment of the Bears Ears National Monument, December 28, 2016, at https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument (hereinafter Presidential Proclamation #9558); White House, "Presidential Proclamation #9681: Modifying the Bears Ears National Monument," December 4, 2017, at https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/; and White House, "Presidential Proclamation #10285:A Proclamation on Bears Ears National Monument," October 8, 2021, at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/08/a-proclamation-on-bears-ears-national-monument/ (hereinafter Presidential Proclamation 10285).

[127] Presidential Proclamation 10285.

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Presidential Proclamation 9558.

[132] Ibid.

[133] Ibid.

[134] Ibid.

[135] BLM, *Inter-Governmental Cooperative Agreement between the Tribal Nations whose representatives comprise the Bears Ears Commission, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni, and the United States Department of the Interior, Bureau of Land Management and the United States Department of Agriculture, Forest Service, for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument*, June 18, 2022, at https://www.blm.gov/sites/ (continued...)

acknowledging the tribes' traditional ecological knowledge and ensuring management decisions for the monument "reflect the expertise and traditional and historical knowledge of interested Tribal Nations and people."[136] The agreement created a framework for communication that includes regular meetings and a timeline for tribal input in planning processes.[137] BLM and FS are working with the Bears Ears Commission on developing a management plan for the monument, which is expected to specify additional management and stewardship activities to be performed by the tribes.[138] BLM and FS entered into related financial agreements with the tribes starting October 1, 2022.[139]

Issues and Options for Congress

Congress may continue to consider the suitability and effectiveness of federal-tribal co-management of federal lands. For example, Congress may continue to consider whether certain federal lands should be managed or protected through co-management agreements. Congress also may consider the scope of activities governed by co-management agreements on federal lands, including whether there are certain activities that agencies should not delegate to tribes. Additionally, Congress may consider the administrative and financial benefits and challenges facing agencies and tribes in these agreements.

Consideration of Traditional Ecological Knowledge

Some Members of Congress have stated that federal-tribal co-management on federal lands can provide an opportunity to integrate unique tribal traditional knowledge with contemporary resource management policies.[140] Tribal traditional knowledge about the landscape may inform effective federal land management decisions in a co-management arrangement. Due to their historical connections, many tribes maintain traditional knowledge about their ancestral landscapes. Although there is no single definition of *traditional knowledge*, one scholar defined it as "a cumulative body of knowledge, practice, and belief ... handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."[141] Through tribal co-management, environmental policymakers can

default/files/docs/2022-06/Bears%20Ears%20National%20Monument%20Inter-Governmental%20Cooperative%20Agreement%202022.pdf (hereinafter BLM, *Bears Ears Agreement*).

[136] Ibid, p. 1.

[137] Ibid.

[138] Personal communication between CRS and DOI, March 14, 2023.

[139] Personal communication between CRS and DOI, March 14, 2023. See also DOI, "Cooperative Agreement with the Hopi Tribe," at https://www.usaspending.gov/award/ASST_NON_L22AC00658_1422; DOI, "Cooperative Agreement with the Ute Indian Tribe," at https://www.usaspending.gov/award/ASST_NON_L22AC00659_1422; and DOI, "Cooperative Agreement with the Pueblo of Zuni," at https://www.usaspending.gov/award/ASST_NON_L22AC00661_1422.

[140] Statement of Chairman Raúl Grijalva, in U.S. Congress, House Committee on Natural Resources, *Oversight: Examining the History of Federal Lands and the Development of Tribal Co-management*, 117th Cong., 2nd sess., March 8, 2022 (explaining that the introduced bills would ensure "the unique knowledge and expertise of indigenous communities is respected and incorporated in the management of federal lands"). Statement of Representative Bruce Westerman, in U.S. Congress, House Committee on Natural Resources, *Oversight: Examining the History of Federal Lands and the Development of Tribal Co-management*, 117th Cong., 2nd sess., March 8, 2022 (noting that "if we would work more closely with tribes ... then we would see not only better management on tribal lands, but we could learn from that on how we manage our federal lands").

[141] Berkes, *Rediscovery*, p. 1252.

potentially learn from traditional knowledge, including tribal values, culture, and ways of life, which could improve land management outcomes.[142]

Some scholars also have argued that once tribes are able to participate in federal land management, including through co-management, they may be able to integrate traditional knowledge with mainstream environmental policies.[143] The executive branch has shown an increased willingness to consider traditional knowledge in federal decisionmaking, including on federal lands. For example, through Executive Order 14072, "Strengthening the Nation's Forests, Communities, and Local Economies," President Biden established a policy to support indigenous traditional ecological knowledge and cultural and subsistence practices in national forests.[144]

Some tribes have asked Congress to direct federal agencies to include tribes in land management decisions to bring together "the expertise of diverse perspectives to build a collective and participatory framework that can benefit everyone."[145] Since the 115th Congress, Members of Congress have introduced legislation that would have required federal land management agencies to consult with tribes in developing management plans on federal lands, including newly designated areas.[146] Several bills specifically reference the integration of traditional ecological knowledge into these management plans.[147] For example, the REC Act of 2022 established one or more Indian Treaty Resources Emphasis Zones on the Mount Hood National Forest to "enable a co-management strategy" and encourage knowledge sharing between FS and the Confederated Tribes of the Warm Springs Reservation of Oregon.[148]

Management of Tribal Cultural Landscapes

Many tribes continue to seek access to federal lands to practice traditional ceremonies in culturally important areas. Co-management of federal lands can provide tribes with the opportunity to provide input on federal decisions affecting these areas to advocate for their protection and maintain access to them. A basic legal framework exists at the federal level to protect tribal religious, historic, and cultural sites and objects.[149] Federal agencies must consult with any tribe that "attaches religious and cultural significance" to historic properties that may be affected by agency projects.[150] In addition, the Native American Graves Protection and Repatriation Act requires museums and federal agencies to identify Native American human

[142] Ibid. See also the Bears Ears National Monument's federal-tribal agreement, which cited incorporating traditional knowledge as a goal (BLM, *Bears Ears Agreement*, p. 1).

[143] Shelly D. Stokes, "Ecosystem Co-management Plans: A Sound Approach or a Threat to Tribal Rights?," *Vermont Law Review*, vol. 27 (2003), p. 426, at https://heinonline.org/HOL/Page?handle=hein.journals/vlr27&div=19&g_sent=1&casa_token=&collection=journals.

[144] Executive Order 14072, "Strengthening the Nation's Forests, Communities, and Local Economies," 87 *Federal Register* 24851, April 27, 2022.

[145] NCAI, "Calling for the Advancement of Meaningful Tribal Co-management of Federal Lands," NCAI Resolution #PDX-20-003, 2020, p. 2, at https://www.ncai.org/resources/resolutions/calling-for-the-advancement-of-meaningful-tribal-co-management-of-federal-lands (hereinafter NCAI, #PDX-20-003).

[146] See, for example, H.R. 1791, Mountains to Sound Greenway National Heritage Act (115th Cong.); H.R. 5243, Northern Nevada Economic Development, Conservation, and Military Modernization Act of 2021 (117th Cong.); and H.R. 7665, REC Act of 2022 (117th Cong.).

[147] H.R. 1791, §5(b)(1) (115th Congress); H.R. 5243, §408 (117th Congress); and H.R. 7665, REC Act of 2022, §1208(b)(2)(D) (117th Congress).

[148] H.R. 7665, REC Act of 2022, §1208(b)(2)(F).

[149] See generally National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.); American Indian Religious Freedom Act (AIRFA; 42 U.S.C. §§1996 et seq.); Archeological Resources Protection Act of 1979 (ARPA; 16 U.S.C. §470aa-mm); and Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.).

[150] 54 U.S.C. §302706(b).

remains, funerary items, and objects of cultural significance in their collections and collaborate with tribes to repatriate them.[151] Congress has considered, and in some cases enacted, legislation relating to sacred site management on federal lands.[152] For example, several laws have allowed for the temporary closure of federal lands to the public at a tribe's request to enable traditional ceremonies and other activities.[153] However, absent specific legislative language, the protection of sacred sites on federal lands is largely up to agency discretion.[154]

During the 117th Congress there was interest in tribal co-management of sacred sites on federal lands. The House Natural Resources Committee held two hearings on the subject.[155] H.R. 8109, the Tribal Cultural Protection Act, would have established a tribal cultural areas system comprising culturally significant sites on federal lands.[156] For each congressionally designated tribal cultural area, the bill would have directed the Secretary of the Interior to prepare a comprehensive management plan and establish a tribal commission to provide related recommendations.[157] It also would have restricted certain activities, such as new roads, mineral development, and grazing, in the designated areas.[158] In addition, H.R. 8108, the Advancing Tribal Parity on Public Lands Act, would have prohibited the sale of public land containing a tribal cultural site, among other things.[159]

Some Members of Congress and stakeholders have opposed the protection of sacred sites as too restrictive of federal land use, similar to arguments that have been raised against executive branch use of the Antiquities Act.[160] For example, some Members of Congress expressed concerns that H.R. 8109 and H.R. 8108 would have given agencies too much discretion to restrict federal lands without congressional approval.[161] During a hearing on these bills held by the House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, some Members and witnesses expressed that some of the bills' restrictions on certain economic access and management activities were inappropriate given the agencies' multiple-use mandates.[162]

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[151] Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.).

[152] For example, see S. 2924 (116th Congress), H.R. 8719 (117th Congress), and P.L. 116-9.

[153] For example, see P.L. 110-246; P.L. 100-225; and H.R. 225 (110th Congress).

[154] See Martin Nie, "The Use of Co-management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands," *Natural Resources Journal*, vol. 48, no. 3 (summer 2008), pp. 16-17, at https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1192&context=nrj.

[155] U.S. Congress, House Committee on Natural Resources, *Oversight: Examining the History of Federal Lands and the Development of Tribal Co-management*, hearings, 117th Cong., 2nd sess., March 8, 2022, at https://www.govinfo.gov/app/details/CHRG-117hhrg47061/CHRG-117hhrg47061/context. See also U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing*: *NPFPL Legislative Hearing*, hearings, 117th Cong., 2nd sess., September 14, 2022, at https://www.congress.gov/event/117th-congress/house-event/115122?s=1&r=1.

[156] H.R. 8109.

[157] Ibid.

[158] Ibid.

[159] H.R. 8108.

[160] The Antiquities Act, Pub. L. No. 59-209 §2, 34 Stat. 225, 225 (June 8, 1906) (codified at 54 U.S.C. §320301(a)).

[161] Statements of Representatives Russ Fulcher, Jay Obernolte, Tom Tiffany, and Yvette Herrell; and Stefanie Smallhouse, President, Arizona Farm Bureau, in U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *Subcommittee Hearing: NPFPL Legislative Hearing*, hearings, 117th Cong., 2nd sess., September 14, 2022, at https://www.congress.gov/event/117th-congress/house-event/115122?s=1&r=1.

[162] Ibid.

Delegation of Federal Functions to Tribes

Although federal land management agencies collaborate with tribes in many ways, the authorities under which they administer federal land do not generally provide clear direction as to which activities agencies should or should not delegate to tribes. Some Members of Congress have referred to co-management as the process of ensuring that tribes play "an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means consistent with applicable authority."[163]

Some tribes and scholars claim that co-management *must* go beyond federal-tribal consultation or collaboration on specific projects, and must include delegation, to be effective.[164] To some tribes and scholars, true co-management requires agencies to engage with tribes as long-term primary partners in planning and implementation rather than consulting with tribes on discrete individual issues.[165] Some tribes argue that in a co-management arrangement, tribal decisionmaking authority would be equal to federal decisionmaking authority.[166]

Congress could clarify its intent regarding which land management activities can be delegated to tribes in several ways. Congress may continue to include tribal co-management provisions in site-specific legislation, as outlined in the "Historic Ties in Minnesota" example. Congress also may consider amending the ISDEAA authority to clarify which activities agencies can delegate to tribes, including through co-management agreements. Some tribes and advocates assert that DOI land management agencies have historically resisted ISDEAA agreements because they require the transfer of program authority and funding.[167] Some contend that agencies continue to interpret and implement ISDEAA's definition of *inherently federal function* as narrowly as possible despite ISDEAA's mandate that the statute and associated agreements be interpreted in favor of transferring programs and funding to tribes.[168] DOI also has received criticism from the Government Accountability Office (GAO) for its case-by-case approach, with GAO noting that the approach results in inconsistent determinations of inherently federal functions and does not provide tribes with information on the rationale behind DOI's prior determinations.[169] Some tribes have argued, and GAO identified, that the lack of clear guidance is an obstacle to fostering self-governance compacts and has allowed agency employees, especially non-BIA employees, to resist entering into compacts with tribes.[170]

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[163] Letter from Representative Raúl Grijalva, Chair, House Natural Resources Committee Chair, to President Joseph R. Biden (September 7, 2022), at https://web.archive.org/web/20220920092752/https://naturalresources.house.gov/imo/media/doc/2022-09-07%20hnrc%20letter%20to%20president%20biden%20on%20tribal%20co-management.pdf.

[164] See Mills and Nie, "Bridges," p. 99; see also White House, "Executive Summary: Tribal Comments Received During Council on Environmental Quality Consultations on the President's America the Beautiful Initiative," 2022, p. 2, at https://www.whitehouse.gov/wp-content/uploads/2022/03/Atb-Tribal-Consultation-Summary.pdf (hereinafter White House, "Executive Summary").

[165] White House, Executive Summary, p. 2. See also Mills and Nie, "Bridges," p. 99 ("consultation must evolve from the unenforceable, discretionary, and variable practice widely criticized by tribes into a meaningful, compatible, and continuing conversation between appropriate tribal and federal officials").

[166] White House, Executive Summary, p. 2.

[167] See Geoffrey D. Strommer and Stephen D. Osborne, "The History, Status, & Future of Self-Governance Under the Indian Self-Determination and Education Assistance Act," *American Indian Law Review*, vol. 39, no. 1 (2015), p. 57.

[168] Ibid.

[169] GAO, *Interior Should Address Factors Hindering Tribal Administration of Federal Programs*, GAO-19-87, 2019, p. 15, at https://www.gao.gov/assets/gao-19-87.pdf (hereinafter GAO, *Interior Factors*).

[170] Ibid, p. 1; Statement of Melanie Benjamin, Chief Executive, Mille Lacs Tribe of Ojibwe, in U.S. Congress, Senate Committee on Indian Affairs, *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an* (continued...)

Congress has considered defining the term in specific and limited instances. Members have cited the following as examples of inherently federal functions: the administration of federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of federal funds, and exercise of certain prosecutorial powers.[171] In the 117th Congress, various bills introduced to implement Indian water rights settlements included language noting that federal compliance activities, including environmental, cultural, and historical compliance activities, were inherently federal.[172] A statutory definition of the term could provide more legal certainty to agencies and thereby potentially encourage agencies' use of ISDEAA agreements for federal-tribal co-management of federal lands, among other activities. On the other hand, a definition could limit flexibility. Some Members of Congress have supported deferring to agencies' case-by-case approach in interpreting the term *inherently federal function*.[173]

Federal Employment in ISDEAA Co-management Agreements

The Indian Self-Determination and Education Assistance Act (ISDEAA) allows federal employees to retain their jobs and federal personnel benefits after a tribe takes over a federal program or service under an ISDEAA agreement. Tribes can offer existing federal employees jobs with the newly transitioned program, either as tribal employees or through a two-year Intergovernmental Personnel Act (IPA) Agreement. Despite these authorities, opponents of federal-tribal co-management have cited fears of losing federal jobs as a reason to limit the use of such agreements. To address this issue, Congress could consider amending ISDEAA or the IPA to allow for ISDEAA-related IPA agreements of longer than two years. This could be helpful in the co-management context, where projects and planning can often take many years. On the other hand, to avoid legal challenges, the federal employee with a longer-term IPA agreement may have to adjust the scope of work to ensure he or she is not performing inherently federal functions.

Sources: 25 U.S.C. §5323; 5 U.S.C. §§3371-3372. See also Kevin Washburn, "Facilitating Tribal Co-management of Federal Public Lands," *Wisconsin Law Review*, vol. 263 (April 2022).

Federal-Tribal Administrative Coordination

Tribes' ability to co-manage federal lands may be limited by the ability of tribes and agencies to coordinate. Many federal land management agencies are large and decentralized, potentially resulting in administrative coordination challenges in implementing authorities and programs. For example, FS is the largest agency within USDA, employing over 30,000 permanent employees managing 154 national forests across the country.[174] In 2013, BIA, FS, and the Intertribal Timber Council, which represents over 60 Indian tribes, issued a joint report noting that FS staff understanding of government-to-government relationships and agency tribal trust responsibilities

Outlook for the Next 30th Years, hearings, 115th Cong., 2nd sess., 2018, S.Hrg. 115-403 (Washington: GPO, 2019), p. 35 (hereinafter S.Hrg. 115-403).

[171] "Indian Self-Determination Act Amendments of 1994," S. 14677, *Congressional Record*, daily edition, October 2, 1994, p. S 14678. See also the No Child Left Behind Act of 2001, P.L. 107-110, which defined *inherently federal functions* as administering federal funds, personnel laws, and contracting and grant laws; administering hearings and appeals; issuing federal regulations and policies; reporting to Congress and the President; and conducting the statutory duties of the Secretary relating to trust resources.

[172] See, for example, H.R. 8921 and S. 1911 in the 117th Congress.

[173] Rep. George Miller, "Tribal Self-Governance Amendments of 1998," House Extensions of Remarks, *Congressional Record*, daily edition, vol. 144 (October 9, 1998), p. E1982, at https://www.govinfo.gov/content/pkg/CREC-1998-10-09/pdf/CREC-1998-10-09-pt1-PgE1982.pdf.

[174] FS, "Fiscal Year 2024 Budget Justification," pp. 30a-9 and 30a-18, at https://www.fs.usda.gov/sites/default/files/FS-FY24-Congressional-Budget-Justification.pdf.

vary throughout national forests.[175] In addition, FS, BIA, and tribes have different understandings regarding the use of the TFPA authority, proposal development, review, and implementation.[176] The report found that this mutual lack of understanding led to limited use of the authority.[177]

Similarly, in DOI, several studies of NPS-tribal partnerships identified failures to understand each other's procedural requirements, timetables, and reporting needs as sources of delay and frustration.[178] Some have argued that NPS has interpreted the ISDEAA authority similar to other government contracting authorities, which leads to the agency treating tribes as general contractors.[179] Instead, as DOI's ISDEAA regulations note, ISDEAA agreements are not governed by the same federal standards required in other government contracts.[180] Some also have criticized DOI because its annual list of non-BIA programs eligible for partnership under self-governance compacts has remained largely unchanged for many years.[181]

DOI and USDA have attempted to address these challenges in various ways. FS has an Office of Tribal Relations based in Washington, DC, as well as regional tribal liaisons.[182] DOI bureaus also have tribal liaison officers.[183] In the co-management context, FS committed to assessing tribal and agency capacity needs to determine tribal training and technical assistance needs to increase co-stewardship capacity.[184] DOI has tried to bolster agency and tribal capacity for co-stewardship using ISDEAA agreements by hiring staff to coordinate the agreements. For example, in 2021, the FWS Kodiak National Wildlife Refuge and Koniag, Inc., a Regional Alaska Native Corporation, used an ISDEAA agreement to establish a community affairs liaison.[185] In 2022, the FWS Yukon Delta National Wildlife Refuge entered into an ISDEAA agreement with Calista, a Regional Alaska Native Corporation, to house a refuge information technician.[186] The technician is to facilitate communication and education between the refuge and Alaska Native stakeholders throughout the region to improve the co-stewardship of resources within the refuge. In both examples, FWS and Alaska Natives financially support the positions.[187]

Congress could consider establishing a formal commission to ensure federal coordination around co-management. This commission could be government-wide, such as the White House Council on Indian Affairs, or it could be department-specific. For example, DOI has established an inter-bureau Committee on Collaborative and Cooperative Stewardship to improve administrative coordination on co-stewardship and co-management.[188] The committee comprises representatives

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[175] Intertribal Timber Council, "Executive Summary," in *2013 TFPA Analysis Report: Fulfilling the Promise of the Tribal Forest Protection Act of 2004*," April 2013, p. 2, at https://www.itcnet.org/file_download/ed11427f-0402-43f1-aa4f-070c06e63e7c.

[176] Ibid.

[177] Ibid., p. 1.

[178] See CRS Report R42125, *National Park System: Units Managed Through Partnerships*, by Laura B. Comay.

[179] King, "Co-management," p. 524.

[180] See, for example, 25 CFR §900.37, which states, "The only provisions of OMB Circulars and the only provisions of the 'common rule' that apply to self-determination contracts are the provisions adopted in these regulations, those expressly required or modified by the Act, and those negotiated and agreed to in a self-determination contract."

[181] Washburn, "Facilitating."

[182] USDA, "Strengthening," pp. 1-2.

[183] DOI, "Tribal Liaison Officers and Points of Contact," at https://www.doi.gov/priorities/tribal-consultation/tribal-liaison-officers.

[184] USDA, "Strengthening," p. 20.

[185] Personal communication between CRS and FWS, April 5, 2023.

[186] Ibid.

[187] Ibid.

[188] Personal communication between CRS and DOI, March 14, 2023.

from BLM, NPS, FWS, the Bureau of Ocean Energy Management, and the Bureau of Reclamation.[189] It also includes BIA and the Office of Native Hawaiian Relations representatives as ex officio members.[190] Among other things, the committee has stated its intention to consider guidance and technical assistance on ways to integrate co-stewardship into existing DOI programs and activities.[191]

Congress also may consider authorizing co-management demonstration projects or programs to facilitate federal-tribal coordination in areas with strong potential tribal capacity for co-management of federal lands. Although there is no universal definition for the terms *demonstration project* and *demonstration program*, legislation has included these terms to describe short-term or otherwise limited projects or programs.[192] If successful, such projects or programs may be reauthorized or expanded. Congress has introduced and enacted legislation authorizing DOI and USDA to undergo federal-tribal co-management-related demonstration projects and programs. For example, as noted, the 2018 farm bill authorized FS to enter into TFPA self-determination contracts with tribes to conduct demonstration projects on agency lands, and the agency has done so with at least one tribe.[193] Congress did not define *demonstration project* in the TFPA.

Members of Congress also have introduced legislation that would have established demonstration projects and programs for Alaska Natives. For example, the Alaska Federal Lands Management Demonstration Project Act, first introduced in the 107th Congress, would have required the Secretary of the Interior to annually select at least six tribes or tribal organizations to perform administrative and management functions, construction, maintenance, data collection, biological research, and/or harvest monitoring on federal lands in Alaska.[194] Although the introduced legislative text did not define the term *demonstration project*, the project authority appeared to be time bound: the text required the Secretary to select eligible tribes to participate in demonstration projects for two fiscal years following enactment of the bill.[195] In the 113th Congress, the Alaska Native Subsistence Co-management Demonstration Act of 2014 would have established an Alaska demonstration program allowing for state-federal-tribal co-management of wildlife through negotiated rulemaking.[196] This act also did not define the term *demonstration program*.

Federal and Tribal Administrative Capacity

Tribes and the GAO also have identified tribal administrative capacity as a key limiting factor for their ability to enter into ISDEAA and other agreements with federal land management

[189] Ibid.

[190] Ibid.

[191] Ibid.

[192] See, for example, the Infrastructure Improvement and Jobs Act (P.L. 117-58), §41001, which authorized appropriations for Energy Storage Demonstration Projects, a pilot grant program, for a term of four fiscal years.

[193] FS, "Monumental 638 Agreement."

[194] Alaska Federal Lands Management Demonstration Project Act, H.R. 4734.

[195] Ibid.

[196] The Alaska Native Subsistence Co-management Demonstration Act of 2014 (discussion draft) at https://docs.house.gov/meetings/II/II24/20140314/101879/HHRG-113-II24-20140314-SD001.pdf. See also Testimony of Tara Sweeney, Co-chair of Alaska Federation of Natives, in U.S. Congress, House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, *Hearing on a Discussion Draft Bill to Authorize a Demonstration Program That Allows for State-Federal-Tribal Co-management of Wildlife Throughout the Traditional Hunting Territory of the Ahtna People and for Other Purposes*: *The Alaska Native Subsistence Co-management Demonstration Act of 2014*, hearings, 113th Cong., 2nd sess., 2014, p. 3.

agencies.[197] A recurring issue is inconsistent agency employee understanding of tribal relations, including in the co-management context. Tribes also have criticized agencies for their lack of understanding and support for the development of ISDEAA agreements. Some tribes have identified the administrative burden of ISDEAA reporting requirements as a barrier to efficient self-governance and have asked Congress to reduce these requirements.[198]

DOI and USDA have attempted to build agency and tribal capacity through trainings and webinars. Pursuant to USDA Departmental Regulation (DR) 1350-002, all FS employees are required to learn about federal trust and treaty responsibilities and to meet "core competencies" for tribal relations work.[199] In the co-management context, USDA hosted at least three workshops connecting more than 150 tribal and agency staff to find potential TFPA projects.[200] Following the enactment of the 2018 farm bill's TFPA ISDEAA demonstration project authority, USDA issued a best practices guide.[201] In November 2022, DOI announced it would consult with tribes to "help inform consistent interpretation and implementation across the Interior Department for improved transparency and certainty around compacting authorities."[202] In particular, DOI held tribal consultations on its annual list of non-BIA programs eligible for partnership under self-governance compacts.[203] The lack of federal agency staff training on tribal relations also prompted the interagency White House Council on Indian Affairs to issue a best practices document to help federal agencies identify and protect tribal treaty rights and other rights in federal decisionmaking.[204]

Some tribes have asserted that agency resistance to ISDEAA agreements, including in the co-management context, results in repeated revisions to agreement proposals that increase the tribal administrative burden. For this reason, some tribes advocate for Congress to mandate that non-BIA DOI agencies enter into ISDEAA agreements if requested by tribes (as is the case for BIA).[205] Some Members of Congress have raised concerns about agency resistance to ISDEAA

[197] GAO, *Interior Factors*, p. 11.

[198] Statement by the United South and Eastern Tribes Sovereignty Protection Fund, in U.S. Congress, Senate Committee on Indian Affairs, *A Call to Action: Native Communities' Priorities in Focus for the 117th Congress*, hearings, 117th Cong., 1st sess., February 24, 2021, S.Hrg. 117-8 (Washington: GPO, 2021), p. 72. By contrast, some argue that after almost 50 years of tribal self-governance contracting, nearly all tribes and tribal organizations that desire to enter into tribal self-governance contracting have already done so (Danielle Delaney, "The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting," *American Indian Law Journal*, vol. 5, no. 2, Art. 1 [2017]).

[199] USDA, "Strengthening," p. 24.

[200] U.S. Congress, Senate Committee on Indian Affairs, *Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires and S. 3014, A Bill to Improve the Management of Indian Forest Land, and for Other Purposes*, hearings, 114th Cong., 2nd sess., June 8, 2016, S.Hrg. 114-361 (Washington: GPO, 2016).

[201] FS, *Best Practices Guide to Execute a USDA Forest Service 638 Agreement Under the Tribal Forest Protection Act*, August 2020, at https://www.fs.usda.gov/sites/default/files/Best-Practices-Guide-20200909.pdf.

[202] DOI, *First Annual Report on Tribal Co-Stewardship: Implementing Joint Secretarial Order 3403 on*, November 2022, p. 5, at https://www.doi.gov/sites/doi.gov/files/ar-esb46-009795-doi-and-tribal-co-stewardship-20221125.pdf.

[203] BIA, "List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Non-BIA Bureaus," at https://www.bia.gov/service/tribal-consultations/list-programs-eligible-inclusion-funding-agreements-negotiated-self.

[204] White House Council on Native American Affairs, *Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making*, September 2022, at https://www.bia.gov/sites/default/files/dup/tcinfo/best-practices-ttr-mou-sept-2022_508.pdf.

[205] S.Hrg. 115-403, p. 6. See also 25 U.S.C. §5321(a)(1)(E).

agreements since the act's inception.[206] Since the 108th Congress, there have been numerous oversight hearings and Members have introduced bills addressing DOI ISDEAA agreement processes and apparent agency resistance to tribal self-governance.[207] In 2020, Congress enacted the Progress Act, which directed DOI agencies to negotiate contracts and funding agreements to maximize implementation of the self-governance policy.[208] The act authorized grants to build tribal capacity and prepare for participation in self-governance agreements.[209] The act also clarified tribal reporting requirements.[210] In the Progress Act, Congress explicitly maintained DOI land management agencies' discretion to refuse to enter into ISDEAA agreements.[211]

Federal Funding for Co-management

Congress may consider whether and how much to fund co-management activities on federal lands. Congress has appropriated funding for specific co-management agreements, including co-management arrangements resulting from water settlements. For example, USACE has requested, and Congress has appropriated, funding for the Dworshak National Fish Hatchery as part of the USACE Operations and Maintenance, Dworshak Dam and Reservoir ID, budget line item in USACE's Operations and Maintenance account.[212]

Congress also has appropriated funding for activities that historically have been conducted by federal land management agencies but that may increasingly be conducted by tribes pursuant to co-management agreements. In such cases, land management agencies usually must allocate funding for such agreements out of relevant program budgets. Some stakeholders and agency officials have opposed ISDEAA co-management agreements based on concerns about inadequate agency budgets. For example, the National Wildlife Refuge Association opposed the FWS ISDEAA agreement with the Council at Yukon Flats National Wildlife Refuge because of FWS's apparently limited budget.[213] In particular, the association argued that FWS should allow for a competitive bidding process (rather than ISDEAA's direct tribal contracting authority), asserting that such a process was "an important way to use refuge funding wisely."[214] In addition, while FWS entering into ISDEAA agreements for only a limited number of refuges may not significantly affect FWS funding availability, more ISDEAA agreements "could prove to have considerable budget ramifications."[215] It appears that the National Wildlife Refuge Association believed that if the agency did not use a competitive bidding process, the tribe might overcharge the agency for services. In addition, co-management agreements under ISDEAA typically require

[206] See H.Rept. 106-477 ("Because [ISDEAA] requires the agencies to divest themselves of programs, staff, and funding at tribal request, the courts should not give Administrative Procedure Act-type deference to agency decisionmaking.")

[207] Statements of Senators John Hoeven and Tom Udall, Port Gamble S'Sklallam Tribe, and United South and Eastern Tribes, in S.Hrg. 115-403, pp. 2, 3, 37, and 43.

[208] Progress Act, P.L. 116-180.

[209] P.L. 116-180, §402(e).

[210] H.Rept. 116-422.

[211] Ibid.

[212] See USACE, *FY2023 Operations and Maintenance Sheets*, p. 91, at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll6/id/2268. See also the Consolidated Appropriations Act, 2023 (P.L. 117-328) and the Infrastructure Investment and Jobs Act (P.L. 117-58).

[213] National Wildlife Refuge Association, Protecting America's Wildlife, "Action Alert: Yukon Flats NWR Annual Funding Agreement," at https://perma.cc/XP7Y-FXD9. See also Washburn, "Facilitating," pp. 300-305.

[214] National Wildlife Refuge Association, Protecting America's Wildlife, "Action Alert: Yukon Flats NWR Annual Funding Agreement," at https://perma.cc/XP7Y-FXD9.

[215] Ibid.

the federal agency to provide funding to the tribes for direct program costs and/or contract support, as outlined below.

Biden Administration Funding for Co-management

With the Biden Administration's focus on promoting co-stewardship agreements, agencies have worked to identify funding for these agreements from various sources. The Department of the Interior (DOI) has acknowledged that requests for collaborative stewardship (or co-management) necessitate increased funding to ensure tribes have the necessary resources to participate. DOI announced 13 new co-stewardship agreements with 18 tribes, Alaska Native Corporations, and tribal consortia between November 2021 and November 2022; DOI did not make publicly available where it obtained the associated funding for these agreements. FS invested nearly $20 million from various funding sources in co-stewardship agreements in FY2022, including at least one ISDEAA agreement. Many tribes have expressed the need for noncompetitive, dedicated, and stable federal resources to reduce the tribal administrative burden in co-management/co-stewardship of federal lands. Some tribes have suggested that Congress add new land management agency accounts or specific budget line items to fund tribal co-management of federal lands or resources. In FY2024, the Bureau of Indian Affairs requested $12 million in a new budget line item that would be used, in part, to support tribal co-stewardship.

Sources: Personal communication between CRS and DOI, March 14, 2023; U.S. Department of Agriculture (USDA), Forest Service (FS), "USDA Forest Service Signs 11 New Agreements to Advance Tribal Co-stewardship of National Forests," November 30, 2022, at https://www.fs.usda.gov/news/releases/new-agreements-advance-tribal-co-stewardship; White House, "Executive Summary: Tribal Comments Received During Council on Environmental Quality Consultations on the President's America the Beautiful Initiative," 2022, p. 2, at https://www.whitehouse.gov/wp-content/uploads/2022/03/Atb-Tribal-Consultation-Summary.pdf; Marine Mammal Commission, *Report of the Marine Mammal Commission: Review of Co-management Efforts in Alaska*, 2008, p. 39, at https://www.mmc.gov/wp-content/uploads/mmc_comgmt.pdf; BIA, *Budget Justifications and Performance Information Fiscal Year FY2024, Bureau of Indian Affairs,* p. IA-LWCF-4, at https://www.bia.gov/sites/default/files/dup/inline-files/bia_2024_greenbook.pdf.

Congress may consider providing funding for indirect or support costs incurred by tribes in ISDEAA agreements with federal land management agencies. ISDEAA requires the Secretary of Interior and the Indian Health Service (IHS) to provide the contracting tribe with funds equivalent to those that the relevant Secretary "would have otherwise provided" for the programs.[216] That includes *contract support costs*, or "reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management."[217] Allowable uses of contract support cost funding include the depreciation of assets, construction and mortgage costs, management studies, insurance and indemnification, and interest expenses on capital.[218] The Supreme Court has held that the government must pay these costs regardless of the availability of appropriations.[219] However, it remains unclear whether agencies outside of IHS or DOI would be required to pay CSCs. Some have argued that ISDEAA agreements with federal land management agencies may therefore be more costly to the tribe than BIA ISDEAA agreements and may discourage ISDEAA co-management agreements.[220]

Some tribes have contended that they can use federal funding more efficiently than the federal government, potentially even decreasing overall project or program costs.[221] For example, tribes that receive lump sum funding in ISDEAA funding agreements may reallocate those funds during

[216] 25 U.S.C. §5325(a)(1) and 25 U.S.C. §5326.

[217] 25 U.S.C. §5325(a)(2).

[218] 25 U.S.C. §5325.

[219] Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 647 (2005); Salazar v. Ramah Navajo Chapter, 132 S. Ct 2181 (2012).

[220] Washburn, "Facilitating," p. 315.

[221] See S.Hrg. 115-403, p. 8.

the year and may carry over unspent funds.[222] In addition, tribes may enter into ISDEAA agreements with multiple years of funding.[223] By contrast, depending on the relevant authorities, federal program appropriations may be time limited and may not be authorized to carry over from one fiscal year to the next. DOI also has noted that "the greater control and flexibility in the use of funds to better meet Tribal conditions, needs, and circumstances promotes more efficient and effective governance and is a major source of significant relative benefits" in ISDEAA funding agreements.[224] At the Grand Portage National Monument, some claim the ISDEAA funding agreement has lowered costs for NPS. For example, the tribe has loaned equipment to the NPS maintenance office, and that equipment would have been expensive for the NPS to purchase.[225] In the forestry context, relative to BIA, some tribes have been adept at decreasing costs, raising worker productivity, and increasing income from forest products.[226]

On the other hand, federal land management agencies may have economies of scale that reduce its direct and indirect costs relative to tribes. In addition, the federal government may not necessarily reduce its costs by entering into ISDEAA agreements with tribes. For example, although federal agencies may incur administrative overhead costs in providing services to tribes, such as human resources, these costs may be lower than the contract support costs requested by the tribe to perform the ISDEAA agreement.

In conclusion, Congress may consider whether and how much to fund co-management activities on federal lands. For example, Congress could continue to appropriate funds for tribal agreements on a case-by case basis, create new agency budget line items specifically for co-management, or appropriate contract support cost funds for DOI and FS ISDEAA agreements, including ISDEAA co-management agreements.

Author Information

Mariel J. Murray
Specialist in Natural Resources Policy

[222] DOI, *Tribal Self-Governance*, pp. 7-8.

[223] 25 U.S.C. §5363 (p)(4).

[224] Ibid. at p. 7.

[225] Washburn, "Facilitating," p. 293.

[226] Ibid. p. 287.

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