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COMING HOME AGAIN:

TRIBAL SOVEREIGNTY, THE TRIBAL WILDLIFE GRANT PROGRAM, AND THEIR POTENTIAL FOR ENDEMIC WILDLIFE REINTRODUCTION

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Despite centuries of federal and state policies that have resulted in extinction or endangerment for multitudes of wildlife species with cultural, ecological, and historical significance to Indigenous nations throughout the United States, many tribes have begun to attempt wildlife reintroduction in and near Indian Country, with or without federal or state support, and sometimes in spite of strident opposition. Recent efforts, including the reintroduction of bison to the Fort Peck and Wind River Reservations, the Nez Perce and Yurok Tribes' release of California condors, and the Confederated Tribes of the Colville Reservation's reintroduction of pronghorn antelope, have shown early signs of success. Tribes attempting to reintroduce endangered, threatened, or extirpated species have used a variety of legal and other tools to further their efforts, sometimes in combinations that reflect unique values or particular history connecting the tribe to the reintroduced species. The focus of this Article is an option that has received relatively little scholarly examination—the Tribal Wildlife Grant Program (“TWG” or “TWG Program”). The TWG Program presents a unique means by which tribes can establish, or reestablish, wildlife management frameworks largely free of federal oversight or intervention, allowing tribes to avoid certain complications of the federal-tribal legal relationship that have impeded many past tribal wildlife management efforts. The Program also allows tribes to choose when and how to partner with states, a significant improvement over other wildlife conservation and management frameworks that used a federalism structure. Finally, the Program provides a mechanism for actualizing inherent tribal sovereignty for tribes that are willing to establish positive laws in connection with their reintroduction efforts.

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I. Introduction

Despite centuries of federal and state policies that have resulted in extinction or endangerment for multitudes of wildlife species with cultural, ecological, and historical significance to Indigenous nations throughout the United States,¹ many tribes have begun to attempt reintroduction in and near Indian Country,² with or without federal or state support and sometimes in spite of strident opposition.³ Recent efforts, including the reintroduction of bison to the Fort Peck and Wind River Reservations, the Nez Perce and Yurok Tribes’ release of California condors, and the Confederated Tribes of the Colville Reservation’s reintroduction of pronghorn antelope, among others, have shown early signs of success.⁴ Tribes attempting to reintroduce endangered, threatened, or extirpated species have used a variety of legal and other tools to further their efforts, sometimes in combinations that reflect unique values or particular history connecting

¹ This Article uses the term “Indigenous nations” to refer to federally recognized tribes, including Alaska Native Corporations, which are eligible to receive funding under the TWG Program. The authors recognize that these 574 nations are a subset of the total number of Indigenous nations within the United States.

² Indian Country includes three different land categories: lands within exterior boundaries of reservations; “dependent Indian communities”; and all trust allotments. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526–31 (1998).

³ Jaden Bales, *Baldes & Bison: What the Return of Buffalo Means to Native Peoples*, WYO. WILDLIFE FED. (June 17, 2020), <https://wyomingwildlife.org/baldes-bison-what-the-return-of-buffalo-means-to-native-peoples/>.

⁴ *Id.*; *Nez Perce Tribe Hold Ceremony to Welcome California Condor Hatchling*, KTVB (Apr. 9, 2018), <https://www.ktvb.com/article/news/local/nez-perce-tribe-hold-ceremony-to-welcome-california-condor-hatchling/277-536758059>; Jimmy Tobias, *This Native American Tribe is Reintroducing a Disappeared Species on Its Own Land; and the Federal Government Can’t Do Anything About It*, PACIFIC STANDARD (updated Sept. 23, 2018, original May 31, 2017), <https://psmag.com/magazine/native-tribe-reintroducing-disappeared-species-on-own-land>.

the tribe to the reintroduced species.⁵ Some tribes have relied upon treaty rights,⁶ while others have used tribal wildlife management and protection laws.⁷ Others have used federal wildlife protection laws that incorporate tribal designations of protected species,⁸ general legal principles like the federal trust responsibility,⁹ the land-into-trust provision of the Indian Reorganization Act,¹⁰ land exchanges, and federal- and private-grant programs, combined with the inherent sovereign power of the tribe over its members and its territory. The focus of this Article is the latter category, and one option that has received relatively little scholarly examination—the Tribal Wildlife Grant Program (TWG or Program). The TWG Program, although relatively new, presents a unique means by which tribes can establish, or reestablish, wildlife management frameworks largely free of federal oversight or intervention, allowing tribes to avoid certain complications of the federal-tribal legal relationship that have impeded many past tribal wildlife management efforts. The Program also allows tribes to choose when and how to partner with states, a significant improvement over other wildlife conservation and management regimes. Finally, the Program provides a mechanism for actualizing inherent tribal sovereignty for tribes that are willing to establish positive laws to authorize or support the reintroduction efforts.

Congress created the TWG program in 2002 through amendments to the Fish and Wildlife Act of 1956 and the Fish and Wildlife Coordination Act.¹¹ The Program is funded with revenues from the Land and Water Conservation Fund, and unlike the State Wildlife Grant Program, which based funding distribution on a formula combining the geographical size of the state, its population, and the completion of a wildlife action plan, Congress contemplated from the beginning that the TWG would be a competitive grant program, opening up greater funding potential for smaller tribes attempting substantial reintroduction and conservation efforts.¹²

Although the Program is fairly new, it has yielded impressive results for the tribes that have used Program funding to support their reintroduction efforts, and yet, as mentioned, it has received relatively little scholarly attention.¹³ This Article aims to fill the void in scholarly analysis by

⁵ Compare Tobias, *supra* note 4, at 1 (Confederated Tribes of Colville Nation reintroducing pronghorn without notifying federal or state authorities) with Bales, *supra* note 3, at 1 (discussing tribal cooperation and collaboration in bison reintroduction efforts).

⁶ Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part i): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 4 (2000).

⁷ Nat'l CONG. OF AMERICAN INDIANS, TRIBAL WILDLIFE CONSERVATION: A HISTORY OF SUCCESS, https://www.ncai.org/H.R._3742_-_Tribal_Project_Examples.pdf.

⁸ Lacey Act, 16 U.S.C. § 3372(a)(1),(2)(A); *United States v. Sohapp*, 770 F.2d 816, 817 (9th Cir. 1985).

⁹ *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001).

¹⁰ Indian Reorganization Act, 25 U.S.C. § 5108.

¹¹ 16 U.S.C. §§ 742a–j; 16 U.S.C. §§ 661–667e.

¹² H.R. REP. NO. 107-103, at 38 (2001).

¹³ See, e.g., Lacey K. Reimer, *Climate Change and the Arctic: Ideas for How the United States and Canada Can Protect Their Arctic Indigenous Peoples*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 233, 254 (2018) (noting that the Program had authorized \$7M in funding for tribal wildlife conservation in 2010); S. James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the United States of America*, 32 ARIZ. J. INT'L & COMP. L. 51, 82 (2015) (briefly mentioning the number of Program grants to tribes in broader discussion of federal agencies and support they provide to tribes); Sally A. Paez, *Preventing the Extinction of Candidate Species: The Lesser Prairie-Chicken in New Mexico*, 49 NAT. RES. J. 525, 579 (2009) (referencing the Program as one example of a panoply of methods of avoiding Endangered Species Act listing); Kirsten Uchitel, *PECE and Cooperative Conservation: Innovation or Subversion Under the Endangered Species Act?*, 26 J. LAND RES. & ENVTL. L. 233, 257 (2006) (same); D. Suagee, J. Walker, & J. Bradley, *Native American Resources 2002 Annual Report*, 2002 ABA ENV'T ENERGY, & RES. L.: YEAR IN REV. 80, 89 (2002) (briefly referencing U.S. Fish & Wildlife Service proposed implementation guidance for the Program).

explaining the Program's roots, goals, and functions, and by describing methods that tribes can use the Program to develop and implement Indigenous wildlife reintroduction frameworks. It also explains how the Program's funds can help tribes exercise their inherent sovereign authority by enacting laws, regulations, or ordinances establishing or reinforcing the tribal values in the species and a basic framework of wildlife management. This may be particularly enticing to some tribes given the Supreme Court's recent rulings supporting tribal sovereignty.

To fully understand the legal and historical context in which tribes are attempting new or continuing reintroduction efforts, this Article will begin, in Part I, by explaining the theoretical and historical foundations of tribal wildlife management, including as impacted by federal laws. This discussion will include an examination of various traditional Indigenous wildlife management systems. In Part II, the Article will briefly explain the federal wildlife management framework, the role of state law with respect to wildlife management on tribal lands,¹⁴ and introduce the Program,¹⁵ explaining its funding mechanisms and illustrating how tribes have relied on Program funds to implement a variety of conservation and reintroduction programs.¹⁶ The relationships that develop between tribes and the federal government, and in some cases, between tribes and state governments, can be a vehicle for mending historical fences, particularly if the historical relationship has been fraught with mistrust, jurisdictional encroachment or divestiture by the respective state, and disputes over natural resources values and management decisions.¹⁷

In Part IV, this Article will explore the Program's potential for realizing tribal sovereignty and for reintroducing endangered and threatened species, and in some cases, for both purposes. With nearly 100 million acres of Indian Country in the United States, and much of it existing as excellent wildlife habitat, interconnected with state and federal lands,¹⁸ the wildly disparate levels of funding for the Program and parallel state programs (which receive around ten-times more in appropriations) is glaring.¹⁹ This section will also situate the TWG Program in the broader context of traditional ecological knowledge (TEK) and federal- and state-tribal wildlife management relationships, many of which include collaborative conservation efforts with state agencies.²⁰ It will ultimately conclude that the TWG Program is not only an important mechanism for increasing

¹⁴ Sandra Lee Pinel & Jacob Pecos, *Generating Co-Management at Kasha Katuwe Tent Rocks National Monument, New Mexico*, 49 ENVTL. MGMT. 593 (2012) (recounting the unlikely, yet remarkably stable, co-management agreement between the Pueblo de Cochiti and BLM with respect to the 2001 Clinton-designated National Monument in New Mexico).

¹⁵ For example, as recounted below, the Yurok Tribe has received nearly \$800,000 in funding from three separate grant awards between 2008–2012 to assist with California condor reintroduction efforts in northern California. *See infra* III.C.

¹⁶ Rebecca Fabbri, *Bighorn Sheep Return to Ancestral Home After a Century*, U.S. FISH & WILDLIFE SERV. (Apr. 9, 2020), https://www.fws.gov/cno/newsroom/Highlights/2020/Bighorn_Sheep/.

¹⁷ *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 515 (1832) (vacating the conviction of a Christian missionary to the Cherokee Nation who was prosecuted under a Georgia law prohibiting non-Indians in Indian country without permit, and holding that state laws have no force in Indian country).

¹⁸ *See, e.g., Udall, Gallego Introduce Tribal Wildlife Corridors Act of 2019*, RUBEN GALLEGO (Nov. 19, 2019), <https://rubengallego.house.gov/media-center/press-releases/udall-gallego-introduce-tribal-wildlife-corridors-act-2019> (describing a bill introduced in late 2019 that acknowledges the unique conservation opportunities on tribal lands and recognizes the strengths of the inherent sovereignty of tribal nations).

¹⁹ FINAL APPORTIONMENT OF STATE WILDLIFE GRANTS FOR FISCAL YEAR 2020, *infra* note 169.

²⁰ Perhaps the most prominent example in recent memory is the Nevada Department of Wildlife's assistance in the translocation of desert bighorn sheep from stock populations to the Pyramid Lake Paiute Tribe's reservation in northwest Nevada. *See Fabbri, supra* note 16 (“[W]hile mortality has been experienced, the herd as a whole is doing well.”).

biodiversity, but it has the potential to bolster inherent tribal sovereignty by supporting Indigenous wildlife reintroduction efforts guided by Indigenous values.

II. Indigenous Wildlife Stewardship – History and Traditions

A. Early History – Time Immemorial to the Allotment Era

Indigenous nations of North America traditionally maintained relational approaches to wildlife and ecosystem management, while Euro-American governmental entities primarily have used a property rights-based approach driven by very specific policy goals.²¹ Some Indigenous nations have natural resources or ecosystem management frameworks that date back centuries or millennia to the beginning of what many tribes refer to as “time immemorial.”²² Others have altered their historical management approaches due to impacts of nineteenth century federal laws and policies like removal and allotment, which fractured and dramatically reduced the tribal land base and significantly altered many tribes’ jurisdiction and regulatory authority,²³ while a third group has combined a traditional Indigenous management framework with some components borrowed from federal or state wildlife management laws or policies.²⁴

Regardless of type, Indigenous wildlife management traditions have been greatly impacted by evolving rules of federal and state law that have gradually reduced tribal land bases and tribal sovereign authority since the post-constitutional period.²⁵ These rules, which are rooted in historic archetypes and stereotypes of Indigenous peoples, inform the legal relationship between federal agencies, state agencies, and tribal governments today. Thus, they still impact tribal efforts to steward and protect wildlife.²⁶ One of the most infamous examples of this was penned by Chief Justice John Marshall, in the earliest Supreme Court opinion establishing the legal relationship between the federal government, states, and tribes.²⁷ In the opinion, he described Indigenous peoples as “fierce savages, whose subsistence was drawn chiefly from the forest,” and opined that “to leave them [Indigenous peoples] in possession of their country, was to leave the country a

²¹ See N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 92–94 (2008) (describing Indigenous relationships to the Earth and the process of removing the “legal, political and economic barriers that obstruct those perspectives from being deployed in actual [land management] practices”).

²² STEVEN R. SIMMS, *ANCIENT PEOPLES OF THE GREAT BASIN & COLORADO PLATEAU* 29 (2008) (dating first human arrivals in the Great Basin to 13,000 years-before-present); see also JERRY EVAN CROUCH, *THE NORTH CANYON HUNTER: A STORY OF ANCIENT PEOPLE IN THE BONNEVILLE BASIN* 20 (2013) (describing evidence of campfires at Danger Cave near Wendover, Utah found under 14 feet of sediment that scientists have carbon dated to 12,400 years-before-present). Tribes buttress aboriginal title claims by showing an uninterrupted and non-treaty possessory right to lands since “time immemorial.” See generally Daniel G. Kelly, Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUMBIA L. REV. 655 (1975). Tribes also successfully defend reserved water rights by showing their use of the land since “time immemorial.” See *United States v. Adair*, 723 F.2d 1394, 1412–15 (9th Cir. 1983) (holding “priority date of time immemorial” was the appropriate standard for deciding water rights necessary to support the Klamath Tribe’s unceded right to hunt and fish).

²³ MENOMINEE NATION TRIBAL CODE, § 287-12 (2020) (mirroring, to some degree, the provisions of the federal Endangered Species Act).

²⁴ *Id.*; CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION, *Wildlife Management Policy*, <https://warmsprings-nsn.gov/program/wildlife-department/>.

²⁵ See Anaya, *supra* note 13, at 61.

²⁶ *Id.*; *Johnson v. M’Intosh*, 21 U.S. 543, 590–91 (1823).

²⁷ *M’Intosh*, 21 U.S. at 590–91.

wilderness.”²⁸ Marshall’s reflections on the people who constituted the first nations of the North American continent were borrowed in part from John Locke,²⁹ whose labor theory of property ownership suffused much of early American law.³⁰ Locke’s view that undeveloped land was worthless until combined with human labor (of a specific European type) informed Marshall and other justices’ early opinions on the nature of Indigenous property ownership and legal rights in the United States.³¹ Locke’s labor theory of accumulation, imbued with a Christian cosmogony,³² posited that so-called improved land would revert to the public commons if allowed to go to “waste.”³³ In Locke’s eyes, if land was not constantly cleared, tilled, and tamed by human hands, it was in an undesirable state of waste. Borrowing from these principles, Marshall and others of the so-called Founding Fathers set out to create a legal framework that paved the way for land domination by individual European and European-American yeomen farmers, land developers and speculators (the latter of which included many of the Founders³⁴), and others seeking some form of the Lockean-American dream.³⁵ The basic contours of Locke’s philosophy were influential in forming the origins of American Property Law,³⁶ which began with Justice Marshall’s deeply

²⁸ *Id.* (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce and were ready to repel by arms every attempt on their independence.”).

²⁹ Susan Henderson-Utis, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 464 (2009) (“John Locke influenced the Founding Fathers perhaps more than any other philosopher from the Enlightenment.”).

³⁰ Alexander D. Northover, *Enough and As Good* in *The Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine*, 65 EMORY L.J. 1363, 1368 (2016) (“Locke argues that God originally bequeathed the world to all of humanity to be shared in common. While resources in the state of nature are held in common, individuals retain property in themselves and their labor. In what would later be called the labor theory of appropriation, Locke argues, ‘Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.’”); see also GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 1–4, 34 (1999) (recounting a parallel, more public-spirited strain in the history of American property that Professor Alexander calls “property-as-propriety,” but that likewise did little to acknowledge the reality that much of the state and federal lands some early Framers wanted to more aggressively distribute to white settlers had been simply—and in many cases brutally—appropriated from Indigenous nations).

³¹ *Id.* This view of property also conveniently and scandalously overlooked the obvious fact that Indigenous nations had their own conceptions of real property with equally sophisticated arrangements of conveyance, inheritance, and rights. ALLAN GREER, *PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA* (2018) (describing various real property systems throughout North America at contact and in the first decades post-contact); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS* (2007) (recounting Marshall’s sordid ties to land speculation—and thus Indigenous dispossession—in early American western lands as an influence behind his *Johnson v. M’Intosh* opinion).

³² *Id.*

³³ *Id.*

³⁴ See generally COLIN CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION* (2019).

³⁵ The latter category included Marshall himself, who along with other wealthy American political leaders and government officials, invested heavily in corporations that profited from the very legal structure that Marshall condemned in *Johnson v. M’Intosh*. WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* 1, 56 (2010).

³⁶ Though Lockean philosophy was hugely influential on lawyers working at the time of the founding, there were other influences too. See generally ALEXANDER, *COMMODITY & PROPRIETY*, *supra* note 30, for perhaps the leading contribution in this area.

flawed and harmful categorization of Indigenous peoples and their legal rights and relationship to the lands of the North American continent in *Johnson v. M'Intosh*.³⁷

Johnson contains some of the least accurate, yet most enduring, factual and legal fallacies of any opinion of the United States Supreme Court.³⁸ These fallacies have been analyzed, well-documented, and deconstructed in over 750 law review articles and several books, and may not survive the next century given the Supreme Court's recent openness to revisiting some of the most destructive and flawed laws and policies the federal government has used to establish and maintain the system of settler-colonialism that persists in the United States today.³⁹ Yet even under the reductionist Locke-Marshall framework of property rights, the North American continent upon which Europeans arrived certainly qualified as "property," even if that framework has limited utility given the modern understanding of ecological systems and their needs.⁴⁰ The pre-contact history of this continent demonstrates clearly that Indigenous peoples engaged in agriculture on every imaginable scale, from small gardens to massive and pervasive plantations, some of which remained after European settlement began.⁴¹ The parklike forests along the eastern seaboard were at least partly the result of intensive and conscious Indigenous ecological practices predating the arrival of Europeans on Atlantic shores.⁴² The 110-million-acre expanse of grasslands that existed in what is now the central plains region was at least in part the result of Indigenous land management and stewardship practices involving prescriptive fires.⁴³ The fertile central valley of California was carefully cultivated and irrigated by Paiute and other Indigenous peoples for over

³⁷ *M'Intosh*, 21 U.S. at 590–91. Other leading lights of the so-called founding generation also held similar conceptions of Native Americans, informing law and public policy at all levels of federal, colonial, and later, state government. Colin Calloway, *George Washington's 'Tortuous' Relationship with Native Americans*, ZOCALO (Aug. 2, 2018), <https://www.zocalopublicsquare.org/2018/08/02/george-washingtons-tortuous-relationship-native-americans/ideas/essay/> (describing Washington's stark attitude toward Native Americans—assimilate or die).

³⁸ Echo-Hawk, *see supra* note 35, at 56, 76.

³⁹ *Id.* at 56; *see* United States v. Cooley, No. 19-1414, slip op. at 4 (June 1, 2021), https://www.supremecourt.gov/opinions/20pdf/19-1414_8m58.pdf; *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020).

⁴⁰ *See* N. BRUCE DUTHU, *SHADOW NATIONS* 118–28 (2013) (describing one danger of over-identifying Native Americans with a romanticized or idyllic existence being a kind of casting out of the legal realm as *homo sacer*, an ancient Roman jurisdictional subject "denuded of virtually all political rights and exposed to sovereign law as a 'bare life.'"); *see also* LISA BROOKS, *OUR BELOVED KIN: A NEW HISTORY OF KING PHILIP'S WAR* 33–44 (2018) (describing seventeenth-century Pocasset agriculture—which we would now describe as "ecological," early Portsmouth settlers misunderstanding of that agriculture, and the ensuing attempt by those settlers to gain Pocasset lands arising from their view that such agriculture was wasting the land).

⁴¹ *See, e.g.*, William E. Doolittle, *Agriculture in North America on the Eve of Contact: A Reassessment*, 82 ANNALS ASS'N OF AM. GEOGRAPHERS 386 (1992) (noting that small gardens were nearly ubiquitous in North America—particularly in the Southwest and along the Eastern Seaboard).

⁴² *Id.* at 393.

⁴³ *Restoring Fire to Native Grasslands*, THE NATURE CONSERVANCY (Sept. 15, 2018) (last updated March 18, 2021), <https://www.nature.org/en-us/about-us/where-we-work/united-states/minnesota/stories-in-minnesota/restoring-fire-to-native-grasslands/>; *see also* Michael Boero, *Traditional Ecological Knowledge and Collaborative Forest Restoration in the Sierra Nevada* (Dec. 2017) (Master's thesis, San Jose State University) (ProQuest) ("With the arrival of Spanish missionaries in the eighteenth century, and the subsequent invasion of miners, farmers, ranchers, and other settlers in the nineteenth century, Native American fire regimes were effectively discontinued in response to colonial regulations and because of genocidal population loss. This loss of Native American ignitions, coupled with policies of total fire suppression by large public land managers in the western U.S., caused a dramatic decrease in natural, low-severity fires since the late 1800s and an increase in destructive mega-fires.").

15,000 years.⁴⁴ Thus, even the most cursory examination of Indigenous land and wildlife stewardship pre- and post-contact reveals that Locke's and Marshall's perception of North America as "untrammelled"⁴⁵ and "wild" before European arrival was nothing more than fictional (and possibly, strategic) fantasy.⁴⁶

The Indigenous stewardship traditions that informed the human-ecosystem interactions described above during the pre-contact period (and beyond, for some tribes) are very broadly known today as traditional ecological knowledge.⁴⁷ TEK is the modern label given to these received traditions passed down through generations of Indigenous peoples, or in other words, "the evolving knowledge acquired . . . over hundreds or thousands of years through direct contact with the environment."⁴⁸ Tribal citizens who have learned TEK do not always refer to it this formally, however. One citizen of the Confederated Tribes of Warm Springs Reservation, home to the Wasco and Paiute people, described it this way: "the Creator at the beginning of time gave us instruction and the wisdom to live the best life . . . [w]e must choose to live by the law, as all the others, salmon, trees, water, air, all live by it."⁴⁹ Another example was offered by Raymond Andrews, the Tribal Historic Preservation Officer for the Bishop Paiute Tribe, at a United States Forest Service-tribal TEK summit in 2016 by way of the following explanation: "while growing up, we didn't know Traditional Ecological Knowledge was what we were doing. TEK is a new term, it is just a part of our lives. We were just doing what we learned."⁵⁰ TEK has proven to have predictive power—a claim Western science long regarded as *sui generis*—and is in many ways the "intellectual twin to science."⁵¹ Because of both attributes, "land managers today often recognize TEK's utility or at least acknowledge Native Americans' long-established

⁴⁴ Ruth Nolan, *Paiute Traditions Inform Water Management Practices in Once-Lush Owens Valley*, KCET (Nov. 26, 2019), <https://www.kcet.org/shows/tending-nature/paiute-traditions-inform-water-management-practices-in-once-lush-owens-valley>.

⁴⁵ Congress famously used *untrammelled* in the Wilderness Act of 1964: "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c) (1964). *Untrammelled* means, "not confined, limited, or impeded." *Untrammelled*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/untrammelled> (last visited Apr. 20, 2020). Both clauses of that sentence presume first, one might say subconsciously, that "man" is equivalent to all people, and second, that such landscapes were always untrammelled and rarely visited.

⁴⁶ The word *wild* has an etymological shade indicating anything "in the natural state, uncultivated, untamed, undomesticated, uncontrolled." *Wild*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/wild> (last visited, Apr. 21, 2020). Recall that Chief Justice Marshall's description of Native American life in many ways trafficked in this othering of those cultures by describing them and the lands upon which he was shortly to take out from under them as *wilderness*. *Johnson v. M'Intosh*, 21 U.S. 542, 590 (1823). The late scholar Vine Deloria remarked that "[i]nherent in the very definition of 'wilderness' is contained the gulf between the understandings of the two [Indian and Euro-American] cultures. Indians do not see the natural world as 'wilderness.'"; Vine Deloria, Jr., *Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 267, 281 (1992).

⁴⁷ Erika M. Zimmerman, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies*, 13 N.Y.U. ENV'T. L.J. 803, 805 (2005).

⁴⁸ U.S. FISH & WILDLIFE SERV., TRADITIONAL ECOLOGICAL KNOWLEDGE FOR APPLICATION BY SERVICE SCIENTISTS (2011), <https://www.fws.gov/nativeamerican/pdf/tek-fact-sheet.pdf>.

⁴⁹ Andrew H. Fisher, *Spirit of the Salmon: Native Religion, Rights, and Resource Use in the Columbia River Basin*, in *INDIGENOUS KNOWLEDGE AND THE ENVIRONMENT IN AFRICA AND NORTH AMERICA* 173, 174 (David M. Gordon & Shepard Krech III eds., 2012).

⁵⁰ U.S. FOREST SERV., FR-1043, FOREST RESEARCH AND DEVELOPMENT: TRIBAL ENGAGEMENT ROADMAP (2015).

⁵¹ Boero, *see supra* note 43.

interrelationship with landscapes that existed before the arrival of Europeans” as a useful source of information about how to address present management challenges.⁵²

One Indigenous nation’s history illustrates the time-tested use of TEK quite well. As they recount it, the Nuwuvi have lived in what is now southern Nevada since the beginning of time.⁵³ They “believe the land itself is alive and sentient, a view that constitutes the epistemological foundation of Nuwuvi culture.”⁵⁴ One of the ways they preserve their connection to their land is through the Salt Songs,⁵⁵ a collection of hundreds of songs that fulfill spiritual functions for the Nuwuvi, but also traverse in concrete ways the entire history of their land.⁵⁶ Such close attention to an ecosystem over so many centuries has yielded an immense body of TEK, including the lifecycles of plants and animals; the ways of watercourses; where the sun does not go, where it does, and when; where the pinyon nuts are plentiful and when they are not; and countless other information about the ecosystem they have relied upon for multiple generations.⁵⁷ Thus, the Nuwuvi have a seemingly inexhaustible well of TEK regarding these desert ecosystems, dating back centuries. Like many Indigenous nations, their TEK is not limited to static observation—it is based on an active and ongoing relationship with the land and its resident wildlife species. For instance, historically and still today, the Nuwuvi people have employed techniques like beating the canopies of pinyon pines to rid them of pinecones and clearing out the pinyon forest underbrush, reducing the fire hazard in resident pinyon-juniper ecosystems.⁵⁸ Nuwuvi cultural practices regarding pinyon-juniper woodland stewardship, coupled with social taboos concerning the details of food harvests and related activities, directly and positively implicate numerous endemic species.⁵⁹

Despite a growing body of documentation of TEK similar to that of the Nuwuvi, and perhaps borrowing or reflecting historical stereotypes or tropes that emerged from the Locke-Marshall era, non-Indigenous scientists and federal- and state-wildlife management agencies have largely “pigeonholed [Indigenous peoples] into one of two categories, ‘hunter-gatherer’ or ‘agriculturalist,’ obscuring the ancient role of many Indigenous nations as ecological stewards or managers and necessarily limiting their use of and impacts on nature to the two extremes of human intervention.”⁶⁰ But as the Nuwuvi’s ecosystem stewardship practice makes clear, the dichotomy

⁵² *Id.* at 29.

⁵³ RICHARD STOFFLE & KATHLEEN VAN VLACK, NUVAGANTU, “WHERE THE SNOW SITS” ORIGIN MOUNTAINS OF THE SOUTHERN PAIUTES, *LANDSCAPES OF ORIGINS IN THE AMERICAS: CREATION NARRATIVES LINKING ANCIENT PLACES AND PRESENT COMMUNITIES* 32, 36 (Jessica Joyce Christie ed. 2009).

⁵⁴ Brian John Lefler, *Nuwuvi (Southern Paiute) Ecological Knowledge of Pinon-Juniper Woodlands: Implications for Conservation and Sustainable Resource Use in Two Southern Nevada Protected Areas* (2014) (Master’s thesis, Portland State University) (ProQuest).

⁵⁵ Kim Stringfellow, *Bringing Creation Back Together Again: The Salt Songs of the Nuwuvi*, THE MOJAVE PROJECT (June 2020), <https://mojaveproject.org/dispatches-item/bringing-creation-back-together-again-the-salt-songs-of-the-nuwuvi/>.

⁵⁶ *Id.*

⁵⁷ See generally Lefler, *Ecological Knowledge of Pinon-Juniper Woodlands*, *supra* note 54.

⁵⁸ Richard Arnold & Jeremy Spoon, *Case Study: Nuwuvi (Southern Paiute) Ancestral Territory, Spring Mountains National Recreation Area and Desert National Wildlife Refuge Complex, Nevada, USA*, CULTURAL AND SPIRITUAL VALUES OF PROTECTED AREAS (last visited Apr. 19, 2020), <https://csvpa.org/library/nuwuvi-ancestral-territory/>.

⁵⁹ See Lefler, *supra* note 54, at 165.

⁶⁰ M. KAT ANDERSON, TENDING THE WILD: NATIVE AMERICAN KNOWLEDGE AND THE MANAGEMENT OF CALIFORNIA’S NATURAL RESOURCES 125 (2005); 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*, 48 NAT. RES. J. 585, 594-95 (2008) [hereinafter Nie, *Use of Co-Management*] (“First, tribal governments are sovereign and have inherent powers of self-government. For this reason, there is a unique government-to-government relationship

between hunter-gatherer or agriculturalist is not only false, it is a construct that relegates the Nuwuvi, and tribes like them, to a category that diminishes the relevance of their TEK, which can ultimately justify externally imposed limits on the extent to which they participate in modern wildlife management decisions.⁶¹ As demonstrated over time, the Nuwuvi's relational land practices not only improve the health of the pinyon-juniper woodlands that they depend on to gather nuts and other important sources of sustenance, but their stewardship of this ecosystem improves habitat for wildlife dependent on the woodlands for survival in a harsh desert climate.⁶² Therefore, in a crucial sense, the Nuwuvi's use of TEK to manage pinyon-juniper ecosystems fulfills one of the Endangered Species Act's (ESA) purposes: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,"⁶³ although their process and practice of providing for the conservation of healthy pinyon-juniper ecosystems predates that statute by centuries.

B. Indigenous Environmental and Wildlife Stewardship from the Allotment Era Through 1950

Throughout the nineteenth century, federal governmental officials, including judges, relied on the Locke-Marshall stereotype to justify legal doctrines and rules that had a devastating impact on tribal jurisdiction, cultural integrity, and tribal populations.⁶⁴ Even if modern federal officials do not share those reductive and harmful views, the legal frameworks available to them to support modern tribal wildlife and ecosystem management efforts rely heavily on, and are limited by, modern laws and policies reflecting aspects of those flawed historical foundations.⁶⁵ For instance, Congress's plenary power over Indian Country is derived from the Doctrine of Discovery and the settler-colonial model it established, which although arguably unconstitutional, remains the basis for all statutes Congress passes that affect, regulate, or otherwise ostensibly support tribal environmental protection efforts, including the Clean Water Act (as applied to Indian Country) and the ESA.⁶⁶ The Plenary Power Doctrine emerged in the mid-nineteenth century as a judicial mechanism justifying congressional authority over inter-tribal affairs, intra-tribal affairs, and all

between federally-recognized tribes and the federal government. Several laws, regulations, executive orders, and internal agency management directives make clear how this relationship affects federal land management. I emphasize this point because of the historic tendency of land management agencies to erroneously think about tribes as one of several "stakeholders" or "publics" that must be consulted before an activity takes place."); *See generally* WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (2003) (describing in detail Indigenous ecological practices throughout pre-contact and early colonial New England).

⁶¹ Nie, *supra* note 60, at 594-95.

⁶² *See* Lefler, *supra* note 54, at 60.

⁶³ 16 U.S.C. § 1531(b) (Supp. 1988).

⁶⁴ The United States' policies of allotment, in which the federal government partitioned sovereign tribal lands, and the concomitant forced removal of children to so-called "Indian schools" violate Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. *See* G.A. Res. 3/260 (Dec. 9, 1948).

⁶⁵ Nie, *supra* note 60, at 618-619; *see also* Lefler, *supra* note 54, at 26-27 (noting that despite ethnological emphasis on the Nuwuvi's nomadism, in fact they "planted and irrigated riparian and spring-fed gardens, tended fields of edible grasses, and managed orchards bearing pine nuts and mesquite beans"); JAMES C. SCOTT, *AGAINST THE GRAIN: A DEEP HISTORY OF THE EARLIEST STATES* (2017) (one line of scholarship contending that it was the early agriculturalists who may have suffered more than their nomadic counterparts from nutritional, physical, and infectious diseases).

⁶⁶ Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207-228 (1984) (discussing apex period of Congress's power over Indian Country and Indigenous peoples in mid-to-late-1800s); Hillary M. Hoffmann, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 OR. L. REV. 353, 358-71 (2019).

manner of federal control of the lives and lands of Indigenous peoples, despite the Supreme Court's concession that there was scant constitutional authority supporting it.⁶⁷

Starting with Congress's termination of treaty making in 1871, continuing through the allotment era, when the federal government divested Indigenous nations of the vast majority of their land base, and ending with the boarding school era, when the federal government literally stole the future from many tribes by removing their children and sometimes permanently severing their connections to home and kin, Indigenous nations experienced over a century of physical and cultural genocide. This comprehensive effort by the federal government to eliminate indigenous nations affected tribes' ability to continue traditional environmental stewardship and retain cultural memory like TEK.⁶⁸ Federal laws like the General Allotment Act, which greatly diminished the tribal land base, and the policies of removal, relocation to reservations, and child separation, combined with greater authority of the federal and state governments and the admission of many new states (concomitantly increasing state authority over what was once tribal land) to supplant and suppress tribal sovereignty.⁶⁹ During this time, many tribes lost not only a great number of their citizens, including entire generations during the boarding school era, but also much of their history and cultural knowledge.

Adding insult to injury, the United States Supreme Court recognized Congress's authority to breach treaties unilaterally in 1903,⁷⁰ and stood back as states began reaching into Indian Country via legislation, which had long been prohibited under the rules set forth by Justice Marshall in the early nineteenth century.⁷¹ This federal passivity also violated the duties the federal government had assumed in multitudes of treaties and by way of the antecedent doctrine to the federal trust.⁷² Despite the legislative reversal of the allotment policy in the Indian Reorganization Act in 1934 and the Supreme Court's increasing level of judicial scrutiny of Congress's legislation regarding Indian Country and Indigenous peoples in the twentieth century (impliedly repealing the harmful presumption of "perfect good faith" it had adopted in cases like *Lone Wolf v. Hitchcock*, for instance),⁷³ the core legal doctrines that allowed allotment to happen (such as Plenary Power and the Doctrine of Discovery) remain in place.⁷⁴ Indeed, mere decades after ending allotment and promising the restoration of lands and authority to tribal governments, Congress began to pass acts in the mid-twentieth century "terminating" tribes and authorizing state

⁶⁷ *United States v. Kagama*, 118 U.S. 375, 378 (1886).

⁶⁸ See Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 153 (1996) (noting that "the policies that the federal government pursued during the half century of the allotment era caused damage to tribal cultures on a massive scale"). TEK is often passed on through religious ceremonies and rituals, which many tribes could not practice openly during the reservation era. The United States federal government has only very recently begun the process of addressing the truth of what happened during this era. See Press Release, U.S. Dep't of Interior, Secretary Haaland Announces Federal Indian Boarding School Initiative (June 21, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative>.

⁶⁹ See generally CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* (1987).

⁷⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁷¹ Echo-Hawk, see *supra* note 35, at 161.

⁷² *Id.*; Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 713–14 (1986).

⁷³ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see also Newton, *supra* note 66, at 223.

⁷⁴ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020) (acknowledging Congress's continuing plenary power to abrogate tribal treaty rights).

civil and criminal jurisdiction inside tribal territories.⁷⁵ Although Congress also backed down from the initial aggression towards tribes demonstrated by Public Law 280 and other termination acts, the jurisdictional mess that Congress left behind and the power that it recognized in states during this time created significant obstacles for tribes seeking to preserve their cultural connections to wildlife species through the present day.⁷⁶

The enduring and legally troubling Doctrine of Plenary Power and its statutory progeny overlook not only the precise relationship between Indigenous peoples and their pre-contact environment, but also the nuanced changes to that relationship that resulted from tribal adoption of nomadism and agriculturalism as a likely hedge against starvation, and other sociological pressures.⁷⁷ Upon closer examination, the binary concept of either hunter-gatherer or agriculturalist simply does not begin to describe the breadth and the depth of Indigenous Americans' ancient and sometimes visceral connection to land *as home*, and to "wildlife" as a source of physical and spiritual sustenance.⁷⁸ Reconciling these opposing forces will take some time, but tribes need not wait for that to happen to pursue reintroduction efforts using the TWG Program, for reasons explained more fully below.

III. The Legal Roots of Federal-Tribal and State-Tribal Wildlife Management Frameworks and the Tribal Wildlife Grants Program

A. Tribal Lands and Tribal Legal Authority over Wildlife

The scope of potential wildlife habitat within the 48 contiguous states under the management authority of federally recognized tribes is immense, including 52 million acres in total.⁷⁹ Lands managed by Native Alaskans tribal governments add another 45 million acres.⁸⁰ This astonishing combined landmass of over 97 million acres exceeds the total acreage of either the National Park Service (NPS) system or the National Wildlife Refuge System.⁸¹ Based on the size of this tribal land base alone, federally recognized tribes play a significant role in managing and protecting North American wildlife, particularly those species that traverse jurisdictional boundaries. While some species can be managed within the boundaries of a single reservation, most transit across the lands of one or more tribes, in addition to private, federal and state lands.⁸² For each tribe

⁷⁵ Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 930 (2012).

⁷⁶ HILLARY M. HOFFMANN & MONTE MILLS, *A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION* 154–56 (2020) (explaining bison reintroduction at Ft. Peck Reservation).

⁷⁷ See, e.g., SIMMS, *supra* note 22, at 180–83.

⁷⁸ Robert Winthrop, *Conflicting Perceptions: Tribal and Regulatory Views of Nature, Risk, and Change*, 16 PRAC. ANTHROPOLOGY 25, 28 (1994) (explaining tribal opposition to a ski resort expansion in which tribe and agency could not agree on where to explain tribal impacts of the expansion in the environmental impact statement illustrating the diametrically opposed views of nature—one as home, and one as alien).

⁷⁹ *Background*, NATIVE AM. FISH & WILDLIFE SOC'Y, <https://nafws.org/about-nafws/background> (last visited Apr. 9, 2020).

⁸⁰ *Id.*

⁸¹ GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND & RESOURCES LAW* 26–27 (7th ed. 2014). For some additional perspective, the Bureau of Land Management (BLM) and the National Forest Service (USFS) together manage 438 million acres. *Id.* at 25–26.

⁸² Paul Weiland & Sue Meyer, *Species Conservation on Tribal Lands*, 21 NAT. RES. & ENV'T 28, 30 (2007) (“Needless to say, species do not respect political boundaries, including those that demarcate reservation lands.”). The complexity of creating a management framework that is effective for these types of species is illustrated well by the challenges of saving the greater sage grouse from extinction in the mid-2000s. See generally Peter O.

participating in a wildlife conservation effort or program, the effectiveness of tribal wildlife management authority is significantly complicated by complex and contradictory rulings from the United States Supreme Court regarding the extent of tribal regulatory powers, which often inhibits effective wildlife management by tribes.⁸³

Some of the complexity relates to the general rules regarding sovereignty and the evolving nature of the relationship between tribes and the federal government. Federally-recognized tribes have sovereign powers to manage tribal lands and a formal government-to-government relationship with the United States.⁸⁴ Tribes therefore have general sovereign authority to manage wildlife in Indian Country and some tribes have additional rights with respect to wildlife on ceded lands (once part of the tribe's land base, but sold or deeded to the federal government, with a reservation of usufructuary rights to wildlife in perpetuity or for a period of years).⁸⁵ According to the Supreme Court, tribal sovereignty must serve as the "backdrop" against which the legal relationship between the federal government and tribes is analyzed if questions arise regarding the scope of a tribe's management authority.⁸⁶ Circumstances that complicate the nation-to-nation relationship framework are governance-sharing arrangements arising out of treaty obligations, special jurisdictional rules regarding tribal authority over non-members and non-member-owned fee land on tribal reservations, federal statutes that purport to directly govern tribal wildlife management, and the trust relationship between the federal government and federally recognized tribes.⁸⁷ This complex, constantly evolving sovereign relationship complicates many tribal land or wildlife management decisions involving a federally managed species or its habitat.⁸⁸

Tribal sovereignty manifests in different ways. As sovereign nations, tribes generally possess regulatory authority and jurisdiction over wildlife within their reservation boundaries and they can regulate hunting and fishing and pass conservation laws, as well as adjudicate disputes arising from those laws and regulations.⁸⁹ For example, a tribe seeking to develop a comprehensive reintroduction effort for a species like bison has authority to release bison on reservation lands and manage the herd within the reservation.⁹⁰ Tribes that own or regulate all lands within their reservations are relatively unimpeded by the complex rules of law referenced above, although they might encounter difficulties obtaining the necessary permissions to bring the

Daniels, *Defending Science & Collaborative Conservation: Sage-Grouse & Western Watersheds Project v. Schneider* (D. Idaho 2019), 44 HARV. ENVTL. L. REV. 591 (2020).

⁸³ See *Montana v. United States*, 450 U.S. 544, 557 (1981); see also Wood, *supra* note 6, at 13 (describing the "awkward and seemingly byzantine set of legal mandates" used to manage salmon in the Pacific Northwest).

⁸⁴ Weiland & Meyer, *supra* note 82, at 29.

⁸⁵ Wood, *supra* note 6, at 80-81.

⁸⁶ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

⁸⁷ Nie, *supra* note 60, at 595; Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UT. L.R. 1471, 1496 (1994).

⁸⁸ Compare Nie, *supra* note 60 (explaining the federal trust relationship and its impact on tribal activities on non-trust federal lands in the context of co-management regimes), with Hoffmann, *Congressional Plenary Power*, *supra* note 66, at 358-71 (2019) (examining in detail the fraught—and unconstitutional—basis for congressional plenary power with respect to many aspects of tribal existence, including tribal environmental stewardship).

⁸⁹ This rule is not absolute, though, and the Supreme Court has held that tribes lack inherent sovereign authority over non-member non-Indians in some circumstances. *Montana v. United States*, 450 U.S. 544, 563-64 (1981). However, even if a tribe lacks inherent authority over non-Indians, it may still be possible for the tribe to regulate non-members and non-member-owned fee land under specific statutory delegations, or pursuant to a treaty power. See Hillary M. Hoffmann, *Congressional Plenary Power*, *supra* note 66, at 390.

⁹⁰ HOFFMANN, *supra* note 76, at 154-56 (explaining bison reintroduction at Ft. Peck Reservation).

bison onto the reservations in the first place under restrictions imposed by neighboring states.⁹¹ The federal government can support these efforts by providing funding and technical assistance for tribal conservation and reintroduction efforts, which is reviewed (if challenged) against the backdrop of tribal sovereignty mentioned above.

These basic sovereignty rules are significantly altered for tribes whose reservations were diminished by allotment, the nefarious but effective land dispossession mechanism created by the federal government in the mid-nineteenth century to aid the feverish pace of Euro-American settlement of tribal lands throughout much of what is now the midwestern and western United States.⁹² This policy, accompanied by the equally nefarious Doctrine of Congressional Plenary Power over tribes, presents unique problems for wildlife, natural resources, and environmental regulation involving Indigenous nations on allotted reservations.⁹³ One significant tension exists in the implementation of the major environmental statutes which play an important role in providing adequate habitat for some species.⁹⁴ Tribal self-governance and environmental governance and management often run into the sobering reality that the Supreme Court still recognizes Congress as a paramount governmental authority in Indian Country.⁹⁵ The Supreme Court also still recognizes that Congress possesses significant authority over wildlife that traverses federal, state, and tribal boundaries,⁹⁶ and although Congress can delegate aspects of environmental or natural resources regulatory authority to federal agencies or tribes, that mechanism can present several other legal challenges for tribes seeking to assert the full measure of their sovereign authority in the context of wildlife conservation.⁹⁷

Particularly thorny issues stem from the continued reliance on the legally flawed notion that tribes can be treated as states, an approach that the federal government has employed from time to time to ostensibly support tribal sovereignty without raising the ire of the Supreme Court.⁹⁸

⁹¹ *Id.* at 152.

⁹² *See, e.g.,* *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (“But we think [the U.S. government’s argument that the Indian Commerce Clause provides a constitutional basis for passing the Major Crimes Act] would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”); *Echo-Hawk*, *supra* note 35, at 181.

⁹³ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (“This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties.”).

⁹⁴ Elizabeth Ann Kronk Warner, *Tribes As Innovative Environmental "Laboratories"*, 86 U. COLO. L. REV. 789, 821–31 (2015) (discussing differing tribes’ approaches to water quality regulation, under cooperative federalism structure of Clean Water Act and inherent tribal authority).

⁹⁵ *See McGirt*, 140 S. Ct. at 2462.

⁹⁶ *See Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (affirming congressional authority – through a delegation to U.S. Fish and Wildlife Service – to protect red wolves).

⁹⁷ Hoffmann, *Congressional Plenary Power*, *supra* note 66, at 391–93 (describing several limitations to the tribal-federal environmental governance regime including wanton effects on tribal sovereignty through environmental legislation, non-applicability to non-federally recognized tribes, difficulty for tribes to run the gauntlet of administrative procedures, and the intersection of the general rule—derived from *Montana v. United States*, 450 U.S. 544 (1981)—that tribes presumptively lack inherent civil authority over fee lands in Indian country under certain conditions); *see also* Hillary M. Hoffmann, *The Constitutionality of Federal Regulation in Indian Country*, THE REGULATORY REV. (Mar. 24, 2021), <https://www.theregreview.org/2021/03/24/hoffmann-constitutionality-federal-regulation-indian-country/>.

⁹⁸ *See generally* Warner, *supra* note 94, at 821 (discussing TAS status under federal environmental statutes).

This approach is constitutionally problematic because tribes do not have the same historical or present-day legal relationship with the federal government as states, nor does the Constitution arguably apply directly to tribes in the same way, or to the same degree, as it applies to states. Even if the Indian Commerce Clause could be considered sufficient to support congressional acts regulating wildlife management and other aspects of life in Indian Country, the Constitution does not provide a coherent structure from which to begin to easily define and outline the differences.⁹⁹ Tribes are “extraconstitutional”, domestic sovereigns, whose relationship with the federal government is marked by certain distinctions not shared by states.¹⁰⁰ The federal government, and in particular, the Supreme Court, has never been able to succinctly and permanently describe the tribal role in what is plainly now a legally pluralistic United States.¹⁰¹ Therefore, the line-drawing on a map that might facilitate modern wildlife management, or natural resources management more broadly, has never been entirely clear or permanent, even to the most well-versed scholars of history and federal Indian law.

Most of the analysis of tribal wildlife management potential seems to assume that the legal foundation described above is solid enough to build upon, or ignores the constitutional problems altogether to focus on treaty tribes or tribes with specific, pragmatic concerns.¹⁰² While these approaches might satisfy the urgent pressures that tribes often face in launching wildlife conservation efforts quickly (particularly for species threatened or endangered by acute forces or circumstances), advising tribes to pursue a course of action built upon a legal house of cards has some obvious potential pitfalls. For one, the tension between tribal inherent sovereignty (including authority to manage wildlife on tribal lands, and potentially, treaty-protected wildlife outside tribal lands), the federal trust relationship, and federal and state regulatory authority on tribal lands, has only been partly addressed by the federal courts, and if courts decide to take up even one of those areas and revisit it to any significant degree, the house of cards might fall and the tribe could see its carefully drawn wildlife management framework suffer as collateral damage.¹⁰³ The reason that this federalism house of cards might fall – that it does not respect the true and full legal scope of tribal sovereignty – makes it worthy of serious pause, and to the limited extent that the Supreme Court has analyzed aspects of it, the justices have done so in a way that does not lead easily to bright-line decisions about wildlife management except when treaty rights are involved.¹⁰⁴ Finally, limiting scholarly analysis of tribal wildlife management frameworks to tribes with treaty rights serves only the limited class of tribes who possess those types of (relatively strong) legal rights.¹⁰⁵

⁹⁹ *Id.*

¹⁰⁰ See *United States v. Lara*, 541 U.S. 193, 213 (2004) (Stevens, J., concurring); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & C.L. 45, 55 (2012) (“The text of the Constitution expressly treats Indians and tribes as outsiders.”).

¹⁰¹ Justice Clarence Thomas has repeatedly emphasized the “confusion” that stems from the Supreme Court’s recognition of tribes’ inherent sovereignty, while at the same time recognizing Congress’s plenary authority over tribal governments, tribal lands, and individual tribal members. See *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

¹⁰² See Wood, *supra* note 6, at 73; Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or A Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97, 174 (2008); Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 449 (1998).

¹⁰³ See *Montana v. United States*, 450 U.S. 544, 557 (1981).

¹⁰⁴ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019).

¹⁰⁵ See *e.g.*, Wood, *supra* note 6, at 101-01 (focusing analysis on tribes with treaty rights to natural resources such as salmon).

There has been some analysis of federal support for tribal wildlife management efforts within the context of the federal trust relationship, and although the federal trust seems like a natural source of support for tribal wildlife management efforts, it is not as easy as it might seem for tribes to use it. A somewhat “amorphous” doctrine, the federal trust is “a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes”¹⁰⁶ which is based on the “U.S. Constitution, treaties, statutes, Executive Orders, and other Federal laws.”¹⁰⁷ A trust relationship arises when there is a congressional enactment affecting Indian Country or federally recognized tribes imposing a federal duty or authorizing some federal action, including support for tribal initiatives and programs.¹⁰⁸ Under this doctrine, the federal government must effectuate that responsibility, duty, or relationship acting as a fiduciary would towards a beneficiary. This translates generally to a federal obligation to support tribal reintroduction efforts, particularly for species that are subject to treaty or statutory protections. However, even when federal agencies expressly acknowledge that they owe a federal trust obligation to tribes undertaking wildlife conservation efforts, which does not always translate into immediate or effective federal assistance for tribes.¹⁰⁹ In a few famous cases, it took tribes several decades to enforce the federal trust obligation against recalcitrant federal agencies.¹¹⁰

In addition to the core legal and structural challenges of doctrines like the federal trust, there are some pitfalls that have arisen in specific circumstances worthy of brief mention as well. Some reservations and other land bases are shared by multiple tribes, which requires wildlife reintroduction efforts to be carefully negotiated between the tribes sharing regulatory authority over the reservation.¹¹¹ Also, tribes that experienced allotment to any degree face particularly burdensome challenges in attempting to reintroduce and manage wildlife, due to the fractured land tenure arrangements that resulted.¹¹² One of the foundational opinions analyzing inherent tribal sovereignty in the modern era, *Montana v. United States*, involved a heavily allotted reservation and the Crow Nation’s attempts to manage fish and wildlife through a tribal regulation that applied to all lands (and all hunting and fishing on those lands) within the reservation boundaries.¹¹³ Crow Nation Tribal Resolution 74-05 prohibited non-members from hunting or fishing within the exterior boundaries of the reservation,¹¹⁴ and upon its adoption, alarm bells rang in the halls of the Montana state government, which had claimed authority to regulate hunting and fishing by non-members on the Crow reservation since the 1920s.¹¹⁵

The basis for the State’s claim of regulatory authority within the Crow Nation was the extent of fee land located within the exterior boundaries of the reservation as a result of extensive allotment, constituting roughly 28 percent of the reservation land base.¹¹⁶ In a severely constrained

¹⁰⁶ *Id.*; U.S. DEP’T OF INTERIOR, SECRETARIAL ORDER # 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, 1 (2014).

¹⁰⁷ *Id.*

¹⁰⁸ Routel & Houlth, *infra* note 301, at 417.

¹⁰⁹ See Wood, *supra* note 6, at 77.

¹¹⁰ *Id.* (citing *United States v. Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981) (Columbia River treaty fishing rights); *United States v. Washington*, 384 F. Supp. 312, 327 (W.D. Wash. 1974) (Puget Sound treaty fishing rights)).

¹¹¹ *The Story of Bison and Native Americans of Wind River Country*, WIND RIVER VISITORS COUNCIL (Nov. 19, 2019), <https://windriver.org/bison-and-native-americans-wind-river/> (discussing process for Eastern Shoshone and Northern Arapaho agreement on bison reintroduction to shared reservation).

¹¹² *Montana v. United States*, 450 U.S. 544, 557 (1981).

¹¹³ *Id.* at 547.

¹¹⁴ Brief for the Petitioners, *Montana v. United States*, (1980) (No. 79 1128) 1980 WL 339348, at 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 548–49.

interpretation of the treaties guaranteeing the Crow Tribe the “absolute and undisturbed use and occupation” of its reservation lands, the Supreme Court held that the Tribe lacked authority to prohibit non-members from hunting or fishing on fee lands within the reservation, while recognizing that the Tribe did have the authority to regulate hunting and fishing on non-fee lands within the reservation.¹¹⁷ Because the Crow Reservation is severely “checkerboarded,” with an alternating pattern of fee land (roughly 28 percent of the total) and tribal land (roughly 69 percent of the total), the result of the *Montana* holding is that the State of Montana may possess regulatory authority over much of the reservation (although this matter has not been definitively resolved by the Supreme Court).¹¹⁸ This uncertainty makes wildlife management exceedingly complex if the state and the tribe do not share the same wildlife management goals.¹¹⁹

In addition to the specific complications that arise on allotted reservations, many states have consistently (and in some cases, aggressively) sought to regulate hunting and fishing on tribal land. Two notable examples include the Arizona Department of Game and Fish, which attempted to impose state wildlife licensing and regulatory requirements on non-member sport hunters and anglers within the White Mountain Apache Reservation¹²⁰ and the New Mexico Department of Game and Fish, which sought to enforce state hunting and fishing regulations against non-members within the Mescalero Apache Reservation.¹²¹ In the former case, the White Mountain Apache Tribe was forced to sue the state in federal district court to enjoin enforcement of the state laws on tribal lands, where the case was ultimately consolidated with a nearly identical one involving the Confederated Tribes of the Colville Reservation (nine separate tribes recognizing one confederated government and sharing one reservation in what is now Washington state) and its own attempts to fend off a similar set of requirements imposed by the State of Washington.¹²² The White Mountain Apache Tribe marketed sport hunting and fishing opportunities to non-members, so the hunters and anglers would pay the Tribe for licenses to take fish and game from tribal lands, and the Tribe and their members would benefit financially from the license fees, as well as the ancillary economic benefits brought about by the sport fishing and hunting.¹²³ This was very similar to the arrangement on the Mescalero Apache Reservation, where the Tribe had worked with the Secretary of Interior and various federal agencies over a decade, constructing lakes and stocking them with fish, translocating elk, and developing sustainable populations of bear, deer, and antelope.¹²⁴

In *White Mountain*, the Ninth Circuit’s analysis of the validity of Washington’s and Arizona’s licensing requirements and other regulations of the non-members’ on-reservation activities turned on a preemption analysis, which required the court to examine the federal, state, and tribal regulations and “interests at stake” and determine whether the challenged state authority

¹¹⁷ *Id.* at 557.

¹¹⁸ Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions*, 15 YALE J. HEALTH POL'Y, L. & ETHICS 251, 271 (2015).

¹¹⁹ See Shaylee Ragar, *Bison Ignite Debate over Future Movement, Expansion in Montana*, MISSOULA CURRENT (Mar. 25, 2019), <https://missoulacurrent.com/outdoors/2019/03/bison-montana/>.

¹²⁰ *White Mtn. Apache Tribe v. State of Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981).

¹²¹ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329 (1983).

¹²² *White Mtn. Apache Tribe*, 649 F.2d at 1277.

¹²³ *White Mountain*, 649 F.2d at 1277 (noting federal role in wildlife management on both reservations as well, given that United States Fish and Wildlife Service stocked tribal lakes and rivers with fish to support on-reservation sport fishing.).

¹²⁴ *Mescalero Apache*, 462 U.S. at 328.

violated federal law.¹²⁵ Yet, unlike a traditional preemption analysis, which requires a court to examine the laws' effects, the tribal preemption analysis requires the court to conduct a thorough analysis of the historical and legal context that gave rise to the tribal exercise of authority.¹²⁶ In this case, the court noted that "for historical and cultural reasons[,] Indians have a special interest in preserving and exploiting the fish and game within reservation boundaries, and the federal government has a corresponding policy to advance that interest."¹²⁷ Even though the court recognized these special interests of the Tribes, it also noted that comprehensive tribal hunting and fishing regulations do not automatically preempt conflicting state laws.¹²⁸ This is because, according to the court, states sometimes have "valid" interests in preserving and regulating wildlife on tribal lands.¹²⁹ Therefore, a finding of preemption turns on application of the "tricorned particularized inquiry" into the state, federal, and tribal interests at stake.¹³⁰ In *White Mountain*, the Ninth Circuit found that the state had a strong interest in conserving wildlife on tribal lands, even if the species subject to the regulation was reintroduced to support on-reservation hunting and fishing (as opposed to being an extant population of a species that the state had traditionally participated in conserving).¹³¹ This state interest is strongest when wildlife migrate from state lands onto tribal lands, and vice versa.¹³² The Ninth Circuit concluded that, for the stocked fish species subject to the tribal regulations at issue in *White Mountain*, nondiscriminatory state laws regulating non-member fishing were valid.¹³³

In the nearly identical case involving the Mescalero Apache Tribe, the Supreme Court came to the opposite conclusion from the Ninth Circuit on preemption.¹³⁴ In the *Mescalero* case, the Tenth Circuit had ruled that the "comprehensive" regulatory scheme the Tribe established to regulate hunting and fishing of the introduced populations of fish and game, approved by the Secretary of the Interior (as required by the Tribe's Indian Reorganization Act Constitution), preempted the New Mexico hunting and fishing regulations which the state had attempted to enforce on the reservation.¹³⁵ The Supreme Court agreed, noting the long history of Indian Reorganization Act-derived secretarial approval of the Tribe's various natural resources development efforts and extent to which the Tribe had used that authority over decades to establish a game hunting and recreational fishing economy, furthering the Tribe's economic self-determination.¹³⁶

¹²⁵ *White Mountain*, 649 F.2d at 1281.

¹²⁶ *Id.* at 1278.

¹²⁷ *Id.* at 1281. Indeed, many tribes have adopted fairly comprehensive regulations of hunting and fishing on tribal lands. See Menominee Nation Tribal Code, § 287-9.

¹²⁸ *White Mountain*, 649 F.2d at 1281.

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

¹³¹ *Id.* at 1283 ("The weight of the state conservation interest depends in large part, however, on the extent to which fish and game migrate across reservation boundaries. ... [I]f the fish and game are migratory, the state interest becomes quite powerful. States have an obvious interest in conserving animals which, if protected, would move off reservations onto state lands; moreover, states have an interest in animals that migrate from state lands, where they survive by virtue of the states' conservation efforts, onto reservations.").

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983).

¹³⁵ *Id.* at 342.

¹³⁶ *Id.*

Although *White Mountain* seemingly bodes poorly for tribes facing aggressive state encroachment through allegedly non-discriminatory state laws reaching onto tribal lands,¹³⁷ *Mescalero* assuages some of those concerns.¹³⁸ There is also an alternative basis for tribes seeking to invalidate the use of state authority on tribal lands, which is the Doctrine of Infringement.¹³⁹ Since 1959, the Supreme Court has held that states may not infringe on tribal sovereignty without congressional authorization.¹³⁴ Many tribes have used the Infringement Doctrine as an argument against state wildlife management laws purporting to regulate hunting and fishing on tribal lands, with some success, except in limited circumstances involving non-member non-Indians.¹³⁵ In limited cases, such as those involving non-member non-Indians seeking to purchase hunting and fishing licenses or permits to hunt or fish on tribal lands, courts have held that states can also require these individuals to purchase a state license pursuant to state hunting and fishing laws.¹⁴⁰ However, although the application of any state law to activities on reservations is problematic from the perspective of tribal sovereignty, the types of state laws that court have upheld largely supported tribal wildlife conservation efforts, rather than undermining them.¹³⁶

It is also worth noting, finally, that tribes have faced off-reservation challenges to reintroduction efforts that have proven formidable. One example is that faced by the Assiniboine and Sioux Tribes of the Ft. Peck Reservation, who sought to reintroduce bison to their homelands from the last remaining population of wild bison (residing in Yellowstone National Park) starting in the early 2000s.¹⁴¹ Because the Tribes knew that the National Park Service had to cull a certain number of bison every year to prevent overcrowding in Yellowstone, and to minimize conflicts with and threats to Montana's livestock industry, they devised a mutually beneficial solution (addressing the Park Service's need to reduce the herd and the Tribes' desire to reintroduce bison to the Reservation) to transport the "surplus" Yellowstone bison to the Fort Peck reservation. This saved the bison from being culled and reintroduced a species that was an essential component of the prairie ecosystem on the reservation prior to the influx of white settlement in Montana in the nineteenth century.¹⁴² The Montana Department of Fish, Wildlife and Parks (DFWP) complicated this plan through its requirement that all bison designated for transport to Fort Peck must undergo a pre-transfer quarantine to determine whether they were free of any infectious diseases that might

¹³⁷ Subsequently, the Supreme Court issued several cases that recognize and increase the scope of inherent tribal sovereignty. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding treaty-guaranteed, off-reservation usufructuary rights not impliedly abrogated by enabling act); *Washington v. United States*, 138 S. Ct. 1832 (2018) (per curiam) (affirming Ninth Circuit ruling that state violated treaty terms guaranteeing tribe "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory" when state installed culverts restricting fish migration); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) (holding state importation tax as applied to Indigenous-owned fuel transport company using state highways to bring fuel to reservation violated treaty term guaranteeing to tribe "right, in common with citizens of the United States, to travel upon all public highways"); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding Congress can disestablish or diminish treaty-guaranteed reservation only by clear and explicit terms); *United States v. Cooley*, 141 S. Ct. 1638 (2021) (holding tribal police officer could detain nonmember in Indian Country – as an extension of tribal inherent sovereignty over reservation lands - where officer believed nonmember's activity threatened the health and welfare of tribe). The *White Mountain* footnotes are confusing because there are a couple of cases with "White Mountain" in the beginning. Here, it is unclear which case is noted.

¹³⁸ *Mescalero Apache*, 462 U.S. at 342.

¹³⁹ Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 777 (1984).

¹⁴⁰ *Id.*

¹⁴¹ HOFFMANN, *supra* note 76, at 153.

¹⁴² *Id.* at 151.

infect off-reservation cattle populations.¹⁴³ In addition, non-Indigenous ranchers opposed the transfer and filed a lawsuit seeking to enjoin it.¹⁴⁴ According to the plaintiffs in that suit, DFWP was required to engage in an extensive planning and analysis process, including taking public comments and studying the carrying capacity of the lands before transferring any animals. Ultimately, the litigation reached the Montana Supreme Court, which, after reviewing the terms of the state statute on which the trial court relied, unanimously determined that no state law applied to transfers of bison to tribal lands (as opposed to “public or private land” as stated in the statute).¹⁴⁵ Instead, DFWP was free to enter into the agreements with the Tribes to transfer bison without complying with the state’s procedural requirements.¹⁴⁶

Despite that initial victory, significant hurdles remained for the Fort Peck Tribes. In 2021, nearly nine years after they initially sought to reintroduce bison to the Reservation, the Tribes had received only 104 bison in four separate transfers, even though hundreds more were slaughtered outside Yellowstone during that time.¹⁴⁷ In 2014, the bison transferred in the second herd grouping had been allowed to move across the state only because they were from the herd that was initially quarantined before the first transfer.

These examples of successes and obstacles tribes have faced in their efforts to reintroduce wildlife highlight some of the benefits of tribal reintroduction initiatives, as well as some of the major pitfalls to avoid. The latter are not all avoidable, which is important to note, because of the legal constraints imposed by the Supreme Court in the *Montana* case and its progeny. So, even if tribes can procure funding and support through the TWG Program, that might not mean that they can avoid the legal hurdles identified above. Also, tribes may wish to partner with state or federal agencies for the sole purpose of avoiding the type of scenario that befell the Tribe in the *White Mountain* case. However, partnerships and collaborative management frameworks can require tribes to compromise on the method, means, and structure of reintroduction efforts, which may impact the degree to which the tribe and its members benefit from the overall reintroduction process. Tribal reintroduction using the TWG Program and its “no-strings-attached” funding support does not require these types of compromises, making it an attractive option for many tribes seeking to reintroduce species for reasons specific to a tribe’s history, culture, and values. Finally, if tribes so choose, they can use the funding to develop tribal wildlife protection laws, which in turn, reflects their inherent sovereignty over their lands and natural resources.

B. The Tribal Wildlife Grant Program – Legal Framework and History

Into the milieu of laws and doctrines explained above, and to very little fanfare, emerged a federal initiative called the State and Tribal Wildlife Grant Program.¹⁴⁸ Congress created the TWG Program as part of the State Wildlife Grants Program,¹⁴⁹ under the provisions of both the Fish and

¹⁴³ *Id.* at 153.

¹⁴⁴ *Id.* at 154 (citing § 87-1-216).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *104 Bison Relocated to Fort Peck Reservation*, DEFENDERS OF WILDLIFE (June 24, 2020),

<https://defenders.org/newsroom/104-yellowstone-bison-relocated-fort-peck-reservation#:~:text=After%20today%2C%20104%20bison%20will,to%20tribal%20led%20restoration%20efforts.>

¹⁴⁸ Act of Nov. 5, 2001, Pub. L. No. 107–63, 115 Stat. 414, 422.

¹⁴⁹ *Id.* Congress also created a now defunct program called the Tribal Landowner Incentive Program, an offshoot of the Landowner Incentive Program, in which federal grant money went toward buttressing private landowner conservation efforts. The Tribal Landowner Incentive Program has not been funded since 2008. TRIBAL

Wildlife Act of 1956 and the Fish and Wildlife Coordination Act.¹⁵⁰ Congress authorized funding for the Program using revenues from the Land and Water Conservation Fund.¹⁵¹ Unlike the State Wildlife Grant Program, which based fund distribution on a formula combining the geographical size of the state, its population, and the completion of a wildlife action plan.¹⁵² Congress contemplated from the beginning that the TWG would be a competitive grant program.¹⁵³ The United States Fish and Wildlife Service (the Service) subsequently implemented an application process in which it selects about 25 proposals from approximately 100 or so applications.¹⁵⁴ Congress initially funded the program with “\$5,000,000 . . . for a competitive grant program for Indian tribes.”¹⁵⁵ According to the 2020 TWG application materials, the Service has distributed about \$94 million dollars to 456 tribal projects since 2003.¹⁵⁶ Notably, though the implementing legislation referred to “Indian Tribes,” the Service determined that only federally recognized tribes are eligible to receive TWG Program funding.¹⁵⁷

The House Committee on Appropriations initially declared that the purpose of the TWG program was to “support cooperative efforts with tribes to address critical wildlife needs, including, but not limited to, wildlife management and habitat restoration projects.”¹⁵⁸ In practice, tribes may put the funds to an extraordinarily wide array of uses.¹⁵⁹ Tribes may use the funds to prepare environmental reviews¹⁶⁰ and permit reviews under Section 404 of the Clean Water Act¹⁶¹ so long as the review is directly related to the grant program.¹⁶² Moreover, tribes can propose projects that take place off tribal trust lands subject to either a valid contract with the landowner or retained treaty rights.¹⁶³ However, tribes may not use the TWG funds to complete a biological opinion pursuant to the ESA’s consultation requirements or, indeed, any other mitigation scheme

LANDOWNER INCENTIVE GRANT PROGRAM – OVERVIEW, U.S. FISH WILDLIFE SERV.,
<https://www.fws.gov/wsfrprograms/Subpages/GrantPrograms/TLIP/TLIP.htm> (last visited May 9, 2020).

¹⁵⁰ 16 U.S.C. §§ 742a–j, 661–667e.

¹⁵¹ H.R. REP. NO. 107–103, at 38 (2001).

¹⁵² *Id.* (“The fiscal year 2002 funds are to be distributed to States and territories through a formula that is based 30 percent on land area and 70 percent on population.”).

¹⁵³ *Id.* at 39.

¹⁵⁴ *See, e.g.*, NOFO FY 2020, *infra* note 167.

¹⁵⁵ Act of Nov. 5, 2001, Pub. L. No. 107–63, 115 Stat. 414, 422.

¹⁵⁶ NOFO FY 2020, *infra* note 167.

¹⁵⁷ *Id.* The Service points to the Bureau of Indian Affairs’ most current notice of federally recognized tribes in the Federal Register. United States Department of the Interior, Fish and Wildlife Service, Tribal Wildlife Grants Program Fiscal Year 2020 Notice of Funding Opportunity (2020), <https://www.fws.gov/nativeamerican/pdf/FY2020-TWG-NOFO-Application-Package.pdf>.

¹⁵⁸ H.R. REP. NO. 107–103, at 39 (2002).

¹⁵⁹ For a list of projects from 2007–2012 *see* U.S. FISH WILDLIFE SERV., SUMMARY OF PROJECTS SUPPORTED BY U.S. FISH & WILDLIFE SERVICE: TRIBAL WILDLIFE GRANTS PROGRAM (2007–2012) (2013), <https://www.fws.gov/nativeamerican/pdf/twg-projects-summary-2007-2012.pdf>. For a list of projects awarded in 2019 *see* U.S. FISH & WILDLIFE SERV., FY 2019 AWARDS FOR TRIBAL WILDLIFE GRANTS (2019), <https://www.fws.gov/nativeamerican/pdf/FY2019-TWG-Award-List.pdf> for a list of projects awarded in 2019.

¹⁶⁰ *Id.*

¹⁶¹ 33 U.S.C. §§ 1251 *et seq.*

¹⁶² NOFO FY 2020, *infra* note 167 (“TWG Program funds may be used to conduct environmental reviews, habitat evaluations . . . and other environmental compliance activities only when they are directly related to the proposed project and are indicated in the proposal application.”).

¹⁶³ *Id.* (“Projects may be proposed on lands other than those that are held in Tribal trust status. For projects that propose to conduct work off of trust lands, the Service requires assurance that, if awarded, the recipient has permission to conduct the activities proposed through a contract with the landowner. A contract would not be required where a Tribe retains treaty rights so long as the proposed activities are pursuant to those treaty rights.”).

in which the tribe or a government entity may bear responsibility under the ESA.¹⁶⁴ Finally, the Service limits annual TWG grants to \$200,000 per tribe.¹⁶⁵

The Program aims to “provide technical and financial assistance for the development and implementation of programs that benefit fish and wildlife resources and their habitat, including species that are not hunted or fished.”¹⁶⁶ Thus far, most of the emphasis has apparently been on providing financial, rather than technical assistance. After Congress initially appropriated five million dollars for the program in 2002, the appropriations have held relatively steady every year since.¹⁶⁷ Interestingly, the TWG Program seems to have received significantly less attention than the State Wildlife Grant Program, under which states receive funding for wildlife management in exchange for creating state wildlife action plans.¹⁶⁸ The funding disparities between the programs are also notable, even taking into account the relative difference in tribal and state land bases, with tribes receiving sometimes as little as ten percent of the funding states obtain.¹⁶⁹

The Service has no specific requirement that tribes use the funds to manage particular species. The Service also publishes a non-exhaustive list of possible qualifying project types, and the range is quite broad.¹⁷⁰ Projects can implement conservation actions, or merely plan them.¹⁷¹ Projects can involve research or historical studies.¹⁷² Projects can map habitat or restore species.¹⁷³ Projects can involve formal conservation plans,¹⁷⁴ or they can simply gather information.¹⁷⁵ Interestingly, in the period between 2007 and 2012, only one project involved TEK as disclosed

¹⁶⁴ *Id.* (“TWG Program funds cannot be used to conduct activities to comply with a Biological Opinion or for mitigating fish or wildlife habitat losses, where the obligation to mitigate is incurred by the Service, another Federal agency, Tribe, State agency, or private entity, nor may the value of property purchased be used for similar purposes, with only one exception. Only activities to mitigate or compensate for TWG Program-funded activities, or that are necessary to secure permits or approval of those activities, are allowable.”).

¹⁶⁵ *Id.*

¹⁶⁶ U.S. FISH & WILDLIFE SERV., TRIBAL WILDLIFE GRANT AND LANDOWNER INCENTIVE PROGRAM PERIODIC REPORT (2006), <https://www.fws.gov/nativeamerican/pdf/twg-incentive-program-periodic-report-2006.pdf> (last visited May 9, 2020). As of 2021, there are 574 federally recognized tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 29, 2021).

¹⁶⁷ U.S. DEP’T OF THE INTERIOR, FISH & WILDLIFE SERV., TRIBAL WILDLIFE GRANT PROGRAM FISCAL YEAR 2020 NOTICE OF FUNDING OPPORTUNITY (2020) [hereinafter NOFO FY 2020], <https://www.fws.gov/nativeamerican/pdf/FY2020-TWG-NOFO-Application-Package.pdf> (describing that for the program’s 17-year history, Congress has appropriated about \$94 million in total).

¹⁶⁸ The authors can find no previous scholarship examining the TWG Program, although there are several articles that explore the state equivalent. See Robert B. Keiter, *Toward A National Conservation Network Act: Transforming Landscape Conservation on the Public Lands into Law*, 42 HARV. ENV’T. L. REV. 61, 84 (2018); Jessica B. Wilkinson, Robert Bendick, *The Next Generation of Mitigation: Advancing Conservation Through Landscape-Level Mitigation Planning*, 40 ENV’T. L. REP. NEWS & ANALYSIS 10023 (2010).

¹⁶⁹ For example, for FY 2020, Congress appropriated \$5.2 million to the Tribal Wildlife Grant Program and \$51.1 million to the State Wildlife Grant Program. *Id.*; see also DEP’T OF THE INTERIOR, FINAL APPORTIONMENT OF STATE WILDLIFE GRANTS FOR FISCAL YEAR 2020, https://www.fws.gov/wsfrprograms/Subpages/GrantPrograms/SWG/SWG_Funding.htm (last visited May 6, 2020).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

in publicly-available materials.¹⁷⁶ In the period between the program's inception in 2003 and 2006, the Service did not report any project incorporating TEK, although it is certainly possible that tribes used TEK to manage reintroduced species without reporting it to the Service.¹⁷⁷

The range of funded projects is extraordinarily diverse, and only a portion of the funded projects target threatened, endangered, or extirpated species. For example, the Twenty-Nine Palms Band of Mission Indians of Southern California received more than \$200,000 in 2003—the first of year of the program—to conduct a comprehensive flora and fauna survey of the Old Woman Mountains Preserve in southern California.¹⁷⁸ This area of significance to the Tribe, which was faced with constant development pressure as the population of California's "Inland Empire" (the area including San Bernardino, Imperial, and Riverside Counties) grows.¹⁷⁹ It was critical to the Tribe that the diversity of species in the Old Woman Mountains was documented so the Tribe could know what was being risked with each development proposal.¹⁸⁰ In 2004, the Iowa Tribe of Oklahoma secured \$250,000 to complete a bald eagle aviary,¹⁸¹ and in 2007, the Seneca Nation of New York received just less than \$200,000 to create a digital habitat map surveying all species of wildlife occupying three counties in New York State.¹⁸²

Several tribes have used the grant award to reintroduce and manage sensitive species. In addition to the several projects explored in depth below, the Blackfeet Nation used a \$212,050 grant to reintroduce the sharp-tailed grouse, or prairie chicken, which was extirpated on the reservation by 1978.¹⁸³ In 2003, the Lower Brule Sioux Tribe reintroduced the swift fox and the black-footed ferret on the reservation.¹⁸⁴ But the early years of the swift fox reintroduction program on the reservation were disappointing, with nearly half of the 45 translocated foxes dying.¹⁸⁵ Indeed, by 2008, the Tribe halted the program due to an excessively high mortality rate and an inability to locate individuals within the region after release.¹⁸⁶ The failure of the initial

¹⁷⁶ The Forest County Potawatomi Tribe in Wisconsin received \$197,079 to incorporate TEK with respect to plant life within the broader context of a biodiversity inventory. SUMMARY OF PROJECTS: TRIBAL WILDLIFE GRANTS PROGRAM (2007–2012), *supra* note 159.

¹⁷⁷ U.S. FISH & WILDLIFE SERV., TRIBAL WILDLIFE GRANT AND LANDOWNER INCENTIVE PROGRAM PERIODIC REPORT (2006), <https://www.fws.gov/nativeamerican/pdf/twg-incentive-program-periodic-report-2006.pdf> (last visited May 9, 2020).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 5. According to Tribal Chairman Dean Mike, "We are afraid that the wild desert lands that were home to our ancestors will one day be lost. It's important we know what we have. It is important that we do what we can do to leave for our children what our old people passed on to us. Knowing what we have is the first step in understanding what must be done." *Id.* Upon completion of the two-year long survey, the Tribe had documented "[a]n abundance of life on the preserve: 237 plant species, representing 35 percent of all plant families in California; 82 percent of the snakes, lizards, amphibians, and tortoises that could potentially occupy the area, including evidence of recent use of the preserve by the Federally-listed desert tortoise; 70 percent of the mammals that could potentially be found on the site, along with 81 species of birds, including 60 neotropical migratory species." *Id.*

¹⁸¹ *Id.*

¹⁸² SUMMARY OF PROJECTS: TRIBAL WILDLIFE GRANT PROGRAM (2007–2012), *supra* note 159.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ SOUTH DAKOTA DEP'T GAME, SWIFT FOX CONSERVATION TEAM: REPORT FOR 2005-2006 (2007) ("Mortalities are investigated to determine cause of death. To date we have confirmed 12 coyote-caused mortalities, four by vehicle strike, and three from unknown causes (19 total). Estimated six-month survival rate is 47.2%.")

¹⁸⁶ World Wildlife Fund & Montana Department of Fish, Wildlife and Parks, Swift Fox Conservation Team: Report for 2009-2010 (2011), https://www.americanprairie.org/sites/default/files/WWF-SwiftFoxReport_2010.pdf. To better understand the overall TWG Program, one of the authors filed a Freedom of Information Act (FOIA) request with the Service with respect to information regarding five grant award projects from FY 2019. To date, the Service

Lower Brule Sioux attempt has not deterred other plains tribes from reintroducing swift foxes. The Fort Belknap Reservation tribes are launching a five-year swift fox release program in 2020 as part of a collaborative effort with private nonprofit organizations.¹⁸⁷

In brief, the TWG Program provides federally recognized tribes with significant financial resources to implement a wide variety of programs aimed at improving wildlife habitat in and around Indian Country. The Program also helps tribes realize some of the potential of their inherent sovereignty, free from federal oversight and state intermeddling, as it places relatively few restrictions on tribes regarding project purpose and method of implementation. As laid out below, tribes can avail themselves of the opportunity for regulatory primacy under the TWG Program, if they do not require or want the assistance of federal and state agencies, freeing them to design and implement reintroduction frameworks that suit tribal goals and reflect tribal values in the reintroduced species.

IV. Modern Examples of Tribes Using the TWG Program to Reintroduce Wildlife in and Near Indian Country

To understand the potential for the TWG program to support tribally designed and implemented wildlife reintroduction and management efforts, as well as to illustrate some challenges that tribes have faced, the sections that follow explain several recent projects funded under the Program. These include efforts to reintroduce species of cultural, ecological, and historical significance to the tribes, many of which can be labeled “successes” as of 2021.

A. Desert Bighorn Sheep Reintroduction Efforts

Bighorn sheep were once somewhat prolific in the United States, occupying ranges as far east as Nebraska and the Dakotas, south to Texas and New Mexico, and throughout California, Nevada, Idaho, Utah, Oregon, and Washington.¹⁸⁸ As of the end of the twentieth century, there were 340 individual bighorn populations in the United States, dispersed across fourteen states and containing approximately 42,700 individuals.¹⁸⁹ Bighorns will settle in every type of arid habitat, from mountainous regions to drought ridden deserts, and “due to the diverse ecosystems that bighorn sheep continually use for habitat, their movement across those ecosystems can be influenced by direct and indirect human and animal intervention factors.”¹⁹⁰ There are four subspecies of bighorn sheep: desert bighorns, peninsular desert bighorns, Rocky Mountain bighorns, and Sierra-Nevada bighorns, distinguished by geographic location and “morphometric and genetic evidence.”¹⁹¹ Between 2008 and 2011, the Nez Perce Tribe benefited from two \$200,000 grants,

has not disclosed the requested information. However, in the following subsections, background information for each project is presented to the extent currently available.

¹⁸⁷ *Tribes Begin Five-Year Swift Fox Reintroduction at Fort Belknap*, Smithsonian National Zoo & Conservation Biology Institute (Sept. 23, 2020), <https://nationalzoo.si.edu/news/tribes-begin-five-year-swift-fox-reintroduction-fort-belknap>.

¹⁸⁸ Frank “Patxi” Larrocea-Phillips, *Idaho Wool Growers Association v. Vilsack: A Public Lands Decision That Could Be Tiered to Work for Other Federal Agencies*, 53 IDAHO L. REV. 479, 489–90 (2017).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Peninsular Desert Bighorn Sheep, [https://wildlife.ca.gov/Conservation/Mammals/Bighorn-Sheep/Desert/Peninsular#:~:text=The%20penisular%20population%20of%20desert,is%20federally%20listed%20as%20endangered;https://www.nwf.org/Educational-Resources/Wildlife-Guide/Mammals/Bighorn-Sheep#:~:text=The%20latest%20science%20shows%20that,sheep%20\(Ovis%20canadensis%20nelsoni\)](https://wildlife.ca.gov/Conservation/Mammals/Bighorn-Sheep/Desert/Peninsular#:~:text=The%20penisular%20population%20of%20desert,is%20federally%20listed%20as%20endangered;https://www.nwf.org/Educational-Resources/Wildlife-Guide/Mammals/Bighorn-Sheep#:~:text=The%20latest%20science%20shows%20that,sheep%20(Ovis%20canadensis%20nelsoni)) (last visited July 16, 2021).

whose purpose was part of a larger effort to manage desert bighorn on the Salmon River corridor through Hells Canyon along the Oregon-Idaho border.¹⁹² The partnership—called the Salmon River Desert Bighorn Project—included Idaho Department of Fish and Game, the Forest Service, and BLM.¹⁹³ Desert bighorns in the region suffer, as do other bighorn populations, from diseases borne by domestic sheep whose grazing ranges overlap with bighorn habitat.¹⁹⁴ They are also one of the most highly prized big game species for trophy hunters. Despite these challenges, the Salmon River bighorn herd has been managed in a way that has maintained the population to the present day, relying in part on TWG Program funds.¹⁹⁵

Another tribe made national news headlines in early 2020 when it released 21 individual desert bighorn sheep into the mountains surrounding the endorheic Pyramid Lake, a remnant of the Pleistocene Lake Lahontan.¹⁹⁶ The release was the result of a \$200,000 grant award from the Service to the Pyramid Lake Paiute Tribe,¹⁹⁷ whose reservation had once been home to a thriving bighorn population, which was eradicated over time due to non-Indigenous settlement, diseases and overhunting.¹⁹⁸ The Nevada Department of Wildlife estimates that the desert bighorn population reached its lowest point in 1960.¹⁹⁹ Before the sheep were extirpated from the homelands of the Pyramid Lake Paiute, the Tribe depended on them for sustenance and as a source from which to make clothing items.²⁰⁰ The tribe's TEK reflects that bighorn sheep are represented in petroglyphs in the area, and that sheep bones were found in ancient fire pits.²⁰¹

The 2019 TWG Program grant to the Pyramid Lake Paiute for the bighorn sheep reintroduction effort includes three years of radio collar monitoring to obtain movement data to

¹⁹² SUMMARY OF PROJECTS: TRIBAL WILDLIFE GRANT PROGRAM (2007–2012), *supra* note 159 (detailing the 2008 award, “Restoration of Bighorn Sheep and Habitat along the Main Stem Salmon River,” which initiated “a five year project to gather important research and support effective management and restoration of bighorn sheep in the Salmon River canyon. Also, detailing the follow-up 2011 study, “Restoration of Bighorn Sheep Populations and Habitats along the Salmon River,” which “will continue the Tribe’s ongoing Restoration Initiative by supporting tribal leadership participation in federal agency NEPA land management policy reviews for the protection of bighorn sheep habitat within the Salmon River.”).

¹⁹³ *Salmon River Desert Bighorn Project*, W. ASS’N FISH & WILDLIFE AGENCIES (2014), https://www.fishwildlife.org/application/files/1815/1673/0803/2014_-AFWA-AnnualReport.pdf; *see also* Jennifer Bruns, *Bighorn Sheep Capture Planned in Hells Canyon*, IDAHO DEP’T FISH & GAME (Feb. 14, 2019), <https://idfg.idaho.gov/press/bighorn-sheep-capture-planned-hells-canyon> (reporting continuing efforts by stakeholders to ensure the Hells Canyon bighorn population remains healthy and viable).

¹⁹⁴ *Salmon River Desert Bighorn Project*, W. ASS’N FISH & WILDLIFE AGENCIES, *supra* note 191.

¹⁹⁵ Bruns, *Bighorn Sheep Capture Planned in Hells Canyon*, *supra* note 191.

¹⁹⁶ Jeff Munson, *22 Bighorn Sheep to be Reintroduced to Pyramid Lake Range*, CARSONNOW.ORG (Jan. 13, 2020), <https://www.carsonnow.org/story/01/13/2020/bighorn-sheep-re-introduced-pyramid-lake-range>.

¹⁹⁷ *Id.*

¹⁹⁸ Kalen Goodluck, *Pyramid Paiute Tribe Reintroduces Bighorn Sheep on Tribal Lands*, High Country News (Feb. 13, 2020), <https://www.hcn.org/issues/52.3/indigenous-affairs-wildlife-the-pyramid-lake-paiute-tribe-reintroduces-bighorn-sheep-on-tribal-lands>.

¹⁹⁹ *Desert Bighorn Sheep*, NEV. DEP’T WILDLIFE, http://www.ndow.org/Species/Furbearer/Desert_Bighorn_Sheep/ (last visited May 7, 2020).

²⁰⁰ *Id.*; *see also* Daniel Rothberg, *For Pyramid Lake Paiute Tribe Bighorn Sheep Reintroduction Part of Decades Long Effort to Recover Wildlife*, NEV. INDIAN COMM’N (Jan. 28, 2020), <https://nevadaindiancommission.org/for-pyramid-lake-paiute-tribe-bighorn-sheep-reintroduction-part-of-decades-long-effort-to-recover-wildlife/> (“[B]ighorn sheep bones have been found in old fire pits. Traditionally, the sheep provided the Tribe with sustenance . . . Horns were used in ceremony and hides were used for clothes.”).

²⁰¹ Rothberg, *supra* note 200.

help formulate a permanent recovery plan.²⁰² To facilitate this effort, the Tribe entered into a partnership with the Nevada Department of Wildlife, which located the bighorn sheep from neighboring mountain ranges before bringing them to the Lake Range mountains just east of Pyramid Lake.²⁰³ This marked the first time that bighorns had occupied the reservation in a century.²⁰⁴ After releasing the sheep in 2020, the Tribe implemented further measures to prevent the spread of disease, such as mandatory livestock quarantine for newly arrived domestic animals to the reservation.²⁰⁵ Although there has been some mortality in the translocated herd, as of June 2021, tribal wildlife managers have reported that the Pyramid Lake desert bighorns are “doing well.”²⁰⁶

B. Agua Caliente Band of Cahuilla Indians and the Peninsular Desert Bighorn Recovery Project

In 2019, the Service awarded the Agua Caliente Band of Cahuilla Indians \$113,800 in TWG Program funds for the “Peninsular Bighorn Sheep Recovery Project.”²⁰⁷ The Tribe and the federal government have been involved in managing the peninsular desert bighorn sheep for three decades, as the sheep population has sometimes dropped to precipitously dwindling numbers in the mountains outside of Palm Springs, California.

The Agua Caliente Band owns half of the underlying real estate in Palm Springs²⁰⁸ and the Agua Caliente people have lived in the Coachella Valley region for at least five thousand years.²⁰⁹ Despite this lengthy history, the Tribes lost most of their land in a burst of white settlement that occurred during the 1850s; and together with ranching, farming, and missionary settlers came railroads, which encouraged even more settlement, all fortified by an “ample supply” of groundwater from the Coachella Valley Groundwater Basin.²¹⁰ The water had supported the Tribe, its sister tribes, and the later arriving immigrants (and their descendants) ever since.²¹¹ Despite the resource battles that inevitably followed, the tribes have an established record of exercising their inherent sovereignty through protecting natural resources, famously securing reserved rights to groundwater in the Coachella Valley aquifer pursuant to an opinion by the Ninth Circuit Court of Appeals in 2017.²¹² Moreover, the Cahuilla Band has been very successful financially, owning

²⁰² See FY 2020 AWARDS FOR TRIBAL WILDLIFE GRANTS, <https://fws.gov/nativeamerican/grants.html> (awarding Pyramid Lake Paiute Tribe \$200,000 to further implement bighorn sheep recovery efforts) (last visited June 18, 2021).

²⁰³ However, the Service’s publication of FY 2019 applicants describes the plan to introduce the desert bighorns into the Virginia range which abuts Pyramid Lake to the west. FY 2019 AWARDS FOR TRIBAL WILDLIFE GRANTS, *supra* note 159; see also Pyramid Lake Paiute Tribe (@plpt), TWITTER (Jan. 14, 2020, 7:30 PM), <https://twitter.com/plpt/status/1217242656658477056> (containing video feed of the desert bighorn sheep release onto tribal lands); Goodluck, *supra* note 198.

²⁰⁴ Goodluck, *supra* note 198.

²⁰⁵ Fabbri, *supra* note 16.

²⁰⁶ *Id.* (“[W]hile mortality has been experienced, the herd as a whole is doing well.”); *Pyramid Lake Bighorn Sheep Herd*, NEVADA WILD (March 26, 2021), <https://soundcloud.com/user-934973730/pyramid-lake-bighorn-sheep-herd> (describing that herd “augmentation” occurred in early 2021, and that the herd is in good shape overall).

²⁰⁷ FY 2019 AWARDS FOR TRIBAL WILDLIFE GRANTS, *supra* note 159.

²⁰⁸ Janet Wilson, *Lawsuit Pits Tribe Against U.S. and Endangered Bighorn Sheep*, L.A. TIMES (Apr. 11, 2005), <https://www.latimes.com/archives/la-xpm-2005-apr-11-me-bighorn11-story.html>.

²⁰⁹ Dana A. Bass, *Agua Caliente: A Case Study and Toolkit for Securing Tribal Rights to Clean Groundwater*, 45 ECOLOGY L.Q. 227, 231 (2018).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017).

two casinos in addition to their extensive real estate holdings giving the Tribe a significant revenue stream with which to continue this legacy of natural resources conservation.²¹³

The peninsular bighorn sheep are a subspecies of bighorn endemic to certain mountain ranges in southern California, including those around the Coachella Valley.²¹⁴ The Service listed the peninsular desert bighorn as endangered under the ESA in 1998.²¹⁵ However, the controversy in the early years of this century underscores the complexities of tribal relationships with environmental groups and with the federal government. In 2001, after being sued for failing to protect bighorn habitat, the Service designated 884,897 acres (about half the area of Delaware) of critical habitat for the peninsular bighorn sheep in the San Jacinto mountains near Palm Springs, California.²¹⁶ A portion of the critical habitat designation—approximately 17,000 acres—was on undeveloped Agua Caliente land. The Tribe objected to the designation because it meant potentially “hundreds of millions of dollars in lost future development revenues.”²¹⁷ The Tribe noted that it had been protecting the sheep for millennia, had a conservation plan in the works, and observed the irony of the U.S. government ceding land to the Tribe only to take it away later.²¹⁸ As a tribal spokesperson at the time put it, “[w]hat more do you want? They’ve [worked to protect the peninsular bighorn sheep] for thousands of years.”²¹⁹ After the district court remanded the critical habitat designation decision in 2006 in response to the Tribe’s legal challenge, the Service went back to the drawing board.²²⁰ The result was an extraordinarily contentious rulemaking process resulting in a final rule in 2009 that contained some 467,000 fewer acres than the 2001 designation—reflecting a decision to excise all tribal lands from the designation.²²¹ Environmental groups, including Center for Biological Diversity, vigorously opposed the new determination, and the press largely painted the Tribe as opposed to bighorn sheep protection generally.²²² The Center for Biological Diversity challenged the 2009 final rule in part because it alleged that the Service improperly made its determination in relying on an “unadopted tribal habitat conservation plan.”²²³ The court deferred, holding that the Service’s desire to maintain a conservation relationship with the Tribe was a legitimate factor in excluding the critical habitat.²²⁴ Though the Service

²¹³ *Tribal Enterprises*, AGUA CALIENTE BAND OF CAHUILLA INDIANS, <http://www.aguacaliente.org/content/Tribal%20Enterprises/> (last visited May 8, 2020).

²¹⁴ *Peninsular Desert Bighorn Sheep*, CAL. DEP’T FISH & WILDLIFE, <https://wildlife.ca.gov/Conservation/Mammals/Bighorn-Sheep/Desert/Peninsular> (last visited Apr. 29, 2020).

²¹⁵ *Id.*; Endangered Status for the Peninsular Ranges Population Segment of the Desert Bighorn Sheep in Southern California, 63 Fed. Reg. 13,134 (Mar. 18, 1998) (codified at 50 C.F.R. pt. 17).

²¹⁶ *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, No. 09-CV-2216 W (CAB), 2011 WL 13356055, at 3 (S.D. Cal. Sept. 26, 2011).

²¹⁷ Wilson, *Lawsuit Pits Tribe Against U.S. and Endangered Bighorn Sheep*, *supra* note 208.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Ctr. for Biological Diversity*, 2011 WL 13356055, at 3.

²²¹ *Id.*

²²² *Id.* at 4; *see also*, Leslie Carson, *Sheep are Losing Ground*, L.A. TIMES (Sept. 2, 2008), <https://www.latimes.com/archives/la-xpm-2008-sep-02-me-sheep2-story.html>; *Agency to Axe Habitat for Endangered Bighorn Sheep*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 13, 2009), https://www.biologicaldiversity.org/news/press_releases/2009/peninsular-bighorn-04-13-09.html (noting without further context that the “re-designation was compelled by a lawsuit brought by the Agua Caliente Band of Cahuilla Indians and industry groups that challenged the 2001 critical habitat designation.”).

²²³ *Ctr. for Biological Diversity*, 2011 WL 13356055, at 10.

²²⁴ *Id.* (“As the Court already stated above, excluding critical habitat area in order to preserve conservation partnerships is a legitimate factor that the Service may consider and give weight to.”). In 2007, the Agua Caliente

recommended approval, the EPA ultimately denied elements of the draft environmental impact statement associated with the application. EPA arrived at its conclusion because of the burdens the plan placed on the Tribe with respect to its sovereign status, including encumbering nearly half the reservation with protective measures as a part of the preferred alternative.²²⁵ EPA also decided the no-action alternative was too broadly written, and violated the federal trust responsibilities due to the Tribe.²²⁶ As of 2021, the THCP has not been approved.²²⁷

C. Nez Perce Tribe, Yurok Tribe, and California Condor Reintroduction

In 2016, the Service awarded the Nez Perce Tribe \$200,000 in TWG Program funds to study the viability of reintroducing the California condor to Hells Canyon and nearby areas.²²⁸ The grant award generated significant attention at the time, including heated debate over the wisdom of condor reintroduction to the area.²²⁹ Scattered accounts of the famous bird's presence in eastern Oregon and Hells Canyon exist in the historical record, but more importantly the Nez Perce language illuminates the connection between the condor and its pre-contact habitats.²³⁰ This historical memory of the Nez Perce, which dates back to time immemorial, reflects the Tribe's TEK regarding the condors and their habitat.²³¹

Band of Cahuilla Indians became the first tribe in the country to complete a tribal habitat conservation plan ("THCP") in coordination with the Service, requesting an incidental take permit under §10 of the ESA.

²²⁵ U.S. ENVTL. PROT. AGENCY, OPINION LETTER ON DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) FOR THE AGUA CALIENTE BAND OF CAHUILLA INDIANS TRIBAL HABITAT CONSERVATION PLAN (CEQ # 20070420), (Jan. 10, 2008) ("The preferred alternative (Alternative 1), if fully implemented, would result in almost half of the Reservation (19,375 acres) being dedicated to the habitat preserve and managed in perpetuity, making it unavailable for the economic use of the Tribe and its members.").

²²⁶ *Id.*

²²⁷ The bighorn sheep herds in the mountains near Palm Springs continue to be affected by a variety of factors including low rates of lamb survival. Maria Sestito, *Bighorn Sheep in Palm Springs Area to be Collared, Tagged in Helicopter Operation*, DESERT SUN (Oct. 30, 2020), <https://www.desertsun.com/story/news/environment/2020/10/28/bighorn-sheep-palm-springs-area-collared-tagged-weekend/6065576002/>.

²²⁸ Eric Barker, *Hells Canyon Eyed in Recovery Effort*, LEWISTON TRIB. (Apr. 7, 2016), https://lmtribune.com/northwest/hells-canyon-eyed-in-condor-recovery-effort/article_d91bf55e-77c8-5977-b01e-f4a82b9ee30d.html.

²²⁹ Compare Sandy Wilbur, *The Case Against Condors in Hells Canyon*, HIGH COUNTRY NEWS (Nov. 8, 2016), <https://www.hcn.org/articles/the-case-against-condors-in-hells-canyon> (arguing against reintroduction basically because of the strong undercurrent of anti-federal government sentiment in eastern Oregon and Idaho, and also the strong gun rights culture which might be resistant to the curtailing of lead ammunition, the principal agent in the condor's precipitous decline in numbers. The article, interestingly, was written by the ex-head of federal condor research) with Angela C. Sondenaa, *Why We Need Condors in Eastern Oregon*, HIGH COUNTRY NEWS (Jan. 18, 2017), <https://www.hcn.org/articles/why-we-need-condors-in-hells-canyon> (noting that the Nez Perce language has a word for condor, that Hells Canyon is a good place to reintroduce the condor, and rejecting Sandy Wilbur's argument as a misunderstanding of the area's citizenry's true relationship to the land and to its living beings).

²³⁰ Angela C. Sondenaa, *Why We Need Condors in Eastern Oregon*, HIGH COUNTRY NEWS (Jan. 18, 2017), <https://www.hcn.org/articles/why-we-need-condors-in-hells-canyon>.

²³¹ *Integrating Use of Traditional Ecological Knowledge into the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/nativeamerican/pdf/tek-integrating-use.pdf> (last visited May 9, 2020) (providing a working definition of TEK for field officers that includes the idea that TEK "is an evolving knowledge acquired by Indigenous and local peoples over hundreds or thousands of years through direct contact with the environment."). A people's oral account of a place or an ecosystem is incredibly important data and has been woven into western scientific accounts of climate disruption or development impact on a landscape. See, e.g., Kirsten Feifel, *Documenting Traditional Ecological Knowledge in Northwest Alaska*, CLIMATE ADAPTATION KNOWLEDGE EXCHANGE (Mar. 2, 2020), <https://www.cakex.org/case-studies/documenting-traditional-ecological-knowledge>.

The California condor's history of near-extinction, subsequent captive breeding program, and reintroduction to the wild has been well-told elsewhere.²³² It is sufficient to recount that the wild population was nearly extirpated due to the use of lead ammunition found in carrion throughout its range in western North America.²³³ By the 1980s, there were 22 condors left in the wild, all of which were captured and placed in a captive breeding program.²³⁴ The Service has intensely managed the birds ever since.²³⁵ Despite the contentious atmosphere surrounding the reintroduction of many once-extirpated species that ranchers fear will prey upon their livestock in the West, the Nez Perce tribe welcomed a condor hatchling in early 2018.²³⁶ In 2019, the Service awarded the Nez Perce Tribe an additional \$200,000 in TWG Program funds for the condor program.²³⁷

The Nez Perce condor reintroduction project is taking place alongside the Yurok Tribe's nearly two-decade-old effort to reintroduce the condor to its aboriginal lands, which include Redwood National Park in northern California.²³⁸ The tribe established the Yurok Tribe Wildlife Program in 2008 for the purpose of reestablishing the California condor on tribal lands.²³⁹ Employing a team of four, including one biologist whose full-time job is to monitor the condor program, the Tribe has become a leader in the effort to reintroduce the largest member of the vulture family to its ancestral home range.²⁴⁰

The Yurok Tribe signed a memorandum of understanding with the U.S. Fish and Wildlife Service (FWS), National Park Service, and the California Department of Parks and Recreation in 2016 committing to "assess the potential to recover condors within the northern portions of their historical range, including Northern California and Yurok Tribe Ancestral Territory."²⁴¹ In April

northwest-alaska (documenting tribal elders' knowledge of ice and snow conditions from 1950–2002 in the Village of Kotzebue with respect to the climate's impact on the area).

²³² E.g., PETER S. ALAGONA, *AFTER THE GRIZZLY: ENDANGERED SPECIES AND THE POLITICS OF PLACE IN CALIFORNIA* 139, 141–44 (2013) (showing historical range of California condor encompassing much of the Intermountain West of the United States. Also noting the significance of symbolism of the condor to Native American tribes and to 20th century conservationists.).

²³³ Jillian Mock, *Lead Ammo, the Top Threat to Condors, is Now Outlawed in California*, AUDUBON (July 1, 2019), <https://www.audubon.org/news/lead-ammo-top-threat-condors-now-outlawed-california> (describing the horrific effects lead ingestion has on the condor and other bird species).

²³⁴ *Condor Updates*, NAT'L PARK SERV., https://www.nps.gov/grca/learn/nature/condor_updates.htm (last visited May 9, 2020).

²³⁵ *California Condor Recovery Program*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/CNO/es/CalCondor/Condor.cfm> (last visited May 9, 2020).

²³⁶ *Nez Perce Tribe Hold Ceremony to Welcome California Condor Hatchling*, KTVB (Apr. 9, 2018), <https://www.ktvb.com/article/news/local/nez-perce-tribe-hold-ceremony-to-welcome-california-condor-hatchling/277-536758059>.

²³⁷ AWARDS FOR TRIBAL WILDLIFE GRANTS, *supra* note 159.

²³⁸ SUMMARY OF PROJECTS: TRIBAL WILDLIFE GRANTS PROGRAM (2007–2012), *supra* note 159, at 35 (noting that from 2008–2012, the Yurok tribe received four TWG awards totaling nearly \$800,000 for condor reintroduction efforts).

²³⁹ *Yurok Tribe Wildlife Program*, YUROK TRIBE, <https://www.yuroktribe.org/wildlifeprogram.htm> (last visited May 8, 2020).

²⁴⁰ See Anna V. Smith, *Indigenous Effort to Return Condors to the Pacific Northwest Nears Its Goal* (Nov. 5, 2020), <https://www.audubon.org/news/an-indigenous-effort-return-condors-pacific-northwest-nears-its-goal>.

²⁴¹ *California Condor Informational Resources*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/cno/es/CalCondor/PDF_files/Expansion-FinalMOUwYurok.pdf (last visited May 8, 2020) ("The Parties will continue to work toward developing adequate state agency support; identifying adequate funding sources; developing support from key existing condor recovery partners; identifying sufficient high quality habitat with minimal potential threats; obtaining necessary permits; completing environmental compliance; establishing an

2019, the Service published a proposed rule introducing a nonessential experimental population (NEP)²⁴² in the Pacific Northwest.²⁴³ The plan proposed an NEP boundary including all of Oregon, northern California, and northwest Nevada.²⁴⁴ The NEP boundary includes a proposed release site in Redwood National Park and habitat in Hells Canyon on the Oregon-Idaho border.²⁴⁵

On March 24, 2021, the Service published a final rule establishing an NEP on Yurok Ancestral Lands and Redwood National Park.²⁴⁶ The final rule establishes that the Yurok Tribe will co-manage the reintroduced condors and includes provisions for annual releases of up to six 1.5 to two year-old individuals. The condors will be brought to a release site where they will be kept in “release pen[s] . . . for a short period of time prior to release.”²⁴⁷ Each bird will be fitted with electronic transmitters and wing markers.²⁴⁸ Thus by early 2022, and due primarily to relentless efforts by the Yurok Tribe, California condors will once again soar over Yurok ancestral homelands after more than a century.²⁴⁹

D. Eastern Band of Cherokee Indians and the Endangered Red Wolf

The Eastern Band of Cherokee Indians are descendants of approximately 1,200 individuals who stayed in the mountains of what is now North Carolina after the United States federal government forcibly removed the Cherokee Nation to modern day Oklahoma in the 1830s. This coincided with Chief Justice Marshall’s tenure on the Supreme Court and a mere decade after his decision in *Johnson v. M’Intosh* adopting the Doctrine of Discovery.²⁵⁰ Other members of the Eastern Band are descendants of Cherokees who made it to Oklahoma and then walked back to their homelands, lobbying the holdouts to remove to Oklahoma, or returning permanently, depending on their ties and affiliations in what became a fractured nation after the army removal in the 1830s.²⁵¹

appropriate release facility; and experimentally releasing, monitoring, and managing condors in the wild before a final determination is made about permanently reintroducing condors to the region.”).

²⁴² U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES ACT: EXPERIMENTAL POPULATIONS (May 1, 2020), <https://www.fws.gov/verobeach/FloridaPantherRIT/20150819%2010j%20Experimental%20Population%20Fact%20Sheet.pdf> (noting the ESA permits the Service to reintroduce listed species under §10(j) outside of their current range, but within their traditional range as experimental populations). *Id.* (determining whether a population is essential or nonessential turns on whether the experimental population is necessary for the species’ survival (essential) or not (nonessential)). *Id.* (differentiating that critical habitat may be designated for essential experimental populations, but not for nonessential experimental populations).

²⁴³ Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of California Condor in the Pacific Northwest, 84 Fed. Reg. 13587, 13587 (proposed Apr. 5, 2019) (to be codified at 50 C.F.R. pt. 17).

²⁴⁴ *Id.* at 13602.

²⁴⁵ *Id.* at 13594.

²⁴⁶ Establishment of a Nonessential Experimental Population of the California Condor in the Pacific Northwest, 86 Fed. Reg. 15602 (Mar. 24, 2021) (to be codified at 50 C.F.R. pt. 17).

²⁴⁷ *Id.* at 15611.

²⁴⁸ *Id.*

²⁴⁹ NAT’L PARK SERV., *California Condors will Take Flight* (Mar. 23, 2021), <https://www.nps.gov/redw/learn/news/condorsreturn.htm>.

²⁵⁰ See *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

²⁵¹ *E. Band of Cherokee Indians v. United States*, 117 U.S. 288, 306 (1886).

The red wolf is endemic to the southeastern United States²⁵² and of great cultural significance to the Cherokee people.²⁵³ The Service listed the red wolf in 1967 and declared it extinct in the wild in 1980.²⁵⁴ After the Service established a nonessential experimental population in North Carolina in the mid-1980s, the wolves reached a zenith of approximately 120–130 individuals by 2006.²⁵⁵ Since that time, wild populations of the wolf have plummeted outside of captivity.²⁵⁶ In 2015, facing intense pressure, the Service conducted a comprehensive review seeking answers as to why the population had collapsed.²⁵⁷ The Service concluded that it needed to reassess how to work with certain stakeholders in the Southeast in order to minimize negative interactions between private landowners and the red wolf.²⁵⁸ The red wolf reintroduction efforts have caused considerable controversy in the region.²⁵⁹

Extremely limited information exists publicly regarding the Tribe's successful grant proposal for the red wolf recovery project. Suffice it to say, once the Service releases more information this will be a very interesting case to follow because of the controversy surrounding the red wolf in this region and salient issues of tribal sovereignty for a federally recognized tribe with without a jurisdictional land base.

E. Summit Lake Paiute Tribe and Lahontan Cutthroat Trout

Listed in 1970 as endangered by the Service, Lahontan cutthroat trout once persisted throughout much of the Great Basin.²⁶⁰ Descendants from a population of trout that once thrived in the deep waters of Pleistocene Lake Lahontan, contemporary populations suffer from a variety of factors including grazing, development, and climate change.²⁶¹ Recovery efforts have been ongoing for several years, during which scientists have rediscovered remnant populations in unlikely places such as small streams scattered about in remote mountain ranges in the Great Basin.²⁶² Lahontan cutthroat trout, like other endemic cutthroat trout populations in the Great Basin such as the

²⁵² *The Red Wolf Species Status Assessment, Five-Year Review and Future Plans*, U.S. FISH & WILDLIFE SERV. (Apr. 18, 2018), <https://www.fws.gov/southeast/faq/red-wolf-status-assessment-five-year-review-and-future-plans/> [hereinafter *Red Wolf Species Assessment*].

²⁵³ James Mooney, *The Myths of the Cherokees*, J. AM. FOLKLORE, July-Sept. 1888, at 103, <https://www.lib.utk.edu/ Cherokee/MythsCherokee.pdf>.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Red Wolf: Canis Rufus*, U.S. FISH & WILDLIFE SERV. (Sept. 7, 2021), <https://www.fws.gov/southeast/wildlife/mammals/red-wolf/#current-status-of-wild-population-section>.

²⁵⁷ *Red Wolf Recovery Program Review*, U.S. FISH & WILDLIFE SERV. (Sept. 19, 2018), <https://www.fws.gov/southeast/faq/red-wolf-recovery-program-review/#has-the-service-responded-to-a-request-from-the-north-carolina-wildlife-resources-commission-to-declare-the-red-wolf-extinct-in-the-wild-and-end-the-reintroduction-program-in-north-carolina-section>.

²⁵⁸ Proposed Replacement of the Regulations for the Nonessential Experimental Population of Red Wolves in Northeastern North Carolina, 83 Fed. Reg. 30,382, 30,385 (proposed June 28, 2018) (to be codified at 50 C.F.R. pt. 17).

²⁵⁹ North Carolina adopted a resolution asking the Service to declare the red wolf extinct in the wild. *Red Wolf Recovery Program Review*, *supra* note 257.

²⁶⁰ See *Lahontan Cutthroat Trout*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/fisheries/freshwater-fish-of-america/lahontan_cutthroat_trout.html (last visited May 9, 2020).

²⁶¹ See Jida Wing et al., *Recent Global Decline in Endorheic Basin Water Storages*, 11 NATURE GEOSCIENCE 926, 926 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6267997/>; Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 806 n. 418 (2005).

²⁶² Nate Schweber, *20 Pounds? Not too Bad for an Extinct Fish*, N.Y. TIMES (Apr. 23, 2013), <https://www.nytimes.com/2013/04/24/us/lahontan-cutthroat-trout-make-a-comeback.html>.

Bonneville cutthroat trout in Utah,²⁶³ are truly links to the past and seemingly defy logic in persisting in such a harsh climate.

Summit Lake, itself a remnant of Lake Lahontan, is one of only two lake systems supporting Lahontan cutthroat trout without human management activities.²⁶⁴ Indeed, Lahontan cutthroat trout persists in only 0.4% of its endemic lake habitat.²⁶⁵ Summit Lake, like Pyramid Lake is endorheic or terminal, meaning water flows in but does not flow out.²⁶⁶ Groundwater dispersion and evaporation are the primary ways by which the lake maintains a relatively constant volume.²⁶⁷ Such lakes are quite common in the Great Basin because of the region's natural topography of tall, narrow, north-south trending mountain ranges separated by deep basins.²⁶⁸

The Summit Lake Paiute Tribe has long depended on the Lahontan cutthroat as a food source.²⁶⁹ Traditionally nomadic, the Tribe has deep, profound connections to Summit Lake.²⁷⁰ The Tribe developed fishing methods and elaborate fish preparation techniques crucial to preserve fish in the harsh climate.²⁷¹ Indeed, the Tribe's name for itself—Agai Panina Ticutta—means “Summit Lake Fish Eaters.”²⁷²

The Tribe received a \$200,000 award in 2019 to further promote its unique population of Lahontan cutthroat trout.²⁷³ The Tribe has been very active in managing the Summit Lake ecosystem to better understand the Lahontan cutthroat trout.²⁷⁴ In conjunction with the University of Nevada at Reno, the Tribe has installed state-of-the-art monitoring systems in a Summit Lake tributary where the trout spawn.²⁷⁵ This project represents a truly exciting partnership between a willing tribe whose sovereign territory hosts an extraordinary resource, and a variety of governmental and academic stakeholders interested in assisting the Tribe.

V. The TWG Program's Potential for Wildlife Reintroduction Efforts and Tribal Sovereignty.

The TWG Program is still in relative infancy, but its use by Tribes is growing and it portends a future of tribal wildlife reintroduction using TEK, co-management, and other types of arrangements in which tribes are the primary regulators or drivers of change. Contemporary examples of TEK as conservation strategy, in particular, are growing. In the Sierra Nevada mountains, between Yosemite and Sequoia National Parks, the North Fork Mono tribe and the

²⁶³ Division of Pub. Aff., *Tribes in 15 States Receive \$4.6 Million From Service for Conservation Work*, U.S. FISH & WILDLIFE SERV. (May 12, 2014), <https://www.fws.gov/news/ShowNews.cfm?ID=F14ABBB3-92CD-3ED8-519A377053497E1F>.

²⁶⁴ James B. Simmons et al., *Population Dynamics of Threatened Lahontan Cutthroat Trout in Summit Lake, Nevada*, NATURE (2020),] <https://www.nature.com/articles/s41598-020-65992-0>.

²⁶⁵ *Id.*

²⁶⁶ *Recent Global Decline in Endorheic Basin Water Storages*, *supra* note 261, at 926.

²⁶⁷ *Id.*

²⁶⁸ *See id.* at 928.

²⁶⁹ Patrick Cooney, *Fish of the People: Summit Lake Lahontan Cutthroat Trout*, FISHERIES BLOG (Oct. 24, 2016), <https://thefisheriesblog.com/2016/10/24/fish-of-the-people-summit-lake-lahontan-cutthroat-trout/>.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Our Story*, Admin. Off. of Summit Lake Paiute Tribe, <https://www.summitlaketribe.org/about-us.html> (last visited May 8, 2020).

²⁷³ FY 2019 AWARDS FOR TRIBAL WILDLIFE GRANTS, *supra* note 159.

²⁷⁴ *Id.*

²⁷⁵ *See* Cooney, *supra* note 269.

USFS have collaborated for many years,²⁷⁶ using tribal TEK to manage culturally significant plants in mountain meadows in the Sierra National Forest. As a result of traditional Indigenous management techniques used by the Tribe such as prescribed burns, the meadows have borne increased biodiversity.²⁷⁷ Moreover, in a time when the West is suffering from historic drought conditions,²⁷⁸ the Tribe's efforts to remove nonnative plants, trees, and brush from the meadows allows the winter snowpack to settle and descend into underground aquifers which researchers have estimated adds an additional 16% to the water supply.²⁷⁹

Despite tribal management arrangements often employing TEK, TEK is not a necessary component of successful collaborative management schemes. Federal agencies have been increasingly willing partners with Tribes based on western science or federal-state priorities. A significant step in the right direction happened in 1997 when the Departments of Interior and Commerce promulgated Secretarial Order # 3206, which clarifies the responsibilities of the agencies of the Department of Interior and the Department of Commerce for any actions taken that "affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights."²⁸⁰ This order, which was issued to allay tribes' frustration over the Departments' enforcement of the ESA in a way that violated tribal treaty rights,²⁸¹ further acknowledges: the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure

²⁷⁶ Ezra David Romero, *An Ancient Native American Drought Solution for a Parched California*, VALLEY PUB. RADIO (Jun. 2, 2015), <https://www.kvpr.org/post/ancient-native-american-drought-solution-parched-california> ("By removing trees, shrubs and nonnative plants in what was once a meadow, Goode believes the forest won't consume as much water. It's a practice passed down generation to generation in his tribe. Thinner forests mean snowmelt will pool in mountain meadows and eventually seep into aquifers rather than consumed by the trees. Second, fewer trees and brush means less chance of large wildfires."); see also Jared Dahl Aldern, *North Fork Mono Meadow Restoration, Fire, and Water: The Tribe's Land and Water Rights and Tenure*, INDIAN LAND TENURE FOUNDATION, <https://www.lessonsofourland.org/wp-content/uploads/2017/09/Meadows.pdf> (last visited Apr. 26, 2020) ("Mono people created and enhanced the habitats for these resources with fire, and this is why North Fork Mono Tribal Chairman Ron Goode refers to plants such as oak trees and animals such as deer not as *natural* resources but as *cultural* resources.") (emphasis in original).

²⁷⁷ See Romero, *supra* note 276.

²⁷⁸ HENRY FOUNTAIN, *The Western Drought is Bad. Here's What You Should Know About It*, N.Y. TIMES (Sep. 13, 2021), <https://www.nytimes.com/article/drought-california-western-united-states.html>.

²⁷⁹ Aldern, *supra* note 276. In Australia, the devastating and unprecedented bush fires of 2019–20 have raised questions of how to manage the land to minimize the severity of the fires. These questions have brought Aboriginal fire-setting techniques into the Australian mainstream, forcing Anglo colonizers to admit that their knowledge of the landscape needs to be much greater in order to implement the precise—and 50,000 year-old—Aboriginal fire control methods. Leah Asmelash, *Australia's Indigenous People have a Solution for the Country's Bushfires. And it's been Around for 50,000 Years*, CNN (Jan. 12, 2020), <https://www.cnn.com/2020/01/12/world/aboriginal-australia-fire-trnd/index.html>.

²⁸⁰ *Working with Tribes: Partnership Stories*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/what-we-do/tribal-partnership-stories.html> (last visited Apr. 25, 2020); U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER # 3206, AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT, (Jun. 5, 1997) [hereinafter S.O. 3206], https://www.doi.gov/sites/doi.gov/files/elips/documents/3206_-_american_indian_tribal_rights_federal-tribal_trust_responsibilities_and_the_endangered_species_act.pdf.

²⁸¹ JEREMY WOOD, *Endangered Species, Endangered Treaties: Protecting Treaty Rights, Economic Development, and Tribal Consultation Under Secretarial Order 3206*, 4 AMER. INDIAN L. J. 130, 139 (2015).

that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.²⁸²

The order outlined five governing principles reflecting the special government-to-government relationship and the concomitant federal intent to mitigate any disproportionate tribal burdens with respect to wildlife management.²⁸³ As a result of this Order, in 2003 a federal district court found that the Service violated the ESA when it relied on tribal wildlife management plans in its decision to designate critical habitat.²⁸⁴ And in 2007, a federal district court agreed with the Department of the Interior that Secretarial Order # 3206 is “for guidance within the Department only, and does not create any substantive trust obligation.”²⁸⁵ On the other hand, in a proceeding where the Seminole Tribe sought intervention by right to a suit where an environmental group was challenging the Service’s refusal to designate critical habitat, a district court relied in part on Secretarial Order # 3206 in granting the Tribe’s application.²⁸⁶

Building on the foundation of Secretarial Order #3206, Secretary Jewell signed Secretarial Order # 3342 in October 2016,²⁸⁷ which directed subagencies with the Department of Interior to immediately “identify opportunities for cooperative management arrangements and collaborative partnerships with tribes.”²⁸⁸ The Order required subagencies to “increase the opportunity for tribes to participate in the management of Federal lands and waters within the [Interior] Department’s jurisdiction and the integration of *traditional ecological knowledge* and practices into management and operations.”²⁸⁹ The order distinguishes between co-management—a mandated reservation or assignment of some aspect of management to the Tribe—and collaborative and cooperative management arrangements.²⁹⁰ The order gives a plethora of examples of the latter arrangements: sharing of expertise, making tribal knowledge integral to the public experience on federal lands,

²⁸² S.O. 3206, *supra* note 280, at 1.

²⁸³ *Id.* at 3-6; U.S. DEP’T OF THE INTERIOR, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, Order No. 3335, at 1 (Aug. 20, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> [hereinafter S.O. 3335], (stating that “Principle 1. The Departments Shall Work Directly With Indian Tribes on a Government-to-Government Basis to Promote Healthy Ecosystems . . . Principle 2. The Departments Shall Recognize that Indian Lands are not Subject to the Same Controls as Federal Public Lands . . . Principle 3. The Departments Shall Assist Indian Tribes in Developing and Expanding Tribal Programs so that Healthy Ecosystems are Promoted and Conservation Restrictions are Unnecessary . . . Principle 4. The Departments Shall be Sensitive to Indian Culture, Religion and Spirituality . . . Principle 5. The Departments Shall Make Available to Indian Tribes Information Related to Tribal Trust Resources and Indian Lands, and, to Facilitate the Mutual Exchange of Information, Shall Strive to Protect Sensitive Tribal Information from Disclosure.”).

²⁸⁴ AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 964 (Carole E. Goldberg et al. eds., 7th ed. 2015).

²⁸⁵ *Miccosukee Tribe of Indians of Fla. v. United States*, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006) (internal quotation omitted).

²⁸⁶ *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, No. 2:10-CV-106-FTM-SPC, at 2-3 (M.D. Fla. July 14, 2010).

²⁸⁷ U.S. DEP’T OF THE INTERIOR, IDENTIFYING OPPORTUNITIES FOR COOPERATIVE AND COLLABORATIVE PARTNERSHIPS WITH FEDERALLY RECOGNIZED INDIAN TRIBES IN THE MANAGEMENT OF FEDERAL LANDS AND RESOURCES, Order No. 3342, at 1 (Oct. 21, 2016) [hereinafter S.O. 3342], https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships_0.pdf.

²⁸⁸ S.O. 3342, at 5.

²⁸⁹ *Id.* at 3 (emphasis added).

²⁹⁰ *Id.* at 4.

and the combining of agency and tribal resources to better manage public lands to name a few.²⁹¹ The scope of the order included the “management of fish and wildlife resources . . . [and] plant resources, including collection of plant material.”²⁹²

Tribal-federal collaborative natural resource management arrangements thrive in and near Indian Country today.²⁹³ For example, the USFS has an extensive framework in place for implementing collaborative tribal relationships, and to “guide collaboration across communities and tribal nations to help develop ethical and significant research partnerships.”²⁹⁴ Indeed, one of the goals of the Service’s 2015 tribal engagement paradigm is to “[e]ncourage integration of American Indian and Alaska Native traditional knowledge, wisdom, and practices in agency land management decisions and implementation.”²⁹⁵ To these ends, the USFS and the Menominee Nation have for 20 years enjoyed a collaborative relationship in which the Service’s forest management science is latticed with the tribe’s TEK in the form of research, energy recapture systems, educational outreach programs, and forest management.²⁹⁶ In 2008, the USFS partnered with the Central Council of Tlingit and Haida Indian Tribes of Alaska to develop an experimental forest²⁹⁷ on the traditional lands of the Wooshkeetaan Tlingit.²⁹⁸ And in 2016, the USFS held a three-day TEK summit with the Bi-State Sage Grouse Area Committee in Carson City, Nevada²⁹⁹—albeit at the infamous Stewart Indian School.³⁰⁰

Subagencies in the Interior Department have also entered into collaborative management arrangements with tribes.³⁰¹ Secretarial Order # 3342 contains references to several collaborations,

²⁹¹ *Id.* at 5-6.

²⁹² *Id.* at 5.

²⁹³ Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RESOURCES L. REV. 49, 67-68 (2021).

²⁹⁴ U.S. FOREST SERV., *supra* note 50, at 1.

²⁹⁵ *Id.* at 9.

²⁹⁶ *Tribal College Student Interns: Adding to the Forestry and Resource Management Knowledge Base*, TRIBAL RELATIONS NEWS, USDA FOREST SERV. (2016), <https://www.fs.fed.us/spf/tribalrelations/documents/news/Fall2016TribalRelationsNewsletter.pdf>.

²⁹⁷ See *Experimental Forests & Ranges*, UNITED STATES FOREST SERV., <https://www.fs.fed.us/research/efr/> (last updated Aug. 28, 2018) (collating a complete list of the 76 experimental USFS forests in the United States and a description of their value to the service).

²⁹⁸ U. S. FOREST SERV., *supra* note 50, at 1.

²⁹⁹ Dan Hottle, *Finding Common Ground: Western Science Meets Indigenous Knowledge at Sage Grouse Summit*, U.S. FISH & WILDLIFE SERV. (July 15, 2016), https://www.fws.gov/cno/newsroom/highlights/2016/Traditional_Knowledge/; see also *The Bi-State Sage Grouse Story*, U.S. FOREST SERV., <https://www.fws.gov/cno/es/bistate-sagegrouse/bi-statesagegrouse.cfm> (last visited Apr. 28, 2020) (describing history of the bi-state sage grouse with respect to its initial status as a listing candidate under the ESA in 2010 to its removal from that status in 2014).

³⁰⁰ Jazmin Orozco Rodriguez, *New Stewart Indian School Museum Reflects on Dark History, Brings Hope for Native Communities*, NEV. INDEP. (Jan. 19, 2020), <https://thenevadaindependent.com/article/new-stewart-indian-school-museum-reflects-on-a-dark-history-brings-hope-for-native-communities> (describing the school’s history in the context of the genocidal assimilationist and allotment era policies designed to remove Native children from their homes, wipe out their languages, their sense of culture and family, and train them to become “productive” Americans); see also United Nations Convention on Prevention and Punishment of the Crime of Genocide, *supra* note 64 (containing Article II (e) which provides that genocide includes situations where a dominant group is “[f]orcibly transferring children of the group to another group.”).

³⁰¹ BLM, the Service, NPS, and Bureau of Reclamation all have intra-agency tribal relations guidelines. See, e.g., BUREAU LAND MGMT. MANUAL 1-1780, IMPROVING AND SUSTAINING BLM- TRIBAL RELATIONS (2016); see also Colette Routel & Jeffrey Houlth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L.

including the Nuwuvi arrangement described above.³⁰² The Order also cites, as a positive example of an ongoing collaboration, a Memorandum of Understanding between FWS and the Kuskokwim Inter-tribal Fish Commission in Alaska.³⁰³ This Commission, comprised of 33 federally-recognized Alaska tribes, was formed in 2015 to give the Tribes in the Kuskokwim watershed, west of Anchorage, a greater role in managing the river's abundant fishery.³⁰⁴ In sum, tribal-federal collaborative management arrangements seem to be gaining traction throughout the United States, including some high profile arrangements.³⁰⁵ By availing themselves of TWG Program funding, tribes entering these collaborative relationships with the federal government have more ability to exercise their inherent sovereignty over their ancestral homelands.

VI. Conclusion

When John Muir stood in the Hetch-Hetchy valley and marveled at the pristine views of nature offered by the Yosemite ecosystem, it probably did not cross his mind that much of that landscape had been transformed on a continuous basis by the Indigenous peoples he encountered occasionally in and around the Yosemite Valley for thousands of years.³⁰⁶ Muir waxed poetic in his prolific writings about Yosemite's qualities as *terra nullius*, and his eloquent descriptions launched a generation of American conservationists, even though the premise upon which Muir wrote and pursued ecosystem conservation was a fallacy.³⁰⁷ Indeed, Indigenous Ahwahneechee peoples (ancestors of modern Miwuk, Me-Wuk, Chukchansi, Kutzadika'a, and Paiute) had cleared and cultivated the Yosemite Valley and surrounding region for centuries.³⁰⁸ They had developed a deep and time-tested relationship with many of the wildlife species inhabiting the Valley, a relationship that changed dramatically once Muir and his fans, including President Theodore Roosevelt, cleared the Tribes out of the Valley to make way for the nation's first national preserve. The Indigenous role in the Valley was diminished and dismissed by Muir, who referred to them as "most ugly" and "some of them altogether hideous."³⁰⁹ Muir was relieved when the army began to burn their wigwams and remove them from the Valley, noting that "they seemed to have no right place in the landscape" and that he was "glad to see them fading out of sight."³¹⁰

REFORM 417, 417 (2013) (arguing for judicial enforcement of consultation duty arising from trust responsibility rather than agency-specific approach currently in force as a result of myriad executive directives).

³⁰² S.O. 3342, *supra* note 280, at 6.

³⁰³ *Id.*

³⁰⁴ See *Overview of the KRITFC Communities*, <http://napaimute.org/wp-content/uploads/2016/05/KRITFC-DOI-USFWS-MOU.pdf> (last visited July 24, 2021).

³⁰⁵ *Bears Ears Inter-Tribal Coalition*, <https://bearscoalition.org/> (last visited July 24, 2021).

³⁰⁶ Raymond Barnett, *John Muir: Racist or Admirer of Native Americans?*, THE SIERRA CLUB, https://vault.sierraclub.org/john_muir_exhibit/life/racist-or-admirer-of-native-americans-raymond-bennett.aspx (last visited November 30, 2021); ANDERSON, *supra* note 60, at 33.

³⁰⁷ See also Rochelle Bloom and Douglas Deur, *Reframing Native Knowledge, Co-Managing Native Landscapes: Ethnographic Data and Tribal Engagement at Yosemite National Park*, 9 LAND 123, 124 (Sept. 22, 2020); Eric Michael Johnson, *How John Muir's Brand of Conservation Led to the Decline of Yosemite*, SCIENTIFIC AMERICAN (Aug. 13, 2014) (quoting Muir's description of Yosemite Valley as a place that was "pure wildness," where "no mark of man is visible upon it."), <https://blogs.scientificamerican.com/primates-diaries/how-john-muir-s-brand-of-conservation-led-to-the-decline-of-yosemite/>.

³⁰⁸ Irene A. Vasquez, *Restoring Reciprocal Relationships for Social and Ecological Health*, 46 ECOLOGY L.Q. 1049, 1050 (2019).

³⁰⁹ Johnson, *supra* note 307.

³¹⁰ *Id.*

As is the case with many policies that affected Indigenous peoples, including removal and allotment, the consequences are often far-reaching and long-lasting. This has been the case with tribes like the Ahwahneechee, whose removal from the ecosystems they had stewarded for generations may have exacerbated, or at least played some yet-to-be determined role in irreversible ecological decline.³¹¹ As the negative consequences of western natural resources policy play out in ecosystems like Yosemite's, which are ravaged by drought and fire every year, awareness of the value of TEK grows in scientific circles and amongst the federal agency officials charged with preserving these areas of public lands and their resident wildlife species.

Although it is far from certain what role reintroduction efforts will play in the reestablishment of biodiverse ecosystems in former and current tribal territories, the questions that are still unresolved do not pose insurmountable obstacles to tribes seeking to use the TWG Program to support wildlife reintroduction and management. First, there is the matter of TEK and the extent to which successful grant recipients implement TEK into their applications, and ultimately, into their wildlife management programs and decisions. So far, there is limited evidence of widespread use of TEK by tribes using TWG Program funds. A corollary to the first question is whether a bias exists with respect to tribal applicants proposing non-TEK projects. Again, this can only begin to be answered with more information from recent successful grant applications. Third, there will likely be questions that tribes face about the degree to which they should involve state and federal agencies, or even private partners, to participate in their reintroduction efforts and strategies. Thus far, according to publicly available resources, tribes have seemed to favor this approach.³¹² Finally, and most importantly, what effect do the grants have on long-term endemic species reintroduction efforts? Based on the results so far, it seems the Tribes have seen significant successes, on the whole.³¹³

On a broader level, the use of the TWG Program funding by tribes bodes well for tribal development of wildlife management frameworks that reflect tribal values. Wildlife conservation often requires many different parties' involvement—federal, tribal, state, and private. Despite sometimes salient rhetoric to the contrary, the broader American public supports wildlife conservation as an enduring American value.³¹⁴ The complexity involved in manifesting this value has sometimes impeded its progress, but the TWG Program and its sister program, the State Wildlife Action Program have no doubt furthered wildlife conservation in the United States. Particularly with respect to states and tribes, whose history is fraught with negativity and profound mistrust, the TWG program provides tribes with a vehicle to engage in meaningful, generative, and open collaboration with states, on a financially—and potentially, legally—level playing field. Also, as mentioned previously, tribes may wish to partner with state or federal agencies for the sole purpose of avoiding the circumstances that befell the Tribe in the *White Mountain* case. Therefore, this might be a strategy worth careful consideration.

³¹¹ *See Id.*

³¹² *See generally* U.S. Fish & Wildlife Serv., *supra* note 166. Scott Aiken, National Native American Program coordinator for the U.S. Fish and Wildlife Service said this with respect to the Pyramid Lake bighorn sheep reintroduction effort: “No individual sovereign can manage wildlife— all sovereigns have to work together to ensure conservation for future generations. Accomplishing and expanding mutual goals boils down to communicating to tribes in a meaningful way. Seeing the Tribe’s ability to not only operate independently, but in concert with the state and federal agencies is enriching to see as a tribal member myself. This type of coordination was a missing component in the past, so I’m hoping to see more collaborative efforts like this in the future.” Fabbri, *supra* note 16.

³¹³ *See* Wildlife and Parks, Swift Fox Conservation Team: Report for 2009-2010 at 5, *supra* note 186.

³¹⁴ *National Poll Results: How Americans View Conservation*, WECONSERVEPA, <https://conservationtools.org/guides/111-national-poll-results> (last visited May 6, 2020).

In an era when federal and state land management agencies will also no doubt struggle to protect wildlife due to increasing habitat loss,³¹⁵ resulting fragmentation,³¹⁶ and climate change,³¹⁷ tribes may not always be able to depend on external governments to aid or support these reintroduction processes. And even if they can, in some cases, federal or state laws may pose obstacles to tribal reintroduction efforts, as has been the case for various tribes seeking to reintroduce bison. Yet, if tribes pursue reintroduction as an exercise of inherent sovereignty, it is at least arguably a stronger legal basis for fending off the type of state law incursions that plagued the Tribes in *White Mountain* and *Montana*. This is because the legal landscape which paved the way for the rules in those cases has changed. The federal courts, and most notably, the Supreme Court, has begun recognizing tribal sovereignty and the general right of tribes to be free from encroaching states (and holding aggressive states at bay), to a greater degree in recent years than in the past 50 years.³¹⁸

Moreover, even if federal and state agencies are amenable to assisting in tribal wildlife reintroduction efforts, they may not be capable of doing so in a manner and to a degree that tribes require. If tribes value reintroducing species for cultural or religious purposes, for instance, it may be nearly impossible for federal or state agencies to facilitate the reintroduction in a manner that is entirely consistent with those values. Among numerous other reasons, this illustrates the need for tribes to develop their own legal frameworks of species reintroduction. If tribes can develop such frameworks, they can more fully incorporate Indigenous management practices, Indigenous science, or TEK to preserve threatened and endangered species.³¹⁹ Moreover, these frameworks allow the tribe to better withstand potential legal challenges by positively invoking their inherent sovereign authority as evidenced in cases like *New Mexico v. Mescalero Apache Tribe*.³²⁰ Arguably, at least, tribes that develop their own frameworks for wildlife reintroduction, supported

³¹⁵ *Habitat Loss*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Threats-to-Wildlife/Habitat-Loss> (last visited Apr. 23, 2020).

³¹⁶ Nick M. Haddad et al., *Habitat Fragmentation and its Lasting Impact on Earth's Ecosystems*, 1 SCI. ADVANCES 1, 1 (2015).

³¹⁷ Rebecca Fischer & Daniel Timmons, *No New Fossil Fuel Leasing: The Only Path to Maximizing Social Welfare in the Climate Change Era*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10741, (2019) ("Interior's staunch opposition to a full accounting for the social costs of fossil fuel leasing must be acknowledged. Even under more climate change-aware administrations, Interior was unwilling to complete a programmatic analysis of its federal onshore oil and gas leasing program or fully account for the costs of carbon at the lease sale or permit to drill stages.").

³¹⁸ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (affirming tribal sovereign immunity from lawsuits by states, even when they arise from a tribe's commercial activities, and even when those activities take place off Indian lands); *Washington v. United States*, 138 S. Ct. 1832 (2018) (affirming without opinion decision of Ninth Circuit Court of Appeals holding that State of Washington was required to modify "barrier" culverts obstructing salmon spawning to ensure that sufficient salmon populations remained for tribes with treaty fishing rights); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019) (holding that Washington's fuel tax infringed upon the Yakama Nation's treaty right "to travel upon all public highways," which they used to import fuel to their reservation); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469–70 (2020) (rejecting State of Oklahoma's argument that "historical practices [of unlawful white settlement on Muskogee Creek lands] or current demographics [descendants of unlawful settlers occupying Muskogee Creek lands] can suffice to disestablish or diminish reservations"); *United States v. Cooley*, 141 S. Ct. 1638 (2021) (recognizing that Crow Tribe had inherent sovereign authority to detain non-Indians suspected of having committed one or more felonies because, among other reasons, "no treaty or statute had explicitly divested the tribes of the policing authority at issue").

³¹⁹ *Indigenous Peoples' Forest Tenure*, PROJECT DRAWDOWN, <https://drawdown.org/solutions/indigenous-peoples-forest-tenure> (last visited Apr. 24, 2020) (noting that world Indigenous forest tenures sequester between 8.6–12.9 gigatons of CO_{2e} with no upfront costs to implement).

³²⁰ 462 U.S. 324 (1983).

by tribal laws reflecting the values that tribes hold in these wildlife species and the need to protect these species as a means of protecting the cultural health of the tribe, will have a stronger argument under *Montana*, and now *Cooley*, to rebuff the efforts of hostile states to impose hunting and fishing licensing and other requirements on tribal lands.

Finally, the projects highlighted in this Article raise important topics related to collaborative management of natural resources, TEK, and the interconnectedness of North American people with wildlife and landscapes. The highly fragmented jurisdictional rules allocating authority between the United States and tribes in and around Indian Country would seem to work against effective recovery efforts of sensitive species. Indeed, for tribes such jurisdictional boundaries are often barriers to regulatory primacy even on their own lands, but nevertheless incredibly important for sovereignty and self-governance. From what the limited available evidence of TWG Program implementation has shown, tribes are willing to engage with wildlife reintroduction, *sui generis*, or by inviting state and federal government agencies into their territories to save wildlife species in decline. Where such collaboration is impractical or impossible, though, tribes can use the TWG program funding—and the models of its use in Indian Country and beyond—to affirm (or reaffirm) their legal authority over natural resources management while firmly establishing these laws, norms, and values as fundamental background principles of inherent tribal sovereignty.