

CO-MANAGEMENT OR CONTRACTING?
AGREEMENTS BETWEEN NATIVE AMERICAN
TRIBES AND THE U.S. NATIONAL PARK
SERVICE PURSUANT TO THE 1994 TRIBAL
SELF-GOVERNANCE ACT

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I. INTRODUCTION

The 1994 Tribal Self-Governance Act¹ (“TSGA”) provides a mechanism for transferring authority over federal programs, including the management of federal land, to Indian tribes. The TSGA permits tribes to petition bureaus within the Department of the Interior (“DOI”) to manage federal programs that are of “special geographical, historical, or cultural significance”² to the tribe. Additionally, the TSGA links tribal self-determination policy and federal land management, and has the potential to alter federal-tribal relationships and transform institutions for natural resource and public land management.

This Article assesses how the TSGA structures the relationship between Indian tribes and federal land management agencies³ using the National Park Service (“NPS”) as a case study. It inquires into the use and implementation of the 1994 Act as it relates to the management of public land, and uses the TSGA as a lens for analyzing contemporary relations between tribes and federal land management agencies.

* M.S., University of California at Berkeley. This Article has roots in many places. It delights me to thank the many people in those many places who have been a part of the process: Professor Sally K. Fairfax, Professor Philip Frickey, Professor Lynn Huntsinger, Scott Aikin, Laura Baxter, Curtis Berkey, Emogene Bevitt, Wendy Bustard, Leah Carpenter, Timothy Cochrane, David Cooper, Jerry Cordova, Norman Deschampe, Patrick Durham, Ronnie Emery, Doug Eury, Melvin Gagnon, Willis Gainer, James Hamilton, Claire Horsley, Tadd Johnson, Diane Krahe, Dana Logan, Sue Marcus, Beth Rose Middleton, Patricia Parker, Kenneth Reinfeld, Curt Roy, David Ruppert, Deborah Schaaf, William Sinclair, James Stockbridge, Geoffrey Strommer, Scott Travis, Barbara White, Scott Williams, Cindi Wolff, Fred York, and the University of California at Berkeley Department of Environmental Science, Policy, and Management.

¹ The TSGA refers to Title IV of the Indian Self-Determination Act. 25 U.S.C. §§ 458aa-hh (2006). The TSGA addresses non-Bureau of Indian Affairs (“BIA”) programs within the Department of the Interior.

² 25 U.S.C. § 458cc(c) (2006).

³ Defined as the U.S. Forest Service (“USFS”), National Park Service (“NPS”), Fish and Wildlife Service (“FWS”) and Bureau of Land Management (“BLM”). Note that the USFS does not fall under the TSGA because it is in the Department of Agriculture, not the Department of the Interior. The Bureau of Indian Affairs (“BIA”) is excluded from my definition of federal land management agencies.

A. Rationale for Looking at the TSGA

The TSGA is a useful tool for both tribes and federal agencies. It amends the 1975 Indian Self-Determination and Education Assistance Act (“ISDEAA”) and extends it in three major ways: by (1) including non-Bureau of Indian Affairs (“non-BIA”) programs,⁴ (2) expanding coverage from programs exclusively for the benefit of Indians because of their status as Indians⁵ to other programs of significance to tribes, and (3) (impliedly) including options for management of federal land and natural resources.

The TSGA acknowledges the effect that land management by federal agencies has had on tribal sovereignty, and it provides a vehicle for tribal participation in federal land management. The creation of public land has had devastating implications for tribes, their members, and tribal sovereignty. Federal land management has often led to the loss or direct expropriation of tribal land and resources, jurisdiction, and control. As a result, the physical boundary between Indian country⁶ and federal land is complex. One scholar describes how “[a]s an extension of the meaning of self-determination, numerous tribes have asserted their historical traditions on lands no longer part of reservations.”⁷ The TSGA represents a significant step toward federal acceptance of such tribal assertiveness and congressional recognition that federal public land management can both undermine and augment tribal sovereignty.

Legal scholars have suggested that the TSGA represents a significant step toward co-management of protected areas in the United States, even referring to the TSGA’s potential for integrating tribal cultural values, traditional ecological knowledge, and Native American management practices into public land management as “profound.”⁸ The TSGA has simultaneously

⁴ “Non-BIA” refers to bureaus or offices within the Department of the Interior other than the BIA: NPS, BLM, FWS, U.S. Geological Survey (“USGS”), Bureau of Reclamation (“BOR”), Minerals Management Service (“MMS”), Office of Surface Mining (“OSM”), and the Office of the Special Trustee for American Indians (“OST”).

⁵ A program is “for the benefit of Indians because of their status as Indians” where Indians are the “primary and significant beneficiaries as evidenced by: (1) authorizing or appropriations legislation or legislative history; (2) implementing regulations; or (3) the actual administration of the program.” *Indian Self-Determination and Education Assistance Act: Oversight Hearing Before the H. Subcomm. on Native American Affairs of the Comm. on Natural Resources*, 103d Cong. 40-41 (1994) [hereinafter *Hearing* (1994)] (statement of Bonnie Cohen, Asst. Secretary—Pol’y, Management and Budget, U.S. Dep’t of the Interior).

⁶ “The land within the borders of all Indian reservations, the land occupied by an Indian community (whether or not located within a recognized reservation), and any land held in trust by the United States but beneficially owned by an Indian or tribe.” BLACK’S LAW DICTIONARY 787 (8th ed. 2004).

⁷ Richmond L. Clow, *Introduction to Self-Determination: Pursuing Indigenous and Multi-agency Management*, in TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT 225 (Richmond L. Clow & Imre Sutton eds., 2001).

⁸ Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 230, 236 (1998); see also Dave Egan & M. Kat Anderson, *Theme Issue: Native American Land Management Practices in National Parks*, 21 ECOLOGICAL RESTORATION 245 (2003); David Ruppert, *Building Partner-*

generated a fair amount of controversy: during the legislative process senators seeking to clarify the consequences of including the non-BIA provisions placed multiple holds on the Bill;⁹ the same provisions led to a protracted negotiated rulemaking session (for regulation drafting). Additionally, agreement negotiations have been the subject of much media attention.¹⁰

Despite the attention and controversy the TSGA has generated in the abstract, however, its implementation has received little scholarly analysis. A single law review article examines the legislative history of the 1994 amendments in general and describes the non-BIA provisions within that larger context,¹¹ and newspaper coverage sheds little light on the TSGA's implementation.

It is important to understand the contours of the TSGA and the details of its implementation because it expands the avenues available to tribes to participate in public land management in two ways. First, it establishes a government-to-government negotiation process that obligates agencies to negotiate with tribes.¹² Johnson and Hamilton write:

In the past, Bureaus other than the BIA refused to cooperate with tribes, but their cooperation is now compelled. It was the intent of the Committees of jurisdiction that any activities performed by any division or agency of the Interior Department on or near the reservation were negotiable items for self-governance tribes. The Sec-

ships Between American Indian Tribes and the National Park Service, 21 *ECOLOGICAL RESTORATION* 261, 262 (2003); Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 *TULSA L. REV.* 271, 308-09 (2003); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 *VT. L. REV.* 226 (1996-1997) [hereinafter Tsosie, *Tribal Environmental Policy*].

⁹ Telephone Interview with Tadd Johnson, Former Staff Director and Counsel, U.S. House Subcomm. on Native American Affairs (Apr. 22, 2005) (on file with the Harvard Environmental Law Review).

¹⁰ See, e.g., B.L. Azure, *Bison Range-Management Opponents Try to Buffalo Officials*, *CHAR-KOOSTA NEWS*, Sept. 1, 1995, at 4; B.L. Azure, *Burns Accuses Tribes, USFWS of Secret Bison Range Negotiations*, *CHAR-KOOSTA NEWS*, Nov. 29, 1996, at 3; B.L. Azure, *Council Miffed by USFWS Actions Concerning Bison Range*, *CHAR-KOOSTA NEWS*, Jan. 24, 1997, at 1; Dan Hansen, *Tribe Wants Control of Bison; Push to Take Over Management of Wildlife Refuges Sparks Sharp Debate in Montana*, *SPOKESMAN REV.*, June 10, 2003, at B1; Mark Matthews, *Back on the Range?*, *HIGH COUNTRY NEWS*, July 7, 2003, at 4; Kit Miniclier, *Babbitt Plans to Let Indians Care for Some Public Lands*, *DENVER POST*, Nov. 18, 1994, at B-04; Lisa Morris, *The Compacting of Our National Refuges and Parks: National Bison Range Revisited Through Grand Portage Tribe*, *OHJWE NEWS*, Nov. 13, 1998, at 1; Jim Robbins, *Bison Roam in the Refuge, but That's on a Reservation*, *N.Y. TIMES*, Nov. 24, 2003, at A16.

¹¹ A literature search reveals only one article that addresses the 1994 amendments in detail: Tadd M. Johnson & James Hamilton, *Sovereignty and the Native American Nation: Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 *CONN. L. REV.* 1251 (1995). No other scholarship appears to address the provisions pertaining to or agreements with non-BIA bureaus in any depth.

¹² It does not require the agencies to reach agreement. This is a significant difference between BIA and non-BIA programs. The BIA is mandated to enter into contracts or compacts with tribes for BIA programs that are for the benefit of Indians because of their status as Indians. 25 U.S.C. § 450f (2006).

retary is mandated by Section 403(b)(2) to sit down with tribes on these matters.¹³

The process established by the TSGA contrasts with existing avenues for tribal participation. For example, agency consultation of tribes has been harshly critiqued,¹⁴ and courts have largely deferred to agency decision-making when tribes have attempted to access federal land for religious use and to protect sacred sites.¹⁵ The result has been what one scholar has described as an “incremental loss of Indian rights behind a curtain of administrative discretion.”¹⁶ Although agreements negotiated pursuant to the TSGA still hinge largely on agency and bureau discretion, the TSGA establishes a new process for government-to-government relations, and provides another way for tribes to participate in federal public land management and management decisions.¹⁷

The second way the TSGA expands tribes’ ability to manage public land is by allowing them to exercise congressionally-delegated federal authority through Annual Funding Agreements (“AFAs”). AFAs are instruments negotiated pursuant to the TSGA that govern the transfer of federal programs and funds to tribes. Although the delegation of federal authority to tribes is not new,¹⁸ the TSGA may permit the delegation of authority over federal programs and federal land for the first time.

Tribes are sovereign political entities that retain inherent sovereign powers despite their close relationship with the United States federal government. Tribes retain sovereign powers that have not (a) been ceded through treaties or other agreements, (b) divested by the courts (both by Justice Marshall¹⁹ and in the later cases regarding implicit divestiture²⁰), or (c) lost

¹³ Johnson & Hamilton, *supra* note 11, at 1272.

¹⁴ Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, Or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 26-28 (1999-2000).

¹⁵ Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1638 (2004) (“After Lyng, it became clear that the courts would not mandate protection for Indian sacred sites, and that the majority of such sites would only be protected if federal land management agencies decided that they should be.”). See also Imre Sutton, *Indian Cultural, Historical, and Sacred Resources: How Tribes, Trustees, and the Citizenry Have Invoked Conservation*, in TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN NATURAL RESOURCE MANAGEMENT, *supra* note 7, at 165, 186.

¹⁶ Mary Christina Wood, *Symposium on Clinton’s New Land Policies: Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 761 (1995).

¹⁷ For a discussion of identity as an influence on public land claims and the Marin Coast Miwok, see Jennifer Sokolove et al., *Managing Place and Identity: The Marin Coast Miwok Experience*, 92 GEOGRAPHICAL REV. 23 (2002).

¹⁸ Title 25 of the U.S. Code, for example, contains many examples of such delegation, including the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2006); Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2809 (2006); and the Indian Self-Determination Act, 25 U.S.C. §§ 450–458 (2006).

¹⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

through Congress' exercise of plenary power over tribes.²¹ However, plenary power and tribes' status as sovereigns also allows Congress to delegate federal authority to tribes, expanding tribal authority.²²

Federal delegations thus augment tribal power and may provide an alternative basis for tribal jurisdiction.²³ Delegations under the TSGA may extend the extra-territorial dimensions of tribal sovereignty,²⁴ and strengthen the ability of tribes to control and participate in managing programs and functions that impact tribal sovereignty but are located outside Indian country.²⁵ These programs are not normally within the scope of a tribe's retained sovereign authority, but may exist through delegation of federal authority over federal lands to tribes. By offering tribes the opportunity to expand their authority, the TSGA represents a useful, even "underutilized,"²⁶ tool for tribes and parks.

B. Rationale for the NPS as a Case Study

The NPS provides an excellent case study for examining the implementation of the TSGA. The creation of national parks, by force or with tribal consent, has often displaced tribes, tribal members, traditional communal property rights systems, tribal institutions, and tribal resource management regimes. As a result, national parks often border or surround sacred sites and places of ongoing traditional use (such as gathering).²⁷ Because national

²⁰ *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²¹ Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 8-14 (1999); Professor Philip Frickey, Federal Indian Law Lecture at Boalt Hall School of Law (Nov. 15, 2004).

²² *Id.*

²³ Thomas P. Schlosser, *Federal Delegation of Tribal Jurisdiction Over Nonmembers*, Morisset, Schlosser, Homer, Jozwaik & McGaw, Sept. 1999, <http://www.msaj.com/papers/fed-deleg.htm> (last visited Mar. 18, 2007) (on file with the Harvard Environmental Law Review).

²⁴ Note that tribal sovereignty is not coterminous with territory. It has elements concerning reservation boundaries, land ownership and tribal membership. See, e.g., Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 *J. LAND RESOURCES & ENVTL. L.* 185, 190 (2000).

²⁵ The "Indian Estate" encompasses a number of categories of land upon which tribes may exercise varying degrees and types of jurisdiction. These may include tribally owned land within and outside of reservation boundaries (which may or may not be held in trust by the federal government), individual allotments held in trust, Indian land claims, and non-reservation lands on which Indians have usufructuary rights. See Charles Geisler, *Property Pluralism*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 65, 73-75 (Charles Geisler & Gail Daneker eds., 2000).

²⁶ PACIFIC WEST REGION, SUMMIT OF NATIONAL PARKS-TRIBES-CONSERVATION ORGANIZATIONS, A NEW BEGINNING FOR EQUITY AND UNDERSTANDING – NATIONAL PARKS AND TRADITIONALLY ASSOCIATED AMERICAN INDIAN TRIBES 33 (2003) [hereinafter PACIFIC WEST REGION].

²⁷ As David Ruppert states,

. . . living Indian cultures offer cultural resource protection that goes far beyond the protection of archaeological sites or abandoned ruins. Through traditional resource collecting and the application of traditional knowledge related to this collecting ac-

parks and Indian reservations are often close neighbors (in some cases the two are even superimposed), it is necessary to examine what role, if any, the TSGA may play in providing a means for tribes to participate meaningfully in the management of federal lands and resources to which they have ties.

This Article examines the implementation of the TSGA by the NPS through a case study at Grand Portage National Monument (“GPNM”). The NPS negotiated one of the first AFAs under the TSGA at GPNM. The GPNM AFA was the first AFA to include programmatic functions (other agreements tend to be concerned with performance of discrete projects), and it has become a model for subsequent efforts across the DOI.²⁸

This Article analyzes how the TSGA works as a tool for sharing authority between the NPS and tribes, and seeks to extend a growing literature on tribal-NPS relations and cooperative management efforts within the national parks.

C. Structure

This Article is organized into five Parts. Part II includes a brief history of the relationships between the NPS and Native American tribes and identifies a range of cooperative efforts between tribes and parks. Part III charts the evolution and expansion of Indian self-determination policy between 1975 and 1994. It describes how the TSGA defines the contours of negotiations and agreements between non-BIA bureaus and tribes, and the constraints the TSGA places on tribal involvement and eligible programs. Part IV examines the implementation of the TSGA across the DOI and through a case study at GPNM. This includes a review of the history of the relationship between the NPS and the Grand Portage Band of Minnesota Chippewa (“Band”) and a discussion of the Band’s efforts to use the TSGA to manage the monument’s maintenance department. Part V explores why the TSGA has yet to achieve widespread or particularly substantive changes in the management of federal land and federal programs.

tivity, Indian peoples maintain their living cultural heritage as well as continue to affect and shape the environment around them. If land management agencies have an interest in understanding the histories of the lands and resources they manage, they would benefit by finding ways to incorporate indigenous management techniques into their own management regimes.

Ruppert, *supra* note 8, at 261-62.

²⁸ For example, Federal Register documents announcing the Fish and Wildlife Service’s AFAs both reference the Grand Portage AFA. Fish and Wildlife Service and Confederated Salish and Kootenai Tribal Governments Sign Annual Funding Agreement Notice, 70 Fed. Reg. 5205 (Feb. 1, 2005) [hereinafter FWS & CSKT]; Fish and Wildlife Service and Council of Athabaskan Tribal Governments Sign Annual Funding Agreement Notice, 69 Fed. Reg. 41,838 (July 12, 2004) [hereinafter FWS & CATG].

D. Conclusions

The TSGA represents an incremental extension of the 1975 ISDEAA. Congress broadened Indian self-determination policy to include public land management (within the Department of the Interior), and the tools, processes, and mechanisms established by the TSGA are familiar to the realm of federal Indian self-determination policy. The TSGA is narrow: it allows only tribes that meet an established set of requirements to petition for management of programs and functions, and the eligibility of programs is narrowly circumscribed by the TSGA and subject to agency and bureau discretion.

Despite the background of the TSGA and its limited nature, the NPS has conceptualized the TSGA not as a step in a long path toward Indian self-determination, but as an aberration in public land policy and an intrusion into public land management. The NPS has narrowly construed the TSGA, framed it within the NPS's conventional tools for sharing money and authority with non-tribal entities, and proceeded carefully to avoid setting precedent. Consequently, tribes may negotiate on a government-to-government basis with the NPS, but the substantive programs look more like contracting than co-management. It is not clear that the TSGA provides a sovereign nation with any more programmatic control and decision-making authority than a contractor.

Even though its application has been limited, the TSGA compels a very different and potentially useful process for Native American tribes and the NPS. The GPNM case study explores this process and demonstrates how important supportive NPS leadership and informal relationships are for sustaining the formal agreement under the TSGA. The TSGA offers the possibility for tribes and the NPS to foster cooperation and to build trust. This Article analyzes how the TSGA works as a tool for sharing authority between the NPS and tribes, and seeks to extend a growing literature on tribal-NPS relations and cooperative management efforts within the national parks.

II. OVERVIEW OF TRIBAL-NATIONAL PARK SERVICE RELATIONS

The TSGA provides a lens for viewing contemporary relationships between tribes and the National Park Service, and the growing literature on NPS and tribal relations has just begun to focus on this issue.²⁹ The purpose

²⁹ Sources that begin to address the history include: PHILIP BURNHAM, *INDIAN COUNTRY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS* (2000); THEODORE CATTON, *INHABITED WILDERNESS: INDIANS, ESKIMOS, AND NATIONAL PARKS IN ALASKA* (1997); Steven Haberfeld, *Government-to-Government Negotiations: How the Timbisha Shoshone Got Its Land Back*, 24 AM. INDIAN CULTURE & RES. J. 127 (2000); Jim Igoe, *History, Culture, and Conservation: In Search of More Informed Guesses About Whether "Community-Based Conservation" Has a Chance to Work*, 13 POL'Y MATTERS 174 (2004); ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS & NATIONAL PARKS* (1998); John F. Martin, *From*

of this section is to provide a brief history of tribal-NPS relations over time and to contextualize the TSGA by looking at both the tools available and precedent for tribal-NPS cooperation.

A. *Brief Overview: Tribal-NPS Relations*

National Park Service and tribal relations are presently and historically complex and vexed. Although the diversity of tribes and parks makes generalizations about NPS policy hazardous, this section provides a brief history as an orientation to the 1994 Tribal Self-Governance Act. The history suggests a rationale for extending Indian self-determination policy to NPS programs. The NPS, like the BIA, has centralized land management.³⁰ It has often benefited indirectly from the erosion of tribal land and authority through federal Indian policies, and has also actively engaged in the dispossession of tribal land, the removal of tribal members from their homes, and the prohibition of tribal uses and practices upon certain lands. The history of the interaction between the NPS and Native American tribes begins to explain tribes' claims to land in NPS ownership, the complexity of boundaries between Indian reservations and national parks,³¹ and why greater inclusion of tribes in park decision-making and management might be warranted.

The creation of national parks preceded the 1916 establishment of the National Park Service by at least forty years.³² Responsibility for managing

Judgment to Land Restoration: The Havasupai Land Claims Case, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 271 (Imre Sutton ed., 1985); PETER NABAKOV & LAWRENCE LOENDORF, *RESTORING A PRESENCE: AMERICAN INDIANS AND YELLOWSTONE NATIONAL PARK* (2004); Paul Gerrald Sneed, *National Parklands in Northern Homelands: A Comparison of Co-Management of National Parks with Native People in Alaska (U.S.A.) and the Yukon (Canada)* (1998) (unpublished Ph.D. dissertation, University of Hawaii) (on file with the Harvard Environmental Law Review); Sokolove et al., *supra* note 17; MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* (1999); Steve Ulvi, *On Common Ground: An Enduring Wilderness as Cultural Landscape and Biotic Reserve*, in *CROSSING BOUNDARIES IN PARK MANAGEMENT: PROCEEDINGS OF THE 11TH CONFERENCE ON RESEARCH AND RESOURCE MANAGEMENT IN PARKS AND ON PUBLIC LANDS* 274 (David Harmon ed., 2001) (regarding Gates of the Arctic National Park and Preserve, Alaska National Interest Lands Conservation Act ("ANILCA") and the relationship between the NPS, tribal councils, and regional native associations).

³⁰ David Louter, *Nature as We See It: National Parks and the Wilderness Ideal*, 21 *ECOLOGICAL RESTORATION* 251, 253 (2003) ("Conservation changed the ties between native peoples and the lands within national parks . . . by centralizing authority over the use of resources within parks and other federal reserves.").

³¹ Six units of the NPS are on, or contain, tribal trust land; one national park has been designated by Congress as Indian Country; twelve park units are on Indian reservations but do not contain trust land; and thirteen park units in Alaska contain land belonging to twenty-eight distinct Alaska Native groups. EMOGENE BEVITT, *AMERICAN INDIAN LIAISON OFFICE, NAT'L PARK SERV., NATIONAL PARKS, TRIBAL TRUST LAND AND INDIAN RESERVATIONS* (Aug. 2004).

³² Although Yellowstone National Park (est. 1872) is frequently referred to as the "first" national park, the first reserve that did not rely on the War Powers and that was retained in federal ownership was actually the Hot Springs Reservation in Arkansas in 1832. Yosemite National Park, although reserved earlier than Yellowstone, was initially granted to the state for management in 1868. SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS TO LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780-2004*, at 36 (2005). The 1916 National Park

early parks and reservations fell to the United States Army.³³ Virtually all of the park units established before 1916 were imposed upon tribes through land cessions.³⁴

The national park system has embodied and reflected a number of different attitudes toward tribes over time. Scholars noting that wilderness need not preclude human inhabitation have pointed to the words of painter and traveler George Catlin who, in the 1830s, articulated one conception of a national park: “containing man and beast, in all the wild and freshness of their nature’s beauty.”³⁵ Catlin’s paternalistic vision included the presence of tribes and their members, although largely as either museum pieces or part of nature. The parks that were created embodied not Catlin’s vision, but rather a desire to create accessible tourist attractions glossed as uninhabited wilderness.³⁶ This often resulted in the exclusion of tribal members from their land, the prohibition of traditional tribal land uses within park units,³⁷ and the extinguishment of Indian title and rights altogether. “Uninhabited

Service Organic Act described the purpose of the national parks, monuments and reservations under NPS jurisdiction: “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” National Park Service Organic Act, 16 U.S.C. § 1 (2006).

³³ DUANE HAMPTON, *HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS* (1971).

³⁴ Parks and monuments include Yellowstone, Yosemite, Mount Rainier, Crater Lake, Sully’s Hill, Platt, Mesa Verde, Rocky Mountain, and Glacier. See KELLER & TUREK, *supra* note 29, at 19, 27.

³⁵ SPENCE, *supra* note 29, at 10.

³⁶ RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY* 16-17, 293 (1997).

³⁷ Nor were Native Americans the only communities excluded from park boundaries. Cochrane explores how the dispossession of fishermen from Isle Royale National Park changed the fishermen’s language, stories, and consciousness about their relationship with the environment. Timothy Cochrane, *Place, People, and Folklore: An Isle Royale Case Study*, 46 *WESTERN FOLKLORE* 1 (1987). Bruce Weaver’s study of the campaign to establish Great Smoky Mountains National Park provides an interesting parallel to the body of literature on Native American dispossession in two respects: (1) Historians studying Native Americans and national parks have described the propagation of myths that Indians never inhabited the areas that park advocates sought to preserve. See, e.g., NABAKOV & LOENDORF, *supra* note 29, at 29-30 (concerning Yellowstone National Park); KELLER & TUREK, *supra* note 29, at 94 (concerning Olympic National Park). Weaver describes how the campaign and rhetoric around the Great Smokies (est. 1934) was remarkably similar, focusing on a theme of “empty wilderness.” Promotional materials described the mountains (which were home to Cherokees and mountaineers) as “unknown,” “unvisited by man,” and “uninhabited.” Bruce J. Weaver, “*What to Do with the Mountain People?*”: *The Darker Side of the Successful Campaign to Establish the Great Smoky Mountains National Park*, in *THE SYMBOLIC EARTH: DISCOURSE AND OUR CREATION OF THE ENVIRONMENT* 151, 159-60 (James G. Cantrill & Christine L. Oravec eds., 1996); (2) The promoters and the NPS also played the other side of the coin, portraying, romanticizing, and using Indians and white mountaineers as tourist attractions: the mountain communities were promoted as “a museum of mountain culture,” and the Great Smoky Mountains Conservation Association advertised: “Like the mountaineers, our Indians will retain possession of their abodes within the Park, and perhaps enjoy their new dignity being objects of interest to million[s] of tourists.” Weaver, *supra*, at 161-62; see also Joseph L. Sax, *The Trampas File*, 84 *MICH. L. REV.* 1389 (1985-1986).

wilderness had to be created before it could be preserved,”³⁸ and the national park system has benefited from the erosion of Indian country.

The literature suggests at least three ways tribes have been dispossessed of their land and resources for national park units. First, the NPS has expropriated land and resources, removed and excluded Native Americans from park boundaries, and prohibited activities and use.³⁹ One scholar writes that present-day “denials of native claims on parks have served only to perpetuate the legacy of native dispossession.”⁴⁰

Second, the NPS has changed land management by focusing its management regimes on enhancing visitors’ scenic experiences through both tourism development and the direct manipulation of nature, including the promotion of certain species.⁴¹ Management for tourism and scenery changed the nature of the land and the human and ecological communities that occupied it. Traditional tribal communities and structures were displaced by visitor facilities and new “resident communities” consisting of NPS and concessions staff and short-term visitors. Native Americans, if included in the park at all, were treated as visitor attractions.⁴² Such management regimes also displaced indigenous management and knowledge, and with it, activities of cultural import to tribes and their members.⁴³

Finally, in some situations, tribes have consented to NPS acquisition or management of tribal land. But cessions by the tribe, especially where the tribe was either coerced or sought economic benefit in the midst of poverty, are not voluntary.

To some extent, national park policy toward tribes mirrored federal Indian policy at the time. The early Yellowstone (est. 1872) “model” of creating uninhabited wilderness, engaging in Indian removal, restricting traditional tribal hunting and subsistence uses, and viewing Native Americans as visitors rather than inhabitants, reflects the federal policies of removal (1830s-1860s), reservation (1860s-1887), and allotment (1870s-1934).⁴⁴ The NPS, later the manager of many of the national monuments reserved under the Antiquities Act of 1906, came into direct conflict with tribes in its charge to protect archaeological resources of tribes’ historic culture—often to the detriment of tribes’ contemporary culture and resources. The NPS institutionalized notions of static, past-tense tribes and tribal cul-

³⁸ SPENCE, *supra* note 29, at 4.

³⁹ See *id.*; Lynn Huntsinger & Sarah McCaffrey, *A Forest for the Trees: Forest Management and the Yurok Environment, 1850 to 1994*, 19 AM. INDIAN CULTURE & RES. J. 155 (1995).

⁴⁰ SPENCE, *supra* note 29, at 6.

⁴¹ SELLARS, *supra* note 36, at 4.

⁴² SPENCE, *supra* note 29, at 107.

⁴³ See M. Kat Anderson & Michael G. Barbour, *Simulated Indigenous Management: A New Model for Ecological Restoration in National Parks*, 21 ECOLOGICAL RESTORATION 269 (2003).

⁴⁴ ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 26-32 (4th ed. 2005).

tures that threatened to displace its concern for living, dynamic and evolving modern tribes.

Aided, perhaps, by competition between the BIA and the NPS within the DOI, the era of the Indian Reorganization Act and the Indian New Deal (1834-1940s) provided some change:

If anything, the 1930s marked the beginning of several new attempts to open up national park areas for traditional uses. . . . While no one within the Indian Service directly supported native claims to the national parks, Collier's Indian New Deal did foster a level of tribal activism that made it difficult for the park service to "preserve" more wilderness areas at the expense of Indian communities.⁴⁵

During this period of the Indian New Deal, some park unit enabling legislation and national monument designations began to explicitly reserve rights and privileges for tribes and their members.⁴⁶

The era of termination was also reflected throughout the park system (1940s-1960s).⁴⁷ The NPS continued its policy of Indian removal from national parks well into the 20th century. For example, in 1953, Yosemite National Park adopted the Yosemite Indian Village Housing Policy, permitting only permanent government employees (and their families) to live within the park. By 1969, the policy had resulted in the destruction of the Indian village and the removal of non-government-employed Yosemite Indians from the valley.⁴⁸ The NPS and concessioners at the Grand Canyon carried out a similar policy with the Havasupai in 1955.⁴⁹ But tribes also reacted against the NPS: drawing on tribal council resolutions dating from 1934, the Navajo Nation created the first tribal park in 1958 as an alternative to continued NPS ownership and management on the Navajo reservation.⁵⁰

Interestingly, in 1963, even while the NPS's *Leopold Report* recommended that ". . . biotic associations within each park be maintained, or

⁴⁵ SPENCE, *supra* note 29, at 134.

⁴⁶ For example: Canyon de Chelly in 1931 and Pipestone National Monument in 1937. 16 U.S.C. § 445 (2006) (authorizing the President to establish the Canyon de Chelly National Monument within the Navajo Indian Reservation, Arizona); 16 U.S.C. § 445c (2006) (establishing Pipestone National Monument, Minnesota).

⁴⁷ Termination was the official policy of the federal government from the 1940s through the 1960s. It sought to end federal responsibility for Indian affairs and to eliminate federal programming for Indians. Congress terminated over 100 tribes, ending their coverage under federal Indian laws and subjecting them to state laws, severing their trust relationship with the federal government, and converting their land to private ownership. FRANCIS PAUL PRUCHA, *THE GREAT FATHER 1014* (1995).

⁴⁸ The tribe is not federally recognized. It was formally known as the American Indian Council of Mariposa County, and is now known as the Southern Sierra Miwok Nation. SPENCE, *supra* note 29, at 129-32, 173 n.59.

⁴⁹ *Id.* at 135.

⁵⁰ Jeffrey Mark Sanders, *Tribal & National Parks on American Indian Lands 68-70* (1989) (unpublished Ph.D. dissertation, University of Arizona) (on file with the Harvard Environmental Law Review).

where necessary recreated, as nearly as possible in the condition that prevailed when the area was first visited by the white man," and that "a national park should represent a vignette of primitive America,"⁵¹ there was little discussion of the habitation of wilderness and the role of humans as hunters, predators, and participants in the ecosystem.⁵² Sellers writes, "Ignoring Native American perceptions of landscapes and wilderness and the possibility of ecological change resulting from Native American use of lands, this New World imagery suggested a kind of wilderness *pastorale* that had enormous appeal to many in the Park Service."⁵³ The irony is that although many parks have been created to preserve "historical vignettes of the settlement period, Indians were not part of that vignette. Instead, the parks preserve an empty landscape, vacated by or cleared of native inhabitants."⁵⁴

The 1960s were also a time of increased attention to tourism in the national parks, and this included the potential for recreation on Indian reservations. The NPS promoted park units as agents of tribal economic development, both through park establishment⁵⁵ and exchanges with tribes.⁵⁶ As discussed below, at GPNM the NPS provided advisory assistance in planning recreation development on the Grand Portage reservation at the same time that it was actively involved in national recreation planning efforts at the local, state and national level.

Tribes have witnessed some change in NPS-tribal relations in the era of self-determination (1960s-present). Keller and Turek consider the Lake Superior Chippewa's successful effort to halt the acquisition of tribal land for Apostle Islands National Lakeshore in 1970 the beginning of a new era in which "the NPS could no longer ignore resident Indians."⁵⁷ A few tribes were able to secure a return or transfer of land from federal agencies.⁵⁸ The

⁵¹ A.S. Leopold et al., *Wildlife Management in the National Parks: The Leopold Report* (1963), available at http://www.cr.nps.gov/history/online_books/leopold/leopold4.htm.

⁵² See, e.g., PACIFIC WEST REGION, *supra* note 26, at 11.

⁵³ SELLARS, *supra* note 36, at 214. But see ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 199-200 (1987) (arguing that the Leopold Committee considered Native American manipulation of the environment, particularly periodic burning, to be "original" and "natural," and therefore, part of the baseline conditions at the time of European contact). The committee may have perpetuated a view of Native Americans as part of natural rather than human history. See, e.g., STEVEN CONN, HISTORY'S SHADOW: NATIVE AMERICANS & HISTORICAL CONSCIOUSNESS IN THE NINETEENTH CENTURY 30-31 (2004).

⁵⁴ Thanks to Lynn Huntsinger for her comments on this section.

⁵⁵ Nez Perce National Historical Park was established in 1965 as a result of efforts by the Nez Perce Tribe to foster economic development and create jobs through tourism. See TED CATTON, NEZ PERCE NATIONAL HISTORICAL PARK: ADMINISTRATIVE HISTORY ch. 1 (1996), available at <http://www.nps.gov/nepe/adhi/adhi.htm>.

⁵⁶ In 1962, the NPS and Navajo Nation signed a memorandum of agreement that allowed NPS use of Navajo land in exchange for specific economic privileges within the monument. Memorandum of Agreement Between the Navajo Tribes, Bureau of Indian Affairs, and National Park Service Relating to the Recreational Development of the Navajo National Movement (May 8, 1962).

⁵⁷ KELLER & TUREK, *supra* note 29, at 16.

⁵⁸ On a number of occasions, the creation of a national park has been offered as a compromise by both tribes and the federal government where tribes have made claims to the restora-

Havasupai Tribe obtained additional reservation land and usage rights in the Grand Canyon National Park Expansion Act of 1975. In 1980, the Alaska National Interest Lands Conservation Act ("ANILCA") added ten new park units in Alaska, provided for subsistence use in nine of the units, and established Subsistence Resource Commissions with seats and a voice for Alaska Natives.⁵⁹

Since the 1990s, legislation has expanded the substantive and procedural remedies available to tribes with regard to public lands.⁶⁰ In 1994, the TSGA included non-BIA bureaus like the NPS in its provisions, and amendments to the Marine Mammal Protection Act authorized the Secretaries of

tion and transfer of federal land. During the occupation of Alcatraz Island (1969-1971), the federal government refused to acknowledge the Indians' claims to the "surplus land," and "offered instead to make Alcatraz a national park with an Indian theme, an Indian name, and Indian employment preference in hiring the necessary park personnel." *ALCATRAZ IS NOT AN ISLAND* 65-68 (Peter Blue Cloud ed., 1972). The Indians rejected the proposal. Alcatraz Island became part of Golden Gate National Recreation Area ("GGNRA") in 1973. Interestingly, U.S. Representative Burton's original GGNRA bill excluded Alcatraz from the park and provided that the government sell it to the Indian people; Alcatraz was later added. HAL K. ROTHMAN, *THE PARK THAT MAKES ITS OWN WEATHER: AN ADMINISTRATIVE HISTORY OF GOLDEN GATE NATIONAL RECREATION AREA* 28-30 (2002).

Conversely, the Sioux Nation proposed a national park under tribal ownership in the Black Hills, which later led to the introduction of federal legislation calling for joint NPS-tribal management. In 1983, after the Sioux Nation was awarded compensation in the Court of Claims (*Sioux Nation of Indians et al. v. United States*, 650 F.2d 244 (1981)), and the hope of a judicial land restoration grew dim, the Sioux drafted a bill to return land to the Sioux Nation. It involved a land exchange and creation of a tribal religious area and Sioux Park. Imre Sutton, *Incident or Event?: Land Restoration in the Claims Process*, in *IRREDEEMABLY AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 211, 224 (Imre Sutton ed., 1985). The Sioux National Black Hills Act or "Bradley Bill" was introduced in 1985 and called for joint management of the park between the NPS and the Sioux Nation. Office of Sen. Daniel Inouye, *1986 Black Hills Hearing on S.1453: Introduction*, 4 *WICAZO SA REV.* 10 (1988). (Thank you to Professor Frickey for sharing this information from his files.) It never made it out of committee. A similar bill was introduced in 1990. John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 *GREAT PLAINS NAT. RESOURCES J.* 40, 92 (2001); see also David Melmer, *Historic Partnership: State And Federal Officials Meet With Oglala Sioux*, *INDIAN COUNTRY TODAY*, Mar. 2, 2005, at B1. Neither the Alcatraz offer nor the Black Hills proposal succeeded, but in both examples the creation of national parks has served as a pawn in negotiations regarding Indian land claims.

⁵⁹ Sneed, *supra* note 29, at 109, 160.

⁶⁰ This includes amendments to the National Historic Preservation Act in 1992, Pub. L. No. 102-575, 106 Stat. 4600 (1992) (codified as amended at 16 U.S.C. § 470 (2006)); the Native American Graves Protection and Repatriation Act in 1990, 25 U.S.C. §§ 3001-3013 (2006); President Clinton's Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Grave Protection and Repatriation Act: Background and Legislative History*, 24 *ARIZ. ST. L.J.* 35, 61-70 (1992). *But see* Wood, *supra* note 16, at 749; President Clinton's Executive Order on Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). *See generally* Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 *IDAHO L. REV.* 475 (2005); Dave Egan, *Defining Cultural and Ethnographic Landscapes*, 21 *ECOLOGICAL RESTORATION* 258 (2003); Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 *VT. L. REV.* 145 (1996-97); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 *U. COLO. L. REV.* 413 (2002).

Interior and Commerce to enter into agreements with Alaska Native organizations to “conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”⁶¹ In February 1995, the NPS created the American Indian Liaison Office (“AILO”).⁶² A number of tribes have used this emphasis on cooperation and government-to-government relations to secure agreements with national park units.⁶³

Yet relations remain vexed. In 1996, six tribes—the Navajo Nation, Five Sandoval Indian Pueblos, Hualapai Tribe, Timbisha Shoshone Tribe, Miccosukee Tribe, and Pai ‘Ohana—established the Alliance to Protect Native Rights in National Parks.⁶⁴ It is not clear what the next era in federal Indian policy or NPS-tribal relations will be.

B. *Avenues for Tribal–NPS Cooperation*⁶⁵

Tribes and parks have used a variety of tools and methods for creating more cooperative relationships, representing a range of options and experience. For example, joint management of Canyon de Chelly National Monument by the Navajo Nation and the NPS originated in 1931, and demonstrates that cooperative efforts between tribes and parks are neither implausible nor novel.⁶⁶ Nonetheless, the NPS has rarely relinquished ownership or control over land to tribes. Instead, other types of agreements are more common. It is important to situate the TSGA among four categories of tools for NPS-tribal cooperation: land transfers and exchanges, co-management, agreements, and tribal parks.

⁶¹ Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532 (codified as amended at 16 U.S.C. § 1388(a)). In 1997, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and the Biological Resources Division signed a Memorandum of Agreement for the negotiation of the Marine Mammal Protection Act Section 119 Agreements with the Indigenous People’s Council for Marine Mammals, an Alaska-wide agency. For more information, see Jennifer L. Schorr, *The Integration of Traditional Ecological Knowledge and Science Under Marine Mammal Protection Act Co-Management Agreements* (Mar. 9, 1998) (unpublished Master’s thesis, University of Washington).

⁶² American Indian Liaison Office, Aug. 2000, *available at* <http://crm.cr.nps.gov/archive/23-09/23-09-10.pdf>.

⁶³ This is addressed later in Part II.C.

⁶⁴ See Todd Wilkinson, *Native Americans Challenge Park Agency for Land Rights*, *CHRISTIAN SCI. MONITOR*, Oct. 22, 1996, at 1.

⁶⁵ A few sources address current NPS Management Policies; the NPS website has a long but non-exhaustive list. *Compilation of NPS Management Policies Pertaining to Native Americans*, Jan. 2003, *available at* <http://www.nps.gov/policy/NativeAmericanPolicies.htm>. See generally Bluemel, *supra* note 60 (exploring agency directives); Egan, *supra* note 60 (discussing management policies).

⁶⁶ It is revealing that the co-management occurs on tribal land rather than federal land.

1. *Land Transfers and Exchanges*⁶⁷

In rare cases, tribes have been able to secure rights and privileges, or even transfers of land, when changes to the park are necessary or desired by the NPS. For example, a park expansion at Grand Canyon and a change from monument to park designation at Death Valley provided the political and administrative opening for the Havasupai and Timbisha Shoshone tribes to assert their voices effectively to secure land for tribal use or ownership. At Grand Canyon National Park, the Havasupai Tribe was able to secure additional tribal land use and ownership rights within the park under the Grand Canyon Expansion Act of 1975.⁶⁸ The Timbisha Shoshone Tribe was able to secure land for a reservation within Death Valley National Park and to designate a Timbisha Shoshone Natural and Cultural Preservation Area with some specified locations for co-management by the park and tribe.⁶⁹

The Eastern Band of Cherokee Indians participated in a land exchange with Great Smoky Mountains National Park and the Blue Ridge Parkway in 2003. The Eastern Band of Cherokee Indians Land Exchange Act of 2003⁷⁰ authorized the National Park Service to exchange 143 acres of land within Great Smoky Mountains National Park and the Blue Ridge Parkway (adjacent to the tribe's trust land and part of the tribe's aboriginal territory) for 218 acres of land acquired by the Eastern Band of Cherokee Indians ("EBCI") adjacent to the Blue Ridge Parkway.⁷¹ The Act places the exchanged land in trust for the EBCI, which intends to build educational facilities on the land. It also prohibits gaming,⁷² and directs the NPS and EBCI to agree on standards for construction on the land.⁷³ Evidently, once a park enters NPS own-

⁶⁷ For references regarding the repatriation of federal land (NPS and non-NPS) see Sutton, *supra* note 58, at 211; Tsosie, *Tribal Environmental Policy*, *supra* note 8, at 306.

⁶⁸ See Janet R. Balsom, *Inclusion in NPS Management at Grand Canyon: Tribal Involvement and Integration*, in *CROSSINGS BOUNDARIES IN PARK MANAGEMENT: PROCEEDINGS OF THE 11TH CONFERENCE ON RESEARCH AND RESOURCE MANAGEMENT IN PARKS AND ON PUBLIC LANDS 250* (David Harmon ed., 2001); BURNHAM, *supra* note 29, at 182-83; KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION 149-92* (2001); KELLER & TUREK, *supra* note 29, at 156; MARTIN, *supra* note 29, at 271.

⁶⁹ See BURNHAM, *supra* note 29, at 307; Catherine S. Fowler et al., *Caring for the Trees: Restoring Timbisha Shoshone Land Management Practices in Death Valley National Park*, 21 *ECOLOGICAL RESTORATION* 302, 303 (2003); Haberfeld, *supra* note 29, at 154-56; THE TIMBISHA SHOSHONE TRIBAL HOMELAND REPORT: A DRAFT SECRETARIAL REPORT TO CONGRESS TO ESTABLISH A PERMANENT TRIBAL LAND BASE AND RELATED COOPERATIVE ACTIVITIES, part 3(c), <http://www3.iwvisp.com/blm/report> (last visited Jan. 3, 2007) (on file with the Harvard Environmental Law Review).

⁷⁰ Eastern Band of Cherokee Indians Land Exchange Act of 2003, 16 U.S.C. § 460a-5 (2006).

⁷¹ The exchanged land appears to have been acquired in anticipation of the Act. The NPS and EBCI also have some history with regard to acquisitions of rights-of-way for the Blue Ridge Parkway. See FAIRFAX ET AL., *supra* note 32, at 123.

⁷² 16 U.S.C. § 460a-5(e) (2006).

⁷³ *Id.* § 460(d)(2).

ership and is given national park unit designation, however, such a park is rarely transferred from federal to tribal control.

2. *Co-Management*

True sharing of park management, or co-management, is probably more rare than land transfers. However, a recent agreement at the Southern Unit of Badlands National Park provides a glimpse at the possibilities for co-management. The Oglala Sioux Tribe manages the visitor center for the Southern Unit of Badlands National Park under a recently negotiated Memorandum of Understanding (“MOU”) negotiated with the NPS.⁷⁴ But the closest co-management arrangement between tribes and parks may be between the NPS and the Navajo Nation at Canyon de Chelly.

Canyon de Chelly was established in 1931 by presidential proclamation. It lies within the Navajo reservation in northeastern Arizona and, although managed as a park unit by the NPS, is retained in ownership by the Navajo Nation. The enabling legislation,⁷⁵ in addition to providing for the rights of Navajos within the monument, loosely defined what activities would be governed by the tribe and the NPS. Generally, the NPS has responsibility for archaeological resources; cultural and historic resources; objects and issues of scientific interest; and visitor services. The Navajo Nation manages water, forest, mineral and subsurface resources and grazing allotments. The Navajo Nation assumes jurisdiction, in cooperation with the NPS, over land use regulation, primarily through the tribe’s allocation of agricultural land use permits. Although the enabling legislation does not provide a clear mandate to cooperate with the tribe in monument management, the NPS and the Navajo Nation coordinate various management efforts (e.g., law enforcement, interpretation, and facilities management).⁷⁶

3. *Agreements*

More common than either co-management agreements or land transfers are agreements in which tribes have secured favorable language in the ena-

⁷⁴ Associated Press, *One Badlands Tourist Center Now Run By Tribe* (Oct. 4, 2004), available at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=lm&list=H-AmIndian> (then follow “October 2004” hyperlink; then follow “FYI: News Items of Interest 10/5/2004” hyperlink) (on file with the Harvard Environmental Law Review).

⁷⁵ Pub. L. No. 71-667, 46 Stat. 1161 (Feb. 14, 1931). Canyon de Chelly National Monument was not established under the Antiquities Act of 1906. A 1927 act required congressional action for changes to reservation boundaries. 25 U.S.C. § 398d (2006). Thus, a presidential proclamation under the Antiquities Act would not be sufficient. As a result, Congress passed an act to authorize the President of the United States to establish the Canyon de Chelly National Monument within the Navajo Indian Reservation, Arizona. Act of Feb. 14, 1931, 16 U.S.C. § 445 (2006). The boundaries to the park were later changed by Pub L. No. 72-404, 47 Stat. 1419 (1933) (codified as amended at 16 U.S.C. § 445 (2006)).

⁷⁶ Interview with Scott Travis, Superintendent, Canyon de Chelly Nat’l Monument, at Canyon de Chelly Nat’l Monument, Ariz. (Mar. 23, 2004).

bling legislation establishing park units and recognizing the rights and privileges of tribes and tribal members regarding hiring preferences, sharing of management, preference in concessions, and hunting and/or gathering within park boundaries.

Tribes and the NPS have entered into a variety of agreements with tribes for different purposes. For example, the NPS regularly enters into memoranda of agreement (“MOAs”) or MOUs.⁷⁷ It also negotiates cooperative agreements that provide a means for transferring funds from NPS to other entities, including tribes.⁷⁸ For example, some tribes have entered into general agreements to formalize the government-to-government relationship between the park unit and themselves.⁷⁹ Other tribes have been able to gather or hunt within parks where NPS regulations are generally hostile to such activities.⁸⁰ The activities are permitted when park enabling legislation (or other legislation) so provides,⁸¹ where treaty rights (or case law) apply,⁸² or where superintendents have used their discretion to permit such gathering to occur.⁸³ Where treaty rights are at issue, the rights may include servitudes

⁷⁷ For example, the NPS has an MOA with the Navajo Nation for Navajo National Monument. The monument is within the Navajo reservation, but is under primarily NPS ownership. A 1962 MOA permits the NPS to manage an additional 240 acres that remains in Navajo ownership. For a sampling of MOUs and MOAs between tribes, states, and federal agencies, see Oregon Law Institute, Northwestern School of Law of Lewis & Clark College, *Protection of Cultural Resources & Co-Management of Natural Resources by Tribes and the Government*, Course Materials from the July 28, 2000 Program in Portland [hereinafter Oregon Law Institute].

⁷⁸ This is used, for example, at Chaco Culture National Historic Park. The park has a “long-standing cooperative agreement” with the Navajo Nation concerning the Chaco Protection Sites Program pursuant to the Chacoan Outliers Protection Act of 1995. E-mail from Wendy Bustard, Museum Curator, Chaco Culture NHP Museum Collection, Department of Anthropology, University of New Mexico, to author (Feb. 24, 2005) (on file with the Harvard Environmental Law Review). *But see* KELLER & TUREK, *supra* note 29, at 192 (suggesting that attempts at cooperative management at Chaco Culture NHP have been unsuccessful).

⁷⁹ General Agreement Among the National Park Service, Redwood National Park; California Department of Parks and Recreation, Prairie Creek Redwoods State Park; and the Yurok Tribe—to formalize the government-to-government relationship, Agreement No. G84800 20005 (Mar. 27, 2003).

⁸⁰ Ruppert, *supra* note 8, at 261-62.

⁸¹ *E.g.*, Big Horn Canyon National Recreation Area and Crow Tribe; Lake Mead National Recreation Area and Hualapai Tribe; Big Cypress National Preserve and Miccosukee and Seminole Tribes; Organ Pipe Cactus National Monument and Indians of the Papago Reservation; Pipestone National Monument and “Indians of all tribes,” Act of Aug. 25, 1937, 16 U.S.C. §§ 445c-d (2006) (establishing Pipestone National Monument, Minnesota); Grand Canyon National Park and Havasupai Tribe (16 U.S.C. §§ 221-228 (2006)). The Grand Canyon National Park Enlargement Act of 1975 permits use of 185,000 acres for traditional purposes, including hunting and gathering. 16 U.S.C. § 228a (2006).

⁸² Looking not at the NPS, but at the U.S. Forest Service, Wilkinson explores some of the contention between the Nez Perce Tribe and USFS regarding off-reservation rights, campground fees and stay limits, and the nature of the USFS’s obligation to protect treaty resources. 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, 450-61 (1998).

⁸³ *See, e.g.*, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, HAWAII VOLCANOES NAT’L PARK, POLICY STATEMENT ON NATIVE HAWAIIAN USE OF HAWAII VOLCANOES NATIONAL PARK (1995).

across federal land to access resources.⁸⁴ Goodman has also suggested that such rights may lend themselves not only to claims of rights to use the resource and the right to the resource itself, but even a right to manage or co-manage the resource.⁸⁵ A number of park units have negotiated use agreements with federally recognized tribes.⁸⁶

4. *Tribal Parks as Alternatives*

Tribes may also seek to manage their own land with tribal park designations. Historian Diane Krahe describes the efforts of the tribes of the Flathead reservation in Montana that protested the imposition of wilderness and roadless areas by the Indian Office/BIA, and eventually developed and adopted their own wilderness designation, a model, in Krahe's words, for "preserving the natural integrity of Indian lands on Indian terms."⁸⁷

There are a number of tribal parks in existence. The Navajo Nation has an active tribal park system.⁸⁸ Prompted by concerns about NPS control and

⁸⁴ See *United States v. Winans*, 198 U.S. 371, 381 (1905). Bluemel has suggested that using such property-based claims may represent a difficult but perhaps unexplored and useful alternative to achieve accommodation of Native American use of public land. Bluemel, *supra* note 60, at 546-54.

⁸⁵ Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting & Fishing Rights: Tribal Co-Management as a Reserved Right*, 30 ENVTL. L. 279, 282 (2000). Some have proposed that the TSGA be amended to provide for mandatory compacting between non-BIA bureaus and tribes where treaty resources are a consideration. Telephone Interview with Geoffrey Strommer, Attorney, Hobbs, Straus, Dean and Walker (Apr. 22, 2005) (on file with the Harvard Environmental Law Review).

⁸⁶ Zion National Park, Cedar Breaks National Park, and Pipe Spring National Monument have signed a Memorandum of Understanding with the Kaibab Band of Paiute Indians, the Moapa Band of Paiute Indians, and the Paiute Indian Tribe of Utah. This agreement allows tribal members to gather plants in the park for traditional cultural-religious purposes under prescribed conditions. Memorandum of Understanding Regarding the Gathering of Plant Resources for American Indian Traditional Cultural-Religious Purposes from National Park Lands (May 2, 1998-Mar. 4, 1999). Zion National Park also has a "formal park policy that exempts Southern Paiute tribal members from paying fees if they enter the park for nonrecreational activities (i.e. traditional religious, ceremonial, medicinal, or other customary activities)." NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, ZION NATIONAL PARK: GENERAL MANAGEMENT PLAN 8 (2001). The Nisqually Indian Nation and Mount Rainier National Park entered into a cooperative use agreement for gathering on November 23, 1999. Memorandum of Understanding Regarding the Gathering of Plant Resources for American Indian Traditional Cultural-Religious Purposes from National Park Lands between Mount Rainier National Park and the Nisqually Indian Tribe, No. 1443-MU9450-99-002 (Nov. 23, 1998); DANIEL BOXBERGE, *THE LEGAL CONTEXT OF NATIVE AMERICAN LAND AND RESOURCE USE IN MOUNT RAINIER NATIONAL PARK* (1998). The agreement included a sunset provision and its future is uncertain. Public Employees for Environmental Responsibility, a non-governmental organization, threatened to bring suit if the agreement is renewed. PACIFIC WEST REGION, *supra* note 26, at 29. An agreement between Lassen Volcanic National Park and the Mooretown Rancheria also allows members of the tribe to collect or gather plants within the park. General Agreement Between Lassen Volcanic National Park and Mooretown Rancheria, No. GA8400-99 001 (Sept. 30, 1999).

⁸⁷ Diane L. Krahe, *A Sovereign Prescription for Preservation: The Mission Mountains Tribal Wilderness*, in *TRUSTEESHIP IN CHANGE*, *supra* note 7, at 198.

⁸⁸ See Sanders, *supra* note 50, at 61.

authority over tribal land, a 1934 Navajo Tribal Council resolution called for the return of NPS lands within the Navajo reservation, specifically at Canyon de Chelly.⁸⁹ The resolution communicated the desire of the Navajo Nation to protect its own lands and provide for public use, with the acknowledgement that the Navajo “have a greater love for their country and its beauties than any other people can possibly have,” “know more about their country and always will have a greater interest in its welfare than any other people,” and that the “management by ourselves of our own scientific and scenic areas would give us an additional source of income necessary to maintain our ever-increasing population.”⁹⁰ The Navajo Nation’s first tribal park, Monument Valley, was established in 1958 partly in response to “persistent NPS efforts to acquire the valley.”⁹¹

The Navajo Parks and Recreation Department currently manages Monument Valley, Antelope Canyon–Lake Powell, Bowl Canyon, Little Colorado River Gorge, Window Rock, and Four Corners National Navajo Tribal Park.⁹² The Navajo Nation is not alone: the Intertribal Sinkyone Wilderness Council manages the Sinkyone InterTribal Park in California, the Ute Mountain Tribe of the Ute Mountain Reservation operates a tribal park in Colorado,⁹³ and the Pueblo of Santa Clara own and operate the Puye Cliff Dwellings in New Mexico.⁹⁴

In sum, there are a variety of avenues for NPS-tribal cooperation, including land transfers and exchanges, co-management, agreements, and tribal parks. Part III analyzes the TSGA as one of these avenues by examining its background and provisions to shed light on its use. If the restoration of tribal land or exclusive management is the desired goal, the TSGA is an inadequate tool. However, as land restoration appears to be a rare, unlikely,⁹⁵ or even politically impossible option, and as litigation under the First Amendment continues to fail,⁹⁶ the TSGA and the opportunities it presents for increasingly tribal participation in federal land management might be useful.

⁸⁹ DAVID M. BRUGGE & RAYMOND WILSON, *ADMINISTRATIVE HISTORY: CANYON DE CHELLY NATIONAL MONUMENT, ARIZONA* 23 (1976).

⁹⁰ 19 N.T.C. § 1 (1970).

⁹¹ Keller & Turek, *supra* note 29, at 213.

⁹² See Navajo Nation Parks and Recreation Department, <http://www.navajonationparks.org/parks.htm> (last visited Feb. 15, 2007) (on file with the Harvard Environmental Law Review).

⁹³ See Ute Mountain Ute Tribal Park, <http://www.utemountainute.com/tribalpark.htm> (last visited Feb. 15, 2007) (on file with the Harvard Environmental Law Review).

⁹⁴ See Puye Cliff Dwellings, <http://www.hanksville.org/voyage/misc/puye.html> (last visited Feb. 15, 2007) (on file with the Harvard Environmental Law Review).

⁹⁵ See Sutton, *supra* note 58, at 211, 228-29.

⁹⁶ These are what Bluemel has called the “traditional claims raised by Native American activists” and the subject of much legal literature. See Bluemel, *supra* note 60, at 483, 496-98.

III. THE 1994 TRIBAL SELF-GOVERNANCE ACT: HISTORY AND PROVISIONS

The TSGA is one step in a long aggregation of amendments to the ISDEAA, and represents an effort by Congress to link the programs of non-BIA bureaus within the Department of the Interior to Indian self-determination policy. The inclusion of non-BIA DOI bureaus (like the NPS) in the TSGA represents not a provision aberrant to the ISDEAA's history, but rather an incremental step consistent with both its history and its intent. It is significant, and perhaps new, that the TSGA recognizes the import of programs of non-BIA bureaus to Indian self-determination. Even so, their inclusion follows a trend of gradual expansion of the scope of the ISDEAA.

A. *Evolution of the Indian Self-Determination Act and Amendments*⁹⁷

Although scholars have identified early examples of Indian self-determination policy⁹⁸ throughout the pendulum swings of federal policy toward Native Americans, self-determination emerged as a major policy goal in the 1960s and 1970s. A response to both the American Indian Movement and the destructiveness of termination, it brought sweeping changes. President Nixon, in his special message to Congress in 1970, stated, "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."⁹⁹ Changes in Indian education and Indian health services and the enactment of the Indian Child Welfare Act followed.¹⁰⁰

Federal self-determination policy, with the passage of the ISDEAA in 1975, aimed to reduce the dominance of the federal government, and specifically the BIA, by encouraging tribes to assume control over federal programs for Native Americans. The ISDEAA was intended to provide a mechanism for transitioning from federal planning and administration to tribal self-determination,¹⁰¹ and from federal paternalism to tribal empower-

⁹⁷ For quick overviews, see VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICANS INDIANS, AMERICAN JUSTICE 21-24 (1983); PRUCHA, *supra* note 47, at 1085-1170.

⁹⁸ The origins of self-determination policy are beyond the scope of the article. See, e.g., Russell Lawrence Barsh, *Are We Stuck in the Slime of History?* 15 AM. INDIAN Q. 1 (1991); and a response from Richmond L. Clow, *A Hesitant Second*, 15 AM. INDIAN Q. 39 (1991). Johnson and Hamilton also describe how early policies have been used by tribes more recently. For example, an 1834 Act (25 U.S.C. § 48 (2006)) that permitted competent tribes (as deemed by the Secretary of the Interior) to "direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them," was used by the Red Lake Band of Chippewa Indians in the 1980s. Johnson & Hamilton, *supra* note 11, at 1256.

⁹⁹ Message from the President of the United States Transmitting Recommendations for Federal Indian Policy, H.R. DOC. NO. 91-363, at 1 (1970).

¹⁰⁰ Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (2006); Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1601 (2006); Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (2006).

¹⁰¹ See PRUCHA, *supra* note 47, at 1113 (listing the main points of Nixon's proposals to Congress).

ment.¹⁰² The congressional findings in the 1994 amendments state the point succinctly: “[T]he Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs.”¹⁰³ The ISDEAA, then, created a “process by which resources dedicated to administering and implementing Indian programs are removed from Bureau of Indian Affairs personnel and placed directly into the hands of tribal governments.”¹⁰⁴

The ISDEAA also reflects fear of termination.¹⁰⁵ Concerned about the possibility of losing all federal funding and assistance,¹⁰⁶ many tribes sought—and Nixon advocated—“self-determination without termination.”¹⁰⁷ As a result, legislators opted not to pass a “takeover” bill that would have allowed tribes to assume complete administration from the federal government. The ISDEAA instead provided for a different mechanism for transfer of responsibility, one that explicitly acknowledged a commitment to the federal trust responsibility, allowing tribes to assume responsibility through a contracting process.¹⁰⁸

The federal policy of Indian self-determination has continued to expand since the enactment of the ISDEAA in 1975.¹⁰⁹ Amendments to the ISDEAA, including the TSGA, have enlarged its scope from BIA and Indian Health Service to non-BIA agencies, from contracts to more sophisticated and flexible compacts and annual funding agreements, and from programs exclusively for the benefit of Indians because of their status as Indians to programs to which tribes have geographical, historical, and cultural connections.¹¹⁰

¹⁰² See generally Johnson & Hamilton, *supra* note 11.

¹⁰³ Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 202(3), 108 Stat. 4270, 4271 (codified in 25 U.S.C. § 458aa (2006)).

¹⁰⁴ Johnson & Hamilton, *supra* note 11, at 1252.

¹⁰⁵ See *supra* note 47 for a definition of termination. See generally CLINTON ET AL., *supra* note 44, at 40.

¹⁰⁶ *Id.* at 45-46.

¹⁰⁷ PRUCHA, *supra* note 47, at 1112.

¹⁰⁸ It should be noted that “638” contracts are to be distinguished from contracts between the federal government and private parties. They are agreements between two sovereigns and could be (and have been) likened to treaties. Johnson & Hamilton, *supra* note 11, at 1256 n.24, 1262-63.

¹⁰⁹ *Id.* at 1262-78.

¹¹⁰ From 1975 to 1994, the ISDEAA and its amendments have reflected different emphases in federal policy: civil rights in 1975, localism and devolution in 1988, and outsourcing and reduced government in 1994. The TSGA was drafted during the Clinton administration, and its language reflects some of the rhetoric of the times (e.g., Gore’s Reinventing Government campaign). One of the policy goals of the title of the Act is to “provide for an orderly transition through a planned and measurable parallel reduction in the Federal bureaucracy.” 25 U.S.C. § 458aa (2006). However, although the TSGA has been framed incorrectly as another outsourcing measure (see, e.g., Paul McHugh, *Bush’s Plan for Preserves*, S.F. CHRONICLE, Oct. 16, 2003, at C9), AFAs were not and are not part of an explicit part of government outsourcing. The major policy goal is not an increase in efficiency or savings in program costs (although that may well occur), but rather an emphasis on reconnecting federal programs to tribes that have an association to them. 25 U.S.C. § 450 (2006). Regardless, outsourcing may continue to color the debates about the TSGA, particularly the possibility of federal job displace-

Under the 1975 ISDEAA, Native American tribes and Alaska Native Villages were given the right to assume responsibility for BIA or Indian Health Service (“IHS”)¹¹¹ programs performed pursuant to federal law that *benefited Indians because of their status as Indians*.¹¹² Under Indian Self-Determination Act contracts (commonly referred to as “638 contracts”), tribes have been given discretion over program operations and received federal funds¹¹³ that the BIA or IHS would have received to provide the same services.¹¹⁴ The types of programs available to tribes range widely, and some tribes have used the ISDEAA to assume control over tribal natural resource management.¹¹⁵ But the ISDEAA was not without its critics; some argued that the BIA was interpreting the Act’s language so narrowly as to prevent tribes from obtaining any real discretion and control over programs.¹¹⁶

In response to calls for greater flexibility in allocating federal resources, and prompted by a series of articles on mismanagement and waste within the BIA in the *Arizona Republic*, Congress began discussion on the 1988 amendments to the Indian Self-Determination Act.¹¹⁷ The 1988 amendments created the Self-Governance Demonstration Project (“Project”), which did two things. First, it created two new instruments for transferring federal programs to tribes: compacts¹¹⁸ and AFAs.¹¹⁹ Compacts and AFAs were in-

ment. See Indian Self-Governance in the National Park Service, DRAFT Subject to Policy Review 7 (Apr. 24, 1995) (on file with the Harvard Environmental Law Review) [hereinafter ISG in the NPS] (describing how the NPS will attempt to relocate employees affected by AFAs and stating that “a reduction-in-force could be required. While this would not normally seem necessary, in this time of downsizing there simply may not be the FTE available in which to place affected employees”). Much of the opposition to the Act has centered on the loss of federal jobs, and as the Grand Portage case study will demonstrate, the Band and NPS went to great lengths to create arrangements to protect a NPS employee’s position.

¹¹¹ The BIA is in the Department of the Interior. The Indian Health Service is in the Department of Health and Human Services.

¹¹² See *supra* note 5.

¹¹³ Tribes often invest additional funds into the programs under “638 contracts.”

¹¹⁴ H.R. REP. NO. 106-477, at 61-67 (1999).

¹¹⁵ See HISTORICAL RESEARCH ASSOCIATES, INC., *THE FORESTS OF ANISHINABE: A HISTORY OF MINNESOTA CHIPPEWA TRIBAL FORESTRY, 1854-1991*, at 7-19 (1992); Huntsinger & McCaffrey, *supra* note 39, at 180-81. Because the ISDEAA pertained only to programs provided pursuant to federal law for the benefit of Indians, tribal control was likely limited to natural resources on tribal land. The TSGA extends the programs and functions available to tribes.

¹¹⁶ Russell Lawrence Barsh & Ronald L. Trosper, *Title I of the Indian Self-Determination and Education Assistance Act*, 3 AM. INDIAN L. REV. 361, 361 (1975).

¹¹⁷ See, e.g., Chuck Cook et al., *Indians Are Sold Out by U.S.*, ARIZ. REPUBLIC, Oct. 4, 1987, at A1; Johnson & Hamilton, *supra* note 11, at 1267.

¹¹⁸ A compact is an “executed document that affirms the government-to-government relationship between a self-governance Tribe and the United States. The compact differs from an AFA in that parts of the compact apply to all bureaus within the Department of the Interior rather than a single bureau.” 25 C.F.R. § 1000.2 (2006).

¹¹⁹ As 25 C.F.R. § 1000.121 states:

Annual funding agreements for non-BIA programs are legally binding and mutually enforceable agreements between a bureau and a Tribe/Consortium participating in the self-governance program that contain: (a) A description of that portion or portions of a bureau program that are to be performed by the Tribe/Consortium; and (b)

tended to provide tribes more flexibility and control over programs and funds than were possible under self-determination contracts. The difference between self-determination contracts and self-governance compacts/AFAs centers on the ability of tribes to allocate funds between programs. The compacts function to establish a government-to-government relationship; the AFAs allow a tribe to concentrate various program funds within one funding package. Thus, if a tribe seeks to manage multiple programs, it can receive the funds for all the programs under one AFA, rather than negotiating a multitude of self-determination contracts. Under the 1988 amendments, funds could be distributed as block grants rather than as categorical program grants.¹²⁰

Second, the 1988 amendments established a separate category for tribes wishing to enter into compacts and AFAs. To be eligible “Self-Governance tribes,” tribes had to meet four requirements: (1) the tribe(s) must be federally recognized; (2) the tribe must request participation with an official action of the tribal governing body; (3) the tribe must demonstrate financial stability and management capability by having no material audit exceptions in the tribe’s “638 contract” audit; and (4) the tribe must have “successfully completed a planning phase, requiring the submission of a final planning report which demonstrates that the tribe has conducted legal and budgetary research and internal tribal government and organizational planning.”¹²¹ Under the 1988 amendments, up to twenty tribes were permitted to negotiate for AFAs for various programs, and the Act would sunset after five years. The result of the 1988 amendments was to streamline the process and also allow tribes greater decision-making authority to allocate and re-allocate the AFA funds among various programs with less federal oversight.

The 1988 amendments also extended the ISDEAA another way: they permitted bureaus within the DOI other than the BIA to contract for programs established for the benefit of Indians because of their status as Indians. By 1994, the Bureau of Reclamation and Bureau of Land Management had negotiated “638 contracts” with a number of tribes under this provision to, for example, construct water delivery services and irrigation projects or to do cadastral survey work meant to benefit the tribes.¹²²

The 1991 Tribal Self-Governance Demonstration Project Act extended the duration of the Project, increased the number of tribes from twenty to thirty, and required that the tribes undergo a one-year planning period prior

Associated funding, terms, and conditions under which the Tribe/Consortium will assume a program, or portion of a program.

25 C.F.R. § 1000.121 (2006).

¹²⁰ See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 134-41 (1993-1994).

¹²¹ See H.R. REP. NO. 106-477, at 64-65 (1999).

¹²² *Hearing* (1994), *supra* note 5, at 39-40 (statement of Bonnie Cohen, Asst. Secretary—Pol’y, Management and Budget, U.S. Dep’t of the Interior).

to compact negotiation.¹²³ The DOI permanently established the Office of Self-Governance in 1991 and a Northwest Field Office in 1993 (for negotiation and implementation in the Northwest and Alaska).¹²⁴ The number of tribes under self-governance and the number of compacts/AFAs grew steadily between 1991 and 1994.¹²⁵

Until the 1994 amendments, the Indian Self-Determination Act had only included non-BIA agency programs that were intended to benefit Indians because of their status as Indians. Comments at a number of congressional hearings foreshadowed the possibility of extending the scope of non-BIA agency programs available to tribes within the Self-Governance Project.¹²⁶

The 1994 Self-Determination Act Amendments brought three significant changes. First, they permanently established the Self-Governance Program within the DOI. Second, they allowed tribes to establish consortia, that is, groups of “two or more otherwise eligible Indian tribes . . . [that are] treated as a single Indian tribe for the purpose of participating in Self-Governance”¹²⁷ Third, and most importantly for the purposes of this Article, Title IV of the ISDEEA as amended in the TSGA allowed tribes (or consortia) to petition non-BIA bureaus within the DOI (Bureau of Land Management (“BLM”), Bureau of Reclamation (“BOR”), Minerals Management Service (“MMS”), NPS, Office of Surface Mining and Reclamation Enforcement (“OSM”), U.S. Fish and Wildlife Service (“FWS”), and U.S. Geological Survey (“USGS”))¹²⁸ to manage federal programs in two areas: (1) the familiar programs available to Indians because of their status as Indians,¹²⁹ and (2) programs of “special geographic, historical, or cultural signif-

¹²³ Tribal Self-Governance Demonstration Project Act, P.L. 102-184, 105 Stat. 1278 (1991) (codified as amended at 25 U.S.C. § 450f (2006)).

¹²⁴ Tribal Self-Governance: 2004 Annual Report to Congress to be Submitted by the Sec. of the Interior 3 (Nov. 27, 2006), available at www.tribalselfgov.org/OSG_KenPosts/Kens_docs/Feb07_Ken/Final%202004%20Annual%20Report.pdf.

¹²⁵ 65 Fed. Reg. 78,688 (Dec. 15, 2000) (codified at 25 C.F.R. pt. 1000 (2006)).

¹²⁶ See *Tribal Self-Governance Demonstration Project Act: Hearing Before the S. Select Comm. on Indian Affairs*, 102d Cong. 6 (1991) (statement of Eddie F. Brown, Asst. Secretary for Indian Affairs, Bureau of Indian Affairs, U.S. Dep’t of the Interior); see also *Hearing* (1994), *supra* note 5 (statement of Bonnie Cohen, Asst. Secretary—Pol’y, Management and Budget, U.S. Dep’t of the Interior).

¹²⁷ 25 U.S.C. §§ 458aa-cc (2006).

¹²⁸ Note that this does not include the U.S. Forest Service, which is in the Department of Agriculture. One explanation for why the Forest Service is not included is that the amendments to the Act show a pattern in expanding from the BIA (which is in the DOI) to other DOI bureaus. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1234 n.101 (1975) (asserting that the trust responsibility is particularly pronounced with the Department of the Interior, which is “charged with primary responsibility for Indian affairs”). Granted, the Act does include the Indian Health Service (Department of Health and Human Services). Note that even though it is not included in the Act, the USFS has negotiated cooperative agreements with tribes. See Oregon Law Institute, *supra* note 77.

¹²⁹ Some of the AFAs have been negotiated under this first category. 25 U.S.C. § 458cc(b)(2) (2006). See, e.g., Bureau of Reclamation, Summary of Mid Pacific’s Region

icance” to the participating tribe/consortium.¹³⁰ Most debate has centered on the latter type.

B. 1994 Tribal Self-Governance Act: Participation and Eligible Programs

1. Structuring Tribal-NPS Relations: Who May Participate and How

The TSGA establishes a process that allows for the participation of a select group of tribes, and the hurdles to participate are large. Although BIA and IHS programs are available to federally recognized tribes through self-determination contracts, only self-governance tribes may enter into AFAs for non-BIA programs fitting within the geographic, historical, cultural nexus. Once a tribe has entered into the Self-Governance program, it may then petition the bureau for management of programs and functions (or portions thereof). Because NPS units may only negotiate with self-governance tribes, this substantially narrows the field of tribes eligible to participate. There are currently about 230 self-governance tribes (of approximately 562 federally-recognized tribes) represented under eighty-eight compacts or AFAs with the BIA and sixteen AFAs with non-BIA bureaus (including the Office of the Special Trustee for American Indians). Barriers to entry into the Self-Governance program are significant, and tribes must prove themselves competent managers by meeting requirements set by the federal government.¹³¹ The requirements likely serve as a deterrent to many tribes. For some, the cost of legal fees and protracted negotiations may be prohibitive. Capable and qualified tribes with significant connections to national park units may be excluded because they do not wish to enter into the Self-Governance program. On the other hand, the rigorous standards might also serve to counter some of the opposition to the TSGA. The tribes eligible to assume non-BIA programs are a select group that have chosen to prove that they meet financial and organizational standards set by the federal government.

Tribes are themselves not uniformly enthusiastic about self-governance. Because the TSGA divides tribes into two groups, self-governance tribes and non-self-governance tribes, many have expressed concern that the Act is divisive, alienating, colonial, and may lead to abrogation of the federal trust

Native American Program, <http://www.usbr.gov/native/news/2005/mp2005.html> (last visited May 18, 2007) (on file with the Harvard Environmental Law Review).

¹³⁰ 25 U.S.C. § 458cc(c) (2006). Interestingly, in its request to enter into negotiations with the NPS, the Band argued that the monument would meet both categories for inclusion: the management of the monument as a program for Indians as well as a program of geographic, historical, and cultural significance. Letter from Norman Deschampe, Chairman, Grand Portage Reservation Tribal Council, to Pat Parker, Chief, Am. Indian Liaison Office, Nat'l Park Serv. (Nov. 5, 1996).

¹³¹ See *infra* note 121 and accompanying text.

responsibility.¹³² One scholar comments that “[t]he invitation to participate carries with it a divisiveness that draws some participants toward assimilation while it creates alienation among factions that choose not to participate.”¹³³

The TSGA has certain provisions that recognize tribal sovereignty: it does not waive tribal sovereign immunity, abrogate the federal trust responsibility, or mandate tribal consultation with the public. Yet federal bureaus are still required to use public consultation “when required by law or when appropriate under bureau discretion.”¹³⁴ The regulations do provide guidelines for appropriate procedures for inclusion and notification of the tribes/consortia in the public consultation process, but they do not require tribes to consult the public. Nor is the action considered a significant federal action triggering the National Environmental Policy Act (“NEPA”). In drafting regulations, the rulemaking committee received public comments requesting that requirements be established for tribal public consultation procedures, but “[t]he Committee rejected this comment, because the Tribes/consortia are considered sovereign entities and the Department of the Interior has no authority . . . to dictate guidelines for their internal purposes.”¹³⁵ Although the AFA negotiation process neither precludes nor requires public consultation, the Secretary of the Interior is required to submit an array of reports to Congress regarding the administration of self-governance and the status of non-BIA programs, and to publish lists of programmatic targets in the Federal Register.¹³⁶ In sum, the statute allows tribes that manage federal programs to be treated differently from federal agencies because of their status as sovereign nations.

After an AFA has been negotiated and a draft is completed by the park and tribe, it is then reviewed by the NPS regional office with jurisdiction over the park (of which there are seven), the Department of the Interior’s

¹³² In the NPS context, this does not appear to have been a problem in current AFA negotiations, although difficulties might arise if AFAs were negotiated with certain tribes (Self-Governance tribes) while excluding others (i.e., non-Self-Governance tribes) that also have affiliations with the park unit. The NPS has articulated similar concerns: “The National Park Service is particularly concerned with the effect annual funding agreements may have on existing relationships, agreements, and partnerships with Indian tribes or Indian people who may or may not be eligible tribes as defined by the Act.” ISG in the NPS, *supra* note 110, at 7.

¹³³ George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in *STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY* 212, 221 (George Pierre Castile & Robert L. Bee eds., 1992). Esber also argues that “[w]hat has been called economic development is an ethnocentric persuasion to model tribal economies after the U.S. pattern.” One might argue that it is not just a persuasion to model tribal economies after the United States but also tribal government: many tribes have mirror images of federal agencies and bureaus (e.g., Tribal Historic Preservation Offices, Tribal Environmental Protection Agencies, etc.).

¹³⁴ Office of the Asst. Secretary-Indian Affairs; Tribal Self-Governance, 65 Fed. Reg. 78,688, 78,697 (Dec. 15, 2000) (codified at 25 C.F.R. § 1000).

¹³⁵ *Id.*

¹³⁶ See List of Programs Eligible for Inclusion in Fiscal Year 2003 Annual Funding Agreements To Be Negotiated with Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 67 Fed. Reg. 16,431, 16,431-35 (Apr. 5, 2002).

Office of Self-Governance, the regional Solicitor, the NPS American Indian Liaison Office, and/or the Washington Solicitor's Office.¹³⁷

Unlike other tools for Tribal-NPS cooperation (like specific enabling legislation), the TSGA is relevant to the entire national park system. Because Congress has authorized executive agencies to delegate authority to tribes, the AFA is not dependent upon subsequent congressional approval by statute (although the TSGA does provide for a ninety-day period for congressional review).¹³⁸

2. *Programs Eligible for Negotiation*

Self-governance tribes may petition for management of programs and functions or portions thereof, but the scope of agency/bureau discretion and the extent to which an agency/bureau is compelled to negotiate with a tribe for a non-BIA program remained in dispute.¹³⁹ As noted above,¹⁴⁰ the TSGA does not appear to *compel* bureau action with non-BIA programs to the extent that it does with BIA programs (where the Secretary is obligated to negotiate *and* contract with tribes meeting specific requirements). Although the NPS is compelled to negotiate, no substance is guaranteed. The programs made eligible for inclusion under an AFA are also a matter of bureau discretion. Because bureaus may not permit the transfer of "inherently federal" responsibilities under the TSGA, how bureaus define "inherently federal functions" will likely determine the degree to which tribes may participate in managing federal programs.¹⁴¹

a. *Inherently Federal*

The inclusion of non-BIA programs "was the very last item negotiated in the measure and was highly controversial."¹⁴² As the TSGA was drafted, language prohibiting the transfer of inherently federal responsibilities was added in response to opposition to tribal control over non-BIA programs and resources. The opposition was raised primarily by the International Associa-

¹³⁷ Telephone Interview with Emogene Bevitt, Program Analyst, Am. Indian Liaison Office, Nat'l Park Serv. (Dec. 3, 2003) (on file with the Harvard Environmental Law Review).

¹³⁸ 25 U.S.C. § 458cc(f) (2006) states that the Secretary of the Interior shall submit a copy of each AFA to the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives for review at least 90 days before the AFA is to go into effect.

¹³⁹ See for example the regulations for the 2000 amendments to the Act which discuss the various positions. Office of the Asst. Secretary-Indian Affairs; Tribal Self-Governance, 65 Fed. Reg. 78,688, 78,694 (Dec. 15, 2000) (codified at 25 C.F.R. § 1000).

¹⁴⁰ See *supra* note 12.

¹⁴¹ For example, this was at issue in the negotiations between the Confederated Salish and Kootenai Tribes and the Fish and Wildlife Service over the National Bison Range Complex. Erin Patrick Lyons, "Give Me a Home Where the Buffalo Roam": *The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation*, 8 J. GENDER RACE & JUST. 711, 728-29 (2005).

¹⁴² Johnson & Hamilton, *supra* note 11, at 1271-72.

tion of Fish and Wildlife Agencies.¹⁴³ The Association expressed concern about the impact of the TSGA on “the existing jurisdiction and authority of the tribal, state and Federal governments over natural resources . . .”¹⁴⁴ and suggested that the statute “could raise expectations about programs which are not intended to be eligible for compact, or the Secretary is otherwise constrained from compacting to the tribes.”¹⁴⁵

In response to the opposition, section 403 was amended by subsection (k), which states: “Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1) with respect to functions that are inherently Federal . . .”¹⁴⁶ The language left the question of what is considered an inherently federal function open to definition by the Department of the Interior. It also opened the possibility that federal land managers wishing to shrink the scope of the TSGA’s application could broadly interpret “inherently federal” to include all park management functions.¹⁴⁷

¹⁴³ The International Association of Fish and Wildlife Agencies was founded in 1902 and represents fish and wildlife professionals. See Association of Fish and Wildlife Agencies, Introduction, http://www.fishwildlife.org/intro_approach.html (last visited Mar. 18, 2007) (on file with the Harvard Environmental Law Review).

¹⁴⁴ 140 CONG. REC. S14,678 (daily ed. Oct. 7, 1994) (statement of Sen. McCain).

¹⁴⁵ The Association appeared to be most concerned about threats to state authority. Letter from R. Max Peterson, Executive Vice-President, Int’l Assoc. of Fish & Wildlife Agencies, to Sen. John McCain, Co-Chairman, Senate Comm. on Indian Affairs (Oct. 3, 1994) (printed in 140 CONG. REC. S14,680 (daily ed. Oct. 7, 1994)). An exchange of communication between Senator McCain and then-Secretary of the Interior, Bruce Babbitt ensued. Babbitt wrote, “I realize that there are some who are concerned about the possibility that Self-Governance tribes may compact for national programs that benefit the public at large.” Letter from Bruce Babbitt, Sec. of the Interior, to Sen. John McCain, Vice Chairman, Senate Comm. on Indian Affairs (Sept. 22, 1994) (printed in 140 CONG. REC. S14,679 (daily ed. Oct. 7, 1994)). He continued in a later letter:

Nothing . . . would change jurisdictional responsibilities for administering federal laws governing natural resources The Secretary of the Interior has no authority to change state law or jurisdiction. Consequently, I have no authority to confer on an Indian tribe jurisdiction exercised by a state government over any natural resource.

Letter from Bruce Babbitt, Sec. of the Interior, to Sen. John McCain, Vice Chairman, Senate Comm. on Indian Affairs (Sept. 28, 1994) (printed in 140 CONG. REC. S14,679 (daily ed. Oct. 7, 1994)).

¹⁴⁶ Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4275 (codified as amended at 25 U.S.C. § 458dd (2006)).

¹⁴⁷ The bureaus could easily define inherently federal to include all management functions, leaving little for tribes. A similar critique of the 1975 Act suggests that “the provisions of the statute referring to ‘trust responsibility’ have been interpreted by the Bureau to make all of its regulatory powers non-delegable. Because no governing power is returned to tribes, Congress’ explicit legislative goal of training Indians for leadership responsibility will not be achieved.” Barsh & Tosper, *supra* note 116, at 361.

b. Defining Inherently Federal: DOI Solicitor's Opinion

In 1996, after the passage of the TSGA and in the absence of promulgated regulations,¹⁴⁸ then DOI Solicitor John Lesly issued an opinion to provide a department-wide standard for defining “inherently federal.”

Lesly identified two types of limitations that arise from the “inherently federal” concept: limitations on the transfer of (1) functions “that have been determined by the courts not to be delegable under the Constitution,” and “discretionary functions vested in Federal officials.”¹⁴⁹

Discussing the first limitation, Lesly states that the applicable constitutional restriction is the non-delegation doctrine, which limits the ability of Congress or the executive branch to transfer power to non-federal entities.¹⁵⁰ Lesly notes that the limits that the doctrine may place on delegation are “relaxed where the delegation is to a tribe in an area where the tribe exercises sovereign authority.”¹⁵¹

How the non-delegation doctrine applies to Indian tribes was at issue in *United States v. Mazurie*.¹⁵² The Supreme Court found lawful a federal statute that delegated regulatory power over the sale of alcohol by non-members in Indian country to the tribe, essentially confirming that Congress may delegate power to tribes that is not delegable to private, non-governmental entities.¹⁵³ Harold Krent, in his assessment of the contexts in which Congress has authorized the exercise of administrative power by non-federal persons or

¹⁴⁸ The promulgated regulations, as the *Federal Register* notice states, do not address what functions are inherently federal. Instead, the Department of the Interior will decide “on a case to case basis after consultation with the Office of the Solicitor.” Office of the Asst. Secretary-Indian Affairs; Tribal Self-Governance, 65 Fed. Reg. 78,688, 78,690 (Dec. 15, 2000) (codified at 25 C.F.R. § 1000).

¹⁴⁹ Memorandum from the Office of the Solicitor, U.S. Dep’t of the Interior, on Inherently Federal Functions Under the Tribal Self-Governance Act 6 (May 17, 1996) [hereinafter *Inherently Federal Functions*] (on file with the Harvard Environmental Law Review). The limitations were described by Sen. McCain. 140 Cong. Rec. S14,678-79 (daily ed. Oct. 7, 1994).

¹⁵⁰ See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U.L. REV. 62 (1990); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986).

¹⁵¹ *Inherently Federal Functions*, *supra* note 149, at 7-8.

¹⁵² 419 U.S. 544 (1975).

¹⁵³ In *Mazurie*, the Court stated:

This Court has recognized limits on the authority of Congress to delegate its legislative power Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter

Cases such as [*Worcester* and *Kagama*] surely establish the proposition that Indian tribes within “Indian country” are a good deal more than “private, voluntary organizations,” These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.

Mazurie, 419 U.S. at 556–57 (citations omitted).

entities, echoes *Mazurie*: “Delegations to states and Indian Tribes are undoubtedly the easiest to accept because of our federal structure. . . . The Executive’s supervisory role can be shared with other political sovereignties in our system.”¹⁵⁴ The Solicitor relies on the decision in *Mazurie*¹⁵⁵ to conclude that Congress may delegate power to tribes under the TGSa that “could not be properly delegated to a non-governmental private organization.”¹⁵⁶

To define the second limitation (on the delegation of discretionary functions vested in federal employees), Leshy draws upon both a list of functions provided by Sen. McCain,¹⁵⁷ and an Office of Management and Budget (“OMB”) Policy Letter on Inherently Governmental Functions.¹⁵⁸ Senator McCain states that inherently federal functions “certainly could include discretionary administration of Federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of Federal funds, and other discretionary functions vested in Federal officials.”¹⁵⁹ The OMB Policy Letter defines an inherently governmental function as “a function that is so intimately related to the public interest as to mandate performance by Government employees.”¹⁶⁰ It places those functions into two categories: “The act of governing, i.e., the discretionary exercise of Government authority, and . . . monetary transactions and entitlements.”¹⁶¹ Leshy is careful to note that the OMB guidance is prepared to address contracting with private entities, which “tribes are not.”¹⁶²

In the end, the Solicitor’s opinion provided general guidance on defining inherently federal functions, and left much room for interpretation in the TSGA’s implementation. It also left open for debate whether the TSGA is a congressional authorization of tribal power or a congressional delegation of federal authority. The language of the TSGA is vague: it authorizes the tribe to “plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior.”¹⁶³ The TSGA does not describe the nature of the programs being administered by the DOI. Some sources suggest that tribes managing programs under the TSGA are exercising federal authority: Leshy’s opinion re-

¹⁵⁴ Krent, *supra* note 150, at 111.

¹⁵⁵ 419 U.S. 544 (1975).

¹⁵⁶ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 72 (1998).

¹⁵⁷ 140 Cong. Rec. S14,678 (daily ed. Oct. 7, 1994) (statement of Sen. McCain).

¹⁵⁸ *Inherently Federal Functions*, *supra* note 149, at 11. Subcategories in the OMB guidelines (e.g., concerning the “ultimate control over the acquisition, use or disposition” of federal property) could be relevant to the implementation of the TSGA. OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, POLICY LETTER NO. 92-1, POLICY LETTER ON INHERENTLY FEDERAL FUNCTIONS, 57 Fed. Reg. 45,096 (Sept. 30, 1992) [hereinafter OMB POLICY LETTER].

¹⁵⁹ 140 CONG. REC. S14,678 (daily ed. Oct. 7, 1994) (statement of Sen. McCain).

¹⁶⁰ OMB POLICY LETTER, *supra* note 158.

¹⁶¹ *Id.*

¹⁶² *Inherently Federal Functions*, *supra* note 149, at 12.

¹⁶³ 25 U.S.C. § 458cc (2006).

fers to delegations of federal authority,¹⁶⁴ and the Supreme Court has suggested that the authority exercised by the federal government over federal lands, even within Indian reservations, is federal.¹⁶⁵

However, the TSGA also suggests that the federal programs are at least partially tribal.¹⁶⁶ We might ask, for example, whether a national park on an Indian reservation can be accurately described as a wholly federal endeavor. Where the TSGA allows tribes to control programs administered by the Secretary of the Interior that are geographically, historically, and/or culturally significant to tribes, those activities are also tribal in nature. When tribes manage the programs, they take on the responsibilities of the NPS and manage the programs by virtue of both their inherent sovereignty and the authority granted to them by the Secretary of the Interior. The Solicitor's opinion recognizes a mix of federal and tribal authority and allows for a sliding scale:

Departmental agencies should consider requests in relation to the extent of tribal sovereignty over the nature and scope of the functions sought to be delegated. The more a delegated function relates to tribal sovereignty over members or territory, the more likely it is that the inherently Federal exception of section 403(k) does not apply.¹⁶⁷

The TSGA creates a new avenue for federal-tribal relations, one that some have described as a marriage of tribal and federal bureaucracies.¹⁶⁸

C. Conclusion

The TSGA is a product of a gradual evolution of amendments to the Indian Self-Determination Act. The TSGA constrains which tribes may participate and what authority can be delegated. Although the TSGA and the Solicitor's opinion suggest that non-BIA bureaus ought to treat tribes as more than private organizations, both in the process of negotiation and in determining what functions are eligible for inclusion in AFAs, decision-making ultimately rests with the non-BIA bureaus. Under the TSGA, they can either restrict or broadly construe what is considered an inherently federal function. They are obligated to negotiate, but not to come to an agreement.

¹⁶⁴ Inherently Federal Functions, *supra* note 149, at 6-10.

¹⁶⁵ *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that the condemnation of tribal land within the Cheyenne River Reservation by the BOR for a dam and reservoir and the opening of the area to public use abrogated the tribe's power to regulate non-Indian hunting and fishing on the taken land).

¹⁶⁶ See CLINTON ET AL., *supra* note 44, at 233-39.

¹⁶⁷ Inherently Federal Functions, *supra* note 149, at 12.

¹⁶⁸ Telephone Interview with Timothy Cochrane, Superintendent, Grand Portage Nat'l Monument (Dec. 5, 2003).

This overview of the TSGA leads to a number of questions to explore when examining the Act and its implementation: How slowly or quickly have tribes moved to use the TSGA to negotiate for non-BIA programs and functions? How will tribes and non-BIA bureaus address the question of what is an inherently federal function? How will the AFA change the relationship and dynamics between tribes and park units? Does tribal decision-making differ from NPS decision-making? So far, this Article has detailed how the TSGA structures the federal-tribal relationship in the abstract. An overview of the implementation of the TSGA across non-BIA bureaus and an in-depth case study of GPNM provide an opportunity to analyze the TSGA on the ground.

IV. IMPLEMENTATION OF THE 1994 TRIBAL SELF-GOVERNANCE ACT

A. *Non-BIA Annual Funding Agreements*

1. *Overview*

AFAs negotiated pursuant to the TSGA have involved limited delegations of federal authority, especially outside the context of the FWS and the NPS. The TSGA requires non-BIA bureaus to submit for publication in the *Federal Register* a list of programs eligible for negotiation with tribes/consortia. For FY 2000, the BLM listed ten programs, the FWS listed nine programs (and identified nineteen refuges and hatcheries in close proximity to self-governance tribes), and the NPS listed twenty-two programs (and identified fifty-three park units with known geographic, historic or cultural connections to tribes and programs/activities eligible for negotiation).¹⁶⁹ However, AFAs between tribes and non-BIA bureaus have not been as numerous as the *Federal Register* list might imply. (For an overview of AFAs negotiated by other non-BIA bureaus, see Appendix A.) The USGS and OSM had not negotiated any AFAs with Indian tribes as of April 11, 2007.¹⁷⁰ The BLM¹⁷¹ has negotiated an AFA with one tribal consortium. The BOR

¹⁶⁹ List of Programs Eligible for Inclusion in Fiscal Year 2006 Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 70 Fed. Reg. 53,680, 58,680 (Sept. 9, 2005).

¹⁷⁰ Telephone communication with Kenneth Reinfeld, Senior Policy/Program Analyst, U.S. Dep't of the Interior (April 11, 2007) (notes on file with the Harvard Environmental Law Review). The OSM has no AFAs, but it does provide funding through annual grants to the Navajo, Hopi, Northern Cheyenne, and Crow Tribes under the Energy Policy Act of 1992 to "develop[] tribal regulations and policies with respect to surface mining," assist OSM in the "permitting and inspection of coal mining on tribal lands," and to train and educate tribal staff. E-mail from Willis Gainer, Office of Surface Mining, to author (Apr. 1, 2005) (on file with the Harvard Environmental Law Review).

¹⁷¹ The BLM has been involved in a number of other cooperative arrangements with tribes. For example, at Kasha-Katuwe Tent Rocks National Monument, public access may be closed by order of the Pueblo Cochiti Tribal Governor. See Rio Puerco Field Office, Bureau of Land Mgmt., Kasha-Katuwe Tent Rocks National Monument, <http://www.nm.blm.gov/recrea->

has negotiated AFAs with seven tribes.¹⁷² The work has included construction, data collection and analysis, and archaeological curation.¹⁷³

The FWS entered into AFAs with the Confederated Salish and Kootenai Tribes (“CSKT”) at the National Bison Range Complex (“NBR”) in Montana in March 2005, and with the Council of Athabascan Tribal Governments at the Yukon Flats National Wildlife Refuge in Alaska in April 2004.¹⁷⁴ Negotiations at the NBR Complex began earlier than the negotiations at GPNM, but have been much more contentious,¹⁷⁵ likely because the CSKT petitioned the FWS for control over management of all NBR operations.¹⁷⁶ At GPNM, the Band originally petitioned for monument management but scaled back its request to maintenance functions. The NBR and GPNM negotiations influenced each other.¹⁷⁷ In fact, the same DOI Assistant Solicitor negotiated AFAs at GPNM and at the NBR.¹⁷⁸

A number of groups have contested the NBR AFA, protesting tribal hiring preferences, lack of public comment, loss of jobs for federal employees, and fragmentation of the refuge system.¹⁷⁹ A Montana State legislator even sponsored a resolution opposing tribal management of the NBR.¹⁸⁰ Defining “inherently federal” has also been a major focus of the negotiations. The FWS and CSKT signed an AFA in 2005 for FY 2005-2006 stating that the CSKT will perform functions and programs concerning refuge management, the biological program, the fire program, the maintenance program,

tion/albuquerque/kasha_katuwe.htm (last visited Jan. 3, 2007) (on file with the Harvard Environmental Law Review). The enabling legislation for El Malpais National Monument and Conservation Area (managed jointly by the BLM and NPS) provides that areas of the monument may be temporarily closed to “protect the privacy of religious activities.” 16 U.S.C. § 460uu-47 (2006).

¹⁷² E-mail from Barbara White, Native Am. Affairs Office, U.S. Bureau of Reclamation, to author (Apr. 25, 2005) (attachment entitled “History of P.L. 93-638, as amended, Title IV Self-Governance Agreements in the Bureau of Reclamation, Department of the Interior”) (on file with the Harvard Environmental Law Review).

¹⁷³ Telephone interview with Barbara White, Native Am. Affairs Office, U.S. Bureau of Reclamation (Feb. 18, 2005) (notes on file with the Harvard Environmental Law Review).

¹⁷⁴ FWS & CSKT, *supra* note 28.

¹⁷⁵ See generally Lyons, *supra* note 141.

¹⁷⁶ Letter from D. Fred Matt, Chairman, CSKT Tribal Council to Gale Norton, Sec’y of the Interior and Dave Wiseman, Project Leader, National Bison Range Complex (Apr. 23, 2003). The CSKT excluded law enforcement activities from their request. *Id.*

¹⁷⁷ Interview with James Hamilton, Attorney, Hamilton Quigley & Twait PLC, in St. Paul, Minn. (Mar. 19, 2005).

¹⁷⁸ *Id.*

¹⁷⁹ Lyons, *supra* note 141, at 727-32. Even though not legally mandated, the CSKT and the FWS solicit public comments on their website. Confederated Salish & Kootenai Tribes and U.S. Fish & Wildlife Service, News Release, <http://mountain-prairie.fws.gov/cskt-fws-negotiation/> (last visited Jan. 3, 2007) (on file with the Harvard Environmental Law Review).

¹⁸⁰ The non-binding resolution read: “Be it further resolved, that the Montana Legislature desires that programs not established specifically for American Indians, such as the National Bison Range, continue under the sole management of the appropriate federal agency for the benefit of all Americans.” H.J. Res. 11, 55th Leg. (Mont. 1997). The resolution died in committee. E-mail from Angie Gifford, Montana State Legislature Library, to author (Dec. 3, 1997) (on file with the Harvard Environmental Law Review).

and visitor services.¹⁸¹ It represents the most substantive and wide-reaching AFA to date in terms of content, but remains contentious. Recent media coverage suggests that the NBR management has been plagued by distrust and failed communication on both sides.¹⁸² The AFA was set to expire in March 2006, but has been extended on a provisional basis.¹⁸³

2. *The National Park Service Annual Funding Agreements*

Five tribes/consortia have negotiated AFAs with the National Park Service, and four have ongoing AFAs (see Figure 1). With the exception of GPNM, NPS AFAs have included discrete projects—for example, river and watershed restoration, ethnographic and archaeological studies, and planning and construction efforts for NPS facilities—rather than programmatic control and decision-making. The circumstances are different at GPNM in that the Grand Portage Band manages the entire maintenance department rather than individual maintenance tasks and projects. Grand Portage affords an opportunity not only to analyze the implementation of the TSGA, but also to use the Act as a lens for viewing past and contemporary tribal-NPS relations at the Monument.

B. *Grand Portage National Monument Case Study*

1. *History of Grand Portage Band, Minnesota Chippewa Tribe and NPS*

In many ways, Grand Portage National Monument (est. 1951) is very different from the early national parks. At GPNM, NPS control over the land resulted not from forced dispossession, but rather from the Grand Portage Band of Minnesota Chippewa (“Band”) and Minnesota Chippewa Tribe (“MCT”) hoping both to protect a site of significance to the MCT and Band, the NPS, and the public, and to reap some of the economic benefits of a federal endeavor.

GPNM is located in the northeastern tip of Minnesota and follows the Grand Portage trail from Lake Superior to Fort Charlotte on the U.S.-Canadian border. The Monument commemorates fur trade history: in the seventeenth century, it emerged as a center of economic activity, and the name Grand Portage, or “Great Carrying Place,” refers to the route traversed by

¹⁸¹ Fiscal Years 2005-2006 Annual Funding Agreement Between the United States Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes of the Flathead Reservation 8 (2004), available at http://mountain-prairie.fws.gov/cskt-fws-negotiation/nbrc_afa_12104final.pdf (on file with the Harvard Environmental Law Review).

¹⁸² Jim Robbins, *Sharing of Bison Range Management Breaks Down*, N.Y. TIMES, Feb. 13, 2007, at A15.

¹⁸³ Press Release, Public Employees for Environmental Responsibility, *Troubled First Year for Bison Range Refuge Tribal Operation* (July 20, 2006), http://www.peer.org/news/news_id.php?row_id=715 (on file with the Harvard Environmental Law Review).

French voyageurs and tribes from Lake Superior to the Pigeon River for travel inland.¹⁸⁴ Canoes and supplies were carried across the well-traveled trail to avoid waterfalls and other obstructions along the river.¹⁸⁵ The Monument transects the reservation of the Band. The Band and the MCT¹⁸⁶ donated about half of the monument's approximately 710 acres.¹⁸⁷ Since its inception, the Band has been active in the management of the Monument by donating land for the Monument, securing language within the enabling legislation that guarantees the MCT and Band and their members certain rights, and continuing to advocate for an active role in Monument management.

a. Tribal Protection and Restoration Efforts: State and NPS Proposals

Long before GPNM was established, the Band was experienced in working with federal agencies to maintain the historic fur trading site. In the 1930s, the Band members received money for efforts of the Indian Division of the Civilian Conservation Corps.¹⁸⁸ At the time, suggestions that a park or recreational facilities be constructed also began to appear in BIA documents and NPS sources. A letter circulated within the BIA in 1935 suggested developing a "co-operative Indian summer resort undertaking" and urged the consideration of recreational planning in highway placement.¹⁸⁹ An Office of Indian Affairs Report recommended establishing an Indian owned and managed "out-of-doors and recreational paradise" as part of the Indian Reorganization Act-based land acquisition project aimed at mitigating the effects of allotment.¹⁹⁰ In 1937, the BIA designated 19,000 acres around Fort Charlotte and 11,000 acres along the Grand Portage trail as roadless areas on the

¹⁸⁴ NAT'L PARK SERV., FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT: GRAND PORTAGE NATIONAL MONUMENT, COOK COUNTY, MINNESOTA ix (2005) [hereinafter GPNM FINAL GMP].

¹⁸⁵ NAT'L PARK SERV., DRAFT GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT: GRAND PORTAGE NATIONAL MONUMENT, COOK COUNTY, MINNESOTA (2001) [hereinafter "GPNM DRAFT GMP"].

¹⁸⁶ The Grand Portage Band and the Minnesota Chippewa Tribe are both federally recognized Native American tribes. The Grand Portage Band is one of the six member reservations of the Minnesota Chippewa Tribe. Minnesota Chippewa Tribe, <http://www.mnchippewatribe.org/> (last visited Feb. 15, 2007) (on file with the Harvard Environmental Law Review).

¹⁸⁷ See Division of Land Acquisition, Nat'l Park Serv., Master Deed Listing, Status of Lands as of 12/31/76 [hereinafter Master Deed Listing] (on file with the Harvard Environmental Law Review) (describing the "Chippewa Indian" donation as 335.26 acres, almost half of the 709.97 acres in the Monument). A map of GPNM is located in GPNM DRAFT GMP, *supra* note 185, at 3.

¹⁸⁸ RON COCKRELL, GRAND PORTAGE NATIONAL MONUMENT, MINNESOTA: AN ADMINISTRATIVE HISTORY 14-15 (1983), available at http://www.cr.nps.gov/history/online_books/grpo/adhi1.htm.

¹⁸⁹ Letter from Bob Marshall, Dir. of Forestry, Office of Indian Affairs, to William Zimmerman, Asst. Comm'r, Office of Indian Affairs (June 28, 1935) (on file with the Harvard Environmental Law Review).

¹⁹⁰ Office of Indian Affairs, Grand Portage Land Acquisition Project (Indian) 13 (Oct. 24, 1935) (on file with the Harvard Environmental Law Review). The Band and the BIA were engaged in buying back land within the reservation that had been allotted. See also Sutton,

Grand Portage Reservation.¹⁹¹ (The Band succeeded in having the roadless area designations eliminated in 1959.)¹⁹² Proposals for state¹⁹³ and national parks were also on the table throughout the 1930s.¹⁹⁴

b. Grand Portage National Historic Site

In 1950, the Band invited the NPS to discuss the possibility of acquiring National Historic Site status for the land. A 1950 letter describes the National Historic Site designation as three-fold: to preserve and protect the site in perpetuity, to attract public attention and visitors, and to encourage travel to nearby Isle Royale National Park (est. 1940). A representative of the NPS also informed the Tribal-Band committee that the NPS was “not seeking to take over any land from the Indians,” noting in his letter that

supra note 58, at 211-12 (regarding New Deal programs of the 1930s that supported “land acquisition for and restoration to the tribes”).

¹⁹¹ Office of Indian Affairs, Order No. 486, “Establishment of Roadless and Wild Areas on Indian Reservations,” 3 Fed. Reg. 606, 607 (March 22, 1938); Diane L. Krahe, Last Refuge: The Uneasy Embrace of Indian Lands by the National Wilderness Movement, 1937 – 1965, ch. 4 (2005) (unpublished Ph.D. dissertation, Washington State University) (on file with the Harvard Environmental Law Review).

¹⁹² Establishment of Roadless and Wild Areas on Indian Reservations: Elimination of Certain Areas, 24 Fed. Reg. 8257 (Oct. 10, 1959). The removal of the designation occurred between the time of the authorization and establishment of the national monument, but it is unclear if the events are related. The relationship between the roadless area designations on the reservation, made by the BIA, and the historic site and monument designations, made by the NPS, as well as the relationship between the NPS and BIA (at Grand Portage and in general), could provide a fascinating and informative area for future study.

¹⁹³ A “Fort Charlotte State Park” had been proposed to the Minnesota legislature in 1923 but was halted when the state realized some of the complications of acquiring Indian trust land. COCKRELL, *supra* note 188, at 12.

¹⁹⁴ A letter to Horace Albright, Director of the NPS, in 1932 suggests that Grand Portage is a site worthy of national monument status but laments the lack of interest on the part of the state of Minnesota in purchasing the land for the NPS. Letter from Charles H. Ramsdell, landscape architect, to Horace Albright, Dir., Nat’l Park Serv. (Mar. 8, 1932). Although the letter makes no reference to the wishes of the Band or Tribe, it is interesting to read in light of NPS practice of soliciting state acquisition and donation to the NPS (e.g., in the Appalachian mountains and at nearby Isle Royale [auth: 1931; est. 1940]). See generally FAIRFAX ET AL., *supra* note 32, ch. 4. The letter states:

It’s one thing to buy the Great Smokies for the Park Service, but quite another to tell Ole Dahl up-state legislator and farmer from Kandiyohi County, that Minnesota cash should buy Grand Portage for the same reason. . . . I will say this-If the State of Iowa had such a spot, I’ll warrant their State Park planners would have been there years ago and done something too.

Letter from Charles H. Ramsdell to Horace Albright, *supra*. In 1935, an NPS representative studied the “historical values” of the Grand Portage area, and the National Parks Advisory Board approved Grand Portage as a site of national significance in 1936. Merrill J. Mattes & George F. Ingalls, Nat’l Park Serv., Report on Proposed Grand Portage National Historic Site, Including Proposed Agreement Between United States Department of the Interior and the Chippewa Tribe and Grand Portage Band of Indians (1951) (on file with the Harvard Environmental Law Review).

“[a]pparently there has been some local suspicion on this score.”¹⁹⁵ The national historic site was created in 1951 after the DOI and the Band and the MCT signed a memorandum of agreement.

The MOA provided that the Secretary of the Interior would agree to cooperate with the MCT and Band in preservation (and use), interpretation, planning on adjacent lands, encouraging the production and sale of art and handicrafts, and providing preferential employment on related projects, explicitly referring to maintenance. It also acknowledged the rights of the MCT and the Band to hunt, fish, and trap on the land, and stated that materials and development plans for the site “shall be mutually agreed upon by the parties to this agreement and they shall mutually consult on all other matters of importance to the program.”¹⁹⁶ The land remained in tribal ownership and under Band management, and the NPS provided limited technical assistance,¹⁹⁷ but the historic site designation did not “turn on the federal money spigot.”¹⁹⁸

With increasing NPS and conservation group pressure (e.g., the Wilderness Society), and with limited funds available for historic site management, the MCT decided that pursuing national monument status would be “highly desirable.”¹⁹⁹ Congress authorized the GPNM in 1958,²⁰⁰ but made establishment subject to relinquishment of tribal lands by the Band and the MCT.²⁰¹ GPNM almost literally bisects the Band’s reservation, and many Band members contested ceding reservation land to the federal government.²⁰² Nonetheless, the Band and the MCT donated 258 and 50 acres, respectively.²⁰³ GPNM was established in 1960 as a unit of the National Park System. In addition to the tribal land donations, the NPS purchased allotments from

¹⁹⁵ Memorandum from Merrill J. Mattes, Reg’l Historian, Region 2, Nat’l Park Serv., and George F. Ingalls, Reg’l Chief, Land and Recreational Planning, Region 2, Nat’l Park Serv., to Lawrence O. Merriam, Reg’l Dir., Region 2, Nat’l Park Serv. (Sept. 8, 1950).

¹⁹⁶ Memorandum of Agreement Between the Department of the Interior, and the Minnesota Chippewa Tribe and the Grand Portage Band of Indians Relating to the Establishment of Grand Portage National Historic Site (Aug. 1, 1951) (on file with the Harvard Environmental Law Review).

¹⁹⁷ COCKRELL, *supra* note 188, at 30.

¹⁹⁸ CAROLYN GILMAN, *THE GRAND PORTAGE STORY* 130 (1992).

¹⁹⁹ COCKRELL, *supra* note 188, at 32.

²⁰⁰ 16 U.S.C. § 450oo (2006); GPNM FINAL GMP, *supra* note 184, at 1.

²⁰¹ COCKRELL, *supra* note 188, at 1, 36. The enabling legislation provides:

Establishment of the foregoing areas as the Grand Portage National Monument shall be effective when title to that portion of the aforesaid lands and interests in lands which is held in trust by the [U.S.] for the [MCT] and the [Band] has been relinquished . . . to the Secretary . . . for administration

16 U.S.C. § 450oo (2006).

²⁰² COCKRELL, *supra* note 188, at 35.

²⁰³ Resolution of the Grand Portage Band Council (Feb. 25, 1959); Resolution of the Minnesota Chippewa Tribe (Mar. 21, 1959).

individual tribal members (held in trust),²⁰⁴ approximately eighty acres of Band and MCT land, and non-trust fee land within the reservation.²⁰⁵ Some have noted that “it was perhaps the first time in which agency personnel had worked together with Native representatives on a park proposal.”²⁰⁶

c. Grand Portage National Monument Enabling Legislation

The Monument’s enabling legislation does not provide for joint management, but does recognize certain rights and privileges for members of the Band and the MCT. The legislation transfers “custody, control, and administration” of the donated property to the Secretary of the Interior, relinquishing “all right, title, and interest of the [MCT] and the [Band].”²⁰⁷ It provides members of the Band and MCT with certain privileges and preferences, primarily intended to promote tribal economic development.²⁰⁸ Section 3 provides the MCT tribal members privileges such as visitor accommodations and guide services within the Monument.²⁰⁹ Section 4 provides for preferential employment for members of the MCT,²¹⁰ and Section 5 encourages the production and sale of Band “handicrafts” within the monument.²¹¹ Tribal members may use docking facilities constructed and maintained by the Department of the Interior (NPS).²¹² They also have the “privilege of traversing the area,” meaning they may, among other things, cross the monument on snowmobiles and ATVs at five designated locations, “subject to reasonable regulation by the superintendent.”²¹³ Hunting and trapping are not permitted within the Monument boundaries. The Act states that the Secretary of the Interior shall “provide consultative or advisory assistance” to the MCT and Band in planning facilities and development around the monument.²¹⁴

²⁰⁴ Letter from John F. Aiton, Acting Asst. Reg’l Dir., Midwest Region, Nat’l Park Serv., to Superintendent, Grand Portage, and enclosure, Summary of Meeting with Bureau of Indian Affairs for Nov. 26-29, 1962, Bemidji, Minn. (Jan. 15, 1963).

²⁰⁵ Master Deed Listing, *supra* note 187.

²⁰⁶ FRANK NORRIS, ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY ch. 2 (2002) available at http://www.cr.nps.gov/history/online_books/norris1/chap2b.htm. That is, of course, to ignore Canyon de Chelly.

²⁰⁷ 16 U.S.C. §§ 4500o-1 (2006) (providing for the establishment of Grand Portage National Monument).

²⁰⁸ *Id.* §§ 4500o-3 to -9.

²⁰⁹ *Id.* § 4500o-3.

²¹⁰ *Id.* § 4500o-4. The hiring preference is defined further in GPNM’s Minnesota Chipewya Tribal Preference Policy, GPNM Policy # 97-01. GPNM FINAL GMP, *supra* note 184, at 6.

²¹¹ 16 U.S.C. § 4500o-5.

²¹² *Id.* § 4500o-7.

²¹³ GPNM FINAL GMP, *supra* note 184, at 67 (quoting the original act, Pub. L. No. 85-910 (1958)).

²¹⁴ Act of Sept. 2, 1958, 16 U.S.C. § 4500o-8 (2006). This provision has been used by the tribe to enlist NPS help; it also suggests that the NPS maintained an interest in controlling land use adjacent to the monument. Note that this includes both members of the MCT and the Band, a reflection of the donation of land by both.

The enabling legislation, although reserving some privileges for the Band within the Monument, does not explicitly provide any right to the Band to co-manage the Monument. Nonetheless, the Monument was specifically established “to work with the Grand Portage Band in preserving and interpreting the heritage and lifeways of the Ojibwe people,”²¹⁵ and a number of agreements codify and formalize that relationship,²¹⁶ including the annual funding agreement under the TSGA that has allowed the Band to assume control over the Monument’s maintenance program.

d. Grand Portage Indian Park Proposals

Long before the Band petitioned to enter into an AFA with the NPS under the Self-Governance Act, the NPS and the Band explored the possibility of establishing an Indian park adjacent to GPNM. The park proposals do not suggest returning GPNM to Band ownership or control, and the proposals were never formally enacted. Nevertheless, these proposals and land use plans are relevant to a discussion of the TSGA and GPNM because they envision a relationship between tribe and park that is similar to that set by the AFA, and provide examples of both tribal park planning and NPS involvement in tribal recreational land use planning, two relatively unexplored areas of Native American and NPS history.²¹⁷

In 1961, shortly after the establishment of the monument, the Band requested under the GPNM enabling legislation that the Secretary of the Interior provide advisory assistance regarding the development of reservation lands.²¹⁸ The NPS responded, publishing *A Recreational Land Use Plan: Grand Portage Indian Reservation, Minnesota* in 1961. The plan allowed the NPS to participate in decisions regarding land use adjacent to GPNM (timber harvesting and private resort development²¹⁹ on reservation lands were particular concerns) and suggested that cooperation with the Band would be consistent with the NPS’s involvement in national and state recreation planning.²²⁰ Some of the NPS proposals included integrating the utilities for the Village, Monument, and proposed Indian Park; providing “elbow room”

²¹⁵ GPNM DRAFT GMP, *supra* note 185, at 4.

²¹⁶ See *infra* Part IV.B.2.b.

²¹⁷ The proposals for a tribal park in Minnesota (although never formally enacted) correspond with the Navajo Nation’s successful efforts to create tribal parks and a tribal park system during the same time period. See SANDERS, *supra* note 50, at 68-70.

²¹⁸ 16 U.S.C. § 4500o-8 (2006) (“To the extent that appropriated funds and personnel are available therefor, the Secretary of the Interior shall provide consultative and advisory assistance to the Minnesota Chippewa Tribe and the Grand Portage Band of Chippewa Indians, Minnesota, in the planning of facilities or developments upon lands adjacent to the monument.”); see also NAT’L PARK SERV., A RECREATIONAL LAND USE PLAN: GRAND PORTAGE INDIAN RESERVATION, MINNESOTA 4 (1961) [hereinafter RECREATIONAL LAND USE PLAN].

²¹⁹ RECREATIONAL LAND USE PLAN, *supra* note 218, at 1-3.

²²⁰ *Id.* at 2. A few years earlier, the NPS published a report recommending Pigeon Point as an area for future study and suggesting that the road from Duluth to Canada be developed as a parkway. NAT’L PARK SERV., OUR FOURTH SHORE: GREAT LAKES SHORELINE RECREATIONAL AREA SURVEY (1959). It also coincided with a similar focus by the BIA, and newly appointed

around the monument;²²¹ establishing a tribal park to be administered by the Band with campgrounds, trails, and picnic areas as well as a system and organization for park management;²²² and recommending that the Secretary of the Interior work to acquire privately-owned parcels within the reservation to further park protection.²²³

Mission 66, the NPS program to increase park capacity through construction and reconstruction of roads, visitor centers, and visitor accommodations, brought more planning efforts to GPNM.²²⁴ The Mission 66 Edition of the GPNM Master Plan, published in 1961, reflected the NPS's concern about land use adjacent to GPNM. It recommended "[c]ooperat[ing] with and encouraging the Grand Portage Indian Band to[] develop a reservation Master Plan . . . in accord with the Master Plan for the Monument,"²²⁵ and suggested that development within the monument might require additional land from the Band.²²⁶ It also reiterated that the Monument should provide benefits to the Band, as stated in the GPNM enabling legislation.²²⁷

In 1965, the Band again requested the Secretary of the Interior's assistance, this time regarding the development of a tribal park.²²⁸ To provide recommendations, Secretary Udall commissioned a task force consisting of representatives of the BIA, NPS, Public Health Service, Minnesota Conservation Department, Band, and MCT.²²⁹ In 1967, the Task Force released its recommendations: that an Indian park of 12,644 acres be established with federal investment, that the park be owned and eventually managed by the Band (but that initially, the endeavor be directed and supervised by the Secretary of the Interior until the Band built sufficient capacity to manage the

commissioner of Indian Affairs Philleo Nash, in building recreational facilities on reservations to attract tourism. PRUCHA, *supra* note 47, at 1091-92.

²²¹ RECREATIONAL LAND USE PLAN, *supra* note 218, at 12.

²²² *Id.* at 21.

²²³ *Id.* at 19.

²²⁴ Mission 66 coincided with the 50th anniversary of the creation of the NPS in 1966. RUNTE, *supra* note 53, at 173.

²²⁵ NAT'L PARK SERV., MASTER PLAN FOR THE PRESERVATION AND USE OF GRAND PORTAGE NATIONAL MONUMENT: MISSION 66 EDITION 10 (1961).

²²⁶ *Id.* at 6.

²²⁷ The report states:

The apparent intent in the Monument establishment Act that the *rights of Indians* in and around the Monument areas be protected, and that the *Service cooperate* in making the Monument an asset to the Grand Portage community, is to be observed in relations with the Band. In view of the desire of the Grand Portage Band, as expressed in a formal resolution of their Council, that plans for the development and growth of their village be made in accord with the Service's plans for development of the Monument, assistance will be given to the Band in working out a mutually desirable scheme of development in the vicinity of the Monument.

Id. at 6-7 (emphasis in original). The report recommends creating additional and suitable space for tribal concessions. *Id.* at 7.

²²⁸ Jim Hull, *Messages from the Manager*, MOCCASIN TELEGRAPH, n.d., at 4-5.

²²⁹ GRAND PORTAGE TASK FORCE, A TASK FORCE REPORT ON A PROPOSED GRAND PORTAGE INDIAN PARK AND THE GRAND PORTAGE NATIONAL MONUMENT, MINNESOTA 7 (1967) [hereinafter TASK FORCE REPORT].

park), and that private (primarily non-Indian) landholdings be acquired for the park with federal assistance.²³⁰

The proposal appeared to meet the needs of the NPS. It provided some extra-territorial control over lands adjacent to the monument at a time when NPS employees were concerned about the threat of resource extraction, particularly timber harvest and mining, and “uncoordinated development” on reservation lands.²³¹ It also gave the NPS additional control over Indian lands. Congressional appropriations would be channeled through the DOI and the NPS to be allocated to a Grand Portage Indian park board of directors “under the terms of a contract or memorandum of understanding.”²³²

The Band also saw advantages to such a proposal, including employment opportunities, the development of a self-sustaining local economy,²³³ effective management of the historical and recreational resources of the reservation,²³⁴ fulfillment of the promise and potential for the development of the monument areas,²³⁵ and possible funds to acquire land within the reservation held by non-Indians. The Band, however, also understood the negative aspects of the proposal:

The Committee is fully aware of the probable economic impact of the Indian Park on this community. We know also that the Indian Park can produce a situation in which our children can prosper and improve their way of life. In short, we need no one to convince us of the value and the desirability of the Park concept as we now know it.

However, we are dealing with the last remaining small possession of many of the Indian people of our community. We are obligating and dedicating this last possession, this land, to certain purposes which are sure to conflict with traditional Indian usage. In order to justify the inevitable restrictions, we must be able to produce positive assurance that the land itself will not be lost and that our peo-

²³⁰ *Id.* at 8-9.

²³¹ *Id.* at 8. (It appears that one private landowner retained mineral rights when he sold tracts within the reservation to the federal government in the 1930s. The rights remained a concern after the individual signed a mineral lease with a mining company that included lands under the Grand Portage trail. NAT'L PARK SERV., MASTER PLAN: GRAND PORTAGE NATIONAL MONUMENT, MINNESOTA 22 (1973) [hereinafter GPNM MASTER PLAN].)

²³² TASK FORCE REPORT, *supra* note 229, at 25.

²³³ Hull, *supra* note 228, at 1-2.

²³⁴ TASK FORCE REPORT, *supra* note 229, at 7.

²³⁵ It is a frequent and long-standing source of contention between the Band and the NPS that the NPS failed to provide the amount of economic development and tourism that was promised when the park was established. *See, e.g.*, Hull, *supra* note 228, at 4-5. A Grand Portage Reservation Business Committee resolution, issued in response to the first General Management Plan planning process in 1971, stated that the NPS has “failed to provide the new structures and development which were promised as a condition to release of monument lands by the Grand Portage Indians,” and that the Master Plan provides “no assurance as to when, if ever the [NPS] will begin to fulfill its contractual commitments to Grand Portage.” Grand Portage Res. 20-22 (Nov. 24, 1971).

ple will be given every opportunity to derive maximum benefits from the Indian Park. . . .

We want this Park very badly, but if we are to have it at all, it must come on terms that we and our children can live with.²³⁶

An exchange between State Representative William Trygg and members of the Grand Portage Tribal Council in the local newspaper in 1968 reveals a similar sentiment.²³⁷ The Cook County News Herald published a story detailing Trygg's proposal for a national park for the Grand Portage reservation.²³⁸ Members of the tribal council responded:

Mr. Trygg forgot to add that these are the Indians . . . whose future livelihood depends upon the continued and increasing productivity of the Reservation . . . it is extremely unlikely that these Indian lands will ever be ceded, seized, or purchased for strictly National Park usage So you see Mr. Trygg, we already have our plans for the future [referring to the proposed Indian park] and the creation of a Voyageurs National Park at Grand Portage is not one of them.²³⁹

Although a bill was drafted to authorize the Secretary of the Interior to work with the Band and Tribe to "establish, develop, and manage the Grand Portage Indian Park,"²⁴⁰ the Indian park was never established. Historian Ron Cockrell attributes the inaction to "differing opinions" and lack of federal appropriations, but further research is expected to provide clarification.²⁴¹

Nevertheless, many aspects of the proposals have come to fruition. The Band now enacts its own zoning ordinances on the reservation and considers the NPS holdings in its zoning decisions,²⁴² and the Band has implemented a

²³⁶ TASK FORCE REPORT, *supra* note 229, at 7.

²³⁷ Trygg was also hired as a land use consultant and published one of the many studies on the resources of the reservation. J. WILLIAM TRYGG, A PRELIMINARY STUDY OF THE HISTORICAL, NATURAL & CULTURAL RESOURCES FOR THE GRAND PORTAGE INDIAN RESERVATION, TOURIST AND RECREATIONAL RESOURCES PLAN (n.d.). The purpose of the report was to develop "such plans and estimates as will attract tribal and private capital to be invested in recreational facilities to the end that new employment opportunities will be introduced into the Reservation Areas, and that the economic standards of the areas will be improved." *Id.*

²³⁸ *Grand Portage Reservation Proposed for National Park*, COOK COUNTY NEWS HERALD (Grand Marais, Minn.), Jan. 25, 1968, at 1.

²³⁹ Paul LeGarde, Letter to the Editor, COOK COUNTY NEWS HERALD, Feb. 1, 1968, at 22.

²⁴⁰ Memorandum from Bernard R. Meyer, Assoc. Solicitor, Parks and Recreation, to Members of the Task Force on Grand Portage Indian Park 1 (Mar. 1, 1968).

²⁴¹ COCKRELL, *supra* note 188, at 45, 47.

²⁴² The NPS's interest in controlling land use adjacent to the monument, particularly timber harvest, has been continuous. The Band identifies a separate category for "Parks & Recreation" areas operated by tribal, federal or state governments, and it considers adjacency to NPS land in making zoning determinations. Interview with Norman Deschampe, Chairman, Grand Portage Band, in Grand Portage, Minn. (Mar. 21, 2005); Grand Portage Band of Lake Superior Chippewa Indians, Land Use Ordinance 95-02, art. 8.10 (June 26, 1996).

number of the proposals for recreation and tourism on reservation lands. Perhaps most interestingly, the Band has recently participated in the creation of the Grand Portage State Park and cooperatively manages the land around Pigeon Falls (initially designated as part of the Indian park proposals).

The Band's participation at Grand Portage State Park ("GPSP") and interaction with the Minnesota Department of Natural Resources (Parks and Recreation Division) have been shaped by the Band's experience with NPS. Like the Monument, the state park lies within the Grand Portage reservation. Non-tribal land was purchased for the park with the help of private donations. The State of Minnesota acquired the land, but unlike the Monument, it has not retained ownership. Instead, it donated the land to the Band, and the Band leases it back to the state for operation as a state park.²⁴³ GPSP opened to the public in 1995, and is co-managed by the Band and the State. The Band negotiated for special hiring preferences and created an employment classification specifically for Band members. The co-management agreement "provides that staff positions should be held by those with significant knowledge of Indian culture, preferabl[y] knowledge of the Grand Portage Band."²⁴⁴ The Band also participates in the selection of park managers. The Band exercises considerably more control over the management of the GPSP than of GPNM. It has strengthened its control over selection of park managers, modified hiring preferences to ensure that Band members are considered and hired at all levels, maintained ownership of the designated land, and asserted greater control over general management and programs park-wide. It also operates from years of experience participating in recreational land use planning efforts for the area.

In sum, the proposals for an Indian park at Grand Portage are important for a number of reasons: they provide an unexplored chapter in our knowledge of the history and development of tribal parks, bear a strong resemblance to the language of the TSGA and its structuring of cooperative management arrangements, and provide examples of the NPS's involvement in coordinating outdoor recreation policy and creating parks with tribes and on tribal land. Although the plans would have resulted in the Band sharing authority over tribal land with the NPS, it nevertheless provides an early proposal for co-management between tribes and the NPS.

²⁴³ Minnesota Indian Affairs Council: Grand Portage, http://www.indianaffairs.state.mn.us/tribes_grandportage.html (last visited Mar. 21, 2007) (on file with the Harvard Environmental Law Review); see also *Grand Portage: Rich in Land, and Protective of It* (Minnesota Public Radio broadcast June 21, 2003), available at http://news.minnesota.publicradio.org/features/2003/06/21_ap_grandportage (on file with the Harvard Environmental Law Review).

²⁴⁴ Minnesota Indian Affairs Council: Grand Portage, *supra* note 243.

2. *Grand Portage National Monument and the 1994 Tribal Self-Governance Act*

a. *Negotiations*

Grand Portage National Monument and the Grand Portage Band have been actively engaged in self-governance annual funding agreement (“AFA”) negotiations since 1996, when the Band first approached the NPS and secured an early planning grant from the DOI Office of Self-Governance.²⁴⁵ Under the AFA, first implemented in February 1999, the Band is responsible for administering the maintenance program for GPNM.²⁴⁶

The Band first approached the NPS in November 1996 and requested to enter into negotiations for a Compact and Annual Funding Agreement for “the assumption of the operation of the Grand Portage National Monument.”²⁴⁷ According to Band Chairman Norman Deschampe, the Band wanted to enter into negotiations to increase tribal participation in the Monument. The park unit may be managed and owned by the NPS, but the Monument bisects the reservation and is surrounded by the tribal community. It was thought that if the Reservation Tribal Council (“RTC”) took a more active role in managing the Monument, the community would increase its involvement as well. The Band could then play a role in managing its “own land.”

Grand Portage National Monument may be the “poster child” for implementation of the TSGA.²⁴⁸ Some have suggested that it was contemplated as one of the logical places for use by the drafters of the Act itself.²⁴⁹ In some ways, it represents the easy case for AFA negotiation. Unlike many parks, where tribes were removed from within park boundaries and land was taken with little or no compensation, at GPNM, the Band solicited protection of the land by the NPS, donated land for the Monument, and entered into a number of cooperative agreements with the NPS regarding management of the site. As an RTC resolution notes, the Monument was created “specifically to establish a preference for the employment and involvement of the

²⁴⁵ The Band entered into the Self-Governance Program in 1996 and contracted for its own programs from the BIA before it approached the NPS. Interview with Norman Deschampe, *supra* note 242. The Band has actively used the ISDEAA and its amendments. It has used 638 contracts for natural resource management, including hiring personnel and preparing a number of natural resource management plans. See HISTORICAL RESEARCH ASSOCIATES, INC., *supra* note 115, at 7-19. Planning grants had been made available to tribes wishing to enter into negotiations. They have since been discontinued. Telephone Interview with William Sinclair, Dir., DOI Office of Self-Governance and Self-Determination (Mar. 4, 2005) (on file with the Harvard Environmental Law Review).

²⁴⁶ See generally John Myers, *Park Service, Ojibwe Band Team Up*, DULUTH NEWS-TRIBUNE, Oct. 1, 1998, at A1.

²⁴⁷ Grand Portage Reservation Tribal Council, Resolution No. 45-96 (Sept. 25, 1996); Letter from Norman Deschampe, Grand Portage Band, to Pat Parker, Nat'l Park Serv. (Nov. 5, 1996) (on file with the Harvard Environmental Law Review).

²⁴⁸ Interview with James Hamilton, *supra* note 177.

²⁴⁹ *Id.*

Grand Portage Band and its members in the operation and administration of the monument.²⁵⁰ NPS proposals for an Indian park adjacent to the Monument suggest that the NPS has recognized the Band as a capable park manager, and the activities that the Band sought to negotiate for (the maintenance program) were not only mentioned in the historic site designation legislation, but also performed by Band members prior to the involvement of the NPS. Thus, the “geographic, historical and cultural” significance criteria were easily met. Plus, GPNM is not a premiere park unit. It is likely that negotiations would have been much more difficult if the AFA concerned one of the “crown jewels” of the park system.²⁵¹ One might ask, if the TSGA would not work at Grand Portage, where would it work?

Although perhaps the “easy case” relative to other national park units and public lands, the negotiations were by no means easy. Planning and negotiations between GPNM and the Band began prior to the promulgation of regulations for the Act. The Band anticipated resistance and took a staged approach,²⁵² opting to withdraw its initial request to assume administration of all Monument functions²⁵³ and instead to assume responsibility over the maintenance program before pursuing more.²⁵⁴ The Band reasoned that maintenance would be the easiest first step for many reasons.²⁵⁵ The enabling legislation references maintenance;²⁵⁶ Band members had been involved in construction and restoration with the Indian Division of the CCC in the 1930s;²⁵⁷ the Band had continued to maintain the site under historic site status;²⁵⁸ Band members had been working in the maintenance department already; and maintenance provided an opportunity for the Band to “look inside” the NPS, to see how Monument operations functioned and how the

²⁵⁰ Grand Portage Reservation Tribal Council, Resolution No. 45-6 (Sept. 25, 1996) (on file with the Harvard Environmental Law Review).

²⁵¹ See, e.g., AN HISTORIC INTERPRETATION PROGRAM FOR THE STATE OF MINNESOTA: A REPORT SUBMITTED TO THE LEGISLATIVE COMMITTEE ON MINNESOTA RESOURCES BY THE MINNESOTA HISTORICAL SOCIETY 18 (1977) (“Grand Portage has had a rather low priority with the National Park Service. Its short tourist season and comparative isolation make it a difficult place in which to work and to attract tourists. Year-round offices and residences of Park Service personnel are located 40 miles away in Grand Marais.”).

²⁵² Telephone Interview with Timothy Cochrane, Superintendent, Grand Portage Nat'l Monument (Dec. 5, 2003) (notes on file with the Harvard Environmental Law Review).

²⁵³ The Band initially stated that it was interested in negotiating an AFA that would “allow it to operate the Monument in all essential aspects not considered inherently federal.” Letter from Norman Deschampe to Pat Parker, *supra* note 130.

²⁵⁴ “At this time, the Grand Portage Band wishes to limit its negotiations to an AFA for the ‘Maintenance’ functions, programs and activities currently performed by the NPS at the Grand Portage Monument. However, we have a continuing interest in other aspects of the Monument operation as well.” Letter from Norman Deschampe, Chairman, Grand Portage Reservation Tribal Council to James Loach, Superintendent, Nat'l Park Serv. Great Lakes Systems Support Office (Jan. 23, 1997) (on file with the Harvard Environmental Law Review).

²⁵⁵ *Id.*

²⁵⁶ 16 U.S.C. § 4500o-4 (2006) (providing for the establishment of Grand Portage National Monument).

²⁵⁷ COCKRELL, *supra* note 188, at 14-15.

²⁵⁸ Robert Pearman, *Chippewas Chipping in to Restore an Old Fort*, N.Y. TIMES, Feb. 21, 1965, at 14.

NPS worked. The Band also noted that the maintenance functions were “not unlike those currently performed by the band on Reservation lands.”²⁵⁹

The GPNM AFA was closely watched as a precedent-setter for other park units and tribes. As a result, questions about the loss of federal jobs and the definition of inherently federal functions were heightened in the negotiation process. James Hamilton, attorney for the Band during the negotiations, notes that they were “not negotiating the Grand Portage AFA, they were negotiating the Self-Governance Act.”²⁶⁰

i. Federal Jobs

The issue of loss of federal jobs was particularly contentious.²⁶¹ The transition from NPS to Band employment was eased by the fact that many of the workers were seasonal and were either Band members or related to Band members.²⁶² With the exception of one employee, all NPS maintenance workers were willing to work under the Band.²⁶³ As a result, the negotiations centered on accommodating the continued employment of an individual who wanted to remain with the NPS.²⁶⁴ He was able to do so through the negotiation of a sub-agreement under the Intergovernmental Personnel Act (“IPA”).²⁶⁵ The employee remains employed by the NPS but is loaned to the Band on detail. When he retires, the position will go to the Band.

The arrangement has been advantageous for many employees. As seasonal workers, they would have been employed only for six-month periods without benefits under the NPS. The Band, however, has been able to extend their employment through the year and to provide full medical coverage. In addition, the IPA agreement demonstrates how arrangements can be made between park and tribe that smooth transitions and mediate the loss of federal jobs. Cochrane notes that the maintenance is “as good or better than when [the National Park Service] did it.”²⁶⁶ At GPNM, the AFA has re-

²⁵⁹ Letter from Norman Deschampe to James Loach, *supra* note 254.

²⁶⁰ Interview with James Hamilton, *supra* note 177.

²⁶¹ This is a common issue. For example, at Redwood National and State Parks (Cal.), state park employees feared a federal take-over and loss of their jobs before the NPS and the California Department of Parks and Recreation agreed to co-manage the park unit. See FAIRFAX ET AL., *supra* note 32, at 165-66.

²⁶² Telephone Interview with Timothy Cochrane, *supra* note 168.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*; Intergovernmental Personnel Act, 5 U.S.C. §§ 3371–3376 (1970). The AFA provides the details of the arrangement: “The Band will employ under this AFA, in a position of its choosing, the NPS employee who currently serves as maintenance supervisor for the Monument Under the IPA agreement, the NPS will pay the salary, benefits, and other direct and indirect costs of employing that employee.” Fiscal Year 1999 Annual Funding Agreement Between Nat’l Park Serv., U.S. Dep’t of the Interior, and Grand Portage Band of Chippewa Indians § 10(E) (1999) (on file with the Harvard Environmental Law Review).

²⁶⁶ Interview with Timothy Cochrane, Superintendent, Grand Portage Nat’l Monument, in Grand Marais, Minn. (Mar. 23, 2005). The Band’s assumption of NPS maintenance programs occurs as the media has focused on the \$4.9 billion maintenance backlog within the national park system. NAT’L PARK SERV., PARTNERING AND MANAGING FOR EXCELLENCE (2003), *avail-*

sulted in innovative and beneficial arrangements, suggesting that the Act may provide for additional and unforeseen benefits for both the federal government and tribes.

ii. Inherently Federal

Despite the amount of attention given to the issue at the congressional level, the NPS and Band left the inherently federal question unanswered in negotiations at GPNM. Lacking regulations, the Band and NPS proceeded with little guidance as to how to define “inherently federal” functions. By assuming management of Monument maintenance, instead of more federal functions, the Band and the Monument have been able to skirt the question, at least initially. The strategy that the Band chose allowed them to successfully negotiate an AFA without shipwrecking the process on the inherently federal question, thus leaving “inherently federal” undefined.

b. The AFA on the Ground: The Value of the Informal

The AFA has led to an arrangement that is a combination of tribal and NPS efforts. The Band’s maintenance department is part of the tribal government.²⁶⁷ It follows both Band and NPS guidelines, working primarily under Band personnel policies and procedures. The current maintenance supervisor worked for the NPS for fourteen years, and refers to the Chairman of the RTC and the Superintendent as his “two bosses.”²⁶⁸ The department wears blue uniforms to distinguish themselves “from the grey and the green,” but the uniform patch displays the names of both the Band and GPNM.²⁶⁹ Under the AFA, the Band maintenance department also has greater flexibility than a private contractor working with the NPS might. This flexibility has allowed the Band, which has its own construction company, to loan equipment to the Band-operated maintenance department for work at the monument, as well as to use the maintenance department to work outside monument boundaries. The Band has run the maintenance program more efficiently and cost-effectively than the NPS.²⁷⁰

able at <http://www.nps.gov/accompreport2003/pdf/npsdocu15web.pdf>. See, e.g., April Reese, *Admin Behind on Alleviating Maintenance Backlog in Rockies — Report*, LAND LETTER, Apr. 14, 2005, art. 9. The maintenance backlog is relevant to the AFA in that Band members have had to acquaint themselves with the new NPS Facility Management Software System, intended to alleviate the backlog, which adds substantially to the amount of paperwork and procedures pertaining to monument maintenance.

²⁶⁷ Interestingly, it is listed as “NPS” on interoffice envelopes for the Reservation Tribal Council. Interview with Melvin Gagnon, Maintenance Foreman, Grand Portage Nat’l Monument, in Grand Portage, Minn. (Mar. 22, 2005).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ The programs under the four NPS AFAs cost slightly more than pre-AFA NPS management of those programs. Tribes are able to perform the services at roughly the same funding level as the NPS, but contract support and administrative overhead increase the monetary cost. Interview with Patricia Parker, Chief; Emogene Bevitt, Deputy Chief; and Ronnie Emery, Tribal Liaison, Am. Indian Liaison Office, Nat’l Park Serv., in Washington, D.C. (Jan. 5, 2005).

Much of the co-management literature emphasizes the importance of formal agreements between co-managing entities, which afford both parties a documented and codified statement of their rights and responsibilities. This presumably would protect the less powerful party from changes by the other party (e.g., changes in administrator or political administration), as well as provide a cause of action in a legal dispute. A desire for formal and enforceable arrangements is not surprising, and is shared by both the tribe and the NPS at GPNM. An articulation of the Band's rights in the enabling legislation for the Monument, for example, has been extremely important. Nevertheless, the GPNM case study speaks to the value of informal arrangements that sustain and support the formal.

Informal agreements and compatible personalities are important reasons that the Grand Portage AFA has succeeded. Both the Band and GPNM have been actively involved in securing funding and support for a new heritage center. The Band and the NPS have multiple cooperative agreements, including ambulance service and assistance with structural fires.²⁷¹ In addition, the Monument uses the water and sewers of the Band and has built a community water storage facility and sewer infrastructure in return.²⁷² The Band and the NPS also participate in the planning processes of the other. Additionally, a member of the Band sat on the planning team in the monument's General Management Plan process²⁷³ and the superintendent of the monument was invited to participate in the reservation-wide transportation plan.²⁷⁴ The Band and GPNM staffs communicate daily.²⁷⁵ They have also cooperated in interpretation: the NPS helped publish a book on Band members' stories about the land, the Grand Portage casino has an exhibit on GPNM, and the RTC office has a display that was constructed with the help of NPS interpretive staff.²⁷⁶ Chairman Deschampe has suggested that sometimes it matters less to the Band whether it is the Band or the NPS that is doing something: either way, the Band benefits from having a quality operation.²⁷⁷ This might explain why the Band has been willing to take smaller steps toward assuming NPS programs.

The Grand Portage case study also shows how the relationship between parks and tribes may change in this era of self-determination, and also in this era of gaming. The Band no longer contends with the level of poverty of the 1950s, and gaming has provided the Band with new opportunities. As a result, the Band is no longer as dependent upon the economic development that a national park unit might bring. Instead, it now controls programs once managed by the federal government, including natural resource management

²⁷¹ GPNM FINAL GMP, *supra* note 200, at 7.

²⁷² *Id.* at 11.

²⁷³ *Id.* at 1.

²⁷⁴ Interview with Timothy Cochrane, *supra* note 168.

²⁷⁵ Interview with Norman Deschampe, *supra* note 242.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

and planning on the reservation. It has used its own political power to assist the Monument, for example, in lobbying for a new heritage center that would move GPNM headquarters to the reservation from its current location in Grand Marais, forty miles away. The Band has built the capacity to manage its own resources and has taken an active role in national and state park planning and management on the reservation.

C. Implementing the Tribal Self-Governance Act: Why So Little Activity?

Examining the NPS AFAs reveals that use of the TSGA has resulted in tribal negotiation for discrete park unit functions, but not substantive park management. This is true even at GPNM, which in many ways represents the best case scenario (a responsive superintendent, favorable enabling legislation, a positive historical relationship, a patient tribe, the transfer of relatively minor decision-making authority, existing informal arrangements, and a non-premier park unit). Tribes have not used the TSGA on a larger scale or with greater frequency for a number of reasons. At a summit of park, tribal, and conservation organizations in the Pacific Northwest in 2003, some attendees suggested that the NPS fears loss of federal jobs and relinquishment of control over programs, that conservationists fear tribes will prioritize tribal needs over park priorities, and that a general lack of confidence in tribal management of park functions is problematic.²⁷⁸ In addition to those factors, the lack of activity under the TSGA can be attributed to barriers to tribal participation, a lack of tribal interest or resources, the presence of internal and external opposition, and the NPS's narrow interpretation of the TSGA. The latter is particularly significant and is the focus of this Section.

First, the TSGA establishes a set of barriers that may dissuade some tribes from participation. The barriers include requirements for entry into the Self-Governance program, as well as a time-consuming and costly process of negotiation. The Band, for example, had to pay legal costs for three years of negotiation. For less well-endowed tribes, the resources required for AFA negotiation could be a substantial hurdle, such that the significant barriers to entry and the costs of negotiation might undermine the intent of the TSGA.

Second, lack of funding and capacity may continue to inhibit tribal involvement not only in NPS programs, but also in establishing tribal parks and other tribal land management efforts, and may explain why the TSGA has not been used to a greater extent.²⁷⁹ Third, opposition within and outside the NPS has been significant. At GPNM, some of the greatest opposition has come from within the NPS. Cochrane says that he was seen by some as "setting up a means for giving away the park."²⁸⁰ Although the GPNM case

²⁷⁸ See PACIFIC WEST REGION, *supra* note 52, at 33.

²⁷⁹ Gaming has the potential to significantly alter this scenario.

²⁸⁰ Telephone Interview with Timothy Cochrane, *supra* note 168. Similar arguments were voiced by conservationist critics in the 1995 negotiations between the NPS and the Timbisha Shoshone in Death Valley National Park and the 1975 expansion of Grand Canyon National

study demonstrates how the AFA has resulted in tribal management of Monument maintenance, it also reveals how both direct opposition to the TSGA within the NPS and larger, more institutional NPS responses may inhibit tribes from substantive management of NPS programs. This Article argues that the NPS appears to have reacted to the TSGA as a change in public land law and policy, rather than viewing it as a logical extension of Indian self-determination policy (as its legislative history suggests would be warranted).²⁸¹ As a result, it has narrowed the application of the TSGA.

The NPS response to the TSGA has in part been to view the Act as an aberration in public land policy. As an NPS document on the Act states,

[The TSGA] represents a fundamental shift from Self-Determination and Self-Governance through tribal control of programs, functions, and activities that support the delivery of services to Indians because of their status as Indians to opportunities for Self-Governance tribes to negotiate funding agreements for the operation of Department of the Interior programs, functions, and activities that may have nothing to do with the delivery of services to Indians.²⁸²

The NPS has construed the TSGA narrowly, framed it within the NPS's conventional tools for sharing money and authority, and proceeded cautiously to avoid setting precedent.

The NPS has viewed the TSGA through the framework of contracting or procurement. While acknowledging government-to-government negotiations, it has applied the terms and processes familiar to the NPS system and bureaucracy. For example, both the NPS superintendent and a contracting officer sign the AFA, the same procedure for transferring funds in a contracting situation. In response, the Band sought clarification of its status under the TSGA during AFA negotiations. The Band included language in an early draft of the AFA specifying that the "Band is not a 'contractor' and, in performing Activities under this AFA, need not comply with 36 C.F.R. Part 51 concerning concessions contracts and permits, or with 36 C.F.R. Part 8 concerning standards applicable to employees of NPS concessioners."²⁸³ Because negotiations must follow the guidelines in the TSGA, this was not contracting, but the NPS nevertheless applied familiar contracting tools to the situation.

Park. Keller and Turek describe the response from a number of conservation organizations to the Grand Canyon land transfer: "The [National Parks Conservation Association], for instance, condemned a 'Havasupai land grab.' The *Sierra Club Bulletin* reported a Grand Canyon 'giveaway,' and the *New York Times* accused the Havasupai of a 'raid' on public land." KELLER & TUREK, *supra* note 29, at 165.

²⁸¹ This is written with the understanding that the NPS encompasses numerous organizational levels (e.g., NPS national and regional directors, the NPS AILO, park superintendents, and park unit staff) that may respond to the Act differently.

²⁸² ISG in the NPS, *supra* note 110, at 2.

²⁸³ DRAFT 1998 Annual Funding Agreement Between Nat'l Park Serv. and Grand Portage Band of Chippewa Indians 3 (1997).

Even though the processes may differ, the substance still resembles contracting or procurement. Most of the programs the NPS has identified as eligible for compacting under the TSGA are activities that the NPS could contract out to any private corporation or small business, not just Indian tribes.²⁸⁴ Some NPS officials have construed the TSGA as merely providing an opportunity for “sole source contracts with Indian tribes.”²⁸⁵ Tribes may petition the NPS for any range of activities, including projects that would otherwise be available to private contractors, but the TSGA does not limit NPS delegation to such projects. The NPS has conceptualized the TSGA narrowly, reading the TSGA as a way to allow tribal-NPS contracting (without a bidding process). This may have real consequences for the programs and functions that the NPS considers eligible for negotiation.

The TSGA does not specify that AFAs be negotiated on an incremental basis (for example, by requiring an additive process from contracting to something more substantive), but the NPS has stated a preference that “[c]arrying out Self-Governance in the National Park Service will be an evolving process starting with the already familiar process of contracting with tribes for particular services or products and moving toward the direct delivery by Indian tribes of functions, programs and activities generally performed by National Park Service employees.”²⁸⁶ The TSGA and the Solicitor’s opinion suggest that more programmatic control ought to be freely available to tribes; the goal of the TSGA is Indian self-determination, not minimal disruption of, or strict adherence to, NPS contracting procedures.

The NPS has also distinguished its programs from those of the BIA, suggesting that the provisions of the Act are either inapplicable to non-BIA programs or apply in different ways. The TSGA outlines some important procedural differences between negotiation for BIA and non-BIA programs, and between programs for the benefit of Indians and programs of geographic, historical, and/or cultural significance to tribes. But the congressional findings and declaration of policy that introduce the TSGA support the notion that non-BIA programs are included in the goal to promote tribal control of federal programs. For example, the findings refer to the federal bureaucracy generally, BIA and non-BIA alike: “[T]he Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-gov-

²⁸⁴ For example, in 2000, the NPS listed the following activities as available for AFA negotiations: archeological surveys, comprehensive management planning, cultural resource management projects, ethnographic studies, erosion control, fire protection, hazardous fuel reduction, housing construction and rehabilitation, gathering baseline subsistence data, janitorial services, maintenance, natural resource management projects, range assessment, reindeer grazing, road repair, solid waste collection and disposal, and trail rehabilitation. List of Programs Eligible for Fiscal Year 2000 Annual Funding Agreements to be Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs, 64 Fed. Reg. 11,032, 11,034-35 (Mar. 8, 1999).

²⁸⁵ Interview with Patricia Parker, Emogene Bevitt, and Ronnie Emery, *supra* note 270.

²⁸⁶ ISG in the NPS, *supra* note 110, at 2-3.

ernance and dominates tribal affairs;”²⁸⁷ “transferring control to tribal governments, upon tribal request, over funding and decisionmaking for Federal programs . . . strengthens the Federal policy of Indian self-determination.”²⁸⁸

Relying on the nature of its appropriations and its responsibility to the public trust, the NPS has tried to distinguish its programs from those of the BIA and to suggest limitations on the TSGA’s application to NPS programs. Whereas the BIA is appropriated funds specifically for Indians, and tribes may redesign and conduct programs to “meet the needs of individual tribal communities,”²⁸⁹ the NPS has stressed that it receives funds for the benefit of the general public, and that NPS AFAs “must be made in relation to the mission of the agency and the purpose of the park unit.”²⁹⁰ With regard to the flexibility for reallocating funds between programs that AFAs and compacts permit for BIA programs, the NPS suggests that the law may prohibit the reprogramming of funds: “The Bureau of Indian Affairs model may not fit [non-BIA] programs in many instances. Reprogramming of funds by a tribe to non-park activities outside of the park would appear to violate our appropriations act and is not permitted.”²⁹¹

The NPS may be narrowly construing the TSGA for any number of reasons. First, the law governing NPS activities conflicts with some of the provisions of the TSGA. Second, some in the NPS conceptualize the Act as a special contracting provision. Third, the NPS forces the TSGA through normal channels and familiar infrastructure for interacting with other entities. Finally, issues surrounding loss of federal jobs, confusion about the TSGA and outsourcing measures, and loss of federal control play out at various levels of the NPS.

V. CONCLUSIONS

On a larger scale, this Article is about the intersection of federal public land management and Indian law and policy in a contemporary setting—contemporary because federal public land management and Indian policy have always been intertwined. Generally, the enlargement of the federal bureaucracy and federal land holdings has been directly related to the reduction of tribal control over tribal affairs and land. Huntsinger and McCaffrey have demonstrated how the divestiture of tribal natural resources was not the result of expropriation of land alone; bureaucratic control and imposition of management regimes could be equally detrimental to tribal land holdings

²⁸⁷ Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 202(3), 108 Stat. 4250, 4271 (codified as amended at 25 U.S.C. § 458aa (2006)).

²⁸⁸ § 202(5)(A)-(B).

²⁸⁹ ISG in the NPS, *supra* note 110, at 4.

²⁹⁰ *Id.* at 1.

²⁹¹ *Id.* at 4.

and tribal authority.²⁹² Authority over land was removed from Indian hands and centralized in federal bureaus, including the BIA *and* the NPS.

The TSGA is philosophically significant in that it recognizes that non-BIA programs implicate tribal sovereignty. Although the Act has not received widespread use as of today, it does represent a significant step in connecting public land management to Indian self-determination. By encouraging tribal participation, planning, and administration, the TSGA provides a lens for examining public land policy and Indian law and policy in an era where, as the TSGA suggests, federal land management can function not to erode tribal sovereignty, but to strengthen it.

An examination of co-management under the TSGA at GPNM also reveals at least three barriers that may arise in conjunction with AFA negotiation with the NPS or any non-BIA bureau. First, encouraging permanent self-governance or institutions for co-management would presumably require similarly permanent funding arrangements. However, AFAs, as their name implies, are negotiated and re-negotiated on an *annual* basis. The regulations do provide for negotiation of a “successor AFA” which expedites the process by using the terms of the past AFA,²⁹³ and the amendments have been used to increase the amount of funding available to the tribe.²⁹⁴ The funds are essentially as secure as the park unit’s budget: funds are allocated to the Band as if the monument were allocating funding to an NPS maintenance program.²⁹⁵ Nevertheless, AFAs remain subject to congressional control and appropriations, and this can be problematic. In FY 1999, Congress placed a moratorium on all *new* self-determination and self-governance compacts to address and study problems related to contract support costs.²⁹⁶ The AFA at GPNM was almost struck down by the moratorium, but its provisions had been negotiated the previous year, and it received funding.²⁹⁷

Second, co-management and self-determination are not obviously compatible goals. The TSGA essentially substitutes tribal bureaucracy for federal bureaucracy, and the two become a little muddled as a result. Here the TSGA is quite clear in favoring a reduction in federal bureaucracy. The law

²⁹² Huntsinger & McCaffrey, *supra* note 39, at 155 (identifying two main mechanisms of divestiture of Yurok forest resources: the expropriation of land and denial of access to resources and through a shift in management regimes resulting in ecological change).

²⁹³ 25 C.F.R. § 1000.180 (2000).

²⁹⁴ Telephone Interview with Timothy Cochrane, *supra* note 168.

²⁹⁵ Funding has increased annually from about \$293,000 in FY 2000 to \$356,000 in FY 2004. Timothy Cochrane, Superintendent, Grand Portage Nat’l Monument, Grand Portage National Monument AFA Fiscal History and Notes (on file with the Harvard Environmental Law Review).

²⁹⁶ ALFRED R. GREENWOOD, APPROPRIATIONS FOR FY2000: INTERIOR AND RELATED AGENCIES (Cong. Research Serv. No. RL30206, Oct. 20, 1999), available at <http://www.ncse.org/NLE/CRSreports/Agency-24.cfm>.

²⁹⁷ Telephone Interview with Timothy Cochrane, *supra* note 168; Telephone Interview with Emogene Bevitt, *supra* note 137; see also John Myers, *Grand Portage Deal Scuttled*, DULUTH NEWS-TRIBUNE, Nov. 7, 1998, at B1. Congressman James Oberstar also supported the notion that the moratorium did not apply to the GPNM AFA. See Letter from Rep. James L. Oberstar (D-Minn.) to Kitty Roberts, Dir., Cong. Affairs, Nat’l Park Serv. (Nov. 20, 1998).

suggests that its intent is to allow a tribe to assume functions in the absence of federal control and paternalism and to build self-governance capacity. In reality, the Band and GPNM work extremely closely in co-management arrangements, and monument operations require day-to-day communication. In other words, successful co-management of a national park may not be entirely co-terminous with tribal self-governance, if self-governance is conceived as a freedom from federal oversight, control, and paternalism.

Finally, perhaps the biggest hurdle is opposition from non-BIA bureaus or, at a minimum, a tendency on the part of the non-BIA bureaus to conceptualize the TSGA as an intrusion into public land management. As the legislative history demonstrates, the provisions regarding non-BIA programs were a logical and even predictable extension of the ISDEAA. Self-governance tribes are approaching non-BIA bureaus from the backdrop of Indian self-determination, and non-BIA bureaus have tried to constrain the application of the TSGA instead. Non-BIA bureaus generally, and the NPS specifically, ought to reorient and broaden their interpretation of the TSGA so that they view it through the lenses of both federal land management and Indian self-determination policy.

The NPS is struggling with questions about where resident, adjacent, associated, and dispossessed communities fit within national parks, and where and under what conditions Indian tribes and their members should be integrated into park management. The TSGA reexamines those questions by providing tribes with processes and avenues for interacting, negotiating, and cooperating with the NPS that are not available to other, non-tribal communities. The Grand Portage case study demonstrates how informal and formal relationships, including but not limited to the AFA, have led to positive results and good government-to-government relations. The AFA has structured a particular aspect of that relationship, which combines NPS and Band management and may lead to greater co-management. But even if the TSGA changes how tribes may negotiate with the NPS, the substantive elements—the activities that tribes are performing—look more like contracting or procurement than co-management. This may follow from how the NPS has framed and conceptualized the TSGA, articulated its responsibility, and understood its relationship and commitment to tribes.

If GPNM provides any indication about the future direction of the TSGA, it is that the park and tribe will move slowly, and that arrangements can be made to settle the problems that arise. Chairman Deschampe has suggested that there are benefits to NPS ownership, and perhaps the ultimate question does not concern who does what, but rather how to create a park that is a successful unit for both the National Park Service and tribes.

TABLE 1

National Park Service Annual Funding Agreements*			
Tribe/Consortium	National Park Unit	Fiscal Years	Description
Kawerak, Inc.	Alaska Regional Office (AK)	1996 1997 1998	Preparation of record of the Bering Strait Region's Inupiat, Siberian Yupik and Southern Norton Sound Yupik culture, history, knowledge and tradition.
Grand Portage Band of Chippewa Indians	Grand Portage National Monument (MN)	1999 2000 2001 2002 2003 2004 2005 2006	Perform the entire maintenance program for the monument; additional projects (e.g. fire suppression system excavation, fire hydrant replacement, handicap accessible pathway project, wood preservative application to buildings, replacement of sewage left station pumps, repair and rehab of Mt. Rose Trail and handrails, and carpentry preparation of historic buildings for a fire suppression system installation).
Lower Elwha Tribal Community	Olympic National Park (WA)	1998 2002 2003 2004 2005 2006	Projects under the NPS Elwha River Restoration Program.
Yurok Tribe	Redwood National and State Parks (CA)	2001 2002 2003 2004 2005 2006	Perform watershed restoration activities; provide an overview of Native American consultations; perform a cultural resources study of Espau Lagoon at Prairie Creek; perform archaeological investigation and historic resources study for relocation of the park maintenance facility; produce an ethnographic overview; perform an archaeological investigation of Alder Camp Road. (The AFA has since been amended to include other rehabilitation work, culvert replacement for road maintenance, and pre- and post-prescribed fire monitoring.)**
Tanana Chiefs Conference, Inc.	Alaska Regional Office (AK)	2002 2003 2004 2005 2006	Recruit a program manager to facilitate and coordinate the interpretive design, the architectural team, and economic analysis for the Morris Thompson Cultural and Visitor Center in Fairbanks; to acquire the land and to design and construct the center.
* Except where otherwise noted, the information in Figure 1 is from the American Indian Liaison Office, Nat'l Park Serv., <i>National Park Units and Self-Governance Tribes and Overview of Self-Governance Agreements with the National Park Service</i> (for all information through 2004), supplemented by List of Programs Eligible for Inclusion in Fiscal Year 2006 Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 70 Fed. Reg. 53680 (Sept. 9, 2005) (for information for FY 2005) and author's telephone communication with Kenneth Reinfeld, Senior Policy/Program Analyst, U.S. Dep't of the Interior (April 11, 2007) (for information on FY 2006).			
** Pacific West Region Summit of National Parks-Tribes-Conservation Organizations, <i>A New Beginning for Equity and Understanding — National Parks and Traditionally Associated American Indian Tribes</i> , October 7 - 9, 2003, Klamath, CA, at 14, 24.			

TABLE 2

Annual Funding Agreements - Non-BIA Agencies								
Agency/Bureau	Bureau of Land Mgmt	Bureau of Reclamation	Fish and Wildlife Service	Geological Survey	National Park Service	Minerals Mgmt Service	Office of the Special Trustee for American Indians	Office of Surface Mining
Number of Tribes/ Consortia with AFA(s) (past and present)	1	7	2	0	5	0	3	0
Tribes/Consortia with AFA(s)	Council of Athabasca Tri- bal Govern- ments (AK)	1. Salt River Pima-Maricopa Indian Community of the Salt River Reservation (AZ) 2. Gila River Indian Com- munity of the Gila River Indian Reservation (AZ) 3. Chippewa-Cree Tribe of the Rocky Boys Reservation (MT) 4. Kanuk Tribe of California	1. Council of Athabasca Tribal Governments (AK); Yukon Flats National Wildlife Refuge 2. Confederated Salish and Koo- tenai Tribes of the Flathead Res- ervation (MT); National Bison Range Complex		1. Kaverak, Inc. (AK); Alaska Regional Office 2. Tanana Chiefs Conference, Inc. (AK); Alaska Regional Office 3. Yurok Tribe of the Yurok Reservation (CA); Redwood National and State Parks 4. Grand Portage Band of Min- nesota Chippewa Indians; Grand Portage National Monument 5. Lower Elwha S'Klallam Tri- bal Community of the Lower Elwha Reservation (WA); Olympic National Park		1. Cherokee Nation (OK) 2. Confederated Salish and Kootenai Tribes of the Flathead Reservation (MT) 3. Wyandotte Tribe of Oklahoma	

Sources: Telephone Conversations with Kenneth Reinfield, Office of Self-Governance, May 19, 2005 and April 11, 2007 (providing all 2005-present data); BLM: Telephone Conversation with Jerry Cordova, Tribal Coordinator, U.S. Bureau of Land Management, February 18, 2005; BuRec: Telephone Conversation with Barbara White, U.S. Bureau of Reclamation, February 18, 2005; FWS: Telephone Conversation with Patrick Durham, American Indian Liaison, U.S. Fish and Wildlife Service, 2005; National Bison Range Complex AFA *available at* http://mountain-prairie.fws.gov/ckit-fws-negotiation/nbrcc_afa_12104_final.pdf (last visited Jan. 3, 2007); Yukon Flats National Bison Range AFA *available at* <http://alaska.fws.gov/media/cag/afa.pdf> (last visited Jan. 3, 2007); USGS: Telephone Conversation with Sue Marcus, American Indian/Alaska Native Liaison, USGS, February 18, 2005; NPS: Document from National Park Service American Indian Liaison Office (AII/O); Email from Emogene Bevitt, American Indian Liaison Office, NPS, to Mary Ann King (Nov. 20, 2003); OSM: Email communication with Willis Gainer, Office of Surface Mining, April 1, 2005.