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## Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack

Vanessa Racehorse  
*University of New Mexico School of Law*

Anna Hohag

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# **Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack**

**By Vanessa Racehorse\* & Anna Hohag\*\***

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\* Vanessa Racehorse is a member of the Shoshone-Bannock Tribes, as well as a descendant of the Cherokee Nation and the Shoshone-Paiute Tribes. She is an Assistant Professor of Law at the University of New Mexico School of Law and has a JD from Columbia Law School.

\*\* Anna Hohag is Nümüü (Paiute) and an enrolled citizen of the Bishop Paiute Tribe. She works in-house as a Staff Attorney for a federally recognized tribe in Southern California. The views and opinions expressed in this Article are the views of hers alone and do not reflect or represent those of her employer, or any other person, Tribe, entity, institution, or organization she may be affiliated with.

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INTRODUCTION

Due to the increasing pressures of the climate change crisis, federal and state governments are beginning to acknowledge that Indigenous-led stewardship and control over Tribal aboriginal homelands is a crucial component of addressing climate change. In the United States, Tribal nations have a long history of responsible land stewardship, with environmental conservation and respect for the world’s biodiversity being an inextricable piece of Tribal customs, traditions, and knowledge. This Article strives to pay due respect to traditional land stewardship and its important role in the past, present, and future.

Part I of this Article starts with an overview of the history of forcible dispossession of Native American land, and provides initial thoughts on the myriad of meanings that the expression “Land Back”<sup>1</sup> can hold. The United States has a long history of forcibly removing Native American Tribes<sup>2</sup> from their ancestral homelands and relocating them to smaller

<sup>1</sup> The “Land Back” movement has a wide variety of interpretations and implications for Indigenous peoples, and it is near impossible to provide a uniform definition that encapsulates all its meanings. However, in this Article, Land Back specifically refers to the return of Tribal ancestral homelands to Tribal stewardship. This can be accomplished through more ways than just the acquisition of title, which is why this Article discusses co-management, partnerships with conservation groups, and other alternatives that can be explored to facilitate tribes’ connection to their ancestral homelands and prioritize the application of indigenous knowledge as a means to achieve climate justice. For further discussion on the diverse interpretations of “Land Back,” *see infra* Part I.B.

<sup>2</sup> In this Article, the terms “Native American,” “Tribes,” “American Indian,” and “Indian” are used interchangeably to describe Indigenous peoples in the United States. The authors’ intent is to use these terms with the utmost respect, while being cognizant of the varying personal preferences of Indigenous peoples in the United States.

plots of land, with some estimates indicating Tribal nations ultimately lost 98.9% of their aboriginal homelands post-contact.<sup>3</sup> Part II will discuss how this change in land tenure and land use can be linked to climate change, with Indigenous<sup>4</sup> communities often at the frontline of climate change events. Additionally, areas predominantly occupied by Indigenous peoples are frequently more prone to experience extreme weather conditions, such as extreme heat, drought, greater wildfire risks, and extreme flooding, the latter of which has caused the relocation of some coastal Indigenous communities.<sup>5</sup>

Although modern Indian land use is manifold, traditional Indigenous stewardship is rooted in careful management of the ecosystem. Indigenous peoples across the globe remain the stewards and protectors of most of the world's biodiversity, while standing at the forefront of the opposition to extractive industries. According to a report conducted by the Indigenous Environmental Network, Indigenous-led movements in resistance to oil and gas projects have stopped or delayed greenhouse gas emission equal to nearly one-quarter of the annual total U.S and Canadian emissions.<sup>6</sup> The leadership demonstrated by Indigenous peoples to combat the climate crisis is indicative of the cultural value system that justifies land restitution.

Parts III, IV, and V of this Article explore the efforts being made on the federal, state, and Tribal level to return land to its original caretakers and discusses practical ways that Tribal governments and organizations are achieving Land Back through mutual goals of conservation and repatriation. While the preferred method used by the federal and state governments and their respective agencies has been to extend opportunities for Tribal co-management, this is not enough to curb the urgency of the impending climate disaster, the effects of which have been, and will continue to be, felt first and foremost by Indigenous peoples. It is time for Land Back. There is no clearer argument for Land Back than to prevent irreparable harm to the planet—a cause that is unquestionably in the greatest good for all people.

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<sup>3</sup> Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCI. 578, 578 (2021).

<sup>4</sup> In this Article, the term “Indigenous” is intended to be a more global reference to the peoples and communities who inhabited lands prior to invasion and colonization by European nations. For further reflections on the “notion of ‘indigenous’ peoples,” see generally ANNE ROSS ET AL., *INDIGENOUS PEOPLES AND THE COLLABORATIVE STEWARDSHIP OF NATURE* (2011).

<sup>5</sup> See *infra* Part II.B.

<sup>6</sup> INDIGENOUS ENV'T NETWORK & OIL CHANGE INT'L, *INDIGENOUS RESISTANCE AGAINST CARBON 1, 12* (2021), <https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf>.

## I. HISTORY OF FORCIBLE DISPOSSESSION OF INDIGENOUS LANDS

### *A. Doctrine of Discovery, Broken Treaties, and Indian Removal*

For centuries, the majority of tribes' aboriginal homelands have been strategically taken by federal, state, and local governments, frequently with little to no compensation.<sup>7</sup> Although the legal theories and strategies deployed for each taking has varied, the underlying premise remained largely consistent: Native Americans were not using the land as productively as others would.<sup>8</sup> During the early colonial period, the foundation of federal Indian law centered on both a doctrine of discovery and a law of conquest, which served to vest rights to the land in the colonizing nations, while preserving a smaller degree of rights, such as aboriginal title, in Native nations.<sup>9</sup>

Over the course of a century, Native Americans entered hundreds of treaties with the United States, where they ceded over 400 million acres of their aboriginal homelands in exchange for promises made by the United States government.<sup>10</sup> The federal government's original intent was for the Native peoples to reside in the western half of the country, in their own

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<sup>7</sup> Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 52 (2005) (citing *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 288–91 (1995)); *Sioux Tribe of Indians v. U.S.*, 316 U.S. 317, 331 (1942); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903)). *See also* ROBERT J. MILLER, *RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 35 (2012) (citing ROGER G. KENNEDY, *MR. JEFFERSON'S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE* 68, 251–52 (New York: Oxford University Press, 2003)) (describing one example of the "bargain prices" paid for millions of acres of Indian land, where "President Jefferson paid \$0.05–\$0.25 an acre for land he immediately sold to settlers and southern planters for \$1.50–\$2.00 an acre").

<sup>8</sup> Leeds, *supra* note 7, at 52. *See also* MILLER, *supra* note 7, at 25–26 (describing how *terra nullius* was a common argument to take land and how "the colony justified taking land from Native Americans because the natives had not 'subdued' the land and thus had no 'civil right' to it").

<sup>9</sup> JUDITH V. ROYSTER ET AL., *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* 72 (4th ed. 2018) (citing *Johnson v. M'Intosh*, 21 U.S. 543 (1823)).

<sup>10</sup> *See* U.S. COMM'N ON C.R., *BROKEN PROMISES: EVALUATING NATIVE AMERICAN HEALTH CARE* 21 (2004); *see also* Mary Christina Wood, *Tribal Trustees in Climate Crisis*, 2 AM. INDIAN L.J. 518, 536 (2017) (noting that "the solemn promises made by federal negotiators to native leaders to gain cession of nearly all land in America had to be secured by a principle of duty towards the tribes.").

Indian territory, but as the population of American settlers grew, so did the demand for additional Indian land.<sup>11</sup>

The federal government then approached Indian removal for many years in a “haphazard” fashion, until this approach formally became federal policy after the election of Andrew Jackson, the “most powerful exponent” of removal.<sup>12</sup> In response to the growing demand for land from white settlers, the federal government uprooted dozens of tribes over the course of many years, driving them further and further west. In the south, the federal government displaced the Choctaws, Creeks, Chickasaws, Seminoles, and Cherokees from their aboriginal homelands and forced them on a deadly march across hundreds of miles.<sup>13</sup> In the northern states and territories, although removal did not happen on the “grand scale” that occurred in the south, northern tribes also experienced their own dislocation.<sup>14</sup> Removal stands out as one of the more damaging parts of the larger “civilization policy” that began in the eighteenth century with the partial aim of destroying Indigenous subsistence and landholding practices.<sup>15</sup> In accomplishing this objective, removal had the effect of “forcefully renam[ing] the physical and cultural landscape as it marginalized Native ways of living and being.”<sup>16</sup>

Other wholesale removals of land from tribal ownership included the General Allotment Act of 1887 (the “Dawes Act”), which resulted in ninety million acres of Indian land being taken out of Indian ownership and control.<sup>17</sup> The loss of Native land during the allotment era was accomplished through Congress’s so-called “plenary power,”<sup>18</sup> to further

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<sup>11</sup> ROYSTER ET AL., *supra* note 9, at 73. See also MILLER, *supra* note 7, at 35–36 (detailing how “[t]he idea of removing all tribes to the federally designed ‘Indian Territory’ of modern-day Oklahoma did not last long”).

<sup>12</sup> GRANT FOREMAN, *INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS* 13 (2d ed. 1972).

<sup>13</sup> See *id.*

<sup>14</sup> JOHN P. BOWES, *LAND TOO GOOD FOR INDIANS: NORTHERN INDIAN REMOVAL* 6 (2016) (describing the dislocation of tribes such as the Wyandots, Shawnees, Miamis, Delawares, and Potawatomis).

<sup>15</sup> *Id.* at 4, 54.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Issues: Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/#:~:text=visit%20the%20reservation, Termination, 13%2C263%20individuals%20lost%20tribal%20affiliation> (last visited Dec. 6, 2022).

<sup>18</sup> See ROYSTER ET AL., *supra* note 9, at 94–95 (describing the federal government’s plenary power “to regulate the country’s relations with the Indian tribes and to exercise authority over Indians and Indian tribes themselves”); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see also *United States v. Kagama*, 118 U.S. 375, 381 (1886).

facilitate settlement of “public lands.”<sup>19</sup> In order to promote settlement of the west, federal policy also promoted the disposition of these now “public lands” through homesteading laws, mining laws,<sup>20</sup> and railroad grants.<sup>21</sup> For centuries, federal policy focused on the development of natural resources, with environmental conservation serving, at best, “a marginal role.”<sup>22</sup> Additionally, during the 1950s and 1960s, Congress implemented a policy of “termination” that ended the federal government’s recognition of 109 tribes.<sup>23</sup> During this period, over 1.3 million acres of land were removed from trust status.<sup>24</sup> Ultimately, tribal nations lost 98.9% of their aboriginal homelands through these different phases of federal policy, which had a duplicitous aim of assimilating Native people while taking hold of their land to exploit it for the resources thereon.<sup>25</sup>

It should be noted that the federal government’s authority over lands imposes a duty of protection, known as the public trust doctrine when managing public lands, and the Indian trust doctrine when dealing with Indian lands.<sup>26</sup> Beginning in the nineteenth century, the Supreme Court applied trust language in several cases to “justify federal plenary power to protect public lands.”<sup>27</sup> The legal framework shaped by these cases led to further delegation of Congressional authority to federal land management

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<sup>19</sup> Rebecca T. Tsosie, *Conflict Between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians*, 39 TULSA L. REV. 271, 282 (2003).

<sup>20</sup> For example, the 1872 Hardrock Mining Law dedicated “more than half of all public lands to mining as the preferred use.” CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 20 (1992).

<sup>21</sup> Tsosie, *supra* note 19, at 283 (citing GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 83–85, 91–92, 97–98 (3d ed. 1993)).

<sup>22</sup> *Id.* (quoting CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 18 (3d ed. 1993)).

<sup>23</sup> *Issues: Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/#:~:text=visit%20the%20reservation.,Termination,13%2C263%20individuals%20lost%20tribal%20affiliation> (last visited Dec. 6, 2022).

<sup>24</sup> *Id.*

<sup>25</sup> Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCI. 578, 578 (2021). See also Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT’L L. 345, 348 (1993) (“governments throughout the Americas, led by Europeans and their descendants, have sought to expropriate, allot, and control Indian land and resources as a means of assimilating Indians”).

<sup>26</sup> See Wood, *supra* note 10, at 519 (2017) (“The Indian trust doctrine requires federal agencies to protect tribal lands and interests held in trust.”) (citing Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994)).

<sup>27</sup> Tsosie, *supra* note 19, at 282.

agencies.<sup>28</sup> The “trust” in public lands “designat[es] the range of citizen interests—e.g., commercial, recreational, aesthetic—that the federal government must consider as it manages these lands.”<sup>29</sup> The foundational principle being that the government is required to protect crucial resources, acting as trustee for the “benefit of present and future generations of citizens.”<sup>30</sup> However, for decades, the focus on federal policy applicable to public lands was “to transfer public resources into private hands on a wholesale basis in order to conquer nature.”<sup>31</sup> This policy was driven by a “utilitarian philosophy” of natural resources management, where human beings attempt to strategically utilize natural resources as “economic commodities” and manage them in a way that would facilitate continued “yield” in the future.<sup>32</sup>

This history of dispossession and exploitation is succinctly summarized by Jerry C. Straus’s foreword to Peter H. Eichstaedt’s *If You Poison Us: Uranium and Native Americans*:

The history of our nation’s relations with American Indians is one of ignorance, indifference, exploitation, and broken promises. When land occupied by the Indians was needed by settlers, or for some other public purpose, it was seized and the Indians herded onto apparently barren reservations. Then, when these reservation lands turned out to be rich in minerals and other resources, they were leased to mining companies, ranchers, and others, with little or no regard for the rights of the native inhabitants, their livelihood, or the long-term effects on the land. Often, only token payments were made for these extractive uses and sometimes none at all because the secretary of the interior, the designated federal trustee, failed to ensure payment.<sup>33</sup>

In more recent years, the federal government has increasingly recognized that tribes should have some involvement in approving natural resource use and extraction on their lands. Although tribes started to receive compensation for these natural resources, they were compensated

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<sup>28</sup> *Id.* (citing Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269 282 (1980)).

<sup>29</sup> *Id.*

<sup>30</sup> Wood, *supra* note 10, at 521, 533 (“At the core of this trust lies the sovereign duty of asset protection and a limit on privatization or license that could threaten public assets.”).

<sup>31</sup> WILKINSON, *supra* note 20, at 18.

<sup>32</sup> Tsosie, *supra* note 19, at 297 (citing Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 150 (1999)).

<sup>33</sup> Jerry C. Straus, *Foreword* to PETER H. EICHSTAEDT, *IF YOU POISON US: URANIUM AND NATIVE AMERICANS*, at ix (1994).

at much lower rates than they should have been<sup>34</sup> and suffered immeasurable consequences to their health and environment.<sup>35</sup> Federal policies were often purposefully designed to keep tribes' returns on natural resources low by orchestrating a combination of circumstances that served that objective, including offering public land for cheap, "limit[ing] competition in bidding on Indian leases," and demonstrating "a preference for leasing to non-Indian businesses."<sup>36</sup> This shift towards tribal use of their own natural resources for industrial and economic purposes added complexities surrounding modern Indian land use, as there is not always a guarantee of environmental preservation, which is further described in Part II.

Although estimates indicate that Indigenous communities globally "manage or have tenure over less than a third of the world's land surface,"<sup>37</sup> tribal nations in the United States ultimately lost 98.9% of their aboriginal homelands from European colonization. Even though most of these lands are no longer under tribal control, which today is legally termed "Indian country,"<sup>38</sup> tribal nations maintain an important connection to their ancestral homelands.<sup>39</sup> Additionally, as further

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<sup>34</sup> See, e.g., MILLER, *supra* note 7, at 38 ("Even when outright theft is not the problem, tribes are often stuck in long-term leases that the BIA forced on them at below-market rates. In 1981, the Navajo Nation was receiving \$0.15–\$0.38 cents a ton for coal when American suppliers were selling coal for \$70 per ton. . . . In 1977, the congressional Indian Policy Review Commission concluded that 'the leases negotiated on behalf of Indians are among the poorest agreements ever made.' "); Press Release, Department of Justice, Chevron to Pay U.S. More Than \$45 Million to Resolve Allegations of False Claims for Royalties Underpayment (Dec. 23, 2009), <https://www.justice.gov/opa/pr/chevron-pay-us-more-45-million-resolve-allegations-false-claims-royalties-underpayment> (announcing a settlement of over \$45 million to resolve claims that Chevron companies "knowingly underpa[id] royalties owed on natural gas produced from federal and Indian leases").

<sup>35</sup> See Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. REV. 437, 439, 461 (2010) (citing Jerry C. Straus, *Foreword* to PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS, at ix (1994)).

<sup>36</sup> *Id.* at 461.

<sup>37</sup> Leonardo Figueroa Helland, *Indigenous Pathways Beyond the "Anthropocene": Biocultural Climate Justice Through Decolonization and Land Rematriation*, 30 N.Y.U. ENV'T L.J. 347, 375 (2022) (citing Stephen T. Garnett et al., *A Spatial Overview of the Global Importance of Indigenous Lands for Conservation*, 1 NATURE SUSTAINABILITY 369, 370 (2018)).

<sup>38</sup> See 18 U.S.C. § 1151 (2018) (defining "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

<sup>39</sup> Tsosie, *supra* note 19, at 284.

described in Parts III, IV, and V, tribes have made tremendous strides in regaining their aboriginal homelands through a variety of mechanisms, including by purchasing land outright, as well as by receiving land from conservancy groups, local governments, and the federal government.

### *B. Land Back as More than a Movement*

The “Land Back” movement has a wide variety of meanings and outcomes for Indigenous peoples.<sup>40</sup> In this Article, Land Back is meant to refer to the literal “undoing of the large-scale displacement of tribes from their lands,”<sup>41</sup> and the return of tribal ancestral homelands to tribal stewardship. From a practical standpoint, the actual transfer of title to *all* public and private lands would present “seemingly insurmountable legal, equitable, and practical questions.”<sup>42</sup> However, this Article argues that restoring tribes’ connection to the land and promoting Indigenous stewardship is about more than title and can come in the form of co-management of public land. Additionally, when private land cannot be transferred to tribal control, private landowners still have opportunities to acknowledge tribes’ historical connection to the land they reside on, as well as support and facilitate tribes’ present-day relationship to the land.

This complex interpretation of the Land Back movement extends far beyond the Anglo-American concept of property rights. It is about a return to culture, place, and identity through the sacred responsibility to care for the land and environment for future generations to come. It is also about repatriation, the Indigenous-led efforts to “restore sacred relationships between Indigenous people and our ancestral land [and] honoring our matrilineal societies.”<sup>43</sup> When Indigenous peoples’ physical relationship to the land is severed, so is the knowledge and practices that have sustained the culture and landscape, including the animals, plants, medicines, and traditional lifeways for millennia. Bringing back access to these sacred lands and spaces also facilitates peoples’ access to their foods, medicines, ceremonies, and languages again. The idea of repatriation and rebuilding

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<sup>40</sup> See, e.g., Kekek Jason Stark, et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 445–46 (2022) (describing how “#Landback” is a popular phrase in popular culture with “a kaleidoscope of meanings”); Lindsey Schneider, “Land Back” Beyond Repatriation: Restoring Indigenous Land Relationships, in *THE ROUTLEDGE COMPANION TO GENDER AND THE AMERICAN WEST* 452, 453 (2022) (arguing “ ‘Land back’ . . . should be understood not as the return of title but rather as the full restoration of Indigenous land relationships.”).

<sup>41</sup> Stark, et al., *supra* note 40, at 446.

<sup>42</sup> *Id.*

<sup>43</sup> *What is Repatriation?*, SOGOREA TE’ LAND TRUST, <https://sogoreate-landtrust.org/what-is-rematriation/> (last visited Jan. 2, 2022).

the peoples' relationship to the land is a relationship that not only benefits Indigenous peoples. It benefits everyone because it has proven to be an effective method of environmental stewardship for millennia. Given that we are experiencing a critical moment in time for the global community to respond to climate change and its ever-encroaching impacts, environmental and conservation groups, as well as federal and state governmental leaders, are finally recognizing that Indigenous Knowledge<sup>44</sup> and stewardship systems play a key role in finding solutions that will benefit our entire society. It is now in the public interest and for the broader public good that we find solutions to these exigent problems we all collectively face.

## II. CORRELATION BETWEEN DISPOSSESSION AND CLIMATE CHANGE

The planet we live on today is drastically different from that of our grandparents and it continues to rapidly change. Leading climate scientists have warned that continued carbon emissions threaten to cause “dramatic climate change that could run out of our control.”<sup>45</sup> Climate change detection and attribution science have played a crucial role in drawing the correlation between the parties responsible for climate change, and the resulting climate changes and extreme events.<sup>46</sup> At this crucial juncture in time, it is clear “that control of trace gases must play a critical role in preserving a planet resembling the one on which civilization developed.”<sup>47</sup> One of the two principal greenhouse gases (“GHGs”), CH<sub>4</sub> (methane) arises primarily from human-related emission sources such as landfills, oil and gas production, coal mining, and industrial processes.<sup>48</sup> It is largely believed that a significant reduction in these human-related activities “would have a rapid and significant effect on atmospheric warming

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<sup>44</sup> The term “Indigenous Knowledge” refers to the pragmatic expertise of Indigenous communities formed by their intricate connection to the land they reside on, learned through millennia of trial and error. For further discussion regarding the unique characteristics of Indigenous Knowledge contrasted with scientific knowledge, see generally ROSS ET AL., *supra* note 4, at 34–38.

<sup>45</sup> James Hansen et al., *Climate Change and Trace Gases*, 365 PHIL. TRANSACTIONS ROYAL SOC'Y 1925, 1925 (2007).

<sup>46</sup> Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 58, 62 (2020).

<sup>47</sup> Hansen et al., *supra* note 45, at 1926.

<sup>48</sup> *Global Methane Initiative: Importance of Methane*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/gmi/importance-methane> (last updated June 9, 2022).

potential.”<sup>49</sup> It is clear that there is a pressing need for a complete overhaul of land management practices to counteract these well-documented impacts.

The removal of Indigenous nations from their aboriginal homelands also has a demonstrable connection to a reduction in biodiversity.<sup>50</sup> For example, habitat loss and degradation are major threats to global biodiversity, both of which are primarily caused by human land conversion and industrial uses.<sup>51</sup> Leading biologists have postulated that we are in the midst of a “Sixth Mass Extinction” due to dramatic declines in global biodiversity that require a dramatic shift in land management practices to ensure adequate land protection for biodiversity conservation<sup>52</sup>. Notably, scientific studies show that Indigenous land management practices “result in higher native and rare species richness . . . and less deforestation and land degradation than non-Indigenous practices,”<sup>53</sup> again pointing to the crucial role of Indigenous stewardship as part of the solution to a global crisis.

### *A. Shifting Land Management Practices*

Tribal communities have their own cultural and traditional norms regarding land use, but these values and approaches have historically been marginalized in approaches to public land use.<sup>54</sup> Indigenous stewardship provides many crucial lessons regarding environmental preservation, as evidenced by the fact that approximately eighty percent of the world’s biodiversity lies within areas still held and defended by Indigenous peoples.<sup>55</sup> As the global community becomes increasingly concerned about the highly visible effects of climate change, there is a growing movement to recognize the promise that Indigenous stewardship may have in achieving climate justice.

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<sup>49</sup> *Id.*

<sup>50</sup> Helland, *supra* note 37, at 361–62 (citing Álvaro Fernández-Llamazares et al., *Scientists’ Warning to Humanity on Threats to Indigenous and Local Knowledge Systems*, 41 J. ETHNOBIOLOGY 144, 146 (2021); Victor M. Toledo, *Por que los pueblos indigenas son la memoria de la especie?*, 107 PAPELES DE RELACIONES ECOSOCIALES Y CAMBIO GLOBAL 27 (2009) (Spain)).

<sup>51</sup> Richard Schuster et al., *Vertebrate Biodiversity on Indigenous-Managed Lands in Australia, Brazil, and Canada Equals That in Protected Areas*, 101 ENV’T SCI. & POL’Y 1, 1 (2019).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1–2.

<sup>54</sup> Tsosie, *supra* note 19, at 297. *See also* Wiggins, *supra* note 25, at 349 (“Indians are on the margins of the organized environmental movement.”).

<sup>55</sup> Helland, *supra* note 37, at 358.

### 1. *Historical Indigenous Practices to Settler Land Use*

When Native people refer to their territory, they are referring not only to the land, but also to the plants, the animals, and the water.<sup>56</sup> This all-encompassing approach is reflected in the traditional Indigenous land management techniques that have been refined and adapted over millennia. These Indigenous land management techniques and Traditional Ecological Knowledge systems—including practices like traditional burns, gathering plants for weaving baskets, and harvesting foods—not only have a holistic benefit to the people themselves, but also play a vital role in preventing overgrowth and massive ecological disasters like forest fires.<sup>57</sup> For centuries, prior to contact with settler societies, many Indigenous communities modified their environment through purposeful burning to produce important ecological effects that would promote their primary food sources.<sup>58</sup> Simultaneously, these traditional burns and land harvesting practices prevented extreme natural disasters and regenerated the land.<sup>59</sup> However, the arrival of white settlers began the cessation of traditional burns, as settlers saw fire as a threat to property such as crops and houses.<sup>60</sup>

The western wildfires of the past decade alone have been some of the most devastating in history,<sup>61</sup> due in no small part to the suppression

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<sup>56</sup> See Wiggins, *supra* note 25, at 348.

<sup>57</sup> See, e.g., Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996); see also Rebecca Tsosie, *Indigenous Sustainability and Resilience to Climate Extremes: Traditional Knowledge and the Systems of Survival*, 51 CONN. L. REV. 1009 (2019).

<sup>58</sup> See, e.g., STEPHEN W. BARRETT & STEPHEN F. ARNO, INDIANS, FIRE AND THE LAND IN THE PACIFIC NORTHWEST 42–43 (Robert Boyd ed., 1999); see also WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 50–51 (1983) (describing the ecological effects of selective Indian burning practices, which “promoted the mosaic quality of New England ecosystems” and created an ideal environment for game and gatherable food sources).

<sup>59</sup> DAMON B. AKINS & WILLIAM J. BAUER JR., WE ARE THE LAND: A HISTORY OF NATIVE CALIFORNIA 194–95 (2021).

<sup>60</sup> STEPHEN W. BARRETT & STEPHEN F. ARNO, INDIANS, FIRE AND THE LAND IN THE PACIFIC NORTHWEST 42 (Robert Boyd ed., 1999); CRONON, *supra* note 58, at 118–19 (describing the passage of laws in the New England colonies that restricted large-scale burning, making “earlier Indian uses of fire increasingly difficult to continue as colonial settlement advanced”).

<sup>61</sup> *Top 20 Largest California Wildfires*, CAL FIRE (Oct. 24, 2022) [https://34c031f8-c9fd-4018-8c5a-4159cdf6b0d-cdn-endpoint.azureedge.net/-/media/calfire-website/our-impact/fire-statistics/featured-items/top20\\_acres.pdf](https://34c031f8-c9fd-4018-8c5a-4159cdf6b0d-cdn-endpoint.azureedge.net/-/media/calfire-website/our-impact/fire-statistics/featured-items/top20_acres.pdf) [<https://perma.cc/7ZCG-9FPZ>] (in a review of the largest fires in the past ninety years, thirteen out of twenty of the largest fires have occurred in the past decade).

of Indigenous historic and traditional land management practices. However, this Article is not intended to generalize or romanticize Indian land use as always and only centered on environmental preservation, as tribal nations and their approaches are complex and diverse.

## 2. *Complexities of Modern Indian Land Use*

The diversity amongst American Indians makes it difficult to identify a uniform “[I]ndigenous land ethic.”<sup>62</sup> On the one hand, there is certainly a core belief within Native American culture and tradition “that Earth is a living, conscious being that must be treated with respect and care.”<sup>63</sup> This approach towards the environment is a foundational piece of an Indigenous land management style known as Traditional Ecological Knowledge (“TEK”).<sup>64</sup>

In contrast, some tribal nations have also partaken in the development of natural resources on their land as a major part of their economic development.<sup>65</sup> While there is a myriad of explanations, including tribes’ need to secure crucial funding to improve housing, education, and other governmental services, there is also pressure for Indian leaders “to adopt modern corporate strategies to ensure the survival of their nations and people,” often as a result of long-standing and continuous exploitation of tribal resources by the American government and private corporate

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<sup>62</sup> Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 268 (1996).

<sup>63</sup> *Id.* at 276. See also Rosser, *supra* note 35, at 466 (noting that “There is *some* truth to the stereotype” of Natives as conservationists); see also DONALD L. FIXICO, *THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES* 145 (1998) (“the ‘Mother Earth’ concept is one of the few universal concepts among American Indians.”); see also Sheila Watt-Cloutier, *Climate Change in the Arctic*, in *PARADIGM WARS: INDIGENOUS PEOPLES’ RESISTANCE TO GLOBALIZATION* 97, 99 (Jerry Mander & Victoria Tauli-Corupz eds., 2006) (explaining Inuit “culture and economy reflect the land and all that it gives. [Inuit] are connected to the land. Our understanding of who we are—our age-old knowledge and wisdom—comes from the land. . . . That outlook, a respectful human outlook that sees connection to everything, should inform the debate on climate change.”).

<sup>64</sup> Jim Robbins, *How Returning Lands to Native Tribes Is Helping Protect Nature*, YALE ENV’T 360 (June 3, 2021), <https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature>.

<sup>65</sup> See Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development*, 12 LEWIS & CLARK L. REV. 1065, 1066 (2008). See also Wiggins, *supra* note 25, at 348-49 (noting that Indians “[l]ike all other peoples . . . have utilized and developed their territories”).

actors.<sup>66</sup> For example, for over forty years the Navajo Nation permitted mass uranium mining on the Nation's lands,<sup>67</sup> the effects of which were disastrous for Navajo peoples and their environment.<sup>68</sup> This practice continued until 2005, when the Navajo Nation Council passed the Diné Natural Resources Protection Act, where the Nation prohibited further uranium mining on the Nation's lands.<sup>69</sup> The Act also "declared that uranium mining was antithetical to Navajo Fundamental Law regarding protection of the Nation's natural resources and to the teachings of medicine peoples regarding 'harmony and balance in life and a healthy environment.'"<sup>70</sup>

There is also often notable division between tribal members and tribal governments when it comes to the exploitation of natural resources on tribal land.<sup>71</sup> Ultimately, there is no pan-Indian approach to Indian land use that guarantees tribal nations will always prioritize environmental preservation over economic development, and this Article does not seek to challenge the principle that tribes have sovereign authority when it comes to making decisions about land use. Rather, this Article seeks to acknowledge that "sustainable development is part of the cultural and religious heritage of most Indian peoples,"<sup>72</sup> and there is significant promise in achieving climate justice by promoting Indigenous stewardship that is rooted in these sustainable practices.

In addition to integrating elements of environmental preservation into traditional practices and customs, many tribes have also codified these practices, adapting to modern circumstances when enacting their own

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<sup>66</sup> Rosser, *supra* note 35, at 474 (quoting DONALD FIXICO, *THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY* 142).

<sup>67</sup> From 1944 to 1986, almost 30 million tons of uranium ore were extracted from Navajo lands pursuant to leases with the Navajo Nation. *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/navajo-nation-uranium-cleanup/abandoned-mines-cleanup> (last visited Dec. 26, 2022).

<sup>68</sup> The majority of the miner population was comprised of tribal members, who succumbed to lung cancer and other illnesses from exposure to uranium dust and gas. Jassica Barkas Threet, *Testing the Bomb: Disparate Impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan*, 13 U. BAL. J. ENV'T L. 29, 32 (2005). Additionally, after more than one thousand uranium mines were closed or abandoned, Navajos continued to inhale radioactive dust from open-air uranium piles, drank contaminated water, and slept on floors built from waste material. Rosser, *supra* note 35, at 442.

<sup>69</sup> Diné Natural Resources Protection Act of 2005, NAVAJO NATION CODE ANN. tit. 18, §§ 1301–1303 (2005).

<sup>70</sup> Rosser, *supra* note 35, at 442–43 (2010) (quoting Navajo Nation Council Res. CAP-18-05 § 1301).

<sup>71</sup> *See id.* at 449.

<sup>72</sup> Wiggins, *supra* note 25, at 348.

environmental protection codes. For example, Diné Natural Law, codified in Navajo Nation Code, Tit. I, § 205, declares that “The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life.”<sup>73</sup>

On a federal level, there is an increasing acknowledgment that Indigenous Knowledge and stewardship practices benefits us all. In fact, the White House Office of Science and Technology Policy (OSTP) and the Council on Environmental Quality (CEQ) recently released government-wide guidance for federal agencies to recognize and include Indigenous Knowledge in federal research, policy, and decision making.<sup>74</sup> The goal of this new policy guidance is to elevate Indigenous observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and responsible stewardship of natural and cultural resources in federal policymaking.<sup>75</sup> Indigenous Knowledge is integral to traditional stewardship practices and can be further fostered through tribal co-management, land restoration, and repatriation, as further discussed herein. In fact, a growing number of studies have shown the efficacy of native management.

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<sup>73</sup> ROYSTER ET AL., *supra* note 9, at 8. Other crucial sections of Diné Natural Law “declares and teaches that: . . . C. All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist; and D. The Diné have the sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking; and E. Mother Earth and Father Sky is part of us as the Diné and the Diné is part of the Mother Earth and Father Sky; The Diné must treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father; and F. The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way; and G. It is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations.” *Id.*

<sup>74</sup> Raychelle Aluaq Daniel et al., *What is “Indigenous Knowledge” And Why Does It Matter? Integrating Ancestral Wisdom and Approaches into Federal Decision-Making*, WHITE HOUSE OFF. SCI. & TECH. POL’Y BLOG (Dec. 2, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/12/02/what-is-indigenous-knowledge-and-why-does-it-matter-integrating-ancestral-wisdom-and-approaches-into-federal-decision-making/>.

<sup>75</sup> OFF. OF SCI. & TECH. POL’Y, COUNS. ENV’T QUALITY, EXEC. OFF OF THE PRESIDENT, GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON INDIGENOUS KNOWLEDGE (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>. See also OFF. OF SCI. & TECH. POL’Y, COUNS. ENV’T QUALITY, EXEC. OFF OF THE PRESIDENT, IMPLEMENTATION OF GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON INDIGENOUS KNOWLEDGE (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/IK-Guidance-Implementation-Memo.pdf>.

In other areas of the world, Indigenous peoples have actively protected biodiversity, while simultaneously supporting ecosystems through strategically curated landscapes.<sup>76</sup> Research has demonstrated that Indigenous stewardship of forest land has historically slowed or outright halted deforestation or degradation.<sup>77</sup> Studies have also shown the benefits of Indigenous management in promoting biodiversity. For example, in one study conducted in 2019, Indigenous managed lands in Australia, Brazil, and Canada were shown to be more vertebrate species rich than existing protected areas.<sup>78</sup> In another study, the forests and other biodiverse areas of Central America were shown to be “coterminous with the homelands of the region’s six million Indians.”<sup>79</sup> While it cannot be ignored that some Indigenous communities exercise their autonomous rights to partake in the extraction of natural resources on their lands, those groups remain in the minority, and there remains “good reason to believe that if Indians are permitted to chart their own future they will continue to serve not only themselves, but also the global environment.”<sup>80</sup>

### *B. Indigenous Communities as Frontline Communities Impacted by Climate Change*

Indigenous people around the globe find themselves at the forefront of the climate crisis and experience firsthand the impacts of rising sea levels, extreme weather events, and ecological disasters such as erosion, flooding, threat of tsunamis, and wildfires. For example, the Inuit and other Indigenous communities in the northern Arctic region are at the frontline of human-induced climate change. For generations, the Inuit have monitored their environment and been able to accurately predict the weather in order to safely travel across ice to hunt.<sup>81</sup> However, they are witnessing firsthand the extreme changes in weather patterns and it is

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<sup>76</sup> Helland, *supra* note 37, at 359.

<sup>77</sup> *Id.* at 373 (citing Monica Gabay & Mahbubul Alam, *Community Forestry and Its Mitigation Potential in the Anthropocene: The Importance of Land Tenure Governance and the Threat of Privatization*, 79 FOREST POL’Y & ECON. 26, 26–35 (2017)).

<sup>78</sup> Schuster et al., *supra* note 51, at 4.

<sup>79</sup> Wiggins, *supra* note 25, at 348 (citing Mac Chapin, *Indigenous Peoples and the Environment in Central America*, 8 RSCH. & EXPL. 232–33 (1992)). See also *Indigenous Peoples and Natural Ecosystems in Central America and Southern Mexico* (map), in Center for Support of Native Lands and National Geographic, *Indigenous Peoples and Natural Ecosystems in Central America and Southern Mexico*, ELI.ORG (Dec. 2001), <https://www.eli.org/research-report/indigenous-peoples-and-natural-ecosystems-central-america-and-southern-mexico>.

<sup>80</sup> Wiggins, *supra* note 25, at 354.

<sup>81</sup> Watt-Cloutier, *supra* note 63, at 97.

predicted that entire villages will need to be relocated due to irreparable damage from melting sea ice and thawing permafrost.<sup>82</sup> Relatedly, there is a clear pattern of environmental injustice when it comes to the purposeful placement of dangerous pollutants near majority-minority communities. For example, race is cited as being “the most important variable associated with the siting of hazardous waste facilities nationwide.”<sup>83</sup>

Due to these climate impacts, numerous Tribal Nations are working urgently to relocate their communities to safer lands. In 2022, the Biden administration committed \$75 million to three tribes, two Alaska Native villages, and one Tribal Nation in Washington state for their ongoing efforts to relocate their communities because of climate change threats.<sup>84</sup> Eight other tribes will receive \$5 million to fund planning for potential relocation. The Department of the Interior, in coordination with FEMA and other partners, has proclaimed that they will support efforts to address the growing risks faced by many tribes due to climate change.<sup>85</sup>

However, it remains unclear if and how these federal priorities will adequately address the challenges faced by non-federally recognized tribes. The Isle de Jean Charles Biloxi-Chitimacha-Choctaw tribe is one of ten state-recognized tribes in Louisiana. The Isle de Jean Charles in southern Louisiana was once 22,000 acres, and an inland refuge to coastal

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<sup>82</sup> *Id.*

<sup>83</sup> Jeffrey R. Cluett, *Two Sides of the Same Coin: Hazardous Waste Siting on Indian Reservations and in Minority Communities*, 5 HASTINGS W.-NW J. ENV'T L. & POL'Y 191, 192 (1999) (noting findings of COMM'N FOR RACIAL JUSTICE). See also Rosser, *supra* note 35, at 468–69 (discussing the environmental justice movement and potential reasons for “the concentration of harmful activities in minority communities”); PARADIGM WARS, *supra* note 61, at 167–68 (describing how the “Western Shoshone believe they have been targeted [for a radioactive nuclear waste repository] because, like many other indigenous peoples, they are politically, culturally, and geographically isolated from the state within which they exist . . .”).

<sup>84</sup> Christopher Flavelle, *U.S. to Pay Million to Move Tribes Threatened by Climate Change*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/climate/native-tribes-relocate-climate.html>. See also Riley Rogerson, *Biden administration commits \$50 million to relocation of two Alaska villages threatened by climate change*, ANCHORAGE DAILY NEWS, <https://www.adn.com/alaska-news/rural-alaska/2022/11/30/white-house-announces-50-million-to-relocate-2-alaska-communities/> (last updated Dec. 1, 2022).

<sup>85</sup> *FACT SHEET: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration's Second Tribal Nations Summit*, THE WHITE HOUSE (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/>.

tribes.<sup>86</sup> However, climate change, erosion, and the deterioration of the Mississippi Delta due to oil extraction has diminished the land to a mere 320 acres and this small plot of land continues to dwindle.<sup>87</sup> The Tribe is currently struggling to find an urgent solution to relocating their community, as they are considered Louisiana's first climate refugees. Situations like these make climate change highly visible to Indigenous nations as they witness firsthand the impacts on their homes and communities.

### *Indigenous Resistance*

Indigenous communities also frequently stand at the frontline of resistance efforts.<sup>88</sup> An estimated forty percent of "ecological distribution conflicts"<sup>89</sup> involve Indigenous peoples that are impacted by corporate, state, and intergovernmental industrial projects.<sup>90</sup> According to a report conducted by the Indigenous Environmental Network, Indigenous-led resistance to oil and gas projects have stopped or delayed greenhouse gas emissions equal to one-quarter (twenty-four percent) of the annual total U.S. and Canadian emissions.<sup>91</sup> This can include putting their physical bodies on the line, such as when Nez Perce tribal members stood at the border of the Tribe's reservation, forming a human blockade in front of a

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<sup>86</sup> The Lowlander Center, inclusive of Tribal leadership, First Peoples' Conservation Council, *Louisiana Tribes Adapt to Climate Change while Upholding Sovereignty*, CULTURAL SURVIVAL (Aug. 31, 2022), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/louisiana-tribes-adapt-climate-change-while-upholding>.

<sup>87</sup> *Id.* See also Robynne Boyd, *The People of the Isle de Jean Charles Are Louisiana's First Climate Refugees—but They Won't Be the Last*, NRDC (Sept. 23, 2019), <https://www.nrdc.org/stories/people-isle-jean-charles-are-louisianas-first-climate-refugees-they-wont-be-last>.

<sup>88</sup> See, e.g., INDIGENOUS ENV'T NETWORK & OIL CHANGE INT'L, INDIGENOUS RESISTANCE AGAINST CARBON 6–11, 13 (2021), <https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf>. (providing an overview of some "proposed, canceled, and operating projects" that are indicative of the "frontline fights facing indigenous resistance" in North America).

<sup>89</sup> The term "ecological distribution conflict" refers to "social conflicts born from the unfair access to natural resources and the unjust burdens of pollution." *Ecological Distribution Conflicts*, ENV'T JUST. ORGS., LIABS. & TRADE, <http://www.ejolt.org/2016/04/ecological-distribution-conflicts/> (last visited Mar. 14, 2023) (citing J. Martínez Alier & M. O'Connor, *Ecological and Economic Distribution Conflicts*, in R. Constanza et al., *GETTING DOWN TO EARTH: PRACTICAL APPLICATIONS OF ECOLOGICAL ECONOMICS* 1 (1st ed. 1996)).

<sup>90</sup> Helland, *supra* note 37, at 376–77 (citing *Environmental Justice Atlas*, EJATLAS.ORG).

<sup>91</sup> INDIGENOUS ENV'T NETWORK & OIL CHANGE INT'L, INDIGENOUS RESISTANCE AGAINST CARBON 1, 12 (2021), <https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf>.

mega-load shipment carrying equipment to the tar sands of Canada, a project that could result in enough carbon emissions to mean “game over for the climate.”<sup>92</sup> Additionally, tribal nations are actively deploying legal strategies through the federal court system. For example, in resistance to that same project, the Nez Perce obtained a federal court order enjoining a separate mega-load shipment that would have affected tribal resources.<sup>93</sup> Tribal nations are also challenging the decisions of federal agencies that favor further extractive projects and are likely to prove detrimental to the environment. For example, in January 2019, leaders from the Ksanka Band of the Ktunuxa Nation and several conservation groups filed a lawsuit challenging the U.S. Fish and Wildlife Service’s decision to approve a mining project without adequately considering data regarding the threats climate change poses to threatened grizzly bear and bull trout populations.<sup>94</sup>

Indigenous peoples, including tribal nations and their citizens, often stand at the forefront of resisting massive extractive projects that hold tremendous potential to harm the environment and contribute to climate change. By leveraging their status as sovereign governments, tribes have used a myriad of legal tactics to regain management authority, to varying degrees, over their aboriginal homelands. These approaches include purchasing land outright, “treaty rights litigation, co-management structures, cooperative agreements, and use of private conservation tools.”<sup>95</sup> By making these efforts, tribes have successfully brought wolves back to the Idaho wilderness, salmon to the Umatilla Basin, and cui-ui fish to Nevada’s Pyramid Lake, as part of their long list of accomplishments in promoting and safeguarding biodiversity.<sup>96</sup>

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<sup>92</sup> Wood, *supra* note 10, at 524 (quoting James Hansen, *Opinion Editorial, Game Over for the Climate*, N.Y. TIMES (May 9, 2012)).

<sup>93</sup> See *Nez Perce Tribe v. U.S. Forest Serv.*, No. 3:13-CV-348-BLW, 2013 U.S. Dist. LEXIS 131503 at \*5 (D. Idaho 2013) (“Overarching this statutory duty, is the Government’s duty as trustee over the Tribe. The Supreme Court has held that the ‘constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government’s unique obligations toward the Indians.’ ” (quoting *Washington v. Washington Com. Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 673 n. 20, (1979))).

<sup>94</sup> Complaint for Declaratory and Injunctive Relief, *Ksanka KUPAQA XA’ĒĆIN v. U.S. Fish & Wildlife Serv.*, No. 9:19-cv-00020-DWM (D. Mont. Jan. 25, 2019).

<sup>95</sup> Wood, *supra* note 10, at 540 (citing JAN G. LAITOS, SANDI ZELLMER & MARY CHRISTINA WOOD, *NATURAL RESOURCES LAW* 426–34 (2006)).

<sup>96</sup> *Id.*

### III. FEDERAL PROMISES—LAND BACK COMPARED TO TRIBAL CO-MANAGEMENT

Engaging the federal government is a core component of successfully achieving Land Back or any form of Tribal Co-Management. Before federal lands became public lands designated as national parks or national monuments, they were Indian land. As discussed in Part I of this Article, if not for the dispossession of Indigenous lands, areas that are currently designated as public lands would exist under an entirely different management structure. Land Back is truly a “return” of lands that were removed from Indigenous land tenure through a myriad of strategies. Every tribal community and Native person in the United States can trace their peoples’ history back to a time of forced relocation or removal, displacement, allotment, theft, fraud, or worse, genocide. In fact, the “historical record shows that all the current federal public land base was once tribal lands, and much of it can be traced to specific land cessions from tribes, often pursuant to Senate-ratified treaties or presidential executive orders that were later violated.”<sup>97</sup>

The stories about this country’s genocidal history live on in our own families and in our Tribal communities. Some tribes continue to commemorate the exact days that their people were forcibly removed from their homelands to ensure their history and the sacrifices of their ancestors live on forever.<sup>98</sup> Like thousands of Native people across the country, our ancestors shared a similar fate of forced removal and relocation as a result of the establishment of Yellowstone National Park and Yosemite National Park.<sup>99</sup> Today, land return and co-management can represent both

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<sup>97</sup> Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 265. See, e.g., *Peoria Tribe of Indians of Okla. v. United States*, 390 U.S. 468, 469–70 (1968). See also *10 Public Lands with Powerful Native American Connections*, U.S. DEP’T OF INTERIOR BLOG (Oct. 30, 2020).

<sup>98</sup> For example, the Pala Band of Mission Indians commemorates the eviction of their ancestors from Kupa (now known as Warners Hot Springs, CA), and their forced relocation to what is now the Pala Indian Reservation at their annual Cupa Days. For more history on this unjust story of removal and relocation, including the U.S. Supreme Court’s decision upholding their eviction from Kupa, see *Barker v. Harvey*, 181 U.S. 481 (1901) or the Tribe’s website: <http://www.palatribe.com/visitors/history/#1574837861105-ef0d56c4-e372>.

<sup>99</sup> See David Treuer, *Return the National Parks to the Tribes*, ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks->

actionable steps towards addressing centuries-old injustice and a commitment towards building partnerships for the current common problem we all face—climate change.

### *A. Moving Forward: Land Return and Co-Management*

Tribes have a strong track record of sustainable management of fish and wildlife, from bison on the plains, salmon in the Pacific Northwest, and caribou in Alaska to hundreds of other examples nationwide. Such relationships have endured short-term crises, such as wildfires and floods, and presumably long-term stress, such as century-long droughts. Through it all, species survived and thrived under Native stewardship. The moral case for tribal stewardship is hard to ignore, especially in a time when traditional ecological knowledge has become more important in addressing sustainability.<sup>100</sup>

Professor David Treuer, in his 2021 article in *The Atlantic* magazine made a compelling argument for returning some of the most sacred and spiritually significant lands in the country back to the tribes—the national parks.<sup>101</sup> While this endeavor may sound unrealistic at first, once you

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to-the-tribes/618395/. See also Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks*, Oxford University Press (1999). See also Mark David Spence, *Dispossessing the Wilderness: Yosemite Indians and the National Park Ideal, 1864–1930*, 65 PAC. HIST. REV. 27; see also generally YOSEMITE CONSERVANCY, VOICES OF THE PEOPLE: THE TRADITIONALLY ASSOCIATED TRIBES OF YOSEMITE NATIONAL PARK (2021). In 1891, the chiefs and head men of the existing remnants of the tribes of Yosemite, the Mono and the Paiute Indians submitted a petition to the President and to Congress asserting their claims to Yosemite and requesting specific remedial action or just compensation be provided for the taking of their lands. See *Yosemite Indian Petition to the United States (c. 1891)*, Yosemite Online (Aug. 2006), [http://www.yosemite.ca.us/library/yosemite\\_indian\\_petition\\_to\\_the\\_us.html](http://www.yosemite.ca.us/library/yosemite_indian_petition_to_the_us.html) (last visited Mar. 14, 2023). Today, there are seven traditionally associated tribes of Yosemite, which include the Bishop Paiute Tribe, Bridgeport Indian Colony, Mono Lake Kootzaduka’a Tribe, North Fork Rancheria of Mono Indians of California, Picayune Rancheria of the Chukchansi Indians, Southern Sierra Miwuk Nation, and the Tuolumne Band of Me-Wuk Indians. These tribes include federally recognized and non-federally recognized tribes, tribes with some of the smallest reservations in the country, and some with no reservation at all. To this day, Yosemite is one of the most visited national parks in the world. NAT’L PARK SERV., YOSEMITE CULTURAL RES. MGMT. TEAM, VOICES OF THE PEOPLE: THE TRADITIONALLY ASSOCIATED TRIBES OF YOSEMITE NATIONAL PARK (2021); *History & Culture, People, Yosemite Indians: Surviving Communities*, NAT’L PARK SERV.: YOSEMITE NAT’L PARK (Nov. 21, 2022), <https://www.nps.gov/yose/learn/historyculture/surviving-communities.htm>.

<sup>100</sup> Washburn, *supra* note 97, at 289.

<sup>101</sup> Treuer, *supra* note 99 (“[T]here can be no better remedy for the theft of land than land” and “no lands are as spiritually significant as the national parks.”).

come to understand the history of land in the United States, including the theft, the forced removal and other acts of genocide that predicated the establishment of most national parks, and once you envision what a reasonable and just remedy to such disastrous and inhumane policies would or could be, the idea of land return as a form of justice and rematriation becomes more sensible. And not only is land return just and sensible, but it is also realistic using established law and property tools. Finally, evidence suggests that, in some circumstances, tribal governments manage public lands as better stewards than the federal agencies that currently manage them.<sup>102</sup> According to reports, “[i]n many cases, tribal forests . . . were often found to be in better condition than neighboring federal lands”<sup>103</sup> and Indigenous peoples are considered to be the protectors of biodiversity around the world.<sup>104</sup>

With Secretary Deb Haaland<sup>105</sup> leading the Department of the Interior (“Interior Department”), and Chuck Sams III<sup>106</sup> leading the National Park Service (“NPS”), the return to Indigenous stewardship is expected to continue as part of forging a new path forward.<sup>107</sup> In 2021, the Interior Department and the U.S. Department of Agriculture (“USDA”) signed Joint Secretarial Order No. 3403, committing to Tribal co-stewardship, including through written co-stewardship agreements with Tribal Nations.<sup>108</sup> By the end of 2022, the USDA, the Forest Service and

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<sup>102</sup> Washburn, *supra* note 97, at 287.

<sup>103</sup> *Id.* (quoting 2 THIRD INDIAN FOREST MGMT. ASSESSMENT TEAM, INTERTRIBAL TIMBER COUNCIL, AN ASSESSMENT OF INDIAN FORESTS AND FOREST MANAGEMENT IN THE UNITED STATES (2013)).

<sup>104</sup> See Schuster et. al, *supra* note 51.

<sup>105</sup> Secretary Haaland is a member of the Pueblo of Laguna and is the first Native American to hold a cabinet-level position. *U.S. Secretary of the Interior: Secretary Deb Haaland*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited Feb. 20, 2022).

<sup>106</sup> Chuck Sams III is an enrolled member, Cayuse and Walla Walla, of the Confederated Tribes of the Umatilla Indian Reservation, and is the first Tribal citizen to lead the NPS. *News Release: Charles F. Sams III Sworn In as National Park Service Director*, NAT’L PARK SERV. (Dec. 16, 2021), <https://www.nps.gov/orgs/1207/director-chuck-sams-sworn-in.htm#:~:text=WASHINGTON%20%E2%80%94%20Charles%20F.,leader%20for%20nearly%20five%20years>.

<sup>107</sup> See, e.g., Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403 (Nov. 15, 2021), <https://www.usda.gov/sites/default/files/documents/joint-so-3403-stewardship-tribal-nations.pdf> (“The [Interior Department and USDA] recognize that it is the policy of the United States to restore Tribal homelands to Tribal ownership and to promote Tribal stewardship and Tribal self-government.”).

<sup>108</sup> Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403 (Nov. 15, 2021),

the Interior Department had entered into more than twenty new co-stewardship agreements with tribes to further co-stewardship goals, with more than sixty additional agreements under various stages of review.<sup>109</sup>

In addition to these commitments by these federal agencies, the Biden Administration also announced a national goal of conserving at least thirty percent of all our nation's lands and waters by the year 2030.<sup>110</sup> This response reflects the urgency that climate change and its impacts will have not only in our country but around the globe.<sup>111</sup> This public conservation goal has been coined the "America the Beautiful" plan and the Administration plans to enlist the leadership of sovereign Tribal nations in caring for lands, water, and wildlife.<sup>112</sup> Ushering in a new era of Land Back could be a ripe solution to achieving these conservation goals on a domestic and global scale.

Primary methods that may be used to work towards achieving this impressive goal include Tribal co-management agreements, conservation easements or some other restricted property rights, or the outright and unrestricted purchase or voluntary return of tribal land. These are just some of the diverse approaches that tribes and tribal organizations have taken to actualize Land Back which may serve as a resource for other tribes or interested parties wishing to achieve this same interconnected and mutually beneficial goal.

Not only can the path to co-management and Land Back be considered a moral imperative but a realistic one, as well. As Kevin Washburn, former Assistant Secretary of Indian Affairs, recently opined, "[a] simple path to tribal co-management already exists in federal law. It has been authorized by Congress for more than twenty-five years and required no significant new congressional action. The time is right to

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<https://www.usda.gov/sites/default/files/documents/joint-so-3403-stewardship-tribal-nations.pdf>. In 2022, the U.S. Department of Commerce also announced that it will formally join in these co-stewardship efforts by signing on to Joint Secretarial Order 3403. Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403, Amendment No. 1 (Nov. 21, 2022), [https://www.doi.gov/sites/doi.gov/files/elips/documents/joint-so-3403-a1\\_0.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/joint-so-3403-a1_0.pdf).

<sup>109</sup> *FACT SHEET: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration's Second Tribal Nations Summit*, THE WHITE HOUSE (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/>.

<sup>110</sup> U.S. DEP'T OF THE INTERIOR ET AL., *CONSERVING AND RESTORING AMERICA THE BEAUTIFUL* 6 (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

refocus on this important existing pathway.”<sup>113</sup> Several scholars and legal practitioners have written in great depth about the mechanism tribes have been using for decades to successfully take over and run federal programs through self-determination contracts and self-governance compacts pursuant to the Indian Self-Determination and Education Assistance Act (“ISDEAA”).<sup>114</sup> While not extensively used, this process, which has been reaffirmed and amended by Congress numerous times, has established an avenue for tribes to co-manage federal public lands with agencies both within and outside the Interior Department.<sup>115</sup>

While some Tribes have entered into contracts with land management agencies in the past, those contracts have been so rare and limited in scope that some experts argue they cannot be characterized as true “co-

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<sup>113</sup> Washburn, *supra* note 97, at 266. See also *Concrete Steps to Improve Tribal Co-Management of Federal Public Lands: Hearing on The History of Federal Lands and the Development of Tribal Co-Management Before the H. Comm. on Nat. Res.*, 117th Cong. 2 (Mar. 8, 2022) (written testimony of Kevin K. Washburn, Dean of University of Iowa College of Law); see also Monte Mills & Martin Nie, *Bridges to a New Era: A report on the Past, Present and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 52 (2021); see also Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2015).

<sup>114</sup> Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2006)). In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (commonly referred to as “the ISDEAA”), allowing tribes to contract directly with federal agencies to administer federal programs that provide services to Indian people because of their status as Indians (also known as “638 contracts”). A 1988 ISDEAA amendment further broadened the statute to allow contracts outside of the Bureau of Indian Affairs and Indian Health Service, and in 1994 Congress expanded the statute to allow for tribal contracts outside of the Department of Interior, such as Fish and Wildlife Service, Bureau of Reclamation, the National Park Service, and the Bureau of Reclamation. In 2004, Congress further expanded contracting to the U.S. Forest Service within the U.S. Department of Agriculture. Today, more than half of all federal programs are carried out by tribes instead of the government. For scholarship on contracting pursuant to the Indian Self Determination and Education Assistance Act, see, e.g., Danielle Delaney, *The Master’s Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/ Compacting*, 5 AM. INDIAN L. REV. 309 (2017); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014); Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV’T L. REV. 475 (2007).

<sup>115</sup> Washburn, *supra* note 97, at 278–82. See also List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs and Fiscal Year 2022 Programmatic Targets, 87 Fed. Reg. 7201 (Feb. 8, 2022).

management.”<sup>116</sup> However, now is an opportune time to change that, especially with burgeoning potential opportunities with the National Park Service. As mentioned, some of the most iconic and culturally significant public lands in the country are national parks, including Yosemite, Yellowstone, the Grand Canyon, and Glacier.<sup>117</sup> Tribal Nations remain hopeful as Chuck Sams III was confirmed as the first ever Native American NPS Director<sup>118</sup> and he will help lead the Biden Administration’s agenda, including initiatives to further climate resiliency.<sup>119</sup>

### 1. Challenges to Land Back and Co-Management

Although federal avenues for Tribal Co-Management have existed for decades through the ISDEAA, the Tribal Self Governance Act (“TSGA”),<sup>120</sup> and the Tribal Forest Protection Act (“TFPA”),<sup>121</sup> tribes have had very limited success in contracting with the federal government to provide land management services. These Congressional attempts to encourage and implement Tribal Co-management have continued to disappoint for numerous reasons. These reasons include a lack of mandatory federal funding, minimal to no incentives for federal officials to initiate and prioritize relationship building and partnerships with tribes, ignorance about Tribal expertise and tribes’ track records of successfully

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<sup>116</sup> Washburn, *supra* note 97, at 289–90.

<sup>117</sup> *Id.* at 290 (“Most of these lands are aboriginal Indian lands, that is, the former homelands of Native people.”). *See also* Treuer, *supra* note 99.

<sup>118</sup> *See* Hallie Golden, ‘Heal the past’: first Native American confirmed to oversee national parks, *GUARDIAN* (Nov. 20, 2021), <https://www.theguardian.com/environment/2021/nov/20/chuck-sams-national-park-service-confirmed-indigenous-americans> (interviewing “some Indigenous leaders [who] see Sams’ appointment as a potential path toward healing from old but deeply rooted wounds”).

<sup>119</sup> *News Release: Charles F. Sams III Sworn In as National Park Service Director*, NAT’L PARK SERV. (Dec. 16, 2021), <https://www.nps.gov/orgs/1207/director-chuck-sams-sworn-in.htm#:~:text=WASHINGTON%20%E2%80%94%20Charles%20F.,leader%20for%20nearly%20five%20years>.

<sup>120</sup> Tribal Self-Governance Act of 1994 (Indian Self-Determination and Education Assistance Act Amendments of 1994), Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. §§ 458aa–hh (2012)). In 1994, Congress significantly amended the ISDEAA by enacting the Tribal Self-Governance Act, also known as the Indian Self-Determination and Education Act Amendments of 1994. *See id.* The TSGA Amendments established a permanent tribal self-governance program within the Department of the Interior, whereby the Bureau of Indian Affairs (BIA), and every other bureau in the DOI that provides services to Indian tribes is authorized to transfer programs to participating tribes and tribal organizations. *Id.*

<sup>121</sup> Tribal Forest Protection Act of 2004, Pub. L. No. 108-278, 118 Stat. 868 (codified as amended at 25 U.S.C. § 3115a).

running federal programs, restrictions within the TFPA which limit contracting opportunities to only those federal lands “bordering or adjacent to the Indian forest land or rangeland,” and the limited scope of existing co-management agreements.<sup>122</sup> In recently published articles, scholars like Kevin Washburn, Monte Mills, and Martin Nie have recommended an array of possible solutions to fix these shortfalls and realize the strong potential for Tribal Co-Management.<sup>123</sup> For example, possible solutions to improve Tribal Co-Management include broadening the lands eligible for co-management under the TFPA, providing mandatory funding to contracting opportunities for federal land management similar to the federal programs under BIA and IHS, and encouraging and incentivizing federal agencies and their officials to seek out and enter into co-management agreements with tribes for land management. Nevertheless, there are a handful of cases that represent recent successes that are worth highlighting given the challenges mentioned above.

## 2. *Examples of Federal Land Back and Co-Management*

In 2021, the Interior Department transferred over 18,000 acres of lands comprising the National Bison Range from the Fish and Wildlife Service to the Bureau of Indians Affairs to be held in trust for the Confederated Salish and Kootenai Tribes.<sup>124</sup> The National Bison Range was established on May 23, 1908, when President Theodore Roosevelt signed legislation authorizing funds to purchase land for bison conservation. It was the first time Congress appropriated tax dollars to buy land specifically to preserve wildlife.<sup>125</sup> However, it is important to acknowledge that the 1908 legislation effectuated the federal government’s seizure of 18,000 acres of homeland from the Salish and

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<sup>122</sup> *Id.* For a more in-depth discussion on the inadequacies of the ISDEAA, TSGA, and the TFPA in implementing Tribal Co-Management for federal land management services, please see Mills & Nie, *supra* note 113 and Washburn, *supra* note 97.

<sup>123</sup> See Mills & Nie, *supra* note 113; see also Washburn, *supra* note 97.

<sup>124</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); *Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes*, U.S. DEP’T OF THE INTERIOR (June 23, 2021), <https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai>; Sarah Mosquera, *A bison range homecoming: Confederated Salish and Kootenai Tribes reclaim a Montana nature preserve*, GUARDIAN (May 27, 2022), <https://www.theguardian.com/us-news/2022/may/27/bison-range-native-tribes-reclaim-montana-nature-preserve>.

<sup>125</sup> U.S. FISH & WILDLIFE SERV., COMPREHENSIVE CONSERVATION PLAN: NATIONAL BISON RANGE iii (2019).

Kootenai.<sup>126</sup> Restoring the Salish and Kootenai's management authority over the National Bison Range is an important recognition of the Tribes' relationship with the bison, which is central to their cultural identity, and rightfully places them back as the primary caretakers of the land and wildlife that reside within that portion of their aboriginal homelands.

Other examples of tribal co-management of federal public lands include the Yurok Tribe's co-management of Redwoods (with NPS), Grand Portage Band of Lake Superior Chippewa co-management of Grand Portage National Monument (with NPS), the Council of Athabascan Tribe Governments co-management of Yukon Flats (with Fish and Wildlife Service), Sitka Tribe of Alaska's co-management of Sitka National Historical Park (with NPS), and the Bears Ears Commission's co-management of Bears Ears National Park.<sup>127</sup>

Full repatriation becomes more complex with regards to land that is designated as a national park or national monument because this land is held in "trust" for the public.<sup>128</sup> However, some of the land with the most sacred and spiritual significance to tribes are located within national parks.<sup>129</sup> In an effort to further tribal management authority over culturally significant areas on public lands, House and Senate Democrats have introduced the Advancing Tribal Parity on Public Land Act<sup>130</sup> and the Tribal Cultural Areas Protection Act,<sup>131</sup> both of which would further facilitate tribes' role in public land management. Although these bills have not yet been enacted into law, and this is not the first time Congress has considered legislation that acknowledges tribes' connection to sacred lands,<sup>132</sup> they hold promising ideas for how the federal government may move towards restoring sacred land to Tribal nations.

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<sup>126</sup> *Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes*, U.S. DEP'T OF THE INTERIOR (June 23, 2021), <https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai>. See also Robbins, *supra* note 64.

<sup>127</sup> Washburn, *supra* note 97, at 289–311; Mills & Nie, *supra* note 113.

<sup>128</sup> Mills & Nie, *supra* note 113, at 182.

<sup>129</sup> Washburn, *supra* note 97, at 290–91. See also Treuer, *supra* note 99.

<sup>130</sup> H.R. 8108, 117th Cong. 2nd sess. ("A Bill to protect Native cultural sites located on Federal land, to improve consultation with Indian Tribes, [and] to bring parity to Indian Tribes with regard to Federal public land management laws . . .").

<sup>131</sup> S.4423, 117th Cong. 2nd sess. ("provid[ing] for the preservation of tribal cultural sites on public land, including by establishing the Tribal Cultural Areas System, setting forth requirements related to land management, and authorizing certain actions by tribes").

<sup>132</sup> Previous proposed legislation with similar objectives includes the Native American Sacred Lands Act, introduced in 2003, which contemplated that a

Another strategy for land restoration includes reclassifying federal public lands to tribal trust status. In some instances, the federal government appropriated land previously belonging to tribal nations for governmental purposes and much of this land is currently managed by federal agencies. There is a strong argument that once the governmental purpose has been fulfilled, the land should be repatriated to the respective tribal nation(s).<sup>133</sup> As one example, in 2000, the Department of the Army transferred 4,900 acres at Lake McFerren, located on the former Fort Wingate Army Depot in New Mexico, to the Bureau of Indian Affairs for the benefit of the Navajo and Zuni Tribes.<sup>134</sup> In 1970, an Act of Congress placed 48,000 acres of the Blue Lake area into trust status for Taos Pueblo.<sup>135</sup> In 2018, the Western Oregon Tribal Fairness Act placed federal land into trust for the Cow Creek Band of Umpqua Tribe and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.<sup>136</sup> Ultimately, there is a slowly growing list of Congressional Acts that have enhanced tribes' legally cognizable rights to their ancestral territory, as well as a notable uptick in tribal co-management agreements.

#### IV. LAND BACK BY LOCAL AND STATE GOVERNMENTS

State and local governments can also play a major role in the Land Back and tribal co-management arena. In the last few years alone, the State of California has made significant strides in rebuilding State-Tribal relations. This includes numerous efforts to encourage, facilitate, establish, and support avenues for California tribes to lead statewide efforts in pursuit of environmental justice, responsible land stewardship, addressing climate change, as well as tribal management and restoration

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federal agency might be willing to transfer land sacred to tribal nations into trust for the benefit of that tribe or tribes, as long as those tribes agreed to "manage the land in perpetuity to protect that sacredness." Tsosie, *supra* note 14, at 306 (quoting H.R. 2419, 108th Cong. at § 6(a)).

<sup>133</sup> Tsosie, *supra* note 19, at 303, 306–7. See also Ronald A. Hodge, *Getting Back the Land: How Native Americans Can Acquire Excess and Surplus Federal Property*, 49 N.D. L. REV. 333, 333 (1973) ("[A]cquisition of unused federal property represents a viable method for Native Americans to restore at least part of that lost land—land which they still need").

<sup>134</sup> Tsosie, *supra* note 19, at 306.

<sup>135</sup> Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437.

<sup>136</sup> Western Oregon Tribal Fairness Act, Pub. L. No. 115-103, 13 Stat. 2253 (2018).

of traditional territories.<sup>137</sup> This is in stark contrast to the majority of the State's respectively short 170-year history since California statehood in 1850.<sup>138</sup>

Since its inception, the State of California has strategically repressed tribes' access to, and cultural use of, lands within their aboriginal homelands. For example, California has not recognized aboriginal or usufructuary rights to unceded lands in California for tribal citizens to do many of the culturally significant practices that other tribes in the United States continue to do off-reservation, such as hunting, fishing, trapping, and gathering on lands within their ancestral territories.<sup>139</sup> This is because under the federal Indian law framework in California, these types of aboriginal rights, commonly understood as usufructuary rights, are recognized as reserved in treaties and other acts of Congress.<sup>140</sup> In

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<sup>137</sup> See Statement of Administration Policy, California Office of the Governor, Native American Ancestral Lands (Sept. 25, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf>; see also Cal. Exec. Order N-15-19 (June 18, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/06/6.18.19-Executive-Order.pdf?emrc=b13680>.

<sup>138</sup> Governor Peter Burnett, who was the first Governor of California, is widely known for his anti-Indian sentiment, including his address to the state legislature in which he proclaimed: "That a war of extermination will continue to be waged between the races until the Indian race becomes extinct must be expected. . . . While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert." Erin Blackmore, *California's Little-Known Genocide History Stories*, HIST. (Dec. 4, 2020), <https://www.history.com/news/californias-little-known-genocide>. The early governor, supported by the federal government, led genocidal efforts to eradicate Indigenous communities throughout the state, and the discovery of gold in the California foothills led to some of the most horrendous examples of genocide in our country's history. Burnett set aside state money to arm local militias against Natives and, with the help of the U.S. Army, distributed weapons to the militias, who are tasked with raiding tribal outposts and scalping and killing Native people. *Id.* Local governments put bounties on Native scalps and paid settlers for stealing horses of the Native people they murder. *Id.* An estimated 100,000 Natives in California died during the first two years of the Gold Rush alone; by 1873, only 30,000 Indigenous people remained. *Id.* At least 16,000 murders of Native Indians of California are documented during this time. *Id.* See also Benjamin Madley, *Op-Ed: It's time to acknowledge the genocide of California's Indians*, L.A. TIMES (May 22, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-madley-california-genocide-20160522-snap-story.html>.

<sup>139</sup> See *In re Wilson*, 30 Cal. 3d 21 (Cal. 1981) (upholding a criminal conviction of a Pit River tribal citizen for hunting on ancestral territory without a state permit reasoning that aboriginal hunting rights and associated usufructuary rights had been extinguished in California).

<sup>140</sup> See *Winters v. United States*, 207 U.S. 564 (1908) (recognizing that the treaty that established the Fort Belknap reservation also implicitly reserved tribal water rights). For further information on reserved rights off-reservation, see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

California, around the time of statehood, federal officials came to the California region and negotiated eighteen treaties with Indigenous communities throughout the state.<sup>141</sup> However, after pressure and lobbying from California officials, the treaties were never ratified by the U.S. Senate and instead were sworn to secrecy for fifty years.<sup>142</sup> Because of this history, tribes in California have had to be creative in order to re-establish their connections to their cultural practices, and the lands, waters, plants, and animals within the cultural landscape in California.<sup>143</sup>

Today, Tribal-State relations are at an all-time high, making it an opportune time for land return and co-management efforts. On June 18, 2019, Governor Gavin Newsom issued Executive Order N-15-19,<sup>144</sup> acknowledging and apologizing on behalf of the State for its historical “violence, exploitation, dispossession and the attempted destruction of tribal communities,” which dislocated California Native Americans from their ancestral land and sacred practices. The Executive Order also established the California Truth and Healing Council. Unlike the majority of the state’s history, it is now state policy to seek and encourage opportunities for land return, co-management, and access to ancestral territories.<sup>145</sup> The state even released a proposal to provide \$100 million to Tribal leaders to buy ancestral lands.<sup>146</sup>

Moreover, there appear to be ever-evolving examples of land return of different shapes and sizes happening in California.<sup>147</sup> In recognition of

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<sup>141</sup> Larissa K. Miller, *The Secret Treaties with California's Indians*, PROLOGUE, Fall–Winter 2013, at 38, <https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf>.

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Curtis G. Berkey and Scott W. Williams, *California Indian Tribes and the Marine Life Protection Act: The Seeds of a Partnership to Preserve Natural Resources*, 43 AM. INDIAN L. REV. 307, 308–315 (2019).

<sup>144</sup> Exec. Order N-15-19 (June 18, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/06/6.18.19-Executive-Order.pdf?emrc=b13680>.

<sup>145</sup> Statement of Administration Policy, California Office of the Governor, Native American Ancestral Lands (Sept. 25, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf>.

<sup>146</sup> Maya Yang, *California plan would give \$100m to Indigenous leaders to buy ancestral land*, GUARDIAN (Mar. 18, 2022), <https://www.theguardian.com/us-news/2022/mar/18/california-indigenous-tribes-purchase-land>.

<sup>147</sup> Beyond land return and co-management, some tribes have also found creative solutions in working with the state government and its respective agencies to reconnect with and access lands off-reservation for cultural practices, like hunting, which had sustained the wellbeing of their people for thousands of years prior to colonization. For example, the Bishop Paiute Tribe renewed access to hunting for their tribal citizens within their peoples’ ancestral territories as a result of open dialogue, negotiation, and an agreement with the California Department of Fish and Wildlife. *Bishop Paiute Tribe and*

the value of traditional knowledge and its use in managing coastal California lands and waters, the State has begun supporting tribal efforts to co-manage lands and waters in California. For example, the State has promised its support for tribal co-management of 200 miles of coastline with \$3.6 million in state funds.<sup>148</sup> Inland and upriver from the coastal water of California, in the first agreement of its kind in the state, ownership and management of a ninety-three-acre ecological preserve, the Butte Creek Ecological Preserve, was transferred from Chico State Enterprises to the Mechoopda Indian Tribe to manage, protect, restore, and steward the land.<sup>149</sup> The land return was enabled by the passage of Assembly Bill 379, which permitted the Wildlife Conservation Board to work much more directly with California Native American Tribes to facilitate land management and grants for various purposes in connection with fish and wildlife habitats.<sup>150</sup> Butte Creek is critical salmon habitat and spawning grounds for the largest population of Central Valley spring run Chinook, a state and federal threatened evolutionarily significant unit, according to

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*Department of Fish and Wildlife Enter Into Historic Agreement*, CAL. NAT. RES. AGENCY, <https://secretary.resources.ca.gov/2020/02/bishop-paiute-tribe-and-department-of-fish-and-wildlife-enter-into-historic-agreement>. For California tribes, restoring access to traditional territories outside of the current reservations lands for practices like hunting is a significant achievement considering the brutal historical context of the last 170 years of statehood and the eighteen treaties in California that were never ratified and therefore never reserved otherwise standard usufructuary rights like hunting, fishing, and gathering rights on ceded territories. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) for more information on reserved rights off-reservation. See *In re Wilson*, 30 Cal.3d 21 (Cal. 1981), a California Supreme Court case upholding a criminal conviction of a Pit River tribal citizen for hunting on ancestral territory without a state permit, reasoning that aboriginal hunting rights and associated usufructuary rights had been extinguished in California.

<sup>148</sup> Sophie Austin, *Five tribes on California's coast are moving forward in their efforts to protect marine ecosystems as part of the Tribal Marine Stewards Network*, U.S. NEWS (Oct. 9, 2022), <https://www.usnews.com/news/politics/articles/2022-10-09/california-tribes-will-manage-protect-state-coastal-areas#:~:text=SACRAMENTO%2C%20California,%243.6%20million%20in%20state%20money>.

<sup>149</sup> Andrew Staples, *Ancestral Land in Butte Creek Canyon Return to the Mechoopda Tribe*, CHICO STATE TODAY (Sept. 23, 2022), <https://today.csuchico.edu/bcep-transferred-to-mechoopda-tribe>; Noah Herbst, *Partners in preservation: Chico State and the Mechoopda Tribe's historic land transfer*, THE ORION (Sept. 30, 2022), <https://theorion.com/92287/news/partners-in-preservation-chico-state-and-the-mechoopda-tribes-historic-land-transfer/>.

<sup>150</sup> Andrew Staples, *Ancestral Land in Butte Creek Canyon Return to the Mechoopda Tribe*, CHICO STATE TODAY (Sept. 23, 2022), <https://today.csuchico.edu/bcep-transferred-to-mechoopda-tribe>; Noah Herbst, *Partners in preservation: Chico State and the Mechoopda Tribe's historic land transfer*, THE ORION (Sept. 30, 2022), <https://theorion.com/92287/news/partners-in-preservation-chico-state-and-the-mechoopda-tribes-historic-land-transfer/>.

the release.<sup>151</sup> These examples can serve as a pathway for the over 100 tribes in California to achieve some form of land return or co-management.

Local governments in the Bay Area of California have also become proactive in supporting Tribal Land Back efforts. The City of Oakland and Sogorea Te' Land Trust, an Indigenous women-led nonprofit, announced plans for the City to "grant a cultural conservation easement [for Sequoia Point] in perpetuity to the Land Trust, allowing the Land Trust to immediately use the land for natural resource restoration, cultural practices, public education, and to plan for additional future uses."<sup>152</sup> This effort represents a willingness on behalf of local elected leaders to repair tribal relations and meaningfully support tribal land stewardship efforts through conservation. "I am committed to returning land to Indigenous stewardship, to offer some redress for past injustices to Native people," said Mayor Schaaf. "I hope the work we are doing in Oakland with the Sogorea Te' Land Trust can serve as a model for other cities working to return Indigenous land to the Indigenous community we stole it from."<sup>153</sup>

This movement of state and local governments supporting Tribal Land Back efforts extends beyond California's borders. When Kansas Governor Laura Kelley signed Senate Bill 405, it authorized the Kansas State Historical Society ("KSHS") to convey the Shawnee Indian Cemetery back to the ownership and stewardship of the Shawnee Tribe.<sup>154</sup> While the Shawnee Tribe is now headquartered in Miami, Oklahoma as a result of federal policies of forced removal and relocation of Native people, this 0.52 acre parcel of land in Kansas was the final resting place of many prominent Shawnee ancestors such as former chiefs and family members.<sup>155</sup> "Besides being a sacred site for our people, it also signifies the general location of our last true home," said Second Chief Roy Baldridge.<sup>156</sup>

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<sup>151</sup> Andrew Staples, *Ancestral Land in Butte Creek Canyon Returned to the Mechoopda Tribe*, CHICO STATE TODAY (Sept. 23, 2022), <https://today.csuchico.edu/bcep-transferred-to-mechoopda-tribe/>; Jennie Blevins, *Butte Creek Ecological Preserve transferred to Mechoopda*, ENTERPRISE-RECORD (Sept. 24, 2022), <https://www.chicoer.com/2022/09/24/butte-creek-ecological-preserve-transferred-to-mechoopda/>.

<sup>152</sup> *Sogorea Te' Land Trust and City of Oakland Announce Plan to Return Land to Indigenous Stewardship*, CITY OF OAKLAND (Sept. 8, 2022, 11:57 AM), <https://www.oaklandca.gov/news/2022/sogorea-te-land-trust-and-city-of-oakland-announce-plan-to-return-land-to-indigenous-stewardship>.

<sup>153</sup> *Id.*

<sup>154</sup> *Shawnee Indian Cemetery in Johnson County, KS Returns to Shawnee Tribe*, SHAWNEE TRIBE (Apr. 15, 2022), <https://www.shawnee-nsn.gov/news-community/post/shawnee-indian-cemetery-returns>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

The Chickahominy Tribe located in modern day Virginia also achieved Land Back after successfully partnering with the governor in 2022. The Tribe, which finally received federal recognition in 2018, was able to reacquire 944 acres of land within its ancestral territory along the Chickahominy River with \$3.5 million in state funds provided by outgoing Governor Ralph Northam.<sup>157</sup> This was a profound achievement for the Tribe whose footprint along the Chickahominy River, while located at the heart of the Tribe's traditional territory, had been largely disconnected since the seventeenth century.<sup>158</sup>

In July 2022, the Onondaga Nation in New York recovered over 1,000 acres of the Tribe's ancestral forest lands in the Tully Valley, which include the headwaters of Onondaga Creek, for reforestation and preservation through an agreement with the state of New York and the federal government.<sup>159</sup> "For the Onondaga people, Onondaga Lake and Onondaga Creek are sacred. They are considered living relatives, central to the Onondaga worldview and spirituality. These waterways and other natural areas, like the Tully Valley lands, provide freely-given and sustainable connections with traditional foods and medicine, support ancestral memory and cultural life ways, and remind the Nation of their cultural and ecological responsibilities to their non-human relatives."<sup>160</sup> This land return achieved through government-to-government cooperation not only returns stewardship responsibilities to the Tribe, it also provides a pathway towards healing between the Onondaga people and others who now live in the local region.

There is no doubt that state and local governments have historically been at the forefront of land dispossession and animosity with tribes for centuries. However, the examples in this section demonstrate that today, in an era of conservation for a collective future, engagement in meaningful

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<sup>157</sup> Joseph Martin, *Chickahominy Tribe reacquires ancestral lands*, INDIAN COUNTRY TODAY (Mar. 13, 2022), <https://indiancountrytoday.com/news/chickahominy-tribe-reacquires-ancestral-lands>. The Governor amended the state budget to directly appropriate \$3.5 million from the general fund for the preservation of historic tribal lands of the Chickahominy Tribe. Nicole Duimstra, *Support for the Governor's Virginia Land Conservation Foundation Budget Amendment*, VA. CONSERVATION NETWORK (Apr. 5, 2021), <https://vcnva.org/virginia-land-conservation-foundation-budget-amendment/>.

<sup>158</sup> Joseph Martin, *Chickahominy Tribe reacquires ancestral lands*, INDIAN COUNTRY TODAY (Mar. 13, 2022), <https://indiancountrytoday.com/news/chickahominy-tribe-reacquires-ancestral-lands>.

<sup>159</sup> *The Onondaga Nation, in Unprecedented Land Back Moment, Regains 1,023 Acres of the Land From New York State*, ONONDAGA NATION (July 1, 2022), [https://www.onondaganation.org/uncategorized/2022/land\\_back\\_1023\\_acres/](https://www.onondaganation.org/uncategorized/2022/land_back_1023_acres/).

<sup>160</sup> *Id.*

dialogue between Tribal, state and local leaders may lead to fruitful Land Back efforts and a healing of centuries-old relations.

## V. TRIBES AS THE LEADERS OF LAND BACK

In many cases, tribes and Tribal organizations have taken matters into their own hands. Some tribes with sufficient monetary resources have resorted to buying back lands that neighbor their reservations and other lands within their ancestral territories in an effort to reclaim their physical connection to the land.<sup>161</sup> The benefits of tribes buying land back themselves is evident, as it reduces the possibility there will be conditions or restrictions on the use of the land, unlike conservation easements or co-management agreements. This arrangement is more aligned with principles of tribal sovereignty and self-determination, as it positions tribes as the ultimate decision-makers. However, the challenges are similarly clear: purchasing ancestral territories will likely come at a high price and therefore, oftentimes, the ability to buy back ancestral territory rests on the success of a tribe's economic development ventures, such as gaming, natural resources, tourism, etc. Additionally, there is no guarantee that all tribes will elect to apply stringent environmental protections.

However, certain tribes are purchasing their aboriginal territory with the explicit intent of conserving the land for traditional and ceremonial purposes. For example, the Squaxin Island Tribe purchased 875 acres of forest within their ancestral territory from the Port Blakely Companies in Washington State. In a separate transaction, the Port Blakely Companies also returned two miles of waterfront property and 125 acres of tidelands to the Squaxin Island Tribe at no cost.<sup>162</sup> The Chairman of the Squaxin Island Tribe, Kris Peters, has indicated that the tribe does not plan to develop the property, but rather the land would be stewarded for ceremonial use.

### A. Partnerships with Conservation Groups

Organizations such as the Nature Conservancy and the Natural Resources Defense Council are also actively seeking opportunities to

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<sup>161</sup> See, e.g., Kira Kay & Jason Maloney, *Why Native Americans are buying back land that was stolen from them*, PBS NEWS (Oct. 16, 2021, 4:13 PM), <https://www.pbs.org/newshour/show/why-native-americans-are-buying-back-land-that-was-stolen-from-them>.

<sup>162</sup> Lynda V. Mapes, *Timber company returns 2 miles of waterfront property to Squaxin Island Tribe*, THE SEATTLE TIMES: ENV'T (Dec. 22, 2021, 6:00AM), <https://www.seattletimes.com/seattle-news/environment/timber-company-returns-2-miles-of-waterfront-property-to-squaxin-island-tribe/>.

partner with tribes and other Indigenous communities to promote Indigenous stewardship as a means of environmental conservation.<sup>163</sup> For instance, the Yurok Tribe in northern California is piecing back together their ancestral lands with the help of land conservations groups like the Trust for Public Land and the Western Rivers Conservancy. One of the main purposes of this reclamation is to protect and restore salmon habitat, their primary food source, and to use the land for ceremonial and gathering purposes that are central to their cultural identity as Yurok people.<sup>164</sup> To date, the Yurok have purchased more than 80,000 acres to add to their traditional land holdings.<sup>165</sup>

In another recent acquisition in 2021, the Passamaquoddy Tribe at Motahkomikuk (Indian Township) reacquired 140 acres of their unceded ancestral territory in Maine after partnering with multiple land trusts.<sup>166</sup> The island was included as part of the Tribe's reservation in their 1794 Treaty, as well as the Maine Indian Claims Settlement Act of 1980. However, after it was illegally sold the Tribe was banned from going on to this culturally significant island.<sup>167</sup> This land return is a piece of a larger effort by the Wabanaki Tribes in Maine to improve the health and well-

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<sup>163</sup> In 2019, the Nature Conservancy transferred more than 200,000 acres of the Nimmie-Caira wetlands (now renamed Gayini, meaning "water") to the sole ownership of the Nari Nari, an Indigenous people who have inhabited that region of Australia for over 50,000 years. Robbins, *supra* note 64. See also *How We Work: Indigenous Peoples and Local Communities*, THE NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/community-led-conservation/> (last visited Jan. 2, 2022) (describing how and why the Nature Conservancy actively seeks to work in partnership with Indigenous Peoples to "learn from their stewardship experiences, and amplify their leadership in conserving lands, waters and ways of life").

<sup>164</sup> Robbins, *supra* note 64. See also *Klamath River Blue Creek*, W. RIVERS CONSERVANCY, <https://www.westernrivers.org/projects/ca/klamath-river-blue-creek> (last visited Mar. 15, 2023) (describing its work to return "sacred ancestral homelands to California's Yurok Tribe, which will manage the lands to recover forests that were harvested for decades and to improve habitat for . . . fish and wildlife").

<sup>165</sup> Robbins, *supra* note 64. See also Kira Kay & Jason Maloney, *Why Native Americans are buying back land that was stolen from them*, PBS NEWS (Oct. 16, 2021, 4:13 PM), <https://www.pbs.org/newshour/show/why-native-americans-are-buying-back-land-that-was-stolen-from-them> (describing how the Yurok have bought back more than 70 thousand acres of their original territory from the Green Diamond Resource Company).

<sup>166</sup> Robbins, *supra* note 64; *Passamaquoddy Tribe Reacquires Culturally Significant 140-Acres of Island in KCI Monosakom (Big Lake), Maine*, DRUMMONDWOODSUM, <https://dwmlaw.com/passamaquoddy-tribe-requires-culturally-significant-140-acres-of-island-in-kci-monosakom-big-lake-maine/> (last visited Mar. 15, 2023).

<sup>167</sup> *Passamaquoddy Tribe Reacquires Culturally Significant 140-Acres of Island in KCI Monosakom (Big Lake), Maine*, DRUMMONDWOODSUM, <https://dwmlaw.com/passamaquoddy-tribe-requires-culturally-significant-140-acres-of-island-in-kci-monosakom-big-lake-maine/> (last visited Mar. 15, 2023).

being of their people by expanding their access, management, and ownership of lands to practice their land-based cultures across their homeland.

The Trust for Public Land also established the Kashia Coastal Reserve in 2016 to restore the Kashia's access to their ancestral homelands, which includes having a place to harvest medicine and food, as well as conduct ceremonies. A core part of this effort also includes putting a traditional management plan in place to help restore the forest.<sup>168</sup> Similarly, almost four centuries after the Mohican Nation Stockbridge-Munsee Band's painful removal from the New York region, a New York based land conservancy group called Open Space Institute transferred 156 acres along the Hudson River to the Tribe, who will continue to manage it as a nature preserve.<sup>169</sup> The land is on Papscanee island in New York, near Albany, within the ancestral territory of the Tribe.<sup>170</sup> The Western Rivers Conservancy transferred a 1,199 acre ranch, a property valued at \$4.5 million to the Esselen Tribe of California—250 years after the land was taken from them in the region now known as Big Sur along California's central coastline.<sup>171</sup> The ranch property is significant in many ways—it contains a redwood forest and a crystalline stream, the Little Sur, where steelhead spawn.<sup>172</sup> The Tribe plans to protect its natural values, including the numerous species that also call the region home, as well as use the land for ceremonial and cultural purposes.<sup>173</sup>

While this is a celebrated effort, purchasing ancestral lands in the modern real estate market often comes at a steep price and this avenue is

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<sup>168</sup> *The Kashia Return to the Coast*, TRUST FOR PUB. LAND, <https://www.tpl.org/blog/kashia-coastal-reserve> (last visited Jan. 4, 2022).

<sup>169</sup> Robbins, *supra* note 64.

<sup>170</sup> Brennen Scarborough, *New York land being returned to Stockbridge-Munsee Mohican people*, WSAW, <https://www.wsaw.com/2021/05/12/new-york-land-being-retuned-to-stockbridge-munsee-mohican-people/> (last updated May 11, 2021, 9:19 PM); *Papscanee Island Nature Preserve Returned to the Stockbridge-Munsee Community*, OPEN SPACE INST. (May 9, 2021), <https://www.openspaceinstitute.org/news/papscanee-island-nature-preserve-returned-to-the-stockbridge-munsee-community>. See also *The Greatest Gift: The Return of Papscanee Island*, OPEN SPACE INST. (June 7, 2022), <https://www.openspaceinstitute.org/stories/the-greatest-gift-the-return-of-papscanee-island>. (“Leaving Papscanee, the Mohican people began a long and painful odyssey of forced displacement, moving first to New England, then to western New York and the Midwest. Finally, by the mid-1800s, the tribe was granted permanent property in Wisconsin. . . . ‘This place is a cultural touchstone that we can continue to come back to, and directly communicate with and draw strength from our ancestors,’ Hartley said. ‘Our land is intrinsic to who we are—it’s our identity. The greatest gift is to have our land back.’”).

<sup>171</sup> Robbins, *supra* note 64.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

simply out of reach for tribes that rely on federal funding to run most tribal governmental programs. Other tribes and tribal organizations have taken to actively organizing and creating grassroots efforts to reclaim Indigenous lands and their connections to those lands. This is especially true for landless tribes and unrecognized tribes who currently lack the ability to take land into trust through the federal Part 151 regulatory process which provides an avenue for federally recognized tribes to take land into trust status.<sup>174</sup> This section will explore a few of the examples across the country demonstrating this grassroots approach.

### *B. Additional Moral Imperatives to Acknowledge Tribal Stewardship*

In California's Bay Area, the Sogorea Te' Land Trust, an intertribal, women-led organization, has sparked a popular movement inspiring local non-Indigenous residents to acknowledge the historical caretakers of the land they reside on by paying voluntary "rent" or "tax."<sup>175</sup> Non-Indigenous people living on the Confederated Villages of Lisjan's territory can make a voluntary annual contribution through the Shuumi Land Tax to support the critical work of the Sogorea Te' Land Trust.<sup>176</sup> Through the establishment of the Shuumi Land Tax, local residents are able to voluntarily opt into a symbolic "tax" that supports the Land Trust's "work of rematriation, returning Indigenous land to Indigenous peoples, . . . and build[] urban gardens, community centers, and ceremonial spaces."<sup>177</sup> Beyond the voluntary tax, the organization has also established relationships with the local cities to achieve their land reclamation and rematriation goals.<sup>178</sup>

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<sup>174</sup> The Indian Reorganization Act ("IRA") of 1934 [Pub. L. No. 109-221, 48 Stat. 984, codified as amended at 25 U.S.C. §5108] provides the Secretary of Interior with the discretion to acquire trust title to land or interests in land. The Secretary bases the decision to make a trust acquisition on the evaluation of the criteria set forth in Title 25 Code of Federal Regulations (CFR) Part 151 and any applicable policy. With the exception of certain mandatory acquisitions, the decision to acquire title requires Secretarial approval.

<sup>175</sup> *Shuumi Land Tax*, SOGOREA TE' LAND TRUST, <https://sogoreate-landtrust.org/shuumi-land-tax/> (last visited Jan. 5, 2022).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., *Sogorea Te' Land Trust Shuumi Land Tax*, CITY OF ALAMEDA, <https://www.alamedaca.gov/RESIDENTS/Information-for-Residents/Sogorea-Te-Land-Trust-Shuumi-Land-Tax>. The Alameda City Council voted to become the first city to pay the Shuumi Land Tax annually. See also *Sogorea Te' Land Trust and City of Oakland Announce Plan to Return Land to Indigenous Stewardship*, CITY OF OAKLAND (Sept. 8, 2022, 1:57 PM), <https://www.oaklandca.gov/news/2022/sogorea-te-land-trust-and-city-of>

The Duwamish Tribe has applied a similar model in the Seattle area through its “Real Rent Duwamish” initiative. Through the establishment of “Real Rent Duwamish,” local residents can opt into voluntary rental payments to the Duwamish Tribe. These initiatives for private landowners and residents of land where Indigenous peoples have been displaced from are both meaningful acknowledgments of tribes as stewards of the land since time immemorial, as well as creative mechanisms to support tribes’ efforts to keep the land alive and thriving.

## CONCLUSION

Land Back is a social and environmental justice movement that is not only a reckoning of our nation’s past, but also a crucial component in achieving climate justice moving forward. The historical dispossession of Indigenous lands led to the overexploitation of our country’s natural resources—a major contributor to the climate change crisis our global community now faces. Indigenous communities are uniquely invested in this issue, as many are experiencing the impacts of climate change firsthand and often stand at the forefront of resisting further development of massive extractive projects. While Indigenous land use is complicated and diverse, there remains an inextricable link between traditional native land management and reverence for the land that sustains us all. This has led to numerous stakeholders—including federal, state, and local governments, as well as local organizations and land trusts—recognizing the key role that tribes can play as meaningful partners and leaders in environmental conservation. Given that Indigenous worldviews, cultures and spiritualities are inherently grounded on a special moral responsibility to, and relationship with, their communities, their surrounding waters and lands, and the survival thereof for future generations, Indigenous stewardship is a key part to solving today’s very urgent and complicated problem we all face.

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oakland-announce-plan-to-return-land-to-indigenous-stewardship (The City of Oakland would grant a cultural conservation easement over Sequoia Point in perpetuity to the Land Trust, “allowing the Land Trust to immediately use the land for natural resource restoration, cultural practices, public education, and to plan for additional future uses”).