"Concrete Steps to Improve Tribal Co-Management of Federal Public Lands"

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Chairman, Ranking Member, and Members of the Committee, thank you for asking me to appear before you. I offer the following context and suggestions to encourage tribal co-management of federal public lands, using existing legislative authority.[2]

Introduction

One of the most significant longstanding injustices in the history of the United States is the theft of land from Indian tribes during the better part of the first two centuries of this nation's existence. The taking of native land reflects a wide gulf between our idealistic claims to be a just nation and the truth buried in our nation's history. Our nation is far from perfect. Since 1787, however, this country has been working steadily, more or less, to achieve our highest ideals and to become a "more perfect union." It is in this spirit of idealism that I appear before you today.

All of North America was once occupied by Native American tribal nations. Today, the vast majority of federal public land is located in the western United States, and tens of millions of acres of this land can be traced to specific land cessions from tribes pursuant to Senate-ratified treaties, or Presidential executive orders, that were later violated.

Tribes have consistently sought the return of their lands from the federal government. Tribal nations in South Dakota, for example, regularly renew their request for the return of the Black Hills. An outspoken Ojibwe scholar, David Treuer, has boldly called on the United States to return the national parks to tribes, saying "there can be no better remedy for the theft of land than land" and "no lands are as spiritually significant as the national parks." Demands by the "LandBack" movement have met with some success, as Congress recently returned a significant Fish and Wildlife Service refuge, the National Bison Range, to the Confederated Salish & Kootenai Tribe

[1] For identification purposes only. The testimony presented here is made in an individual capacity and is not made on behalf of the University of Iowa or any other institution

[2] A more comprehensive assessment of the ideas discussed herein will be published in the Wisconsin Law Review, in an article entitled *Facilitating Tribal Co-Management of Federal Public Lands* (forthcoming 2002), A draft of the article is currently available here: http://ssrn.com/abstract=3951290.

in Montana. As our country continues to reckon with historical injustices and seeks to develop allies in much-needed conservation efforts, more action is appropriate.

The Need for Tribal Management or Co-Management of Public Lands

While returning federal lands to tribes presents significant complexities, a wide range of actions can meet some of the same goals. Today, I wish to discuss tribal co-management of federal public lands as a meaningful and constructive way to acknowledge and recognize past injustices and also broaden the federal commitment to conservation and strong stewardship of public land.

Tribes have a lot to offer in land conservation and management, including traditional ecological knowledge and thoughtful practices regarding resource management that have been passed down through generations. Tribal land managers perform better, in some ways, than expert federal managers. Bold federal conservation goals need broad support and tribes can be important allies to the federal government and our international partners in this effort.

Views on the Indian Self-Determination and Education Assistant Act

Broad opportunities for tribal co-management are already authorized by federal laws on tribal self-determination and self-governance. In 1975 Congress enacted Public Law 93-638, the Indian Self-Determination and Education Assistance Act ("ISDA"), which allowed tribes to contract with certain federal agencies to administer federal programs that provide services to Indian people because of their status as Indians. Under such contracts—commonly called "638 contracts"—tribal governments step into the shoes of the federal government in providing federal services. The vast majority of these contracts are between tribal governments or tribal consortia, on one side, and the Indian Health Service ("IHS") and the Bureau of Indian Affairs ("BIA") on the other. The self-determination laws have transformed federal services in Indian country. The contracting scheme has simultaneously enhanced tribal sovereignty and self-determination and improved the quality of federal services to Indian people. It has also had the practical effect of building substantial tribal capacity in a field of some complexity: contracting with the federal government.

In 1994, Congress expanded tribal ISDA contracting authority, allowing tribal governments to contract with Interior agencies, such as the Fish & Wildlife Service ("FWS"), the Bureau of Land Management ("BLM") and the National Park Service ("NPS"). These 1994 amendments authorized tribes to contract for virtually any federal program, service or function at the Departments of Interior or Health and Human Services as long as it has a "special geographic, historical, or cultural significance" to a tribe that is successfully involved in the ISDA self-governance program. Similar authority was eventually extended to the Department of Agriculture, home to the U.S. Forest Service ("USFS").

To tribes, expanding the contracting regime beyond traditional tribal self-governance programs held great promise. Opportunities would seem to abound for partnerships between tribes and federal land management agencies. However, the strong potential for tribal co-management in the 1994 amendments has yet to be realized.

Indeed, in contrast to the BIA and IHS, tribes have had very little success in contracting with the federal land management services. Compared to more than 800 annual contracts with the BIA in recent years, tribes have entered fewer than a dozen contracts annually with all of the other land management agencies within Interior combined, including the BLM, FWS and NPS. Based on the numbers alone, it is fair to conclude that the Congressional initiative to encourage federal-tribal contracts related to public land management has failed.

To address this failure, I respectfully present several recommendations to incentivize contracts between tribes and federal land management agencies and to facilitate participation by tribes in meeting ambitious federal conservation objectives. Some of the suggestions are directed toward the agencies and some are directed toward Congress.

Interior Agencies Should Expand the List of Federal Programs, Services and Activities That Are Subject to Potential Contracting

The Department of the Interior is required by law to publish each year a list identify existing contracts and detailing the list of programs that are eligible for contracting. Since 1994, tribal governments have become more and more successful in running federal programs and tribal governmental capacity and expertise has expanded. However, Interior's annual list of eligible programs, services and activities has changed very little in more than 20 years since the list was first published in the Federal Register.

To its credit, Interior has not ignored the program. Interior has occasionally held tribal consultations on the program and the list has not been entirely static. In light of the "LandBack" movement and heightened interest among tribal governments and conservation organizations in engaging tribes in land conservation, this program should be made a Departmental priority. The Department should consult with tribes with a view toward expanding the lists of functions for which tribes can contract. The following activities have been included, but some of these could be expanded:

Eligible Bureau of Land Management programs (among others):

- Minerals management and cadastral surveys
- Cultural heritage activities
- Natural resource management, such as timber management and watershed restoration
- Range management, such as revegetation, noxious weed control, and wild horse management
- Riparian management, such as erosion control
- Recreation management, such as facilities construction and maintenance
- Habitat management

Eligible National Park Service programs (among others):

- Archaeological surveys
- Comprehensive management planning
- Ethnographic studies
- Erosion control
- Fire protection

- Gathering subsistence data
- Hazardous Fuel Reduction
- Housing Construction and Rehabilitation
- Interpretation
- Janitorial Services
- Maintenance
- Natural Resource Management
- Campground Operation
- Range Assessment
- Reindeer Grazing in Alaska
- Road Repair
- Solid Waste Collection and Disposal
- Trail Rehabilitation
- Watershed Restoration and
- Maintenance
- Recycling Programs

Eligible Fish and Wildlife Service programs (among others):

- Subsistence programs within Alaska
- Technical assistance, restoration, and conservation
- Endangered species conservation and recovery programs
- Wetland and habitat conservation restoration
- Fish hatchery operations

Each Interior agency should be directed to go through the list of activities anew and take a fresh look, in consultation with tribes.

Interior Agencies Should Also Expand the List of Federal Facilities, Lands, and Units That Are Subject to Potential Contracting

In the same document in which Interior annually publishes notice of the list of eligible programs, services and activities for which tribes can contract, it also publishes the names of the lands or units that lie in proximity to an eligible tribal government exercising self-governance. Similar to the eligible program and services lists, these lists have also remained relatively static during the past 20 years.

To provide examples, the NPS lists 15 park units in Alaska and eight in Arizona, and even one in my current home state of Iowa—Effigy Mounds National Monument. It lists six iconic units in New Mexico, including Aztec Ruins National Monument, Bandelier National Monument, Carlsbad Caverns National Park, Chaco Culture National Historic Park, Pecos National Historic Park and White Sands National Monument.

However, some newer public land units, which would seem to be appropriate for inclusion, are omitted from the list. For example, the Bears Ears National Monument in Southeastern Utah was not included, despite significant tribal interest in assisting the BLM in managing this tribally

significant landscape. The list contains no units in Wisconsin, despite press reports that suggest that the Red Cliff Band of Lake Superior Chippewa has been in talks with the NPS regarding the Apostle Islands National Lakeshore, which is adjacent to the Red Cliff and Bad River Indian Reservations.

Agencies should schedule tribal consultations, perhaps on a regional basis, on the scope of the list of public land units, and actively seek out tribal interest in engagement with particular units. I am quite confident that such a review would result in the addition of more parks, monuments, and refuges to the list. Ultimately, agencies should be encouraged to expand the list by identifying additional units and additional functions.

Congress Should Authorize Modest Funding for Tribal Planning Grants and Contract Support Costs to Assist Tribes with Successful Proposals for Land Management Contracts

Two structural impediments exist to successful tribal contracts for public land management, at least in comparison to the original program for contracts for "Indian services." First, contracting is mandatory for the BIA or IHS when requested by a tribe, while it is only discretionary for the land management agencies. Tribes have long sought to make contracting mandatory even outside the BIA and IHS. I recommend no change here, at this time, but I do believe that Interior should embrace contracting opportunities much more seriously.

Second, when a tribe enters a contract with either the BIA or the IHS, the ISDA requires the agency to provide the contracting tribe with funds equivalent to those that the Secretary "would have otherwise provided for his direct operation of the programs." The costs are known as "contract support costs" and they have been the subject of significant stress and litigation. The theory for them is this: in the normal operation of a federal program, an agency has other expenditures involved in running the program that may not implicate specific program funds. For example, the federal government may have costs associated with hiring personnel or with providing employee benefits that would ordinarily be borne by the federal government but may not be allocated directly from program funds. To account for such expenses, the ISDA entitles tribes to an additional percentage of program funds, which varies by tribe and location, to account for other costs that the federal government would have borne in providing the same services. These funds are akin to "indirect costs," or "facility and administrative costs" allocated in university research grants, for example.

After decades of litigation, the Supreme Court ultimately held in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), that the law requires the federal government to pay such costs even if Congress has not appropriated adequate funding. As a result, tribes can now count on this funding in Indian services contracts. However, these costs are significant, often reaching from ten to fifty percent or more of the principal amount of the contract. Because contracts with other DOI agencies or the USFS do not address contract support costs, contracts with other agencies are less lucrative and more burdensome on tribes than contracts with the BIA or IHS. Because contract support costs represent the ordinary and routine costs of operating program, every government must bear them. For a tribe contracting with a non-BIA or IHS federal agency, the tribe must meet those expenses in other ways. Because contracts with land management agencies are, in this way,

more costly to the tribe than Indian services contracts, contracts with these agencies are less attractive and more burdensome to tribes.

Congress should consider awarding contract support costs, at least in some limited fashion in this context, just as it does in the Indian services context. From the perspective of tribes, the federal government saves some administrative resources when a tribe takes over functions. It makes sense to offer some, at least modest, recognition of these savings. If this proposed reform is untenable, a more modest reform that might make a difference is authorizing and appropriating modest planning grants to allow interested tribal governments to explore options and make a sophisticated judgment about the costs of running a federal program.

Interior Should Encourage Federal Managers to Negotiate with Tribes by Rewarding Superintendents and Regional Directors Who Enter Negotiations for Contracts with Tribes and Recognizing Those Who Successfully Enter Contracts

Aside from financial barriers tribes may face in seeking contracts with federal land management agencies, tribes face additional obstacles related to agency culture, tribal expectations, and even the political dynamics at the agency and within interest groups and Congress. For a variety of reasons, federal officials may be unwilling to engage in serious discussions about such contracts. Because tribes have significant experience managing lands and resources, however, tribes have a lot to offer.

Federal opposition to contracting may be rooted in ignorance about tribal success in running federal Indian programs. As Cherokee philosopher Will Rogers once noted, "we are all ignorant, just about different things." A BLM state director, park superintendent, or FWS regional director may simply not understand the sophisticated programs being run by tribes in some of the same subject matter areas as the public land management agencies. Park superintendents are accustomed to giving tours of the iconic public lands they proudly manage. Perhaps these superintendents and other federal managers should also be *taking* tours of the tribal lands managed by neighboring tribes.

Starting with modest contracts may create an opportunity to build trust and develop a shared understanding of missions and goals. One example of low-hanging fruit is so called "interpretive services." Nearly every national park unit has employees who are charged with explaining the significance of the park unit. Tribal employees may have unique value in helping members of the public understand the cultural, historical, and scientific significance of particular lands.

New partnerships are not easy. From the federal side, a partnership involves compromise and the willingness to give up some level of control. Federal officials who have the vision to begin such conversations and successfully develop new ways of approaching the management of public lands should be rewarded.

Congress Should Align the Criteria for Tribal Contracts for USFS Land Management Agreements with the Criteria for Interior Agreements

For the programs in the Department of the Interior, Title 25, Section 5363(c) of the U.S. Code allows a tribe to contract for federal activities or programs that have a "*special geographic, historical or cultural significance*" to the tribe. Since virtually all public lands in the United States were once occupied by one or more tribal nations, the limitation in this language is not particularly significant. For almost every public land unit in the western United States and many in the East, it is likely that there is a tribe that qualifies. To the extent that this language is limiting, it should be understood to help the agency determine which tribe should be engaged as to which service unit.

In contrast, the authorization for tribal contracting with USFS is more limited. In 2004, Congress expanded contracting to the USFS, located within the Department of Agriculture, through the Tribal Forest Protection Act ("TFPA"). The 2004 amendment was passed largely in response to a bad fire season in which tribes were impacted by the failure of federal officials to prevent a forest fire from migrating from USFS land to a tribal forest. In 2018, Congress again expanded USFS contracting authority in the Agricultural Improvement Act (the 2018 Farm Bill), which granted USFS the authority to enter ISDA agreements with tribes to undertake TFPA-specific projects and work. In part because of this context, this law has more restrictive language than in the DOI authorization.

Under the TFPA, tribes are restricted to contracting only for projects on federal lands "bordering or adjacent to the Indian forest or rangeland." I would respectfully suggest that this language is unduly narrow and restricts tribal nations with significant connections to the land, including some tribal nations that are located near public lands, though not formally adjacent. It would make sense to expand the TFPA authorization to match the broader language in section 5363(c). Since contracting is not mandatory for USFS, and the agency retains discretion as to whether to enter such a contract, it is hard to see a downside to broadening the authorization.

Agencies Should Lengthen Contractual Terms to Develop Longer Partnerships

Some agencies have begun to execute two-year or more agreements, and this extension is a positive development. Two-year agreements make sense because they reflect the limit of federal budget authority (for many agencies, money appropriated in one year generally can be used that year and carried over to the following fiscal year). For mature relationships between tribes and agencies, agencies should be encouraged to enter long-term arrangements, such as five-year contracts, which have automatic adjustments if fiscal conditions change.

While longer contracts would assist with certainty and continuity, such a contract need not be a straitjacket. For example, if federal appropriations for the specific facility decrease, the tribe's contract could be cut by a proportional amount. Moreover, tribes generally have the authority under the law to retrocede a function or program back to the federal government, and likewise, an agency has the authority to reassume a program if the tribe is failing to meet its contractual obligations.

Conclusion

Each year, Native American tribal nations enter hundreds of federal contracts worth billions of dollars to run federal Indian programs. These "self-determination contracts" have been enormously

successful in improving the effective delivery of federal programs on Indian reservations, while also maintaining the government's goal of encouraging tribal participation in economic development. When tribes manage public land, they bring a longstanding and deep commitment to land stewardship. They also have strong human capital to bring to bear, including traditional ecological knowledge that has developed over centuries.

Tribal governments wish to use their resources and expertise more. At a time when all nations must work together to address the effects of climate change, federal co-management with tribal nations can bring to bear new tools, new expertise, and new players to bear on the federal conservation agenda. A modest and attainable way to begin the expansion of tribal co-management is by using the mechanisms already congressionally authorized. This can lead to a strong potential of developing more contracts and relationships, breathing new life into the tribal contracting programs on public lands.

Thank you for inviting my views.