



CURRENT LAND, WATER, AND WILDLIFE
AUTHORITIES THAT CAN SUPPORT TRIBAL
STEWARDSHIP AND CO-STEWARDSHIP

FINAL REPORT

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
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Cover Photo: *Bison herd grazing as a storm rolls in.* National Park Service / Jacob W. Frank.
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INTRODUCTION

On November 15, 2021, the Secretary of the Interior and the Secretary of Agriculture jointly issued Secretarial Order No. 3403, *Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters* (S.O. 3403 or Order). The Order in part directed the Bureaus and Offices (Bureaus) of the Department of the Interior (Department) to undertake a legal review of current land, water, and wildlife treaty responsibilities and authorities that can support co-stewardship and Tribal stewardship, to be finalized within one year.¹ This report (Final Report) is submitted to the Secretary of the Interior pursuant to Section 1(d) of S.O. 3403.

The Final Report was prepared by the Department's Office of the Solicitor (SOL) to fulfill S.O. 3403's directive. The Final Report is not intended to be a substitute for consultation with SOL, and it should not be relied upon to provide legal opinions or advice regarding the authorities or programs it references, which may be superseded, withdrawn, repealed, revised, or amended at any time. The Final Report is not intended to create any right or benefit, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, officers, or any other person.

The Final Report is organized into four parts. Part I summarizes the policies and directives of S.O. 3403. Part II reviews key terms to be applied in implementing S.O. 3403's policies and directives. Part III surveys authorities and considerations that may inform co-stewardship efforts by the Department's bureaus and offices (Bureaus), and provides an overview of treaty rights principles based on the understanding that an assessment of rights under a particular treaty can only be done in consultation with SOL on a case-by-case basis. Part IV surveys authorities that may inform Bureau efforts to support Tribal stewardship. Appendix I to the Final Report contains contact information for SOL offices in the Regions and in Headquarters. Appendix II lists directives, guidance, and policies that may be relevant to S.O. 3403's policies and directives. Appendix IV provides some examples of co-stewardship arrangements between Bureaus and Tribes.

¹ S.O. 3403, § 1(d).

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I. OVERVIEW OF S.O. 3403

The Department of the Agriculture and the Department of the Interior together manage over half a billion acres of federal lands and waters.² Previously owned and stewarded by Tribes from time immemorial, these lands and waters remain home to cultural and natural resources of great significance to Tribes and their citizens. These include sacred religious sites, burial sites, and wildlife, as well as sources of indigenous foods and medicines, many of which lie within areas in which Tribes hold reserved rights to hunt, fish, gather, and pray under treaties and agreements with the United States.

The Secretaries of Agriculture and of the Interior jointly issued S.O. 3403 to establish goals for their Departments for managing Federal lands and waters within their jurisdictions in ways that seek to protect the treaty, religious, subsistence, and cultural interests of federally recognized Tribes and the Native Hawaiian Community, that ensure such management is consistent with the United States' nation-to-nation relationship with federally recognized Tribes, and that fulfill the Federal trust responsibility to those Tribes and their citizens. To further these goals, S.O. 3403 directs that each Department's bureaus and agencies undertake the following steps to the extent consistent with applicable authority:

- Ensure all decisions relating to the stewardship of Federal lands, waters, and wildlife consider how to safeguard the interests of the Tribes such decisions may affect.
- Make collaborative agreements with Tribes for the co-stewardship of Federal lands and waters, including for wildlife and its habitat.
- Identify and support Tribal opportunities to consolidate Tribal homelands and empower Tribal stewardship of those resources.
- Report annually on actions taken to fulfill the purpose of this Order.

S.O. 3403 further describes the requirements that apply to stewardship activities and affirms certain principles for informing the Departments' implementation of S.O. 3403, described in the sections that follow.

A. Principles of Implementation

S.O. 3403 affirms certain principles that should inform the fulfillment of its requirements,³ which include the following:

- Tribes and Native Hawaiian Organizations can engage with the Departments directly to address matters of mutual interest in the management of Federal lands.

² See www.fs.usda.gov/about-agency/newsroom/by-the-numbers. See also U.S. Congressional Research Service, *U.S. Department of the Interior: An Overview* 1 (R45480; June 2021).

³ S.O. 3403, § 3.

- The Departments will collaborate with Tribes to ensure they have an integral place in decision-making relating to the management of Federal lands and waters, to include consideration of Tribal expertise and Indigenous knowledge, particularly with respect to managing resources subject to treaty and reserved rights and subsistence uses.
- The Departments will meaningfully consult Tribes at the earliest stages of planning and decision-making to ensure they have an opportunity to shape the direction of management, including by duly considering Tribal recommendations for Federal lands management.
- The Departments will incorporate Tribal forest, agricultural, and/or range management plans into their landscape-scale or watershed-scale restoration and conservation planning, to the maximum extent practicable.
- The Departments and Tribes will work together to develop appropriate institutional means to implement collaborative and cooperative stewardship arrangements.
- The Departments will include dispute resolution procedures appropriate to the subject in collaborative agreements entered into with Tribes.
- Non-Federally recognized Tribes will be presumptively included in S.O. 3403 where authorized by applicable authority.⁴

S.O. 3403 goes on to set forth three sets of requirements that apply to different forms of collaborative and cooperative stewardship activities, each of which is described below.

B. Federal Stewardship

S.O. 3403 directs that wherever a Departmental management decision for Federal lands and waters (or for wildlife and its habitat) may impact the treaty or religious rights of Tribes,⁵ the Department must incorporate the Principles of Implementation established by S.O. 3403 and summarized above.

C. Co-Stewardship

S.O. 3403 directs the Department's Bureaus to endeavor to engage in co-stewardship with Tribes whenever Federal lands and waters, including wildlife and its habitat, are located within or adjacent to a Federally recognized Tribe's reservation or, if non-adjacent, where Tribes have subsistence or other rights or interests in them. S.O. 3403 directs the Departments to identify affected Tribes

⁴ See, e.g., Advisory Council on Historic Preservation, *Guide to Working with Non-Federally Recognized Tribes in the Section 106 Process* at 3 (Feb. 2018) (federal agencies may invite non-recognized tribes to participate in National Historic Preservation Act review process as "additional consulting parties" based on a "demonstrated interest" in an undertaking's effects on historic properties (citing 36 C.F.R. §§ 800.2(c)(5) and 800.3(f)(3))).

⁵ S.O. 3403, § 4.

through use, at a minimum, of a number of information resources.⁶ S.O. 3403 also directs Bureaus to endeavor to engage in co-stewardship whenever asked to do so by a Federally recognized Tribe.⁷

To aid the goals of co-stewardship, S.O. 3403 directs that the Department's Bureaus to:

- Promote the use of collaborative agreements and/or provisions in land management plans consistent with the Department's obligations under existing law;
- Develop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives and goals of S.O. 3403, including success toward developing new collaborative stewardship agreements and enhancing existing ones;
- Coordinate and cooperate on co-stewardship efforts and initiatives with the Department of Agriculture and its bureaus and agencies;
- Use agreements as a tool to foster cooperation on protection of treaty, subsistence, and religious rights, consistent with consensual policy-making referenced in Executive Order 13175;⁸ and
- Evaluate and update each Department's manuals, handbooks, or other guidance documents for consistency with S.O. 3403.

Finally, where a collaborative or cooperative co-stewardship arrangement is not permitted by law, S.O. 3403 directs Bureaus to give consideration and deference to Tribal proposals, recommendations, and knowledge that affect management decisions on such lands whenever possible.

D. Tribal Stewardship

S.O. 3403 expressly recognizes 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. S.O. 3403 directs the Department, consistent with applicable authorities and in furtherance of S.O. 3403, to support consolidation of tribal landholdings within reservations, including Tribal acquisition of Federal lands and private inholdings; and to facilitate Tribal requests to have lands placed in trust, including for conservation, protection of sacred sites, cultural or religious use, or exercise of subsistence or treaty reserved rights. In addition to consolidation of

⁶ See Tribal Treaties Database (available at: <https://treaties.okstate.edu>); Bureau of Indian Affairs Tribal Land Locator Tool (available at <https://biamaps.doi.gov/indianlands>); U.S. Forest Service Tribal Connections Map Viewer (available at www.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32); Office of Native Hawaiian Relations Native Hawaiian Organization List (available at www.doi.gov/hawaiian/NHOL); and Office of Native Hawaiian Relations Native Hawaiian Homestead and Beneficiary List (available at www.doi.gov/hawaiian/homestead-beneficiary-associations-list).

⁷ S.O. 3403, § 5.

⁸ Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

lands within a Tribe's reservation, S.O. 3403 provides support for the trust acquisition of non-reservation lands consistent with the different forms of Tribal land tenure that exist in the United States. In the Lower 48 states, for example, some tribes lack trust or reservation lands and some reservations include large amounts of non-Tribal fee lands, a legacy of the policy of allotment. In the State of Alaska, the Alaska Native Claims Settlement Act of 1971 revoked all Alaska Native reservations (with one exception) but left the Secretary's authority to take land into trust for Alaska Natives in the State intact. The main authorities for the acquisition or exchange of lands into trust for Tribes remains the Indian Reorganization Act of 1934 and the Alaska IRA of 1936, the implementation of which under 25 CFR part 151 is the responsibility of the Bureau of Indian Affairs. However, other laws applicable to the transfer of lands under Federal ownership may merit consideration in fulfilling the goals of Section 6 of S.O. 3403.

II. TERMINOLOGY

A. Tribe

S.O. 3403's policies and directives apply to collaborative and cooperative arrangements with Federally recognized Tribes and the Native Hawaiian Community,⁹ which uses Native Hawaiian Organizations as its informal representatives,¹⁰ and, in limited instances, non-Federally recognized Tribes.¹¹ Based on this, the Department has prepared the following definitions¹² for use by Bureaus in implementing S.O. 3403's policies and procedures:

- Tribe or Tribes. Tribe or Tribes refer to any American Indian or Alaska Native tribe, band, nation, pueblo, rancharia, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994.¹³
- Native Hawaiian Community. Native Hawaiian Community refers to the distinct Native Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.¹⁴
- Native Hawaiian Organization. Native Hawaiian Organization refers to the informal representatives of the Native Hawaiian Community that can engage the Department and address matters of mutual interest with respect to the management of Federal lands and waters.¹⁵

B. Stewardship, Co-Stewardship, and Co-Management

The ordinary meaning of the term “stewardship” is “the conducting, supervising, or managing of something,” especially “the careful and responsible management of something entrusted to one's care.”¹⁶ Read within the context of S.O. 3403 as a whole, “stewardship” can be understood to include activities involved in or relating to the management of lands and waters by Bureaus and by Tribes. These activities could include, but are not limited to, landscape- or watershed-scale restoration and

⁹ S.O. 3403, § 1 (to ensure management of federal lands and waters in manner seeking to protect “the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes, including the Native Hawaiian Community”); *id.*, § 3(a) (Indian Tribes and Native Hawaiian organizations).

¹⁰ S.O. 3403, § 3(a).

¹¹ S.O. 3403, § 3(h).

¹² See 502 DM 1.5.E-G.

¹³ 25 U.S.C. §§ 5130, 5131.

¹⁴ 43 C.F.R. § 50.4.

¹⁵ The Department's Office of Native Hawaiian Relations maintains a list of Native Hawaiian Organizations (www.doi.gov/hawaiian/NHOL).

¹⁶ See www.merriam-webster.com/dictionary/stewardship.

conservation planning and other Federal land management planning efforts;¹⁷ resources management;¹⁸ and management decisions for Federal lands and waters.¹⁹ The Department has prepared the following definitions²⁰ for use by Bureaus in implementing S.O. 3403's policies and procedures:

- Stewardship. Stewardship refers to Departmental activities relating to management, conservation, and preservation of Federal lands and waters, including wildlife and its habitat. These include authorized development activities and the maintenance of existing infrastructure required to meet mission objectives; management of vegetation, fish, wildlife, and other resources; protection of cultural resources; and the provision of recreational and educational opportunities on Federal lands and waters.
- Co-Stewardship. Co-stewardship broadly refers to collaborative or cooperative arrangements between Bureaus and Tribes and Native Hawaiian Organizations related to shared interests in managing, conserving, and preserving Federal lands and waters. Collaborative and cooperative arrangements can take a wide variety of forms. These may include, for example, sharing technical expertise; combining the capabilities of Bureaus and Tribes and Native Hawaiian Organizations to improve resource management and advance the responsibilities and interests of each; making Tribal knowledge, experience, and perspectives integral to the public's experience of Federal lands; cooperative agreements; and annual funding agreements under the Tribal Self-Governance Act (25 U.S.C. § 5361 *et seq.*) where applicable.

While “stewardship” can be understood to include management-related activities, it is important to distinguish “co-stewardship” as used in S.O. 3043 from “co-management,” a distinct term defined by Secretarial Order No. 3342, which also addresses cooperative and collaborative partnerships between the Department and Tribes in the management of Federal lands and resources.²¹ The Department has prepared the following definition²² for use by Bureaus in implementing S.O. 3403's policies and procedures:

- Co-Management. Co-management narrowly refers to collaborative or cooperative stewardship arrangements that are undertaken pursuant to Federal authority that requires the delegation of some

¹⁷ S.O. 3403, § 3(d).

¹⁸ S.O. 3403, § 3(f).

¹⁹ S.O. 3403, § 4.

²⁰ See 502 DM 1.5.

²¹ Secretary of the Interior, Order No. 3342, *Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources* (Oct. 21, 2016) (S.O. 3342).

²² See 502 DM 1.5.C.

aspect of Federal decision-making or that make co-management otherwise legally necessary, such as management of the salmon harvest in the Pacific Northwest, where co-management has been established by law.

C. Indigenous Knowledge

S.O. 3403 directs Bureaus to consider Tribal expertise and/or Indigenous knowledge as part of Federal decision-making relating to Federal lands.²³ To that end, SOL prepared the following definitions²⁴ for use by Bureaus:

- Indigenous Knowledge. Indigenous Knowledge refers to a body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems that is applied to phenomena across biological, physical, cultural and spiritual systems. Like scientific knowledge, Indigenous Knowledge is an evolving body of evidence-based knowledge with insights acquired through direct and long-term experiences with the environment, as well as on extensive observations, lessons, and skills passed from generation to generation. Where appropriate, Indigenous Knowledge can and should inform Department decision-making along with scientific inquiry.

²³ S.O. 3403, §§ 1, 3(f), 5.

²⁴ 502 DM 1.5.D.

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III. CO-STEWARDSHIP

Many existing authorities support collaborative and cooperative co-stewardship arrangements between Bureaus and Federally recognized Tribes. Determining the authorities that could apply in a particular case requires consultation with SOL based on the facts and circumstances of each case. For this reason, Bureaus are encouraged to consult with SOL as early in the process as possible.

This section surveys authorities and considerations that may inform co-stewardship efforts by Bureaus. It begins with a brief survey of some issues that can arise when federal agencies collaborate or cooperate with outside entities. It then reviews some authorities that can apply to the Department in particular. It concludes with a survey of authorities relevant to particular Bureaus .

A. General Federal Authorities

Employees who undertake co-stewardship activities on behalf of Bureaus must keep in mind that their status as Federal employees carries with it a general responsibility to act in the national public interest in accomplishing the Department's mission. That status also implicates a number of specific requirements under Federal law. This section discusses those requirements in broad terms and is only intended as an introduction to make Bureaus aware of possible limitations on their co-stewardship activities and to alert their employees of potential areas of concern when considering proposals for collaborative and cooperative co-stewardship arrangements with Tribes.

1. Treaty Rights

Treaties are legally binding formal agreements between two or more sovereign nations. Along with the U.S. Constitution and federal laws, Indian treaties are the supreme law of the United States and remain valid and enforceable unless and until Congress clearly expresses its intent to abrogate them. By virtue of the Constitution's Supremacy Clause, Indian treaties are superior to conflicting state laws and regulations. This means that states cannot qualify the rights guaranteed to Indian tribes under their treaties.

Indian treaties also form the foundation of the unique Federal-Tribal relationship. As the U.S. Supreme Court has explained, “[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party . . . it has charged itself with moral obligations of the highest responsibility and trust.”²⁵ In keeping with that relationship, Federal agencies have a duty to consider impacts to treaty rights when making agency decisions.

²⁵ *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

Within the context of S.O. 3403, two considerations must be kept in mind when determining whether any treaty rights are implicated by a Federal action or decision.

First, it is important to remember that the rights arising under an Indian treaty may be expressly stated or impliedly reserved, and that implied rights are just as important as express ones. This distinction flows from the principle of reserved rights, which recognizes that treaties with Tribal Nations are grants *from* the Tribal Nations, not grants *to* them, and that Tribal Nations retain all rights not expressly granted.²⁶ The Supreme Court has recognized implied rights in the context of water rights, as well as in the hunting and fishing context. In *Winters v. United States*,²⁷ the landmark reserved water rights case, the U.S. Supreme Court held that a right to water was impliedly reserved in the agreement establishing the Fort Belknap Reservation, even though the agreement was completely silent as to water. The Court observed that the purpose of the Reservation was to encourage the tribes to give up their “nomadic” way of life and become farmers, and that the Reservation’s arid land would be “practically valueless” without irrigation.²⁸ In *Menominee Tribe v. United States*,²⁹ the Court found an implied right to fish and to hunt on reservation lands from treaty language describing title to the reservation as being “held as Indian lands are held.” In these and subsequent implied treaty rights cases, the courts have made clear that a right will be inferred when that right supports a purpose for which a Tribal Nation’s reservation was established.

The second consideration is whether the treaty at issue secures any rights *outside* a Tribal Nation’s reservation boundaries. Generally speaking, treaty rights are limited to on-reservation lands except where (1) the treaty explicitly guarantees off-reservation rights; or (2) the treaty impliedly reserved off-reservation rights necessary to accomplish the purpose of the tribe’s reservation. In contrast to the exclusive nature of on-reservation treaty rights, a tribe’s off-reservation treaty rights are generally non-exclusive and shared with non-Indian citizens. For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*,³⁰ the Supreme Court construed treaty language providing for the right to take fish “at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory,” as entitling treaty tribes to a presumptive fifty-percent share of all harvestable fish passing through certain state-controlled, off-reservation waters, with the remainder going to non-Indian citizens).

These are only two of many considerations that Bureaus must bear in mind when considering the possible impacts of their actions on treaty rights. Claims to treaty reserved rights are among the most complex and frequently litigated areas of federal Indian law, in large part because treaty interpretation necessarily differs according to the individual historical circumstances of each tribe and each treaty. The canons

²⁶ *United States v. Winans*, 198 U.S. 371, 381 (1905).

²⁷ 207 U.S. 564, 576-77 (1908).

²⁸ *Id.* at 576.

²⁹ 391 U.S. 404, 405-06 (1968).

³⁰ 443 U.S. 658, 678-79 (1979).

of construction that apply to Indian treaties require that each treaty be read within the specific historical context in which it was written and interpreted in light of the particular tribe's understanding at the time the treaty was made. These rules apply even when the treaty language under consideration is similar or identical to that used in another treaty. The Supreme Court has repeatedly instructed that similar language in different treaties involving different parties need not have the same effect. An individualized review of the surrounding historical circumstances is therefore central to every treaty's interpretation.

S.O. 3403 directs Bureaus to undertake a legal review of current land, water, and wildlife treaty responsibilities that can support co-stewardship and tribal stewardship. However, the existence and scope of rights arising under a particular treaty requires a fact-specific inquiry involving the signatory tribe or tribes, the rights asserted, and the history of the relevant treaty negotiations. This process will involve identifying any relevant treaty provisions and use of the Tribal Treaty Database established with the support of the Department of the Interior and the U.S. Department of Agriculture.³¹

For these reasons, Bureau staff must approach questions of treaty rights on a case-by-case basis in consultation with attorneys in SOL. Bureaus may also reach out to relevant Tribe(s) for their views on the treaty provision(s) at issue. Doing so may assist a Bureau in more readily obtaining access to relevant documentation, thereby establishing an administrative record of the Bureau's efforts at seeking and considering the Tribe's own views as to the nature and scope of its treaty rights.

2. Sub-Delegation Doctrine

When participating in collaborative or cooperative arrangements with Tribes, Bureau staff should bear in mind that their work for the Department implicates a number of specific requirements under Federal law. The purpose of this section is to introduce Bureau staff to some of these requirements so they may consider how they can affect the substance and scope of potential arrangements.

The United States Constitution provides that "all legislative powers...shall be vested in a Congress of the United States."³² Grounded in the principle of separation of powers, the non-delegation doctrine bars Congress from delegating to federal agencies powers that are strictly and exclusively legislative,³³ unless Congress also provides an intelligible principle to guide and limit the agency's use of such discretion.³⁴

³¹ <https://treaties.okstate.edu/>.

³² U.S. CONST. art. I, § 1.

³³ 73 C.J.S. *Pub Admin L & Proc* 97; *Touby v. United States*, 500 U.S. 160, 162 (1991); *Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019); Daniel Franz, *The Subdelegation Doctrine as a Legal Tool for Establishing Tribal Comanagement of Public Lands: Through The Lens of Bears Ears National Monument*, 32 COLO. NAT. RESOURCES, ENERGY & ENVTL L. REV. 1 (2021).

³⁴ *Touby v. United States*, 500 U.S. at 164-65.

As relevant here,³⁵ the doctrine of sub-delegation limits a federal agency's ability to sub-delegate the authority that Congress provides it to entities outside the agency.³⁶ Sub-delegations of agency authority to outside parties may blur the lines of governmental and political accountability, and could allow a sub-deegee to pursue goals inconsistent with an agency's own.³⁷ The sub-delegation doctrine is intended to avoid such results by barring an agency from sub-delegating its final decision-making authority to parties outside the agency absent affirmative evidence that Congress intended the agency to be able to do so.³⁸

Generally speaking, keeping "final reviewing authority" means more than just having an option to withdraw from a relationship with a non-Federal entity. Any arrangement with a non-Federal party must support the national interest and not inappropriately subordinate the role of the agency to parochial interests. It means keeping meaningful control over an outside partner's activities, for example, through oversight, veto, or otherwise.

Further, it should be noted that sub-delegations involving Tribes may be considered differently than those with private entities. The U.S. Supreme Court in *U.S. v. Mazurie* has held that the limits on sub-delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter"³⁹ and that federally recognized tribes in Indian country "are a good deal more than 'private, voluntary organizations'."⁴⁰ Based on *Mazurie*, courts have viewed sub-delegations giving a Tribe a measure of added control over its own tribal lands differently than those to an entity lacking any independent jurisdiction.⁴¹

It is important to note, however, that maintaining final reviewing authority does not prevent other forms of involvement by outside parties in an agency's decision-

³⁵ Though the doctrine includes sub-delegations to subordinate officers within an agency, sub-delegations within an agency presumptively permissible absent affirmative evidence of a Congressional intent. *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004). See also *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014); *La. Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671 (3d Cir.2014); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir.2011); *United States v. Mango*, 199 F.3d 85, 91–92 (2d Cir.1999); *House v. S. Stevedoring Co.*, 703 F.2d 87, 88 (4th Cir.1983); *United States v. Gordon*, 580 F.2d 827, 840 n. 6 (5th Cir.1978); *United States v. Vivian*, 224 F.2d 53, 55–56 (7th Cir.1955). See also Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 242 (2011) (the topic of sub-delegation no longer discussed in administrative law treatises and casebooks as it once was); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 n. 305 (2004).

³⁶ Franz, *supra* note 33, at 16.

³⁷ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 565-66.

³⁸ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 566; *National Park and Conservation Ass'n v. Stanton*, 54 F.Supp.2d 7, 18 (1999) (federal agency may not completely shift responsibility to private actor); *Bellion Spirits, LLC v. United States*, 393 F.Supp.3d 5, 15 (D.D.C. 2019).

³⁹ *U.S. v. Mazurie*, 419 U.S. 544, 556-67 (1975) (upholding delegation of authority to Tribes to regulate liquor in Indian country).

⁴⁰ *U.S. v. Mazurie*, 419 U.S. at 557.

⁴¹ *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v Bd. of Oil and Gas Conservation of State of Montana*, 792 F.2d 782, 795 (9th Cir. 1986).

making processes.⁴² For example, where Congress gives an agency broad discretion to permit certain activities, the agency may condition its grants on decisions of state, local or tribal government, provided there is a reasonable connection between the two.⁴³ An agency may also seek input from outside parties in fact-gathering and advice-giving as part of its decision-making process.⁴⁴ Outside parties may further provide policy recommendations and advice so long as the agency itself actually renders the final decision and does not merely “rubber stamp” another’s decision submitted under the guise of “advice.”⁴⁵ It is also permissible for an agency to sub-delegate nondiscretionary activities, such as compiling, hearing, and transmitting technical information, to outside parties.⁴⁶

In developing a collaborative or cooperative arrangement with Tribes or Tribal entities, Bureau staff must consult SOL to determine when the sub-delegation doctrine applies.

3. Inherently Governmental Functions

Bureaus must also take care to ensure that a collaborative or cooperative arrangement does not allow a non-Federal partner to perform an inherently governmental function of the agency. Grounded in past challenges to federal delegations of authority to private parties,⁴⁷ the prohibition against the transfer of inherently governmental functions took shape in the context of federal contracts for private goods and services.⁴⁸ Typically arising in procurement, its principles may be useful for assessing which agency functions or activities a Tribal partner may appropriately perform pursuant to a collaborative or cooperative arrangement.

In 2008, Congress directed the Office of Management and Budget (OMB) to review then-existing policy and legislation to develop a single, consistent definition of the

⁴² *National Park and Conservation Ass'n v. Stanton*, 54 F.Supp.2d 7, 19 (D.D.C. 1999) (citing *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir.1952), *cert. denied* 344 U.S. 855 (1952); *Bellion Spirits, LLC v. United States*, 393 F.Supp.3d 5, 15 (D.D.C. 2019); *see also Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1144 (D.C. Cir. 1984); *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 568.

⁴³ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 567 (citing *United States v. Matherson*, 367 F.Supp. 779, 782–83 (E.D.N.Y.1973), *aff'd* 493 F.2d 1339 (2d Cir.1974); *Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983) (upholding Department regulation conditioning certain rights-of-way grants on Tribal approval)).

⁴⁴ *Sierra Club v. Lynn*, 502 F.2d 43, 58–59 (5th Cir.1974), *cert. denied*, 421 U.S. 994; 422 U.S. 1049 (1975); *Bellion Spirits, LLC v. United States*, 393 F.Supp.3d 5, 15 (D.D.C. 2019); *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 568.

⁴⁵ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 568; *National Park and Conservation Ass'n v. Stanton*, 54 F.Supp.2d 7, 9–10 (D.D.C. 1999); *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v Bd. of Oil and Gas Conservation of State of Montana*, 792 F.2d 782 (9th Cir. 1986).

⁴⁶ *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation*, 792 F.2d at 795.

⁴⁷ *See* Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating A Principled Approach From Its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791, 799–800 (2017) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

⁴⁸ *See* U.S. Congressional Research Service, *The Federal Activities Inventory Reform Act and Circular A-76* (updated Apr. 6, 2007).

term “inherently governmental function.”⁴⁹ OMB did so in Policy Letter 11-01.⁵⁰ Relying on the Federal Activities Inventory Reform (FAIR) Act of 1998, OMB defined “inherently governmental function” as meaning a function “so intimately related to the public interest as to require performance by Federal Government employees.⁵¹ This includes activities requiring “either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.”⁵² Inherently governmental functions also involve the interpretation and execution of the laws of the United States so as to

- (1) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) significantly affect the life, liberty, or property of private persons;
- (4) commission, appoint, direct, or control officers or employees of the United States; or
- (5) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriations and other Federal funds.⁵³

Inherently governmental functions usually do not include gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials, or functions that are primarily ministerial and internal in nature.⁵⁴

OMB established two tests for identifying inherently governmental functions.⁵⁵ The first looks at whether the function involves the exercise of the United States’ sovereign powers without regard to discretion, for example, representing the United States in an inter-governmental forum or sentencing a person convicted of a

⁴⁹ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411 (2008) (codified at 31 U.S.C. § 501 note).

⁵⁰ Office of Management and Budget, Policy Ltr. 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56227, 56236 (Sep. 11, 2011) (OMB Policy Ltr. 11-01).

⁵¹ Pub. L. 105-270, § 5(2)(A), 112 Stat. 2382, 2384 (Oct. 19, 1998) (codified at 31 U.S.C. § 501 note). See also U.S. Congressional Research Service, *Definitions of “Inherently Governmental Function” in Federal Procurement Law and Guidance* (R42325, Dec. 23, 2014).

⁵² FAIR Act, § 5(2)(B); OMB Policy Letter 11-01, § 3(a).

⁵³ FAIR Act, § 5(2)(B); OMB Policy Letter 11-01, § 3(a).

⁵⁴ FAIR Act, § 5(C); OMB Policy Letter 11-01, § 3(b). This includes, for example, building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.

⁵⁵ OMB Policy Ltr. 11-01, § 5-1(a).

crime.⁵⁶ The second considers the exercise of discretion, and whether in a given case it commits the government to a course of action where two or more alternatives exist and decision-making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that identifies acceptable decisions or conduct or that subjects discretionary decisions to oversight and final approval by agency officials.⁵⁷

OMB further developed criteria to assist agencies identify “critical functions” that should also only be performed by Federal employees. Critical functions are those “necessary to the agency being able to effectively perform and maintain control of its mission and operations,” which are typically “recurring and long-term in duration.”⁵⁸ Determining if a function is “critical” or not depends on the mission and operations, which differ between agencies and within agencies over time.⁵⁹ Hence the determination requires the exercise of informed judgment by agency officials, who must consider the importance that the function holds for the agency and its mission and operations.⁶⁰ The more important the function, the more important that the agency have internal capability to maintain control of its mission and operations.⁶¹

Inherently governmental functions and critical function limit the activities a Bureau may contract with an outside partner to perform. For example, absent some other authority, an agreement to allow an external Bureau partner to grant or deny a permit or application would likely be an improper transfer of an inherently governmental function. Other examples of inherently governmental functions include determining the operating hours of a park or refuge or determining to whom a parcel of Federal land might be sold.

Nevertheless, Bureaus retain significant latitude to use agreements with outside partners to support their government operations without inappropriate transfers of agency authority. The inherently governmental function limitation would not, for example, prohibit an arrangement to develop an exhibit on geological sites within a BLM National Monument to be placed within the Monument’s visitor center. Nor should it prevent a partner from determining, consistent with USGS guidelines, the precise location of a USGS stream gauge station.

In developing a collaborative or cooperative arrangement with Tribes or Tribal entities, Bureau staff must consult with attorneys in SOL to avoid any inappropriate transfer of the Bureau’s inherently governmental functions or its critical functions.

One final note: It is important to distinguish “inherently governmental function” as defined in the FAIR Act and in OMB Policy Letter 11-01 from “inherent federal

⁵⁶ OMB Policy Ltr. 11-01, § 5-1(a)(1)(i).

⁵⁷ OMB Policy Ltr. 11-01, § 5-1(a)(1)(ii).

⁵⁸ OMB Policy Ltr. 11-01, § 3.

⁵⁹ OMB Policy Ltr. 11-01, § 5-1(b).

⁶⁰ *Id.*

⁶¹ *Id.*

function,” a distinct term used in the Tribal Self-Government Act and that applies only in the context of Tribal agreements entered pursuant to Title IV of the Indian Self-Determination and Education Assistance Act, which is separately discussed in Section III.B.1 below.

4. Antideficiency Act

Another important consideration for purposes of co-stewardship is the Antideficiency Act,⁶² which contains a series of controls over the use of appropriated funds and which generally requires that Federal agencies must “pay as they go.” Absent specific authority, government officials are prohibited from making payments or committing the United States to make payments at some future time, unless there is enough money currently available in their agency’s funds to cover the cost in full.

The Antideficiency Act applies to all Federal activities, including partnerships and other collaborative and cooperative arrangements. Bureaus should be mindful that any co-stewardship activities they undertake must stay within the bounds of fiscal year funding, and no co-stewardship arrangements should be entered that purports to bind the Department to pay funds in the future, in advance of any appropriations available in terms of time, purpose, and amount. One example would be a co-stewardship arrangement that provides for the Department to commit a certain sum in grant funds to an organization for each of the next five years, which would likely be improper under the Antideficiency Act unless there are sufficient funds specifically available for more than one year. Bureau staff must consult SOL to determine when the Anti-Deficiency Act applies.

5. Administrative Procedure Act

The Administrative Procedure Act (APA)⁶³ governs how Federal agencies make and enforce their rules and procedures. Collaborative and cooperative co-stewardship activities have the potential to raise two kinds of APA issues, one relating to rulemaking and adjudication, the other to possible challenges to actions a Bureau takes in aid of co-stewardship activities.⁶⁴

With respect to rulemaking, Bureaus should be aware how some co-stewardship activities might be seen as “rules” or “adjudications” within the meaning of the APA. The APA defines a “rule” as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁶⁵

⁶² Pub. L. 97–258, 96 Stat. 923 (codified at 31 U.S.C. §§ 1341-1342).

⁶³ Pub. L. 89–544, 80 Stat. 381 (1966) (codified as amended at 5 U.S.C. §§ 551-559).

⁶⁴ The APA may also provide the basis for challenges under the National Environmental Policy Act, the Endangered Species Act, and other statutes that the Department may implement.

⁶⁵ 5 U.S.C. § 551(4).

In the context of co-stewardship, a “rule” may be considered an agency action that regulates the future conduct of the public. For example, rules of use for certain areas within a National Park pursuant to a co-stewardship arrangement between a Tribe and a National Park System unit might be seen to create a “rule” for APA purposes. Similarly, a determination that a person should be denied access to those areas for having violated the rules under the same co-stewardship arrangement could be seen as an “adjudication” within the meaning of the APA. In each case, adherence to the procedural steps of the APA would be required. Bureaus must consult SOL to determine when the APA applies.

With respect to APA challenges to co-stewardship activities, several potential grounds for a claim exist. The most common is the claim that an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶⁶ Depending on the precise nature of the actions at issue, this standard could, in some instances, apply to collaborative or cooperative co-stewardship arrangements under S.O. 3403. When it does, it means that the decision to enter into a co-stewardship arrangement and the substantive activities of the arrangement itself could ultimately be reviewed by a Federal court. To survive such a challenge, the relevant Bureau or agency would have to show that its decisions relating to the co-stewardship arrangement were rational and reasonable and able to be articulated. In addition, APA challenges are usually decided on an administrative record, which is made up of the materials the Department relied on in taking its action. Bureau employees should therefore take care to ensure that their co-stewardship decisions and actions are based on, and supported by, a complete and thoroughly documented administrative record.

6. National Environmental Policy Act

The National Environmental Policy Act (NEPA)⁶⁷ is intended to ensure that information about the environmental impacts of federal actions is available to Federal decision makers and the public before their decisions are made. In some cases, NEPA requires the responsible federal official to prepare an Environmental Impact Statement (EIS) or other environmental document.⁶⁸

Though context-specific, it is possible that activities connected to a co-stewardship arrangement could constitute a “major federal action” requiring NEPA review. For instance, a co-stewardship arrangement allowing a Tribe or Tribal organization to conduct habitat improvement for a protected species could constitute a major federal action within the meaning of NEPA. It is therefore critical to assess whether a proposed co-stewardship activity might constitute a federal action covered by NEPA and, if so, the steps, if any, that are needed to comply with NEPA’s requirements. For this reason, it would be prudent, to the extent possible, for

⁶⁶ 5 U.S.C. § 706(2)(A).

⁶⁷ 42 U.S.C. §§ 4321 et seq.

⁶⁸ 516 DM 1.3. The responsible official is normally the lowest-level official with overall responsibility for formulating, reviewing, or proposing an action or, alternatively, has been delegated the authority or responsibility to develop, approve, or adopt a proposal or action. *Id.*

Bureaus to make their Tribal partners aware of NEPA’s applicability and the potential for NEPA litigation resulting from co-stewardship activities. Further information about NEPA and the Department’s NEPA policies and requirements are available from the Department’s Office of Environmental Policy & Compliance,⁶⁹ and from the Department’s NEPA webpage.⁷⁰ Bureau staff must consult SOL to determine when NEPA applies.

7. Records-Related Authorities

The following authorities may also apply to records and information prepared in connection with a proposed collaborative or cooperative co-stewardship arrangement.

a. Freedom of Information Act

The Freedom of Information Act (FOIA)⁷¹ provides outside parties potential access to any information that is created or obtained by the Department and that is under the Department’s control at the time of the request. Bureaus should keep in mind that documents generated during co-stewardship activities will generally be considered agency records subject to release under FOIA. This may be especially relevant when considering co-stewardship activities involving cultural or natural resources holding significant historical or sacred importance to Tribes.

However, the Department may withhold documents from release to the public if they fall within one of nine specified FOIA exemptions. Exemption 5 of FOIA (covering, among other things, internal documents that are both pre-decisional and deliberative) is the exemption that would most likely be relied on for withholding co-stewardship-related documents requested under FOIA, provided, however, that have not been shared with a Tribal partner. For this exemption to apply, the documents must be “inter-or intra-agency.” This means that in most circumstances, only documents generated within the Department (or that come from another Federal agency) will qualify under this exemption.

A related issue to bear in mind is “waiver” of a FOIA exemption that would otherwise allow a Bureau or office to withhold a particular document from disclosure under FOIA. In effect, a Bureau or office can waive its right to rely on a FOIA exemption where there has been an earlier disclosure of a document to an outside party, such as a non-Federal organization. Such a disclosure would ordinarily prevent the Department from asserting a FOIA exemption, should a request for the documents be made. As a result, Bureaus should carefully consider whether they may wish to withhold a particular document in the future, and avoid providing partners any such documents. Bureau staff must consult SOL to determine when FOIA applies.

⁶⁹ <https://www.doi.gov/oepec>.

⁷⁰ <https://www.doi.gov/nepa>.

⁷¹ 5 U.S.C. § 552.

b. Privacy Act

The Privacy Act⁷² imposes certain requirements on how Federal agencies handle information under their control that is identifiable to a specific individual and that is retrieved from files using a personal identifier. Department employees should carefully consider whether any information is being collected and/or used in a co-stewardship activity (for example, lists of volunteers from a particular organization) in such a way as to bring it within the Privacy Act. The Privacy Act limits the permissible uses of such information and restricts its release outside of the Department, such as to a non-Federal partner.

The Privacy Act requires maintenance of a system of records in accordance with a published Federal Register notice and generally allows the subject individuals to access and amend their records. It also requires a notice specifying when information the Department collects will be placed in a Privacy Act system of records. Bureau staff must consult SOL to determine when the Privacy Act applies.

c. Federal Records Act

The Federal Records Act (FRA) is a collection of statutes governing the creation, management and disposal of records by federal agencies with provisions that apply to Federal agencies.⁷³ The FRA requires Federal agencies to preserve as Federal records any recorded information, regardless of media, made or received by a Federal agency in accordance with law or in the conduct of business, that is valuable as evidence of the organization, functions, policies, decisions or other activities of the Federal government, or because of the value of information it contains. If a document is determined to be a Federal record, it must be maintained according to established records disposition schedules. Co-stewardship-related Federal records must also be managed in accordance with the Federal Records Act. Additionally, Bureaus should be aware that documents created by partners and obtained by the Department may also fall within the definition of a Federal Record. This could include, for example, a document prepared by a Tribe describing its activities under a cooperative relationship with a Bureau or office to conduct research into the Park's archaeological resources. Bureau staff must consult SOL to determine when the Federal Records Act applies.

d. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)⁷⁴ applies whenever a Federal agency conducts or sponsors a collection of information that involves identical questions posed to 10 or more individuals. The PRA requires the Office of Management and Budget to approve such collections of information. The PRA may apply, for example, to a partnership in which the partner develops and implements a customer satisfaction survey of visitors to a National Monument if the survey were

⁷² 5 U.S.C. § 552a.

⁷³ 44 U.S.C. § 3101 et seq.

⁷⁴ 44 U.S.C. § 3501 et seq.

determined to be a Department “sponsored” collection of information. Bureau staff must SOL to determine when the PRA applies.

B. Departmental Authorities

1. Indian Self-Determination and Education Assistance Act

a. Generally

The Indian Self-Determination and Education Assistance Act (ISDEAA) Act emphasizes tribal self-determination and self-governance “in planning, conduct, and administration” of certain federal programs.⁷⁵ Passed by Congress in 1975, Title I of ISDEAA authorized the Departments of the Interior and Health and Human Services to contract with Tribes to assume planning and administering certain federal services and programs with federal funding, referred to as 638 contracts or self-determination contracts.

In 1994, Congress amended ISDEAA to add a new Title IV, known as the Tribal Self-Governance Act.⁷⁶ The Tribal Self-Governance Act authorizes the Department to enter into self-governance compacts with Tribes that participate in the Department’s Tribal Self-Governance Program.⁷⁷ Approved compacts allow Tribes to assume funding of, and control over, some federal programs, , services, functions, or activities (PFSAs) that the Department otherwise would provide directly to Tribes. To be eligible for participation in the Self-Governance Program, a Tribe must, among other things, demonstrate financial stability and management capability. The Office of Self Governance (OSG) is responsible for administering self-governance compacts and funding agreements for Department programs.

ISDEAA authorizes the Department to contract or compact with Tribes, upon a Tribe’s request, and both establish programs that may be contracted or compacted under ISDEAA, such as BIA programs authorized under the Snyder Act, 42 Stat. 208, and BIA and non-BIA programs within the Department that benefit Indians.⁷⁸ If the contractibility of a program is unclear, the Department first looks at the authorizing language establishing the program, which may include an appropriations act. The appropriations language should indicate the origin of the funding and may also direct how that funding shall be used. Next, the Department would determine whether the Secretary is or intends to carry out the program being funded. If the Secretary intends to carry out the program, in the case of new funding, or already provides the program, then the program is contractible under ISDEAA. If the Secretary does not carry out the program, then it is likely that the program is not contractible.

Additionally, where the performance of a function is “so intimately related to the public interest as to mandate performance only by Federal Government

⁷⁵ Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 et seq.).

⁷⁶ Pub. L. 103-413, tit. IV, 108 Stat. 4272 (1994) (codified at 25 U.S.C. § 5361 et seq.).

⁷⁷ 25 U.S.C. § 5362; *see also* <https://www.bia.gov/as-ia/osg>.

⁷⁸ 25 U.S.C. § 5321(a) (Title I); *id.* at § 5362 (Title IV).

employees,” the function is “inherently Federal” and may not be assumed by a Tribe under ISDEAA.⁷⁹ Generally, these functions require the exercise of substantial discretion while applying government authority, use of value judgment when making decisions for the government, or both, such as: (1) binding the United States to take or not take some action by contract, policy, regulation, authorization, order, or otherwise; (2) determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (3) significantly affecting the life, liberty, or property of private persons; or (4) exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible, including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds).⁸⁰ Determinations of whether a function is “inherently Federal” are made on a case-by-case basis according to the PFSA the Tribe seeks to assume, the applicable federal law governing the activity, and the amount of authority to be retained by the Bureau.⁸¹ Where a Tribe disagrees with a Bureau’s determination, it may request reconsideration by the Secretary.

In 1996, Solicitor John Leshy issued a guidance memorandum⁸² for implementing the Tribal Self-Government Act. Solicitor Leshy’s memorandum (Leshy Memorandum) reviews guidance provided by OMB and discusses qualifications that apply in the context of working with Tribes. Because federal law makes clear that Tribes are not like private contractors, Bureaus must consider the relation of the function sought in a contract to a Tribe’s sovereign power. OMB’s guidance is simply that, for which reason it must yield if it conflicts with specific provisions of the Tribal Self-Governance Act. The Leshy Memorandum concludes that the act’s prohibition on contracting inherently federal functions can only be applied on a case-by-case basis, for which reason Bureaus considering entering a collaborative or cooperative arrangement with Tribes under the TGA should closely consult with attorneys in SOL.

Even if a program is eligible to be contracted, Tribes’ participation is voluntary, and Tribes have options in how they receive services. Under certain circumstances, the Secretary is authorized to decline to enter into a contract and is allowed to reject the terms of a compact or funding agreement. The Secretary is also authorized to reassume control of a contracted or compacted program under certain conditions.

⁷⁹ 25 U.S.C. § 5361(6) (defining “inherent federal function”); *id.* at § 5363(k) (no authorization to enter agreements for inherently federal functions). *See also* 31 U.S.C. § 501 note at § 5(2)(A) (“a function so intimately related to the public interest as to require performance by Federal Government employees.”). *See also* OMB Circular A-76 at § 6(e) (“a function which is so intimately related to the public interest as to mandate performance by Government employees.”).

⁸⁰ U.S. Dep’t of Interior, Office of the Solicitor, *Inherently Federal Functions under the Tribal Self-Governance Act*, Memorandum to Assistant Secretaries and Bureau Heads 11 (May 17, 1996) (Leshy Memo).

⁸¹ Leshy Memo at 14.

⁸² Leshy Memo.

A key difference between self-determination contracts and self-governance compacts is the amount of Tribal flexibility. Under Title I, the Department must approve any substantial changes to a contract. Title IV, however, provides Tribes limited authority to redesign or consolidate PFSAs and reallocate funding in certain circumstances. Thus, although PFSAs may be redesigned under contracts and compacts, Tribes with a contract must receive prior approval to do so.

b. Non-BIA Programs Eligible for ISDEAA

Another difference between self-determination contracts and self-governance compacts is that under Title IV, both BIA and non-BIA Bureaus have discretion to fund PFSAs that are not eligible for self-determination contracts under Title I. Specifically, self-governance compacts may include PFSAs administered by the Department other than through the BIA that are otherwise available to Indian tribes or Indians and “may ... also include other programs, services, functions, and activities, or portions thereof ... which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”⁸³ Each Bureau must identify potentially contractible programs by activity and unit (location) and publish the results in the Federal Register annually.⁸⁴ The Department interprets the latter section as granting the government discretion to fund programs “that may coincidentally benefit Indians but that are national in scope and [are] not by definition ‘programs for the benefit of Indians because of their status as Indians.’”⁸⁵

A wide variety of non-BIA programs are eligible for inclusion in self-governance funding agreements.⁸⁶ These include programs within Bureau of Land Management (BLM) (Minerals Management Inspection; Cadastral Survey; cultural heritage, Bureau of Reclamation (BOR), Office of Natural Resource Revenues (ONRR), National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), U.S. Geological Survey (USGS), Bureau of Trust Funds Administration (BTFA), and Appraisal and Valuation Services Office (AVSO). These are summarized in the following chart. Other programs subject to third-party agreements are addressed in the Bureau-specific sections of this review.

Under section 412(c) of Title IV of ISDEAA, the Secretary of the Interior (Secretary) is required to publish an annual list of non-BIA programs, services,

⁸³ 25 U.S.C. § 5363(b)(2), (c).

⁸⁴ 25 U.S.C. § 5365(c). *See, e.g.*, U.S. Dep’t of Interior, Office of the Secretary, *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 2021 Programmatic Targets*, 86 Fed. Reg. 14147 (Mar. 12, 2021). The Agriculture Improvement Act of 2018, Pub. L. 115-334, tit. VIII, § 8703, 132 Stat. 4877 (Dec. 20, 2018) (codified at 25 U.S.C. §§ 3115b), enables Tribes to enter into similar agreements with the Department of Agriculture involving the administration or management of certain national forest lands.

⁸⁵ *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 990 (9th Cir. 2005) (quoting 65 Fed. Reg. 78,688, 78,695 (Dec. 15, 2000)).

⁸⁶ *See, e.g.*, 86 Fed. Reg. 14147 (Mar. 12, 2021) (includes details on existing AFAs between non-BIA bureaus and Tribes).

functions, and activities, or portions thereof, that are eligible for inclusion in agreements negotiated under the self-governance program, as well as programmatic targets for non-BIA Bureaus.⁸⁷

Bureau	Program(s)
BLM	Minerals management services; cadastral surveys; cultural heritage activities; natural resources management; range management; riparian management; recreation management; wildlife and fisheries habitat management; wild horse management.
BOR	Components of water resource projects with proximity to self-governance tribes.
ONRR ⁸⁸	Audits of Tribal royalty payments; verification of royalty payments; royalty valuation; intergovernmental Personnel Act internship program.
NPS ⁸⁹	Archaeological surveys; comprehensive management planning; Cultural Resource management projects; ethnographic studies; erosion control; fire protection; gathering baseline; subsistence data—Alaska; hazardous fuel reduction; housing construction and rehabilitation; interpretation; janitorial services; maintenance; natural resource management projects; operation of campgrounds; range assessment—Alaska; reindeer grazing—Alaska; road repair; solid waste collection and disposal; trail rehabilitation; watershed restoration and maintenance; Beringia research; Elwha River restoration; recycling programs.
FWS ⁹⁰	Subsistence programs in Alaska; restoration and conservation technical assistance; endangered species programs; education programs; environmental contaminants program; wetland and habitat conservation restoration; fish hatchery operations; National Wildlife Refuge operations and maintenance.
USGS	Data acquisition and analysis activities.
BTFa	Beneficiary processes program (Individual Indian Money Accounting technical functions).
AVSO	Real property appraisal and valuation services.

The Solicitor has designated SOL-Division of Indian Affairs as Lead Office for ISDEAA. Pursuant to the Solicitor’s Manual, this means that DIA is responsible for coordinating issues relating to ISDEAA with all SOL Divisions and Regions, as appropriate. This includes notifying Divisions and Regions of issues and developments concerning ISDEAA; identifying issues and developments of concern within Divisions and Regions and attempting to reconcile them; and briefing the Solicitor and appropriate Deputy Solicitors on relevant issues and conflicts.⁹¹

2. Secretarial Order No. 3342

⁸⁷ See, e.g., 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).

⁸⁸ While ONRR can include these programs in a self-determination contract or self-governance compact, they are more often the subject of a cooperative agreement under Section 202 of the Federal Oil and Gas Royalty Management Act, discussed further below.

⁸⁹ NPS also lists 68 Park Service Units with close proximity to Self-Governance Tribes. 86 Fed. Reg. 14149-14150.

⁹⁰ FWS also lists 33 refuges and hatcheries with close proximity to Self-Governance Tribes. 86 Fed. Reg. 14151.

⁹¹ U.S. Dep’t of Interior, III SOL. MANUAL 8.1 (rev. Dec. 16, 2021).

The policies and directives of S.O. 3342, *Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources* (Oct. 21, 2016) have direct relevance for co-stewardship.

Like S.O. 3403, S.O. 3342 proceeds from the recognition of Tribes' special geographical, historical, and cultural connections to Federal lands and waters and their traditional ecological knowledge and practices regarding resource management.⁹² S.O. 3342 encourages "cooperative management agreements" and "collaborative partnerships" between Department resource managers and Tribes that further shared interests in the management of Federal lands and resources.⁹³

S.O. 3342 is intended to establish a process (and provide institutional support) to ensure the Department's land managers evaluate and develop opportunities to further establish partnerships that benefit Tribes and Federal agencies.⁹⁴ Section 1 of S.O. 3342 articulates the principles and legal foundation for interactions between the Department's land management Bureaus and Tribes as they relate to shared interests in managing, conserving, and preserving natural and cultural resources under their responsibility.

S.O. 3342 anticipates that cooperative and collaborative arrangements with Tribes will vary depending on circumstances and may include actions that range from improving the sharing of technical expertise; making Tribal knowledge, experience, and perspectives an integral part of the public's experience with federal lands; combining Tribal and Bureau-specific capacities to improve resource management while advancing the responsibilities and interests of both; to annual funding agreements under the Tribal Self-Governance Act.⁹⁵

Section 5 of S.O. 3342, which sets forth the Department's approach to cooperative and collaborative partnerships with Tribes, directs Bureaus to:

- ❖ Identify opportunities for cooperative management arrangements and collaborative partnerships with Tribes; and
- ❖ Undertake appropriate efforts to prepare their respective staffs to partner with Tribes in the management of natural and cultural resources over which the Bureaus have jurisdiction.⁹⁶

Such efforts shall include but are not limited to:

⁹² S.O. 3342. *See also id.*, § 5(b) (observing that Tribes offer significant knowledge and experience in the management of natural resources, including traditional ecological knowledge and practices, which can enhance the management of federal resources by Bureaus and better protect Tribal rights and interests).

⁹³ S.O. 3342, § 5.

⁹⁴ S.O. 3342, § 1.

⁹⁵ S.O. 3342, § 2(c)(2). Section 6 of S.O. 3342 provides examples of cooperative and collaborative arrangements then in existence between Tribes and Bureaus.

⁹⁶ S.O. 3342, § 5.

- ❖ Identifying key personnel to explore opportunities for cooperative management arrangements and collaborative partnerships;
- ❖ Developing Bureau-specific guidance for cooperative and collaborative partnerships with Tribes; and
- ❖ Engaging in Tribal consultations at Regional and unit-specific levels, when requested to do so, to better understand Tribal interests in specific cooperative and collaborative opportunities.⁹⁷

To assist Bureaus in identifying appropriate subjects of a cooperative agreement or collaborative partnership arrangement, S.O. 3342 includes a non-exclusive list of activities to which it will apply:

- ❖ the delivery of programs & services;
- ❖ the identification, protection, preservation, and management of culturally significant sites, landscapes, and resources;
- ❖ the management of fish and wildlife resources and plant resources, including collection of plant material;
- ❖ the management and implementation of maintenance activities; and
- ❖ the management of information related to tribal, cultural, and/or educational materials related to Bureau units.

3. Departmental Manual Part 502

The Department of the Interior's Departmental Manual (DM) is the authorized means of documenting and issuing instructions, policies, and procedures having general and continuing applicability to Departmental activities.⁹⁸ Bureaus must comply with the DM's provisions unless superseded by appropriate authority.⁹⁹

Consistent with the DM's requirements,¹⁰⁰ the Department has converted the policies and directives of S.O. 3403 into new DM Part 502, entitled Collaborative and Cooperative Stewardship with Tribes and the Native Hawaiian Community (Part 502). Part 502 also incorporates the policies and directives of S.O. 3342, *Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources* (Oct. 21, 2016), whose policies and directives on ways Bureaus can identify opportunities for cooperative and collaborative partnerships with Tribes in managing federal lands and resources overlap with S.O. 3403.

Chapter 1 of Part 502, Policies and Procedures, sets forth the policy and responsibilities for collaborative and cooperative stewardship of Federal lands and waters with Tribes and the Native Hawaiian Community. It includes definitions of

⁹⁷ S.O. 3342, § 5.

⁹⁸ 011 DM 1.1.

⁹⁹ 011 DM 1.2.B (*e.g.*, statute, regulation, Executive order, Secretarial order, or court decision).

¹⁰⁰ 012 DM 1.1 (requiring Secretarial orders to be converted to appropriate parts of the DM).

key terms such as “Stewardship,” “Co-Stewardship,” “Indigenous Knowledge,” “Tribe,” and “Native Hawaiian Community.”¹⁰¹

Chapter 2 of Part 502 sets forth the charters and responsibilities of two bodies with responsibilities for ensuring the consistent implementation of 502 DM 1. The first is an inter-Bureau Departmental committee (Co-Stewardship Committee or Committee) comprised of senior career representatives from BLM, the Bureau of Ocean Energy Management (BOEM), BOR, NPS, and FWS.¹⁰² The Committee is intended, among other things, to provide an inter-Bureau forum for discussing and resolving issues related to the planning and implementation of co-stewardship arrangements.

Chapter 2 of Part 502 separately establishes a Working Group on Collaborative Stewardship within the Department’s Office of the Solicitor (SOL Working Group), whose Chairperson is an *ex officio* member of the Co-Stewardship Committee).¹⁰³ Comprised of Associate Solicitors, Regional Solicitors, and Field Solicitors, the purpose of the SOL Working Group is to provide legal advice to the Co-Stewardship Committee when requested, and to provide an SOL-wide forum for identifying and discussing conflicting views that may arise with respect to authorities that may apply to co-stewardship activities and for elevating questions and issues to the Solicitor or Principal Deputy Solicitor as needed.

C. Bureau-Specific Authorities

1. Bureau of Land Management

The Bureau of Land Management (BLM) manages the Nation’s public lands pursuant to its organic act, the Federal Land Policy and Management Act of 1976 (FLPMA)¹⁰⁴ and other statutes. Unless otherwise provided by law, FLPMA directs the Secretary, through the BLM, to manage the public lands “on the basis of multiple use and sustained yield,” which requires management of the public lands and resources for a variety of uses, including but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural, scenic, scientific and historical values to achieve and maintain in perpetuity output of various renewable resources of the public lands.¹⁰⁵ The BLM manages some of the West’s most spectacular landscapes, many of which are found in the BLM’s 32 million-acre National Conservation Lands System. The BLM also manages federally owned minerals underlying surface lands managed by other agencies. In sustaining the

¹⁰¹ 502 DM 1.5.

¹⁰² The Committee also includes *ex officio* representatives from the Office of Policy Analysis, the Bureau of Indian Affairs, and the Office of Native Hawaiian Relations.

¹⁰³ S.O. 3342 directs the Office of the Solicitor to develop a working group to advise Bureaus on legal questions associated with exploring opportunities for and entering into cooperative agreements and collaborative partnerships with Tribes. S.O. 3342, § 5.

¹⁰⁴ 43 U.S.C. § 1701 et seq.

¹⁰⁵ See 43 U.S.C. § 1732(a) (directing management of the public lands under the principles of multiple use and sustained yield except where otherwise provided by law), 1703(c), (h) (defining multiple use and sustained yield).

health, diversity, and productivity of America’s public lands for the use and enjoyment of present and future generations, BLM administers more public land - more than 45 million surface and 700 million sub-surface acres - than any other Federal agency. BLM also has specific and unique responsibilities associated with the Federal Subsistence Management Program in Alaska pursuant to Title VIII of the Alaska National Interest Lands Conservation Act.¹⁰⁶ BLM staff must consult with SOL to determine when the authorities discussed below apply.

a. FLPMA § 307

FLPMA Section 307(a)¹⁰⁷ authorizes BLM to “conduct investigations, studies, and experiments, on [its] own initiative or in cooperation with others, involving the management, protection, development, acquisition, and conveying of the public lands.”

FLPMA Section 307(b) authorizes BLM to “enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands.”¹⁰⁸ The U.S. Court of Appeals for the Tenth Circuit has held that section 307(b) is an independent authority for allowing non-federal entities to carry out management activities on BLM-managed public lands, upholding BLM’s use of a memorandum of understanding under section 307(b) to allow the State of Wyoming to operate elk feed grounds on BLM lands and rejecting the contention that BLM was required to issue a separate lease or right-of-way.¹⁰⁹ BLM has also relied on section 307(b) of FLPMA to enter into an assistance agreement with the Pueblo de Cochiti for collaborative management of Kasha-Katuwe Tent Rocks National Monument in New Mexico.¹¹⁰ This assistance agreement carries out the direction in the monument’s establishing proclamation to “manage the monument . . . in close cooperation with the Pueblo de Cochiti.”¹¹¹ Although it does not appear that either the proclamation or the assistance agreement requires the Pueblo’s concurrence in land use planning decisions, the Pueblo’s Governor was included as

¹⁰⁶ 16 U.S.C. § 3101 et seq.

¹⁰⁷ 43 U.S.C. § 1737(a).

¹⁰⁸ 43 U.S.C. § 1737(b).

¹⁰⁹ See *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1125-1128 (10th Cir. 2009); see also *Cal. Wilderness Coal., et al.*, 176 IBLA 93, 95 n.2 (2008) (“BLM’s authority to enter into cooperative agreements with state and Federal agencies, such as the proposal by [the California Department of Fish and Game] at issue here, for use and development of the public lands for purposes similar or closely related to those of the Department, is granted by [FLPMA] sections 302(b) and 307(b)”).

¹¹⁰ Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOUR. J. 586, 613-14 (2008); BLM Rio Puerco Field Office, Record of Decision for the Kasha-Katuwe Tent Rocks National Monument Resource Management Plan (approved May 25, 2007) (Kasha-Katuwe ROD) (available at https://eplanning.blm.gov/public_projects/lup/73145/134985/165139/Rio_Puerco_Field_Office-Kasha_Katuwe_Tent_Rocks_RMP_ROD_CB.pdf).

¹¹¹ Proclamation No. 7394, Establishment of the Kasha-Katuwe Tent Rocks National Monument, 66 Fed. Reg. 7343, 7344 (Jan. 22, 2001).

a concurring signatory in the record of decision for the monument’s most recent land use plan.¹¹²

b. FLPMA § 202(c)(9)

Many broadly applicable authorities already require BLM to consult or coordinate with Tribes or to consider Tribal policies.¹¹³ An additional authority uniquely applicable to BLM is found in section 202(c)(9) of FLPMA, which requires BLM, “to the extent consistent with the laws governing the administration of the public lands, [to] coordinate [its] land use inventory, planning, and management activities . . . with the land use planning and management programs . . . of or for Indian tribes by, among other things, considering the policies of approved . . . tribal land resource management programs”; to “keep apprised of . . . tribal land use plans”; and to “assure that consideration is given to those . . . tribal plans that are germane in the development of land use plans for public lands.”¹¹⁴ Although these consultation authorities do not by themselves provide concrete mechanisms for BLM to enter into co-stewardship or Tribal stewardship arrangements, these authorities can play an important role in developing such arrangements

c. ANILCA § 809

Section 809 of the Alaska National Interest Lands Conservation Act (ANILCA)¹¹⁵ authorizes the Secretary to “enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, [Alaska] Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of Title VIII of” ANILCA.¹¹⁶ Title VIII of ANILCA, in turn, addresses the management of subsistence use of federal lands in Alaska by rural residents, both Native and non-Native.¹¹⁷

The Department, on behalf of BLM, the National Park Service, and the U.S. Fish and Wildlife Service, relied on Section 809 of ANILCA to enter into a memorandum of agreement (MOA) with the Ahtna Inter-Tribal Resource Commission, a body representing eight Tribes and two Alaska Native Corporations

¹¹² See Kasha-Katuwe ROD at ROD-11.

¹¹³ See, e.g., 54 U.S.C. § 302706(b) (National Historic Preservation Act of 1966); 16 U.S.C. § 470ii(a) (Archaeological Resource Protection Act of 1979). See generally Exec. Order No. 13175 § 5(d), 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2021) (“On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, *including negotiated rulemaking*.” (emphasis added)); 512 DM 4 (Policy on Consultation with Indian Tribes and Alaska Native Corporations); 512 DM 5 (Procedures for Consultation with Indian Tribes).

¹¹⁴ 43 U.S.C. § 1712(c)(9).

¹¹⁵ Pub. L. 96-487, 94 Stat. 2371 (Dec. 2, 1980) (codified as amended at 16 U.S.C. § 3101 et seq.).

¹¹⁶ 16 U.S.C. § 3119.

¹¹⁷ See, e.g., 16 U.S.C. § 3111(1) (declaring the congressional finding that “the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the [federal] lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence”).

(ANCs) based in the Ahtna region of Alaska.¹¹⁸ In November 2020, on the basis of this MOA, the Federal Subsistence Board announced that it would “establish a community harvest system for the Ahtna traditional communities of Cantwell, Chistochina, Chitina, Copper Center, Gakona, Gulkana, Mentasta Lake, and Tazlina for moose and caribou.”¹¹⁹

d. Tribal Forest Protection Act

The Tribal Forest Protection Act (TFPA)¹²⁰ authorizes BLM to enter into agreements with Tribes “to carry out . . . project[s] to protect Indian forest land or rangeland (including . . . project[s] to restore Federal land that borders on or is adjacent to Indian forest land or rangeland).”¹²¹ The statute defines “Indian forest land or rangeland” as “land that . . . is held in trust by, or with a restriction against alienation by, the United States for an Indian tribe or a member of an Indian tribe,” and is “forest land . . . ; or . . . has a cover of grasses, brush, or any similar vegetation; or . . . formerly had a forest cover or vegetative cover that is capable of restoration.”¹²² Covered projects must meet certain criteria, including that the BLM-managed lands involved must “border[] on or [be] adjacent to” the Tribe’s trust lands; “pose[] a fire, disease, or other threat to” those trust lands or be “in need of land restoration activities”; and “present[] or involve[] a feature or circumstance unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances).”¹²³ If BLM denies a Tribe’s request to enter into an agreement, the TFPA requires the agency to provide the Tribe an explanation for its decision, and to propose consultation with the Tribe.¹²⁴

Projects proposed by a Tribe under the TFPA may be carried out through a Tribal Self-Governance Act (TSG) funding agreement.¹²⁵ Like the TSG, the TFPA may extend to ANCs as well as federally recognized Tribes¹²⁶ – although the reference to trust or restricted lands may mean that ANCs are, in many cases, practically excluded from participation under the statute.

e. Good Neighbor Authority

The Good Neighbor Authority (GNA) allows BLM and the U.S. Forest Service to authorize federally recognized Indian tribes to conduct certain projects on Federal

¹¹⁸ Memorandum of Agreement Between United States Department of the Interior and Ahtna Inter-Tribal Resource Commission for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region at 2-3 (2016) (available at https://www.doi.gov/sites/doi.gov/files/uploads/ahtna_doi_moa_with_signature_pages_final.pdf).

¹¹⁹ See Subsistence Management Regulations for Public Lands in Alaska – 2020-21 and 2021-22 Subsistence Taking of Wildlife Regulations, 85 Fed. Reg. 74,796, 74,798 (Nov. 23, 2020).

¹²⁰ Pub. L. 108-278, 118 Stat. 868 (codified at 25 U.S.C. § 3101 et seq.).

¹²¹ 25 U.S.C. § 3115a(b)(1).

¹²² 25 U.S.C. § 3115a(a)(2).

¹²³ 25 U.S.C. § 3115a(c).

¹²⁴ 25 U.S.C. § 3115a(d).

¹²⁵ See 25 U.S.C. § 3115b.

¹²⁶ See 25 U.S.C. § 3115a(a)(3) (citing 25 U.S.C. § 5304).

lands in pursuit of specific land management goals.¹²⁷ The GNA allows the agency to enter into cooperative agreements or contracts with states, counties, ANCs, or Tribes to carry out “similar and complementary forest, rangeland, and watershed restoration services . . . on Federal land, non-Federal land, and land owned by an Indian tribe.”¹²⁸ Activities that can be included in a Good Neighbor agreement include “activities to treat insect- and disease-infected trees” or “reduce hazardous fuels,” or “any other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat,” but generally exclude construction or repair of roads, parking areas, or public buildings or works.¹²⁹ Covered activities can be funded in part by proceeds from the sale of timber removed as part of the agreement.¹³⁰

f. Stewardship Contracting Authority

BLM’s Stewardship Contracting authority allows BLM to enter into stewardship contracting projects “via agreement or contract as appropriate” with public or private entities to perform services to achieve land management goals for “the public lands that meet local and rural community need.”¹³¹

Land management goals that can be pursued under BLM’s Stewardship Contracting authority include “[r]oad and trail maintenance or obliteration to restore or maintain water quality,” improving “[s]oil productivity, habitat for wildlife and fisheries, or other resource values,” “[s]etting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat,” “[r]emoving vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives,” “[w]atershed restoration and maintenance,” “[r]estoration and maintenance of wildlife and fish,” and “[c]ontrol of noxious and exotic weeds and reestablishing native plant species.”¹³²

g. FLPMA § 501(a)

Subsection 501(a) of FLPMA allows BLM to issue rights-of-way for a variety of purposes, and could potentially be used to authorize Tribes to carry out Tribal activities on public lands.¹³³ While most of the enumerated purposes involve the transportation or transmission of people, goods, energy, or communications across the public lands, Subsection 501(a) includes a catch-all provision, which applies to “such other necessary . . . systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through [public] lands.”¹³⁴ Under some circumstances, Tribal activities on public lands could qualify as, or require

¹²⁷ 16 U.S.C. § 2113a.

¹²⁸ See 16 U.S.C. § 2113a(a)(1), (a)(5), (a)(6), (a)(7), (b)(1)(A).

¹²⁹ 16 U.S.C. § 2113a(a)(4).

¹³⁰ 16 U.S.C. § 2113a(b)(2)(C).

¹³¹ 16 U.S.C. § 6591c(b).

¹³² 16 U.S.C. § 6591c(c).

¹³³ 43 U.S.C. § 1761(a).

¹³⁴ 43 U.S.C. § 1761(a)(7).

the development of, a “system[] or facilit[y]”; in such a case, a ROW under Subsection 501(a) could be a vehicle for facilitating these activities.

h. FLPMA § 302(b)

Subsection 302(b) of FLPMA allows BLM to “regulate, through easements, permits, leases, [or] licenses, . . . the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns.”¹³⁵ BLM’s regulations interpret this provision as complementing FLPMA Subsection 501(a) by providing that a lease, permit, or easement may be issued under Subsection 302(b) for “[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law,” including “residential, agricultural, industrial, and commercial [uses], and uses that cannot be authorized under” Subsection 501(a).¹³⁶ Specifically, leases shall be used “to authorize uses of public lands involving substantial construction, development, or land improvement and the investment of large amounts of capital which are to be amortized over time”; “[p]ermits shall be used to authorize uses of public lands for not to exceed 3 years that involve either little or no land improvement, construction, or investment, or investment which can be amortized within the term of the permit”; and “[e]asements may be used to assure that uses of public lands are compatible with non-Federal uses occurring on adjacent or nearby land.”¹³⁷ Like rights-of-way under Subsection 501(a), leases, permits, and easements under Subsection 302(b) could in some circumstances be used to facilitate Tribal activities on public lands.

i. Recreation and Public Purposes Act

The Recreation and Public Purposes Act (RPPA)¹³⁸ authorizes BLM to sell or lease public land “to a State, Territory, county, municipality, or other State, Territorial, or Federal instrumentality or political subdivision for any public purposes, or to a nonprofit corporation or nonprofit association for any recreational or any public purpose consistent with its articles of incorporation or other creating authority.”¹³⁹ Like a right-of-way, lease, permit, or easement under FLPMA, a lease under RPPA could potentially be used to allow Tribal activities to occur on public lands. Such an application of RPPA must assess whether a proposed use qualifies as a “public purpose” under the RPPA. Moreover, because the RPPA does not include Tribes in its list of potential beneficiaries, BLM staff must consult with SOL to determine when to obtain an RPPA lease.

j. NATIVE Act

¹³⁵ 43 U.S.C. § 1732(b).

¹³⁶ 43 C.F.R. § 2920.1-1.

¹³⁷ 43 C.F.R. § 2920.1-1.

¹³⁸ Pub. L. 83-387, 68 Stat. 173 (Jun. 4, 1954) (codified at 43 U.S.C. § 869 et seq.).

¹³⁹ 43 U.S.C. § 869(a).

The Native American Tourism and Improving Visitor Experience (NATIVE) Act¹⁴⁰ is intended, among other things, to “increase coordination and collaboration between Federal tourism assets to support Native American tourism” and to “enhance and improve self-determination and self-governance capabilities in the Native American community.”¹⁴¹ Although the NATIVE Act focuses on tourism planning rather than on land management, several provisions could authorize BLM to undertake on-the-ground projects that would reflect Tribal priorities, and that could be carried out by Tribes under the delegation authorities discussed above.¹⁴² The NATIVE Act generally requires Federal agencies to “support the efforts of Indian tribes . . . to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community,”¹⁴³ which could be read to support actions by land managers to accommodate and support cultural practices on federal lands. BLM staff must consult SOL on a case-by-case basis to determine when the NATIVE Act may authorize activities on public lands.

2. Bureau of Indian Affairs

The following provides a summary of authorities available to the Bureau of Indian Affairs (BIA) that could support co-stewardship arrangements. BIA staff must consult SOL to determine when the authorities discussed below apply.

a. 25 U.S.C. § 48

This statute authorizes the Secretary to give a Tribe supervisory authority over persons engaged by the Secretary for the Tribe’s benefit.

b. Act of Sept. 1, 1937, ch. 897, § 9, 50 Stat. 900, 901

Formerly codified at 25 U.S.C. § 500h, this statute provides the Secretary discretionary authority to grant to any corporation, association, or other organization of Alaska Natives subject to such terms as she may impose, any or all of the Secretary’s powers relating to the administration of the reindeer industry or

¹⁴⁰ Pub. L. 114-221, 130 Stat. 847 (2016) (codified at 25 U.S.C. § 4351 et seq.)

¹⁴¹ 25 U.S.C. § 4351.

¹⁴² See 25 U.S.C. §§ 4353(c)(1)(G)-(I), 4354(a). These provisions direct federal agencies to “develop innovative visitor portals for parks, landmarks, heritage and cultural sites, and assets that showcase and respect the diversity of the indigenous peoples of the United States”; “share local Native American heritage through the development of bilingual interpretive and directional signage that could include or incorporate English and the local Native American language or languages”; “improve access to transportation programs related to Native American community capacity building for tourism and trade”; “take actions that help empower Indian tribes . . . to showcase the heritage, foods, traditions, history, and continuing vitality of Native American communities”; “support the efforts of Indian tribes . . . to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community” and “provide visitor experiences that are authentic and respectful”; and “provide assistance to interpret the connections between the indigenous peoples of the United States and the national identity of the United States.”

¹⁴³ See 25 U.S.C. § 4354(a)(2).

business upon a finding that such grant is in the interests of Alaska Natives and serves the purpose of the act.

c. American Indian Agricultural Resource Management Act

The American Indian Agricultural Resource Management Act (AIARMA)¹⁴⁴ contains provisions that allow the Federal government and Tribal governments to exercise concurrent jurisdiction over trespass to agricultural lands,¹⁴⁵ and authorize cooperative agreements between the Department of the Interior and Indian tribes for certain purposes, including cooperative manpower and job training, the development and publication of cooperative education and resource planning materials, the improvement of land and facilities, and natural resource management and development.¹⁴⁶ AIARMA also provides for Secretarial compliance with Tribal laws pertaining to Indian agricultural lands (including laws regulating the environment or historic or cultural preservation).¹⁴⁷

d. National Indian Forest Resources Management Act

The National Indian Forest Resources Management Act (NIFRMA)¹⁴⁸ authorizes the Federal government and Tribal governments to exercise concurrent jurisdiction over forest trespass matters,¹⁴⁹ and provides for Secretarial compliance with Tribal laws pertaining to Indian forest lands (including laws regulating the environment or historic or cultural preservation).¹⁵⁰ NIFRMA also authorizes cooperative agreements between the Department of the Interior and Indian tribes for certain purposes, including job training, and development and publication of cooperative environmental education and natural resource planning materials, land and facility improvements, including forestry and other natural resources protection, fire protection, reforestation, and other activities related to land and natural resource management.¹⁵¹ Finally, NFIRMA directs the Secretary to establish a BIA cooperative education program that provides financial assistance for tuition, books, and fees under cooperative agreements with educational institutions and entails an obligated service agreement with the BIA, an Indian tribe, or a tribal forestry-related enterprise. That program is the Cooperative Education Program.¹⁵²

e. Indian Law Enforcement Reform Act

The Indian Law Enforcement Reform Act¹⁵³ authorizes the Secretary to enter into agreements for the use of personnel or facilities of a Federal, tribal, State, or other

¹⁴⁴ Pub. L. 103–177, 107 Stat. 2011 (1993) (codified at 25 U.S.C. § 3701 et seq.).

¹⁴⁵ 25 U.S.C. § 3713(c).

¹⁴⁶ 25 U.S.C. § 3733.

¹⁴⁷ 25 U.S.C. § 3712(b).

¹⁴⁸ Pub. L. 101–630, tit. III, § 302, 104 Stat. 4532 (1990) (codified at 25 U.S.C. § 3101 et seq.).

¹⁴⁹ 25 U.S.C. § 3106(c).

¹⁵⁰ 25 U.S.C. § 3108.

¹⁵¹ 25 U.S.C. § 3115.

¹⁵² 25 U.S.C. § 3113(b).

¹⁵³ Pub. L. 101–379, 104 Stat. 473 (1990) (codified as amended at 25 U.S.C. § 2801 et seq.).

governmental agency to aid in the enforcement in Indian country of Federal or tribal laws.¹⁵⁴

3. Bureau of Ocean Energy Management & Bureau of Safety and Environmental Enforcement

The Department's offshore energy management responsibilities are managed by several Bureaus, including the BOEM and the Bureau of Safety and Environmental Enforcement (BSEE).¹⁵⁵

BOEM is responsible for the stewardship of Outer Continental Shelf (OCS) energy and mineral resources, with a mission to manage the development of the OCS energy and mineral resources in an environmentally and economically responsible way. Pursuant to the Outer Continental Shelf Lands Act (OCSLA),¹⁵⁶ BOEM's duties include managing oil and gas resources as well as hard minerals and the development of renewable energy on the OCS and conducting environmental studies of the impacts of OCS development. Many Native Americans live near and use areas where BOEM activities are proposed and conducted, and BOEM is committed to maintaining open and transparent communications with Tribal governments, Alaska Native Corporations, Native Hawaiian Organizations and other indigenous communities through formal government-to-government consultation and informal dialogue, collaboration, and engagement.

BSEE's mission is to promote safety, protect the environment, and conserve resources offshore through vigorous regulatory oversight and enforcement. It is the lead Federal agency charged with improving safety and ensuring environmental protection related to the offshore energy industry, primarily oil and natural gas, and most recently renewable energy, on the OCS. It is BSEE's stated policy to recognize and fulfill its legal obligations to identify, protect, and conserve Tribal trust resources; carry out its trust relationship with federally recognized Tribes; and invite Tribes to consult on a government-to-government basis whenever BSEE plans, or has actions with Tribal implications.¹⁵⁷ BOEM and BSEE staff must consult SOL to determine when the authorities discussed below apply.

a. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act (OCSLA)¹⁵⁸ defines the OCS as all submerged lands lying seaward of state coastal waters (3 miles offshore) which are under U.S. jurisdiction. While the OCSLA does not expressly refer to "Indians" or "Tribes," it does authorize BOEM "to enter into agreements to carry out environmental studies on the impacts of OCS development and to obtain

¹⁵⁴ 25 U.S.C. § 2804.

¹⁵⁵ These offices include the Office of Natural Resource Revenue, which is responsible for collecting and disbursing revenues from energy production on Federal and Indian lands and the Outer Continental Shelf.

¹⁵⁶ 43 U.S.C. § 1331, et seq.

¹⁵⁷ BSEE, Bureau Interim Directive 2022-047N (Part 570 – Tribal Engagement) (Oct. 27, 2022).

¹⁵⁸ Pub. L. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. § 1331 et seq.).

information for such studies from any person.”¹⁵⁹ BOEM’s environmental studies program has funded environmental studies that have involved close partnership with Tribes.

Some treaties protect Tribal uses of waters above the OCS in certain areas. In such cases, treaty rights would implicate various provisions of OCSLA that require the Secretary to consider how OCS activity affects ocean users.¹⁶⁰ In some cases, OCS activity may also affect traditional ceremonies and practices that are not the subject of treaty rights. BOEM units have worked with other Federal agencies to develop a transferable best-practices method to identify areas of tribal use and significance that could be impacted by offshore renewable energy siting.¹⁶¹

Several OCSLA provisions refer to “local government,” including one that allows the Secretary to make negotiated, noncompetitive agreements with local governments for the use of OCS sand, gravel, and shell resources for use in certain kinds of projects.¹⁶² Though the regulations implementing this provision do not specifically reference agreements with Tribes,¹⁶³ the provision is amenable to an interpretation that permits such agreements with Tribes. Other OCSLA provisions that refer to “local government” provide processes for input on OCS decision-making that are described below in the context of the regulations implementing them.

The Office of the Solicitor, Division of Minerals Resources (DMR) does not consider the holding of an OCS lease or grant to be a form of stewardship or co-stewardship contemplated by S.O. 3403 and therefore has not considered situations in which a Tribe might hold an OCS lease or grant. However, instances may exist in which Tribal businesses hold interests in an OCS lease as lessee or working interest owner.

b. Regulations on Coordination & Consultation

Numerous BOEM regulations at 30 C.F.R. part 583 (Negotiated Noncompetitive Agreements for the Use of Outer Continental Shelf Sand, Gravel, and/or Shell Resources) and part 585 (Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf) contain provisions pertaining to consultation, coordination, or cooperation with affected Indian tribes. Part 583 requires that once BOEM determines that a project qualifies for a negotiated agreement for sand, gravel, and/or shell resources, Part 583 requires BOEM to coordinate with any potentially affected federally recognized Indian Tribes or

¹⁵⁹ 43 U.S.C. § 1346. *See also* S.O. 3342, § 3(e) (noting same).

¹⁶⁰ *See, e.g.*, 43 U.S.C. §§ 1337(p)(4), 1340(g), 1344(a).

¹⁶¹ OCS Study BOEM 2015-047, D. Ball, et al., *A Guidance Document for Characterizing Tribal Cultural Landscapes* (Nov. 30, 2015).

¹⁶² 43 U.S.C. § 1337(k)(2).

¹⁶³ *See* 30 C.F.R. part 583.

Alaska Native Corporations in evaluating whether to enter a negotiated noncompetitive agreement.¹⁶⁴

BOEM's renewable energy regulations at 30 C.F.R. Part 585 set forth numerous requirements for coordination and consultation with Tribes in connection with the issuance and administration of leases, rights-of-way, and easements. BOEM will provide for coordination and consultation with the Governor of any State, the executive of any local government, and the executive of any Indian Tribe that may be affected by a lease, easement, or right-of-way, and BOEM may further invite the representative of an affected Indian Tribe to join in establishing a task force or other joint planning or coordination agreement in carrying out responsibilities under Part 585.¹⁶⁵ BOEM will coordinate and consult with the Governor of any affected State, the executive of any affected local government, and any affected Indian Tribe prior to issuing OCS renewable energy leases.¹⁶⁶ BOEM will identify areas for environmental analysis and consideration for OCS renewable energy leasing in consultation with any affected Indian Tribes.¹⁶⁷ BOEM will coordinate and consult with affected Indian Tribes in the review of non-competitive lease requests.¹⁶⁸ BOEM will coordinate and consult with any affected Indian Tribes as appropriate when issuing leases, rights-of-way grants, and right-of-use-and-easement grants on the OCS to a Federal agency or a State for renewable energy research activities.¹⁶⁹ BOEM will coordinate and consult with any affected Indian Tribes when reviewing a lessee's Site Assessment Plan and will further provide any affected Tribe relevant non-proprietary data and information pertaining to the proposed activities.¹⁷⁰ BOEM will coordinate and consult with any affected Indian Tribes as appropriate in reviewing a lessee's construction and operations plan and will further provide any affected Indian Tribe relevant nonproprietary data and information pertaining to the proposed activities.¹⁷¹ BOEM will coordinate and consult with any affected Indian Tribes in reviewing a general activities plan and will provide affected Indian Tribes relevant non-proprietary data and information pertaining to the proposed activities.¹⁷² Finally, in connection with decommissioning activities for facilities authorized under a site assessment plan, construction and operations plan, or general activities plan, BOEM must acquire from a lessee documentation of any coordination efforts the lessee has made with the affected Tribal governments.¹⁷³

¹⁶⁴ 30 C.F.R. § 583.310(b).

¹⁶⁵ 30 C.F.R. § 585.102(e).

¹⁶⁶ 30 C.F.R. § 585.203.

¹⁶⁷ 30 C.F.R. § 585.211(b).

¹⁶⁸ 30 C.F.R. § 585.231(e).

¹⁶⁹ 30 C.F.R. § 585.238(b).

¹⁷⁰ 30 C.F.R. § 585.613(c).

¹⁷¹ 30 C.F.R. § 585.628(d).

¹⁷² 30 C.F.R. § 585.648(c).

¹⁷³ 30 C.F.R. § 585.902(f).

c. Opportunities for Collaboration

Other BOEM and BSEE regulations include general “cooperate and consult” provisions which, though they do not expressly reference Tribes, may be broadly read as doing so.

Part 250 sets forth BSEE’s regulation of the offshore program that govern oil, gas, and sulfur exploration, development, and production operations on the OCS.¹⁷⁴ In regulating all operations under a lease, right-of-use and easement, or right-of-way, the BSEE Director will cooperate and consult with affected States, local governments, other interested parties, and relevant Federal agencies.¹⁷⁵ In the event of a lessee fails to control and remove pollution occurring as a result of operations conducted by or on behalf of the lessee and the pollution damages or threatens to damage life (including fish and other aquatic life), property, any mineral deposits, or the marine, coastal, or human environment, the BSEE Director, in cooperation with other appropriate agencies of Federal, State, and local governments shall have the right to control and remove the pollution at the lessee's expense.¹⁷⁶ In considering an application for a grant of a pipeline right-of-way, a Regional Supervisor shall prepare an environmental analysis in accordance with applicable policies and guidelines.¹⁷⁷ To aid in the evaluation and determinations, the Regional Solicitor may request and consider views and recommendations of appropriate Federal agencies, hold public meetings after appropriate notice, and consult, as appropriate, with State agencies, organizations, industries, and individuals, and must give consideration to any recommendation by the intergovernmental planning program, or similar process, for the assessment and management of OCS oil and gas transportation.¹⁷⁸

Part 550, which regulates the BOEM Offshore program governing oil, gas, and sulfur exploration, development, and production operations on the OCS, requires BOEM to regulate all activities under a lease, a right-of-use and easement, or a right-of-way to ensure cooperation and consultation with affected States, local governments, and “other interested parties,” including “relevant Federal agencies.”¹⁷⁹

Part 556 establishes the procedures under which BOEM will exercise the authority to administer a leasing program for oil and gas, and sulfur. After a development and production plan or a development operations and coordination document is deemed submitted, the Regional Supervisor will make a public information copy available for comments and recommendations. must solicit comments from affected States, local governments, and the public.¹⁸⁰

¹⁷⁴ 30 C.F.R. § 250.102.

¹⁷⁵ 30 C.F.R. § 250.106(d).

¹⁷⁶ 30 C.F.R. § 250.300(a)(2).

¹⁷⁷ 30 C.F.R. § 250.1016(a).

¹⁷⁸ *Id.*

¹⁷⁹ 30 C.F.R. § 550.120(d).

¹⁸⁰ 30 C.F.R. § 550.268.

Part 552 provides BOEM's procedures and requirements for the submission of oil and gas data and information resulting from exploration, development, and production operations on the OCS to the BOEM Director.¹⁸¹ The Director as soon as practicable after analysis, interpretation, and compilation of oil and gas data and information developed by BOEM or furnished by lessees, permittees, or other government agencies, shall make available to affected States and, upon request, any affected local government, a summary report of data and information to assist them in planning for the onshore impacts of potential OCS oil and gas development.¹⁸² The Director shall also consult with affected States and other interested parties on the nature, scope, content and timing of the summary report.¹⁸³

Part 556 establishes BOEM's procedures under which the Secretary will exercise the authority to administer a leasing program for oil and gas, and sulfur.¹⁸⁴ OCSLA requires the Secretary to prepare an oil and gas leasing program that consists of a five-year schedule of proposed lease sales to best meet national energy needs, showing the size, timing, and location of leasing activity as precisely as possible.¹⁸⁵ In starting the five-year program preparation process, BOEM invites and considers nominations for any areas to be included or excluded from leasing by inviting and considering suggestions and information from local governments and other interested parties.¹⁸⁶ Once BOEM publishes the proposed five-year program in the Federal Register, local governments can review and provide comment on the proposed program.¹⁸⁷ In order to establish information needed for the assessment and management of impacts to the environment by OCS oil and gas or other mineral activities in a region, the BOEM Director will conduct studies of areas included in any oil and gas lease sale or other lease, which will be planned and carried out in cooperation with affected States and interested parties.¹⁸⁸

Part 553 establishes BOEM's requirements for demonstrating Oil Spill Financial Responsibility for covered offshore facilities and sets forth the procedures for claims and the limit of liability for offshore facilities under the Oil Pollution Act of 1990.¹⁸⁹ It defines "claimant" to mean "any person or government" presenting a claim under the Act.¹⁹⁰

4. Bureau of Reclamation

The Bureau of Reclamation (BOR) manages, develops, and protects water and related resources in an environmentally and economically sound manner in the interest of the American public. It is the Nation's largest wholesale water supplier.

¹⁸¹ 30 C.F.R. § 552.1.

¹⁸² 30 C.F.R. § 552.4(a).

¹⁸³ *Id.*

¹⁸⁴ 30 C.F.R. § 556.101.

¹⁸⁵ 30 C.F.R. § 556.200 (citing 43 U.S.C. § 1344(a)).

¹⁸⁶ 30 C.F.R. § 556.202.

¹⁸⁷ 30 C.F.R. § 556.204.

¹⁸⁸ 30 C.F.R. § 556.1300(a)-(b).

¹⁸⁹ 30 C.F.R. § 553.1 (citing 33 U.S.C. § 2701 et seq.).

¹⁹⁰ 30 C.F.R. § 553.3.

Under the Reclamation Act of 1902,¹⁹¹ BOR's work first focused on the construction of dams and facilities to store and convey water, later expanding to include hydropower production, flood control, municipal and industrial water, recreation, and fish and wildlife enhancement. Areas operated by BOR often include important cultural and natural resources and may provide unique educational and interpretive opportunities for collaborative and cooperative arrangements with Tribes.

The Office of the Solicitor Division of Water Resources has identified a number of authorities that may support co-stewardship activities with Tribes. BOR staff must consult with SOL to determine when the authorities discussed below apply.

a. 43 U.S.C. § 373d

This statute authorizes the Commissioner of the BOR to enter into grants and cooperative agreements with any Indian tribe, institution of higher education, national Indian organization, or tribal organization to promote the development, management, and protection of their water resources.

The BOR Native American Affairs Program (NAAP) mission is to ensure federally recognized Indian tribes have the opportunity to participate in BOR programs in a way that fulfills the Federal responsibility toward tribes, respects tribal sovereignty, and strengthens the unique government-to-government relationship.

The Bureau of Reclamation has authorities, in addition to tribal funding programs authorized by 43 U.S.C. § 373d, under its WaterSMART programs that are available for financial assistance to a variety of entities, including tribes. Reclamation staff should consult with SOL to determine when the authorities discussed below apply to review eligibility requirements.

b. 43 U.S.C. § 2901-2907

Sections 8001 – 8007 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Title VIII—Water and Power, Subtitle A—Reclamation Title Transfer, 43 U.S.C. § 2901-2907, authorize BOR to transfer title of project facilities to qualifying entities, including tribes.

c. BOR Project Specific Authorities

Because BOR does not have an organic act, each project is authorized by an act of Congress. Project-specific authorities can provide unique opportunities for collaborative and cooperative stewardship of BOR-owned facilities.

d. Indian Water Rights Settlements

Federal Indian water right settlements authorized by acts of Congress often provide collaborative and cooperative stewardship opportunities. Each authorization can

¹⁹¹ Pub. L. 57-161, ch. 1093, 32 Stat. 388 (1902) (codified as amended and supplemented at 43 U.S.C. § 371 et seq.).

provide unique opportunities for stewardship activities with Federally recognized tribes.

e. Reclamation Manual on Coordination & Consultation

BOR's Manual recognizes the "unique legal and political relationship with Indian tribes as provided for in the Constitution, treaties, and other Federal laws and policies."¹⁹² BOR's policy recognizes the federal trust responsibility and government-to-government nature of the relationship between Federally recognized Tribes and the United States generally, and the Department of the Interior specifically.

Among activities specific to BOR's commitment to matters related to co-stewardship priorities, BOR's policy is to actively support and participate in the Department's Indian water rights negotiation and implementation activities; tribal trust and the Endangered Species Act; and ISDEAA. In this context, BOR Reclamation generally must rely upon specific congressional federal project or Indian water rights settlement authorizations to create opportunities for stewardship activities with Federally recognized Tribes.

5. Fish & Wildlife Service

With 565 national wildlife refuges, 38 wetland management districts, and 5 national monuments, the National Wildlife Refuge System (NWRS) manages more than 850 million acres of lands and waters. The Fish and Wildlife Service (FWS) manages the NWRS pursuant to various laws, including the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife System Improvement Act of 1997,¹⁹³ and, for refuges in Alaska, the Alaska National Interest Lands Conservation Act of 1980, as amended.¹⁹⁴ Under the Administration Act, the "mission of the System is to administer a national network of lands and waters for conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."¹⁹⁵ Each refuge is managed to fulfill the mission of the NWRS, the specific purpose for which each refuge was established, and for compatible wildlife-dependent recreation.¹⁹⁶

The following authorities provide support for collaborative and cooperative co-stewardship arrangements between FWS and Tribes. FWS staff must consult SOL to determine when the authorities discussed below apply.

¹⁹² See Reclamation Manual, Policy NIA P10, Indian Policy of the Bureau of Reclamation (Jul. 24, 2014, rev. Sep. 24, 2020).

¹⁹³ 16 U.S.C. § 668dd-668ee.

¹⁹⁴ 16 U.S.C. §§ 3101-3233.

¹⁹⁵ 16 U.S.C. § 668dd(a)(2).

¹⁹⁶ 16 U.S.C. § 668dd(a)(3).

a. Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA)¹⁹⁷ directs the Service to investigate and report on proposed Federal actions that affect any stream or other body of water and to provide recommendations to minimize impacts on fish and wildlife resources. Among other things, the FWCA authorizes the Secretary to enter into any contract or cooperative agreement with a federally recognized Indian tribe to assist with the control and management of an invasive species.¹⁹⁸ It also grants FWS broad authority to enter cooperative agreements for the conservation of all species of fish and wildlife, and applies that authority in directing the FWS to collaborate with federally Recognized Indian Tribes in the management of National Wildlife Refuges.

b. Endangered Species Act

S.O. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (Jun. 5, 1997), jointly issued with the Secretary of Commerce, clarifies the responsibilities of Bureaus when they take actions under the authority of the Endangered Species Act (ESA)¹⁹⁹ and its implementing regulations that affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in the Order. S.O. 3225, *Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)* (Jan. 19, 2001), supplements S.O. 3206 by defining its application in Alaska; establishing a consultation framework relative to the subsistence exemption in Section 10(e) of the ESA; and reiterating government-to-government consultation requirements relative to overall ESA implementation in Alaska.

S.O. 3206 defines “tribal trust resources” to mean those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States. Pursuant to S.O. 3206, the Departments “shall consider[] the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities.”

S.O. 3206 acknowledges that “that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.” Because of the unique government-to-government relationship between Tribes and the United States, the Department and affected Indian tribes “need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.” S.O. 3206 directs FWS (and the National Oceanic and Atmospheric Administration) to collaborate with Tribes on the ESA, including but not limited to, candidate

¹⁹⁷ Act of Mar. 10, 1934, ch. 55, 48 Stat. 401 (codified as amended at 16 U.S.C. § 661-666e).

¹⁹⁸ 16 U.S.C. § 666c-1(l).

¹⁹⁹ 16 U.S.C. § 1531 et seq.

conservation, the listing process, Section 7 consultation, habitat conservation planning, recovery, and enforcement.

c. National Wildlife Refuge System Administration Act

The National Wildlife Refuge System Administration Act (NWRSA)²⁰⁰ provides authority, guidelines and directives for FWS to improve the National Wildlife Refuge System; administers a national network of lands and waters for the conservation, management, and restoration of fish, wildlife and plant resources and habitat; ensures the biological integrity, diversity, and environmental health of refuges is maintained; defines compatible wildlife-dependent recreation as appropriate general public use of refuges; establishes hunting, fishing, wildlife observation and photography, and environmental education as priority uses; establish a formal process for determining compatible uses of refuges; and provide for public involvement in developing comprehensive conservation plans for refuges.

d. The Fish and Wildlife Act

The Fish and Wildlife Act of 1956 (FWA)²⁰¹ authorizes the Secretary, as delegated to the FWS, to consider and determine the policies and procedures that are necessary and desirable to carry out the laws relating to fish and wildlife, and also to take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources. This broad authority can be utilized to cooperate with Tribes in managing resources under the FWS's jurisdiction.²⁰²

e. Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act (ANILCA)²⁰³ provides for the designation and conservation of certain public lands in Alaska, including units of the National Wildlife Refuge System, and for the continuing subsistence needs of the Alaska Native people. ANILCA directs the FWS to be the lead Federal agency in managing subsistence for Native Tribes on federal lands in Alaska.

6. National Park Service

The National Park Service (NPS) manages units of the National Park System pursuant to what is commonly known as the NPS Organic Act.²⁰⁴ The Organic Act directs the Secretary to “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural

²⁰⁰ 16 U.S.C. § 668dd et seq.

²⁰¹ Act of Aug. 8, 1956, ch. 1036, 70 Stat. 1122 (codified as amended at 16 U.S.C. § 742f et seq.).

²⁰² 16 U.S.C. § 742f(a).

²⁰³ 16 U.S.C. § 3101 et seq.

²⁰⁴ Act of August 25, 1916, ch. 408, 39 Stat. 535 (codified as amended in various sections of Title 54 of the United States Code).

and historic objects, and wildlife in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”²⁰⁵ Put another way, the fundamental purpose of the National Park System is conservation of park resources and values, and the NPS’s principal responsibility is to manage park units to avoid impairment of those resources and values.²⁰⁶ NPS also has specific and unique responsibilities associated with the Federal Subsistence Management Program in Alaska pursuant to Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA).²⁰⁷ NPS staff must consult SOL to determine when the authorities discussed below apply.

a. General Authorities

The following general authorities can support collaborative and cooperative stewardship arrangements with Tribes.

i. General Agreements

NPS may enter into memoranda of agreement and understanding, or similar vehicles, to document an ongoing relationship with various non-Federal entities. General agreements will not involve an exchange of value or entail legal liability. Examples of such agreements include an agreement between the Havasupai Tribe and Grand Canyon National Park for use and occupancy of Supai Camp on the South Rim. It also includes a Memorandum of Cooperation between the Chickasaw Nation and the Chickasaw National Recreation Area for collaborating on interpretation, cultural and natural resource management, and infrastructure development/maintenance.

ii. Cooperative Agreements

A variety of authorities²⁰⁸ authorize NPS to enter into cooperative agreements with most entities for natural resource protection, research, and protection of historic or archaeological sites. One example includes work by the Navajo Nation to document its archaeological management practices with Chaco Culture National Historical Park for sites located near the unit.

iii. Commercial Service Opportunities

Many commercial opportunities for cooperation and collaboration exist under existing authorities. Examples of such current activities include a marina concession at Bighorn Canyon National Recreation Area operated by the Crow Tribe pursuant to 54 U.S.C. § 101913; a lease by the Navajo Nation of a former concession facility at Canyon de Chelly National Monument pursuant to 54 U.S.C. § 102102; and authorized commercial activities such as fee-based guided tours or interpretive programs pursuant to 54 U.S.C. § 101925. In addition, NPS

²⁰⁵ 54 U.S.C. § 100101(a).

²⁰⁶ See generally NPS, Management Policies 2006, § 1.4 (“Park Management”).

²⁰⁷ 16 U.S.C. § 3101 et seq.

²⁰⁸ See, e.g., 31 U.S.C. § 6305; 54 U.S.C. §§ 100703, 101702, 200103, 320102.

administers annual grant programs available to a variety of entities, including Indian tribes and Native Hawaiian Organizations for tribal cultural heritage protection pursuant to 54 U.S.C. §§ 302901 and 302906.

b. Specific Authorities

In addition to the general authorities described above, the following specific authorities may also support collaborative and cooperative stewardship arrangements with Tribes.

i. Park-Specific Statutory Authorities

Many park-specific authorities contain opportunities for co-stewardship. For example, the Oglala Sioux Tribe has operated concessions in Badlands National Park's South Unit based on requirements in the South Unit's enabling legislation. NPS staff should consult with attorneys in the relevant SOL office on the best resources for further information on such opportunities.

ii. Grant Opportunities for Historic Preservation

In 2014, Congress passed legislation authorizing the Secretary to administer a program of direct grants to Indian tribes and Native Hawaiian Organizations for purposes of preserving historic properties.²⁰⁹

iii. NATIVE Act

The Native American Tourism and Improving Visitor Experience (NATIVE) Act²¹⁰ requires coordination with Indian tribes and Native Hawaiian Organizations in tourism-related planning and projects. The Act is intended, among other purposes, to “increase coordination and collaboration between Federal tourism assets to support Native American tourism” and to “enhance and improve self-determination and self-governance capabilities in the Native American community.”²¹¹ Although the NATIVE Act focuses on tourism planning, rather than on land management, several provisions could authorize NPS to undertake on-the-ground projects that would reflect Tribal priorities.²¹² The Act's provision requiring agencies to “support the efforts of Indian tribes . . . to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community”²¹³ could potentially be read as a broad mandate for land managers to accommodate and support cultural practices on federal lands.

²⁰⁹ Pub. L. 113-287, 128 Stat. 3199 (codified 54 U.S.C. § 302701 et seq.).

²¹⁰ Pub. L. 114-221, 130 Stat. 847 (codified at 25 U.S.C. §§ 4351-4355).

²¹¹ 25 U.S.C. § 4351.

²¹² See *supra*, note 142 (citing 25 U.S.C. §§ 4353(c)(1)(G)-(I), 4354(a)).

²¹³ See 25 U.S.C. § 4354(a)(2).

iv. Tribal Plant Gathering

NPS regulations at 36 CFR § 2.6 permit NPS to enter into agreements with Indian tribes for traditional gathering of plants or plant parts on NPS lands.

c. Other Opportunities

i. NPS Management Policies

The formal relationship between NPS and tribes is augmented by the historical, cultural, and spiritual relationships that Tribes have with park lands and resources.²¹⁴ As the ancestral homelands of many Tribes, parks protect resources, sites, and vistas that are highly significant for them.²¹⁵ For this reason, NPS will pursue an open, collaborative relationship with American Indian tribes to help Tribes maintain their cultural and spiritual practices and enhance NPS's understanding of the history and significance of sites and resources in the parks.²¹⁶

NPS acknowledges that activities carried out on park lands may sometimes affect tribal trust resources, which are those natural resources reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, and are protected by a fiduciary obligation on the part of the United States.²¹⁷ In accordance with the government-to-government relationship and mutually established protocols, the Service will interact directly with tribal governments regarding the potential impacts of proposed NPS activities on Tribes and trust resources.²¹⁸

It is NPS policy to pursue opportunities to improve natural resource management within parks and across administrative boundaries by pursuing cooperative conservation with public agencies, appropriate representatives of Tribes and other traditionally associated peoples in accordance with Executive Order 13352 (Facilitation of Cooperative Conservation).²¹⁹ It is also NPS policy to develop and implement its programs in a manner that reflects knowledge of and respect for the cultures of Tribes with ties to particular resources in parks.²²⁰ NPS will regularly and actively consult with Tribal governments and other traditionally associated groups regarding planning, management, and operational decisions that affect subsistence activities, sacred materials or places, or other resources with which they are historically associated. Information about the outcome of these consultations will be made available to those consulted.²²¹

²¹⁴ NPS, Management Policies 2006, § 1.11.

²¹⁵ NPS, Management Policies 2006, § 1.11.

²¹⁶ NPS, Management Policies 2006, § 1.11.

²¹⁷ NPS, Management Policies 2006, § 1.11.3.

²¹⁸ NPS, Management Policies 2006, § 1.11.3.

²¹⁹ NPS, Management Policies 2006, § 4.1.4.

²²⁰ NPS, Management Policies 2006, § 8.5.

²²¹ NPS, Management Policies 2006, § 8.5.

Various policies permit NPS to coordinate with Indian tribes and Native Hawaiian Organizations and allow access to sacred sites.²²² NPS will protect and maintain American Indian access rights and protection of sites associated with tribes according to applicable laws and policies. The American Indian Religious Freedom Act reaffirms the First Amendment rights of Native Americans to access national park system lands for the exercise of their traditional religious practices. American Indians will be permitted access within wilderness for sacred or religious purposes consistent with the intent of the American Indian Religious Freedom Act and other applicable authorities provided by federal statutes and executive orders.²²³

ii. Treaty Rights

Treaty rights may provide an additional opportunity for collaborative and cooperative co-stewardship arrangements between NPS and Tribes. For example, the Red Cliff Band of Chippewa/Ojibwe/Anishinaabe are currently negotiating an agreement with Apostle Islands National Seashore to conduct guided tours pursuant to their reserved treaty rights. Treaty rights vary by tribe and location, and opportunities should be explored in consultation with the Regional Solicitor's office.

7. Office of Natural Resources Revenue

The following Office of Natural Resources Revenue (ONRR) authorities may be relevant for potential stewardship arrangements. ONRR staff must consult with attorneys in their Regional Solicitor's Office to determine when a proposed arrangement implicates any of the authorities discussed below.

a. Federal Oil and Gas Royalty Management Act of 1982

The Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA)²²⁴ directs the Secretary to establish a comprehensive system for collection, accounting, auditing, and disbursement of royalties from development of Federal and Indian oil and gas. Title II, Section 202 of FOGRMA authorizes the Secretary to enter into cooperative agreements with Tribes to carry out those functions in cooperation with the Secretary for Indian oil and gas under the jurisdiction of the Tribe.

b. Pub. L. No. 102-154

Public Law No. 102-154 authorizes the Secretary to enter into cooperative agreements with Tribes to carry out inspection, auditing, investigation or enforcement activities in cooperation with the Secretary for royalties from coal, solid mineral, and geothermal leases on Indian lands.²²⁵

²²² See NPS, Management Policies 2006, § 5.3.5.3.2.

²²³ NPS, Management Policies 2006, § 6.3.12.

²²⁴ Codified at 30 U.S.C. § 1732.

²²⁵ 105 Stat. 1001 (1991) (codified at 30 U.S.C. § 196).

8. Office of Surface Mining Reclamation & Enforcement

The following Office of Surface Mining Reclamation and Enforcement (OSMRE) authorities may be relevant for potential stewardship arrangements. OSMRE staff must consult SOL to determine when the authorities discussed below apply.

a. Surface Mining Control and Reclamation Act of 1977

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is not a public lands or resource management statute, and the Office of Surface Mining Reclamation and Enforcement (OSMRE), which administers SMCRA, is not a land management agency. Under SMCRA, lands within Tribal reservations are not “Federal lands” as that term is defined in SMCRA (although there is some federal coal in some Indian lands, which BLM leases).

OSMRE does, however, have a Federal Indian lands program, and Tribes may attain primacy from the Secretary to be the primary regulatory authority, with oversight from OSMRE, for regulating surface coal mining operations and abandoned mine land reclamation on Indian lands, which SMCRA defines as “all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.”²²⁶

b. Consultation Regulations and Policies

The following authorities require OSMRE to consult or coordinate with Tribes based on the specific subject matter. OSMRE, Directive REG 18, “Tribal Consultation and Protection of Tribal Trust Resources” (June 26, 2013) sets forth OSMRE’s policies and procedures for ensuring that its actions having tribal implications are consistent with applicable Executive Orders on Tribal consultation.²²⁷

In addition, in areas where OSMRE is the primary SMCRA regulatory authority on Indian lands, Federal regulations at 30 C.F.R. Part 750 require that OSMRE consult with the BIA and the affected Tribe(s) at various stages of the permitting, inspection, and enforcement process.²²⁸ The Federal regulations at 30 C.F.R. Part 755 also provide that any Indian tribe can request that the Secretary, acting through OSMRE, enter into a Tribal-Federal intergovernmental agreement that would allow the Tribe to assist OSMRE and recommend specific actions on permits, permit applications, inspection and enforcement activities, and bond release or forfeiture decision as well as providing funding for Tribal employees.

For abandoned mine lands (AML) reclamation activities that OSMRE performs on Indian lands that are not subject to an approved Tribal Reclamation Program,

²²⁶ 30 U.S.C. § 1291(9).

²²⁷ Available at <https://www.osmre.gov/sites/default/files/inline-files/directive979.pdf>.

²²⁸ See, e.g., 30 C.F.R. §§ 750.6(a)(4), 750.12(c)(3)(iii), and 750.18(d) & (f).

OSMRE is required to consult with BIA and the affected tribe before undertaking an AML reclamation project.²²⁹

9. U.S. Geological Survey

The United States Geological Survey (USGS) is not responsible for regulations or land management. However, it provides impartial information on the health of ecosystems and the environment, the natural hazards that threaten us, the natural resources²³⁰ we rely on, the negative effects of climate and land-use change, and the core science systems that help us provide timely, relevant, and usable information. USGS recognizes the importance of Native knowledge as a complement to the USGS mission to better understand the Earth and its systems. Collaboration combining tribal traditional ecological knowledge with empirical studies allows the USGS and Tribal governments, organizations, and peoples to increase their mutual understanding of the increasing challenges facing our natural world.

USGS engages in collaborative and cooperative activities with Tribes and Tribal organizations, as well with the Bureau of Indian Affairs and other federal entities. This involves a variety of work touching on a range of topics including wildlife diseases, water availability, contaminants, energy and minerals, invasive and endangered species, and other impacts that human activity are having on our planet. It also includes field and laboratory studies, training, and internships. USGS staff must consult SOL to determine when the authorities discussed below apply.

a. Indian Water Rights Projects

USGS has cooperated with Tribes for many decades to address water resource issues such as flooding, drought, water supply, Indian Water Rights, and other needs using the appropriated Cooperative Matching Funds (CMF), sometimes in conjunction with other available USGS program funds. USGS is a leader in establishing flood monitoring systems, groundwater modeling to assess water resource availability, water-quality studies and performs other projects that are tailored for local tribal needs. For example, the Sac and Fox Tribe of the Mississippi in Iowa (Meskwaki Nation) has developed a series of projects with the USGS over several years including a long-term data collection that has developed into a flood monitoring system. The USGS has also developed a hydrogeologic framework and water budget for an important drinking water aquifer project for the Cheyenne and Arapaho Tribes. Using directed CMF funding, a number of USGS projects were completed with Tribes and other Federal partners (Bureau of Reclamation and Bureau of Indian Affairs), in conjunction with and oversight by the Secretary's Indian Water Rights Office. These projects are generally matched with funds from the local partner Tribes. For example, the Anza/Cahuilla Indian Water Rights project (CA) developed regular meetings with the two tribes, along with the BIA,

²²⁹ 30 C.F.R. § 886.27(c).

²³⁰ Although it relies on the term “resources,” the USGS, through its interdisciplinary research, acknowledges the interconnectedness of the Earth and all the life forms that live upon it.

BOR and USGS, resulting in a 4-year accelerated timeline for a hydrologic study into complex groundwater flows with surface-water interaction and modeling.

b. Consultation

The USGS Survey Manual (SM) establishes the policies and initiatives which govern the actions, conduct, and procedures of USGS. SM chapter 500.6, American Indian and Alaska Native Tribal Relations (Sep. 14, 2020), clarifies and describes USGS requirements and responsibilities regarding compliance with applicable statutes, regulations, Executive and Secretarial Orders and Memoranda, and Departmental policies relevant to the relationships between the USGS and American Indian tribes, Alaska Native tribes, and Alaska Native Corporations.

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IV. TRIBAL STEWARDSHIP

Section 6 of S.O. 3403 on Tribal stewardship of lands and waters directs Bureaus to support consolidation of Tribal landholdings within reservations, including through Tribal acquisition of Federal lands and private inholdings. It further directs Bureaus to facilitate Tribal requests to have lands placed in trust status, including for conservation, protection of sacred sites, cultural or religious use, or exercise of subsistence of treaty reserved rights. The following authorities can support Tribal stewardship pursuant to Section 6 of S.O. 3403. Their applicability must be determined, however, based on the facts of each case. Bureaus must consult SOL to determine when the authorities discussed below apply.

A. Indian Reorganization Act

The overriding purpose of the Indian Reorganization Act of 1934 (IRA)²³¹ was to end the failed federal policies of allotment and assimilation, establish means for Tribes to assume a greater degree of political and economic self-determination,²³² and give Tribes “control of their own affairs and of their own property.”²³³ The IRA has several provisions of potential relevance for Tribal stewardship.

1. Acquisition of Land in Trust

IRA Section 5 authorizes the Secretary in her discretion to acquire “any interest in lands, water rights or surface rights to lands, within or without existing reservations,” including trust or otherwise restricted allotments, “for the purpose of providing land for Indians.”²³⁴ Title to any land acquired under Section 5 shall be taken in the name of the United States in trust for the Tribe for which it is acquired. Trust lands may be acquired through purchase, relinquishment, gift, exchange, or assignment. The Department’s regulations for implementing trust land acquisitions for Tribes are found at 25 C.F.R. part 151 (Part 151). Part 151 sets forth the authorities, policy, and procedures governing the Department’s acquisition of land in trust for Tribes. Bureau staff should consult with attorneys in SOL-Division of Indian Affairs for further information on conveyances of land into trust for the benefit of Indians.

2. Restoration of Surplus Reservation Lands

IRA Section 3 authorizes the Secretary “to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States.”²³⁵ The Department has long

²³¹ Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 5101 et seq.).

²³² The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act, Sol. Op. M-37029 at 6 (Mar. 12, 2014) (citing *Morton v. Mancari*, 417 U.S. 535, 542 (1974)).

²³³ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler)).

²³⁴ 25 U.S.C. § 5108.

²³⁵ See 25 U.S.C. § 5103(a).

construed Section 3 as limited to reservation lands “opened to sale or disposal for the benefit of the Indians.”²³⁶ Determining whether lands subject to a Tribal stewardship request constitute “remaining surplus lands” within the meaning of IRA Section 3 must be determined on a case-by-case basis in consultation with SOL Division of Indian Affairs.

3. Land Exchanges

IRA Section 4 allows the Secretary to approve the voluntary exchange of restricted Indian lands for land of equal value whenever she determines that such exchange “is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.” 25 U.S.C. § 5107. The Department has historically interpreted Section 4 as applying to individual Indian lands and tribal trust lands and as allowing a comparatively small difference in land value, which difference can be made up by cash payment.²³⁷

IRA Section 5 separately authorizes exchanges of any interest in lands within or without a reservation to provide land for Indians. Lands exchanged under Section 5 may be of unequal value, provided that the Tribe obtains the benefit of the difference in value.²³⁸ Title to exchanged lands for a Tribe under Section 5 must be taken by the United States in trust for the Tribe.

B. Indian Land Consolidation Act

The Indian Land Consolidation Act (ILCA)²³⁹ authorizes the Secretary to approve Tribal land consolidation plans, allowing Tribes to sell or exchange any tribal lands or interests to limit or eliminate undivided fractional interests or to consolidate its landholdings.²⁴⁰ While a Tribe cannot accept less than ten percent of the fair market value of the land or interests sold or exchanged, ILCA authorizes the Tribe to accept cash payments to equalize the value of the transaction.²⁴¹ ILCA further mandates that the Secretary acquire into trust any interest in trust or restricted lands if two requirements are met: a portion of the land to be acquired must have been in trust or restricted status on November 7, 2000; and the land to be acquired must be

²³⁶ See, e.g., San Carlos Lands Restoration, Sol. Op. M-27878 (May 20, 1936); Review of the Legal Aspects of the San Carlos Mineral Strip Proposed Restoration, Sol. Op. M-36599, 69 INT. DEC. 195, 198-99 (1962); The Authority of the Secretary to Transfer Areas Within the Uncompahgre Reservation under Section 3 of the Indian Reorganization Act, Sol. Op. M-37051 (Feb. 21, 2018). See also *Bowman v. Udall*, 243 F. Supp. 672, 682 (D.D.C. 1965), *aff'd sub nom. Hinton v. Udall*, 364 F.2d 676 (D.C. Cir. 1966).

²³⁷ See, e.g., Commissioner of Indian Affairs, Circ. No. 3162 at 2 (Jun. 26, 1936); IRA Exchange of Land, Memorandum from Solicitor Nathan Margold to Commissioner of Indian Affairs John Collier (Feb. 3, 1937).

²³⁸ IRA Exchange of Land, Memorandum from Solicitor Nathan Margold to Commissioner of Indian Affairs John Collier at 4-5 (Feb. 3, 1937).

²³⁹ Pub. L. No. 97-459, 96 Stat. 2517 (1983) (codified at 25 U.S.C. §§ 2201-2221).

²⁴⁰ 25 U.S.C. § 2203.

²⁴¹ *Id.*

located within a reservation.²⁴² ILCA Section 203 makes IRA Section 5 applicable to any Tribe that voted to reject the IRA.

C. Indian Self-Determination and Education Assistance Act

In addition to authorizing Tribes to contract or compact to provide some federal services, ISDEAA authorizes the Secretary to donate any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration (subject to certain provisions) to an Indian tribe or tribal organization.²⁴³ ISDEAA also authorizes the Secretary to acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the Tribe or Tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this chapter.²⁴⁴ To do so, however, the Secretary must acquire the property before it can be donated and the Tribe must have an ISDEAA contract, grant, or self-governance compact in place before the BIA submits its request on behalf of the Tribe for buildings or lands located off-reservation.

ISDEAA's implementing regulations define the terms "real property" to mean "any interest in land together with the improvements, structures, and fixtures and appurtenances thereto."²⁴⁵ The regulations define "excess property" to mean real or personal property under the control of a Federal agency, other than BIA and IHS, which is not required for the agency's needs and the discharge of its responsibilities."²⁴⁶ Finally, they define "surplus property" to mean "excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration (GSA)."²⁴⁷ Although there is no explicit cross-reference to the definitions of excess property or surplus property in the Federal Property and Administrative Services Act, the ISDEAA definitions are consistent with these definitions in the Federal Property and Administrative Services Act.

D. Act of Aug. 6, 1956

The Act of August 6, 1956²⁴⁸ authorizes the Secretary to convey title to any federally owned buildings, improvements, or facilities (including any personal property used in connection with such buildings, improvements, or facilities) that are situated on the lands of any Indian tribe, band, or group or on lands reserved for the administration of its affairs, where such lands no longer required by the Secretary for the administration of Indian affairs. This section is used for property

²⁴² 25 U.S.C. § 2216(c).

²⁴³ 25 U.S.C. § 5324(f).

²⁴⁴ *Id.*

²⁴⁵ 25 C.F.R. § 900.6.

²⁴⁶ 25 C.F.R. § 900.102(a).

²⁴⁷ 25 C.F.R. § 900.12(b).

²⁴⁸ Pub. L. No. 84-991, 70 Stat. 1057 (originally codified at 25 U.S.C. § 443a; transferred to 43 U.S.C. § 1457 note).

already under BIA stewardship and on lands of such tribes or on lands reserved for the administration of the tribe's affairs.

E. Hawaiian Home Lands Recovery Act

The Hawaiian Home Lands Recovery Act (HHLRA)²⁴⁹ provides, in part, for the settlement of claims against the United States through the exchange and transfer of Federal lands for the United States' continued retention of lands initially designated as available lands under the Hawaiian Homes Commission Act and for the lost use of such lands. HHLRA authorizes the Secretary, in consultation with the Chairman of the Hawaiian Homes Commission, to convey excess lands under control of a Federal agency within the State of Hawaii to the Department of Hawaiian Home Lands for inclusion in the Hawaiian Homelands Trust. Conveyance is made without reimbursement to the controlling agency.

F. Federal Property and Administrative Services Act

The purpose of the Federal Property and Administrative Services Act (FPASA)²⁵⁰ is to provide the Federal government with an economical and efficient system for disposing of surplus property.²⁵¹ The FPASA authorizes the General Services Administration (GSA) to transfer excess property from one Federal agency to another. This includes the transfer, without compensation, to the Secretary of "excess real property" within the reservation of a recognized Tribe.²⁵² Lands transferred to the Secretary under FPASA's Tribal provision are to be held in trust for the benefit and use of the Tribe within whose reservation the property is located.²⁵³

FPASA defines "excess property" as property under the control of a Federal agency that the head of the agency determines is not required to meet its needs or responsibilities.²⁵⁴ It excludes lands in the public domain; land reserved or dedicated for national forest or national park purposes; minerals in land withdrawn or reserved from the public domain that the Secretary determines are suitable for disposition under the public land mining and mineral leasing laws; and land withdrawn or reserved from the public domain, except those that the Secretary, along with the GSA Administrator, determines are not suitable for return because the lands are substantially changed in character by improvements or otherwise.²⁵⁵

²⁴⁹ Pub. L. No. 104-2, 109 Stat. 353 (1995).

²⁵⁰ Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of Titles 40 and 41 of the U.S. Code).

²⁵¹ 40 U.S.C. § 101.

²⁵² 40 U.S.C. § 523.

²⁵³ 40 U.S.C. § 523(b)(1).

²⁵⁴ 40 U.S.C. § 102(3).

²⁵⁵ 40 U.S.C. § 102(9)(A).

G. Federal Land Policy and Management Act

The Federal Land Policy and Management Act of 1976 (FLPMA),²⁵⁶ discussed above, also provides authority for BLM to sell²⁵⁷ or exchange²⁵⁸ public lands to any person provided they are a citizen of the United States or to any corporation provided it is subject to the laws of any State or the United States.²⁵⁹

1. Sale of Tracts of Public Land

FLPMA authorizes the sale of tracts of public land where BLM, as a result of land use planning,²⁶⁰ determines that the tract meets certain disposal criteria. These include that the tract is difficult and uneconomic to manage due to its location or other characteristics, and is not suitable for management by another Federal agency; that the tract is no longer required for the purpose for which it was acquired; or where disposal of the tract “will serve important public objectives.” Such objectives include, but are not limited to, the expansion of communities and economic development, provided these cannot prudently or feasibly be achieved on land other than public land, and where these outweigh other public objectives and values, such as recreation and scenic values, that would be served by keeping the tract in federal ownership.²⁶¹ The sale of a public land tract under FLPMA must be at a price not less than its fair market value as determined by BLM.²⁶²

FLPMA imposes certain limits on the sale of tracts of public lands. Lands within units of the National Wilderness Preservation System, National Wild and Scenic Rivers Systems, and National System of Trails may not be sold under FLPMA.²⁶³ Tracts designated for sale over 2500 acres in size must be referred to Congress for review.²⁶⁴ Sales must be conducted through competitive bidding procedures established by BLM unless BLM waives this requirement based on equitable considerations or public policies.²⁶⁵ In recognizing public policies, BLM must further consider certain potential purchasers, including the state in which the tract is located and local governments in the vicinity; adjoining landowners; individuals; and any other person.²⁶⁶

2. Exchanges of Tracts of Public Lands

FLPMA authorizes BLM to dispose of a tract of public land (or interests therein) by exchange where BLM determines that the public interest will be well served by

²⁵⁶ Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. § 1701 et seq.).

²⁵⁷ 43 U.S.C. § 1713.

²⁵⁸ 43 U.S.C. § 1716.

²⁵⁹ 43 U.S.C. § 1717.

²⁶⁰ *See* 43 U.S.C. § 1716.

²⁶¹ 43 U.S.C. § 1713(a)(3).

²⁶² 43 U.S.C. § 1713(d).

²⁶³ 43 U.S.C. § 1713(a).

²⁶⁴ 43 U.S.C. § 1713(c).

²⁶⁵ 43 U.S.C. § 1713(f).

²⁶⁶ 43 U.S.C. § 1713(f)(1)-(5).

doing so.²⁶⁷ In considering the public interest, BLM must weigh a number of considerations, including the needs of local people.²⁶⁸ Lands received by BLM within the boundaries of a conservation system established by Congress become part of the relevant system without further action by BLM.²⁶⁹

Land received in exchange for a tract of public land must be located in the same state. The value of the lands to be exchanged must also be equal. If not, then their values must be equalized by the payment of money as circumstances require, provided payment does not exceed 25% of the total value of the tract of public land.²⁷⁰ However, BLM and parties involved may, by mutual agreement, waive any equalization payment if BLM determines that doing so will expedite the transfer, that the public interest will be better served thereby, and where the amount waived is less than a specified amount.²⁷¹

H. Recreation and Public Purposes Act

The Recreation and Public Purposes Act (RPPA)²⁷² authorizes BLM to dispose of any public lands by sale or lease to a State, Territory, county, municipality, or other State, Territorial, or Federal instrumentality or political subdivision for “any public purposes,” or to a nonprofit corporation or nonprofit association for any recreational or any public purpose consistent with its articles of incorporation or other creating authority.²⁷³

The RPPA’s implementing regulations define “public purpose” as meaning “for the purpose of providing facilities or services for the benefit of the public in connection with, but not limited to, public health, safety or welfare,” but not use of lands or facilities “for habitation, cultivation, trade or manufacturing” unless necessary for and integral to, i.e., an essential part of, the public purpose.²⁷⁴ Among other things, the RPPA requires BLM to find that the land is to be used for an established or definitely proposed project, that it is not of national significance, and that it is not more than is reasonably necessary for the proposed use.²⁷⁵

The RPPA does not apply to lands in any national forest, national park, national monument, or national wildlife refuge.²⁷⁶ It also does not apply to Indian lands or

²⁶⁷ 43 U.S.C. § 1716.

²⁶⁸ 43 U.S.C. § 1716.

²⁶⁹ 43 U.S.C. § 1716(c). These include the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, and the California Desert Conservation Area.

²⁷⁰ 43 U.S.C. § 1716(b).

²⁷¹ 43 U.S.C. § 1716(b). FLPMA further allows the Secretary to exchange land of “approximately equal value” where the Secretary determines that doing so is in the public interest and that doing so will expedite the exchange. 43 U.S.C. § 1716(h).

²⁷² Act of June 14, 1926, ch. 578, 44 Stat. 741 (codified as amended at 43 U.S.C. §§ 869-869-4 and 1721).

²⁷³ 43 U.S.C. §§ 869, 869-1.

²⁷⁴ 43 CFR 2740.0-5(d).

²⁷⁵ 43 U.S.C. § 869(a).

²⁷⁶ 43 U.S.C. § 869(c).

lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department by Executive Order for the use of Indians.²⁷⁷

The RPPA imposes certain limits on the acreage that may be conveyed to a state or non-profit for recreational or other public purposes in a single calendar year, with certain exceptions.²⁷⁸

BLM shall fix the price of a sale or lease under RPPA through appraisal or otherwise, after taking into consideration the purpose for which the lands are to be used.²⁷⁹ Land conveyed under the RPPA may not be transferred by a grantee or its successor except with the consent of BLM to a qualified grantee. In the event the lands conveyed are transferred without consent of the Secretary or devoted to a use other than that for which they were conveyed, title to the lands shall revert to the United States.²⁸⁰

I. Tribe-Specific Authorities

In addition to the general authorities outlined above, Tribe-specific laws may also authorize the conveyance of land to Tribes. The following examples of such authorities is provided for illustrative purposes only.

1. Pub. L. No. 76-690 (Spokane and Colville Tribes)

Pub. L. No. 76-690, 54 Stat. 703 (1940),²⁸¹ authorizes the Secretary to “select and acquire” new cemetery lands to replace those required for the Grand Coulee Dam project on the Columbia River. Sites used for the relocation of cemeteries are to be held in trust for the Spokane Tribe or the Colville Tribe, as the case may be.

2. Confederated Salish and Kootenai Tribes

Pub. L. No. 90-402²⁸² authorizes the Secretary, upon request of the Confederated Salish and Kootenai Tribes, to dispose of specific lands within the exterior boundaries of the Flathead Reservation in Montana by sale at not less than fair market value or by exchange, and to thereby acquire Indian or non-Indian owned land within the Reservation boundaries and to hold such lands for Tribal use or sale to Tribal members.

²⁷⁷ 43 U.S.C. § 869(c).

²⁷⁸ 43 U.S.C. § 869(b); 43 U.S.C. § 1721.

²⁷⁹ 43 U.S.C. § 869-1.

²⁸⁰ 43 U.S.C. § 869-2.

²⁸¹ Codified at 16 U.S.C. § 835g.

²⁸² 82 Stat. 356.

3. Three Affiliated Tribes

Section 206(b) of the Fort Berthold Mineral Restoration Act of 1984²⁸³ authorizes the Secretary of the Army and the Secretary of the Interior to enter agreements to declare lands within the reservation acquired by the United States for the construction, maintenance, or operation of the Garrison Dam and Reservoir Project that are no longer needed for such purposes as held by the United States in trust for the Three Affiliated Tribes of the Fort Berthold Reservation.

4. Catawba Tribe Land Claims Settlement Act

Section 9(a) of the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993,²⁸⁴ 107 Stat. 1118, extends the provisions of the Indian Reorganization Act to the Catawba Indian Tribe. Section 12 of the act authorizes the Secretary to approve the sale, exchange, or lease lands within the Tribe's reservation, limiting the total size of the Tribe's reservation to 6,000 acres within South Carolina, but permitting the Tribe to acquire additional non-reservation lands that can be held in fee simple.

5. Maine Indian Claims Settlement Act

Section 5 of the Maine Indian Claims Settlement Act of 1980²⁸⁵ authorizes the Secretary to purchase, from funds allocated under the Act, or otherwise acquire for the tribes, land or natural resources within the state of Maine to be held in trust. The Act expressly limits the Secretary's authority to acquire such property to the provisions outlined in the Act and precludes trust acquisitions pursuant to the IRA.

6. Menominee Restoration Act

Section 6 of the Menominee Restoration Act²⁸⁶ mandates that the Secretary accept land owned by the Tribe or its members within the boundaries of Menominee County, Wisconsin and that such land shall be held as reservation land.

7. Texas Band of Kickapoo Act

Section 5 of the Texas Band of Kickapoo Act²⁸⁷ extends the Secretary's authority under the IRA to acquire lands in trust for the benefit of the Tribe but limits the Secretary's acquisition authority to land located in Maverick County, Texas.

²⁸³ Pub. L. No. 98-602, 98 Stat. 3152 (1984).

²⁸⁴ Pub. L. No. 103-116, 107 Stat. 1118 (1993).

²⁸⁵ Pub. L. No. 96-420, 94 Stat. 1785.

²⁸⁶ Pub. L. No. 93-197, 87 Stat. 770 (1973).

²⁸⁷ Pub. L. No. 97-429, § 5(a), 96 Stat. 2269, 2270 (1983).

APPENDIX I.

SOL CONTACT INFORMATION

For further information and advice on specific collaborative or cooperative co-stewardship proposals, Bureaus are advised to contract the appropriate Solicitor's office.

A. Alaska Regional Solicitor

The Office of the Alaska Regional Solicitor is located in Anchorage, Alaska. (907) 271-4131.

B. Pacific Northwest Regional Solicitor (Idaho, Montana, Oregon, and Washington)

The Office of the Northwest Regional Solicitor is located in Portland, Oregon. A Field Office is located in Boise, Idaho. (503) 231-2126.

C. Pacific Southwest Regional Solicitor (California, Hawaii, Nevada, and the Pacific Islands)

The Office of the Pacific Southwest Regional Solicitor is located in Sacramento, California. A Field Office is located in San Francisco, California. (916) 978-6131.

D. Southwest Regional Solicitor (New Mexico, Oklahoma, Texas, Arizona, Colorado, Kansas, Louisiana, Illinois, Indiana, and Alabama)

The Office of the Regional Solicitor is located in Albuquerque, New Mexico. A Field Office is located in Tulsa, Oklahoma. (505) 248-5600.

E. Southeast Regional Solicitor (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the Virgin Islands)

The Office of the Regional Solicitor is located in Atlanta, Georgia. A Field Office is located in Knoxville, Tennessee. (404) 331-4447.

F. Northeast Regional Solicitor (Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin)

The Office of the Regional Solicitor is located in Minnesota's Twin Cities area. Field Offices are located in Boston, Massachusetts, and Pittsburgh, Pennsylvania. (612) 713-7100.

G. Intermountain Regional Solicitor (Utah, Arizona and Nevada)

The Office of the Regional Solicitor is located in Salt Lake City, Utah. A Field Office is located in Phoenix, Arizona. (801) 524-5677.

H. Rocky Mountain Regional Solicitor (Colorado, Iowa, Kansas, Missouri, Nebraska, and Wyoming)

The Office of the Rocky Mountain Regional Solicitor is located in the Denver, Colorado, metropolitan area. A Field Office is located in Billings, Montana. (303) 445-0610.

I. Office of the Solicitor

The Office of the Solicitor is headquartered in Washington, D.C. and is comprised of the Division of Mineral Resources (BLM, BOEM, BSEE, OSM); the Division of General Law; the Division of Indian Affairs (BIA); the Division of Land Resources (BLM); the Division of Parks & Water (NPS, FWS); and the Division of Water Resources (BOR, DPW). (202) 208-4423.

APPENDIX II.

RELATED POLICY & GUIDANCE

In addition to the authorities described above, this section details sources of additional guidance that can support cooperative and collaborative arrangements with Tribes, including Executive and Secretarial Orders, guidance of Bureaus, including annual Tribal consultation reports, as well as guidance from the Department's sister agencies, including the Department of Agriculture.

A. Executive Orders

Executive Orders (EOs) are issued by the President of the United States to manage Executive Branch operations. The following EOs may have relevance for issues of collaborative and cooperative stewardship arrangements between the Department and Tribes.

1. E.O. 14008, Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021)

Establishing policy to combat the climate crisis by aligning the management of Federal procurement and real property, public lands and waters, and financial programs to support robust climate action and further directing the Secretary of the Interior to consult with Tribal authorities regarding the development and management of renewable minerals and conventional energy resources on Tribal lands.

2. E.O. 14082, Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022 (Sep. 12, 2022)

Directing Federal agencies in implementing the energy and infrastructures provisions in the Inflation Reduction Act of 2022, Pub. L. 117-169, to prioritize effectively coordinating with Tribal governments in implementing critical investments

3. E.O. 14052, Implementation of the Infrastructure Investment and Jobs Act (Nov. 18, 2021)

Directing Federal agencies in implementing the Infrastructure Investment and Jobs Act, Pub. L. 117-58, to prioritize effectively coordinating with Tribal governments in implementing critical investments.

4. E.O. 13352, Facilitation of Cooperative Conservation (Aug. 26, 2004)

Directing Interior, Agriculture, Commerce, Defense, and the EPA to implement environment and natural resources laws in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in

Federal decision-making, in accordance with their respective agency missions, policies, and regulations.

5. E.O. 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000)

Establishing principles and directions for Federal agency consultation with federally recognized Tribes. *See also Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (Jan. 26, 2021) (reaffirming requirement that Federal agencies prepare and periodically update detailed plan of action to implement the policies of EO 13175).

6. E.O. 13007, Indian Sacred Sites (May 24, 1996)

Directing Federal agencies having statutory or administrative responsibilities for management of Federal lands to accommodate access to and use of Indian sacred sites and to avoid adversely affecting physical integrity of such sites, to the extent practicable and consistent with law. *See also* 512 DEPARTMENTAL MANUAL (DM) 3 (establishing policies, responsibilities, and procedures for implementing E.O. 13007).

B. Secretarial Orders

In addition to S.O. 3403 and S.O. 3342, the following Secretarial Orders also provide support for collaborative and cooperative stewardship arrangements.

1. S.O. 3366, Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior (Apr. 18, 2018)

Directing Bureaus to collaborate with relevant Tribal authorities responsible for recreation during the Department's land management planning and implementation, including prioritizing recreational projects and funding that contribute to achieving recreational opportunities; to work cooperatively with Tribal wildlife agencies to enhance their access to Department lands to provide opportunities for recreation; and to work cooperatively with Tribal wildlife agencies to ensure that regulations for recreation on lands and waters managed by the Department complement, or at a minimum do not contradict, the regulations on the surrounding lands and waters to the extent legally practicable.

2. S.O. 3362, Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors (Feb. 9, 2018)

Directing Bureaus to collaborate with Tribal fish and wildlife agencies to attain or sustain wildlife population goals during the Department's land management planning and implementation, and to identify additional ways to work cooperatively with Tribal wildlife agencies to enhance access to the Department's land for wildlife management actions, including for Tribes.

3. S.O. 3356, Hunting, Fishing, Recreational Shooting, and Wildlife Conservation Opportunities and Coordination with States, Tribes, and Territories (Sep. 15, 2017)

Directing greater collaboration with Tribes and Tribal wildlife agencies to coordinate in identifying opportunities for increased access to Department lands and waters, including for access through adjacent lands; to attain or sustain wildlife population goals during Department land-management planning and implementation, including prioritizing active habitat-management projects and funding that contribute to achieving wildlife population objectives, particularly for wildlife that is hunted or fished; and to work cooperatively with Tribal wildlife agencies to enhance their access to Department lands for wildlife management actions.

4. S.O. 3225, Endangered Species Act and Subsistence Uses in Alaska (Depts. of Interior and Commerce) (Supplementing S.O. 3206) (Jan. 19, 2001)

Clarifying application of S.O. 3206 in Alaska and requiring Department to provide information indicating conservation concerns relative to a species that is listed as endangered or threatened under the ESA and also used for subsistence to affected Alaska Natives, Tribes, and other Native organizations; to seek their full and meaningful participation in evaluating and addressing conservation concerns; and to seek input from, and collaboration with, Alaska Natives when gathering information upon which to base findings relative to whether a subsistence take is materially and negatively affecting listed species; and for other purposes.

5. S.O. 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (Depts. of Interior and Commerce) (Jun. 5, 1997)

Clarifying Departmental responsibilities as to actions taken under authority of the ESA and its implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, and requiring Departments to work directly with Tribes on a government-to-government basis to promote healthy ecosystems; to recognize that Indian lands are not subject to the same controls as federal public lands; to assist Tribes in developing and expanding Tribal programs for promoting healthy ecosystems so as to render conservation restrictions unnecessary; to be sensitive to Indigenous culture, religion, and spirituality; and to make available to Tribes information related to Tribal trust resources and Indian lands, to facilitate the mutual exchange of information and strive to protect sensitive Tribal information from disclosure.

C. Departmental Directives

The Departmental Manual (DM) is the authorized means of documenting and issuing instructions, policies, and procedures that have general and continuing

applicability to Departmental activities,²⁸⁸ and it describes the organizations and functions of the Department's Bureaus, documents delegations of the Secretary's authority, and prescribes the policies and general procedures for administrative activities and specific program operations.²⁸⁹ The following non-exclusive list of DM chapters provides examples of how the DM may generally or particularly support collaborative and cooperative co-stewardship arrangements.

1. 512 DM 2 (Responsibilities for Indian Trust Resources)

Part 512 addresses American Indian and Alaska Native Programs. Chapter 2 establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the federal Indian trust responsibility.

2. 512 DM 3 (Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites)

Establishes the policy, responsibilities, and procedures to accommodate access to and ceremonial use of Indian sacred sites and to protect the physical integrity of such sites consistent with E.O. 13007, "Indian Sacred Sites."

3. 512 DM 4 (Policy on Consultation with Indian Tribes and Alaska Native Corporations)

Provides Departmental requirements for government-to-government consultation between Department and Tribal and Alaska Native Corporation officials, expands and clarifies the Department's policy on consultation with Indian Tribes and Alaska Native Corporations, and acknowledges the provisions for conducting consultation in compliance with E.O. 13175, applicable statutes, and administrative actions.

4. 512 DM 5 (Procedures for Consultation with Indian Tribes)

Provides the procedures and process government-to-government consultation between Department and Tribal and Alaska Native Corporation officials.

5. 514 DM 1 (Hawaiian Homes Commission Act)

Describes the structures and procedures for carrying out the Secretary's responsibilities under the Hawaiian Homes Commission Act for approving certain exchanges of land by the Department of Hawaiian Home Lands of the State of Hawaii.

²⁸⁸ 011 DM 1.1.

²⁸⁹ 011 DM 1.2.

6. 604 DM 1 (Implementing Landscape-Level Approaches to Resource Management)

Establishes policy and provides guidance on implementing landscape-level approaches to resource management for all Bureaus with responsibilities for the management of resources, including but not limited to water, lands, air quality, natural, scenic, recreational, and cultural, and infrastructure under the Department's jurisdiction. Defines "landscape goals" as broad statements of present and desired future landscape condition developed in coordination with stakeholders.²⁹⁰

D. Interagency Agreements

1. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights (2021)

Signed by 17 Federal agencies, the Tribal Treaty Rights MOU commits the Department to work to support the creation, integration, and use of a searchable and indexed database of all treaties between the United States government and Tribal nations and facilitate understanding and compliance with our treaty obligations; to enhance ongoing efforts to integrate consideration of Tribal treaty and reserved rights early into the federal decision-making and regulatory processes to ensure agency actions are consistent with constitutional, treaty, reserved, and statutory rights; and to develop, improve, and share tools and resources for identifying, understanding, and analyzing whether and how Tribal treaty and reserved rights may be adversely impacted or otherwise affected by agency decision-making, regulatory processes or other actions or inaction.

2. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites (2021)

Signed by 8 Federal agencies, the Sacred Sites MOU commits the Department to improving the protection of, and access to, Indigenous sacred sites through enhanced and improved interdepartmental coordination, collaboration, and action, and through demonstrating its commitment by considering issues of protection and access to Indigenous sacred sites early in the process of agency decision-making and regulatory processes.

²⁹⁰ 604 DM 1.4.B.

E. Bureau Guidance

1. BIA, National Policy Memorandum NPM-DBIA-2022-2, Supporting Tribal Nations in Stewardship of Federal Lands and Water (Nov. 18, 2022)

Providing policy guidance for BIA programs, offices, regions, and agencies to support collaborative and cooperative stewardship of Federal lands and waters pursuant to S.O. 3403, including directing BIA staff to support the goals of SO 3403; establishing a national framework for BIA to support other bureaus and offices in fulfilling treaty and trust responsibilities to Tribes in the stewardship of Federal lands and waters in ways sensitive to variations in Tribal histories; affirming BIA support for its sister bureaus and offices as they develop and broaden nation-to-nation relationships with Tribes; and reaffirming BIA's commitment and support to the consolidation of Tribal homelands, the pursuit of co-stewardship, and the utility of Indigenous Knowledge for the stewardship and management of Federal lands and waters.

2. BLM, Permanent Instruction Manual (PIM) No. 2022-011, "Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary's Order 3403" (Sep. 13, 2022)

Providing BLM direction for implementing the provisions of S.O. 3403, including on ways for: designing co-stewardship arrangements; involving Tribes in the processes resulting in BLM decision-making, including land-use planning; identifying co-stewardship opportunities; evaluating and incorporating Indigenous Knowledge in its analyses and decision-making; and documenting all co-stewardship arrangements.

3. BSEE, Bureau Interim Directive (BID) 2022-047N, Part 570 – Tribal Engagement (Oct. 27, 2022)

Establishing National Tribal Engagement Program to ensure BSEE's commitment to Tribal engagement throughout the Bureau, with requirements: to designate a Tribal Liaison Officer; to ensure BSEE's compliance with Departmental requirements on Tribal and Alaska Native corporations consultations and meetings; to ensure NTEP has necessary resources to carry out its consultation responsibilities; and to ensure adequate training for BSEE representatives with responsibilities for Tribal consultations.

4. FWS, Director's Order (DO) No. 227, "Fulfilling the Trust Responsibility to Tribes and the Native Hawaiian Community, and Other Obligations to Alaska Native Corporations and Alaska Native Organizations, in the Stewardship of Federal Lands and Waters" (Sep. 8, 2022)

Stepping-down the requirements of S.O. 3403 to ensure that FWS manages Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence,

and cultural interests of Tribes, Alaska Native corporations, and the Native Hawaiian Community; establishes a consistent national framework for guiding FWS in administering trust responsibilities to Tribes and the Native Hawaiian Community in the stewardship of federal lands and waters, including where Tribes have subsistence or other rights or interests; reaffirms FWS's commitment for government-to-government relationship with Tribes and its government-to-sovereign relationship with the Native Hawaiian Community, acting through the Native Hawaiian Organizations; and supplements FWS's existing Native American Policy at 510 FW 1, and forthcoming Alaska Native Relations Policy at 510 NW 2.

5. FWS, 510 FW 1, Native American Policy (updated Jan. 20, 2016)

Providing a framework for government-to-government relationships with Tribes and articulates the principles for FWS's interactions with Tribes on issues of shared interests in the conservation of fish, wildlife, and their habitats, including FWS lands and cultural resources that exist on those lands, as well as co-management and collaborative management.²⁹¹

6. FWS, Traditional Ecological Knowledge for Application by Service Scientists (Feb. 2011)

Providing overview of definitions of traditional ecological knowledge and its potential uses by FWS.²⁹²

7. NPS, Policy Memorandum 22-03, Fulfilling the National Park Service Trust Responsibility to Indian Tribes, Alaska Natives, and Native Hawaiians in the Stewardship of Federal Lands and Waters (Sep. 12, 2022)

Setting forth guidance on how NPS will implement the requirements of S.O. 3403 and supplements existing guidance found in *NPS Management Policies 2006* on matters including consultation; co-stewardship of federal lands and waters; collaborative and annual funding agreements; access to and protection of sacred sites; Tribal expertise and Indigenous knowledge; treaty rights and trust responsibilities; and NPS staff competencies and trainings.

8. NPS, Management Policies 2006 (2006)

Setting forth framework and providing direction for all NPS management decisions.²⁹³ Adherence is mandatory unless specifically waived or modified by the Secretary, Assistant Secretary, or NPS Director.²⁹⁴ Numerous provisions address working relationships with Tribes, from the basics of engagement,²⁹⁵ park system

²⁹¹ Available at <https://fws.gov/media/native-american-policy-2016-0>.

²⁹² Available at <https://www.fws.gov/media/traditional-ecological-knowledge-fact-sheet>.

²⁹³ Available at https://www.nps.gov/subjects/policy/upload/MP_2006.pdf.

²⁹⁴ NPS Management Policies 2006 at 4.

²⁹⁵ See *id.* at subsections 1.7 (civic engagement), 1.11 (relationships with American Indian Tribes), and 1.12 (Native Hawaiians, Pacific Islanders, and Caribbean Islanders).

planning,²⁹⁶ natural resource management,²⁹⁷ and wilderness preservation and management.²⁹⁸

9. NPS, Reference Manual RM 66B, “Handling Protected Information” (Oct. 2004)

Discussing available procedures and tools for handling protected information collected, maintained, or disseminated by NPS concerning cultural and natural resources.²⁹⁹ NPS’s “Reference Sensitivity, Proprietary and Quality Designations” (Aug. 27, 2018) provides further discussion of ways to protect sensitive data from public disclosure.³⁰⁰

10. NPS, Making Friends. An Introduction to Building National Park Service Friends Groups (Apr. 2009)

Handbook for NPS staff and communities interested in creating or expanding Friends Groups, which help support interpretive, educational, and scientific activities through fundraising, membership programs, and awareness building.³⁰¹ Though it does not address Tribal collaboration, it includes an appendix listing and summarizing authorities and statutory tools that may be useful in forming partnership arrangements.

11. BOR, Reclamation Manual, Policy NIA P10, “Indian Policy of the Bureau of Reclamation” (Jul. 24, 2014, rev. Sep. 24, 2020)

Setting forth BOR’s policies for complying with the laws and policies defining the United States’ special relationship with Tribes and for ensuring that Tribes have the opportunity to participate in the Reclamation Program.³⁰²

²⁹⁶ See *id.* at subsections 2.1.3 (NPS “will actively seek out and consult with existing and potential visitors, neighbors, American Indians, other people with traditional cultural ties to park lands... The Service will work cooperatively with others to improve the condition of parks; to enhance public service; and to integrate parks into sustainable ecological, cultural, and socioeconomic systems”), and 2.3.1.5 (members of the public, including American Indians, will be encouraged to participate during the preparation of a general management plan and the associated environmental analysis).

²⁹⁷ See, e.g., *id.* at subsection 4.1.4 (NPS will pursue opportunities to improve natural resource management within parks and across administrative boundaries by pursuing cooperative conservation with public agencies, appropriate representatives of American Indian tribes and other traditionally associated peoples, and private landowners in accordance with Executive Order 13352 (Facilitation of Cooperative Conservation)).

²⁹⁸ See *id.* at subsection 6.3.12 (American Indian access and associated sites) (addressing protection and maintenance of certain sites associated with Tribes).

²⁹⁹ Available at <https://irma.nps.gov/DataStore/Reference/Profile/2224216>).

³⁰⁰ Available at <https://irma.nps.gov/DataStore/DownloadFile/626221>.

³⁰¹ Available at <http://npshistory.com/publications/rtca/making-friends.pdf>.

³⁰² Available at <https://www.usbr.gov/recman/nia/nia-p10.pdf>.

12. BOR, Guidance for Implementing Indian Sacred Sites Executive Order 13007 (Sep. 16, 1998)

Setting forth BOR interim guidance for implementing E.O. 13007.

13. Office of the Solicitor Partnership Legal Primer (2004)

Providing guidance for Bureaus to develop effective and appropriate partnerships, which can be important to effectively accomplishing the Department's various missions of managing, conserving, and protecting America's natural, cultural, and historic resources.³⁰³ The *Partnership Primer* addresses questions about the nature of partnerships generally, and the legal frameworks for engaging in them. Though in need of updating and revision in light of subsequent changes in law, especially with respect to use of appropriations and Department resources, the *Partnership Primer* remains a valuable resource for understanding the issue of collaborative and cooperative arrangements.

14. DOI Bison Working Group (NPS, FWS, BLM, BIA, USGS), 2020 Bison Conservation Initiative

Describing the Bison Working Group's principles for accomplishing collaborative approaches to ecological and cultural restoration of American bison, and describing five goals, including shared stewardship with Tribes, states, and other stakeholders.³⁰⁴

F. Other

1. Cooperative Ecosystems Studies Units National Network

The Cooperative Ecosystem Studies Units (CESU) Network³⁰⁵ is a national consortium of Federal agencies,³⁰⁶ Tribes, academic institutions, state and local governments, nongovernmental conservation organizations, and other partners working together to support informed public trust resource stewardship. Federal partners participating in CESU include BIA, BLM, BOEM, BOR, FWS, and USGS.³⁰⁷ CESUs provide research, technical assistance, and education to federal land management, environmental, and research agencies and their partners to address natural and cultural resource management issues at multiple scales and in an ecosystem context. Federal agencies participate in CESUs within the scope of

³⁰³ U.S. Dep't of Interior, Office of the Solicitor, *Partnership Legal Primer* (1st ed. Sept. 2004).

³⁰⁴ Available at <https://www.nps.gov/articles/000/bison-conservation-initiative.htm>.

³⁰⁵ Further information on CESUs is available at <http://www.cesu.psu.edu/default.htm>.

³⁰⁶ As of January 2022, 17 Federal agencies participated in the CESU Network. See http://www.cesu.psu.edu/materials/FactSheet_CESU_Partners_JAN2022.pdf. These included the following Bureaus: BIA; BLM; NPS; FWS; BOR; BOEM; USGS. Participating agencies of USDA include the Forest Service and the Farm Agency.

³⁰⁷ Other federal partners include USFS, the National Oceanic and Atmospheric Administration; National Aeronautics and Space Administration; Department of Defense, Office of the Assistant Secretary of Defense for Sustainment and POW/MIA Accounting Agency; U.S. Army Corps of Engineers; and Department of Energy, Western Area Power Administration.

their respective missions and administrative structure. The CESU Network includes more than 480 nonfederal partners and 17 Federal agencies across seventeen CESUs representing biogeographic regions encompassing all 50 states, the District of Columbia, and U.S. insular areas.

APPENDIX III.

CURRENT EXAMPLES OF COLLABORATIVE STEWARDSHIP ARRANGEMENTS

The following list is intended to provide examples of current collaborative stewardship arrangements with Tribes for Bureau staff seeking further information on possible arrangements.

A. BLM

1. Bears Ears National Monument

In June 2022, the Bureau of Land Management, the U.S. Forest Service, and the five Tribes of the Bears Ears Commission – the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni – formalized a partnership for co-management of the Bears Ears National Monument. The BLM and the U.S. Forest Service jointly manage the monument and will prepare a management plan for federal lands within the 1.36 million-acre boundaries of the Bears Ears National Monument working cooperatively with the Tribal members of the Bears Ears Commission to protect and restore the monument objects and values.

B. FWS

1. Kodiak National Wildlife Refuge

FWS entered its first contract under Title I of ISDEAA with Koniag, Inc., an Alaska Native Claims Settlement Act Corporation, to support a new Community Affairs Liaison position intended to serve a critical role in enhancing communication and education programs and services between FWS and Alaska Native stakeholders in the Kodiak Archipelago. In doing so FWS recognizes and supports Koniag's deep cultural and historic ties in the region and its ability to meaningfully contribute to and enhance FWS's relationships and communications in the region.

2. Dworshak National Fish Hatchery

FWS and the Nez Perce Tribe have collaboratively managed the Dworshak National Fish Hatchery, located in the heart of the Nez Perce Reservation, since 2005. The U.S. Army Corps of Engineers constructed the Hatchery to mitigate for the impacts of Dworshak Dam on the North Fork of the Clearwater River and the four lower Snake River dams, and continues to own the facility. In 2016, FWS transferred all fish production at the Hatchery to the Tribe, which produces 2.1 million steelhead, 2.55 million spring Chinook, and 500,000 coho salmon annually and provides harvest opportunities for the shared Tribal and non-Tribal fisheries in the Clearwater, Snake and Columbia Rivers in Idaho, Washington and Oregon. FWS maintains its longstanding partnership with the Tribe by providing support to

the hatchery through the Idaho Fish and Wildlife Conservation Office and Pacific Region Fish Health Program.

3. Rappahannock River Valley National Wildlife Refuge

In April 2022, the Rappahannock Tribe re-acquired 465 acres of its ancestral land at Fones Cliffs, a sacred site on the eastern banks of the Rappahannock River in Virginia located within the Rappahannock River Valley National Wildlife Refuge. The site is a globally significant Important Bird Area for migratory birds, and the Refuge hosts one of the largest nesting populations of bald eagles on the Atlantic coast. A site of both natural and cultural importance, it is also a key feature along the Captain John Smith Chesapeake National Historic Trail. The Tribe's lands will be publicly accessible and held with a permanent conservation easement conveyed to FWS. The Tribe will create trails and a replica 16th-century village where its members can educate the public about their history and Indigenous approaches to conservation. The lands also offers opportunities for the Tribe to expand its Return to the River program, which trains Tribal youth in traditional river knowledge and practices and conducts outreach and education for other communities interested in the Rappahannock River. The Department, through FWS, continues to engage the Tribe about next steps for its important stewardship work, including ongoing management, interpretation, and continued use of the stewardship model for potential future acquisitions.

4. Lenape National Wildlife Refuge

In June 2022, FWS entered a Memorandum of Understanding with the Delaware Nation, the Delaware Tribe residing in Oklahoma, and the Stockbridge-Munsee Community in Wisconsin to establish a secure, respectful location on federal lands in the Delaware River Basin to rebury ancestral remains repatriated under the Native American Graves Protection and Repatriation Act. FWS offered a reburial site at Cherry Valley National Wildlife Refuge, part of the Lenape National Wildlife Refuge complex, in Stroudsburg, Pennsylvania. The agreement will guide the reburial process and the future operational relationship between the Refuge and the Tribes, who share ancestral ties to the region.

C. NPS

1. Acadia National Park

NPS been involved in a multi-year project with the Wabanaki Nations of Maine on traditional gathering of sweetgrass within Acadia National Park. The interdisciplinary work focuses on Wabanaki stewardship approaches through centuries of learned Indigenous knowledge and cultural protocols for Indigenous sovereignty within natural and cultural resource management on ancestral lands. The project, which aims to provide a template of culturally appropriate engagement between Native American gatherers and National Parks, has shown how effective incorporating Indigenous knowledge can be; the positive impacts plant-gathering

can have on plant colonies when done in a culturally appropriate traditional manner; and the benefits of including traditional knowledge at the initial stages of a project.

2. Statue of Liberty National Monument and Ellis Island

The Statue of Liberty National Monument has cooperative agreements in place with the Stockbridge-Munsee Community Band of Mohicans, the Delaware Tribe of Indians, and the Delaware Nation. The agreements were critical pieces of the park's efforts to greatly improve visitor experiences on Liberty Island and Ellis Island. In addition to increasing access to park areas and improving security screening, Tribal consultation resulted in a project to beautify Liberty Island through plantings and landscape changes.

3. Mount Rainier National Park

NPS is currently collaborating with the Nisqually Tribe to publish a report on the results of five years of traditional plant-gathering research on three species traditionally harvested by Nisqually tribal members on Mount Rainier, Washington. It will offer summary considerations and recommendations for administering traditional plant gathering activities in a manner that minimizes impact to harvested plants and associated plant communities. Furthermore, consultation with the Cowlitz Indian Tribe and Yakama Nation helped develop the Ohanapecosh Visitor Center exhibits to give visitors historical and contemporary context of the traditionally associated Taidnapam.