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This Land Is Not Our Land, This Land is Their Land: Returning National Park Lands to Their Rightful Protectors

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THIS LAND IS NOT OUR LAND, THIS LAND IS THEIR LAND: RETURNING
NATIONAL PARK LANDS TO THEIR RIGHTFUL PROTECTORS

By Sierra Kennedy¹

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**THIS WAS WRITTEN IN WASHINGTON, DC, WHICH IS
LOCATED ON PISCATAWAY AND NACOTCHTANK
(ANACOSTAN) LAND.**

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We are the land . . . that is the fundamental idea embedded in Native American life . . . the Earth is the mind of the people as we are the mind of the earth. The land is not really the place (separate from ourselves) where we act out the drama of our isolate destinies. It is not a means of survival, a setting for our affairs . . . It is rather a part of our being, dynamic, significant, real. It is ourself . . . It is not a matter of being ‘close to nature’ . . . The Earth is, in a very real sense, the same as our self (or selves) . . . That knowledge, though perfect, does not have associated with it the exalted romance of the sentimental ‘nature lovers’, nor does it have, at base, and self-conscious ‘appreciation’ of the land . . . It is a matter of fact, one known equably from infancy, remembered and honored at levels of awareness that go beyond consciousness, and that extend long roots into primary levels of mind, language, perception and all the basic aspects of being . . .” - Paula Gunn Allen, Laguna Pueblo²

I. INTRODUCTION

Land is and always has been vital to Native Americans.³ To take what would become national park land, militias across the county attacked and murdered entire tribes.⁴ These were not individual decisions, but ordered by the government.⁵ Understanding the connection between Native Americans and their land is an ongoing struggle for non-Natives.⁶ The only point of agreement between settlers and Native Americans pertaining to national park lands, now or then, is the unparalleled beauty these lands hold. Where settlers and Native Americans differ is how, for whom, and why.⁷

² ARNE KALLAND & ANNIE L. BOOTH, NATURE ACROSS CULTURES: VIEWS OF NATURE AND THE ENVIRONMENT IN NON-WESTERN CULTURES 329, (Helaine Selin ed., Kluwer Academic Publishers 2003).

³ Andrew Lee, *Decolonize the parks*, ANTI-RACISM DAILY, (Jul. 14, 2021), <https://www.wayfair.com/foodservice/pdp/symple-stuff-boulangier-hairpin-metal-legs-base-w004247163.html>. (Showing the idea of Native Americans being subhuman was rooted in the founding of the United States).

⁴ *Id.* (Discussing the slaughter of the Miwok people by a California militia, ordered by the governor of California, to gain access to the lands that later will become Yosemite National Park.), <https://ckarchive.com/b/75u7h8h2732p> (last visited July 17, 2021).

⁵ *Id.* (Showing the idea of Native Americans being subhuman was rooted in the founding of the United States), (Beginnings of our national parks are deeply tied to racism and white supremacy by the likes of men such as John Muir and Madison Grant.); See *John Muir: A Brief Biography*, *Sierra Club*, SIERRA CLUB https://vault.sierraclub.org/john_muir_exhibit/life/muir_biography.aspx, (last visited December 14, 2021), Brentin Mock, *The U.S. National Park Service Grapples with Its Racist Origins*, BLOOMBERG CITYLAB, (Aug. 26, 2016, 12:45 PM), <https://www.bloomberg.com/news/articles/2016-08-26/at-its-centennial-anniversary-the-u-s-national-park-service-tries-to-diversify-its-visitors-and-workforce>, (Founding based in bigotry radi- ate through systems for a very long time.).

⁶ See *Stop The Line 3 Pipeline*, STOPLINE3.ORG, <https://www.stopline3.org> (last visited December 14, 2021) (Showing current struggles between the American government and Native American land protections.).

⁷ *Birth of a National Park*, NATIONAL PARK SERVICE,

The first national parks in the United States were founded before the creation of their regulating agency, the National Park Service (NPS).⁸ The National Park Service was not established until the National Park Services Organic Act of 1916 (NPSOA) was signed into law.⁹ Meaning, the government understood the importance of protecting lands and setting them aside for public use and conservation before they even delegated an agency to oversee them. As more lands was stolen, the government saw the need for an agency dedicated to their care.

Though the parks and the history of their preservation is important, that is only part of their story. The history of the national parks system is inextricably linked to feelings of entitlement based on race.¹⁰ These aspects are not only found in the beginning of the parks, but throughout their history and continue today.¹¹ The United States government created the national park system through executive orders and acts passed by Congress.¹² NPS also has the power to make regulations within their parks¹³ Now, national parks continue to grow with the guidance of the Secretary of the Department of the Interior.

Many people think a monetary remedy to those who have been disadvantaged will help heal wounds and progress America forward.¹⁴ The reality is, money could never fully fix the

<https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm>, (last visited December 14, 2021); *Theodore and Conservation*, NATIONAL PARK SERVICE, <https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm>, (insert last visited date); (For the United States government, preservation has taken a second seat to tourism; preservation is paid for by tourism.). Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RESOURCES L. REV 42, 42 (2007); *Native American Describe Traditional Views of Land Ownership*, SOCIAL HISTORY FOR EVERY CLASSROOM, <https://shc.ashp.cuny.edu/items/show/1543>, (last visted December 14, 2021); Joel Brady, *Land is Itself A Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV.. 153 (2000) (Highlighting the importance of preservation to the founding of national parks and to the tribes

⁸ *Quick History of the National Parks*, NATIONAL PARK SERVICE, <https://www.nps.gov/articles/quick-nps-history.htm>, (last visited December 14, 2021) (Discussing the creation of the National Park System and its close relationship with the Bureau of Indian Affairs.);

⁹ See Organic Act of 1916, 54 U.S.C. (Establishing the National Park System).

¹⁰ Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RESOURCES L. REV (INSERT PAGE NUMBER) (2007) (Giving an example of the claim in relation to Yellowstone National Park.).

¹¹ Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 615-17 (2020) (The history of national parks is, regrettably, in-extricably linked to feelings of entitlement based on race.); Jack Goldsmith, *Designing for Diversity*, 68 NAT'L PARKS 20 (May/June 1994) (Analyzing the lack of diversity among the people who visit National Parks.), David Treuer, *Return the National Parks to the Tribes*, THE ATLANTIC (May 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/> (last visited July 17, 2021) (Reviewing the statistics of various ethnic groups that visit the major National Parks.), supra note 3.

¹² See Organic Act of 1916, 54 U.S.C. (Establishing the National Parks Service within the Department of the Interior and removing the public lands from the Department of War); Antiquities Act of 1906, 16 U.S.C. 431-33

¹³ See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999) (Showing an instance when a park made a regulation for its own land.).

¹⁴ Rashawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, 2020 POL'Y 2020

problem. Native Americans view the land as life. Land is tied to their spiritual beliefs, their ancestors, their very existence, and survival. You cannot take away someone’s life and mend the issue with a dollar amount. The heart of their culture—their land—needs to be returned.

The focus of this Comment is to lay the legal foundation for the Department of the Interior, most notably the Secretary of the Interior Deb Haaland, to begin giving national park lands back to the Native American tribes that occupied them before colonization in America. Part I will focus on brief histories of the National Park Service, land taking, and Native American preservation practices. This leads to the co-management aspect proposed in this Comment. Part II will discuss and outline the processes in which land has been acquired and either transformed or added to already protected national parks. There will be an evaluation of the different attempts through the courts to give the land back to the tribes it rightfully belongs to, and where co-management and compromise has gotten us to today concerning the use of public lands. Part III will use the proceeding legal analysis to form the final recommendation of a plan to return the national park lands back to their original caretakers. This will begin with the co-management of these lands that will allow the Department of the Interior to work with Native Americans for conservation efforts while putting Native American connections first. With this goal in mind, this Comment focuses on commencing co-management tactics between the Department of the Interior and the rightful caretakers of the lands. After the co-management is successful, national parks will be given back to those caretakers, one by one.

President Theodore Roosevelt utilized the power given to him by the Antiquities Act in 1906 to take millions of acres of land from tribes across the country and turn them into national parks, though that is not the only way lands can be deemed National Park lands.¹⁵ Congress also has the ability to add land via legislation alongside the Secretary of the Interior.¹⁶ Now, as this research establishes, the Secretary of the Interior can use the power given to her by acts and public law discussed throughout this Comment to also add, or take away, lands from the National Parks Service.¹⁷ These strategies can be used to finally give that land back. There are over eighty million acres of national park land in the United States and hundreds of acres continue to be added.¹⁸ Paired with the power given to the Department of the Interior by the

BROOKINGS, Apr. 15, 2020 <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> (Providing an argument for reparations for Black Americans; use to compare the difference between the unfortunate situations of Black Americans and Native Americans.).

¹⁵ *Theodore Roosevelt and Conservation*, NATIONAL PARK SERVICE, www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm, (last visited December 14, 2021); see also Sarah Krakoff, *Not yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 567 (2020); see e.g., Indian Removal Act, 4 Stat. 411-12 (May 28, 1830) (Showing the basis for the argument that the land taken that took place was wrongful in nature).

¹⁶ *Id.* (Warranting the use of “wrongful land taking” throughout this Comment).

¹⁷ See National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101-307108.

¹⁸ The New River Gorge National Park is the newest national park in the United States. New River Gorge is located in West Virginia and contains 72,808 acres of newly protected land. The new park is on S’atsoyaha (Yuchi), Tutelo, Moneton land. At this time, I cannot find any statement from these tribes on the designation of the new park.

American Indian Religious Freedom Act of 1978 (AIRFA)¹⁹, the Burke Act²⁰, precedent from several Supreme Court rulings²¹, and the increasing demand for change, Secretary Haaland can utilize her life experiences, heritage, and knowledge to start righting a nearly 700 year wrong.²²

II. “WE ARE THE LAND . . .”: NATIVE CULTURE, SPIRITUALITY, AND THE HISTORY OF DISPOSSESSION

A. *Preservation and Co-Management*

The need for conservation by settlers arose from nature writers.²³ These writers believed that humans could not occupy space and it still be preserved.²⁴ Subsequently, President Theodore Roosevelt single handedly took millions of acres and deemed them protected public lands through the Antiquities Act; he established national monuments, like Devils Tower, in 1906 and throughout the rest of his presidency until 1909.²⁵

The NPSOA had the purpose of ensuring conservation of the lands, flora and foliage, and the wildlife within them to ensure the same access and enjoyment for as long as possible.²⁶ Throughout the establishment of the parks there has been an increasing acknowledgment of Native American rights to the land.²⁷ Though acknowledgment is a step forward, the rights of the Native American tribes tied to national parks still falls second to preservation, conservation, and tourism.²⁸

Long before settlers came to what is now the United States, Native Americans preserved all the land around us. Though the national parks were founded for conservation and

¹⁹ American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469.

²⁰ 25 U.S.C. ch. 9 § 349.

²¹ *Lyng v. Northwest Indian Cemetery Protective Association*, 108 S.Ct. 1319 (1988), *United States v. Peterson*, 121 F.Supp.2d 1309 (D. Mont 2000), and *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

²² *Secretary Deb Haaland*, DEPARTMENT OF THE INTERIOR, [doi.gov/secretary-deb-haaland](https://www.doi.gov/secretary-deb-haaland), (last visited December 14, 2021).

²³ Kantor, *supra* note 9.

²⁴ *National Monument and Antiquities Act*, CONGRESSIONAL RESEARCH SERVICE, fas.org/sgp/crs/misc/R41330.pdf, (insert last visited date).

²⁵ Kantor, *supra* note 9 at 53.

²⁶ *John Muir: A Brief Biography*, SIERRA CLUB, https://vault.sierraclub.org/john_muir_exhibit/life/muir_biography.aspx. (last visited December 14, 2021).

²⁷ Kantor, *supra* note 9 at 60 (Giving an example of the claim in relation to Yellowstone National Park.); See generally Jim Robbins, *How Returning Lands to Native Tribes Is Helping Protect Nature*, 360, (June 3, 2021), <https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature> (Discussing an example of land return back to Native tribes.).

²⁸ Kantor, *supra* note 9 at 59-60. (NPS took it upon themselves to listen to local tribes about the disrespect and damage done to Devils Tower by climbers and act, setting forth a regulation that was implemented to help keep both climbers and surrounding tribes happy.).

preservation, it quickly became secondary to ensuring a steady stream of paying visitors to these parks.²⁹ For the sake of preservation, however, conservationists across the globe, including the Nature Conservancy, one of the world's largest conservation organizations, are in agreement that preservation is best left in the hands of the tribes.³⁰ Even within the Department of the Interior, specifically the Fish and Wildlife Service, many are adamant that success in conservation and preservation relies on co-management between Native tribes and the Department of the Interior.³¹

The way in which Indigenous peoples manage their land is known as Traditional Ecological Knowledge (TEK).³² The current Administration has stated its desire to work more with Native tribes in order to protect even more public lands, but has not specifically spoke on using TEK to accomplish this.³³ The main difference between Western and Indigenous practices in preservation and conservation is the holistic knowledge Indigenous peoples around the world have had for millennia.³⁴ Doing so shows around the world in different Indigenous practices protecting more land and better than the Department of the Interior can do alone.³⁵

Addressing co-management is not a new concept. There are successful examples of co-management between the Department of the Interior and tribal governments.³⁶ The Tribal Self-Governance Act (TSGA) of 1994 put into place a system that would allow the management of federal land to be transferred to Native American tribes.³⁷ As long as the tribe has "special geographical, historical, or cultural significance" to the land in question, all they have to do is petition the Department of the Interior for management.³⁸ TSGA only applies to federal programs within the Department of the Interior; the National Park System is within the

²⁹ Richard West Stellars, *Preserving Nature in the National Parks*, National Park Service https://www.nps.gov/parkhistory/online_books/sellars/chap7c.htm (last visited July 17, 2021) (Discussing the stresses park leadership are facing that are causing the focus on preservation and the environment to switch to that of a focus on politics and tourism)

³⁰ Robbins, *supra* note 26.

³¹ *Working with Native American Tribes*, U.S. Fish & Wildlife Services, <https://www.fws.gov/southeast/our-services/native-american-tribes>, (Mar. 25, 2019).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Richard Schuster et al., *Vertebrate Biodiversity on Indigenous-managed Lands in Australia, Brazil, and Canada Equals that in Protected Areas*, 101 ENVTL. SCI. & POL'Y 1, 3–4 (2019).

³⁶ Rachel Grabenstein, *Comanagement Between Federal Agencies and Native American Tribes: Applications and Lessons*, SCHOLARWORKS AT UNIVERSITY OF MONTANA 1, 5 (2016), (Providing examples of successful co-management between tribes and the Department of the Interior.)

³⁷ Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV'T'L. L. REV. 475, 475 (2007).

³⁸ *Id.* (Giving examples of tribes and NPS co-managing; for example, Navajo Nation and Monument Valley, their first tribal park. This has since expanded, and Navajo Nation now manages Antelope Canyon-Lake Powell, Bowl Canyon, Little Colorado River Gorge, Window Rock, and Four Corners National Navajo Tribal Park. Other tribe examples are also discussed.)

Department as noted previously.³⁹ This means the land still “belongs” to the United States, but the tribes have an equal part in managing the lands. There are numerous successful co-management examples, including the Santa Rosa and San Jacinto Mountains National Monument working with Agua Caliente Band of Cahuilla and the Kasha-Kauwe Tent rocks National Monument working with the Cochiti Pueblo.⁴⁰ The common consensus is that in order to make co-management work, there must be a clear line of communication between the government agency and the tribe.⁴¹ Not all attempts at co-management have been successful.⁴² Co-management between the Oglala Sioux Tribe and Badlands National Park was strained from the start; the Tribe had been promised a large reservation set aside in the Fort Laramie Treaty, but that land lessened significantly to five much smaller reservations, one being Pine Ridge Reservation.⁴³ In 1942, this reservation was taken back by the United States War Department and used for the war effort; families on the land were removed and told they could return after the war, which never happened and that reservation became part of Badlands National Park.⁴⁴

There are guidelines, such as negotiations, within TSGA that stop tribes from using the full ability given to them within the Act.⁴⁵ The negotiation process is not only time consuming, but costly, and tribes usually have limited funding.⁴⁶ There is also evidence that there is opposition within the National Park Service, because they see this Act as a way for tribes to get their lands back from within the parks.⁴⁷ This thought process is vital to the recommendation within this Comment.

This action alone would give the Secretary of the Interior a very important and strong voice in handing over the lands, including those in national parks.⁴⁸ Despite the ability to petition for land, very few movements have been made in this direction.⁴⁹ With the current Secretary of the Interior being Native American herself, it is possible that the uncertainty

³⁹ Grabenstein, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.* (Giving examples of numerous co-management success stories, [i.e. San Jacinto Mountains National Monument and the Agua Caliente Band of Cahuilla Indians,] and highlighting the importance of “effective communication” to these success stories.).

⁴² *Id.* (Discussing the issues of co-management between Oglala Lakota Tribe and Badlands National Park; mostly the issues of disagreements on how to manage the lands.).

⁴³ *Id.*

⁴⁴ *Id.* (Telling the historical background and how, ultimately, the families were never allowed back to the land, the government deemed it excess property, and then told the tribe if they surrendered management to the land, they could hold trust. Using this tactic, the government went back on their agreement and used land management as a coercion tactic.).

⁴⁵ King, *supra* note 36.

⁴⁶ *Id.* (Discussing the cost of negotiations and litigation on behalf of the tribes. Limited funding makes the process, at time, impossible.)

⁴⁷ *Id.*

⁴⁸ *Id.* at 528.

⁴⁹ *Id.* at 523.

surrounding the use of this Act to the advantage of tribes across the country will decrease.

B. *Brief National Park History*

On March 1, 1872, Yellowstone became the world's first national park when established by President Ulysses S. Grant.⁵⁰ The goal continues to be the preservation of specific areas from being developed, and was driven by many well-known explorers like John Muir, whom is known as the “Father of our National Park system. Muir began the Sierra Club and became known as the most noted environmentalist in the nation.⁵¹ Muir inspired President Theodore Roosevelt and Yosemite National Park which drove him to fully back the power of the Antiquities Act of 1906.⁵² Over the course of his presidency, Roosevelt set aside 230 million acres of protected public lands, parks, and monuments.⁵³

In 1916, President Woodrow Wilson made NPS an official bureau under the Department of the Interior via the Organic Act.⁵⁴ The Organic Act officially gave national parks a home within the agency and drew out the powers to those within the Department.⁵⁵ However, most national parks have been added through acts of Congress and the Antiquities Act.⁵⁶ The Antiquities Act gives the power to the President to quickly deem something as a protected land—used to distinguish millions of acres as national park land.⁵⁷ Meaning, the power to create national park land is shared with Congress, the Department of the Interior, and the President. A vast majority of national park land was done via the President, as shown by many Presidents throughout history.⁵⁸ Congress seeks guidance from the Secretary of the Interior on adding new lands to the NPS.⁵⁹

C. *The Antiquities Act*

The acquisition of land happened in several ways, but most acreage was taken via Acts

⁵⁰ Birth of a National Park, *supra* note 6.

⁵¹ *Id.*

⁵² *Id.*, 16 U.S.C § 431–33.

⁵³ Theodore and Conservation, *supra* note 6.

⁵⁴ *Quick History of the National Parks*, NATIONAL PARK SERVICE, <https://cles/quick-nps-history.htm>, (last visited December 14, 2021).

⁵⁵ *Organic Act of 1906*, NATIONAL PARK SERVICE, <https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm>, (last visited December 14, 2021).

⁵⁶ Joe E. Watkins, *The Antiquities Act at 100 Years: Then, Now, and Tomorrow*, NAT'L PARK SERV.

<https://www.nps.gov/archeology/sites/antiquities/activities/gwwat.htm> (last visited July 17, 2021) (Discussing the use of establishing National Parks as a way to displace and ultimately rid Native Americans from the United States).

⁵⁷ *Id.*

⁵⁸ *National Monuments and the Antiquities Act*, CONGRESSIONAL RESEARCH SERVICE,

<https://fas.org/sgp/crs/misc/R41330.pdf> (last visited July 17, 2021) (Giving examples and highlighting the use of this Act to move millions of acres of land to the National Park Service).

⁵⁹ *Quick History of the National Parks*, *supra* note 54.

such as the Antiquities Act and forced removal by the American government.⁶⁰ This Act gave the power to the President to quickly declare land protected and placing it under the control of the government; specifically, the Department of the Interior.⁶¹ After camping in Yosemite with John Muir, Roosevelt utilized the brand new Antiquities Act of 1906 to add millions of acres of national park and public lands; the intention being to protect federal lands and resources quickly.⁶² Like Muir, Roosevelt had a well-known negative opinion of Native Americans, including the use of their land and the ability for them to protect it.⁶³ Land protection being the intended use of the Antiquities Act, though it has since been used to also reduce or modify the protections of existing national parks, monuments, and public lands.⁶⁴

Congress created some restrictions on the Antiquities Act to ensure checks and balances, which include requiring congressional approval for anything more than 5,000 acres in Alaska and anymore designations made in Wyoming.⁶⁵ Though some proclamations have been debated or unfavored, the Antiquities Act is overall highly favored across the board.⁶⁶ In order for a president to use the Act to establish a monument or protected lands, the land must contain, “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.”⁶⁷

These lands are acquired as seen fit by these three decision makers—the President, Congress, and the Secretary of Interior—but the future of these lands are proclaimed without regard to those who inhabited the land at acquisition. Since the beginning, Native Americans have had their land immorally taken by the growing United States and the national parks across the nation are large chunks of some of the most sacred and important land to hundreds of tribes.⁶⁸

Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to men and animals. We cannot sell the lives of men and animals; therefore we cannot sell this land. It was put here for us by the Great

⁶⁰ Kantor, *supra* note 9 at 49–54.

⁶¹ Watkins, *supra* note 56.

⁶² *Roosevelt, Muir, and the Grace of Place*, NATIONAL PARK SERVICE, <https://www.nps.gov/yose/learn/historyculture/roosevelt-muir-and-the-grace-of-place.htm> (last visited December 14, 2021); *See also* National Monument and Antiquities Act, *supra* note 56.

⁶³ *Id.*, Alys Landry, *Theodore Roosevelt: ‘The Only Good Indians Are the Dead Indians’*, INDIAN COUNTRY TODAY, Sept. 13, 2018 (Showering President Roosevelt’s support for assimilation of Native Americans and his very open and strongly negative opinion of Native Americans.); *See also* John Muir: A Brief Biography, *supra* note, 25 (Providing the background and love that Muir and Roosevelt shared for preservation and their joint negative views of Native Americans.).

⁶⁴ Kantor, *supra* note 9 at 51-4.

⁶⁵ Watkins, *supra* note 56.

⁶⁶ *Id.* at 2.

⁶⁷ 54 U.S.C. § 320301(a).

⁶⁸ Kantor, *supra* note 9 at 58.

Spirit and we cannot sell it because it does not belong to us. You can count your money and burn it within the nod of a buffalo's head, but only the great Spirit can count the grains of sand and the blades of grass of these plains. As a present to you, we will give you anything we have that you can take with you, but the land, never.⁶⁹

III. THE POWER OF THE DEPARTMENT OF THE INTERIOR AND THE FUTURE THAT COULD BE

A. *Court Rulings*

Tribes have attempted to take back their land via the legal system.⁷⁰ In fact, past attempts via the courts have had the Establishment Clause, the Free Exercise Clause, and even the First Amendment at the reigns, driving the attempt to reclaim their lands.⁷¹ The Free Exercise Clause, which prohibits the government from interfering in the practice of religion.⁷² Distinguishing this as an administrative solution is the main objective, however, the issue of constitutionality opens another avenue for redress. This section will focus on three of the largest cases concerning public lands and the access to them by Native Americans: *Lyng v. Northwest Indian Cemetery Protective Association*⁷³, *United States v. Peterson*⁷⁴, and *Bear Lodge Multiple Use Association v. Babbitt*⁷⁵.

In 1974, the Supreme Court decided *Lyng v. Northwest Indian Cemetery Protective Association*.⁷⁶ Three tribes in northwestern California were contesting the building of a timber road near Chimney Rock in the Six Rivers National Forest. The construction of the road would take away from the land that they viewed as sacred and used for religious purposes.⁷⁷ Justice O'Connor, writing the opinion for the Court, stated that the construction and timber harvest does not burden religion in a way that is recognized by the Free Exercise Clause.⁷⁸ The Free Exercise Clause, "withdraws from legislative power, state and federal, the exertion of any

⁶⁹ *Native American Describe Traditional Views of Land Ownership*, SOCIAL HISTORY FOR EVERY CLASSROOM, <https://shec.ashp.cuny.edu/items/show/1543>, (last visited December 14, 2021).

⁷⁰ Until *McGirt v. Oklahoma* in 2020, there has been no successful return of Native land through the legal system. The first documentation of land being returned to Native American tribes is that of the Wiyot tribe in California. In 2000, they raised funds to buy 1.5 acres of their native land back from Eureka, California. In 2006, the city gave them sixty more acres. This was the first documented voluntary land return able to be found.

⁷¹ Joel Brady, *Land is Itself A Sacred, Living Being*: *Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 159–160 (2000).

⁷² *Amdt1.1.4.1 Free Exercise Clause: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/es-say/amdt1_1_4_1/, (last visited August 29, 2021).

⁷³ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 439 (1988).

⁷⁴ *Peterson*, 121 F.Supp.2d at 1310.

⁷⁵ *Babbitt*, 175 F.3d 814 at 817.

⁷⁶ *Lyng*, 485 U.S. 439 at 439.

⁷⁷ *Id.*

⁷⁸ *Id.* at 476–77.

restraint on the free exercise of religion.”⁷⁹ The tribes claimed they were doing just this, but the Court found that because the timber harvesting and the road construction took into account and attempted to protect the religious sites in question, they did not violate the rights of the tribes.⁸⁰

In *United States v. Peterson*, the Blackfeet Tribe were coerced into signing a treaty that transferred their land to form Glacier National Park, but allowed them to keep their hunting and fishing rights within the park.⁸¹ In 2000, police attempted to arrest Blackfeet Tribe members who hunted in the park.⁸² Members claimed that it was a part of the treaty with the United States that the tribe retain their hunting rights in specific portions of the park. The Court found that though Congress may have intended to make a separate game preserve through its language, it did not; therefore, hunting broke the law.⁸³ The only right left to the Blackfeet Tribe was the right to access and camp for free inside the park.⁸⁴

In 1995 NPS created a new regulation in an attempt to honor the Eastern Shoshone Tribe and their religious practices.⁸⁵ This regulation prohibited climbers from deteriorating the land any further by limiting the amount of climbing equipment, such as bolts, and also asked climbers to voluntarily resist climbing or using Devil’s Tower during the month of June, a very sacred time for the Cheyenne River Sioux Tribe. However, quickly after the regulation was established, a touring company, Bear Lodge, challenged NPS in court.⁸⁶ Bear Lodge claimed that the regulation was put into place to preserve Devil’s Tower to “reduce harmful effects on spiritual practices of Native Americans,” and violated the Establishment Clause.⁸⁷ The court held Bear Lodge had no standing to sue and mentions the fact that views towards Native American spiritual practices have been changing, and protecting these sacred sites has become more of a priority.⁸⁸ The court quotes the enactment of the American Indian Religious Freedom Act (AIRFA) or 42 U. S. C. § 1996 (1994) as proof of this.⁸⁹ The establishment of AIRFA set up new protections and basic acknowledgment of sacred sites and traditional forms of worship.⁹⁰ Some of those protections include possessions of sacred items, access to sacred sites, and freedom to worship through burials and ceremonies.⁹¹ NPS claimed protection of

⁷⁹ U.S. Const. amend. I § 1.4.1. (Proving the Court does not recognize the importance of religious protection in relation to land and Native practices.) *See also* U.S. Const. amend. I, § 4.1.

⁸⁰ *Lyng*, 485 U.S. 439 at 440 (1988).

⁸¹ *Peterson*, 121 F.Supp.2d at 1310.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Babbitt*, 175 F.3d 814 at 817.

⁸⁵ *Id.* at 815.

⁸⁶ *Id.* at 814.

⁸⁷ *Id.* at 816.

⁸⁸ *Id.* at 817.

⁸⁹ 42 U. S. C. § 1996 (1994).

⁹⁰ *Id.*

⁹¹ *Id.*

Devils Tower because of the prominent role it played for numerous tribes across the North Plains.⁹²

Bear Lodge can be used to strengthen the argument for returning sacred lands back. This case came out of the United States Court of Appeals for the Tenth District and denied certiorari in 2000. The Supreme Court has drastically changed since 2000 and another petition could prove a different outcome.

Peterson never went before the Supreme Court.⁹³ If the Supreme Court did grant review the chance to uphold treaties and possibly retroactively uphold treaties that have since been broken. That type of decision would be momentous for the land back movement, forcing the United States government to honor treaties, give back stolen land, and restore rights initially established under the treaties.

B. *Secretary of the Interior*

The election of Deb Haaland in 2019 made her the first of two Native American women to the U.S. House of Representatives. In 2020, after winning the Presidential Election, President-Elect Joseph Biden announced Rep. Haaland as his nominee for the Secretary of the Interior. She is the first Native American to serve as any Cabinet Secretary. She is from New Mexico and is part of the Pueblo of Laguna.⁹⁴ Haaland's main responsibilities include land management and conservation; she also has power over the Bureau of Indian Affairs and NPS.

The Secretary of the Interior is the head of the Department of the Interior which houses the NPS bureau, as well as the Bureau of Indian Affairs, U.S. Fish and Wildlife Services, National Forest Services, and the Bureau of Land Management. Part of their job is to make recommendations to Congress as to what lands should be future national parks or public lands.⁹⁵ The Secretary, however, is granted more power under the National Historic Preservation Act of 1966. Within this Act, the Secretary is granted special powers in handling concern for Native Americans and their culture when dealing with historic preservation, such as the ability to guarantee proper traditional cultural practices.⁹⁶ The National Historic Preservation Act of 1966 focuses mostly on the ability of the Secretary in relation to states and the National Historic Register.⁹⁷

⁹² Kantor, *supra* at note 9.

⁹³ *Peterson*, 121 F.Supp.2d 1309 at 1310.

⁹⁴ Secretary Deb Haaland, *supra* note 21..

⁹⁵ *Id.*.

⁹⁶ 16 U.S.C. 470a (d)(4)(B)(C) (Showing the ability of the Secretary to argue for the return of national park land by using traditional practices and the First Amendment.).

⁹⁷ 16 U.S.C. 470.

The idea of returning the land to the rightful tribes is not outlandish: in fact, over the last few years, the Supreme Court and city councils alike have begun returning land to tribes. Though some land is being bought back, some land is being given the same way it was taken, by simply declaring it so. The Wiyot tribe raised funds to buy back one and a half acres from the city of Eureka, California in 2000; in 2019, the city gave them 200 additional acres of their original land.⁹⁸ Some tribes have resulted in buying back their land piece by piece.⁹⁹ On the federal level, the Department of the Interior returned nearly 18,000 acres of the National Bison Range land to the Confederated Salish and Kootenai Tribes in Montana just weeks ago.¹⁰⁰ Roughly one year ago, the Supreme Court agreed that the treaties put into place must be honored unless Congress otherwise stated they were dissolved when Native American allotted land became a state in the union.¹⁰¹

Throughout the vast history of legislation, precedent set-in judicial decisions, Acts, and Executive Orders, the power to acquire and sell land has changed drastically. Research has shown there is enough precedent and granted power to give the Secretary of the Interior the ability to distinguish landownership. This research shows Secretary Haaland has the ability to return land to the tribes without utilizing the traditional legislation route.¹⁰² The Burke Act gave the Secretary of the Interior the power to measure and determine adequate competency and capability of a Native American to manage their own affairs and allow all restrictions upon their land, and what they could do with their land, to be lifted.¹⁰³

⁹⁸ *California City Returns Island Taken from Native Tribe in 1860 Massacre*, THE GUARDIAN, Oct. 21, 2019, <https://www.theguardian.com/us-news/2019/oct/21/california-city-returns-island-taken-from-native-tribe-in-1860-massacre> (last visited July 16, 2021), (Adding historical background to land taking throughout history since settlement commenced),

⁹⁹ *Native American Tribe in Maine Buys Back Island Taken 160 Years Ago*, THE GUARDIAN, June 4, 2021, <https://www.theguardian.com/us-news/2021/jun/04/native-american-tribe-maine-buys-back-pine-island> (last visited July 16, 2021) (Adding historical background to land taking throughout history since settlement commenced),

¹⁰⁰ Alexandra Kelley, *DOI Returns More Than 18k Acres of Land to Native American Tribes*, THE HILL, June 23, 2021, <https://thehill.com/changing-america/respect/equality/559902-doi-returns-over-18000-acres-of-land-to-native-american>, (Proving Congress is on board with giving land back alongside the Department of the Interior).

¹⁰¹ *McGirt v. Oklahoma*, 591 U.S. (July 9, 2020) (quoting The Muscogee Nation) (citing The Muscogee Nation, Muscogee (Creek) Nation statement regarding U.S. Supreme Court decision, July 9, 2020, <https://www.muscogeenation.com/muscogee-creek-nation-statement-regarding-u-s-supreme-court-decision/> (last visited July 16, 2021).) (Showing there is now precedent for other tribes to make claims that their land is protected, including land that has since been set aside within National Parks across the country).

¹⁰² The Burke Act, 25 U.S.C. § 349, Pub. L. No. 98-608 (1984), *See United States v. Sioux Nation of Indians*, 488 U.S. 371 (1980), Pub. L. No. 106-462, 114 Stat. (1992), *Carcieri v. Salazar*, 129 S. Ct. 1058 (U.S. 2009).

¹⁰³ The Burke Act, 25 U.S.C. § 349 (Explaining “the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. . .” However, the Act did state that the land would remain within the American jurisdiction. This would work well concerning National Park lands as the plan is co-management, both tribal and American funding and law. The United States National Park Service is considered

Nearly eighty years later, Public Law Number 98-608 gave the Secretary power to issue legal documents to effectuate land transfers.¹⁰⁴ Prior to the most recent Supreme Court ruling, in 1980, the same court found that compensation can be given to the tribes due to wrongful land taking.¹⁰⁵ The court did not specify that compensation had to be monetary, leaving it open to interpretation until otherwise stated.¹⁰⁶ Similarly, the courts ruled in 2009 that the Secretary of the Interior has the right to take land; though it does not specifically state the Secretary has the right to give back land, the ruling left that open to interpretation as well.¹⁰⁷ Under Public Law Number 106-462, it became official policy to reverse the side effects of allotment on Native Americans and their tribes.¹⁰⁸ The General Allotment Act of 1887, also known as the Dawes Act that led to the Dawes Rolls, was used to distribute “tribal land” to families or individuals for private ownership.¹⁰⁹ This Act was seen as a good thing as it was used to replace the complete extinction of Native Americans.¹¹⁰ Before the Act, tribes held 138,000,000 acres of land, after its instillation, tribal lands only totaled 48,000,000 acres of land.¹¹¹ Allotment became the common practice for removing tribes from lands and putting those lands into government or private owners’ hands. The taking of national park land is arguably a huge side effect of the allotment policies.

IV. RECOMMENDATIONS

Secretary Haaland has highlighted a focus on indigenous issues while she holds her Cabinet position, including building better relationships with tribes. As a Representative in the House, Rep. Haaland fought vigorously to save Oak Flat from private mining contracts. Oak Flat is sacred land to the San Carlos Apache tribe as well as part of Tonto National Forest. As Secretary, she has also established Secretary’s Order 3400, which helps tribes better manage their tribal lands to “ensure each Tribe has a homeland where its citizens can live together and

the gold standard around the world for conservation and preservation. As the data throughout this comment shows, Indigenous peoples around the world are better at preservation and conservation than governments alone. The co-management is important for upholding and bettering the land and the ecosystems and environments surrounding them).

¹⁰⁴ Pub. L. No. 98-608 (1984), (Tying the Burke Act (1906), this law would give the Secretary the ability to not only give the land back to the rightful tribes, but also make the land transfers legally binding by issuing the documentation without the necessity of Congress.).

¹⁰⁵ *United States v. Sioux Nation of Indians*, 488 U.S. 371, 423 (1980).

¹⁰⁶ *Id.*, (Without the court giving specifics as to what constitutes “compensation” the door is open to justify returning what was taken from them wrongfully as compensation. The Secretary of the Interior can use this case as precedent to legitimize her actions. This will give strength to the actions for bigger land returns in the future.)

¹⁰⁷ *Carcieri v. Salazar*, 129 S. Ct. 1058 1064 (U.S. 2009).

¹⁰⁸ Pub. L. No. 106-462 (114 Stat. 1992).

¹⁰⁹ 25 U.S.C. Ch. 9

¹¹⁰ American Indian Relief Council, *History and Culture: Allotment Act 1887*,

http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_allotmentact (last visited October 28, 2021).

¹¹¹ *Id.*

lead safe and fulfilling lives.”¹¹² Her dedication to tribes and their land is undeniable.

Secretary Haaland can lay out a plan that involves both co-management and returning of land. She can begin the co-management of lands as seen throughout current practices of co-management, for all National Parks and their original caretakers. She could ensure no depletion of the lands is allowed through co-management and ensure proper funding between the Department and the tribes which will run the parks.

From here, she can set deadlines for full land handover to those tribes. This will be a slow process, but the timing to start this is vital. This recommendation could, but most likely will not, take place during the current Administration. However, Secretary Haaland is a vital piece of this recommendation, and her current position is important. The co-management aspect will be vital to understanding the duties the Department of the Interior will have after the land is given back.

Though historically the lands designated as national parks must go through Congress with the Secretary of the Interior’s guidance, this research has found there are other ways.¹¹³ By utilizing the Burke Act, Secretary Haaland has the power to deem any Native American person or tribe as “competent” so they can then manage their own land.¹¹⁴ She does not need the help of Congress to even draft the legal documentation with the power she is given via Public Law Number 98-608.¹¹⁵ The courts have also mentioned the Secretary has the power to compensate for lands taken and erase the negative effects that allocations have had on Native tribes.¹¹⁶ The courts were not specific as to what constitutes as compensation nor are they specific as to what “effects” are covered by their ruling; because of the open interpretation, the ability to utilize these for the benefit of the tribes is promising.¹¹⁷ Haaland can draw authority from *Sioux* as her legal basis to return land as a way of compensation. She could also cite *Carcieri* to support her power to manipulate land holdings granted by the Supreme Court. Paired with powers granted to the Secretary of the Interior by the National Historic Preservation Act of 1966, for the first time a Native American woman can use her voice, cultural knowledge, and Native perspective to shape NPS into what it should have been the entire time.

¹¹² *Interior Department Takes Steps to Restore Tribal Homelands, Empower Tribal Governments to Better Manage Indian Lands*, DEP’T OF THE INTERIOR, <https://www.doi.gov/pressreleases/interior-department-takes-steps-restore-tribal-homelands-empower-tribal-governments> (April 27, 2021) (last visited October 28, 2021).

¹¹³ See *supra* note 86.

¹¹⁴ The Burke Act, 25 U.S.C. § 349, Pub. L. No. 98-608 (1984) (Showing the definition of competent being to the interpretation of the Secretary. It is worth noting, when it was established, competence was tied closely to “proximity of whiteness”, meaning there had to be some mixed races with European blood.)

¹¹⁵ Pub. L. No. 98-608 (1984).

¹¹⁶ See *Sioux Nation of Indians*, 488 U.S. 371 (1980); See *Carcieri*, 129 S. Ct. 1058 (U.S. 2009); See *supra* note 90

¹¹⁷ *Id.*

It is vital to this recommendation to note that with the recent return of half of Oklahoma to the Muscogee Nation by the Supreme Court, the return of eighteen thousand acres of land from the National Bison Range to the Confederated Salish and Kootenai Tribes through Congress with the help of the Department of the Interior, and with the promises made by President Biden to “make good” on past broken promises sets Secretary Haaland up for much less pushback to move forward.¹¹⁸ This also strengthens the argument that *now* is the time to make these specific moves.

At this point, these are not even lofty aspirations, though timing is important. The recommendations in this Comment should be attempted now. This Administration faces pressure to do right when looking at systematic racism within our country, that includes all Black, Indigenous, and peoples of color. The most successful route will most likely be through the Acts above, however all is not lost if those do not work. President Biden has made public promises and could ultimately rely on utilizing the Antiquities Act of 1906 to give wrongfully taken land back with ease.

Native cultures preserved the land up to the colonization of the United States, and there is no evidence that that would end or change, only evidence that preservation would be better.¹¹⁹ President Biden appointed Secretary Haaland because he felt she had the ability to progress the Department of the Interior forward; there is no better way to do that than giving back wrongfully acquired land and ensuring the preservation and conservation efforts here and moving forward are a joint effort amongst both Native and non-Native environmentalist and conservationists.

There are eighty-five million acres of national park lands, if all were returned, it still would not cover the ninety million acres taken during the General Allotment Act.¹²⁰ Decolonization of the parks is a very small portion of what needs to be done for the millions of Native lives that have suffered since the first European foot fell on this continent. This is not an American phenomena, this is something that has happened across the globe.¹²¹ In fact, America

¹¹⁸ Celine Castronuovo, *Biden: Federal Government 'has Long-broken Promises to Native American Tribes'*, THE HILL, (Dec. 19, 2020), <https://thehill.com/homenews/administration/531004-biden-federal-government-has-long-broken-promises-to-native-american>, See *McGirt*, 591 U.S. (July 9, 2020), Alexandra Kelley, *DOI Returns More Than 18k Acres of Land to Native American Tribes*, THE HILL, (June 23, 2021).

¹¹⁹ See generally Richard Schuster et al., *supra* note 34; Grabenstein, *supra* note 35; King, *supra* note 36; Robbins, *supra* note 26. (Discussing the fact that it is commonly accepted and acknowledged that land preservation is better when practiced through Native techniques that have been practiced globally for centuries.)

¹²⁰ David Treuer, *Return the National Parks to the Tribes*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/> (last visited July 17, 2021), (Discussing The General Allotment Act of 1887 and how it helped take land from Native occupants and push them into specified locations, now reservations without their consent or input.), Krakoff, *supra* note 10 (Focusing the authors information the Central Arizona Project and how it essentially sacrifices Native lands and lives around the desert so that large cities can have the last remaining water sources for survival.)

¹²¹ Treuer, *supra* note 132 (Giving examples of national park lands being returned to indigenous peoples in

has also returned land to rightful owners as well.¹²² With precedent, the current social climate surrounding Native Americans and land being returned, now is the time to revitalize the relationship between the United States and Native Nations across the country.¹²³ In conclusion, I recommend adopting a strong co-management relationship between tribes and the federal government and, over time, give the parks and lands within them back to their rightful caretakers. The power administrative law has over this process is clear and now, at this moment in history, when a Native American woman is the Secretary of the Interior, we must act and attempt to begin the process of righting the wrongs done to millions.

Australia and New Zealand give the United States something to look to, though they are not perfect. Australia has passed legislation in 1976, when America was still taking land from Native Americans, that gave “nearly half of the Northern Territory” back to the Aboriginal peoples. New Zealand allowed greater roles pertaining to conservation of the Whanganui River to the Māori. In both instances, the non-indigenous peoples have kept access to the lands at the discretion of the Māori.).

¹²² *The Panama Canal and the Torrijos-Carter Treaties* , THE DEP'T OF STATE, <https://history.state.gov/milestones/1977-1980/panama-canal> (last visited July 17, 2021 (Using the example of Jimmy Carter giving Panama back to its rightful owner as precedent that this Act can be used to not only take land but also give land back).

¹²³ “Landback” is a movement that is gaining steam recently. There are hashtags, groups, and manifestos supporting and demanding the American government return the land to Native Nations across the country. Some demands include dismantling the Bureau of Land Management and the National Park Service. Though this movement calls for full return of all public lands and this comment only focuses on national park lands, we must start somewhere.