

INTERTRIBAL: THE UNHERALDED ELEMENT IN INDIGENOUS WILDLIFE SOVEREIGNTY

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Intertribal organizations are a powerful and unheralded element behind recent gains in Indigenous wildlife sovereignty. Key to winning and implementing judicial and political victories, they have also helped tribal nations become powerful voices in wildlife and habitat conservation. Through case studies of these organizations and their impact, this Article shows why intertribal wildlife organizations are necessary and influential, and how the intertribal form reflects a distinct relational approach to wildlife governance. As the first article focused on the intertribal form, moreover, the Article also identifies an unexamined actor in tribal sovereignty and legal change.

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INTRODUCTION

On July 20, 2020, explosives rang through the woods outside Bellingham, Washington.¹ With the removal of the last of the 125-foot-wide dam across the Nooksack River, water rushed free for the first time in a half century.² The City of Bellingham had built the dam in 1961, blocking fish passage and transforming habitat integral to the Nooksack and Lummi Tribes.³ Its removal was the culmination of almost twenty years of negotiation between the tribes, the city, and the state.⁴ Trevor Delgado, Historic Preservation Officer for the Nooksack Tribe, watched the water flow.⁵ “The tribe has been waiting for this for decades,” he said. “This is the start of a new direction.”⁶

As in this and other dam removals across the country,⁷ Indigenous peoples are exercising more influence over wildlife and habitat preservation than at any time since colonists dominated their lands. With Deb Haaland (Laguna Pueblo) as Secretary of Interior and Chuck Sams (Cayuse and Walla Walla) as Director of the National Parks Service,⁸ tribal citizens hold key leadership positions in federal environmental and resource management. Tribal treaty rights are powerful tools for conservation, leading, for example, to a sweeping mandate to Washington State to restructure dams and culverts blocking salmon migration.⁹ In response to Indigenous advocacy, Congress declared bison¹⁰ the national mammal of the United States in 2016.¹¹ In 2022, four tribal nations and the United States agreed to co-manage Bears Ears National Monument, a historic measure that may serve as a model for tribal-federal co-management of other public lands.¹²

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1. Lynda Mapes, *Bang! Watch a Nooksack River Dam Finally Coming Down, Freeing Miles for Fish Habitat*, SEATTLE TIMES (July 20, 2020), <https://perma.cc/S7TH-YKB6>.
 2. *Id.*
 3. Tara Lohan, *A Dam Comes Down—and Tribes, Cities, Salmon and Orcas Could All Benefit*, THE REVELATOR (July 14, 2020), perma.cc/RYP6-SAU9.
 4. Mapes, *supra* note 1.
 5. *Id.*
 6. *Id.*
 7. See Colleen Fox et al., *Native American Tribes and Dam Removal: Restoring the Ottaway, Penobscot and Elwha Rivers*, 15 WATER ALTS. 31, 33–34 (2022) (reviewing tribal involvement in dam removals).
 8. B. ‘Toastie’ Oaster, *From Dominance to Stewardship: Chuck Sams’ Indigenous Approach to the NPS*, HIGH COUNTRY NEWS (Nov. 1, 2022), perma.cc/9P8W-REKZ.
 9. *United States v. Washington*, 827 F.3d 836, 841 (9th Cir. 2016), *aff’d by equally divided court per curiam*, 585 U.S. 1089 (2018).
 10. The western scientific name for the animal is *Bison bison*, shortened to “bison,” but the Inter-Tribal Buffalo Council, and Indigenous sources consulted for this work, use the term “buffalo.” This Article therefore prefers the term buffalo except when, as in the designation of the national mammal, it refers to an actor that selects the term bison.
 11. Act of May 9, 2016, Pub. L. No. 114–52, 130 Stat. 373.
 12. Brian Maffly, *Utah Tribes Secure Co-Management Role for Bears Ears National Monument*, SALT LAKE TRIB. (June 22, 2022), perma.cc/A92U-TMNR; see generally Kevin Washburn,

Despite the celebration of these developments, there is little recognition of a key element in their success: the role of intertribal entities.¹³ Behind Bears Ears, behind treaty rights victories in the Northwest and Midwest, behind recognition of bison as the national mammal, and behind many other tribal conservation success stories are intertribal organizations, organizations formed and governed by multiple tribes working together to protect vital resources. Far more than ad hoc gatherings, these entities are often decades old, with legal attributes similar to those of the tribes that create them. As this Article shows, these organizations have been critical to advances in both tribal self-determination and conservation.

The absence of scholarship on intertribal wildlife management organizations reflects a broader lacuna in federal Indian law. Federal Indian law scholarship focuses almost exclusively on legal relationships between tribes and non-tribal governments, whether federal, state, or (occasionally) international.¹⁴ In so doing, this scholarship emphasizes laws developed primarily on non-tribal terms for non-tribal arenas. But Indigenous governments have long negotiated legal relationships between themselves.¹⁵ Indeed, treaty negotiations between Indigenous and European-American governments were built in part upon pre-contact rules of intertribal diplomacy.¹⁶ The 1944 formation of the National

Facilitating Tribal Co-Management of Federal Public Lands, 2022 WIS. L. REV. 263, 268 (2022) (noting that tribes have had “comparatively little success” contracting with federal land management agencies).

13. Although a few publications discuss individual intertribal wildlife organizations, *see, e.g.*, KEN ZONTEK, *BUFFALO NATION: AMERICAN INDIAN EFFORTS TO RESTORE THE BISON* 75–76 (2007) (discussing Inter-Tribal Buffalo Council); Larry Nesper & James Schlender, *The Politics of Cultural Revitalization and Intertribal Resource Management*, in *NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN* 277, (Michael Eugene Harkin & David Rich Lewis eds., 2007) (discussing Great Lakes Indian Fish and Wildlife Commission), there appear to be none in the legal literature, and none (besides a brief chapter by the author in a 2023 book on tribal wildlife management) discussing intertribal management organizations generally.
14. *See, e.g.*, ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 2 (3d ed. 2015) (describing the field as the law that “governs the relationships between tribal sovereigns and state and federal governments”); CAROLE E. GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS IN THE FEDERAL SYSTEM* xi (7th ed. 2015) (describing casebook as “survey[ing] the tribal-federal relationship”).
15. Intertribal relationships took many forms, from tributary relationships, like that between the Shinnecock and Pequot Tribes, FAREN R. SIMINOFF, *CROSSING THE SOUND* 4 (2004), to confederacies of independent governments, like those of the Haudenosaunee (Iroquois) and Muscogee (Creek), VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 85–89 (1983), to negotiations and intermarriage across wholly separate peoples, like those of the Puget Sound peoples. ALEXANDRA HARMON, *INDIANS IN THE MAKING: ETHNIC IDENTITIES AND INDIAN RELATIONS AROUND PUGET SOUND* 6–9 (2000).
16. *See* COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* 26–32 (2013) (discussing how diplomatic tools, particularly wampum belts and calumets (peace-pipes), spread throughout separate tribes in the east, and were adopted in tribal-European treaty making).

Conference of American Indians, governed by tribal governments from across the United States, created a new forum for intertribal action.¹⁷ Although wildlife management organizations may be the most common example of the intertribal form, tribal nations are creating such organizations to serve a variety of needs, from health care¹⁸ to insurance coverage¹⁹ to banking.²⁰ These organizations form against the backdrop of federal and state law, but through them tribes define their relationship through distinctly tribal law and policy. As the first legal publication focused on the intertribal form, this Article reveals a new model through which to understand Indigenous legal action.

Because intertribal organizations do not fit within models that assume individual tribes as legal actors, they face challenges in asserting the legal attributes of tribes. A number of cases consider whether and to what extent intertribal organizations are entitled to sovereign immunity and autonomy from state and federal laws. A few of these cases turn woodenly on formalistic criteria, particularly whether they are incorporated under federal, state, or tribal law. But most undertake a more sensitive investigation into the purposes of the organizations to determine whether they are entitled to the sovereign rights of the tribes that form them. By examining these cases, this Article provides both courts and tribes with guidance on the intertribal form. It also identifies a new category of law, intertribal law, that many of these organizations use to incorporate.

Equally important, the Article provides a new lens through which to examine both legal and environmental change. The intertribal organizations examined here are powerful engines of both de jure and de facto sovereignty. They play an important role in securing and implementing judicial victories that protect treaty rights to fish and hunt free of state control. Further, by pooling tribal resources to perform monitoring and enforcement functions, they contribute to the development of tribal governmental institutions, without which de jure sovereignty is meaningless.²¹ Through providing a coordinated voice, moreover,

17. See KENNETH R. PHILP, *TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933-1953* 13-15 (1999) (discussing formation of the National Congress of American Indians); National Congress of American Indians Constitution, art. II & III, perma.cc/6XTQ-N4VM (discussing membership structure of NCAI).

18. See *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1165-66 (S.D. 2012) (discussing intertribal health care organization).

19. See *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 682 (8th Cir. 2011) (discussing Amerind, an intertribal insurance pool).

20. See *About Us*, NATIVE AM. BANK, perma.cc/7PYN-4AP7 (discussing Native American Bank, a chartered Community Development Financial Institution, listing almost thirty tribes as shareholders); see also Bethany R. Berger, *Elouise Cobell: Bringing the United States to Account*, in *OUR CAUSE WILL ULTIMATELY TRIUMPH: PROFILES IN AMERICAN INDIAN SOVEREIGNTY* 181, 184 (Tim Alan Garrison ed., 2014) (discussing founding of the Native American Bank).

21. See Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR*

these organizations have won a secure role in non-tribal decision-making bodies, with exponentially greater influence than tribes would have on their own.

These organizations also appear to have a transformative environmental impact. Although there are too many variables to rigorously measure the ecological impact of intertribal management here, these organizations have repeatedly catalyzed better monitoring, higher standards, and population reintroduction and preservation.²² Further, they have contributed to the development of a distinctly Indigenous science, one informed not only by traditional ecological knowledge (the ecological knowledge passed down within Indigenous communities)²³ but by shifting power relations to prioritize the different knowledge sources and scientific questions asked by Indigenous communities.

Part I discusses the reasons why wildlife governance is such an important arena for the intertribal form. Some of these reflect the general reality that ecosystems ignore political boundaries, but others are distinctive to Native peoples: treaties and other laws resulting in shared resources between tribes; the artificiality of imposed definitions of tribes and reservations; and the vulnerabilities of individual tribes against non-Native domination.

Part II provides case studies of three of the most important intertribal organizations, the Northwest Indian Fisheries Commission, the Great Lakes Indian Fish and Wildlife Commission, and the Inter-Tribal Buffalo Council. These organizations serve distinct tribal groups and work with distinct non-human populations, and have different legal histories and structure. The case studies provide more specific examples of the challenge and promise of these organizations.

Part III examines the legal status of intertribal organizations generally, and the varying results when they have asserted sovereign immunity, autonomy from state law, and exceptions from federal laws of general applicability. This part provides guidance to tribes seeking to form intertribal organizations and to judges seeking to avoid irrational results. It also identifies the promise of intertribal law in creating and governing these organizations.

Part IV discusses the impact of intertribal wildlife organizations in contributing to effective and sustainable management; enhancing tribal sovereignty; and developing a distinctly Indigenous body of scientific knowledge.

GOVERNANCE AND DEVELOPMENT 23–27 (Miriam Jorgensen ed., 2007) (discussing importance of effective tribal institutions).

22. *Infra* Part IV(A).

23. *Infra* Part IV(B). Definitions of “traditional ecological knowledge” are contested and varying, but a leading authority defines it as “a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.” FIKRET BERKES, SACRED ECOLOGY 8 (7th ed. 2018).

Before beginning, I want to acknowledge the danger in writing about Indigenous peoples generally: there are 574 federally recognized tribes;²⁴ their ancestors spoke scores of distinct languages,²⁵ and they had (and have) vastly different cultures, practices, and environments. The risk of essentialization is particularly strong in discussing Indigenous relationships to nature. Non-Indians have long employed tropes of an “ecological Indian” always acting in harmony with an Edenic natural world.²⁶ Sometimes these tropes were used to undermine Indigenous humanity and rights, as in Chief Justice Marshall’s assertion that “to leave [tribal governments] in possession of their country, was to leave the country a wilderness” in order to diminish tribal property and sovereign rights.²⁷ Sometimes these tropes served environmental claims, as in the famous “crying Indian” public service announcements of the 1970s.²⁸ Often these tropes had no more to do with the actual lives and histories of Native peoples than did “crying Indian” actor Iron Eyes Cody, who claimed to have been born to Cherokee and Cree parents in Oklahoma, but was actually born to Italian immigrants in Louisiana.²⁹

There are, however, similarities among the approaches of the groups examined here. One reveals an irony in this Article’s title, with its reference to “wildlife.” “Wild” evokes the two dominant Western approaches to nature: either that it must be tamed and broken or that it must be preserved and isolated in its separation.³⁰ National Parks Director Sams reports, however, that in his decades of travels among different tribes, he has never found one with a word equivalent to “wild.”³¹ All the Indigenous groups discussed here perceive both animals and their ecosystems as deeply connected, not separate from, human life. Potawatomi botanist Robin Wall Kimmerer captures this difference in

24. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022).

25. See Marcin Kilarski, A HISTORY OF THE STUDY OF THE INDIGENOUS LANGUAGES OF NORTH AMERICA 9–10 (2021).

26. See Stewart Krech III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY 26 (1999) (critiquing the “ultimately dehumanizing” trope of Indigenous people only preserving and not changing the environment); Benedict Singleton et al., *Toward Productive Complicity: Applying ‘Traditional Ecological Knowledge’ in Environmental Science*, 10 THE ANTHROPOCENE REVIEW 393, 398 (2021) (discussing continuing essentialism in literature applying traditional ecological knowledge).

27. *Johnson v. McIntosh*, 21 U.S. 543, 590 (1823).

28. DANIEL BELGRAD, THE CULTURE OF FEEDBACK: ECOLOGICAL THINKING IN SEVENTIES AMERICA 60 (2019) (discussing the Crying Indian commercial); see also PHILIP DELORIA, PLAYING INDIAN 171–85 (1998) (discussing uses of Indianness in the 1960s–1970s counter-culture movement).

29. Belgrad, *supra* note 28, at 69.

30. See also Michael Asch, *Wildlife: Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims*, 15 CAN. PUB. POL’Y / ANALYSE DE POLITIQUES 205, 208 (1989) (discussing binary between “wildlife” and “domesticates”).

31. Oaster, *supra* note 8.

contrasting the Judeo-Christian and Anishinaabe creation stories.³² In the first, Eve succumbs to a snake's temptation to eat forbidden fruit and is excluded from Eden; in the second, Sky Woman falls to earth bringing gifts and partners with the animals of earth to build a fertile land.³³ The contrast, like the absence of a word for wild, reflects a third way that seeks neither to tame nor to preserve untouched the animals in their control. Instead, the mission of these groups is to at once consume and conserve animals and the ecosystems they inhabit. The approach is dynamic and transformative, far from the ecological Indian trope.

This third way is also helpful in understanding the relationships between the tribes that compose intertribal organizations. These relationships do not reflect Edenic harmony. Just as humans and non-human creatures have different, sometimes opposing, interests, so too different tribes have different, and sometimes opposing, interests. Intertribal organizations may be forums for conflicts among their members, and cannot always resolve them. But through them tribal governments create a new force, one that alters power relationships and achieves transformative results.

I. "WE MUST MOVE FORWARD TOGETHER"³⁴: WHY INTERTRIBAL WILDLIFE ORGANIZATIONS?

A convergence of legal, historical, and ecological factors makes the intertribal form particularly appropriate for wildlife management. First, ecosystems ignore political boundaries. Effective management of the habitat in one's control has little impact if species depend on travel outside the habitat or are dependent on species or conditions that exist outside the habitat. Second, federal law often gives multiple tribes rights to the same wildlife resources, and traditional use patterns may create shared use of resources as well. Finally, the small size of many tribes limits the political, administrative, and scientific resources of individual tribes working in isolation, and the often-fierce opposition to tribal management by private, state, and federal parties, creates particular dangers from conflicts and inconsistency between tribes. This section discusses these factors.

A. Ecosystems Ignore Reservation Boundaries

Reservation boundaries mean nothing to wildlife. Crossing those boundaries may be common or even necessary to a species' life cycle, and activity outside tribal lands can have profound impacts on habitat within it.

32. ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS* 6–7 (2013).

33. *Id.*

34. NW. INDIAN FISHERIES COMM'N, 2020 STATE OF OUR WATERSHEDS REPORT 4 (2020), <https://perma.cc/S5Z8-M8XR> (quoting Northwest Intertribal Fisheries Commission Chairwoman Lorraine Loomis).

In addition, America's history of dispossessing Native people of their lands means that some key species exist only outside official tribal territories. For all these reasons, it is crucial that tribes cooperate to protect and enhance wildlife and their habitat.

For the Indigenous peoples of the Pacific Northwest, for example, salmon were "not much less necessary . . . than the atmosphere they breathed."³⁵ But salmon are anadromous, migrating from the Pacific Ocean through freshwater rivers to reach their spawning grounds.³⁶ While treaties guarantee these tribes rights to fish salmon both on their reservations and at all "usual and accustomed" places outside them,³⁷ actions anywhere along this route may deprive all tribes of the resource. Tribes must work together to protect the entire habitat and ensure that no one entity or person, tribal or otherwise, monopolizes it.

The Great Lakes present a similar example. Lakes Huron, Michigan, and Superior together include three states and two countries as well as multiple separate treaty areas involving many separate tribes.³⁸ The watersheds that sustain fish populations cross between treaty areas and states.³⁹ Threats to those populations cross boundaries as well. The Atlantic lamprey, for example, crossed into the Great Lakes through the Welland Canal in Ontario; Quagga and zebra mussels arrive on transatlantic ship ballasts; and invasive water plants do the same.⁴⁰ Addressing the threat in just one place simply will not work.

B. *Rights Are Often Shared Between Tribes*

Rights are often shared between tribes, either as a matter of law or as a matter of culture and tradition. In such cases, intertribal coordination may be necessary, or at least highly beneficial, for management and protection of the resource.

35. See *Washington v. Wash. State Comm. Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 680 (1979) (quoting *United States v. Winans*, 198 U.S. 371, 380–81 (1905)).

36. *Id.* at 662–63.

37. *Id.* at 674 (quoting Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1133, art. III. Identical, or almost identical, language is included in other treaties referenced in the case).

38. See Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109; Treaty with the Chippewas, Oct. 4, 1942, 7 Stat. 591; Treaty with the Chippewas, July 29, 1837, 7 Stat. 536; Treaty with the Chippewas, May 9, 1936, 7 Stat. 503; see also GIS Maps, GREAT LAKES FISH & WILDLIFE COMM'N, perma.cc/X6BV-3XKF (mapping areas covered by the various treaties with the Chippewas).

39. See TRAVIS BARNICK ET AL., INVASIVE SPECIES PROGRAM 2019 5 (2022) (providing map of treaty areas showing them crossing state lines, and describing ways that species introduced in Great Lakes Basin cross into inland streams and lakes); Evan S. Childress & Peter B. McIntyre, *Life History Traits and Spawning Behavior Modulate Ecosystem-level Effects of Nutrient Subsidies from Fish Migrations*, 7 ECOSPHERE 1 (2016) (discussing negative impact of closing access from streams to lakes).

40. Keith Matheny, *10 Least Wanted Michigan Invaders*, DET. FREE PRESS (Apr. 24, 2021).

Although the United States today recognizes 574 Indian Tribes and Alaska Native villages, modern tribal status often conceals traditional interrelationships and divisions. The seven modern Sioux Tribes of the Dakotas, for example, were created by the division of a far larger area of land formerly guaranteed to the united Great Sioux Nation.⁴¹ Elsewhere, as with the Shoshone and Northern Arapaho Tribes of the Wind River Reservation⁴² and the Confederated Tribes of the Colville Reservation,⁴³ officials located multiple unrelated tribes on a single reservation. Intertribal management may help alleviate some of the artificiality of contemporary tribal definitions by allowing historically related groups to work together toward common interests.

Even more important, federal treaties and statutes often share particular resources between multiple modern tribes. Many treaties creating off-reservation hunting and fishing rights reserve those rights to multiple tribes without differentiating among them. This means that the tribes must work together to allocate rights and avoid over-burdening the resource. This is true, for example, of the rights administered by the Northwest Indian Fisheries Commission, the Columbia River Inter-Tribal Fisheries Commission, the Great Lakes Indian Fish and Wildlife Commission, and the Chippewa Ottawa Resource Authority.⁴⁴ As a more recent example, the Marine Mammal Protection Act exempts “any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean” from its prohibition on taking whales and other marine mammals for subsistence purposes.⁴⁵ This includes multiple Alaska Native villages, who must share a strict quota on subsistence whaling set by the International Whaling Commission.⁴⁶

Sometimes different treaties and statutes reserve hunting and fishing rights in the same area or resource for different tribes. In separate 1868 treaties, for example, the Crow and Northern Cheyenne people reserved the right to hunt on lands outside their neighboring reservations.⁴⁷ Similarly, the 1964 Klamath

41. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell J. Newton, et al. eds. 2012) [hereinafter COHEN]; Act of Mar. 2, 1889, ch. 405, §3, 25 Stat. 888–89 (1889) (codified as amended 25 U.S.C. §§ 476, 477) (dividing Great Reservation of the Sioux Nation in Dakota Territory into seven smaller reservations).

42. *Wyoming v. EPA*, 849 F.3d 861, 867 (10th Cir. 2017).

43. Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in United States v. Oregon*, 28 L. & Soc’y REV. 1181, 1185 (1994).

44. See *infra* Part II; see also *About Us*, NW INDIAN FISHERIES COMM’N, perma.cc/X9FC-YWRS (noting 20 tribes with rights under treaties negotiated in the 1850s); *Home*, CHIPPEWA OTTAWA RES. AUTH., perma.cc/RKW6-ST4B (noting five tribes with rights under an 1836 treaty).

45. 16 U.S.C. § 1371(b) (2018).

46. See generally Hiroko Ikuta, *Political Strategies of the Historical Victory in Aboriginal Subsistence Whaling in the Alaskan Arctic: The International Whaling Commission Meeting in Brazil, 2018*, 104 SENRI ETHNOLOGICAL STUD. 209, 209, 214 (2021) (describing whaling quota system).

47. Treaty with the Northern Cheyenne and Northern Arapaho Tribes of Indians, May 10, 1868, 15 Stat. 656, art. II; Treaty with the Crow Tribe of Indians, May 7, 1868, 15 Stat. 650, art. IV.

Treaty and the 1988 Hoopa-Yurok Settlement Act both reserve rights to fish for salmon, whose life cycle extends throughout the Klamath and Trinity Rivers.⁴⁸ To protect those resources, tribes must coordinate among themselves on how to use and manage them.

Even where tribes do not share resources as a matter of law, they may do so as a matter of culture and tradition. Debates in the Southwest over the San Francisco Peaks and Bears Ears National Monument show the power of intertribal action with respect to these resources. The San Francisco Peaks, located outside Flagstaff, Arizona, are sacred for the Navajo, Hopi, Havasupai, Hualapai, and White Mountain Apache tribes, and a place where these peoples gather plants for religious and medicinal purposes.⁴⁹ These tribes have separate interests, and have at times engaged in bitter conflict.⁵⁰ By joining together to protest the use of recycled sewage effluent for snowmaking on the mountain, the tribes were able to rally public outcry and an initial injunction from a panel of the Ninth Circuit.⁵¹ The Circuit, however, agreed to hear the case en banc and eventually reversed the decision.⁵²

In a story with a happier ending, Hopi, Navajo, Ute, and Zuni tribes created a coalition that led to the creation of Bears Ears, the first Native American national monument, and secured a significant voice in its management.⁵³ In forming the Bears Ears Coalition, the tribes—which have sometimes struggled over shared resources⁵⁴—recognized that “[t]he idea of being a family, all together, is stronger than individual efforts. The unity of the group fuses all Tribes in the future.”⁵⁵ Although President Trump slashed the monument’s size to allow resource exploitation, President Biden restored it in 2021.⁵⁶ As President Biden recognized, although conservationists had advocated for protection of the region for over a century, “[i]t was not until the Hopi Tribe, Navajo Nation, Ute Indian Tribe of the Uintah and Ouray Reservation, Ute Mountain Ute Tribe,

48. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1177–79 (D. Or. 2020), *aff’d*, 48 F.4th 934 (9th Cir. 2022).

49. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008).

50. *See, e.g., Masayesva v. Hale*, 118 F.3d 1371 (9th Cir. 1997) (case by Hopi government against Navajo government alleging unconstitutionality of Navajo-Hopi Settlement Act and damages from Navajo use of Hopi land).

51. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007), *rev’d*, 535 F.3d 1058 (on reh’g en banc) (9th Cir. 2008).

52. *Id.*

53. Charles Wilkinson, “*At Bears Ears We Can Hear the Voices of Our Ancestors*”: *The First Native American National Monument*, 50 ARIZ. ST. L.J. 317, 325, 331 (2018) (discussing the creation of Bears Ears National Monument).

54. *See, e.g., Masayesva*, 118 F.3d at 1375 (case in “the long running and emotion scarring controversy between the Navajo Nation and the Hopi Tribe,” concerning grazing on shared land).

55. RONALD TROSPER, *INDIGENOUS ECONOMICS* 23 (2022) (quoting Willie Grayeyes).

56. Proclamation No. 10285, 86 Fed. Reg. 57321 (Oct. 8, 2021).

and Pueblo of Zuni united in a common vision to protect these sacred lands [that the] monument became a reality.”⁵⁷

C. Pooling Resources Is Necessary

Because many tribes are relatively small, few have the ability to fund effective wildlife governance on their own. Of the hundreds of federally recognized tribes, only fourteen have a resident population over 10,000.⁵⁸ Although gaming and other commercial ventures have dramatically improved the socioeconomic status of U.S. Indigenous people, the poverty and unemployment rates of Native people on reservations are still more than double those of all Americans.⁵⁹ Similarly, while these developments have enabled some tribal governments to achieve fiscal independence,⁶⁰ most tribes still face tremendous shortfalls in providing services to their citizens.⁶¹

Federal law, moreover, denies tribes most of the resources that states use to fund wildlife management. Each year, the federal government gives states hundreds of millions of dollars collected in excise taxes on fishing and hunting gear.⁶² Tribes receive none of that money.⁶³ Nor do tribes receive funds through the State Wildlife Grant Program, which distributes about a million dollars per state each year based on land area and population.⁶⁴ The Tribal Wildlife Grant program, in contrast, is a competitive program awarding in total about \$9,000 per tribe per year, although several tribes manage land areas larger than many states.⁶⁵ While some tribes have been able to generate funding through issuing their own hunting and fishing licenses, judicial restrictions on tribal regulatory jurisdiction make this impossible in many places.⁶⁶ The resulting lack of

57. *Id.*

58. U.S. DEP’T INTERIOR, OFFICE OF THE SEC., OFFICE OF THE ASST. SEC. INDIAN AFFS., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, Table 4 (Jan. 16, 2014), <https://perma.cc/N2JZ-M8DD>.

59. See Randall K. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 187 Table 1 (2015) (showing various socioeconomic statistics for Native people on or near reservations in 1990, 2000, and 2010).

60. *Id.* at 186.

61. See generally U.S. COMM’N ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 5 (2018) (discussing the inadequacy of funding for Native peoples’ needs), <https://perma.cc/5XNB-WHA3>.

62. Julie Thorstensen, *Diversity and Complexity of Tribal Wildlife Systems*, in OUR PLACE IS IN OUR SOUL: WILDLIFE MANAGEMENT ON TRIBAL LANDS 12, 15 (Serra Hoagland & Steven Albert eds., 2023).

63. *Id.*

64. *Id.*

65. *Id.*

66. Compare *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (rejecting state jurisdiction and implicitly affirming tribal jurisdiction over hunting and fishing on trust lands within the Mescalero Apache Reservation) with *Montana v. United States*, 450 U.S.

“annual, sustainable funding” undermines tribes’ “ability to recruit and retain professional staff.”⁶⁷

And establishing tribal wildlife governance is an expensive business. As the stories below make clear, tribes begin this work against a backdrop of concerted legal and political resistance to their having any say in resource governance.⁶⁸ Legal expertise is therefore necessary to achieve and maintain authority regarding wildlife resources. Even once tribes establish their authority, significant scientific and administrative staff are necessary to effectively implement that authority.⁶⁹ By pooling resources, tribes can better meet the multifaceted demands of wildlife governance. They can hire dedicated, expert staff, share monitoring insights, and coordinate in representing tribal interests.

Achieving wildlife goals may also require negotiation with numerous federal, state, and even international agencies. But each individual tribe has little influence on its own. Therefore, as Fred DuBray, a founder of the Inter-Tribal Buffalo Council recognized, to make change “we’re going to need each other’s strength to draw on.”⁷⁰ He saw that if one tribe approached Congress, “they’d probably just close the door in our face. But if we got thirty-four or thirty-eight tribes saying the same thing, they may still close the door in our face, but at least they’re going to hear us.”⁷¹

D. *Anti-Tribal Resistance Makes Conflicts Devastating*

In asserting authority over wildlife populations long regulated solely by state and local law, tribes meet passionate and sometimes racist, and even violent, resistance. This resistance means that opponents will exploit any opportunity to undermine tribal positions. In particular, conflicts between tribes render them vulnerable to claims that tribal positions are not authentically Indian, or that tribes are incapable of governing the resource.

Tribal assertions of authority over wildlife often meet concerted resistance. For example, after U.S. District Court Judge Boldt affirmed tribal treaty fishing rights in Washington, the Ninth Circuit noted that “[e]xcept for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”⁷² Opponents hung Judge Boldt in effigy and pasted bumper-stickers reading “Can

544, 566–67 (1981) (holding tribe could not regulate non-Indian hunting and fishing on fee lands within Crow Reservation).

67. Thorstensen, *supra* note 62, at 15.

68. *Infra* Part II.

69. *Id.*

70. ZONTEK, *supra* note 13, at 80.

71. *Id.*

72. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 696 n.36 (1979) (quoting *United States v. Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978)).

an Indian, Save a Salmon” to their cars.⁷³ In Lake Superior in Michigan, opponents to tribal treaty fishing stole and destroyed gill nets of tribal treaty fishers, sank and swamped their boats, and in one case pelted them with “bombs” made from the bagged contents of a camper porta-pottie.⁷⁴ A decade later in Northern Wisconsin, hundreds, sometimes thousands of non-Indians gathered at lakes where Ojibwe caught walleye, calling the fishers “Tonto,” “Redskin,” “timber n____r,” and “welfare warriors,”⁷⁵ and chanting “[y]ou’re a defeated people; you are a conquered people,” “the only good Indian is a dead Indian,” and “Custer had the right idea.”⁷⁶ “Can an Indian, Save a Salmon” became “Spear an Indian: Save a walleye” or even “Spear a pregnant squaw, save two walleyes.”⁷⁷ Protesters threw rocks and tried to overturn Ojibwa boats.⁷⁸

Western water scarcity in recent years has created new conflicts. When the Bureau of Reclamation cut off water flows to Klamath Basin farmers to protect endangered salmon and sucker fish in 2001, Klamath Falls residents spat on tribal leaders, refused to serve Native people water in restaurants, and created a new bumper sticker reading “Here’s your water, sucker,” and showing urination on the sacred fish.⁷⁹ In response to 2021 water restrictions, opponents camped outside irrigation gates threatening to forcibly open them.⁸⁰ Ammon Bundy, who led an armed takeover of an Oregon wildlife refuge in 2016, joined the standoff, proclaiming “Who cares if there is violence? At least something will be worked out.”⁸¹

In the face of these tensions, apparent conflicts can be used against tribes. In recent years, refusals by the Sault St. Marie Tribe of Chippewa Indians to join a renewed consent decree negotiated with Michigan by the other members of the Chippewa-Ottawa Resource Authority have spurred claims that tribal fishing could “end Great Lakes fishing as we know it.”⁸² When, in 2023,

73. Bruce Barcott, *What’s a River For?*, MOTHER JONES (May/June 2003), perma.cc/YE5S-EE3W; Rob Carson, *Boldt Decision on Tribal Fishing Still Resonates After 40 Years*, THE OLYMPIAN (Feb. 9, 2014), <https://perma.cc/ZJ34-EAEN>.

74. *United States v. Michigan*, 471 F. Supp. 192, 202 n.1 (W.D. Mich. 1979) (reprinting article by Tom Opre in the DET. FREE PRESS (Aug. 27, 1978)).

75. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1288–89 (W.D. Wis. 1994).

76. For a collection of documents regarding the protests, see GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, *MOVING BEYOND ARGUMENT: RACISM AND TREATY RIGHTS* (Ca. 1989), perma.cc/DP79-MKGE [hereinafter *RACISM AND TREATY RIGHTS*].

77. *Id.* at 18.

78. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 843 F. Supp. at 1289.

79. Anita Chabria, *Racism, Drought and History: Young Native Americans Fight Back as Water Disappears*, L.A. TIMES (June 23, 2021), <https://perma.cc/S3K4-YNNJ>.

80. *Id.*

81. Mike Baker, *Amid Historic Drought, a New Water War in the West*, N.Y. TIMES (June 1, 2021), perma.cc/XR9U-KBQR.

82. Caleb Symons, *Great Lakes Group Says Mich. Tribe Can’t Ditch Fishing Pact*, LAW360 (Jan. 31, 2023); Nick Green, *Court Filing Could End Great Lakes Fishing as we Know it*, MICH. UNITED CONSERVATION CLUBS (July 16, 2020), perma.cc/V36M-H9QX.

the Bureau of Reclamation reduced releases of Klamath River water, it used protection of suckerfish—sacred to the Klamath Tribe—to justify the resulting deaths of salmon—sacred to the Yurok and Karuk Tribes.⁸³ What it did not mention was that much of the water diverted would go to upstream farmers, not fish populations.⁸⁴ The tribes, however, were able to resist the “old colonial strategy of divisiveness,” arguing for long-term solutions for lower water levels.⁸⁵

Continuing environmental degradation heightens potential conflicts between tribes as it does between tribes and non-Native interests. But intertribal organizations present a forum to address those conflicts, potentially resolving them out of the public eye, and ensuring they cannot be used to undermine tribal goals.

II. WHAT DOES INTERTRIBAL MANAGEMENT LOOK LIKE?

This section examines the history, structure, and work of these organizations. A few words of definition before I begin. First, “intertribal” means organizations formed by and composed of tribes as governments, in contrast to Pan-Indian groups that represent individuals from many tribes.⁸⁶ Second, “wildlife” here includes all animals—of land, water, or sky—managed to preserve their relationship to the ecosystem, even if that includes restrictions on and manipulation of their movement and goals of harvesting for human consumption. It thus includes buffalo maintained in fenced tribal herds, and fish bred in fisheries for release to lakes and rivers. Finally, “organization” means that there is a level of formality and permanence to the entity, excluding coalitions between tribes without an ongoing legal status.

Many entities fall into this definition. One publication says (without citation) that there are “scores” of them.⁸⁷ Some important organizations not discussed in detail here include the Columbia River Inter-Tribal Fish Commission, through which four tribes in Idaho, Oregon, and Washington manage resources on the Columbia River;⁸⁸ the Chippewa Ottawa Resource Authority, through which Michigan Ojibwe Tribes manage wildlife in Lake Michigan and Lake

83. B. ‘Toastie’ Oaster and Jake Bittle, *Are the Feds Risking Endangered Salmon for Fries and Potato Chips?*, HIGH COUNTRY NEWS (Feb. 21, 2023), perma.cc/29Y6-5QY7.

84. *Id.*

85. *Id.*

86. This definition excludes, for example, the Native American Fish & Wildlife Society, although it is primarily funded by and includes tribal wildlife managers, because only individuals and not tribes are voting members of the organization. See NATIVE AMERICAN FISH & WILDLIFE SOCIETY CONST. & BY-LAWS, art. III, available at perma.cc/BX3F-G26W; see also Thorstensen, *supra* note 62, at 22, 24 (interview with Nathan “Eight Ball” Jim describing history and goals of organization).

87. Charles Wilkinson, *The Belloni Decision*, 50 ENV’T LAW 331, 334 (2020).

88. *Mission Statement*, COLUMBIA RIVER INTER-TRIBAL FISH COMM’N, perma.cc/QW3C-C4TT.

Huron;⁸⁹ the Southwest Tribal Fisheries Commission, through which twenty tribes in Arizona, California, Colorado, Nevada, New Mexico, and Utah manage fisheries on tribal lands;⁹⁰ and the Alaska Eskimo Whaling Commission, through which eleven Inupiat and Yupik villages manage bowhead whaling.⁹¹

The case studies provided here, however, examine three of the most prominent organizations: the Northwest Indian Fisheries Commission, the Great Lakes Indian Fish and Wildlife Commission; and the Intertribal Buffalo Council. These three organizations cover a range of regions and animal resources. All three are committed to the power of coordinated tribal action, and all three have achieved tremendous gains for the animals, people, and habitat they work with. The three organizations, however, have significant differences, reflecting both the different needs of the animals they manage and the distinct cultures and histories of the Indigenous peoples that comprise them.

A. Northwest Indian Fisheries Commission

The Northwest Indian Fisheries Commission (NWIFC) is the oldest contemporary intertribal wildlife management organization and one of the largest. The Commission supports natural resources management for the twenty federally-recognized tribes in what is now western Washington.⁹² Founded to support salmon co-management, its mission has expanded to support shellfish management, non-anadromous groundfish, and land-based wildlife, and, more broadly, to protect the habitat of the entire Puget Sound basin and coastal waters.⁹³

The Commission formed in 1974 in the wake of U.S. District Court Judge Boldt's landmark decision in *United States v. Washington* ("Boldt decision").⁹⁴ The decision affirmed that the tribes retained their treaty rights to fish at "usual and accustomed places" outside their reservations, that they had rights to up to half of the harvestable catch, and that these rights were not subject to general

89. See *Network and Partner Organizations*, GREAT LAKES FISHERIES HERITAGE, <https://perma.cc/FQ5B-YQ66>.

90. See SW. TRIBAL FISHERIES COMM'N, BY-LAWS OF A TAX-EXEMPT NONPROFIT CORPORATION (2017), perma.cc/2CZT-BQXD; SW. TRIBAL FISHERIES COMM'N, STRATEGIC PLAN, OCTOBER 1, 2018–SEPTEMBER 30, 2023 (2018), perma.cc/6G72-CNU2.

91. *Our Story*, ALASKA ESKIMO WHALING COMM'N, <https://perma.cc/AT3E-Q8K3>.

92. The member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh. NW INDIANS FISHERIES COMM'N, *supra* note 44.

93. See, generally NW. INTERTRIBAL FISHERIES COMM'N, TRIBAL NATURAL RESOURCES MANAGEMENT: 2023 ANNUAL REPORT FROM THE TREATY INDIAN TRIBES IN WESTERN WASHINGTON (2023), perma.cc/4REB-J5T9 (discussing diverse initiatives of the Commission and its members tribes).

94. 384 F. Supp. 312 (W.D. Wash. 1974).

state laws.⁹⁵ The court held that Washington could regulate off-reservation treaty fishing “only to the extent reasonable and necessary for conservation of the resource,” and tribes could regulate off-reservation fishing themselves if they abided by certain conditions.⁹⁶ These conditions included regulations protecting the resource that had been discussed with the Washington Department of Fish and Game; personnel to effectively enforce the regulations; and provision of regular reports to the state on number of fish caught by tribal treaty fishers.⁹⁷ Judge Boldt held that only two of Washington’s treaty tribes, the Yakama and the Quinault, met those conditions at that time.⁹⁸ Most of the treaty tribes, however, had fewer than a thousand members.⁹⁹ For each tribe to meet Judge Boldt’s conditions would have taken a substantial portion of their slim resources.

On May 1, 1974, three months after Judge Boldt’s decision, leaders from the Lummi, Quinault, Makah, Squaxin Island, Muckleshoot, and Skokomish tribes met to discuss forming an intertribal commission.¹⁰⁰ Western Washington tribes had discussed such an organization since the 1960s, but the need to implement the self-governance requirements added urgency to the idea.¹⁰¹ The federal government also pressured the tribes to consolidate decision-making and management in a single intertribal entity.¹⁰² Tribes successfully resisted this pressure, but the Commission helped placate the federal demands by acting as a coordinating body for the tribes.¹⁰³

Rather than unified intertribal management, the model adopted by the Commission might be described as sharing resources combined with almost complete tribal independence. This approach is clearly reflected in the Commission’s constitution which, in enumerating the “powers” of the Commission first lists a limitation: “No Commission vote or action may be taken that will supersede the fishery rights and responsibilities or legal rights and legal interests of any member Tribe or Treaty Drainage/Regional Area that has objected.”¹⁰⁴ The statement of purposes similarly emphasizes that its services are “supplemental and supportive” to tribes that “express a need” for them, that while the commission is a “coordinating body . . . to provide a forum to express, communicate, and resolve” issues of concern, such issues must be identified “unanimously”

95. *Id.* at 333–34, 343.

96. *Id.* at 333, 340.

97. *Id.* at 341.

98. *Id.* at 333.

99. *Id.* at 359–80 (providing populations of fourteen tribal plaintiffs, only two with populations over 1,000).

100. Jennifer Ott, *Northwest Indian Fisheries Commission*, HISTORYLINK (Mar. 28, 2011), [perma.cc/LGS6-DAYS](https://www.historylink.org/entry/10000).

101. *See id.*

102. Telephone Interview with John Hollowed, Legal/Policy Advisor, Northwest Indian Fisheries Commission (June 7, 2021).

103. *Id.*

104. NW INDIAN FISHERIES CONST., art. IV § 1.a. [hereinafter NWIFC Const.].

by the tribes.¹⁰⁵ The Constitution also specifies twice, in Article IV § 2 and in Article XIII, that the Constitution does not in any way abridge the sovereign rights and authority of the member tribes.¹⁰⁶

How tribes are represented within the Commission has changed over time to provide individual tribes with even more independence. Originally, the Commission was made up of five members, each of whom was elected by the set of tribes who had signed one of the five original treaties.¹⁰⁷ But these treaty groupings did not reflect cultural or habitat divisions; instead, they were the product of the Territorial Governor's efforts to simplify treaty negotiations by limiting negotiating partners.¹⁰⁸ In 1984, the tribes amended the NWIFC constitution to increase the number of commissioners to eight and to elect both a Commissioner and an alternate from the tribes located in each of the eight Puget Sound Treaty drainage/watershed areas.¹⁰⁹ The election procedures and term of office are set by each of these eight watershed areas and, if the tribes in an area cannot agree, the tribes may each select their own commissioners.¹¹⁰ Today, each of the twenty member tribes elects its own commissioner.¹¹¹

The conditions that generated this coordination and independence began with the pre-contact history of the tribes. The Indigenous inhabitants of Puget Sound were not originally one people; they were numerous autonomous villages speaking several mutually unintelligible languages; many were strangers and even enemies to each other.¹¹² While sometimes treated by ethnographers as one cultural group, others have said that “no American Indian population included a more diverse an assortment of peoples.”¹¹³ Nevertheless, there were important ties between these peoples. Marriage outside one's village could enhance economic and social standing, and villages participated in each other's ceremonial functions and inter-village potlatches, practices that increased both intra-village diversity and local pride.¹¹⁴ “What they shared,” historian Alexandra Harmon writes, “was a system of communicating and conducting relationship with outsiders—a system that drew them all into a region-wide social network.”¹¹⁵

This diversity within interconnection continued in the treaty era. Territorial Governor Isaac Ingalls Stevens, who negotiated the treaties establishing tribal fishing rights in the 1800s, had long tried and failed to get Puget

105. *Id.*, art. II.

106. *Id.*, arts. IV & XIII.

107. Ott, *supra* note 100.

108. ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC IDENTITIES AND INDIAN RELATIONS AROUND PUGET SOUND 78–79 (2000).

109. Ott, *supra* note 100; NWIFC Const. art. III, § II.

110. NWIFC Const., art. V, § II.

111. Hollowed, *supra* note 102.

112. HARMON, *supra* note 108, at 6.

113. *Id.* at 8.

114. *Id.* at 8–9.

115. *Id.* at 6.

Sound's Indigenous inhabitants to select Head Chiefs to represent the villages.¹¹⁶ Although Stevens appointed only a few Head Chiefs, the treaties themselves list dozens of autonomous bands as parties, and the actual tribal signers outnumbered the bands.¹¹⁷ These Indigenous negotiators were unified on little except preserving their off-reservation fishing rights and their rights to work and trade outside the designated reservations.¹¹⁸

The treaties also created more differences between tribes. The treaties created only a few reservations for dozens of tribes.¹¹⁹ Most tribal members chose to remain on their aboriginal lands, even though they received little federal protection from white encroachment.¹²⁰ In the litigation over treaty fishing rights of the 1960s and 1970s, Washington State claimed these groups were no longer tribes, and therefore were not entitled to treaty rights.¹²¹ When the tribes petitioned the Bureau of Indian Affairs for recognition, some of the "landed" Washington tribes initially opposed their claims, fearing recognition would infringe on their rights or sovereignty.¹²² Further, because the treaties gave all the tribes a right to fish at all "usual and accustomed places," and because the key resource, salmon, is one that travels in its lifetime through many different places, disputes over how that resource should be divided among tribes became endemic.¹²³

Perhaps because of these developments, NWIFC does not take on some roles occupied by other major intertribal fisheries commissions. In contrast with NWIFC, the Columbia River Inter-Tribal Fish Commission (CRITFC), declares that its mission is to "ensure a unified voice" in tribal management

116. *Id.* at 76, 79 (discussing U.S. desire for centralized leadership and tribal refusal to provide it).

117. HARMON, *supra* note 108, at 85; *see* Treaty of Point-No-Point, Jan. 26, 1855, 12 Stat. 933 (listing 14 villages but 56 signers, only three designated as "Chiefs"); Treaty with the Duwamish, Suquamish, etc., Jan. 22, 1855, 12 Stat. 927 (listing 23 tribes and bands and including 83 tribal signers); Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1133 (listing 9 tribes and bands, and including 62 tribal signers, but declaring that they "for the purpose of this treaty, are to be regarded as one nation").

118. *Id.*

119. AM. INDIAN POL'Y REV. COMM'N, TASK FORCE TEN., U.S. GOV'T PRINTING OFFICE, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION: REPORT ON TERMINATED AND NON-FEDERALLY RECOGNIZED INDIANS 183 (1976).

120. *See* United States v. Washington, 384 F. Supp. 312, 379 (W.D. Wash. 1974); BRUCE GRANVILLE MILLER, THE PROBLEM OF JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD 94-95 (2001).

121. *Washington*, 384 F. Supp. at 339.

122. AM. INDIAN POL'Y REV. COMM'N, *supra* note 119.

123. *See, e.g.*, United States v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010) (dispute between Colville and Yakama Tribes); United States v. Muckle-shoot Tribe, 235 F.3d 429 (9th Cir. 2000) (dispute between Muckle-shoot and Puyallup, Suquamish, and Swinomish Tribes); United States v. Lower Elwha Tribe, 642 F.2d 1141 (9th Cir. 1981) (dispute between Makah and Lower Elwha Tribes); United States v. Skokomish Indian Tribe, 764 F.2d 670 (9th Cir. 1985) (dispute between Skokomish and Suquamish Tribes).

of fishery resources.¹²⁴ In addition to technical assistance, CRITFC provides enforcement services to police fishing regulations, with cross-deputization from its four member tribes, the State of Oregon, and some counties in Washington.¹²⁵ Similarly, the Great Lakes Fish and Wildlife Commission provide the enforcement services for off-reservation tribal fishing and hunting rights in their coverage areas.¹²⁶ Delegating such classically sovereign functions to NWIFC would likely be a very hard sell to its member tribes.

NWIFC nevertheless embodies the member tribes' commitment to the idea that "by unity of action, we can best accomplish these things, not only for the benefit of our own people, but for all of the people of the Pacific Northwest."¹²⁷ And, like the traditional potlatches at which diverse Puget Sound peoples gathered to exchange resources and form bonds while maintaining independence, NWIFC has allowed unity of action in the face of the member tribes' differences. It provides a forum where its members can meet, share information, coordinate goals and, in many cases, resolve differences without going to court. With dozens of scientists on staff,¹²⁸ the NWIFC can provide cutting edge information and technical assistance on the state of the fisheries and the Puget Sound habitat generally. These scientists provide expert testimony in ongoing litigation over treaty rights, draft and secure agreement on model tribal fishing regulations, and provide valuable information to tribes, the state, the federal government, and the public. Rather than replacing tribal efforts to manage the fisheries, NWIFC complemented them. John Hollowed, the long time legal and policy advisor of the Commission, estimates that from three or four biologists working for the tribes when the Boldt decision was issued, the tribes now employ over 500 people supporting the fisheries and their habitat.¹²⁹

The contributions that NWIFC has made to the wildlife and habitat of the Puget Sound watershed by providing coordinated, high quality information and planning are too numerous to list, but here are a few examples. Every year, NWIFC provides coded wire tagging of millions of fish annually before release from tribal hatcheries with mobile tagging trailers, and genetic and statistical consulting for tribes, and pathological services to prevent, monitor, and address disease.¹³⁰ NWIFC also helps tribes coordinate with the other managers of the

124. Mission Statement, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, perma.cc/QW3C-C4TT.

125. *Columbia River Inter-Tribal Police Department*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, perma.cc/425D-WR4N.

126. See discussion *infra* Section II. B.

127. NW INDIAN FISHERIES COMM'N, *supra* note 44 (quoting the NWIFC Const., Preamble).

128. See Hollowed, *supra* note 102; see also *Staff Directory*, NW INDIAN FISHERIES COMM'N, perma.cc/AYE5-G52C (listing 70 employees, many of them scientists).

129. See Hollowed, *supra* note 102.

130. See NW INDIAN FISHERIES COMM'N, TRIBAL NATURAL RESOURCES MANAGEMENT 2023 ANNUAL REPORT FROM THE TREATY TRIBES IN WESTERN WASHINGTON 15 (2023), <https://perma.cc/D9JF-LY3R> (noting coded wire tagging of more than 6 million fish).

fish resource to set fishing seasons and catch limits.¹³¹ Protecting habitat for all wildlife is also an increasingly important part of its work, as NWIFC provides coordination, technical assistance, and publications to help tribes address habitat destruction and climate change.¹³² This work has expanded to reach not just fish and shellfish, but land animals, and protection of the water itself.¹³³

NWIFC has also provided a continuing voice advocating for tribal fishing rights. As state, tribal, and federal officials come and go, NWIFC is a constant in the ongoing negotiations between groups interested in the resources of the Puget Sound.¹³⁴ Its personnel, too, are remarkably stable: Billy Frank, Jr., the Nisqually man whose resistance was key in securing modern fishing rights, chaired NWIFC from 1981 to his death in 2014; Legal and Policy Advisor John Hollowed has worked for NWIFC since 1987; and other key staff have served with NWIFC for decades.¹³⁵ In the words of Billy Frank, Jr., NWIFC is a clear embodiment of the reality that “[t]he tribes are here to stay as co-managers of the natural resources in western Washington, . . . We are confident that by working together—all of us—we can reach our common goals.”¹³⁶

B. Great Lakes Indian Fish and Wildlife Commission

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) today includes eleven tribes¹³⁷ with territories in Wisconsin, Michigan, and Minnesota. It has over seventy employees and cooperatively manages a wide variety of plant and animal resources.¹³⁸ GLIFWC was modeled in many ways on the success of NWIFC and has a similar history. The distinct interests and legal and cultural histories of the people and wildlife it serves, however, have led to important differences between the two organizations.

GLIFWC formed in 1984 through the merging of two intertribal wildlife management organizations, the Great Lakes Indian Fisheries Commission and the Voigt Intertribal Task Force. The Great Lakes Indian Fisheries Commission formed in 1982 as the brainchild of Henry Buffalo, Jr., the newly graduated

131. *See id.* (noting participation in region wide fisheries management process).

132. *See id.* (summarizing habitat protection measures).

133. *Id.* at 5 (discussing efforts to protect water quality).

134. *See* Hollowed, *supra* note 102.

135. *See id.*

136. *About Us*, NW INDIAN FISHERIES COMM’N, perma.cc/X9FC-YWRS.

137. The member tribes include Misi-zaaga’iganiing (Mille Lacs); Nagaajiwanaang (Fond du Lac); Bikoganoogan St.Croix (Danbury); Gaa-miskwaabikaang (Red Cliff); Mashkiigong-ziibiing (Bad River); Ginoozhekaaning (Bay Mills); Waaswaaganing (Lac du Flambeau); Gete-gitigaaning (Lac Vieux Desert); Zaka’aaganing (Mole Lake/Sokaogon); Gakiwe’onaning (Keweenaw Bay); Odaawaa-zaaga’iganiing (Lac Courte Oreilles). *Member Tribes*, GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, <https://perma.cc/FLH5-7FA7>.

138. *GLIFWC Staff*, GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, <https://perma.cc/BH7K-LH8V> (listing 73 staff members).

tribal attorney for the Red Cliff Band of Lake Superior Indians.¹³⁹ By then, courts had affirmed that tribes in Wisconsin and Michigan retained their treaty fishing rights, but held states could regulate if tribal regulation did not sufficiently meet conservation and safety goals.¹⁴⁰ In attending meetings between tribal leaders and the state in his law school summers, Buffalo had learned that the hard part “wasn’t the affirmation of the right. The greatest challenge . . . was in re-emerging as governments with responsibilities over the resources.”¹⁴¹ Many different organizations were making decisions about the resource, and the tribes needed “a capacity to reach into those organizations . . . take their position amongst those governments and be recognized as a part of the management of those governments.”¹⁴² Buffalo approached biologist Tom Busiahn, who was working on developing fishing regulations for Red Cliff, and suggested they bring all six Lake Superior Chippewa Tribes together to enhance their regulatory capacity.¹⁴³

The year after the Great Lakes Indian Fisheries Commission formed, the U.S. Court of Appeals for the Seventh Circuit affirmed that the parties to the 1837 and 1842 treaties with the Lake Superior Chippewa Indians retained inland hunting and fishing rights in Wisconsin (“Voigt decision”).¹⁴⁴ The court remanded, however, for trial on whether or how the state could regulate that right.¹⁴⁵ Lac Courte Oreilles Chairman Gordon Thayer recognized the importance of the victory, but worried that, if tribal citizens kept getting cited for violation of state law, it would generate a series of state court opinions that would jeopardize the hope of tribal regulation.¹⁴⁶ He organized a meeting of the other tribal parties to the treaties to agree to a unified Voigt Intertribal Task Force to

139. Tom Busiahn, Address in *Minwaaajimo* (2011) in *TELLING A GOOD STORY: PRESERVING OJIBWE TREATY RIGHTS FOR THE PAST 25 YEARS* (LaTisha A. McRoy & Howard J. Bichler eds. Great Lakes Indian Fish & Wildlife Commission 2011), <https://perma.cc/3245-2TKX>.

140. See *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981) (holding state could not regulate fishing in Lake Michigan unless it proved by “clear and convincing evidence” that it was necessary to prevent “irreparable harm to fisheries”); *State v. Gurnoe*, 192 N.W.2d 892, 902 (Wis. 1972) (holding state could regulate fishing in Lake Superior if “reasonable and necessary” for fish conservation); *State v. Whitebird*, 329 N.W.2d 218, 219 (Wis. App. 1982) (upholding conviction for violation of boat registration law because necessary for public safety).

141. Henry Buffalo, Jr., Address in *Minwaaajimo* (2011) in *TELLING A GOOD STORY: PRESERVING OJIBWE TREATY RIGHTS FOR THE PAST 25 YEARS* (LaTisha A. McRoy & Howard J. Bichler eds., Great Lakes Indian Fish & Wildlife Comm’n 2011), <https://perma.cc/EUV2-D86P>.

142. *Id.*

143. *Id.*

144. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 364, (7th Cir. 1983).

145. *Id.*

146. See Nesper & Schlender, *supra* note 13, at 282–83.

develop tribal hunting and fishing regulations and enforce them under negotiated agreements with the state.¹⁴⁷

The next year, the Voigt Intertribal Task Force and the Great Lakes Indian Fisheries Commission joined forces to become GLIFWC. GLIFWC's Constitution is modeled on NWIFC's, with a nearly identical preamble and a similar governance structure.¹⁴⁸ There are, however, significant differences between the two. Where NWIFC's statement of purpose emphasizes the supplemental nature of its services, GLIFWC's announces a collective sense of tradition and responsibility:

The Great Lakes Indian Fish and Wildlife Commission was begun in recognition of the traditional pursuits of the Native American people and the deep abiding respect for the circle of life in which our fellow creatures have played an essential life-giving role. As governments who have inherited the responsibilities for protection of our fish, wildlife, and plants we are burdened with the inability to effectively carry out tasks as protectors and managers. This is especially true now that the state and federal courts have recognized our traditional claims. We have never intended to abandon our responsibilities. The purpose of this agency is to ensure effective self-regulation and intertribal comanagement in support of the sovereignty of its member tribes. . . .¹⁴⁹

While, like the NWIFC Constitution, GLIFWC's Constitution declares that it does not abridge rights vested in the member tribes, it also makes clear that GLIFWC exercises "delegated sovereign authority on behalf of its member tribes" to accept funds, and has the power to "formulate a broad natural resources management program" in its areas of concern.¹⁵⁰ Consistent with these powers, GLIFWC officers act as the enforcement arm for its member tribes' off-reservation activities.

GLIFWC's member tribes have a far higher degree of similarity to each other than NWIFC's do. Although GLIFWC today includes eleven tribes across three states, all of its members are Ojibwe, and share a common language, Anishinaabemowin, and common cultural traditions.¹⁵¹ In 1991, GLIFWC amended its mission statement to pledge to include Anishinaabe culture and tradition in its work.¹⁵² It does this in many ways, including by incorporating traditional hunting seasons and practices and collecting and disseminating

147. *Id.* at 283.

148. GREAT LAKES INDIAN FISH AND WILDLIFE COMM'N art. IX(1)(F) [hereinafter GLIFWC Const.]; NORTHWEST INDIAN FISHERIES COMM'N CONST. [hereinafter NWIFC Const.].

149. GLIFWC Const. art. II.1-2.

150. *Id.* art. IX.1(F), IX.2, X.1(B).

151. Telephone Interview with Ann McCammon-Soltis, Dir., Div. of Intergovernmental Affs., Great Lakes Indian Fish and Wildlife Comm'n (July 26, 2021).

152. Nesper & Schlender, *supra* note 12, at 292.

information on traditional plants and their uses.¹⁵³ Although geography and history created differences among the tribes, and they continue to have different approaches to resource management, this common bond likely increased willingness to delegate sovereign authority to the Commission.

GLIFWC is also careful to respect the limitations of its role. It does not monitor or regulate resource use on reservations, where tribal authority is exclusive.¹⁵⁴ It proposes elements of model regulations and creates the forum for tribal representatives to discuss them, but it is for tribes themselves to adopt them.¹⁵⁵ With respect to its member tribes, its work is governed by the idea that the tribes are the dog, and GLIFWC the tail.¹⁵⁶

From the beginning, GLIFWC has worked to monitor, preserve, and enhance a wide variety of animal and plant resources important to Anishinaabe people. This reflects both the diversity in Anishinaabe subsistence practices and the treaties themselves, which reserve rights to harvest all forms of animal and plant life they utilized at the time the treaty was signed.¹⁵⁷ Wild rice, for example, or *manoomin*, “the good berry,” is an important traditional staple. Since 1984, GLIFWC has conducted annual surveys of wild rice beds and worked to enhance existing beds and establish new ones.¹⁵⁸ GLIFWC has studied and worked to preserve access to other traditional plant life, including sugar maple, balsam fir boughs, birch bark, and American ginseng.¹⁵⁹ GLIFWC tracks and manages harvest of deer, black bear, fisher, bobcat, and other native terrestrial animals.¹⁶⁰ GLIFWC also reports on environmental threats, including logging’s impact on understory plants, local mines’ impact on water quality, and invasive species like lamprey and purple loosestrife impact on native populations,¹⁶¹ and has assisted tribes in developing federally-approved migratory bird hunting regulations.¹⁶² The tasks are all, of course, in addition to extensive monitoring of both inland and Lake Superior fish populations.

153. *Id.* at 289, 294.

154. McCammon-Soltis, *supra* note 151.

155. *Id.*

156. *Id.*

157. *Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin*, 775 F. Supp. 321, 322 (W.D. Wis. 1991).

158. *Manoomin (Wild Rice)*, GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, <https://perma.cc/D4L8-USW3>.

159. *Wild Plant Gathering in National Forests*, GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, <https://perma.cc/VE8F-GHSE>.

160. *Wildlife Section*, GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, <https://perma.cc/8J4W-VFFH>.

161. *E.g.*, ALEXANDRA WRABEL, *THE EFFECT OF LOGGING ON UNDERSTORY PLANTS* (2020); TRAVIS BARNICK ET AL., *INVASIVE SPECIES PROGRAM 2019* (2022); SCOTT CARDIFF & JOHN COLEMAN, *REPORT ON 2015-2016 WATER SAMPLING IN THE LAKE SUPERIOR OJIBWE TREATY CEDED TERRITORIES, CARP RIVERS, GROVELAND, AND REPUBLIC MINE ZONES* (2018).

162. *Wildlife Section*, *supra* note 160.

GLIFWC has made a tangible difference in legal and political disputes over these resources. Between 1983 and 1989, as the federal district court considered whether the state could regulate tribal hunting and fishing, GLIFWC's Voigt Intertribal Task Force negotiated a range of interim agreements, worked with tribes to create model regulations, and provided the monitoring and enforcement to prove that tribes could protect the resource.¹⁶³ In her 1989 decision, in *Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin*, District Court Judge Barbara Crabb declared that “[w]hat the parties in this case have done to give practical effect to plaintiffs’ judicially recognized treaty rights is a remarkable story,” and had praise for GLIFWC’s role in particular.¹⁶⁴ She concluded that the state had “not shown that plaintiffs cannot adequately regulate their members in compliance with an amended plan that is adequate to protect the resources,” and held that so long as the tribes maintained regulations meeting certain conditions, “the state cannot regulate tribal members’ off-reservation fishing.”¹⁶⁵

Judge Crabb reached a similar decision regarding rights to hunt and collect natural resources in 1991, holding that all the harvestable resources should be “apportioned equally between the [tribes] and all other persons,” and that the state could regulate their harvest of almost none of it.¹⁶⁶ That year, the federal government released a report based in part on GLIFWC data proving that treaty fishing had not hurt fishing populations.¹⁶⁷ After the report, Wisconsin chose not to appeal Judge Crabb’s decision.¹⁶⁸

GLIFWC played a significant role in a more recent tribal victory: securing the right to hunt deer at night through “shining” or spotlighting them with bright lights.¹⁶⁹ Judge Crabb had prohibited this traditional practice in 1991, and the tribes had not appealed.¹⁷⁰ Because the state at that time prohibited all night hunting outside reservations, there was little data on its safety.¹⁷¹ Over a decade later, the tribes sought to reopen the judgment after the state had authorized employees and contractors to engage in night hunting to control the deer population and address chronic wasting disease.¹⁷² Judge Crabb rejected the motion,

163. *Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin*, 707 F. Supp. 1034, 1050–52 (D. Wis. 1989).

164. *Id.* at 1052, 1054.

165. *Id.* at 1055.

166. *Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin*, 775 F. Supp. 321, 323 (W.D. Wis. 1991).

167. Nesper & Schlender, *supra* note 13, at 289.

168. *Id.*

169. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 769 F.3d 543 (7th Cir. 2014).

170. *Id.* at 544.

171. *Id.* at 546.

172. *Id.*

but the Seventh Circuit reversed,¹⁷³ relying in significant part on the statistics, regulations, and enforcement role provided by GLIFWC. First, the court noted the tribes had allowed night hunting on their reservations for decades, and their safety record was “outstanding.”¹⁷⁴ Further, Minnesota and Michigan had both safely allowed tribal night-hunting for over a decade, “managed by the same organization, the Great Lakes Indian Fish and Wildlife Organization,” as would manage it in Wisconsin.¹⁷⁵ The proposed regulations, moreover, were modeled on those in Minnesota and Michigan, but stricter, and hunters would receive the same GLIFWC firearm safety training as they did in Michigan.¹⁷⁶ Because of its intertribal nature, in other words, GLIFWC could show an established track record of safe night-hunting, and this was key to the tribal victory in court.

GLIFWC data and publications have also been crucial in shaping public sentiment. In the 1980s, spear-fishers on Wisconsin lakes faced abuse from crowds so virulent that the federal courts declared it a civil rights violation.¹⁷⁷ One of the key claims of the opponents was that tribes were wasting and destroying fish populations, thereby threatening the way of life of rural Northern Wisconsin.¹⁷⁸ The state exacerbated these fears by lowering angler fish bag limits in ways critics claimed were designed to falsely place the blame on treaty fishing.¹⁷⁹ Through its careful monitoring, however, GLIFWC was able to show that treaty fishing did not affect the resource, and that the decline in tourism in Northern Wisconsin was actually the result of the racist protests and other changes rather than the spear-fishers themselves.¹⁸⁰

More recently, by providing statistics to help tribes battle mining operations that harm water quality and fish populations, GLIFWC enabled the tribes to build bridges with their former enemies. Environmental degradation from mines threatens non-Indian farmers and fishers in Northern Wisconsin as well as Ojibwe.¹⁸¹ The same interests that led non-Indians to protest at spear-fishing lakes in the 1980s, therefore, now lead them to recognize the tribes as important allies.¹⁸²

173. *Id.* at 546, 549.

174. *Id.* at 546.

175. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 769 F.3d 543, 549 (7th Cir. 2014).

176. *Id.*

177. *See Lac Du Flambeau of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 843 F. Supp. 1284, 1286 (W.D. Wis. 1994).

178. ZOLTÁN GROSSMAN, *UNLIKELY ALLIANCES: NATIVE NATIONS AND WHITE COMMUNITIES JOIN TO DEFEND RURAL LANDS*, 209 (2017).

179. *Id.* at 220.

180. *Id.* at 218.

181. *Id.* at 228–232.

182. *See Id.* at 207–208 (discussing how common attachment to the Northwoods led to alliances against corporations).

GLIFWC has achieved Henry Buffalo's vision of allowing tribes to exercise responsibility over natural resources and become a necessary voice among the governments in managing them. At the same time, it has contributed to a resurgence of tribal peoples' connections to Anishinaabe culture and their tribal governments, and has enhanced the diversity and health of natural resources across the northern Great Lakes region.

C. *Inter-Tribal Buffalo Council*

The Inter-Tribal Buffalo Council (ITBC) differs from NWIFC and GLIFWC in many ways, and not just because buffalo are different from fish. ITBC was founded not to implement litigation victories but to restore buffalo to tribal ecosystems. Where groups like NWIFC and GLIFWC focus on wildlife populations outside reservations, moreover, ITBC seeks to support on-reservation herds. And where other organizations primarily support tribal regulation and monitoring of wildlife populations, ITBC works to provide tribes with access to buffalo and influence state and federal regulation limiting that access. But like the other groups profiled here, ITBC's mission is to protect the connection of Indigenous people to wildlife of tremendous cultural importance. And like them, ITBC shows the power of intertribal action in achieving tribal and ecological goals.

The near destruction of the American buffalo at the end of the nineteenth century paralleled destruction of the Plains Indians. As the tribes of the Pacific Northwest were salmon people, so many Plains tribes were buffalo people, with buffalo shaping important aspects of their economy, culture, and religion.¹⁸³ But over the course of the nineteenth century, the buffalo population had gone from 60 million to about a thousand.¹⁸⁴ Most were on private livestock ranches and a handful were in national parks.¹⁸⁵ In the words of Fred DuBray, a founder and long-time President of ITBC, "When they destroyed the buffalo herds, they were destroying our culture. . . . if they can't be saved, then we can't either."¹⁸⁶

The tribes that founded ITBC first met through the Native American Fish and Wildlife Society.¹⁸⁷ Several tribes had small buffalo herds, and they recognized that "[i]ndividually our goals may be different, but as a whole our goal is to get the buffalo back to the Indians."¹⁸⁸ In 1991, nineteen tribes gathered together in the sacred Black Hills of South Dakota to agree to collective action.¹⁸⁹ They secured initial funding from Congress, and in 1992 met

183. See Lloyd Burton, *Wild Sacred Icon or Woolly Cow? Culture and the Legal Reconstruction of the American Bison*, 23 POL. & LEGAL ANTHROPOLOGY REV. 21, 23 (2000).

184. *Id.*

185. *Id.*; WILLIAM TEMPLE HORNADAY, *THE EXTERMINATION OF THE AMERICAN BISON* (1889).

186. ZONTEK, *supra* note 13, at 80.

187. *Id.* at 76.

188. *Id.* at 80 (quoting Ernie Robinson, Northern Cheyenne).

189. *History and Mission*, INTERTRIBAL BUFFALO COUNCIL (2023), <https://perma.cc/F633-FNSH>.

in Albuquerque, New Mexico to form the Inter-Tribal Bison Cooperative as a 501(c)(3).¹⁹⁰ In 2010, the organization secured recognition as a Section 17 corporation under the Indian Reorganization Act and changed its name to the Inter-Tribal Buffalo Council.¹⁹¹

Today, ITBC's membership has grown to eighty tribes ranging across twenty states.¹⁹² Tribes join ITBC through resolution. ITBC is governed by a nine-member Board of Directors, with each tribe voting to elect officers and to elect the representative from its region of the country.¹⁹³ ITBC supports tribes by distributing federal funds to tribal buffalo programs through competitive grants, providing tribes with technical assistance, and securing distribution to tribes of surplus buffalo from national parks.¹⁹⁴ Further, the organization acts as a collective voice to promote the restoration and respectful use of buffalo with a range of federal and state government agencies and the public.¹⁹⁵

From the beginning, ITBC has sought to restore buffalo in a distinctly Indigenous way. Its founders rejected both an approach that would treat buffalo as "woolly cows," or livestock subservient to humans, and one that would treat them as wildlife fully separate from humans.¹⁹⁶ Instead, it sought to restore the buffalo as wild animals in relationship with Indigenous people.¹⁹⁷ As its mission statement proclaims, ITBC is dedicated to "restoring buffalo to Indian lands in a manner which promotes cultural enhancement, spiritual revitalization, ecological restoration and economic development compatible with tribal beliefs and practices."¹⁹⁸ Consistent with this mission, ITBC promotes buffalo "free ranging as large as political geographic limitations allow," without genetic manipulation or division of family units, and only the management and supplemental feeding necessary to keep the herds healthy and sustainable.¹⁹⁹

ITBC's work of facilitating distribution of buffalo from national parks to tribes quickly involved it in controversy. Because most buffalo in private herds have been genetically mixed with cattle, one of the few sources of genetically undiluted buffalo are the herds that escaped slaughter at Yellowstone National Park.²⁰⁰ Protected from poaching, the Yellowstone herds grew to over three

190. *Id.*; ZONTEK, *supra* note 13, at 80–2.

191. Telephone Interview with Arnell Abold, Executive Director at InterTribal Buffalo Council (June 28, 2021).

192. See *Intertribal Buffalo Council's 80 Member Nations*, INTERTRIBAL BUFFALO COUNCIL, perma.cc/AWT5-5FTZ.

193. Abold, *supra* note 191.

194. *Id.*

195. *Id.*

196. See Burton, *supra* note 183, at 21–22 (describing different approaches to buffalo).

197. RETURN OF THE NATIVE: THE 25 YEAR HISTORY OF THE INTERTRIBAL BUFFALO COUNCIL (InterTribal Buffalo Council 2017) [hereinafter RETURN].

198. ZONTEK, *supra* note 13, at 76–77.

199. *Id.* at 81.

200. *Id.* at 103.

thousand head by the 1990s.²⁰¹ Buffalo are migratory, and in winter regularly left park grounds for nearby lower grounds.²⁰² Although much of these lands outside the park are federally owned, private ranchers often graze their cattle on such lands at low fees.²⁰³

This set up a conflict with Montana ranching interests, which feared that contact with buffalo would infect their cattle with brucellosis abortus, which can cause abortions and sterility in cattle, buffalo, and elk, and fever in humans.²⁰⁴ The stakes were higher than potential loss of diseased animals, because exposure might lead the U.S. Animal and Plant Health Service to rescind Montana's certification as a brucellosis-free state, requiring expensive testing before any cattle could be shipped from the state.²⁰⁵ Montana authorized hunters to shoot any buffalo that left park grounds, and later entered into a settlement agreement to cooperatively manage the park's buffalo with the National Park Service and the Animal and Plant Health Service.²⁰⁶

Conservation groups challenged these practices without success. In 1991, U.S. District Court Judge John Lovell upheld Montana's plan to authorize buffalo hunts, holding that "Montana has an absolute right under its police powers, in protecting the health, safety, and welfare of its inhabitants, to remove by reasonable means, possibly infected trespassing federal bison which migrate into Montana."²⁰⁷ The court accepted Montana's allegation that brucellosis could travel from buffalo to cattle,²⁰⁸ although studies showed (and another federal court agreed) that this was extremely unlikely.²⁰⁹ In 1996, Judge Lovell also rejected a challenge to federal approval of the state-federal interim plan that continued the killings.²¹⁰

Soon after its founding, ITBC began trying to prevent the slaughter of buffalo that left park grounds. In 1994, it proposed that animals be quarantined, tested, and transferred to tribes if healthy, offering facilities at two reservations for the project.²¹¹ After the winter of 1996/97, when 1,100 buffalo were killed under the federal-state plan, ITBC challenged the plan in court,

201. *Id.* at 99.

202. *Id.* at 23.

203. *Id.*

204. *Fund for Animals, Inc. v. Lujan*, 794 F. Supp. 1015, 1019 (D. Mont. 1991).

205. *Id.* at 1019 (finding that brucellosis-free certification saved \$1 to \$2 million per year by allowing cattle to be shipped without testing).

206. *Greater Yellowstone Coalition v. Babbitt*, 952 F. Supp. 1435, 1438–40 (D. Mont. 1996).

207. *Fund for Animals, Inc. v. Lujan*, 794 F. Supp. 1015, 1020 (D. Mont. 1991).

208. *Id.* at 1019 ("The court finds that bison and livestock readily transmit the disease to each other.").

209. *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998).

210. *Greater Yellowstone Coalition v. Babbitt*, 952 F. Supp. 1435, 1446 (D. Mont. 1996).

211. Ervin Carlson, *Expand Quarantine for Buffalo Beyond Yellowstone*, BOZEMAN DAILY CHRON. (Dec. 12, 2020), <https://perma.cc/5PUH-AL5M>; *40 Yellowstone Buffalo Shipped to 16 Native Nations*, LAKOTA TIMES (Aug. 13, 2020), <https://perma.cc/K3GP-454P>.

but met with no more success than the conservation groups had.²¹² ITBC kept working, achieving a quarantine program at Yellowstone, although the program could not accommodate all the buffalo, and many were still slaughtered.²¹³ In 2009, ITBC finally won a seat as part of the coalition creating the Yellowstone Interagency Bison Management Plan.²¹⁴ In 2014, Fort Peck Assiniboine and Sioux Tribes completed a quarantine facility on their reservation with ITBC funding.²¹⁵ It remained empty for years, however, because of continued resistance from Montana.²¹⁶ Finally, Yellowstone sent the first forty buffalo to Fort Peck, but refusal to authorize additional transfers left the facility far under capacity.²¹⁷ In 2023, Yellowstone made the largest transfer ever, of 112 buffalo, to the tribal facility.²¹⁸

ITBC's other work with the federal government has had unequivocal success. ITBC has, for example, built a lasting and positive relationship with the National Park Service. Today, ITBC works with the National Park Service as an "integral partner" in developing a Bison Stewardship Strategy.²¹⁹ Perhaps influenced by ITBC's advocacy, moreover, over the last two decades the National Park Service has "shifted away from managing bison from [a] live-stock-based perspective toward a wildlife stewardship approach."²²⁰ One of the pillars of this approach is supporting tribal buffalo culture.²²¹ ITBC has also helped elevate recognition of the buffalo nationally, helping to lead a coalition that resulted in a 2016 declaration that bison are the national mammal of the United States.²²²

Most striking is the transformed role of buffalo for tribal peoples. Enabled by ITBC grants, distribution of federal buffalo, and technical assistance, tribal buffalo holdings have multiplied from 1,500 head in 1992 to over 20,000 today.²²³ While still dwarfed by the over 300,000 buffalo kept as livestock,²²⁴

212. *Intertribal Bison Co-op. v. Babbitt*, 25 F. Supp. 2d 1135, 1137 (D. Mont. 1998).

213. Carlson, *supra* note 211.

214. Brett French, *Yellowstone's Quarantined Bison Won't Be Transferred to Tribes Anytime Soon*, BILLINGS GAZETTE (Nov. 11, 2018), <https://perma.cc/9MS8-HY29>; Carlson, *supra* note 202.

215. Carlson, *supra* note 211.

216. *Id.*

217. *Id.*

218. Isabel Hicks, *Yellowstone Program Makes Largest Transfer of Bison to Tribes*, BOZEMAN DAILY CHRON. (Feb. 10, 2023), <https://perma.cc/QFW6-Q425>.

219. AMY SYMSTAD, ET AL., A DRAFT DECISION FRAMEWORK FOR THE NATIONAL PARK SERVICE INTERIOR REGION 5 BISON STEWARDSHIP STRATEGY 8 (2019).

220. *Id.* at vi.

221. *Id.*

222. Stephen Lee, *National Bison Day Marks America's New National Mammal*, CAPITAL J. (Nov. 1, 2016), <https://perma.cc/2RKC-VEBF>.

223. ZONTEK, *infra* note 226; U.S. DEPT. INTERIOR, RESTORATION OF AMERICAN BISON AND THE PRAIRIE GRASSLANDS, ORDER No. 3410 (2023)

224. Jeff M. Martin et al., *Vulnerability Assessment of the Multi-Sector North American Bison Management System to Climate Change*, 3 PEOPLE & NATURE 711, 712 (2021) (noting 85% of

tribes now collectively hold more buffalo herds than the federal government.²²⁵ And as tribes have restored buffalo to the landscape, their grazing patterns have restored the ecosystem, making room for native grasses, birds, and terrestrial animals that once joined them on the Plains.²²⁶

Buffalo are healing not just the ecosystem, but tribal people. ITBC worked with the U.S. Department of Agriculture to allow buffalo meat to be used in food programs for children and the elderly and has promoted buffalo meat on reservations as a way to address high diabetes and obesity rates.²²⁷ The ITBC network played a particular role in the COVID-19 shutdowns, as ITBC was able to direct tribal buffalo to tribal meat processing plants to provide resources to commodity food programs.²²⁸

Some see links between the recovery of the buffalo and the recovery of tribal people. In the words of Mike Faith, who managed the Standing Rock Sioux buffalo herd for fifteen years and now serves as Chairman of the tribe, “The buffalo are coming back strong and so are we as a community. They were almost extinct. So were we as a people.”²²⁹ By harnessing the power of intertribal action, ITBC helped generate this rebirth.

III. LEGAL STATUS

Because intertribal organizations are governed by and represent the interests of their component tribes, they share the sovereign status of tribes themselves. This status should include immunity from suit without their consent, autonomy from state law for most activities in Indian country or that interfere with off-reservation treaty rights, and exemption from some federal laws. Although the limited case law on intertribal organizations generally recognizes this, it is inconsistent, and sometimes turns formalistically on the law—federal, state, or tribal—used to incorporate. This section first discusses the reasons an organization might choose one or the other of these forms, then discusses the case law on whether and why they share the legal status of tribal governments.

roughly 400,000 bison were privately owned and kept as livestock).

225. ZONTEK, *supra* note 13, at 75 (noting 1,500 buffalo in tribal lands in 1991); U.S. DEPT. OF INTERIOR, *supra* note 223 (reporting 11,000 bison on federal lands and 20,000 on tribal lands).

226. RETURN, *supra* note 197.

227. ZONTEK, *supra* note 13, at 79, 88.

228. Abold, *supra* note 191.

229. Patrick Springer, *Study Finds Clear Effects of Buffalo Slaughter*, WILLISTON HERALD (Oct. 14, 2019), <https://perma.cc/2AC4-ZYHG>.

A. Different Legal Forms

At least three legal forms—state, federal, and intertribal—are open to intertribal organizations. The state and federal forms create some funding advantages, but the intertribal form offers the most flexibility and control.

First, intertribal wildlife management organizations may form as charitable 501(c)(3) organizations under state nonprofit corporation law. Because of the large number of such 501(c)(3)s, groups can access plentiful materials on how to organize in this fashion. Many private grants, moreover, are only available to 501(c)(3)s. Nonprofit corporations, however, may not engage in lobbying or some other political activities that may be important to intertribal organizations. More importantly, as discussed below, such organizations may also face more challenges in establishing sovereign immunity and autonomy from state law.

Second, intertribal organizations may form as Section 17 tribal corporations under the federal Indian Reorganization Act.²³⁰ This status, statutorily reserved for tribal corporations,²³¹ clearly establishes the legal connection between intertribal organizations and their composite tribes. It also may make it easier to receive some federal funding.²³² Incorporation under Section 17, however, requires a “petition” to the Secretary of Interior for approval of the proposed charter,²³³ a process that can create delays and reduce flexibility in adjusting the organizational form.²³⁴

The third option is to organize under intertribal law, the path taken by both NWIFC and GLIFWC. The law is intertribal because the governing documents for the organization are created jointly by the member tribes. In this structure, the founding tribes first draft a governing document, such as a constitution, defining the organization’s powers and governance structure. The member tribes then individually resolve to join the organization following their own governmental procedures. The downside of intertribal law route is that there is no clear template for organization, and limited case law resolving potential conflicts. The advantage is that the intertribal form creates maximum flexibility and autonomy for the organization and may also provide the clearest route to recognized tribal status.

Intertribal organizations may also choose to combine forms as needed. Although NWIFC’s core organization is formed under intertribal law, for example, it also created a separate 501(c)(3) nonprofit, Salmon Defense, in 2002.²³⁵ The goal of the organization is to “increase public awareness and education, and

230. 25 U.S.C. § 5124.

231. *Id.*

232. Abold, *supra* note 191.

233. 25 U.S.C. § 5124.

234. See Anthony Brown, *What is Section 17?*, CHEROKEE ONE-FEATHER (May 20, 2016), <https://perma.cc/2EK6-CJK3> (describing the process for the Eastern Band of Cherokee Indians in seeking approval for a Section 17 Corporation).

235. *Mission and History*, SALMON DEFENSE, <https://perma.cc/M8DZ-YPR6>.

support legal actions to turn the tide on salmon habitat degradation,²³⁶ leaving monitoring, intergovernmental, and lobbying work to NWIFC. As it is a 501(c)(3), however, donations to Salmon Defense are tax deductible, and the organization can apply for grants open only to nonprofit organizations.

B. Sovereign Immunity

A key question for intertribal organizations is whether they are entitled to sovereign immunity. Absent congressional abrogation, tribal nations may not be sued without their consent.²³⁷ Organizations created by tribes may also be clothed with sovereign immunity if they are deemed “arms of the tribe.”²³⁸ Different jurisdictions analyze the arm-of-the-tribe inquiry in different ways, but generally consider the purposes, extent of tribal ownership and control, and legal structure of the organization.²³⁹ Courts have not considered the immunity of intertribal wildlife organizations, but have found that intertribal organizations serving different purposes served as arms of their member tribes.

In *White v. California*, for example, the Ninth Circuit held that the Kumeyaay Cultural Repatriation Committee was an arm of the tribe entitled to sovereign immunity.²⁴⁰ The Committee had been created by the twelve Kumeyaay tribes of Southern California to seek repatriation of Kumeyaay human remains.²⁴¹ It was organized through intertribal law, with the tribes agreeing on its structure and function, and each tribal government resolving to join it.²⁴² The *White* opinion noted that the committee was comprised solely of tribal members appointed by each member tribe, and that it was funded exclusively by the tribes.²⁴³ The opinion emphasized that “the whole purpose of the Repatriation Committee, to recover remains and educated the public, is ‘core to the notion of sovereignty.’ Indeed,” the court continued, “preservation of tribal cultural autonomy [and]

236. *Id.*

237. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

238. See, e.g., *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019); *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); *Great Plains Lending, LLC v. Dep’t of Banking*, 259 A.3d 1128, 1138 (Conn. 2021); *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 365 (Cal. 2016).

239. Compare *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010) (applying six-factor test) with *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (applying five-factor test); see also *Great Plains Lending, LLC v. Dep’t of Banking*, 259 A.3d 1128, 1140–42 (Conn. 2021) (discussing various tests). *But cf.* *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1109 (Colo. 2010) (adopting three-factor test, and holding that rather than investigate the purposes, court would investigate whether the according sovereign immunity would support tribal sovereignty).

240. *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014).

241. *Id.* at 1018.

242. See *Id.* at 1025.

243. *Id.* at 1025.

preservation of tribal self-determination,’ are some of the central policies underlying the doctrine of tribal sovereign immunity.”²⁴⁴

Federally-chartered intertribal corporations have also been accorded sovereign immunity. In *Amerind Risk Management Corp. v. Malaterre*, the Eighth Circuit held that an intertribal organization chartered as a federally-chartered Section 17 corporation was an arm of the tribe.²⁴⁵ Amerind had been created by the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana to create a self-insurance risk pool for tribes and tribal housing authorities.²⁴⁶ The opinion relied in part on the established status of Section 17 corporations.²⁴⁷ But the court also emphasized the purposes of the organization, noting that “Amerind is not an ordinary insurance company. Indeed, Amerind’s purpose is to administer a *self-insurance* risk pool for Indian Housing Authorities and Indian tribes.²⁴⁸ Relying on both this tribal purpose and the Section 17 form, the court held that “Amerind ‘serves as an arm of the [Charter Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity.”²⁴⁹ Similarly, the Alaska Native Tribal Health Corporation, a coalition of thirteen Alaska Native regional entities authorized by Congress to provide health services to its member tribes, was recognized as an arm of the tribe entitled to sovereign immunity.²⁵⁰

Some courts have held that incorporation under state law defeats a claim that an organization is an arm of the tribe.²⁵¹ One Alaska Supreme Court case held that an Alaska nonprofit formed by 56 Alaska Native Villages to provide social services to the villages was not entitled to sovereign immunity.²⁵² Because the individual villages would not be financially liable for the actions of the organization, the court found, the governmental purposes and control of the organization were irrelevant.²⁵³

In contrast, a particularly thoughtful district court decision affirmed the sovereign immunity of an intertribal organization, the Great Plains Tribal Chairmen’s Health Board, even though it was incorporated under state law.²⁵⁴ The court relied on the fact that the purposes of the organization, “to act as a formal representative of the tribes to the federal government and to provide

244. *Id.* at 1025 (quoting Breakthrough Mgmt. Grp., Inc., 629 F.3d at 1188).

245. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011).

246. *Id.* at 682.

247. *Id.* at 685.

248. *Id.* (emphasis added).

249. *Id.* (citation omitted).

250. *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 932–36 (D. Alaska, 2019).

251. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1149–50 (10th Cir. 2012).

252. *Runyon ex rel. B.R. v. Ass’n of Vill. Council Presidents*, 84 P.3d 437, 437 (Ak. 2004).

253. *Id.* at 441.

254. *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen’s Health Bd.*, 842 F. Supp. 2d 1163, 1163 (S.D. 2012).

health care and related services to tribal members and member Indian tribes” were “closer to the functions of a tribal government than a business.”²⁵⁵ In addition, the court found that “Great Plains and the sixteen tribes are closely linked in terms of management and composition,” because the organization was “governed almost exclusively by tribally-elected presidents or chairpersons,” and therefore was “accountable to the individual tribes and tribal members through the tribes’ representatives.”²⁵⁶

C. Exemptions from Federal Law

Intertribal organizations may also be exempt from certain federal laws. Although courts have taken different approaches, federal statutes of general applicability will not apply to tribes if applying the statute would (1) violate Congress’s express or implied intent; (2) violate tribal treaty rights, or (3) interfere with distinctly sovereign functions of tribes.²⁵⁷ Courts have applied these exemptions to intertribal organizations.

Courts have, for example, held that intertribal organizations are covered by the congressional exclusion of tribes from the definition of “employers” under Title VII of the Civil Rights Act of 1964.²⁵⁸ In *Dille v. Council of Energy Resource Tribes*, the Eighth Circuit held that the exemption applied to an organization formed to collectively manage the energy resources of thirty-nine tribes.²⁵⁹ It declared that “[i]n the time-honored fashion of governments seeking to address sovereign concerns, CERT was organized to assist member tribes in obtaining the greatest possible benefits from one of the few inherently valuable economic assets they possess—energy resources.”²⁶⁰ These purposes, the court found, “mirror the purposes of the exemption for Indian tribes” from Title VII, “to promote the ability of sovereign Indian tribes to control their own economic enterprises.”²⁶¹ Further, “the council is entirely comprised of the member tribes and the decisions of the council are made by the designated representatives of those tribes.”²⁶² The court reasoned that “Congress certainly could not have intended to withdraw the exemption anytime a group of Indian tribes coalesce for a common purpose related to economic development.”²⁶³

255. *Id.* at 1176.

256. *Id.*

257. See COHEN, *supra* note 41, at § 2.02.

258. 42 U.S.C. § 2000e(b).

259. *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 373 (10th Cir. 1986).

260. *Id.* at 375. The court also articulated why intertribal organizations were such an important tool of sovereignty: “A single tribe, backed into an impoverished corner, lacks the bargaining power essential to deal fairly with enormous multinational energy developers.” *Id.* at 375–76 (quoting *Dille v. Council of Energy Res. Tribes*, 610 F. Supp. 159 (D. Colo. 1985)).

261. *Id.* at 375.

262. *Id.* at 376.

263. *Id.*

A later Ninth Circuit decision followed *Dille* to hold that the Modoc Health Project, an organization formed by two tribes to provide health and welfare services to the tribes was covered by the Title VII exemption.²⁶⁴ Interestingly, the organization appears to have been incorporated as a nonprofit under state law,²⁶⁵ but this did not feature in the court's decision. Instead, the court emphasized that "Modoc's board of directors consisted of two representatives from each Rancheria tribal government," and "was organized to control a collective enterprise and therefore falls within the scope of the Indian Tribe exemption of Title VII."²⁶⁶ The Eleventh Circuit extended the holding to an intertribal organization sued under 42 U.S.C. § 1981, a Reconstruction Era civil rights law, noting that the Alabama Intertribal Council was "an intertribal consortium, with a Board dominated by tribal chiefs and tribe members, organized to promote business opportunities for and between the tribes; as such, we conclude that it is entitled to the same protections as a tribe itself."²⁶⁷

The case law on when general federal laws are inapplicable because of interference with tribal self-government is somewhat divided, with different approaches between and within Circuits.²⁶⁸ One of the most interesting decisions involves the Great Lakes Indian Fish and Wildlife Commission.²⁶⁹ The court held that GLIFWC law enforcement officers were not subject to the overtime requirements of the Fair Labor Standards Act.²⁷⁰ As in the Title VII opinions, the court was not troubled by the intertribal nature of the organization, and did not discuss whether it was organized under state, federal, or tribal law. Instead, in holding that federal overtime laws did not apply, the court emphasized that the Commission's "warden-policemen" were "an important element of the scheme for regulating Indian property rights," and that the "inherent sovereignty' of Indian tribes" applied to the kind of regulatory functions exercised by the Commission with respect to both Indians and non-Indians.²⁷¹ This principle, it found, required "allowing the Indians to manage their own police as they like . . . until and unless Congress gives a stronger indication . . . that it wants to intrude on the sovereign functions of tribal government."²⁷²

264. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998).

265. *Id.* at 1187 (calling Modoc a "nonprofit corporation").

266. *Id.* at 1188.

267. *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1036 (11th Cir. 2001).

268. *Compare San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1319 (D.C. Cir. 2007) (applying NLRA to tribe) *and NLRB v. Little River Band of Ottawa Indians Gov't*, 788 F.3d 537, 556 (6th Cir. 2015) (same) *with NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1286 (10th Cir. 2000) (declining to apply NLRA to tribe) *and Soaring Eagle Casino v. NLRB*, 791 F.3d 648, 675 (6th Cir. 2015) (stating that it would hold the NLRA did not apply to tribal business but it was bound by the Sixth Circuit decision earlier that year).

269. *Reich v. Great Lakes Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993).

270. *Id.* at 465–496.

271. *Id.* at 494.

272. *Id.* at 495.

D. *Autonomy from State Law*

Intertribal management organizations should be free from state jurisdiction to the same extent that a tribe itself would be. Absent clear congressional action, tribes and their citizens are generally immune from state law when they act within Indian country.²⁷³ Activities by tribes within reservations, for example, are immune from state taxes and, to the extent their activity involves only tribal citizens, are immune from most state regulatory power.²⁷⁴ Indian tribes and their citizens are generally subject to state laws like anyone else when they act outside of Indian country.²⁷⁵ For this reason, the NWIFC headquarters is now based on Nisqually tribal lands, and its tribal employees are no longer subject to state taxes.²⁷⁶

An important exception to state jurisdiction outside reservation boundaries is that states may generally not interfere with activities directly connected to off-reservation treaty rights.²⁷⁷ The exemption becomes less certain, however, for activities that go beyond hunting and fishing, or affect non-Indians.²⁷⁸ It is important, therefore, that the game wardens of both GLIFWC and CRITFC are cross-deputized by the non-Indian jurisdictions where they work, allowing them to arrest non-Indians not otherwise subject to tribal jurisdiction.²⁷⁹

E. *Conclusion*

Although decisions on the status of intertribal organizations in different contexts are limited, they reveal some common patterns. Aside from a few outliers, the opinions in general do not focus on formalistic factors like the law—intertribal, federal, or state—under which the groups organize, but instead on their purpose, function, and control. As to purpose, while some were engaged in economic activity, all were devoted to the welfare of their component tribes and their citizens, pursuing functions that would otherwise be accomplished by the tribes themselves. And while they had some differences in form, all were governed by a Board of Directors comprised of representatives of the component tribes, so that the tribes collectively controlled their actions. Intertribal wildlife management organizations that satisfy these criteria should be treated as tribes

273. COHEN, *supra* note 41, at § 6.01(5).

274. *Id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

275. COHEN at § 6.03(1)(a).

276. Hollowed, *supra* note 102.

277. *See* *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1013 (2019).

278. *Cf.* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–145 (1980) (holding that state interests may be considered in determining applicability of state law on reservations in activities involving non-Indians); *Puyallup Tribe v. Wash. Game Dep't*, 391 U.S. 392, 398 (1968) (stating state could only impose measures “necessary” to conserve the resource).

279. COHEN, *supra* note 41, at § 9.07 (discussing cross-deputization agreements).

for most legal purposes. Given the outlier cases, however, organizing intertribal law is the surest means to secure tribal status.

IV. ACCOMPLISHMENTS OF INTERTRIBAL WILDLIFE MANAGEMENT

As the previous case studies suggest, intertribal organizations have played an important role for tribal people and the wildlife they cherish. This section focuses on three aspects of their impact. First, they have enhanced preservation of wildlife and habitat. Second, they have contributed to development of distinctly Indigenous science, one that goes beyond recognition of traditional ecological knowledge but prioritizes the concerns and experiences of Indigenous people. Finally, even as they require tribes to relinquish some authority to intertribal bodies, they have enhanced tribal sovereignty.

A. *Wildlife and Habitat Improvement*

Most intertribal wildlife organizations arose to facilitate Indigenous capture of wildlife, and most faced (and still face) arguments that they undermine conservation. But all seem to be powerful forces for conserving species and their habitat. This phenomenon may be in part because legal and political obstacles mean they must withstand more scrutiny than states and federal government to maintain their hard-won autonomy. But it also reflects the constitutive importance the animals hold for the Indigenous peoples that compose these organizations and the deep knowledge their members possess.

Opponents to Indigenous rights to hunt and fish often cloak their opposition in conservation. Some of these claims are tied up with racism, as the “Can an Indian, Save a Salmon,” “Save a Walleye, Spear an Indian,” and, in a more recent iteration, “Save a Whale, Kill a Makah,” slogan show.²⁸⁰ The organizers of the racist protests against treaty fishing in Wisconsin, for example, claimed that the Ojibwe fishers wasted “thousands of fish” because they were too lazy to clean them.²⁸¹ But opposition also reflects that tribal traditions may include practices, like whale or eagle hunting or gillnet fishing, that conflict with conservation measures.²⁸² The evidence from intertribal organizations, however,

280. John Eligon, *A Native Tribe Wants to Resume Whaling. Whale Defenders Are Divided*, N.Y. TIMES (Nov. 14, 2019), <https://perma.cc/89MW-KYRB> (discussing Makah bumper sticker); Rob Carson, *Boldt Decision on Tribal Fishing Still Resonates After 40 Years*, THE OLYMPIAN (Feb. 9, 2019), <https://perma.cc/Y3H8-5TN8>.

281. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1289, 1291 (W.D. Wis. 1994).

282. *See, e.g.*, John Flesher, *New Great Lakes Fishing Deal Permits Tribes' Use of Controversial Nets, Limits Commercial Fishing*, USA TODAY (Dec. 13, 2022), <https://perma.cc/4TJX-HL8S> (discussing controversy over gillnet fishing).

suggests that their effect is to improve conservation beyond what state and federal agencies require.

International agreements to protect endangered whales, for example, have repeatedly clashed with Alaska Native traditional practices.²⁸³ The Alaska Eskimo Whaling Commission (AEWC) formed to protect subsistence hunting for bowhead whales in the face of an International Whaling Commission moratorium.²⁸⁴ The organization, however, has been a consistent voice for bowhead conservation. It negotiates annually with companies exploring for oil and gas off the Alaska coast to mitigate impacts on the bowhead whale population.²⁸⁵ Using results of its monitoring, scientific studies, and traditional knowledge, it has questioned the methodology and conclusions of federal agencies to advocate for more protection of whale populations.²⁸⁶

Another example comes from the Columbia River Inter-Tribal Fish Commission. In 1995, CRITFC and its member tribes adopted a fish restoration plan called *Wy-Kan-Ush-Mi-Wa-Kish* (spirit of the salmon).²⁸⁷ Pursuant to this plan they entered into the Columbia Basin Fish Accords with the Bonneville Power Administration, U.S. Army Corps of Engineers, and the U.S. Bureau of Land Reclamation in 2008.²⁸⁸ The accords established coordinated and consistent funding for salmon habitat restoration in exchange for the promise of the tribes not to litigate for additional protection or breach of the Snake River dams over the next decade.²⁸⁹ A 2017 evaluation showed many accomplishments under the accords.²⁹⁰ Among other things, 397 barriers to fish passage had been removed; some fish populations had doubled; beavers, coho salmon, and Pacific lamprey had been reintroduced in a number of areas; and juvenile survival rates for wild chinook, steelhead, and sockeye salmon had all increased.²⁹¹

NWIFC, similarly, has used its position to protect water resources that affect the entire Puget Sound ecosystem. In litigation that went to the U.S. Supreme Court, the tribes of western Washington won a ruling ordering the state to remove its culverts that prevented anadromous fish from completing

283. Elizabeth M. Bakalar, *Subsistence Whaling in the Native Village of Barrow: Bringing Autonomy to Native Alaskans Outside the International Whaling Commission*, 30 BROOK. INT'L L. REV. 601, 615 (2005).

284. *Id.*

285. Johnny Aiken, Exec. Dir., Alaska Eskimo Whaling Comm'n, to Michael Payne, Chief, Permits and Conservation Div., Office of Protected Res., Nat'l Marine Fisheries Serv., Comment Letter on Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, Alaska (Dec. 7, 2011), 2, perma.cc/EG6F-AJMZ.

286. *Id.* at 4–6.

287. COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, COLUMBIA BASIN FISH ACCORDS: TEN-YEAR REPORT, 2008-2017 2 (2017).

288. *Id.* at 4.

289. *Id.*

290. *Id.* at 24 (summarizing progress).

291. *Id.* at 9–10.

their life cycle and reaching tribal fishing grounds.²⁹² The action was filed in 2001 after repeated attempts to negotiate removal with the state.²⁹³ NWIFC supported the litigation throughout, as a voice and negotiator for the tribes, and through extensive reporting on the impact of the culverts on fish populations.²⁹⁴ NWIFC also tracks progress of many threats to Puget Sound watersheds, assists tribal members in seeking to address them, and negotiates with non-tribal actors to do the same. In the words of current NWIFC Chair Lorraine Loomis, “We know the status quo isn’t working when it comes to salmon recovery. We know what the science says needs to be done. We know that we must move forward together to address habitat because it is the most important action we can take to recover salmon.”²⁹⁵

By winning the right to manage wildlife themselves, moreover, tribes have not supplanted state and federal management; they have augmented them. An evaluation of GLIFWC reports that its member tribes have created what “may be the most tightly regulated and monitored walleye fishery in the world.”²⁹⁶ In 1983, Wisconsin officials were conducting only about twelve spring fish counts annually at lakes throughout the state.²⁹⁷ By 2001 however, the state and GLIFWC coordinated to undertake sixty such counts annually, a five-fold increase.²⁹⁸

Given the great differences between intertribal management organizations and the wildlife populations they manage, a quantitative analysis of their positive impact is far beyond the scope of this article. But in numerous ways these organizations have played a meaningful role in wildlife and habitat restoration.

B. Indigenous Science

Intertribal organizations also enhance the development of Indigenous science. “Indigenous science” here means something broader than Traditional Ecological Knowledge,²⁹⁹ although it includes that too. Indigenous science is

292. *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017), *aff’d* by an equally divided court, S. Ct. 1832, 1833 (2018).

293. Michael Blumm & Jane Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RES. J. 653, 657 (2009).

294. *See, e.g.*, Bryan Bougher, Questions and Answers Regarding the Tribal Culvert Case, NW. INDIAN FISHERIES COMM’N (Jan. 16., 2001), <https://perma.cc/4YTP-GGK4>; Billy Frank, *Being Frank: Culvert Ruling Benefits Salmon, Everyone*, NW. INDIAN FISHERIES COMM’N BLOG (Sept. 5, 2007), <https://perma.cc/82UW-JU5U>.

295. NW. INDIAN FISHERIES COMM’N, STATE OF OUR WATERSHEDS REPORT 4 (2020).

296. Nesper & Schlender, *supra* note 13, at 286.

297. *Id.* at 298.

298. *Id.*

299. Definitions of “traditional ecological knowledge” are contested and varying, but a leading authority defines it as “a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about

what emerges when Indigenous people direct the questions that science must address and influence the sources of information used to answer them.

In part, intertribal organizations enhance Indigenous science simply by using their collective power to hire scientists not enmeshed in existing bureaucracies. Henry Buffalo, Jr. remarked on this in reflecting on GLIFWC's impact:

Part of what we bring to the equation, is we stole from them some of their best younger minds and their biologists. These were the younger minds who had different theories than the guys who had been there for 30 years. Their theories were not given any daylight and they didn't want to wait around for 10 years or 15 years to get their theories up to the top. They became part of our staff and all of a sudden they were peers, they were colleagues, they were equals to the folks that were the head of the institutions in the states or provinces. And we began contributing with those new theories and developing science.³⁰⁰

Because tribal authority over wildlife is still vulnerable to state or judicial abrogation, moreover, tribes have had to monitor their catch more carefully. This has allowed them to reveal where state natural resource officials are "side-lining science for political concerns."³⁰¹

The products of scientific methods also depend on the questions they are used to answer. Because tribes have different interests regarding wildlife than non-Indigenous communities, the science they generate will also be different. The impact of water quality on fish provides a good example. For many tribes, fish is not simply one food source among many; rather, eating fish regularly is a key cultural and subsistence practice.³⁰² But federal and state water quality standards are typically based on the consumption rates of non-Indigenous people.³⁰³ Even when based on Indigenous consumption rates, they may reflect rates given suppression of cultural practices.³⁰⁴

One innovative intertribal project in Maine sought to address this problem. Five Maine tribes partnered with the EPA to commission a toxicologist and anthropologist to determine water quality standards necessary to permit

the relationship of living beings (including humans) with one another and with their environment." FIKRET BERKES, *SACRED ECOLOGY* 8 (7th Ed. 2018).

300. Buffalo, *supra* note 141, at 4.

301. Nesper & Schlender, *supra* note 13, at 299.

302. *See, e.g.*, Nesper & Schlender, *supra* note 13, at 291 (discussing importance of sharing fish).

303. *See* Jamie Donatuto & Barbara L. Harper, *Issues in Evaluating Fish Consumption Rates for Native American Tribes*, 28 *RISK ANALYSIS* 1497, 1498–99 (2008) (discussing EPA recommendations and difficulties with recommendations for Native American populations). The EPA is now working to adjust water quality standards to reflect Indigenous fish consumption. EPA Press Office, *EPA Announces Proposal to Protect Tribal Reserved Rights in Water Quality Standards and Best Practices for Tribal Treaty and Reserved Rights* (Nov. 30, 2022), <https://perma.cc/8JNV-JPUA>.

304. *Id.*

Indigenous people to safely consume fish as they would if traditional practices were not distorted or depressed.³⁰⁵ The study found that tribal sustenance practices included between 286 to 514 grams per day of fish consumption, in contrast with the 32.4 grams per day Maine used in setting its water quality standards based on non-Indian diets.³⁰⁶ The EPA then relied on this study to reject Maine's water quality standards on the grounds they did not sufficiently protect human safety.³⁰⁷

Intertribal management organizations have also contributed to the growth and dissemination of Traditional Ecological Knowledge. Sometimes this is by actively consulting with elders for publications and reports. The Wabanaki Exposure Scenario report discussed above, for example, deliberately included discussions with Wabanaki elders and cultural experts and vetting of academic literature by these cultural experts in developing its findings.³⁰⁸ Similarly, GLIFWC sought out knowledge from elders to publish two compendiums on the uses of over 300 plants traditionally used by Great Lakes Ojibwa.³⁰⁹

Elsewhere, dissemination occurs simply by creating settings in which scientific experts have access to the knowledge of the Indigenous people actually using the resource. By combining the knowledge of the tribal fishers across the Puget Sound watershed, NWIFC learned that the state's data did not reflect differences between the different coastal areas in the Sound and was able to create more accurate reports.³¹⁰ Similarly, in Alaska, the AEWFC drew on the experience of Yupik and Inupiat whalers to correct the National Marine Fisheries Service on the migration patterns of bowhead whales.³¹¹ Ojibwe fishers, meanwhile, informed GLIFWC staff that toxic mining wastes were contaminating an important Lake Superior spawning ground, leading to the creation of a multi-agency effort to address the problem.³¹²

In short, intertribal wildlife management has encouraged development of a science driven by the concerns, experience, and traditional knowledge of Indigenous people. In so doing, it has enhanced and transformed the understanding of the relationship between humans, wildlife, and their ecosystem.

305. BARBARA HARPER & DARREN RANCO, WABANAKI TRADITIONAL CULTURAL LIFEWAYS EXPOSURE SCENARIO, EPA REGION ONE 8, 2 (2009).

306. Allison Dussias, *Water Quality and (In)equality: the Continuing Struggle to Protect Penobscot Sustenance Fishing in Maine*, 51 CONN. L. REV. 801, 825 (2019).

307. *Id.* at 824.

308. HARPER & RANCO, *supra* note 305, at 13.

309. Nesper & Schlender, *supra* note 13, at 294.

310. Hollowed, *supra* note 102.

311. Aiken, *supra* note 285, at 4–6.

312. McCammon-Soltis, *supra* note 151.

C. Increased Sovereignty

Intertribal wildlife management organizations have also increased the sovereignty of their member tribes. This phenomenon may seem surprising. Even for organizations like NWIFC and ITBC that do not assume classically sovereign police functions, these organizations take on some roles (including monitoring, drafting model laws, and seeking funds) otherwise reserved for tribes themselves. But by taking on these tasks and coordinating communication with outside entities, these organizations have significantly increased the capacity and influence of their member tribes.

First, information is power. In litigation and negotiations with other governments, tribes too often have had to rely on data collected by others, or counter false narratives built on no data at all. By using their collective resources to hire staff charged with collecting and analyzing data, intertribal management organizations can counter this imbalance and address these falsehoods. These data played a key role in securing tribal victories in litigation in the Northwest and Great Lakes, and helped tribes reshape policy debates to further their concerns. By facilitating information sharing among the member tribes, these organizations can maximize their knowledge of all members.

Second, relationships are influence. Resource management requires coordination with many government agencies and interest groups. Ongoing relationships create the trust and sharing of information necessary for that coordination. Although officials within the twenty tribes that comprise NWIFC, the eleven that comprise GLIFWC, or the sixty-nine that comprise ITBC could form those relationships, it would take a great many more collective resources, and changes in leadership would make it necessary to build them again. By coordinating the tribal voice within a single, stable organization, intertribal organizations can secure ongoing relationships and positions with many more entities than individual tribes can on their own.

Finally, unity is legitimacy. Tribal governments face serious questions as to their legitimacy, both from outside the tribe and within. The doubt from non-tribal entities that tribes have the authority or capacity to manage resources is well known. The doubts from tribal citizens are less so. Just as tribes' governing capacity was distorted by generations of efforts to quash or coopt their power, so was their citizens' respect for tribal authority. Having spent generations fighting state regulation of their fishing rights, citizens of Pacific Northwest and Great Lakes tribes were not eager to have any government, tribal or not, restrict them. Indeed, in the years before courts affirmed their treaty rights, "violating," or evading state wardens, had become a part of Ojibwe cultural identity in the Great Lakes region.³¹³ As Henry Buffalo, Jr. recalled, "tribal members didn't

313. See LARRY NESPER, *THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS* 4 (2002).

like” getting cited by GLIFWC wardens “any more than they liked getting cited by state officers.”³¹⁴

To effectively manage wildlife, therefore, tribes must establish legitimacy before both tribal citizens and non-Indian groups. Dissension between tribes increases doubts about the legitimacy of tribal positions and authority, making them appear more mercurial and self-interested. When the Sault Ste. Marie Chippewa tribe, one of the five members of the Chippewa Ottawa Resource Authority, recently seemed to break from the other members on renewal of their agreements with the state, it generated overblown attacks that the tribes were preparing to “end sports-fishing as we know it.”³¹⁵ By coordinating a unified front, however, intertribal organizations add legitimacy to the stances of individual tribal members.

Unity, of course, does have its limits. Tribes cannot completely cede their decisions or voice to others. But the experience of the organizations profiled here provides no evidence that tribes have sacrificed their interests in favor of unity. Instead, the tribes have increased their power, influence, and legitimacy, and achieved their interests in protecting and using natural resources in the process.

CONCLUSION

Let me end, as I began, with a story. In November 2022, the Inter-Tribal Buffalo Council transferred 100 buffalo to the Wolakota Buffalo Range on the Rosebud Sioux Reservation in what is now South Dakota.³¹⁶ Established in 2020, about 1,000 buffalo now roam across Wolakota’s 28,000 acres.³¹⁷ The day after the transfer, tribal citizen T.J. Heinert took down a bull from the herd.³¹⁸ After placing tobacco on the body and saying a prayer, Heinert and a companion, Daniel Eagle Road, brought the buffalo to the Wolakota ranch, where twenty adults and children were waiting.³¹⁹ There, Rosebud elder Duane Hollow Horn Bear told the listeners, “This relative gave of itself to us, for our livelihood, our way of life.”³²⁰ Together, the group butchered the animal, working into the night to remove and clean the pelt, stomach, and tongue, and package the meat for distribution to families through a tribal food program.³²¹

314. Buffalo, *supra* note 141.

315. Nick Green, *Court Filing Could End Great Lakes Fishing as We Know it*, MICH. UNITED CONSERVATION CLUBS (July 16, 2020), <https://perma.cc/NE33-GA8K>.

316. Matthew Brown, *Bison Spread as Native American Tribes Reclaim Stewardship*, AP NEWS, (Nov. 21, 2022), <https://perma.cc/2HDK-C5JM>.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

The story reflects many relationships. That between the buffalo and the rolling high plains prairie. Between the buffalo and the Lakota people. Between those who hunt the animal and those who prepare it. Between the individual hunter and community members in need. Between the Inter-Tribal Buffalo Council and its member tribes. And finally, the relationship between the Inter-Tribal Buffalo Council and the many federal, state, and local agencies it negotiated with to make restoring buffalo to tribes possible.

In *Indigenous Economics*, Professor Ronald Trosper (Salish-Kootenai) argues that Indigenous economies reflect a “relational economics.”³²² In this economics, the starting point is not the individual, but the relationships—between individual and group, between groups, and between them and lands and non-human beings.³²³ Like the buffalo hunt at Wolakota, the intertribal organizations examined here embody this relational approach, forging bonds between tribes to secure relationships with non-tribal groups and thereby restore relationships between people, animals, and land.

322. Trosper, *supra* note 55, at 26.

323. *See id.*