



NOTE

Sovereignty-Affirming Subdelegations: Recognizing the Executive's Ability to Delegate Authority and Affirm Inherent Tribal Powers

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Abstract. Bears Ears National Monument, as proclaimed by President Obama in 2016, realized a bold vision of cooperation between the executive branch and Native nations by elevating a coalition of Native nations as co-managers of a national monument. This proposed system of collaborative management relied on a broad interpretation of the executive branch's power to subdelegate authority—that is, to redelegate authority delegated to it by Congress—to Native nations. While the Supreme Court has explained that the nondelegation doctrine imposes fewer restrictions on Congress's ability to delegate when it shares power with Native nations than it would for delegations to nonsovereign entities outside the federal government, the Court has provided no similar guidance for *executive* subdelegations to Native nations. Lower federal courts similarly have failed to develop a unified approach. They have disagreed on whether Native nations' inherent powers justify treating them differently from other subdelegates.

This Note presents a new understanding of the legality of the executive branch's efforts to share its power with Native nations by synthesizing the Supreme Court's recognition of Congress's ability to affirm tribal sovereignty, the subdelegation doctrine as articulated by lower federal courts, and the executive branch's history of combining federal and tribal authority. In doing so, this Note describes a new application of the subdelegation doctrine for Native nations: When federal agencies engage in sovereignty-affirming subdelegations—subdelegations that affirm tribal sovereignty by intermingling federal and tribal power—they should be presumed to have acted permissibly unless Congress has expressed a contrary intent. Finally, this Note proposes a framework of analysis and a judicial test so courts may recognize when the executive branch has performed a sovereignty-affirming subdelegation.

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Introduction

In December 2017, President Trump shrank, divided, and renamed Bears Ears National Monument.¹ Despite its diminished size, Bears Ears remains important in current discussions about public lands and executive authority. Several groups, including Native nations, have challenged its reduction,² while legal academics and commentators debate whether the Antiquities Act allowed the President to shrink the monument.³ Representatives in Congress, meanwhile, have introduced legislation to restore Bears Ears,⁴ and presidential candidates have even promised to do so if elected.⁵ At the local level, the San Juan County Commission has denounced the Trump Administration's actions.⁶

This current discussion about Bears Ears's future, centered on its boundaries, largely overlooks the Bears Ears Commission, the body created to

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1. Proclamation No. 9681, 3 C.F.R. 188, 193 (2017).
 2. See *Protecting Bears Ears National Monument*, NATIVE AM. RTS. FUND, <https://perma.cc/PGA5-R4PE> (last updated Jan. 9, 2020).
 3. See generally, e.g., Hope M. Babcock, *Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 STAN. ENVTL. L.J. 3 (2017) (arguing the President may not reduce or revoke previously designated national monuments); Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVTL. L. 125 (2018) (arguing the delegated powers of the Antiquities Act work only in the direction of preserving lands); John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENVTL. L. REV. 1 (2019) (finding no support from past presidential monument reductions for the proposition that the President has gained the authority to reduce the size of national monuments by proclamation through congressional acquiescence); John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617 (2018) (arguing the President has the power to reduce and revoke national monuments).
 4. See Bears Ears Expansion and Respect for Sovereignty Act, H.R. 871, 116th Cong. (2019); see also Thomas Burr & Brian Maffly, *Congressional Dems Launch a Push to Make the Former Bears Ears National Monument Bigger than Even Obama Designated*, SALT LAKE TRIB. (updated Feb. 3, 2019), <https://perma.cc/M29V-6KBA>.
 5. See Thomas Burr, *Here's What the Democratic Presidential Hopefuls Plan to Do with Public Lands If They Defeat Trump*, SALT LAKE TRIB. (updated Sept. 22, 2019), <https://perma.cc/52VT-M2TS> (noting that several candidates for the Democratic Party's 2020 presidential nomination, including Pete Buttigieg, Amy Klobuchar, Bernie Sanders, and Elizabeth Warren, have made this pledge); see also Biden for President, Joe Biden's Commitment to Indian Country 2 (2020), <https://perma.cc/3KRJ-LR4Z> (promising to "revers[e] President Trump's proclamation on Bears Ears"); Elizabeth Warren, *My Plan for Public Lands*, MEDIUM (Apr. 15, 2019), <https://perma.cc/W4Y4-3DSA>.
 6. Nate Carlisle, *Split Appears in San Juan as New Navajo-Led County Commission Moves to Support an Even Bigger Bears Ears than Trump Shrunk*, SALT LAKE TRIB. (updated Feb. 21, 2019), <https://perma.cc/A7TV-KEUZ>.

give local Native nations a role in overseeing the monument.⁷ Representatives from the Hopi Nation, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Ute Mountain Ute Tribe, and Pueblo of Zuni would have formed the Commission,⁸ and they would continue to do so as part of the modified Shash Jáa Commission under the Trump Administration's management plan.⁹ The Commission's future, however, remains unclear,¹⁰ and the signs of continued, meaningful participation do not look promising.¹¹

Even if the Commission continues in some form, its fate raises worrying questions about federal Indian law and the future of collaborative management. Bears Ears's collaborative-management program presented the boldest articulation of the Obama Administration's legal and policy position that

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7. See *infra* text accompanying notes 148-53. Typical news coverage of the Trump Administration's new management plan, for example, discusses changes to the borders and the amount of environmental protection without mentioning changes to the Commission. See, e.g., Darryl Fears & Juliet Eilperin, *Trump Officials Say a New Plan Will Protect Bears Ears. Others Call It "Salt in an Open Wound,"* WASH. POST (July 27, 2019, 6:34 AM PDT), <https://perma.cc/F6EF-XGEK>.
 8. See Letter from Carleton Bowekaty, Chairman, Bears Ears Comm'n, to Ryan Zinke, Sec'y, U.S. Dep't of the Interior (June 7, 2017) (on file with author) (summarizing the Commission's membership and explaining that it had prepared to begin work in 2017).
 9. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BEARS EARS NATIONAL MONUMENT: RECORD OF DECISION AND APPROVED MONUMENT MANAGEMENT PLANS—INDIAN CREEK AND SHASH JÁA UNITS 29 (2020), <https://perma.cc/KBW7-B6EX> [hereinafter BEARS EARS MANAGEMENT PLAN].
 10. While the Bureau of Land Management and the Forest Service have proposed how they intend to "work with the [Shash Jáa] [C]ommission or comparable entity," *id.* at H-1 to H-3 (emphasis added), the Native nations "that make up the Shash Jáa Commission have not indicated an interest in convening a [commission] meeting" and opted for other means to engage with the Trump Administration in the development of management plan for Bears Ears, *id.* at 29-30.
 11. See Brian Maffly & Zak Podmore, *Feds Release Final Management Plans for Utah's Bears Ears, Grand Staircase. Critics Say They're Worse than Before,* SALT LAKE TRIB. (updated Feb. 7, 2020), <https://perma.cc/ME8D-HB6S> (explaining that one Native-led organization "dismissed the Bears Ears plan as another example of the federal government ignoring the sovereignty of the five tribes that proposed Bears Ears"). Several of the represented nations have already objected to how the Trump Administration has worked with or failed to work with them. See Tribal Plaintiffs' Response to Federal Defendants' Motion to Dismiss at 14, *Hopi Tribe v. Trump*, Nos. 1:17-cv-02590, 1:17-cv-02605 & 1:17-cv-02606 (D.D.C. Nov. 15, 2018), 2018 WL 6037688, ECF No. 74 (alleging the Administration has "stripped the Bears Ears Commission of the vast majority of its purview and destroyed its character as a representative body of the Tribal governments" by reducing the Monument and failing to work with the Commission in creating management plans under the new presidential proclamation); Ute Indian Tribe, Testimony of the Ute Indian Tribe of the Uintah & Ouray Reservation to the House of Representatives Committee on Natural Resources 4 (2019), <https://perma.cc/9VH4-AZPA> (explaining that Department of the Interior officials had not engaged in "back and forth discussion, . . . further exchange of proposals, . . . [or] deliberative process" with the tribes).

executive agencies could include tribal governments in federal land management decisionmaking processes.¹² Under President Obama's proclamation, the Bears Ears Commission would have provided guidance for developing and implementing Bears Ears's management plan.¹³ Even if Congress reaffirms collaborative management at Bears Ears,¹⁴ the Commission's legality and similar executive efforts to include Native nations in federal decisionmaking may face greater scrutiny, particularly on nondelegation grounds.¹⁵

Consideration of Native nations' inherent sovereignty removes the nondelegation doctrine's perceived barriers to empowering the Bears Ears Commission as a collaborative manager.¹⁶ The Obama Administration faced pushback on the grounds that it had exceeded its ability to subdelegate—or delegate its own delegated authority—when it established Bears Ears National Monument and the Commission.¹⁷ While the nondelegation doctrine permits Congress to delegate administrative authority to executive, state, and tribal agencies within certain limits,¹⁸ its offshoot, the subdelegation doctrine, limits executive agencies' ability to further delegate such authority to other actors.¹⁹

12. See Dep't of the Interior, Secretarial Order No. 3342 (2016), <https://perma.cc/36TU-8MZE> [hereinafter Secretarial Order No. 3342] (encouraging Department of the Interior subagencies to increase cooperation with tribes and presenting a process for realizing increased cooperation); *infra* text accompanying notes 134-37.

13. See Proclamation No. 9558, 3 C.F.R. 402, 408-10 (2016).

14. See Bears Ears Expansion and Respect for Sovereignty Act, H.R. 871, 116th Cong. § 4(c) (2019).

15. See *infra* notes 91-96 and accompanying text. Critics have already condemned Bears Ears's designation as emblematic of the problem of executive overreach at the expense of local interests. See, e.g., Nicolas Loris, *Federal Land Grabs Have Gotten Out of Control. Why Trump's Executive Order Is a Positive Sign.*, HERITAGE FOUND. (Apr. 26, 2017), <https://perma.cc/P997-YFSL>.

16. See *infra* Part III.D.

17. See, e.g., Letter from Jason Chaffetz, Chairman, U.S. House Comm. on Oversight & Gov't Reform, to Sally Jewell, Sec'y, U.S. Dep't of the Interior (Dec. 29, 2016), <https://perma.cc/J75J-53HX> (raising concerns about the legality of the Commission's co-management responsibility and citing support from subdelegation case law).

18. Generally, Congress may delegate authority as long as it "delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73, 412 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (upholding a delegation to an agency within the judicial branch); see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 474-76 (2001) (upholding a delegation to an agency within the executive branch).

19. Subdelegation refers to an agency's redelegation of congressionally delegated authority. *La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671 (3d Cir. 2014); *Perot v. FEC*, 97 F.3d 553, 555-56, 559 (D.C. Cir. 1996) (per curiam). Others have used the term "subdelegation" to refer only to intra-agency delegations and the term "relegation" to describe extra-agency delegations. See Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 891-93 (2012); see also F. Andrew Hessick & Carissa Byrne Hessick, *footnote continued on next page*

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Reevaluating the Supreme Court's delegation case law in light of Congress's power to reaffirm tribal sovereignty draws a line between delegations to Native nations and affirmations of their sovereignty.²⁰ In turn, this line shows that the executive branch can affirm, and often has affirmed, tribal sovereignty by intermingling federal and tribal powers—in other words, through certain sovereignty-affirming subdelegations.²¹

Native nations' sovereignty permits executive agencies to make sovereignty-affirming subdelegations.²² An agency performs a sovereignty-affirming subdelegation when it delegates authority that relates to an area within Native nations' inherent sovereignty and comports with the aims of federal plenary power over Indian affairs. Not only has the executive branch often undertaken these subdelegations,²³ but courts have also recognized their legality even when Congress has not expressly authorized them.²⁴ This Note combines such descriptive claims with a prescriptive proposal for how courts should address such subdelegations. Synthesizing this past practice and case law

The Non-Redelegation Doctrine, 55 WM. & MARY L. REV. 163, 167-78, 191-93 (2013) (defining the “non-redelegation doctrine” as the distinct albeit related idea that courts should not redelegate authority from Congress's appointed delegates when they interpret or “remedy” statutes). Restraints on agencies' ability to perform intra-agency and extra-agency subdelegations exist as a corollary to the nondelegation doctrine. See Jessica Bergman Asbridge, *Whose Job Is It Anyway? The Department of Labor's Authority to Make Labor Market Determinations Under the H-2B Program*, 64 DRAKE L. REV. 273, 294-95 (2016); Brenda Lindlief Hall, *Subdelegation of Authority Under the Endangered Species Act: Secretarial Authority to Subdelegate His Duties to a Citizen Management Committee as Proposed for the Selway-Bitterroot Wilderness Grizzly Bear Reintroduction*, 20 PUB. LAND & RESOURCES L. REV. 81, 87-88 (1999); Marisam, *supra*, at 891-94 (discussing the relationship among the anti-redelegation, nondelegation, and subdelegation doctrines). This Note uses “subdelegation” to refer to both intra- and extra-agency delegations, in part because courts have used the term in this manner. See, e.g., *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (noting the distinction between delegations within and without an agency but referring to both as “subdelegations”).

20. See *infra* Part I.

21. See *infra* Part III.

22. This Note's analysis covers federally recognized Native nations because the federal government only forms a “government-to-government” relationship with a Native nation following recognition. See 25 C.F.R. § 83.2(a) (2019) (explaining that federal recognition “[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States”); see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 & n.1 (9th Cir. 2004) (noting that while unrecognized Native nations exist, only federally recognized Native nations have legal status in the eyes of the federal government). For a brief overview of the distinction between federally recognized and unrecognized Native nations, see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (LexisNexis 2017).

23. See *infra* Part III.A.

24. See *infra* Part III.B.

reveals that courts should review executive branch efforts to include tribal governments in the exercise of federal administrative authority less warily than many courts do today. That is to say, when the executive branch seeks to subdelegate authority that establishes new contours of tribal sovereignty by including tribal governments in the exercise of some federal authority, courts should presume that subdelegating this authority is permissible unless Congress has expressly indicated otherwise.²⁵

This Note, then, seeks to advance two main ideas. First, by tracing the current limits of the nondelegation doctrine and combining it with the federal government's ability to affirm tribal sovereignty, it aims to present a legal argument that supports executive subdelegations to a tribal collaborative manager like the Bears Ears Commission. This Note proposes a presumption for sovereignty-affirming subdelegations and a corresponding judicial test, demonstrating that current law permits an end that many Native nations and their members desire.²⁶ Second, this analysis pushes against arguments that tribal sovereignty's relationship to federal authority makes it less than full sovereignty. At the same time as federal Indian law recognizes Native nations' continued sovereignty, it recognizes Congress's power to abrogate it.²⁷ While this relationship pushes some to question tribal sovereignty's foundations,²⁸ sovereignty-affirming subdelegations reject the understanding that mixing tribal and federal authority makes tribal sovereigns anomalous or lesser. The consensual intermingling of federal and tribal authority, achieved through

25. See *infra* Part III.C.

26. See, e.g., Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENVTL. L. 279, 282-84 (2000); NCAI *Applauds Department of the Interior for Recognizing Tribal Role in Managing Federal Lands and Natural Resources*, NAT'L CONGRESS AM. INDIANS (Oct. 21, 2016), <https://perma.cc/ZC9G-HQMU> ("NCAI has long supported and advocated for the advancement of cooperative relationships that foster and integrate traditional indigenous knowledge and practices into the management of natural resources that affect tribal lands, empowering tribal self-determination and resiliency of tribal communities."); *infra* Part III.C. Many Native nations have participated in co-management and cooperative arrangements to exert greater control over their traditional lands, yet statutes have limited these efforts. See Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 393-95 (2008).

27. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014) (explaining that Native nations retain their inherent sovereignty, yet Congress may act to alter this authority).

28. See, e.g., *United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring in the judgment) ("The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'"); see also *United States v. Bryant*, 136 S. Ct. 1954, 1967-69 (2016) (Thomas, J., concurring).

these subdelegations, can provide a way to strengthen Native nations' sovereignty, not weaken it.

Part I reframes the Supreme Court's case law regarding delegations to Native nations. It demonstrates that the Court in *United States v. Mazurie*²⁹ grappled with Congress's authority to affirm tribal sovereignty rather than its authority to delegate federal power. This understanding not only suggests the district court erred in *Brackeen v. Zinke*³⁰ by evaluating the Indian Child Welfare Act (ICWA)³¹ as a delegation, but also encourages courts to reevaluate the subdelegation doctrine. Part II lays out current subdelegation case law with a focus on subdelegations to nonfederal entities. After establishing the doctrine's contours, this Part next explains how this understanding of subdelegation shaped the Bears Ears Commission's creation.

Part III, the heart of this Note, provides a new understanding of the limits of subdelegation to Native nations. It recognizes the category of sovereignty-affirming subdelegations by synthesizing the past and current executive practices and judicial treatment of subdelegations to Native nations. In such subdelegations, executive agencies affirm tribal sovereignty by intermingling federal and tribal power. This analysis underpins the test for when courts should apply a presumption in favor of sovereignty-affirming subdelegations. This Part concludes by showing that when courts apply this presumption and test, the nondelegation doctrine poses no barriers to the Bears Ears Commission's collaborative management of Bears Ears National Monument.

I. Rethinking Congressional Delegations

Despite the debates about the nondelegation doctrine's significance, the recent success in federal district court of a nondelegation challenge to ICWA threatens to undermine not only executive but also congressional efforts to hand over authority to tribal governments.³² The nondelegation doctrine's

29. 419 U.S. 544 (1974).

30. 338 F. Supp. 3d 514, 536-38 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir.), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019), *argued*, No. 18-11479 (5th Cir. Jan. 22, 2020). The Fifth Circuit panel affirmed only the district court's judgment that the plaintiffs had Article III standing. 937 F.3d at 421-25.

31. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.).

32. *See Brackeen*, 338 F. Supp. 3d at 536-38. Future nondelegation challenges seem increasingly likely. For example, the Attorney General of Utah has already sought to intervene on behalf of the Trump Administration in litigation concerning Bears Ears's reduction, suggesting little hesitancy to entertaining a possible nondelegation challenge given that Utah believes Bears Ears's "[m]anagement . . . has direct and indirect economic impacts on the State and its citizens and directly implicates property rights held in trust by the State to support schools." *See State of Utah's Motion to Intervene on*
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core tenet is that Congress may not delegate its power to legislate.³³ Although this aspect of the doctrine remains clear, many legal academics and commentators disagree about the doctrine's significance and implementation. Some debate whether the nondelegation doctrine restrains or has ever effectively restrained congressional action.³⁴ Others have called for courts to reimagine the doctrine to make it a more useful judicial tool.³⁵ Although the Supreme Court repeatedly has upheld congressional delegations when they have been challenged on nondelegation grounds in recent years,³⁶ several Justices have expressed interest in making the doctrine more exacting.³⁷

Behalf of Defendants at 3, *Hopi Tribe v. Trump*, Nos. 1:17-cv-02590, 1:17-cv-02605 & 1:17-cv-02606 (D.D.C. Oct. 5, 2018), ECF No. 52.

33. See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *Loving v. United States*, 517 U.S. 748, 758 (1996).
34. See, e.g., Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 620 (2017) (contending that state courts enforce the nondelegation doctrine even though federal courts rarely enforce it); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722-23 (2002) (arguing that the Constitution does not contain a nondelegation rule and that the nondelegation doctrine should not be followed); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380-81 (2017) (arguing that the nondelegation doctrine never meaningfully restrained congressional delegations).
35. See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004) (arguing that the better approach to understanding Article I, Section 1 of the Constitution is as a doctrine of "exclusive delegation" rather than the current understanding of the nondelegation doctrine); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315-17 (2000) (arguing that the nondelegation doctrine functions as a series of canons of interpretation); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 976-78 (2018) (arguing that courts should enforce the nondelegation doctrine on an as-applied basis as a solution to general judicial nonenforcement).
36. See, e.g., *Gundy*, 139 S. Ct. at 2129-30 (plurality opinion) (holding that Congress's delegation of authority to the Attorney General to specify when the Sex Offender Registration and Notification Act's registration requirements apply for pre-enactment offenders was not unlawful); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-76 (2001) (holding that Congress did not violate the nondelegation doctrine when it delegated power to the Environmental Protection Agency (EPA) Administrator to set national ambient air quality standards under the Clean Air Act); see also *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1231-34 (2015) (holding that Amtrak is a governmental entity and accordingly vacating the D.C. Circuit's conclusion that Congress unlawfully delegated power to Amtrak to set standards for passenger railroad performance).
37. See *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."); *id.* at 2135-40 (Gorsuch, J., dissenting) (describing the "traditional" tests for violations of the nondelegation doctrine and arguing that the current nondelegation doctrine has

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In *Brackeen v. Zinke*, Judge Reed O'Connor of the United States District Court for the Northern District of Texas held that Congress, through ICWA, unlawfully delegated federal authority to Native nations.³⁸ A Fifth Circuit panel reversed Judge O'Connor's decision because it concluded that, rather than unlawfully delegating power, ICWA lawfully "incorporat[ed] . . . inherent tribal authority."³⁹ The Fifth Circuit, sitting en banc,⁴⁰ may still hold ICWA unconstitutional, but it likely will not do so on nondelegation grounds.⁴¹

Nevertheless, Judge O'Connor's application of the nondelegation doctrine merits greater scrutiny. Judge O'Connor reasoned that ICWA's delegation was unlawful because Native nations "are not a coordinate branch of government" and therefore cannot "exercise federal legislative or executive regulatory power over non-tribal persons on non-tribal land."⁴² The nondelegation doctrine, however, does not contain a "federal actor requirement,"⁴³ as Judge O'Connor would seem to require. Congress generally cannot delegate regulatory power to private entities,⁴⁴ but it may delegate such authority to states and Native

strayed from the traditional approach); *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring); *id.* at 1254-55 (Thomas, J., concurring in the judgment).

38. 338 F. Supp. 3d 514, 536-38 (N.D. Tex. 2018) (concluding that ICWA impermissibly delegated legislative authority to tribal governments by allowing tribal governments to set their own orders of child-custody preferences that would apply to state child-custody proceedings), *aff'd in part, rev'd in part sub nom. Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir.), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019), *argued*, No. 18-11479 (5th Cir. Jan. 22, 2020); *see also* 25 U.S.C. § 1915(c) (2018).

39. *Brackeen*, 937 F.3d at 435-37.

40. *See Brackeen*, 942 F.3d 287.

41. At oral argument, the Fifth Circuit's questioning focused on other constitutional challenges to ICWA, particularly the anti-commandeering challenge. *See* Oral Argument at 15:35-17:15, 26:55-31:35, 32:40-37:15, 39:35-48:00, *Brackeen*, No. 18-11479 (5th Cir. Jan. 22, 2020), <https://perma.cc/9KHU-RXXS>. This focus is not surprising given that Judge Owen's opinion dissenting in part from the panel opinion found merit in this challenge. *Brackeen*, 937 F.3d at 441-46 (Owen, J., concurring in part and dissenting in part) (concluding that certain provisions of ICWA unconstitutionally commandeer state officials).

42. *Brackeen*, 338 F. Supp. 3d at 537-38. This Note evaluates 25 U.S.C. § 1915(c) as a congressional delegation because Judge O'Connor adopted this framing. This Note does not, however, argue that this framing is superior to the Fifth Circuit panel's view that § 1915(c) incorporated rather than delegated authority. *See supra* note 39 and accompanying text.

43. *See Brackeen*, 338 F. Supp. 3d at 537 (capitalization altered).

44. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). However, Congress may make a private entity's approval a precondition for a regulation going into effect. *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939). It may also empower a private entity to propose rules as long as a federal entity retains the final approval power. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

nations as sovereign actors outside the federal government.⁴⁵ Judge O'Connor's omission of this black-letter law, then, challenges the central idea that Native nations' sovereignty enables them to receive any federal authority.

Although the Fifth Circuit has corrected this error,⁴⁶ Judge O'Connor's misapplication of the nondelegation doctrine presents an opportunity to reconsider the Supreme Court's nondelegation case law in relation to its recognition of Congress's authority to reaffirm tribal sovereign authority in *United States v. Lara*.⁴⁷ In *Lara*, the Court determined that Congress had affirmed Native nations' power to prosecute nonmember Indians after the Court had previously ruled that Native nations had lost this power.⁴⁸ But the Court's application of the nondelegation doctrine to Native nations predated *Lara*. It had considered Congress's ability to delegate authority to Native nations in *United States v. Mazurie*, where it upheld a statute that enabled tribal governments to regulate the introduction of liquor onto their lands.⁴⁹ Despite the two opinions' different terminology, reading *Mazurie's* application of the nondelegation doctrine in light of *Lara* reveals that some congressional delegations affirm tribal sovereignty by "relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes."⁵⁰ The

45. See *Rice v. Rehner*, 463 U.S. 713, 730-31, 733-35 (1983) (upholding the delegation of federal authority to states over liquor sales in Indian country under 18 U.S.C. § 1161); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (upholding the same statute's delegation of similar authority to the governments of Native nations). If Article I's text establishes the nondelegation doctrine, one can argue that no such distinction should exist. See Merrill, *supra* note 35, at 2168; see also *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment). Native nations' and states' independent sources of authority justify this differential treatment. See *Rehner*, 463 U.S. at 730-31 (explaining that a "State's police power over liquor transactions within its borders is broad enough" to support Congress's delegation of federal authority over the sale of liquor in Indian country); *Mazurie*, 419 U.S. at 556-57 (concluding that restrictions on congressional delegations to Native nations were "less stringent" because, as sovereign entities, Native nations can hold "independent authority over the subject matter" of the delegated authority).

46. See *Brackeen v. Bernhardt*, 937 F.3d 406, 435-37 (5th Cir.) (relying on the Supreme Court's decision in *Mazurie* in its analysis of the nondelegation challenge to § 1915(c)), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019), *argued*, No. 18-11479 (5th Cir. Jan. 22, 2020).

47. See 541 U.S. 193, 199-207 (2004).

48. See *infra* notes 55-59 and accompanying text.

49. See 419 U.S. at 556-57. The statute in question was 18 U.S.C. § 1161, which has not been significantly modified since *Mazurie*. See 18 U.S.C. § 1161 (2018) (exempting the application of laws prohibiting the introduction of liquor into Indian country when the "act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register").

50. See *Lara*, 541 U.S. at 207.

nondelegation doctrine's central concern is whether Congress has provided enough guidance to limit the delegatee's discretion in exercising congressionally delegated authority.⁵¹ By forgoing the statutory interpretation typical of a nondelegation challenge,⁵² the *Mazurie* Court's analysis indicates that it examined Congress's power to extend or restore the boundaries of tribal sovereign authority rather than Congress's power to delegate.⁵³ Looking through this lens suggests that ICWA may be better understood as affirming tribal sovereignty, not delegating federal authority. Correcting this aspect of Judge O'Connor's opinion in *Brackeen*, then, synthesizes this case law to mark more clearly the division between delegated and inherent authority.

The Supreme Court's approach in *Mazurie* for analyzing congressional delegations to Native nations turned on the extent of federal and tribal authority.⁵⁴ This type of inquiry featured prominently in *Lara* three decades later. In *Lara*, the defendant, a member of the Turtle Mountain Band of Chippewa Indians, argued that the Double Jeopardy Clause barred his federal prosecution, because the Spirit Lake Tribe had already convicted him for the same conduct and this earlier prosecution also rested on federal power.⁵⁵ This argument placed Congress's power to affirm tribal sovereignty before the Court. Fourteen years earlier, in *Duro v. Reina*, the Court had determined that Native nations had lost the inherent power to prosecute nonmember Indians,⁵⁶ but Congress, in response, enacted the "Duro fix," expanding Native nations' inherent power to exercise criminal jurisdiction over nonmember Indians.⁵⁷ The *Lara* Court concluded that Congress could return sovereign powers to Native nations after the Court had determined those powers had been implicitly divested or, in other words, adjudged to be lost by virtue of Native

51. See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

52. See *Gundy*, 139 S. Ct. at 2123 (plurality opinion) ("[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation.").

53. See *Mazurie*, 419 U.S. at 556-57 (focusing on the closeness between the delegated authority and Native nations' independent authority).

54. See *id.* at 553-59 (examining whether Congress had the authority to regulate a business selling alcohol on nonmember-owned fee land within the boundaries of a reservation and whether this authority could be delegated to a tribal government).

55. *Lara*, 541 U.S. at 196-98.

56. 495 U.S. 676, 688 (1990), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, tit. VIII, § 8077(b)-(c), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301 (2018)).

57. Act of Nov. 5, 1990 § 8077(b)-(c), 104 Stat. at 1892-93; see also *Lara*, 541 U.S. at 197-98; Will Trachman, Comment, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CALIF. L. REV. 847, 848 (2005).

nations' dependent status.⁵⁸ The Spirit Lake Tribe prosecuted the defendant exercising its own sovereign powers, not the United States's powers.⁵⁹

In reaching this conclusion, the Court considered the constitutional significance of both *Duro* and the *Duro* fix. Not only had Congress intended to expand tribal sovereignty, rather than delegate authority, through the *Duro* fix, but Congress also had the power to do so.⁶⁰ In the past, it had exercised similar power to alter "the metes and bounds of tribal sovereignty."⁶¹ It had pursued different Indian affairs policies and had even restored previously terminated Native nations.⁶² Moreover, prosecuting nonmember Indians was closely related to Native nations' inherent power to prosecute their own members.⁶³ Accordingly, restoring this power neither conflicted with Native nations' domestic dependent nation status nor encroached on states' authority.⁶⁴ Finally, the Court explained that *Duro* was not a constitutional decision.⁶⁵ *Duro* had established the extent of Native nations' sovereignty *at the time of the decision* based on historical practice, Department of the Interior opinions, treaties, and statute.⁶⁶ The Court recognized that Congress's and the executive branch's actions, rather than the Constitution, had set these boundaries.⁶⁷ Therefore, Congress could change them.⁶⁸

By distinguishing between congressional delegations to Native nations and congressional affirmations of their sovereignty, *Lara* suggests there are two tracks for expanding Native nations' powers: Congress may delegate authority, as recognized by *Mazurie*, or affirm sovereign powers, as recognized by *Lara*. Reexamining *Mazurie* in light of *Lara*, however, reveals that these two opinions differ mostly in terminology, not in substance. Both opinions recognized congressional expansions of tribal sovereignty. The case in *Mazurie* began after the federal government prosecuted the non-Indian owners of the Blue Bull, a bar within the Wind River Reservation, for unlawfully selling

58. *Lara*, 541 U.S. at 199-207. The Court has explained that Native nations' statuses as domestic sovereigns deprives them of certain sovereign powers and leaves other powers subject to withdrawal by Congress. See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

59. *Lara*, 541 U.S. at 210.

60. *Id.* at 199-207.

61. *Id.* at 202-03.

62. *Id.*

63. *Id.* at 204.

64. *Id.* at 204-05.

65. *Id.* at 205.

66. *Id.* at 205-07.

67. *Id.* at 205-06.

68. *Id.* at 207.

liquor in Indian country.⁶⁹ The owners had violated the Wind River Tribes' liquor ordinance by continuing to operate the Blue Bull after the Wind River Tribes had denied them a tribal liquor license.⁷⁰ The Tenth Circuit reversed the owners' conviction for this violation on two grounds, including that Congress had unlawfully delegated authority to Native nations when it enabled "a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands."⁷¹ The Supreme Court, reversing the Tenth Circuit, concluded that 18 U.S.C. § 1161 was a lawful delegation to Native nations.⁷²

As the *Lara* Court did, the *Mazurie* Court, in its treatment of the delegation issue, first examined the boundaries of Congress's plenary power.⁷³ This analysis turned on whether Congress's regulation of non-Indian-owned fee lands within a reservation fell within Congress's Indian Commerce Clause power.⁷⁴ This inquiry, then, really probed whether such regulation was an exercise of plenary power over Indian affairs.⁷⁵ Next, the *Mazurie* Court determined that Native nations' inherent sovereignty established that they could receive authority derived from Congress's plenary power.⁷⁶ It explained:

[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.⁷⁷

Three years later, the Court decided *United States v. Wheeler*, in which it held that Native nations' prosecutions of their members rested on their sovereign authority,⁷⁸ and clarified that the *Mazurie* Court's inquiry into the

69. See *United States v. Mazurie*, 419 U.S. 544, 546-50 (1975); see also 18 U.S.C. § 1154 (2018).

70. *Mazurie*, 419 U.S. at 548.

71. See *United States v. Mazurie*, 487 F.2d 14, 18-19 (10th Cir. 1973), *rev'd*, 419 U.S. 544; see also 18 U.S.C. § 1161.

72. See *Mazurie*, 419 U.S. at 556-59. In *Rice v. Rehner*, the Court subsequently held that § 1161 also lawfully delegated federal authority to states, after a general store owner challenged the requirement that she had to obtain a liquor license from California to sell liquor within the Pala Reservation. See 463 U.S. 713, 715-16, 733-35 (1983).

73. *Mazurie*, 419 U.S. at 553-56.

74. *Id.*; see also U.S. CONST. art. I, § 8, cl. 3.

75. See *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (noting Congress's plenary power derives "explicitly and implicitly" from the Constitution, especially the Indian Commerce Clause); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

76. *Mazurie*, 419 U.S. at 557.

77. *Id.*

78. 435 U.S. 313, 323-26 (1978) (explaining that Native nations retain inherent sovereignty at least over "relations among members of a tribe"); see also *Duro v. Reina*, 495 U.S. 676, 685-86 (1990) ("[T]he retained sovereignty of the tribes is that needed to control their

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relationship between the delegated power and “the internal and social relations of tribal life” really concerned the relationship between the delegated power and inherent sovereignty.⁷⁹ The *Lara* Court’s subsequent reliance on this closeness between the restored and retained powers recasts the *Mazurie* Court’s conclusion “that the independent tribal authority is quite sufficient to protect Congress’ decision” to delegate some of its plenary power to Native nations.⁸⁰ In this light, the *Mazurie* Court found that Congress could reshape the boundaries of tribal sovereignty when exercising its plenary power over Indian affairs.

Courts’ analyses of true congressional delegations to tribal governments look different from analyses of affirmations of sovereignty. For example, in *Arizona Public Service Co. v. EPA*, the D.C. Circuit considered Congress’s 1990 amendments to the Clean Air Act, which enabled Native nations to exercise power under the Act in the same manner as states provided they met certain statutory criteria.⁸¹ In its final rule implementing these amendments, the Environmental Protection Agency (EPA) determined that these amendments delegated “federal authority to regulate air quality to Native American nations within the boundaries of reservations, regardless of whether the land is owned by the tribes.”⁸² Several entities challenged the rule in court on various grounds, including that the EPA had improperly interpreted the Clean Air Act amendments as expressly delegating authority to Native nations to regulate privately owned land within reservations.⁸³ The D.C. Circuit upheld the rule and concluded that the EPA had correctly determined that the Clean Air Act had expressly delegated this regulatory authority to Native nations.⁸⁴

The D.C. Circuit’s analysis differed from the Supreme Court’s in *Mazurie*. While the D.C. Circuit examined the limits of Native nations’ inherent sovereign authority, it did so to confirm that Congress intended to delegate the power to tribal governments to regulate air quality of nonmember-owned fee lands within reservations. Unlike tribal lands, these privately owned lands only fall under Native nations’ inherent regulatory jurisdiction on “a case-

own internal relations, and to preserve their own unique customs and social order.”), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, tit. VIII, § 8077(b)-(c), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301 (2018)).

79. *See Mazurie*, 419 U.S. at 557.

80. *See id.*

81. 211 F.3d 1280, 1284-85 (D.C. Cir. 2000); *see also* Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 29 and 42 U.S.C.).

82. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1285.

83. *Id.* at 1286.

84. *Id.* at 1284, 1287-92.

specific basis.”⁸⁵ Neither the source of Congress’s power, nor the closeness of the relationship between the delegated authority and inherent tribal powers, were closely interrogated by the D.C. Circuit. Critically, the recognition that the delegated power might fall outside Native nations’ inherent authority supported the conclusion that Congress had delegated authority.⁸⁶ In this regard, *Arizona Public Service Co.* reveals that the *Mazurie* Court recognized that Congress relaxed restrictions on inherent tribal sovereignty rather than delegating federal authority.

Distinguishing *Mazurie* and *Arizona Public Service Co.* indicates that the *Brackeen* court erred in understanding ICWA as a delegation. Native nations’ sovereign authority includes custody decisions over Native children.⁸⁷ In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court confirmed that “[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.”⁸⁸ Congress enacted ICWA’s provisions giving tribal governments a role in custody proceedings “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”⁸⁹ In this light, ICWA resembles the *Duro* fix more than it does the Clean Air Act amendments. Congress, pursuant to its plenary power,⁹⁰ reshaped the reach of Native nations’ retained sovereign authority

85. *Id.* at 1287-88. The Supreme Court established the general framework for determining when Native nations had regulatory jurisdiction over non-Indian-owned fee lands in *Montana v. United States*, 450 U.S. 544 (1981). The Court recognized that a Native nation presumptively could not regulate activities on non-Indian-owned fee lands, but it could exercise such jurisdiction when the conduct is performed by “nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” and could regulate “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565-66. The Court has applied *Montana’s* test in subsequent cases. *See, e.g.,* *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320-24, 327-41 (2008) (concluding that the Cheyenne River Sioux could not regulate the sale of non-Indian-owned fee land within the reservation under *Montana’s* test, thereby finding that the Cheyenne River Sioux Tribal Court did not have jurisdiction over a lawsuit brought by customers against their non-Indian bank).

86. *See Ariz. Pub. Serv. Co.*, 211 F.3d at 1288 (concluding that Congress intended to grant Native nations authority to manage air quality on all lands within their reservations notwithstanding whether all these lands actually fell under their sovereign control).

87. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); *Fisher v. Dist. Court*, 424 U.S. 382, 387-88 (1976) (per curiam).

88. 490 U.S. 30, 42 (1989) (acknowledging that federal and state case law before ICWA had recognized tribal jurisdiction over custody proceedings).

89. H.R. REP. NO. 95-1386, at 23 (1978).

90. *See id.* at 13-17 (explaining ICWA’s constitutional basis in Congress’s plenary power over Indian affairs).

over child custody. In light of *Lara* and a reinterpreted *Mazurie*, both ICWA's import and its constitutionality become clear.

In *Mazurie*, the Court did more than recognize Congress's ability to delegate to Native nations. It provided a framework to understand Congress's ability to affirm tribal sovereignty. When Congress affirms tribal sovereignty, it exercises its plenary power to "grant" tribal governments authority closely related to the inherent powers they currently hold. These requirements distinguish affirmations of sovereignty from delegations. More importantly, this synthesis of *Mazurie* and *Lara* provides a path for evaluating executive efforts to affirm tribal sovereignty.

II. The Current Doctrine of Executive Subdelegations

Federal efforts to support Native nations will face constitutional challenges beyond *Brackeen*,⁹¹ and these future challenges may focus on executive efforts to share powers with tribal governments.⁹² In 2016, the Obama Administration's Department of the Interior directed federal land managers to engage in further collaboration and cooperation with tribal governments.⁹³ Members of Congress subsequently questioned the Department of the Interior's authority to direct such actions without congressional authorization.⁹⁴ In particular, they suggested that the Obama

91. See Taylor Ledford, Comment, *Foundations of Sand: Justice Thomas's Critique of the Indian Plenary Power Doctrine*, 43 AM. INDIAN L. REV. 167, 197 (2018-2019) (explaining that the federal government's use of its plenary power over Indian affairs has provoked efforts "to attack title 25 [of the U.S. Code] in its entirety and seek to start from scratch" (citing *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom. Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir.), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019), *argued*, No. 18-11479 (5th Cir. Jan. 22, 2020))).

92. When she ran for the Democratic Party's nomination for the 2020 election, Elizabeth Warren released a policy proposal for federal public lands that called for Native nations to assume greater control over managing these lands. See Warren, *supra* note 5 ("The administration of public lands should incorporate tribes' traditional ecological knowledge, making provisions for tribal culture and customs on public lands, and exploring co-management and the return of resources to indigenous protection wherever possible."). Nondelegation challenges to such efforts appear particularly likely because many statutes that confer authority on Native nations have faced nondelegation challenges in the recent past. See, e.g., *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008) (per curiam) (reviewing a nondelegation challenge to the Indian Reorganization Act's land-into-trust provisions); *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 866-67 (D.C. Cir. 2006) (reviewing a nondelegation challenge to the Pokagon Restoration Act); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1218-23 (9th Cir. 2001) (en banc) (reviewing a nondelegation challenge to the Hoopa-Yurok Settlement Act).

93. Secretarial Order No. 3342, *supra* note 12, at 1.

94. See Letter from Orrin G. Hatch, U.S. Senator, et al., to Barack Obama, U.S. President 1 (Dec. 15, 2016), <https://perma.cc/XB5M-YRNX> (contending that the Department of

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Administration illegally subdelegated authority to the Bears Ears Commission when it established its collaborative-management program for Bears Ears National Monument.⁹⁵ The Trump Administration seems to agree with this criticism,⁹⁶ and any future executive efforts to promote greater collaboration with tribal governments would be vulnerable to similar lines of attack.

Rethinking the current subdelegation case law in light of *Lara* and *Mazurie* will defeat some subdelegation challenges to tribal collaborative management.⁹⁷ The prevailing approach to subdelegations appears to constrain an executive agency's ability to subdelegate to actors outside the federal government,⁹⁸ yet it fails to appreciate the difference between subdelegating authority to tribal governments and affirming their inherent sovereign authority. When examined from this perspective, certain executive subdelegations to tribal governments become a mixture of both affirmations of sovereignty and delegations of federal authority.⁹⁹ Current law, buttressed by historical practice, permits the executive to undertake these actions without express congressional approval.¹⁰⁰

A. Subdelegating Authority

While, in the past, the subdelegation doctrine largely concerned questions about subdelegations within administrative agencies, recent cases have brought attention to subdelegations to entities outside the federal government.¹⁰¹ This

the Interior misled tribal governments when it promised that they would co-manage Bears Ears National Monument because the Department "lacks authority to enter into any such cooperative management arrangement with the Tribes in the absence of authorization from Congress").

95. See Letter from Jason Chaffetz to Sally Jewell, *supra* note 17, at 1 (asserting that co-management at Bears Ears National Monument would require congressional authorization (citing U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565-66 (D.C. Cir. 2004); and High Country Citizens' All. v. Norton, 448 F. Supp. 2d 1235, 1246-47 (D. Colo. 2006)); see also John Curtis, *Contrary to False Claims, My Bill Empowers Utah's Local Tribes*, SALT LAKE TRIB. (updated Jan. 20, 2018), <https://perma.cc/MKQ4-5Y6C> ("Although Obama wanted to give the tribes meaningful co-management of the Bears Ears National Monument, his executive authority under the Antiquities Act was limited—because these are federally owned lands—and to achieve this worthy objective would require an act of Congress.").

96. See *infra* notes 164-65 and accompanying text.

97. See *infra* Part III.

98. See *infra* Part II.A.

99. See *infra* Part III.

100. See *infra* Part III.

101. See Marisam, *supra* note 19, at 894-96 (describing the developments of a line of cases from the D.C. Circuit); Merrill, *supra* note 35, at 2175-76 (noting the return of interest in subdelegation questions); see also Asbridge, *supra* note 19, at 305-06 (highlighting two
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more recent and unsettled case law lays the groundwork for evaluating possible subdelegations to tribal governments. In general, courts evaluate a subdelegation's legality by employing a similar framework to the one they use when examining congressional delegations. Courts first look to Congress's intent and the construction of the original delegating statute.¹⁰² The subdelegatee's identity then shapes the inquiry into congressional authorization for subdelegation.¹⁰³

Courts subject subdelegations within agencies to the least scrutiny. In general, when Congress provides an agency head with a broad congressional grant of administrative and regulatory discretion, this grant creates a presumption in favor of the propriety of subdelegation within the agency, because overseeing large administrative programs requires agency heads to maintain flexibility in discharging their duties.¹⁰⁴ Therefore, courts almost universally permit intra-agency subdelegations unless Congress demonstrates a contrary intent.¹⁰⁵

In contrast, courts more closely scrutinize subdelegations to subdelegates outside the subdelegating agency.¹⁰⁶ In *United States Telecom Ass'n v. FCC*,¹⁰⁷ the D.C. Circuit addressed agencies' ability to subdelegate to state entities. In that case, the court reviewed the Federal Communications Commission's subdelegation to state commissions of its statutory authority to make certain

recent cases from the Third and Tenth Circuits that have considered subdelegations of authority to other agencies).

102. See *United States v. Giordano*, 416 U.S. 505, 522-23 (1974); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); see also Note, *Subdelegation by Federal Administrative Agencies*, 12 STAN. L. REV. 808, 808-09 (1960).
103. See *La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671 (3d Cir. 2014) (noting that subdelegations to "an outside, non-subordinate agency" are evaluated more stringently than intra-agency subdelegations under the prevailing case law (citing *U.S. Telecom Ass'n*, 359 F.3d at 565; and *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008))); *Marisam*, *supra* note 19, at 894-95 (noting that the D.C. Circuit's line of subdelegation cases applies a presumption against subdelegation to other federal agencies, state agencies, and private entities).
104. See *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121-23 (1947) ("[A] rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld."); see also Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1972-73 (2018).
105. See *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190-91 (10th Cir. 2014) (collecting cases); *Marisam*, *supra* note 19, at 897 (explaining the general presumption of permitting subdelegation of authority within agencies).
106. See *Marisam*, *supra* note 19, at 893-97 (describing the current case law's presumption against allowing agencies to subdelegate authority to outside parties); Jennifer Nou, *Essay, Subdelegating Powers*, 117 COLUM. L. REV. 473, 516 (2017).
107. 359 F.3d 554 (D.C. Cir. 2004).

telecommunications unbundling decisions.¹⁰⁸ It held that “while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”¹⁰⁹ The Supreme Court hinted at a similar rule in *ETSI Pipeline Project v. Missouri*, when several states challenged the Secretary of the Interior’s authority to enter into a contract with the ETSI Pipeline Project to withdraw water from a South Dakota reservoir.¹¹⁰ Congress had not empowered the Secretary of the Interior to enter into such a contract, leaving this authority to the Secretary of the Army.¹¹¹ The Secretary of the Interior, however, claimed this authority based on “a tradition of cooperation” with the Secretary of the Army, which included a past agreement to permit the Interior Secretary to exercise the Army Secretary’s contracting power.¹¹² The Court dismissed this argument, explaining that “the Executive Branch is not permitted to administer the [Flood Control Act] in a manner that is inconsistent with the administrative structure that Congress enacted into law.”¹¹³

While the Supreme Court provided no further explanation, the D.C. Circuit has provided several reasons justifying its presumption against subdelegations to outside entities. A subdelegation within the agency, the *United States Telecom* court reasoned, keeps political accountability inside the agency and ensures the subdelegatee will use the authority in line with the agency’s policy goals and vision.¹¹⁴ In contrast, subdelegating powers to another entity not only occludes direct channels of political accountability, but also introduces new decisionmakers with ideas and ends that possibly diverge

108. *Id.* at 564-73. The D.C. Circuit’s reasoning has been examined and adopted by several courts. See, e.g., *La. Forestry Ass’n*, 745 F.3d at 671 & n.16; *Fund for Animals*, 538 F.3d at 132; *High Country Citizens’ All. v. Norton*, 448 F. Supp. 2d 1235, 1246-47, 1247 n.4 (D. Colo. 2006).

109. *U.S. Telecom Ass’n*, 359 F.3d at 566.

110. 484 U.S. 495, 497-98, 515-17 (1988) (holding that the Secretary of the Interior did not have the authority to enter into the contract with ETSI Pipeline Project); Marisam, *supra* note 19, at 896-97 (describing the *ETSI Pipeline Project* decision as containing “[t]he Supreme Court’s clearest articulation of the anti-redelegation doctrine”); Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 321-22 (2017) (noting that both the Supreme Court and the D.C. Circuit have found that a subdelegation outside the agency “is impermissible as an exercise of purely executive power”).

111. *ETSI Pipeline Project*, 484 U.S. at 505-06.

112. *Id.* at 515-16.

113. *Id.* at 516-17.

114. *U.S. Telecom Ass’n*, 359 F.3d at 565-66.

from those of the subdelegating agency.¹¹⁵ Moreover, the D.C. Circuit, in *Defenders of Wildlife v. Gutierrez*, subsequently explained that maintaining accountability through judicial review of agency actions provides an additional reason to disfavor extra-agency subdelegations.¹¹⁶ If the Coast Guard retained its statutory “authority to promulgate traffic separation schemes,” then parties injured by such schemes could bring suits under the Administrative Procedure Act or the Endangered Species Act.¹¹⁷ The fact that such parties could not pursue these same suits against the International Maritime Organization supported the conclusion that the Coast Guard could not delegate this authority.¹¹⁸

The D.C. Circuit has also expressly rejected easing the subdelegation doctrine’s restraints for sovereign subdelegates.¹¹⁹ Although the Supreme Court’s opinion in *Mazurie* supported such easing,¹²⁰ the *United States Telecom* court justified its approach on two grounds. First, *Mazurie* concerned “an express congressional delegation, rather than an administrative subdelegation.”¹²¹ Second, the *Mazurie* Court only engaged in the discussion about delegating to sovereigns “to distinguish” such delegations from “delegation[s] to purely private organizations.”¹²² The Ninth Circuit, however, had applied the *Mazurie* Court’s reasoning to conclude that the subdelegatee’s independent authority eases restrictions on subdelegations.¹²³ The D.C. Circuit dismissed these applications as dicta and underexplained “extension[s] of *Mazurie*.”¹²⁴

115. *Id.* (“In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.”).

116. *See* 532 F.3d 913, 925-26 (D.C. Cir. 2008) (discussing the issue of subdelegation in its analysis of whether the challenged adoption of “traffic separation schemes” constituted final agency action by the Coast Guard).

117. *Id.* at 926; *see also* 5 U.S.C. § 702 (2018); 16 U.S.C. § 1540(g) (2018).

118. *See Defs. of Wildlife*, 532 F.3d at 926-27.

119. *U.S. Telecom Ass’n*, 359 F.3d at 566 (“The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis.”).

120. *See supra* text accompanying notes 73-80.

121. *U.S. Telecom Ass’n*, 359 F.3d at 566.

122. *Id.*

123. *See* *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (applying *Mazurie* to the Secretary of the Interior’s subdelegation to a Native nation of the authority to disapprove right-of-way applications for lands within an Indian reservation); *see also* *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 785-86, 795 (9th Cir. 1986) (applying *Mazurie* to question the legality of a subdelegation of authority over oil and gas well placement on an Indian reservation to a state board). Part III.B below discusses the Ninth Circuit’s approach in depth.

124. *U.S. Telecom Ass’n*, 359 F.3d at 566 (“[I]n neither of these cases was this principle necessary to the outcome, and in neither did the court seek to justify the extension of *Mazurie* from its context—the validity of an express delegation of Congress’s powers.”).

Judicial review of subdelegations to external entities can remain quite strict even when Congress instructs the agency to work closely with such entities. For example, the Tenth Circuit held that the Department of Homeland Security unlawfully subdelegated its authority to issue H-2B visas by requiring the Department of Labor to certify employers before they could employ workers through the H-2B visa program.¹²⁵ Congress had directed the Department of Homeland Security to “consult” with other agencies, but the court concluded that “[t]he statutory language in this case—‘consultation’—cannot reasonably bear the construction [the Department] has given it—congressional authority to subdelegate its authority and responsibilities under the H-2B visa program to an outside agency.”¹²⁶

Even if Congress did not intend for the agency to subdelegate its authority, an agency may still lawfully delegate limited authority to an outside actor. Absent congressional intent to subdelegate, the agency must oversee the subdelegatee and retain final decisionmaking power.¹²⁷ For example, in *National Park & Conservation Ass’n v. Stanton*, the court determined that although Congress permitted the National Park Service to enter cooperative agreements with local governments when managing national scenic rivers, such authorization did not support the Park Service’s agreement to subdelegate the management of the Niobrara National Scenic River to a local council.¹²⁸ The court also considered whether the Park Service “retain[s] sufficient final

125. *G.H. Daniels III & Assocs. v. Perez*, 626 F. App’x 205, 206-07, 211-12 (10th Cir. 2015); see also Asbridge, *supra* note 19, at 275, 293, 309-12. Two other courts, however, have found that this arrangement is not an unlawful subdelegation. See *La. Forestry Ass’n v. Sec’y U.S. Dep’t of Labor*, 745 F.3d 653, 671-73 (3d Cir. 2014) (concluding the Department of Homeland Security permissibly “conditioned its own granting of an H-2B petition on the [Department of Labor’s] grant of a temporary labor certification” instead of subdelegating its statutory authority to the Department of Labor); *Outdoor Amusement Bus. Ass’n v. Dep’t of Homeland Sec.*, 334 F. Supp. 3d 697, 715-16 (D. Md. 2018) (agreeing with the Third Circuit’s reasoning in *Louisiana Forestry* rather than the Tenth Circuit’s in *G.H. Daniels III*), *appeal docketed*, No. 18-02370 (4th Cir. Nov. 15, 2018). The Third Circuit’s reasoning, however, has faced criticism. See Asbridge, *supra* note 19, at 306-09 (criticizing the Third Circuit’s decision in *Louisiana Forestry* for failing to find a delegation of authority).

126. *G.H. Daniels III*, 626 F. App’x at 212. Agreements with outside actors may, in and of themselves, result in unlawful subdelegations when another entity makes determinations as part of these agreements. See *High Country Citizens’ All. v. Norton*, 448 F. Supp. 2d 1235, 1246-47 (D. Colo. 2006) (holding that the National Park Service impermissibly subdelegated its authority to protect a national park’s natural resources when it entered into an agreement with Colorado setting the park’s water rights because the agreement enabled Colorado to determine river flows).

127. See *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999) (“Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority.”).

128. *Id.* at 18-20.

reviewing authority over [Niobrara Council] actions to prevent a violation of the unlawful delegation doctrine.”¹²⁹ It concluded that the subdelegation was unlawful, because the Park Service “retains no oversight over the Council, no final reviewing authority over the [C]ouncil’s actions or inaction, and the Council’s dominant private local interests [were] likely to conflict with the national environmental interests that [the Park Service] is statutorily mandated to represent.”¹³⁰ In general, agencies satisfy the requirements for oversight and final decisionmaking when they review the subdelegates’ decisions in a manner that provides more than a “rubber stamp.”¹³¹

The subdelegation doctrine, as it stands, perhaps does not allow Native nations to administer a national park on their own.¹³² It has unrealized room, however, for Native nations to exercise collaborative authority when executive agencies participate in the decisionmaking process and retain the ability to make final decisions.¹³³ Against this backdrop, several Native nations

129. *Id.* at 19.

130. *Id.* at 20. The Park Service’s retained power to terminate the Cooperative Agreement did not constitute final reviewing authority because the Park Service would likely not exercise it absent an “extreme situation.” *Id.* at 21.

131. *See* *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483, 1488 (9th Cir. 1992) (finding no issue with the Secretary of Agriculture’s ordinary reliance on recommendations from a committee composed of representatives from the orange industry to set quantity limits on orange shipments when the Secretary “retains the authority to depart from or ignore them altogether”); *see also, e.g.,* *Ocean Conservancy v. Evans*, 260 F. Supp. 2d 1162, 1182-83 (M.D. Fla. 2003) (holding the National Marine Fisheries Service’s (NMFS) reliance on recommendations by a panel of independent experts in setting quotas for large coastal shark fishing was not an unlawful delegation because “the NMFS retained sufficient final reviewing authority over the findings of the independent scientific panel”).

132. *See* NAT’L PARK SERV. & OGLALA SIOUX TRIBE PARKS & RECREATION AUTH., SOUTH UNIT—BADLANDS NATIONAL PARK: FINAL GENERAL MANAGEMENT PLAN & ENVIRONMENTAL IMPACT STATEMENT 38 (2012) [hereinafter BADLANDS MANAGEMENT PLAN], <https://perma.cc/BX8J-N4U4> (recommending that Congress redesignate the South Unit of Badlands National Park so this unit would be managed as “the first ‘tribal national park’” by the Oglala Sioux Tribe, thereby suggesting that the executive branch does not have independent authority to do so). Despite the National Park Service’s endorsement, the South Unit has not become a tribal national park. *See* Brian Upton, *Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives*, 35 PUB. LAND & RESOURCES L. REV. 51, 116 (2014) (explaining that, as of 2014, legislation was being developed, but only one member of South Dakota’s congressional delegation had expressed support for creating the tribal national park); Elizabeth Zach, *In the Badlands, Where Hope for the Nation’s First Tribal Park Has Faded*, N.Y. TIMES (Dec. 14, 2016), <https://perma.cc/Y8LP-4TWW> (noting that the National Park Service’s redesignation “is on hold pending tribal action”).

133. Although the National Park Service preferred the creation of a tribal national park for managing the South Unit of Badlands National Park, it considered a “shared management” alternative. BADLANDS MANAGEMENT PLAN, *supra* note 132, at 39-40. This alternative would allow the Oglala Sioux Tribe to manage the South Unit alongside the National Park Service, albeit with “more direct control over the operation and

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developed their own proposal for the collaborative management of a new national monument.

B. Shaping the Inter-Tribal Coalition’s Proposal for Bears Ears National Monument

In October 2015, the Bears Ears Inter-Tribal Coalition, composed of representatives from the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni nations, proposed that the executive branch take an unprecedented action “to protect historical and scientific objects in an area of 1.9 million acres of ancestral land on the Colorado Plateau.”¹³⁴ Never before had Native nations sought a presidential proclamation of a national monument.¹³⁵ And they sought a meaningful role in its administration: “[W]e have concluded that this new monument must be managed under a sensible, entirely workable regime of true Federal-Tribal Collaborative Management.”¹³⁶ Making the united Native nations “full partners with the United States in charting the vision for the monument and implementing that vision” lies at the heart of this groundbreaking proposal.¹³⁷

The Coalition understood that subdelegation case law constrains, yet does not foreclose, the executive branch’s ability to share management authority over a national monument with the united Native nations.¹³⁸ While past presidential-monument proclamations had only provided for tribal consultation, a new one could create a system of collaborative management because Congress had delegated to the President broad discretion to direct national monuments’ management as well as to create them.¹³⁹ In particular, the Coalition highlighted that the Clinton, Bush, and Obama Administrations had all directed how the government would protect new monuments by exercising their discretion to determine “proper care and management” for

management” of the Unit than it currently has. *Id.* at 39. In this option, which would not require congressional action, the National Park Service would supervise a “South Unit manager,” responsible for overseeing “tribal employees.” *See id.* at 39 (suggesting that congressional action is unnecessary for this option by not explicitly requiring it, unlike it did for certain other proposed options).

134. *See* BEARS EARS INTER-TRIBAL COAL., PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 1 (2015), <https://perma.cc/4U9C-Z62Z>.

135. *Id.* at 1-2.

136. *Id.* at 3.

137. *Id.* at 3-4.

138. *See id.* at 21-28 (presenting the legal basis for creating a program of “collaborative management” and noting the constraints created by the subdelegation doctrine).

139. *See id.* at 21-26.

national monuments.¹⁴⁰ The Coalition believed that this discretion gave the President the capacity to create a system of tribal collaborative management at Bears Ears even though no court had evaluated such a proposal before.¹⁴¹

While noting this presidential discretion, the Coalition recognized that the subdelegation doctrine barred the President from giving the Native nations full managerial control.¹⁴² For this reason, the Coalition stressed the partnership at the heart of collaborative management: “President Obama is delegating some authority over the public lands to the Tribes, but it is not a delegation of complete authority: the Tribes and agency officials will be working together as equals to make joint decisions.”¹⁴³ Under the Coalition’s proposal, an eight-member commission would oversee Bears Ears National Monument.¹⁴⁴ A representative from each of the five united Native nations would sit on the commission alongside three representatives from federal agencies.¹⁴⁵ The Coalition contended that requiring these tribal and federal representatives to make decisions jointly removed any concerns about an unlawful subdelegation.¹⁴⁶ Moreover, it attempted to avoid the National Park Service’s mistake that led to the litigation in *Stanton* by assigning authority to the Secretary of the Interior or Agriculture to “make[] the final decision” if the commission members failed to agree.¹⁴⁷

In December 2016, President Obama proclaimed Bears Ears National Monument, but his plan departed from the Coalition’s proposal for collaborative management in a manner that avoided the difficulties the subdelegation doctrine presented.¹⁴⁸ The President stated executive agencies

140. *Id.* at 23-26.

141. *Id.* at 26.

142. *Id.* at 26-27.

143. *Id.* at 26.

144. *Id.* at 29.

145. *Id.* at 29-30.

146. *Id.* at 27 (“Here, the Federal and Tribal teams are directed to work together to reach joint decisions. Up to that point, the system does not violate the unlawful delegation doctrine because, by definition, the Federal agency will have approved these decisions.”).

147. *Id.*

148. See Proclamation No. 9558, 3 C.F.R. 402, 408-10 (2016); see also Secretarial Order No. 3342, *supra* note 12, at 5 (“Cooperation and collaboration [with tribal governments] must take place within the framework of the Department’s legal responsibilities and authorities. In exercising their legal authorities to implement this Order, bureaus should be mindful of legal limits on the delegation of inherently Federal functions to non-Federal entities.”); Charles Wilkinson, “At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top”: *The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317, 331 (2018).

would manage the new national monument.¹⁴⁹ The Secretaries of the Interior and Agriculture would prepare Bears Ears's management plan and provide any management rules.¹⁵⁰ The President, however, adopted the heart of the Coalition's collaborative management proposal:

In recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge, a Bears Ears Commission (Commission) is hereby established to provide guidance and recommendations on the development and implementation of management plans and on management of the monument.¹⁵¹

Composed of a representative elected from each of the five Native nations, the Commission would make recommendations for Bears Ears's administration for the Departments of the Interior and Agriculture to consider.¹⁵² While the Commission's role fell short of collaborative management, the proclamation placed the united Native nations in a more prominent role than they would have had under the existing framework for tribal consultation.¹⁵³

Although the Coalition and the Obama Administration followed the limits established by subdelegation case law in proposing and establishing the Commission, the Trump Administration has questioned its legality and made its future uncertain. When President Trump shrank, divided, and renamed Bears Ears National Monument, he also reshaped the Commission.¹⁵⁴ The renamed Shash Jáa Commission would provide guidance for the management of only the Shash Jáa portion of Bears Ears, and it gained a new member, "the elected officer of the San Juan County Commission representing District 3."¹⁵⁵

149. 3 C.F.R. at 408.

150. *Id.*

151. *Id.* at 408-09.

152. *Id.*

153. See Wilkinson, *supra* note 148, at 331 (explaining that the proclamation establishing Bears Ears gave Native nations "a truly robust role in management and decision-making that [went] far beyond traditional consultation"); see also Exec. Order No. 13,175, 3 C.F.R. 304, 305-06 (2000), reprinted as amended in 25 U.S.C. § 5301 note (2018) (establishing the framework for executive branch agencies to develop consultation programs and policies with Native nations).

154. See Proclamation No. 9681, 3 C.F.R. 188, 193-94 (2017).

155. *Id.* at 194. Leaders from the represented nations have questioned the Trump Administration's choice of a Navajo name for the renaming, as they had selected an English name to reflect both the monument's shared importance to and the collaboration among the represented nations. See Brian Maffly, *By Renaming New Utah Monument Shash Jaa, Is Trump Trying to Divide Native American Tribes?*, SALT LAKE TRIB. (updated Dec. 11, 2017), <https://perma.cc/JZ9H-945Y>. Moreover, the Trump Administration's other change appeared to be designed to place a monument opponent on the Commission. See Jake Bullinger, *DOI Emails on Bears Ears Prove Trump Ignored*
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The Trump Administration, in its management plan for Bears Ears, continues to present the Shash Jáa Commission as a means to promote collaboration with Native nations.¹⁵⁶ The Native nations represented, however, have not demonstrated similar faith in the new Commission.¹⁵⁷

Several signs portend additional trouble for Bears Ears's future collaborative management even if the Shash Jáa Commission convenes. The Trump Administration's management plan suggests that Native nations will function less as co-managers of the monument and more as collaborators in discrete projects.¹⁵⁸ Representative John Curtis imagined an even more limited role for Native nations in his 2017 proposal for the Shash Jáa Commission in managing the Shash Jáa Unit of Bears Ears.¹⁵⁹ The Shash Jáa Commission largely would advise the Shash Jáa Management Council in its decisions through reports and recommendations.¹⁶⁰ Although Representative Curtis defended his proposal, asserting it "gives local Utah tribes and locally elected leaders an opportunity to have real and meaningful management authority over the monument,"¹⁶¹ Native leaders viewed the proposal as denying Native nations the ability to provide input.¹⁶² In particular, they noted that the bill

Natives, OUTSIDE (Mar. 19, 2018), <https://perma.cc/K88J-ELS2> (noting the Department of the Interior pushed for the inclusion of Rebecca Benally, a San Juan County Commissioner and Bears Ears opponent, on the Bears Ears Commission despite resistance from its members); Courtney Tanner, "We've Been Disenfranchised": Republicans in San Juan County Say Redrawn Voter Districts Unfairly Favor Navajos, SALT LAKE TRIB. (updated Apr. 10, 2018), <https://perma.cc/8VCA-TFZU> (noting that Benally "has typically aligned with President Donald Trump and the two Republican commissioners").

156. See BEARS EARS MANAGEMENT PLAN, *supra* note 9, at 3, 29-30.

157. See *id.* at 29-30. The Bears Ears Inter-Tribal Coalition, in fact, condemned the Trump Administration's management plan when it was proposed, and it has accused the former Secretary of the Interior, Ryan Zinke, of "all but turn[ing] his back on the sovereign tribal governments [that] had been entrusted to help manage" Bears Ears. See Press Release, Bears Ears Inter-Tribal Coal., Insufficient and Rushed: BLM Releases Final Management Plans for Illegally Revoked Bears Ears National Monument (Aug. 5, 2019), <https://perma.cc/AE5S-SK7N>.

158. See BEARS EARS MANAGEMENT PLAN, *supra* note 9, at H-1 to H-3.

159. See Shash Jáa National Monument and Indian Creek National Monument Act, H.R. 4532, 115th Cong. §§ 103, 106 (2017). The bill used the old moniker of Bears Ears Commission rather than Shash Jáa Commission. See, e.g., *id.* § 106.

160. See *id.* § 103.

161. See Curtis, *supra* note 95.

162. See Felicia Fonseca, *Tribes: Monument Co-Management Proposal Is Slap in the Face*, AP NEWS (Dec. 11, 2017), <https://perma.cc/XXZ8-RR9J> (reporting that an advocate for Native nations believes Representative Curtis's bill has structured the Shash Jáa Tribal Management Council and Bears Ears Commission in a way that limits Native nations' input); Brian Maffly, *Tribal Leaders Slam Utah Rep. Curtis' Bill to Redraw Bears Ears, Say Management Plan Is Tribal "In Name Only"*, SALT LAKE TRIB. (updated Feb. 1, 2018), <https://perma.cc/723G-AKAE> (reporting Native leaders' criticism of Representative

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would exclude interested nations, such as the Hopi, from the proposed council; would deprive Native nations of the ability to elect their own council representatives; and would empower local Utah politicians by giving them seats on the council.¹⁶³ Equally significant, in interim recommendations made before President Trump's proclamation, the former Secretary of the Interior Ryan Zinke suggested that "the President request congressional authority to enable tribal co-management of designated cultural areas within the revised [Bears Ears National Monument] boundaries."¹⁶⁴ By alluding to the need for congressional approval, Secretary Zinke appeared to repudiate both the Coalition's and the Obama Administration's understandings of presidential discretion under the Antiquities Act and the limits imposed by the subdelegation doctrine.¹⁶⁵

III. Revealing a Doctrine of Sovereignty-Affirming Subdelegations

In the current Congress, several members have advanced proposals that would undo the Trump Administration's changes to Bears Ears.¹⁶⁶ Moreover,

Curtis's bill in a congressional committee hearing); *see also* Press Release, Bears Ears Inter-Tribal Coal., Native American Tribes Oppose H.R. 4532, a Bill to Codify the Repeal and Replacement of Bears Ears National Monument (Jan. 9, 2018), <https://perma.cc/P99U-LJR6> ("[The bill] would create a so-called 'Tribal Management Council' that has nothing to do with true tribal management." (quoting Carleton Bowekaty, councilman for the Zuni Tribe)).

163. *See* Press Release, *supra* note 162 ("It would cut out three of our five tribes with ancestral ties to Bears Ears, require three representatives that have no ties whatsoever to our sovereign governments, and all appointments would be made by the president instead of our tribes." (quoting Carleton Bowekaty, councilman for the Zuni Tribe)); *see also* Maffly, *supra* note 162.
164. Memorandum from Ryan K. Zinke, Sec'y, U.S. Dep't of the Interior, to U.S. President 5 (June 10, 2017), <https://perma.cc/4TQZ-EGLU>; *see also* Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 252-53 (2018).
165. Native leaders' response to Secretary Zinke's call for congressional action suggests that they understood that the Trump Administration had called the legality of the Obama Administration's approach into question. *See* Letter from Alfred Lomahquahu, Vice Chairman, Hopi Tribe, et al., to Ryan Zinke, Sec'y, U.S. Dep't of the Interior 3 (July 10, 2017), <https://perma.cc/WH8A-Q38A> ("The Monument Proclamation is law, and we are thankful for the protections it gives us in moving forward with collaborative management. In the event Congress were to pass legislation authorizing an even more robust regime for tribal management than collaborative management, we would certainly support that, but no such model exists and no such discussions are occurring.").
166. *See* America's Natural Treasures of Immeasurable Quality Unite, Inspire, and Together Improve the Economies of States Act (ANTIQUITIES Act), S. 367, 116th Cong. §§ 102, 103(41) (2019) (directing Bears Ears to be managed as it was proclaimed by President Obama, albeit with the larger boundaries from the Bears Ears Inter-Tribal Coalition's original proposal); Bears Ears Expansion and Respect for Sovereignty Act, H.R. 871, 116th Cong. §§ 2-4 (2019) (proposing to largely restore Bears Ears's management as

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the proposed PROGRESS for Indian Tribes Act of 2019 would make it easier for Native nations to take over federal programs that serve their citizens.¹⁶⁷ Congressional action, however, does not present the only path for expanding Native nations' collaboration with the federal government. As this Note argues, the executive branch, on its own, may subdelegate some federal authority to Native nations in certain situations.¹⁶⁸ Federal agencies could soon undertake these projects, as efforts to increase tribal participation in federal public lands management were raised during the 2020 campaign for the Democratic Party's presidential nomination.¹⁶⁹

This Part presents a framework for evaluating subdelegations of authority to Native nations. To do so, it makes descriptive observations about the existing case law, and it offers courts a new approach based on these observations. Reviewing and synthesizing the history and judicial treatment of subdelegations in Indian affairs reveals a presumption within the subdelegation doctrine that eases constraints on certain subdelegations to tribal governments. Such subdelegations that relate to an area within Native nations' inherent sovereignty and comport with the aims of federal plenary power over Indian affairs are sovereignty-affirming subdelegations. Sovereignty-affirming subdelegations do more than simply recognize new boundaries of inherent tribal powers or transfer federal authority to tribal governments. Instead, they do both. They affirm tribal sovereignty by including Native nations in the exercise of federal administrative authority, achieving a result beyond the sum

proclaimed by President Obama yet expanding its boundaries to the size originally proposed by the Bears Ears Inter-Tribal Coalition). The Coalition has expressed its support for these proposals. See Press Release, Bears Ears Inter-Tribal Coal., More Champions in the Ring (updated Feb. 12, 2019), <https://perma.cc/7EVX-LAD6> (commending Senator Udall and Representative Haaland for reintroducing the ANTIQUITIES Act); Press Release, Bears Ears Inter-Tribal Coal., Rep. Gallego, Rep. Haaland and Seventy Others Champion a Brighter Future for Bears Ears National Monument (updated Feb. 5, 2019), <https://perma.cc/N4DM-TTC3> (expressing support for the proposed Bears Ears Expansion and Respect for Sovereignty Act).

167. See Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019 (PROGRESS for Indian Tribes Act), S. 209, 116th Cong. (as referred to the H. Comm. on Nat. Res., June 28, 2019) (proposing amendments to the Indian Self-Determination and Education Assistance Act to permit tribal control over aspects of the programs); see also S. REP. NO. 116-34, at 4 (2019) (explaining that the bill aims to “streamline the Department of the Interior’s process for approving self-governance compacts and annual funding agreements for Indian programs”).

168. See *infra* Part III.C.

169. See *supra* note 92; see also Elizabeth Warren, *Honoring and Empowering Tribal Nations and Indigenous Peoples*, MEDIUM (Aug. 16, 2019), <https://perma.cc/SM6L-GE5Y> (reiterating Warren’s plan for public lands).

of these two parts.¹⁷⁰ Like all subdelegations, these executive affirmations of inherent sovereignty rely on executive exercises of federal power consistent with congressional aims.¹⁷¹ What sets them apart from other subdelegations is the relationship between federal power and sovereign power. By intermingling the two, the federal authority reshapes tribal sovereignty's bounds and its reach.

Courts should review sovereignty-affirming subdelegations more permissively than other subdelegations for two primary reasons. First, Congress has the ability to affirm tribal sovereignty by “relax[ing] restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority.”¹⁷² As both past and current practice confirm, the executive branch may do the same by intermingling tribal and federal power using the broad discretion Congress has afforded executive agencies over Indian affairs.¹⁷³ Second, the case law evaluating subdelegations to Native nations recognizes that they rest on the combination of inherent and delegated authority. By applying *Mazurie* to these subdelegations, courts have confirmed that their affirmations of sovereignty remove the subdelegation doctrine's ordinary restrictions on Native nations' participation in exercises of federal administrative authority.¹⁷⁴

A. The Executive's Power to Affirm Tribal Sovereignty

In *Lara*, the Court recognized Congress's authority to affirm tribal sovereignty,¹⁷⁵ but the executive has the same ability to alter the bounds of Native nations' inherent authority. Executive actions, as well as congressional

170. Zachary Price proposes a model of “divided sovereignty,” highlighting the intermingling of tribal sovereignty and federal power when Native nations exercise their sovereign authority. Although he intends for this model to replace the traditional dichotomy between inherent and delegated powers, “divided sovereignty” provides a helpful way to understand that Native nations exercise combined federal and tribal authority when they act on powers gained through sovereignty-affirming subdelegations. See Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 663 (2013) (arguing Native nations' exercise of criminal jurisdiction rests on tribal sovereign powers and federal power by virtue of “federal authorization or acquiescence pursuant to Congress's plenary authority”).

171. See *supra* Part II.A.

172. See *United States v. Lara*, 541 U.S. 193, 196 (2004).

173. See *infra* Part III.A.

174. See *infra* Part III.B.

175. 541 U.S. at 199-207.

ones, shape the limits of tribal sovereignty.¹⁷⁶ The Supreme Court has relied, at times almost exclusively, on executive agency actions and opinions to determine that certain tribal powers have been implicitly divested.¹⁷⁷ Moreover, historical powers held by the executive further support recognizing the executive's authority to affirm Native nations' sovereign powers.¹⁷⁸ At the Founding, for example, Congress gave the President largely unfettered power to shape the relations between Native nations and the federal government.¹⁷⁹

Perhaps more importantly, the history of executive agencies' administration of Indian affairs shows that these agencies, in exercising their congressionally delegated powers, have changed the breadth and reach of Native nations' inherent authority and, at the same time, have mixed that authority with federal power. This Subpart will discuss two examples: Courts of Indian Offenses and the land-into-trust process. The Bureau of Indian Affairs (BIA) created Courts of Indian Offenses, hybrid tribal-federal courts, to impose greater federal power over Native nations in the late nineteenth century. In establishing these courts, the BIA acted without express congressional approval. Today these courts persist as federal-tribal institutions that wield Native nations' sovereign authority.¹⁸⁰ The BIA also continues to intermingle federal and tribal power by taking land into trust for Native nations. By holding the title to these lands for the benefit of Native nations and then proclaiming these lands to be Native nations' sovereign territory, the Department of the Interior expands the reach of tribal sovereignty through a joint federal-tribal enterprise.¹⁸¹ The land-into-trust process and the history of Courts of Indian Offenses, then, indicate that executive agencies may engage in

176. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (“Indian law’ draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress.”).

177. See *Duro v. Reina*, 495 U.S. 676, 691-92 (1990) (citing only to Department of the Interior opinions to support the determination that Native nations did not have inherent authority to prosecute nonmember Indians); *Oliphant*, 435 U.S. at 198-99, 206 (relying in part on an opinion by the Attorney General to conclude there was a “commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians”).

178. See *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008) (per curiam) (“The Executive has historically enjoyed extensive authority in conducting relations with American Indians, which has included negotiating treaties with Indian tribes and granting reservations to them by executive order.”).

179. See Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1018-19 (2015); see also Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1299-1300 (2006) (noting that Congress provided the President with “[e]ssentially standardless regulatory authority” concerning Indian affairs during the early republic).

180. See *infra* Part III.A.1.

181. See *infra* Part III.A.2.

sovereignty-affirming subdelegations as part of their delegated power over Indian affairs.¹⁸²

1. Courts of Indian Offenses

Courts of Indian Offenses provide one of the most significant examples of the intermingling of federal and tribal powers. Beginning in 1883, the Commissioner of Indian Affairs established Courts of Indian Offenses, and, soon thereafter, these courts began to operate on several reservations within the United States.¹⁸³ Created for the express purpose of eradicating certain Native practices, which the Secretary of the Interior considered to be “a great hindrance to the civilization of the Indians,”¹⁸⁴ these courts exercised jurisdiction for violations of rules promulgated by the Commissioner of Indian Affairs, which “prohibit[ed] the sun-dance, scalp-dance and war-dance, polygamy, theft, &c.”¹⁸⁵ At the courts’ peak in the early twentieth century, the Commissioner of Indian Affairs oversaw them for two-thirds of the tribal agencies in the United States.¹⁸⁶ By the second half of the twentieth century,

182. See *infra* Part III.B. The federal government has used this intermingling of authority in ways that inflicted significant harm on Native peoples and their cultures beginning in the late nineteenth century. For a discussion of this period, see SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 175-206 (1994).

183. See WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL* 104, 108-09 (1966); 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 646-48 (1984) (explaining that the Secretary of the Interior called for the creation of these courts in 1882, and the Commissioner of Indian Affairs instructed Indian agents to create them in 1883); see also *Colliflower v. Garland*, 342 F.2d 369, 372-73 (9th Cir. 1965), *overruled on other grounds by* *United States v. Wheeler*, 435 U.S. 313 (1978). Some of these courts, often called “CFR Courts,” still exist. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978) (“The CFR Courts are the offspring of the Courts of Indian Offenses.”); *Tillett v. Lujan*, 931 F.2d 636, 638 (10th Cir. 1991); Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 257-58 (2016-2017).

184. See HENRY M. TELLER, *REPORT OF THE SECRETARY OF THE INTERIOR* (1883), in H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. I, at iii, xi-xii (1884) (quoting an 1882 letter to the Commissioner of Indian Affairs); see also 2 PRUCHA, *supra* note 183, at 646-47; Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 805 (2014); Lindsay Cutler, Comment, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1765 (2016) (“These courts were blunt tools of assimilation wielded by the federal government under the guise of federal regulation for the purpose of civilizing the tribes.” (alterations and internal quotation marks omitted)).

185. See H. PRICE, *REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS* (1883), in H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. II, at 1, 10-11 (1884); see also 2 PRUCHA, *supra* note 183, at 647-48.

186. HAGAN, *supra* note 183, at 109.

tribal courts had largely replaced them.¹⁸⁷ Today, the number of such courts has dwindled to seven.¹⁸⁸

Congress did not explicitly empower the Department of the Interior to create Courts of Indian Offenses.¹⁸⁹ Instead, Congress provided that the “secretary of the interior is charged with the supervision of the public business relating to the . . . Indians” and the “commissioner of Indian affairs shall, under the direction of the secretary of the interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations.”¹⁹⁰ The first court reviewing the legality of these courts’ creation concluded in *United States v. Clapox* that the Department of the Interior could establish these courts under the “general power given” by these two provisions.¹⁹¹ While Congress appropriated funds for these courts after their creation and recognized them in other legislation, no statute has ever established or explicitly authorized them.¹⁹²

Courts have long recognized the federal nature of Courts of Indian Offenses. In 1888, the district court in *Clapox* reasoned that Courts of Indian Offenses were “but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.”¹⁹³ Despite their questionable origins, “the congress, as well as the executive, ha[d] assumed considerable responsibility for these courts” by the

187. See *Duro v. Reina*, 495 U.S. 676, 691 (1990) (explaining that “new tribal courts” created following the enactment of the Indian Reorganization Act “supplanted the federal courts of Indian offenses operated by the Bureau of Indian Affairs”); see also James R. Kerr, *Constitutional Rights, Tribal Justice and the American Indian*, 18 J. PUB. L. 311, 321-22 (1969) (noting that, at the time of the article’s publication, “there [were] only twelve functioning Courts of Indian Offenses”); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 233 n.23 (1994) (discussing the declining numbers of Courts of Indian Offenses and the growing numbers of tribal courts in the United States between 1978 and 1988).

188. *United States v. Denezpi*, No. 1:18-cr-00267, 2019 WL 295670, at *2 (D. Colo. Jan. 23, 2019).

189. See HAGAN, *supra* note 183, at 110-11.

190. *United States v. Clapox*, 35 F. 575, 576-77 (D. Or. 1888) (alteration in original) (first quoting Rev. Stat. § 441 (1878); then quoting *id.* § 463).

191. See *id.* at 577.

192. See *Tillett v. Hodel*, 730 F. Supp. 381, 382-83 (W.D. Okla. 1990) (providing examples of congressional recognition of Courts of Indian Offenses in a Kiowa Tribe member’s challenge to these courts’ constitutionality), *aff’d sub nom.* *Tillett v. Lujan*, 931 F.2d 636 (10th Cir. 1991); Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 28 (2018).

193. 35 F. at 577.

mid-twentieth century.¹⁹⁴ The Ninth Circuit continued to recognize these courts' federal nature in *Colliflower v. Garland*, when it considered a federal court's jurisdiction to review a petition from Madeline Colliflower, a member of the Gros Ventre tribe, for a writ of habeas corpus following her conviction in the Court of Indian Offenses on the Fort Belknap Reservation.¹⁹⁵ The court held that the Fort Belknap Reservation's Court of Indian Offenses was sufficiently federal that a federal court had jurisdiction to hear Colliflower's petition¹⁹⁶—a seemingly erroneous conclusion for this particular court.¹⁹⁷ It reasoned:

[I]n the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.¹⁹⁸

194. *Colliflower v. Garland*, 342 F.2d 369, 373 (9th Cir. 1965), *overruled on other grounds by* *United States v. Wheeler*, 435 U.S. 313 (1978).

195. *Id.* at 370-71.

196. *Id.* at 379. The *Colliflower* court noted that the Fort Belknap Reservation had both a tribal court and a Court of Indian Offenses, and it seemed to limit its analysis to only the Court of Indian Offenses. *Id.* at 373. Some Native nations had created distinct tribal courts and tribal court systems in the years following the 1934 Indian Reorganization Act, while others maintained their Courts of Indian Offenses. Fletcher, *supra* note 184, at 805-06. A decade before *Colliflower*, the Eighth Circuit held that these tribal courts exercised tribal authority, notwithstanding the long history of federal authority over Courts of Indian Offenses. See *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94-96 (8th Cir. 1956) (holding that tribal courts' authority derived from Native nations' inherent sovereignty when two tribe members challenged the Oglala Sioux Tribal Court's jurisdiction to convict them for adultery); *Iron Crow v. Oglala Sioux Tribe*, 129 F. Supp. 15, 18 (D.S.D. 1955) (explaining that the Oglala Sioux Tribe's constitution converted the previous Pine Ridge Indian Reservation Court into the Oglala Sioux Tribal Court), *aff'd*, 231 F.2d 89.

197. The *Colliflower* court explained that the Native nations at Fort Belknap had established their own "law and order code." 342 F.2d at 374 (noting also that the new law and order code differed little from the federal regulations). It failed, however, to recognize this act's significance for the nature of the Fort Belknap Court of Indian Offenses, notwithstanding the new code's similarity to the previous regulations. See Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 219 (1991) (explaining that once a Native nation adopted a law and order code, under the Indian Reorganization Act's regulatory framework, "the court changed from a Court of Indian Offenses, or CFR court (a federal instrumentality), to a tribal court, an institution of tribal self-government" (footnotes omitted)); Benedetta A. Kissel, Note, *The Ninth Circuit's Federal Instrumentality Doctrine—A Threat to Tribal Sovereignty*, 53 NOTRE DAME LAW. 358, 371 (1977) (explaining that "[t]he Fort Belknap court at issue in *Colliflower* was probably not a 'true' Court of Indian Offenses" because it applied laws adopted by the peoples of Fort Belknap).

198. *Colliflower*, 342 F.2d at 378-79. Most commentators, however, have concluded that Courts of Indian Offenses exercise Native nations' inherent power rather than delegated
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At the same time, courts acknowledged that Courts of Indian Offenses also rested upon tribal authority. The *Colliflower* court determined that Courts of Indian Offenses “function in part as a federal agency and in part as a tribal agency,” although it limited its determination to the courts on the Fort Belknap Reservation alone.¹⁹⁹ In contrast, the Arizona Supreme Court decided in 1950 that these courts were more tribal than federal. Despite their federal creation, Courts of Indian Offenses exercised tribal sovereign power, not federal power, when they adjudicated cases within Native nations’ jurisdiction.²⁰⁰ In *Williams v. Lee*, the U.S. Supreme Court implicitly adopted a similar conclusion by finding that protecting the Navajo Nation’s inherent sovereignty included protecting the jurisdiction of its Courts of Indian Offenses.²⁰¹

The Department of the Interior had also arrived at the conclusion that the Courts of Indian Offenses combined elements of federal and tribal authority. When he explained the legal foundation of these courts in an official opinion, Nathan R. Margold, Solicitor of the Department of the Interior, first noted *Clapox’s* educational justification, yet then suggested, “[p]erhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses ‘derive their authority from the tribe,

power and, at least, cannot be seen to exercise federal power alone. See, e.g., Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 555-57 (1976); Price, *supra* note 170, at 708 n.259; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 736-37 (1989); Alex Tallchief Skibine, *Deference Owed Tribal Courts’ Jurisdictional Determinations: Towards Co-Existence, Understanding and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 193 n.11 (1994). But see Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 491 (2002) (contending that such courts “are the BIA’s courts, not tribal courts”).

199. *Colliflower*, 342 F.2d at 379. By failing to mark the distinction between Courts of Indian Offenses and tribal courts in its analysis, *Colliflower* undercut tribal sovereignty, which does not rest on federal power. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Iron Crow*, 231 F.2d at 90, 94; Kissel, *supra* note 197, at 371-72 (contending that the application of *Colliflower’s* reasoning has undercut tribal inherent authority). Now, the Indian Civil Rights Act has made clear that Courts of Indian Offenses exercise tribal sovereign power. See 25 U.S.C. § 1301(2) (2018) (defining the “powers of self-government” as including “all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses” and as meaning “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians”).

200. See *Begay v. Miller*, 222 P.2d 624, 628 (Ariz. 1950).

201. See 358 U.S. 217, 222-23 (1959) (concluding that if Arizona infringed on Navajo Courts of Indian Offenses’ jurisdiction, the state “would infringe on the right of the Indians to govern themselves”); see also *Ponca Tribal Election Bd. v. Snake*, 1 Okla. Trib. 209, 229 (Ct. Indian App. Ponca 1988) (“Had the Navajo CFR Court been strictly a federal entity, state jurisdiction could not have interfered with tribal self government.”).

rather than from Washington.”²⁰² The following year, in another Department of the Interior opinion, Solicitor Margold confirmed that these courts rested on both federal and tribal power: “[T]he courts of Indian offenses do not rely for their legality solely upon the authority of the Secretary to create them. They are manifestations of the inherent power of the tribes to govern their own members.”²⁰³

Moreover, the creation of joint federal-tribal Courts of Indian Offenses altered Native nations’ inherent powers without express congressional approval. The Department of the Interior reasoned that the executive’s unilateral creation of these courts “was a recognition by the Interior Department and by Congress that Indian offenses, perhaps more than any other Indian problem, must be handled by the Indian tribes but that such was no longer possible without the active cooperation of the Indian Office.”²⁰⁴ While a desire to eradicate Native customs and impose order on reservations actually prompted the creation of these courts,²⁰⁵ Solicitor Margold understood that the BIA’s actions shaped the nature of Native nations’ sovereign powers, and that it could do so without an express statute delegating this power to the executive.

Courts largely agreed with this position. For instance, in *United States v. Quiver*, twenty years earlier, the Supreme Court held that Native nations, not the federal government, had jurisdiction over crimes perpetrated by Indians against other Indians on reservations unless Congress provided for federal jurisdiction.²⁰⁶ Nevertheless, the Court suggested in a dictum that executive branch officials had a role in supporting tribal jurisdiction despite the lack of statutory authorization for them to do so.²⁰⁷ The Court of Appeals for the

202. Powers of Indian Tribes, 55 Interior Dec. 14, 64 (1934) (quoting W.G. Rice, Jr., *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEGIS. & INT’L L., no. 1, 1934, at 78, 93-94); Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 975-76 (1996) (identifying Solicitor Margold as the opinion’s author); see also Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 225 (2001) (noting Felix Cohen’s possible involvement in creating the opinion).

203. Nathan R. Margold, Solicitor, U.S. Dep’t of the Interior, Secretary’s Power to Regulate Conduct of Indians (Feb. 28, 1935), in 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, at 531, 536 (1979).

204. *Id.*

205. See HARRING, *supra* note 182, at 186.

206. 241 U.S. 602, 603-06 (1916) (finding no federal jurisdiction over adultery committed by two individuals on the Sioux Indian Reservation).

207. *Id.* at 605 (“There is [no federal statute] dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the *administrative officers*.” (emphasis added)). By referring to “administrative officers,” Justice Van Devanter likely alluded to Courts of Indian
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District of Columbia adopted an even more forceful version of this idea in *Morris v. Hitchcock*.²⁰⁸ Even though the Curtis Act sought to dissolve the Chickasaw Nation's government and place its lands under private, individual ownership,²⁰⁹ the court held that the Chickasaw Nation could still impose taxes on nonmembers within its territory as long as its title and lands still existed.²¹⁰ Although the Chickasaw government could still legislate, the court reasoned that Congress's abolition of all other courts in the Chickasaw Nation left the enforcement of its sovereign authority to "executive officers of the United States," exercising their general delegated authority to manage Indian affairs.²¹¹ Even without express congressional authorization, the executive had the ability, if not the duty, to support tribal sovereignty by combining it with federal power.²¹²

Today, courts continue to recognize that the remaining Courts of Indian Offenses rest on both federal and tribal power. Recently, in *United States v. Denezpi*, a district court considered, in a double jeopardy challenge to a federal prosecution, whether the Court of Indian Offenses of the Ute Mountain Ute Agency had exercised federal or tribal authority when it prosecuted the

Offenses overseen by federal Indian agents, which were created to address offenses like the ones listed and had been active on Sioux reservations since the 1880s. See HARRING, *supra* note 182, at 186, 188-89; *supra* notes 183-85 and accompanying text. By 1926, although the BIA had reformed these courts, both the laws applied and personnel remained largely under the BIA's control. HARRING, *supra* note 182, at 190-92.

208. See 21 App. D.C. 565 (1903), *aff'd*, 194 U.S. 384 (1904).

209. See Act of June 28, 1898, ch. 517, §§ 11, 28-29, 30 Stat. 495, 497-98, 504-05, 512 (allotting lands, abolishing tribal courts, and adopting an agreement that would terminate tribal government in March 1906 in the territories of the Five Civilized Tribes); 2 PRUCHA, *supra* note 183, at 748, 753-54. In 1906, Congress changed course and permitted these tribal governments indefinitely through the Five Civilized Tribes Act. See Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 (providing "[t]hat the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law"); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988) (noting that Congress extended these tribal governments following "[d]ifficulty in completing tribal rolls and resistance to allotment"). Accordingly, courts have recognized that these Native nations persist as sovereign entities. See *Murphy v. Royal*, 875 F.3d 896, 935, 937-38 (10th Cir. 2017) (noting that "Congress never dissolved the Creek government" and holding that "Congress has not disestablished the Creek Reservation"), *reargument granted sub nom. Sharp v. Murphy*, No. 17-1107 (U.S. June 27, 2019); *Muscogee (Creek) Nation*, 851 F.2d at 1442 (noting that the D.C. Circuit had previously "held that the Creek government persisted").

210. *Morris*, 21 App. D.C. at 597-98.

211. *Id.* at 598.

212. *Id.* at 598-99 ("[W]e are of the opinion that the Secretary of the Interior had the right, if it were not his duty, to enforce an enactment within the powers of the legislature of the Chickasaw Nation that had received the requisite formal approval of the President of the United States.").

defendant previously.²¹³ The court acknowledged that the federal government had created Courts of Indian Offenses and had exerted significant control over their operation in the past, but, in the wake of the Indian Reorganization Act, the federal government had reduced its control over these courts and increased support for the creation of tribal courts.²¹⁴ Although they “retain some characteristics of an agency of the federal government,” Courts of Indian Offenses exercise Native nations’ inherent sovereignty when they prosecute crimes committed by Indians on tribal lands.²¹⁵ These courts’ creation did not remove Native nations’ inherent authority to bring criminal prosecutions, and, further, Congress had reaffirmed this inherent sovereignty without limiting its exercise to tribal courts.²¹⁶ Accordingly, the *Denezpi* court concluded the Court of Indian Offenses of the Ute Mountain Ute Agency “exercis[ed] the sovereign powers of the Ute Mountain Ute Tribe and [was] not an arm of the federal government.”²¹⁷

Many courts, including tribal courts and Courts of Indian Offenses, have adopted the same conclusion about Courts of Indian Offenses as the *Denezpi* court did.²¹⁸ Courts of Indian Offenses wield inherent powers, and federal authority has served “a channeling function . . . to set up a tribunal” for their exercise.²¹⁹ In this sense, they typify sovereignty-affirming subdelegations. As the Court of Indian Appeals for the Delaware Tribe explained:

We believe that the Court of Indian Offenses is essentially asserting the authority of the tribe it serves as well as any delegated authority of the United States government. The Court of Indian Offenses is essentially both a tribal and a federal entity. Thus, a modern day Court of Indian Offenses may most accurately be characterized as a “federally administered tribal court.”²²⁰

213. No. 1:18-cr-00267, 2019 WL 295670, at *1 (D. Colo. Jan. 23, 2019).

214. *Id.* at *2.

215. *Id.* at *3 (quoting *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991)).

216. *See id.*

217. *Id.* at *4.

218. *See, e.g.,* *CDST-Gaming I, LLC v. Comanche Nation*, No. 5:09-cv-00521, 2009 WL 10668664, at *2 n.2 (W.D. Okla. July 27, 2009) (calling these courts “federally administered” but noting they “exercise[] the Nation’s adjudicatory authority”), *motion to reopen granted*, No. 5:09-cv-00521, 2010 WL 11450496 (W.D. Okla. Nov. 16, 2010); *Tracy v. Superior Court*, 810 P.2d 1030, 1036 n.7 (Ariz. 1991) (en banc); *Ponca Tribal Election Bd. v. Snake*, 1 Okla. Trib. 209, 227 (Ct. Indian App. Ponca 1988); *Kiowa Election Bd. v. Lujan*, 1 Okla. Trib. 140, 151 (Ct. Indian App. Kiowa 1987); *Parker v. Saupitty*, 1 Okla. Trib. 1, 5 (Ct. Indian Offenses Comanche 1979). The Tenth Circuit has offered a more equivocal position, noting that Courts of Indian Offenses both “retain some characteristics of an agency of the federal government” and “function as tribal courts.” *Tillett*, 931 F.2d at 640.

219. *See Kiowa Election Bd.*, 1 Okla. Trib. at 151 (quoting *Comanche Tribe v. Welter*, No. CIV-84-765-A (W.D. Okla. Sept. 4, 1986)).

220. *Gallegos v. French*, 2 Okla. Trib. 209, 233-34 (Ct. Indian App. Delaware 1991).

Because Congress has recognized these courts without ever authorizing them and, more importantly, they further “[c]ongressional policy of supporting tribal self-government and self-determination,” the BIA could create Courts of Indian Offenses using its delegated authority.²²¹ Courts of Indian Offenses as they exist today, then, demonstrate agencies’ ability to intermingle their own delegated power with tribal power to support Native nations’ sovereignty without explicit congressional authorization.

2. The land-into-trust process

The land-into-trust process presents another example of an executive agency shaping tribal sovereignty by intermingling tribal and federal power. While Courts of Indian Offenses combined federal and tribal powers to alter the breadth of Native nations’ sovereign authority, the BIA increases the geographic reach of that authority by taking land into trust. Unlike with Courts of Indian Offenses, Congress has specifically empowered the BIA to take land into trust to promote tribal sovereignty by “establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”²²² In particular, Congress wanted “to provide land for Indians and tribes in order to rebuild the Indian land-base and promote tribal economic and governmental self-sufficiency.”²²³

Taking land into trust entails mixing Native nations’ and the federal government’s claims to the land. The Indian Reorganization Act provides that the federal government will hold the title to these lands “in the name of the

221. *Tillett v. Hodel*, 730 F. Supp. 381, 382-83 (W.D. Okla. 1990), *aff’d sub nom. Tillett*, 931 F.2d 636.

222. *See Morton v. Mancari*, 417 U.S. 535, 542 (1974) (describing the “overriding purpose” of the Indian Reorganization Act, which included the land-into-trust provisions); *see also* 25 U.S.C. § 5108 (2018) (permitting the Secretary of the Interior to take land into trust); *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 226 (2012) (explaining that the land-into-trust authorization “is ‘the capstone’ of the [Indian Reorganization Act’s] land provisions,” which “play a key role in the IRA’s overall effort ‘to rehabilitate the Indian’s economic life’” (first quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][a] (2005 ed.); and then quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973))); Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 446-53 (2002-2003) (explaining the history of land-into-trust provisions as a remedy to the federal government’s allotment policies from the 1880s through the 1930s).

223. McCoy, *supra* note 222, at 451. Through regulations, the BIA has made even more explicit the link between taking land into trust and supporting Native nations’ inherent authority. *See Patchak*, 567 U.S. at 226 (noting the BIA’s “regulations permit the Secretary to acquire land in trust . . . if the ‘land is necessary to facilitate tribal self-determination, economic development, or Indian housing’” (quoting 25 C.F.R. § 151.3(a)(3))).

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United States in trust for the Indian tribe.”²²⁴ This division of title and possession derives from the Marshall Court’s conception of tribal sovereignty and property.²²⁵ Although they did not have full title, Native nations could maintain some forms of sovereign control over those lands through their rights of occupancy.²²⁶ Today, through the land-into-trust process, the BIA converts lands owned fully by Native nations into lands subject to this dual federal-tribal control.²²⁷

Transforming the status of lands by taking them into trust expands the territory under Native nations’ sovereign control. First and foremost, these lands become “Indian country,” placing them largely outside the reach of state regulatory authority and largely under the tribal government’s authority.²²⁸ Second, the BIA can make these new lands into Indian reservations²²⁹ and therefore part of the tribe’s sovereign territory.²³⁰ This land-into-trust process, the Supreme Court has recognized, enables Native nations “to reestablish sovereign authority over territory.”²³¹ While taking land into trust does not

224. 25 U.S.C. § 5108.

225. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 22, § 15.03 (tracing the development of the concept of trust lands).

226. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-62 (1832) (holding that the laws of Georgia had no force within the Cherokee Nation), *abrogated on other grounds by* Nevada v. Hicks, 533 U.S. 353 (2001); Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 591-92 (1823) (concluding that Native nations, by virtue of holding only a right to occupy their lands, cannot sell full title to these lands to others).

227. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 22, § 15.07[1][a]-[b].

228. *See* Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520, 527 n.1 (1998) (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”); Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (noting that states presumptively do not have the ability to tax members of Native nations living in Indian country); Carcieri v. Kempthorne, 497 F.3d 15, 20-21 (1st Cir. 2007) (en banc), *rev’d on other grounds sub nom.* Carcieri v. Salazar, 555 U.S. 379 (2009); McCoy, *supra* note 222, at 476-77 (describing the jurisdictional significance of Indian country).

229. 25 U.S.C. § 5110 (“The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.”). For a description of the process by which land is taken into trust, see BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF THE INTERIOR, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) 39-52 (2016), <https://perma.cc/7K7C-VYKR>.

230. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649-51 (2001) (explaining that the “inherent sovereignty of Indian tribes [is] limited to ‘their members and their territory’” (quoting Montana v. United States, 450 U.S. 544, 563 (1981))).

231. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005).

expand inherent sovereignty's powers, the process's alchemy expands inherent sovereignty's reach.²³²

And the executive reshapes tribal sovereignty in this way without congressional input when it takes land into trust. Although Congress has provided express authorization to the Secretary of the Interior to take land into trust,²³³ the BIA has significant discretion to alter the sovereign status of lands.²³⁴ In *Michigan Gambling Opposition v. Kempthorne*, in which the D.C. Circuit considered a nondelegation challenge to the Indian Reorganization Act's land-into-trust provisions,²³⁵ Judge Brown's dissent recognized the enormity of the executive's power:

By taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe. Thus, the trust acquisition authority is a power to determine who writes the law, and thus indirectly what the law will be, for particular plots of land.²³⁶

Even though Congress delegated the power to take land into trust, the repeated yet largely unsuccessful nondelegation challenges to these provisions suggest that the executive controls and directs this power to broaden Native nations' sovereign territory.²³⁷

232. See *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 39 (D.C. Cir. 2008) (Brown, J., dissenting in part) (explaining that the jurisdictional changes that result from taking land into trust follow “from the ‘attributes of sovereignty’ that ‘Indian tribes retain’” (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *superseded by statute on other grounds*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, 2475-79 (1988) (codified at 25 U.S.C. §§ 2701-2721))).

233. See 25 U.S.C. § 5108.

234. See McCoy, *supra* note 222, at 453-57 (explaining that the process of taking land into trust began without published guidelines, but its procedures and requirements have now evolved through promulgated regulations).

235. 525 F.3d at 30-33 (per curiam) (holding that section 5 of the Indian Reorganization Act was not an unlawful delegation).

236. *Id.* at 39 (Brown, J., dissenting in part) (citation omitted) (citing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-31 (1998)). Justice Thomas has expressed similar concerns. See *Upstate Citizens for Equal., Inc. v. United States*, Nos. 16-1320 & 17-8, 2017 WL 5660979, at *1 (U.S. Nov. 27, 2017) (Thomas, J., dissenting from the denials of certiorari).

237. See, e.g., *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) (holding that land-into-trust provisions do not violate the nondelegation doctrine), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009); *United States v. Roberts*, 185 F.3d 1125, 1136-37 (10th Cir. 1999) (holding Congress lawfully delegated the power to take land into trust to the Secretary of the Interior, who in turn lawfully subdelegated this power within the Department); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 693-96 (9th Cir. 1997) (recognizing a land-into-trust provision as a lawful delegation). The Eighth Circuit in 1995 concluded that the land-into-trust provisions violated the nondelegation doctrine. *South Dakota v. U.S. Dep't of the Interior (South Dakota I)*, 69 F.3d 878, 884-85 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996). Ten years later, the Eighth Circuit examined the issue again and held these provisions

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Sovereignty-affirming subdelegations provide the best framework to understand the land-into-trust process.²³⁸ This process resembles subdelegation because the BIA interchanges its own authority with that of Native nations and enables Native nations, to a certain extent, to direct that authority. Although the BIA retains some authority over the land, the land's new federal-tribal status enables Native nations to exercise sovereign control over it. This expansion of tribal governments' reach, then, affirms tribal sovereignty. The combination of delegation and affirmation places these designations alongside Courts of Indian Offenses as actions akin to sovereignty-affirming subdelegations.

B. Recognizing Sovereignty-Affirming Subdelegations

Sovereignty-affirming subdelegations should face fewer restrictions under the subdelegation doctrine. Critically, the prevailing approach to subdelegation rests on a formal distinction between congressional delegations and executive delegations.²³⁹ But as *Mazurie* itself demonstrates, both types of delegations to tribal governments face fewer restrictions when they affirm tribal sovereignty than when they do not. Two Ninth Circuit cases, *Nance v. EPA*²⁴⁰ and *Southern Pacific Transportation Co. v. Watt*,²⁴¹ have already implicitly adopted this approach for subdelegations. While they did not expressly identify the disputed subdelegations as affirming tribal sovereignty, they employed the framework from *Mazurie* and upheld executive subdelegations that Congress had not expressly authorized. By combining elements of the inquiry for

did not violate the nondelegation doctrine. *South Dakota v. U.S. Dep't of the Interior (South Dakota IV)*, 423 F.3d 790, 796-99 (8th Cir. 2005) (reviewing the Indian Reorganization Act's language and legislative history and finding an intelligible principle for the delegation after largely endorsing the dissenting opinion in *South Dakota I*).

238. Land-into-trust provisions may be understood as codifying the executive branch's pre-existing power to create federal-tribal lands subject to tribal authority. Between 1871 and 1919, the President established reservations by executive order until Congress stopped this practice. Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 628-29 (1960). The Supreme Court subsequently upheld the legality of these reservations. See *Arizona v. California*, 373 U.S. 546, 598 (1963). More importantly, executive reservations provide the same basis for inherent tribal sovereignty as reservations created through treaties or acts of Congress. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 n.1 (1982); see also *United States v. Dion*, 476 U.S. 734, 745 n.8 (1986); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896).

239. See *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (explaining that *Mazurie* "involved a constitutional challenge to an express congressional delegation"); *supra* text accompanying notes 119-22.

240. 645 F.2d 701 (9th Cir. 1981).

241. 700 F.2d 550 (9th Cir. 1983).

affirmations of tribal sovereignty and the inquiry for subdelegations, these cases implicitly recognized the category of sovereignty-affirming subdelegations.

In *Nance*, the Ninth Circuit considered, among other challenges, whether EPA regulations could empower tribal governments to “redesignate their reservations” for the purpose of setting air quality standards.²⁴² The Ninth Circuit rejected the argument that the Clean Air Act barred the EPA from allowing “Indian governing bodies to control air quality standards in the Indian reservations.”²⁴³ Tribal sovereignty drove the court’s evaluation. First, inherent sovereign authority suggested states had no authority over reservation lands.²⁴⁴ Second, tribal sovereignty served as “a backdrop” for interpreting statutes.²⁴⁵ With this in mind, the court concluded that the EPA did not incorrectly interpret the Clean Air Act when its regulations “grant[ed] the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states.”²⁴⁶ The Ninth Circuit upheld this subdelegation without express congressional authorization because the statute contained no contrary intent and lacked a “clear expression of Congressional intent to subordinate the tribes to state decisionmaking.”²⁴⁷

The court next rejected the claims that the Constitution prevented subdelegation of this authority to tribal governments.²⁴⁸ Although redesignating the reservation would affect activities beyond its boundaries, the court found this power remained closely related to Native nations’ inherent sovereign authority. It analogized the power to block pollutants from entering the reservation’s air to Native nations’ inherent power to exclude nonmembers from their reservations.²⁴⁹ Under *Mazurie*’s framework, this closeness between the two powers—one delegated and the other inherent—supported the constitutionality of the subdelegation.²⁵⁰

Two years later, in *Southern Pacific Transportation Co. v. Watt*, the Ninth Circuit again applied *Mazurie* to a subdelegation to Native nations. In 1977, a railroad company challenged the BIA’s denial of the company’s application for a right-of-way through the Walker River Indian Reservation.²⁵¹ Its challenge

242. 645 F.2d at 704-05.

243. *Id.* at 713.

244. *See id.*

245. *Id.* at 714 (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973)).

246. *Id.*

247. *Id.*

248. *Id.* at 714-15.

249. *Id.* at 715.

250. *See id.*

251. *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 552 (9th Cir. 1983). *Southern Pacific* may also recognize agencies’ implied authority to subdelegate powers when doing so advances
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turned on whether the BIA could require tribal consent for a right-of-way application under an 1899 statute that empowered the Secretary of the Interior to grant applications for rights-of-way for telephone, telegraph, and rail lines through lands held by Native nations and peoples.²⁵² The court provided two grounds for concluding that the Secretary of the Interior's regulation requiring tribal consent was not an unlawful subdelegation of the Secretary's statutory authority. First, the Secretary retained reviewing authority because the regulation only "delegates a power to disapprove."²⁵³ Alternatively, the subdelegation was lawful due to the Walker River Paiute Tribe's "independent authority to regulate the use of its own lands."²⁵⁴ Under *Mazurie's* reasoning, this independent authority eased restrictions on subdelegating some power to make the right-of-way decision.²⁵⁵ The statute did not expressly authorize subdelegations, but the Ninth Circuit determined that Congress's delegation of rulemaking power to the Secretary included the power to create preconditions by regulation and that imposing a requirement of tribal consent comported with the statute.²⁵⁶

Nance and *Southern Pacific* employ *Mazurie's* framework to articulate a less-stringent standard for subdelegations to tribal governments: Agencies can subdelegate some of their authority to tribal governments even when Congress has not expressly permitted them to do so.²⁵⁷ When these subdelegations are analyzed as sovereignty-affirming ones, the Ninth Circuit's approach in these cases takes clearer shape. Daniel Rey-Bear suggests that this approach "resembles the balancing of interests in judicial application of federal-tribal preemption analysis," focusing on "the overriding federal interest in protecting and promoting tribal sovereignty,"²⁵⁸ but this comparison captures only part of the analysis. Preemption analysis generally balances the tribal, federal, and state interests implicated by a state's potential exercise of authority in Indian country to determine if federal law preempts the state's action and thereby bars

the statutory framework and does not result in an abdication of statutorily imposed duties. See Asbridge, *supra* note 19, at 300.

252. *S. Pac.*, 700 F.2d at 552; see also Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. §§ 312-318 (2018)).

253. *S. Pac.*, 700 F.2d at 556.

254. *Id.*

255. *Id.* (citing *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)).

256. *Id.* at 553-54.

257. See Daniel I.S.J. Rey-Bear, Comment, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority over Non-Indian Reservation Lands*, 20 AM. INDIAN L. REV. 151, 181-83 (1995-1996).

258. *Id.* at 183.

state authority.²⁵⁹ In the Ninth Circuit's approach, the focus on preemption serves to establish the baseline presumption that Congress has not diminished tribal sovereignty by empowering the state to exercise authority.²⁶⁰ On top of this baseline presumption, the executive may affirm this tribal sovereignty by supplying some administrative power consistent with its congressional mandate.²⁶¹ The Ninth Circuit's reliance on the *Mazurie* Court's inquiry into the relationship between the delegated authority and tribal sovereignty confirms that the subdelegated federal authority serves as a vehicle to extend the Native nations' inherent powers.²⁶² Ultimately, *Nance* and *Southern Pacific* recognize sovereignty-affirming subdelegations and, more importantly, they establish that these subdelegations face fewer of the subdelegation doctrine's constraints.

C. The Sovereignty-Affirming-Subdelegation Presumption

Although executive practice and Ninth Circuit precedent strongly suggest executive agencies may perform sovereignty-affirming subdelegations, the current case law has not fully articulated how and when courts should ease the subdelegation doctrine's usual restraints. Courts must first identify when the executive has affirmed sovereignty through a subdelegation, and, next, they must decide how these restrictions should be relaxed. This Subpart synthesizes the approach implicit in *Mazurie*, the Ninth Circuit's precedents, and the subdelegation doctrine to articulate the sovereignty-affirming subdelegation presumption. In a similar manner to applying the existing intra-agency subdelegation presumption, courts would permit a subdelegation that advances the aims of Congress's plenary power over Indian affairs and delegates

259. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138-40, 144-45 (1980) (explaining the Court's approach to preemption analysis in a challenge to a state's attempt to tax activities related to logging on a reservation); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 22, § 6.03 (describing the application and development of preemption analysis).

260. See *Nance v. EPA*, 645 F.2d 701, 713-14 (9th Cir. 1981) (interpreting the Clean Air Act as permitting the EPA to empower Native nations to redesignate air quality standards for their lands instead of electing to assign this authority to the surrounding states, on the grounds that the statute should be interpreted in light of Native nations' assumed inherent authority over their own lands and states' assumed lack of authority over these same lands).

261. See *S. Pac.*, 700 F.2d at 556; *Nance*, 645 F.2d at 715.

262. See *Nance*, 645 F.2d at 715 ("We do not, however, decide whether the Indians would possess independent authority to maintain their air quality. 'It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority" (alteration in original) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975))).

authority demonstrably related to the Native nation's inherent powers without express congressional authorization.

Congressional grants of discretion to agencies, statutory purpose, the federal government's trust relationship with Native nations, or some combination of these elements can all support subdelegations to tribal governments.²⁶³ The critical inquiry is whether such an exercise of agency discretion finds some support in the statute.²⁶⁴ Statutory requirements for agencies to consult or form cooperative agreements with Native nations provide both strong and widely available statutory bases for subdelegations to Native nations.²⁶⁵ While courts have rejected the argument that statutory directives to consult or enter into cooperative agreements authorize other subdelegations,²⁶⁶ subdelegations to Native nations rest on firmer ground. When Congress authorizes agencies to form cooperative agreements with Native nations, it expressly invites tribal governments to participate in a manner regulated by agency discretion.²⁶⁷ Moreover, the executive's long history of discretion in Indian affairs and shaping tribal sovereignty strengthens the presumption that an agency can subdelegate authority when the statute directs the agency to consult or cooperate with Native nations.²⁶⁸

263. See Rey-Bear, *supra* note 257, at 183.

264. For example, taking land into trust relies on an express delegation of authority, while Courts of Indian Offenses found implicit support in a grant of discretionary authority and subsequent appropriations. See *supra* text accompanying notes 189-92, 222, 232-37.

265. Congress has imposed consultation requirements in several pieces of legislation. See U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 28-29 (2013), <https://perma.cc/ZM2Y-3LXG> (providing examples of statutes with tribal consultation requirements); see also Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 64-67 (2015) (noting current tribal consultation requirements yet highlighting Native nations' critiques of the consultation process). Congress has also authorized cooperative agreements with Native nations. See Secretarial Order No. 3342, *supra* note 12, at 3-5.

266. See *supra* notes 125-30 and accompanying text.

267. See, e.g., 43 U.S.C. § 373d (2018) (empowering the Bureau of Reclamation to "enter into grants and cooperative agreements with" Native nations "to increase opportunities for [them] to develop, manage, and protect their water resources"); see also Krakoff, *supra* note 164, at 237 & n.183 (citing this statute and other similar provisions). When Congress has invited Native nations to participate in exercises of an agency's delegated authority, a subdelegation to Native nations no longer rests on purely executive power, making it compatible with the rule suggested in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) (suggesting that agencies may not subdelegate authority in a manner inconsistent with Congress's statutory scheme). See also *supra* text accompanying notes 110-13.

268. See Asbridge, *supra* note 19, at 296 (contending that courts should not require express authorization to uphold a subdelegation and they "should only invalidate those redelegations where the agency abdicates its statutory duties and frustrates the congressional intent regarding the statute"); *supra* text accompanying notes 178-79; cf. *footnote continued on next page*

Lack of this form of statutory support, however, does not prevent courts from applying the presumption. Because congressional intent guides courts' analysis of the lawfulness of subdelegations, any proposed subdelegation remains viable so long as it furthers Congress's aims.²⁶⁹

Courts must next identify whether the subdelegation affirms tribal sovereignty by allowing Native nations to exercise some federal authority, because the presumption attaches only to sovereignty-affirming subdelegations. *Mazurie's* implicit framework²⁷⁰ establishes a two-part test: A sovereignty-affirming subdelegation occurs when (1) the subdelegation remains within the bounds of a lawful exercise of federal plenary power over Indian affairs, and (2) the subdelegated authority has a demonstrable relationship to the Native nation's inherent sovereign powers. At step one, courts should look to the Court's opinion in *Morton v. Mancari*, which suggests that a government act that is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" falls within the permissible bounds of federal plenary power over Indian affairs.²⁷¹ Accordingly, a subdelegation that "is reasonable and rationally designed to further Indian self-government" would satisfy step one.²⁷² For the

Shah, *supra* note 110, at 331-32 (arguing that interagency subdelegations of adjudicative authority may promote Congress's intentions for agencies to best fulfill "their mandates" through coordination in the absence of express permission to transfer such authority). Courts have shown a willingness to read statutory language to impose other requirements on the federal government to protect Native nations' interests when it is consistent with Congress's desire to protect Native nations. *See, e.g.,* *Wilson v. Block*, 708 F.2d 735, 745-46 (D.C. Cir. 1983) (finding an implied consultation requirement in the American Indian Religious Freedom Act since "[i]t is clear from the reports, and from the statutory preamble, that [the Act] requires federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices" and such a requirement was consistent with that purpose).

269. *See* *Vierra v. Rubin*, 915 F.2d 1372, 1378-79 (9th Cir. 1990) (concluding that the Secretary of Health and Human Service's delegation of authority to a state agency to define what constitutes good cause for a late filing was "invalid to the extent that it allow[ed] the state to promulgate a rule inconsistent with federal legislative intent and regulations"). Because Congress has codified the policy that its trust relationship with Native nations includes "promot[ing] tribal self-determination regarding governmental authority and economic development," one can argue that subdelegations affirming tribal sovereignty always align with congressional aims when they further the underlying statute's objectives and Congress has not expressly forbidden subdelegation. *See* 25 U.S.C. § 5602 (2018).

270. *See supra* text accompanying notes 73-80.

271. *See* 417 U.S. 535, 555 (1974) (upholding the constitutionality of the BIA's hiring preferences for Native persons).

272. *See id.* This constraint also makes sense because the trust relationship effectively provides the "intelligible principle" for all congressional delegations of the power over Indian affairs. *See* Howard L. Highland, Recent Development, *A Regulatory Quick Fix for Carcieri v. Salazar: How the Department of Interior Can Invoke an Alternate Source of Existing Statutory Authority to Overcome an Adverse Judgment Under the Chevron Doctrine*, 63 ADMIN. L. REV. 933, 954 (2011).

second step, courts need to establish that the subdelegated authority's subject matter falls within an area of Native nations' inherent authority.²⁷³ Such a requirement gives effect to the *Mazurie* Court's conclusion that to receive power through delegation, a Native nation need not have independent authority equal to the delegated power.²⁷⁴

The sovereignty-affirming subdelegation presumption also provides a way to promote delegation's virtues while minimizing its vices. First, just like intra-agency subdelegations, sovereignty-affirming subdelegations can promote more effective administration by giving agencies flexibility.²⁷⁵ Tribal governments already play a role in administering federal services and programs,²⁷⁶ so subdelegation provides another tool for structuring these existing relationships. Between 1991 and 2013, the number of Native nations contracting with the BIA and the Indian Health Service to provide federal services skyrocketed,²⁷⁷ and these efforts both have increased tribal governmental capacity and have improved the quality of services to Native peoples.²⁷⁸

273. See *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).

274. *Id.*; see also *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989) (plurality opinion) (explaining that a tribal government could not exercise jurisdiction over hunting on "fee lands owned by nonmembers" without the support of a congressional delegation since these activities "did not bear any 'clear relationship to tribal self-government or internal relations,'" subjects within the Native nation's inherent authority (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))). The case law has provided only a few clues for setting the limits of this test. The Court in *Mazurie*, for example, concluded that selling alcohol within the bounds of a reservation had a sufficient link to tribal sovereign authority because it "affect[s] the internal and social relations of tribal life." 419 U.S. at 557. Ninth Circuit precedent indicates that a resemblance between the delegated and inherent authority may be sufficient. See *Nance v. EPA*, 645 F.2d 701, 715 (9th Cir. 1981) (allowing the EPA to subdelegate authority to set air quality standards to a Native nation because controlling the introduction of pollutants onto the reservation resembled the Native nation's "authority to prevent the entrance of non-members onto the reservation"); see also *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (permitting the subdelegation of the power to deny a right-of-way across a reservation to a Native nation when a Native nation "has independent authority to regulate the use of its own lands").

275. See *supra* text accompanying note 104; see also Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 242 (2011) ("[T]he basis for the common law subdelegation power was a presumed congressional intention—because 'it is impossible for a single individual to perform in person all the duties imposed on him by his office,' Congress intends busy Presidents and agency heads to be able to subdelegate their duties." (footnote omitted) (quoting *Parish v. United States*, 100 U.S. 500, 504 (1879))).

276. See Kevin K. Washburn, Essay, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 205-06 (2017).

277. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 48-49 (2014-2015).

278. See Washburn, *supra* note 276, at 206-07.

Although these programs face challenges and likely require some improvements,²⁷⁹ subdelegations can further advance these successes.

Moreover, tribal subdelegations, like congressional delegations to Native nations, can advance the values of federalism.²⁸⁰ Congress's legislative efforts to promote tribal self-governance have brought Native nations into structures of cooperative federalism by enabling Native nations to enter into agreements with the federal government.²⁸¹ State government participation in cooperative federalism often makes national programs more receptive to local concerns,²⁸² and there is little reason to think tribal government participation cannot do the same.²⁸³ Subdelegation simply serves as an alternative vehicle to promote these same ends.²⁸⁴

Finally, the sovereignty-affirming subdelegation presumption leaves room for agencies and Congress to minimize the identified risks of subdelegation. The presumption does not prevent agencies from placing conditions and limits on the subdelegated authority. Such limits can mitigate the "policy drift

279. See Strommer & Osborne, *supra* note 277, at 48-66 (noting some of the roadblocks to continued growth of such efforts, including resistance from agencies and insufficient funds for contract support costs); Steven L. Mangold, Note, *Progress in Self-Determination: Navigating Funding for ISDA Contracts After Salazar v. Ramah Navajo Chapter*, 38 AM. INDIAN L. REV. 261, 263-66, 295-302 (2013-2014) (suggesting reforms to contracting under the Indian Self-Determination and Education Assistance Act); see also Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 223-38 (2004) (describing some of the challenges in tribal efforts to regulate air pollution under the Clean Air Act's provisions treating Native nations as states).

280. See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 106 (1990).

281. See Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 285-87 (2010).

282. See Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 189-90 (2018).

283. In fact, Congress has already authorized agencies to treat Native nations as states in some environmental programs like the Clean Water Act and the Clean Air Act. See, e.g., 33 U.S.C. § 1377(e) (2018); 42 U.S.C. § 7601(d) (2018); see also *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (identifying the tribes-as-states provision in the Clean Air Act); *City of Albuquerque v. Browner*, 97 F.3d 415, 421 (10th Cir. 1996) (identifying the tribes-as-states provision in the Clean Water Act).

284. Executive subdelegations may be better vehicles for promoting cooperative federalism than congressional delegations. Like congressional delegations, executive subdelegations increase local involvement in federal programs, yet they may further strengthen separation-of-powers principles by encouraging the executive branch to voluntarily check its power. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 462-63 (2012) (arguing that cooperative federalism serves as a check on expansive executive power, furthering separation of powers); cf. Krent, *supra* note 280, at 108 (explaining how congressional delegations advance republican values of participation).

inherent in any principal-agent relationship.”²⁸⁵ Moreover, agencies can structure these subdelegations to ensure potentially aggrieved parties have legal recourse.²⁸⁶ As long as the delegating agency remains involved in the decisionmaking, aggrieved parties may still seek judicial review under the Administrative Procedure Act²⁸⁷ even though the Native nation’s actions fall outside the Act’s scope.²⁸⁸ Regardless of the agency’s choices, Congress can still prevent any subdelegations of which it disapproves by expressly denying agencies the power to subdelegate or requiring the agency to fulfill certain requirements before it subdelegates authority.

The sovereignty-affirming subdelegation presumption and its accompanying test provide courts with a way to determine when they should review subdelegations more permissively.²⁸⁹ This approach rests on

285. See *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); cf. Note, *International Delegation as Ordinary Delegation*, 125 HARV. L. REV. 1042, 1052 (2012) (noting possible solutions to policy-drift concerns in international delegations).

286. See *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 926 (D.C. Cir. 2008) (identifying the lack of expected legal recourse for agency action as a concern raised by subdelegations).

287. See *City of Albuquerque*, 97 F.3d at 424-26 (reviewing an Administrative Procedure Act challenge to water-quality standards set by a Native nation and approved by the EPA under the Clean Water Act); see also 5 U.S.C. §§ 701-706 (2018).

288. See 5 U.S.C. § 701(b)(1) (defining “agency”); cf. Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1290-91 (2013) (noting that the Administrative Procedure Act does not apply to state agencies participating in cooperative federalism schemes).

289. Subdelegations of authority to nonfederal actors may also raise questions about whether those actors are “Officers of the United States” within the Appointment Clause’s scope. See U.S. CONST. art. II, § 2, cl. 2. The Supreme Court has not yet determined how the Appointments Clause applies to nonfederal actors exercising delegated authority. Cf. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019) (mem.) (granting a writ of certiorari to answer the question whether members of the Financial Oversight and Management Board for Puerto Rico are officers), *argued*, No. 18-1334 (U.S. Oct. 15, 2019). Paul Larkin, Jr. and Joseph Luppino-Esposito, however, have suggested that tribal government officials who share federal powers could qualify as “Officers of the United States.” Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 20-24 (2012). But tribal officials acting pursuant to sovereignty-affirming subdelegations are not officers under either of two distinct theories. First, tribal law, not federal law, creates their positions. See *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986) (holding the Appointments Clause inapplicable where state law underpins officials’ “appointment, salaries and direction”); *The Constitutional Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124, 145-47, 145 n.60 (1996) (concluding that “[t]he Appointments Clause simply is not implicated” when a nonfederal source of law creates the actor’s office). And second, under a sovereignty-affirming subdelegation, tribal officials would primarily exercise tribal sovereign powers. See *supra* notes 270-74 and accompanying text; see also *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 99-100 (2007)

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longstanding executive powers, articulates a framework implicit in the existing delegation case law, and enables Congress to act to prevent any unwanted subdelegations. More importantly, this approach provides guidelines for agencies rather than dictating how agencies must structure their subdelegations. Ultimately, this narrow category and narrow presumption present a significant path to promote collaboration among agencies and Native nations.

D. Applying the Presumption: A New Proposal for the Bears Ears Commission

Even though Bears Ears National Monument no longer exists as proclaimed, Representative Ruben Gallego reintroduced a bill in 2019, both to restore the boundaries of the monument to the ones proposed by the Bears Ears Inter-Tribal Coalition in 2015, and to restore the position of the Bears Ears Commission.²⁹⁰ The sovereignty-affirming subdelegation presumption, however, suggests the Department of the Interior could restore and expand the Commission's role under current law without such legislation.

The sovereignty-affirming subdelegation presumption would not apply where Congress has demonstrated an intent to oppose subdelegating authority to Native nations in the relevant statutes governing national monuments and federal public lands. But neither the Antiquities Act nor land management statutes more broadly precludes subdelegating authority to Native nations. First, the Antiquities Act grants the President broad discretion to reserve federal lands,²⁹¹ and gives the Secretaries of the Interior, Agriculture, and the Army similarly broad powers to "make and publish uniform regulations for the purpose of carrying out" the Act, including protecting "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."²⁹² Second, for the general management of public lands, Congress requires that "public lands be managed in a manner that will protect the quality

(determining that state officials who administer federal law are not usually Officers of the United States because they exercise "sovereign law enforcement authority," which derives from the people of the state rather than the federal government). In any event, structuring the subdelegations to limit tribal officials' ultimate authority will avoid Appointments Clause issues. *See Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018) (explaining that Administrative Law Judges are officers because they occupy "continuing" offices and "exercise . . . 'significant discretion'" (quoting *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991))).

290. *See Bears Ears Expansion and Respect for Sovereignty Act*, H.R. 871, 116th Cong §§ 3(a), 4(c) (2019).

291. *See Cappaert v. United States*, 426 U.S. 128, 141-42 (1976); *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

292. 54 U.S.C. §§ 320301(a), 320303 (2018).

of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.”²⁹³ To achieve this end, Congress authorizes the Secretary of the Interior to enter into cooperative agreements to manage public lands²⁹⁴ and protect natural resources.²⁹⁵

Rather than expressing an intent to prevent subdelegation, these statutory provisions provide a tacit basis for subdelegating some management authority to the Bears Ears Commission. Subdelegating management to the Commission likely would better protect Bears Ears’s historical objects.²⁹⁶ The Bears Ears Inter-Tribal Coalition, in its proposal, demonstrated how collaborative management could improve historical understanding of the site, particularly relating to map art, and could also improve land management.²⁹⁷ The Commission’s input, in particular, could improve protection by drawing attention to concerns that the federal government acting alone might overlook.²⁹⁸ Finally, the Commission’s ability to draw on long-developed knowledge of the area and its resources could improve resource management, especially in this era of climate change.²⁹⁹

293. 43 U.S.C. § 1701(a)(8) (2018).

294. *Id.* § 1457b; *see also id.* § 1737(b). Congress has authorized similarly broad authority for the Secretary of Agriculture to enter into cooperative agreements for administration of Forest Service lands. *See* 16 U.S.C. §§ 565a-1, 565a-3 (2018).

295. 54 U.S.C. § 101702(d).

296. Tribal government officials have explained that the Trump Administration’s reduction of Bears Ears has withdrawn protection for a number of historical sites and artifacts, which tribal officials had previously identified as significant. *See* Joe Fox et al., *What Remains of Bears Ears*, WASH. POST (Apr. 2, 2019), <https://perma.cc/5VYJ-LMWH> (“We knew exactly what was within that geographical boundary We knew the gravesites, we knew where the artifacts were, we knew where certain plants and herbs grew.” (quoting Shaun Champoos, councilman for the Uncompahgre band of the Ute Tribe)).

297. BEARS EARS INTER-TRIBAL COAL., *supra* note 134, at 31-34.

298. *See, e.g.*, Sibyl Diver, *Co-Management as a Catalyst: Pathways to Post-Colonial Forestry in the Klamath Basin, California*, 44 HUM. ECOLOGY 533, 537, 540 (2016) (explaining that the Karuk Tribe’s co-leadership of a forestry project alongside the Forest Service enabled restoration efforts that specifically protected culturally important resources, such as tan oak mushrooms); Lauren Goschke, Note, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest*, 27 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 315, 354 (2016) (arguing that tribal co-management of huckleberry fields with the Forest Service will enhance protection because Native nations view huckleberries as a more significant resource than does the Forest Service). For a thorough treatment of California’s indigenous peoples’ traditional ecological knowledge, *see generally* M. KAT ANDERSON, *TENDING THE WILD: NATIVE AMERICAN KNOWLEDGE AND THE MANAGEMENT OF CALIFORNIA’S NATURAL RESOURCES* (2005) (discussing the history and effects of California’s indigenous peoples’ land management practices and how these practices continue today).

299. *See* ANDERSON, *supra* note 298, at 9-10, 361-62 (arguing that beliefs and attitudes embodied in traditional resource management practices “suggest principles that we can
footnote continued on next page”).

Because subdelegating management authority over Bears Ears to the Commission, in fact, furthers rather than impedes the Antiquities Act's aims, the sovereignty-affirming subdelegation presumption would apply as long as the subdelegation satisfies the two prongs of the test. First, federal plenary power over Indian affairs permits empowering the Commission to serve as a collaborative manager. Giving such collaborative-management authority to representatives of tribal governments reasonably and rationally furthers tribal self-determination by providing Native nations greater control over their cultural heritage.³⁰⁰ Second, collaborative-management authority over Bears Ears demonstrably relates to the Native nations' independent authority through two interests: The Native nations value Bears Ears both as an area of spiritual and cultural significance and as part of their ancestral lands.³⁰¹ These interests affect the Native nations' independent authority over internal relationships. As the Bears Ears Inter-Tribal Coalition explained:

The need for protecting the Bears Ears landscape has been broad and heartfelt for well over a century. The rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape saddened and sickened our ancestors, and that sense of loss and outrage continues today. The depth of our spiritual connection to these places is not widely understood, but it is true that these desecrations to our homeland, structures, implements, and gravesites—insults to the dignity of our societies and Traditional Knowledge as well—wound us physically. By visiting Bears Ears, giving our prayers, and conducting our ceremonies, we heal our bodies and help heal the land itself.³⁰²

Overseeing these areas protects current tribal spiritual practices³⁰³ and preserves, as well as ensures, the continued education about tribal national

apply in effecting the changes in values, beliefs, and behavior that will be necessary for modern society to move toward sustainable resource use"); Krakoff, *supra* note 164, at 254-55 (discussing how "traditional knowledge" of the environment, including plant and animal life, can work with scientific knowledge to help improve management of landscapes, including Bears Ears); *see also infra* note 314.

300. See Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 56 (2002) ("For a tribe, controlling collective cultural property, particularly that which is sacred and intended solely for use and practice within the group, is a crucial element of self-determination.").

301. See BEARS EARS INTER-TRIBAL COAL., *supra* note 134, at 8-10; *see also* Krakoff, *supra* note 164, at 239-40; Wilkinson, *supra* note 148, at 318-19, 321-22.

302. BEARS EARS INTER-TRIBAL COAL., *supra* note 134, at 1.

303. *See id.* at 9 ("We go with offerings to our sites. We knock on that wall and say our names—just like you should—you make your entry properly, and address those that reside there as grandmothers and grandfathers as they are. There is no dimension of time in the spirit world. It's good to come here to the sites, to your grandmothers' homes, you remember how it was to be there. With an offering, perhaps some corn meal, you identify yourself, you sing a song and the children dance, and we just speak
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heritage³⁰⁴—“matters that affect the internal and social relations of tribal life.”³⁰⁵

Under current law, the Bears Ears Commission can assume the collaborative-management role it sought in 2015, because the sovereignty-affirming subdelegation presumption would apply to such a grant of authority. Authorizing the Commission to participate in Bears Ears’s management promotes the Antiquities Act’s aims. Moreover, Congress’s broad authorization of cooperative-management agreements for federal public lands tacitly supports tribal collaborative management at Bears Ears. Finally, by giving administrative authority to the Commission, the executive branch both advances tribal self-determination of the Native nations represented by the Commission and subdelegates power tied to these nations’ independent authority over their internal social relations.

Conclusion

Native nations are sovereigns. Even though they are subject to federal plenary power, “until Congress acts, the tribes retain’ their historic sovereignty.”³⁰⁶ This sovereignty and the federal government’s power to affirm it distinguish subdelegations to Native nations from subdelegations to other entities outside the federal government. As this Note shows, the relationship between tribal sovereignty and federal authority provides that sovereignty-affirming subdelegations to tribal governments should, under current law, face fewer restrictions.³⁰⁷ These subdelegations represent an interchange of tribal and federal authority that both eases previous restraints on tribal authority and includes tribal governments in the exercise of federal authority.³⁰⁸ Recognized by past and current executive practice and case law,³⁰⁹ this interchange of authority supports the presumption that such

our language. Your name, your clan, your kiva.” (quoting Joseph Suina, member of the Pueblo of Cochiti)).

304. *See id.* at 10 (“The importance of Bears Ears for our people is through our ancestral sites that were left behind eons ago by our ancestors. They documented the sites by using oral history, [with] pictographs, and by leaving their belongings. When we visit Bears Ears, we connect with our migration history immediately without doubt. With that, we must preserve, manage and educate our future generations.” (quoting Phillip Vicenti, member of the Zuni Tribe)).

305. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

306. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

307. *See supra* Part III.

308. *See supra* Part III.

309. *See supra* Parts III.A-B.

subdelegations to Native nations—much like intra-agency subdelegations—are consistent with Congress’s aims when Congress has not indicated otherwise.³¹⁰

While this Note relies on Bears Ears National Monument to show the significance of the sovereignty-affirming subdelegation presumption,³¹¹ collaborative-management schemes with Native nations achieved through subdelegations can address problems beyond Bears Ears and the administration of national monuments. For example, Native nations face increasing threats from natural disasters, yet their governments often lack the capacity, funding, and even legal ability to respond.³¹² Subdelegating elements of emergency-service provisions, when accompanied with adequate funding, can help tribal governments respond more effectively to disasters, like wildfires, floods, and pandemics.³¹³ Moreover, such subdelegations may even spur the development and proliferation of more effective disaster-prevention techniques across the United States.³¹⁴

Most importantly, reconciling and analyzing the case law to identify sovereignty-affirming subdelegations clarifies the discussions around tribal sovereignty. This Note’s analysis rejects the idea that tribal sovereignty’s relationship to federal plenary power makes it less than actual sovereignty.³¹⁵ Instead, it not only presents an avenue for using federal power to expand Native nations’ inherent authority, but also draws attention to the long and continued history of federal, state, and tribal sovereigns interchanging and intermingling their authority. In this sense, sovereignty-affirming subdelegations

310. See *supra* Part III.C.

311. See *supra* Parts II.B, III.D.

312. See, e.g., Laurence Du Sault, *The Karuk Tribe Fights a Growing Wildfire Threat and a Lack of Funding*, HIGH COUNTRY NEWS (Mar. 12, 2019), <https://perma.cc/656W-HTJU>; Simon Romero, *Checkpoints, Curfews, Airlifts: Virus Rips Through Navajo Nation*, N.Y. TIMES (updated Apr. 10, 2020), <https://perma.cc/STA8-YHAL>; Mitch Smith, “A State of Emergency”: Native Americans Stranded for Days by Flooding, N.Y. TIMES (Mar. 24, 2019), <https://perma.cc/X4RX-E4CP>.

313. See, e.g., Nina Lakhani, *Native American Tribes Take Trailblazing Steps to Fight Covid-19 Outbreak*, GUARDIAN (Mar. 18, 2020, 1:25 PM EDT), <https://perma.cc/6A5W-UPLC> (explaining that the Lummi Nation has been able to respond quickly and effectively to the COVID-19 pandemic, in part because the Nation has increased its healthcare system capacity through its self-determination contract with the federal government); see also *supra* notes 277-79 and accompanying text.

314. See, e.g., Nathan Gilles, *Wildfires Are Essential: The Forest Service Embraces a Tribal Tradition, YES!* (Apr. 3, 2017), <https://perma.cc/8YHJ-X4NX> (describing the Karuk Tribe’s work with the Forest Service to reintroduce controlled burns to Karuk traditional lands in part to mitigate the risks of large wildfires); Jane Braxton Little, *The California Indigenous Peoples Using Fire for Agroforestry*, PAC. STANDARD (updated Oct. 22, 2018), <https://perma.cc/XD3B-BS8B> (describing the Karuk Tribe’s collaboration with the Forest Service and California state agencies to restore traditional agroforestry on federal lands).

315. See *supra* text accompanying note 28.

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confirm more fundamental ideas about sovereignty in the structure of the United States. Ideas of sovereignty emerged from and are still shaped by the interactions of the federal government, states, and Native nations.³¹⁶

316. See Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 39-40 (2019).