The concept of government-to-government consultation between Indian tribes and the United States is long standing and well-recognized. Nearly every President in recent memory has endorsed the policy that the special trust relationship requires meaningful consultation with Indian tribes. In this modern age of self-determination, the federal government eschews the paternalistic policies of the past and acknowledges in principle that agency decisions are more effective and long lasting when tribes are substantively involved in policy development. Nonetheless, in the daily practice of governing, consultation does not always attain its intended purpose, which is to ensure that Indian tribes are consulted before government officials make decisions that impact their lives and territories. Evidence of this unfortunate dynamic can be gleaned from current litigation in the courts, where robust and meaningful consultation, either as required by statute or as a matter of general intergovernmental engagement, could have potentially avoided costly and burdensome lawsuits. This paper examines three recent cases where tribes have resorted to the courts to remedy their exclusion from the government’s decision making process.

I. Introduction

In modern times, presidents from both sides of the aisle have endorsed the policy of engaging in government-to-government consultation with Indian tribes.1 Most recently, President Obama made

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1 See, e.g., Exec. Order No. 13,336, 69 Fed. Reg. 25,295 (May 5, 2004); Remarks to Indian and Alaska Native Tribal Leaders, 1 PUB. PAPERS 800-03 (Apr. 29, 1994); Statement Reaffirming the Government-

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unprecedented strides in increasing the level of government-to-government consultations with tribes by holding an annual White House Tribal Nations conference and establishing the White House Council on Native American Affairs. Through this engagement, the administration and Indian Country identified policy objectives across a wide range of areas, from efforts to streamline land use authorizations and economic development on Indian lands and addressing land fractionation in Indian Country, to resolving long standing water rights disputes, recognizing authority of tribal law enforcement to protect their communities, and providing protections for sacred lands through land withdrawals and monument designations. Endorsing the positive impact of consultation, former President of the National Congress of American Indians Brian Cladoosby, Swinomish Indian Tribal Community, stated at the 2016 State of Indian Nations address: “While there are many legal and ethical reasons to strengthen tribal self-determination there is also a practical reason: it works. President Obama has certainly embraced this concept—as President Nixon did. We expect the next president and the next Congress to work with us, to build on this progress.”

Upon the eve of entering the history books as an unmatched friend of Indian Country, President Obama would face the most challenging controversy of his tenure that arguably arose from insufficient consultation with Indian tribes—protests regarding the proposed Dakota Access pipeline in North Dakota, just north of the Standing Rock Sioux Tribe’s reservation. While defending the U.S. Army Corps of Engineers (USACE)’s prior review and permit decisions in litigation filed by the tribes, the Obama administration carefully reviewed the existing agency decision-making record based on the concerns raised by the tribal nations to determine if any of these decisions needed to be reconsidered. As a result of this review, the Department of the Army concluded that it would not grant the easement under the Mineral Leasing Act to the energy company, and that a more in-depth National Environmental Protection Agency (NEPA) review was warranted. Central to the Army’s decision were Counsel on Environmental Quality (CEQ) NEPA regulations that recommend heightened analysis of alternatives when tribal resources are at stake, environmental protection provisions in the Mineral Leasing Act, the close proximity of the pipeline to the reservation, the potential impact on treaty hunting and fishing rights, and

6 See Memorandum by the Assistant Secretary of Civil Works, Department of the Army to the Commander, U.S. Army Corps. of Engineers re: Proposed Crossing of the Dakota Access Pipeline at Lake Oahe, North Dakota (Dec. 4, 2016).
the involvement of historic tribal homelands. However, the Army’s decision at the end of 2016 would be short lived.

The Trump administration immediately reversed the Obama administration’s call for more environmental review on a platform of domestic energy dominance, with no recognition of the trust relationship with Indian tribes or support for the long standing policy of government-to-government consultation. Meanwhile, the tribes’ litigation was proceeding apace, where the tribes argued the Obama administration’s call for further environmental review was justified.

The D.C. district court ultimately ordered the USACE to expand its NEPA environmental review to assess tribal treaty and water rights and environmental justice issues. However, the court declined to stop the flow of oil through the pipeline pending the remand. Nonetheless, the court did impose interim measures at the tribes’ request, which directed the energy company and USACE to coordinate with the tribes on oil spill response plans, prepare a third party compliance audit, and submit bimonthly reports on repairs or incidents along the pipeline. Most recently, one of the Tribes in the litigation notified the district court that the supplemental environmental review on remand was inadequate because the USACE had failed to properly consult with that Tribe, share information, or respond to the Tribe’s outreach. Hence, a new layer of tribal accusations of inadequate consultation is emerging in this ongoing saga.

The Dakota Access experience will no doubt inform how future administrations, tribal leaders, and courts will approach consultation. The experience has highlighted how history, competing agendas, political sensitivities, and legal requirements all influence how the government approaches its commitment to consult, with varying degrees of success. Below are three additional examples that highlight these tensions and challenges.

II. The Hydraulic Fracking Rule: Tribes’ Voices Raised But Not Heard

Under the Obama administration, the U.S. Department of the Interior (DOI or Interior) undertook a multi-year, extensive rulemaking process to adopt new regulations regarding oversight of hydraulic fracking on public and tribal lands. The effort was to address the absence of federal regulation with the aim of ensuring safe operations to address public concern about fracking’s potential to cause contamination of underground water resources. However this new effort to regulate the booming hydraulic fracking market was met with strong opposition from certain Western states, the energy industry, and certain

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7 Id.
Indian tribes. Multiple lawsuits ensued. While the hydraulic fracking rule has since been repealed by the Trump administration (leading to another round of litigation), and energy companies have sought dismissal of their claims on the grounds of mootness, there remains an instructive case study regarding the tribes’ experience in the promulgation of this rule.

From the beginning, certain tribes with hydraulic fracking activities on their lands opposed the Obama era rule for its overreach of federal authority into tribal affairs and for the failure to consult with tribes on the promulgation of the rule. The rule not only applied to oil and gas activities on public lands, pursuant to the Federal Land Management and Policy Act (FLPMA), but also to such activities on tribal lands, pursuant to the Indian Mineral Leasing Act (IMLA) and its progeny.

The tribes charged that the Bureau of Land Management (BLM) failed to adequately consult with them in violation of the DOI tribal consulting policy. The policy provides that Interior will “consult with tribes on a government-to-government basis whenever DOI plans or actions have tribal implications.” The policy sets forth a process for consultation, and specifically emphasizes that consultation should begin “as early as possible” in the decision-making process. The BLM began consultation with the tribes in January 2012—after it had already drafted a proposed rule and shortly before it published the proposed rule on May 11, 2012. The final rule was ultimately published in March 2015. While the BLM hosted regional meetings, shared copies of the rule with the tribes, and held additional meetings and individual and group consultations with tribal representatives between the proposed rule, after the publication of the revised proposed rule in May, 2013, and before the final rule, that was not enough in the eyes of the tribes. The central criticisms from the tribes were that there was no meaningful consideration of their specific request to be allowed to govern their own lands, that the rule added new, burdensome requirements to an already highly bureaucratic process for development on tribal lands, and that the BLM lacked the legal authority under the Indian Mineral Leasing Act to regulate hydraulic fracking.

When the tribes did not see any substantive changes in the final version of the rule to address their concerns, some of them sought legal relief. In particular, the Ute Indian Tribe sued Interior in the Wyoming federal district court. Judge Skavdahl heard the Ute Indian Tribe’s call for a remedy. In granting the Ute Indian Tribe’s (along with industry and state co-plaintiffs’) motion for a preliminary injunction against Interior, the court specifically discussed the inadequacy of the BLM’s consultation with

14 Sierra Club, 2016 WL 3853806, at *1.
16 U.S. DOI, SECRETARIAL ORDER NO. 3317 (2011); DOI DEPARTMENTAL MANUAL, PART 512, CHAPTERS 4 and 5 (“DM”).
17 Id. at 5.5(A)(1).
18 Id. at 5.5(A)(1).
21 Id. at 16,184-85.
22 Wyoming, 136 F.Supp.3d at 1317.
23 Id.; Sierra Club, 2016 WL 3853806, at *1.
the tribes. The court noted that the agency had already written the rule when it first engaged the tribes, that Interior had already engaged the public in forums in November 2010 and April 2011 on development of the rule without engaging the tribes, and that the outreach to tribes reflected nothing more than what was offered to the public in general. Also pertinent to the court was the fact that the final rule continued to apply its provisions to the tribes in a carte blanche fashion with only a nominal nod to tribal law by providing the same option for a variance as granted to states. The court further outright dismissed the argument that there is federal authority to delegate its regulatory responsibilities to the tribes. Given the court’s related conclusions on the merits that Interior lacked the statutory authority to regulate the hydraulic fracking rule, and the irreparable harm to tribal sovereign authority through the implementation of the regulation, the court enjoined Interior from enforcing the hydraulic fracking rule on public and tribal lands. Eventually, the district court of Wyoming similarly ruled on the merits that Interior lacked statutory authority to regulate hydraulic fracking on public and tribal lands. The Tenth Circuit dismissed pending appeals when the Trump administration rescinded the rule, remanding with directions to vacate the district court’s opinion and dismiss the action.

Meanwhile, the Southern Ute Tribe in Colorado also sued Interior in opposition to the hydraulic fracking rule. While the lack of consultation was not the focus of their case, the Southern Ute Tribe similarly argued that Interior lacked statutory authority to promulgate the regulation and that tribal laws should apply. In the aftermath of the experience in the Wyoming court, Interior settled the Southern Ute case in November 2016, recognizing that the tribe’s regulations on hydraulic fracking exclusively applied to their tribal lands. The settlement did not resolve the legal question as to whether the BLM can regulate hydraulic fracking on tribal lands, but given that the tribal rules were more protective than the federal rules, the parties were able to reach a deal. The Southern Ute Tribal Chairman at the time noted that the Tribe had sued because “we felt that tribal input had been ignored,” but that the negotiations that followed while the case was stayed gave the parties a chance to resolve the dispute: “Once we had the chance to sit across the table from each other in meaningful discussion, we recognized that we shared many of the same goals, including the exercise of sovereignty by the tribe over Southern Ute lands.”

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25 Id.
26 Id. at 1336–37, 1347.
27 Id. at 1354. On an unopposed motion to dismiss the appeal as moot, the Tenth Circuit remanded the case to the district court with instructions to “vacate the order granting the preliminary injunction dated September 30, 2015.” Sierra Club, 2016 WL 3853806.
28 Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017). Certain parties opposing the vacatur order have filed motions with the court to dismiss the appeal as moot given the administration’s formal repeal of the rule, in order to avoid a vacatur of the lower court’s merits ruling. Industry Petitioners-Appellee’s Request for Panel and En Banc Rehearing on Timing of Vacatur at 7, Wyoming, 871 F.3d 1133 (No. 16-8068). Prior petitions for rehearing on that same issue were previously denied by the Tenth Circuit.
30 Complaint at 7, Southern Ute Indian Tribe, No. 1:15-cv-01303.
32 Id.
33 Id.
In sum, this experience with the hydraulic fracking rule indicates that the courts may be influenced by tribal claims of inadequate consultation, particularly in the face of an underlying legal vulnerability in the government’s exercise of authority. It also indicates that engagement with tribes early in the decision-making process, beyond what is offered to the general public, can pay dividends later. Interior could very well have avoided opposition from the tribes in litigation had they brought them to the table much earlier. Such discussions would have offered an opportunity to craft a negotiated approach to advance tribal self-regulation and federal objectives, which was the outcome in the Southern Ute settlement. Instead, Interior stood largely alone in the face of State, tribal, and industry opposition, and indeed, was losing the legal battle when the Trump administration repealed the rule.

III. Bears Ears National Monument: Calls to President Trump Go Unanswered

While certain tribes that have conventional energy development on their lands were pleased with the Trump administration’s repeal of the hydraulic fracking rule, other tribes have fared less well under President Trump’s Executive Order seeking the review of prior designations of national monuments. During his tenure, President Obama designated or expanded 34 national monuments, including the Bears Ears National Monument in southeastern Utah. Upon taking office, President Trump called for action to curb alleged abuses of Antiquities Act authority to designate national monuments, describing it as an “egregious” federal land grab. Thus, in April 2017, Executive Order No. 13,792 called for Secretary of the Interior Ryan Zinke to review all national monument designations made since January 1, 1996, which covered more than 100,000 acres or “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.” The Order directed the Secretary to examine specific questions, none of which elicited input that expressed support for any of the affected monuments. To the dismay of certain Southwest tribes who have long-standing sacred and aboriginal ties to the area, the review included the Bears Ears National Monument, located in southeastern Utah.

The legal authority to designate national monuments arises under the Antiquities Act of 1906. Congress delegated the authority to designate national monuments to presidents, declaring that the president may protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” on lands under federal control. The Act vests the president with broad “discretion” to “declare …national monuments” and “reserve parcels of land as a part of the national monuments” that comprise the “smallest area compatible with the proper care and management of the objects to be protected.”

Under this authority, presidents have reserved over 150 national monuments, such as the Grand Canyon and the Statue of Liberty.

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36 Id.
38 Id. at § 320301(a)-(b).
President Obama designated the Bears Ears National Monument by Proclamation No. 9558 on December 28, 2016. The designation came after unparalleled engagement by affected tribes in the area with the Obama administration, elected officials, and the community. Starting in 2010, a grassroots native organization called Utah Diné Bikéyah started a focused campaign to seek protection for the area, developing a culturally informed map of the Bears Ears region based on more than 70 cultural interviews with local Navajo traditionalists. Many other conservation groups, outdoor recreationists, outdoor retail companies, scientists, and local residents joined the effort. And in a formal expression of the importance of the area to tribal governments, the five tribes with time immemorial ties to the area – the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zuni Tribe – created the Bears Ears Inter-Tribal Coalition (“Tribes”). With assistance from the above referenced groups, the Coalition presented a proposal for the Bears Ears National Monument to President Obama on October 15, 2015, and a supplemental report on October 18, 2016. The proposal called for designating 1.9 million acres of ancestral land as a national monument.

President Obama ultimately reserved a smaller area of 1.35 million acres, but the monument nonetheless covered the areas of most concern to the Tribes. The Obama Proclamation recognized the area’s cultural importance to the Tribes, acknowledging their members’ current traditional use of the area and reliance on natural materials in support of traditional cultural practices. The Obama Proclamation withdrew the area from disposition under the public land laws, subject to valid existing rights, thereby prohibiting new mining claims and new leases for oil and gas development. The Obama Proclamation also prohibited unauthorized persons from destroying or looting any feature of the monument. In addition, it directed the BLM and the U.S. Forest Service to manage the land in a manner consistent with the purposes of the monument. Lastly, the Obama Proclamation established the Bears Ears Commission, consisting of elected officers from the five Tribes, to provide guidance and recommendations to the federal land managers, and requiring agencies to provide written explanations if they declined to follow the tribal input. The Tribes noted in their recent litigation that the Commission gives them “a government-to-government seat at the table to provide substantial, meaningful and continuous input on management of the Monument and to more effectively protect the immensely important historic, scientific, and cultural objects within Bears Ears … ‘to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge.’”

The Tribes sought to continue this spirit of government-to-government consultation with the Trump administration to no avail. The Coalition members sent letters to then-Secretary-nominee Zinke in the

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44 Id. at 16–17.
45 Id. at 17.
46 The Obama Proclamation.
48 The Obama Proclamation.
49 Id.
50 Id.
51 Id.
52 Complaint at 41, Hopi Tribe, No. 1:17-cv-02590 (citations omitted).
spring of 2017, as did the Navajo, Hopi and Zuni tribes separately, requesting to meet with him on Bears Ears.53 The newly-appointed Bears Ears Commission also requested to meet with Secretary Zinke in the spring.54 Nonetheless, the Trump administration proceeded with its monument review in April 2017.

Interior published the opening of the comment period on May 11, 2017, which set a deadline for comments on the Bears Ears National Monument on May 26, a mere 15 calendar days later (comments on the other remaining affected monuments were subject to a July 10th deadline).55 The Tribes and other interested parties provided extensive comments in support of the Bears Ears National Monument. Secretary Zinke provided President Trump with his Interim Report on June 10, 2017, which, in no more than a little over a page and without any analysis or specific response to the public comments let alone the Tribes’ views, concluded that the boundaries of Bears Ears National Monument should be reduced. That same day, DOI expanded the comment period on Bears Ears to July 10th to coincide with the other monuments’ deadline.56 On August 24, 2017, Secretary Zinke transmitted a draft final report to the President, providing only a two page public summary of the report that contained no specifics regarding the Bears Ears National Monument. The recommendations and reports were not available for public review and comment, let alone available to the Tribes given their unique trust relationship status with the United States. The Tribes and other interested stakeholders provided extensive written comments, reports, and data to the Department of the Interior during the review process from late spring to August, with no substantive response from Interior officials.57 Secretary Zinke met with tribal representatives and the Coalition during a May 2017 Utah visit and Interior officials met with tribal representatives in Washington, D.C. as well later in May.58 Similar meetings were provided to local and state officials and apparently mining interests as well.59 The Tribes also requested a meeting with President Trump on the basis of the government-to-government relationship, seeking engagement with the President before he made a final decision.60 The request went unanswered. The Tribes waited for weeks with no indication as to the fate of the monument.

Finally, on December 4, 2017, President Trump issued a Proclamation revoking the Bears Ears National Monument by reducing the reserved lands by approximately 85%, from 1.3 million acres to approximately 202,000 acres (“Revocation Proclamation”).61 The Revocation Proclamation itself

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53 Id. at 42.
54 Id.
57 Complaint at 43, Utah Diné Bikéyah et al., No. 1:17-cv-02605.
contains only broad conclusions that: “Some of the objects Proclamation 9558 identifies are not unique to the monument, and some of the particular examples of these objects within the monument are not of significant scientific or historic interest. Moreover, many of the objects Proclamation 9558 identifies were not under threat of damage or destruction before designation such that they required a reservation of land to protect them.”62 The Revocation Proclamation attempted to designate two new, smaller national monuments named Shash Jáa and Indian Creek. The Revocation Proclamation further provided that the newly-excluded lands would be open to disposition under the public lands, mineral and geothermal, and mining laws starting February 2, 2018, among other authorizations for land uses. A land management process is presently underway for the newly-constituted national monument units.63 The Revocation Proclamation also altered the membership of the tribal commission and reduced the scope of its responsibility, by stating: “that the Bears Ears Commission shall be known as the Shash Jáa Commission, shall apply only to the Shash Jáa unit as described herein, and shall also include the elected officer of the San Juan County Commission representing District 3 acting in that officer’s official capacity.”64 The San Juan County official has been opposed to the Bears Ears National Monument.65

Secretary Zinke’s final report was finally made public the next day on December 5th, one day after the issuance of the Trump Revocation Proclamation. The Zinke report similarly made generalized findings that the monument “contains many objects that are common or otherwise not of particular scientific or historic interest” without specifying those objects and why they are worthy of exclusion.66 Indeed, a large, scientifically-significant trove of Triassic-period fossils is no longer protected under the new boundaries drawn by the Trump Revocation Proclamation with no discussion in the Zinke report as to why the site is not of particular scientific interest.67 Zinke’s report also generally noted that other protective land designations apply to the area, but did not explain why those protections are sufficient to achieve the goals of a monument designation.68 Moreover, the report states that lands that continue to be included in the reduced area should be managed for tribal cultural and traditional uses, but does not explain how opening up the newly-excluded areas to extractive uses will not adversely impact traditional tribal uses.

In the aftermath of the Trump Revocation Proclamation, the five Tribes filed suit in the U.S. District Court of the District of Columbia in December 2017, asserting among other things that President Trump’s Proclamation was ultra vires in violation of the Antiquities Act because the Act does not authorize presidents to revoke or modify prior presidents’ designations. This legal question is untested and has not been ruled on by the courts. The Tribes alleged that revoking the Obama Proclamation will lead to

62 The Revocation Proclamation.
64 The Revocation Proclamation.
68 Id.
disruptive and destructive energy extractive activities, loss of traditional use and enjoyment of the lands, removal of protections from looting and vandalizing of historic objects, all of which in turn will result in destruction of important artifacts that capture and preserve tribal histories and knowledge.\textsuperscript{69} The Tribes further claim that the Trump administration’s failure to implement the tribal Commission deprived the Tribes “of their government-to-government relationship, through the Commission, and the opportunity to provide meaningful guidance and recommendations on the process for protecting the landscape they have utilized and maintained since time immemorial.”\textsuperscript{70}

The litigation is in its infancy stages, with procedural motions pending at the time of publication on issues such as venue. Other companion suits have been filed as well, which have been consolidated with the Tribes’ case. While at the heart of the case is a strictly legal question as to the scope of the President’s authority under the Antiquities Act, there can be no question that the Trump administration’s failure to adequately consult with the five Tribes has resulted in an ill-informed, arbitrary, and destructive decision that is contrary to the purposes of the Act. The Antiquities Act does not contain a public engagement requirement or a specific tribal consultation requirement; however, given the inherent nature of its purpose, which is to preserve objects and landmarks of historic and scientific interest and reserve land that ensures the proper care and management of the same, the Act in this circumstance requires close and meaningful engagement with tribal nations who have valuable, traditional knowledge and a long standing connection with this landscape. The lack of such engagement may very well be the current administration’s downfall, as the Tribes have conveyed detailed data and information that supports the scope of the original Obama designation.

To add to the Tribes’ woes, a newly-elected Congressman from the 3rd district of Utah, Rep. John Curtis (R), introduced a bill at the start of the year that seeks to codify President Trump’s Revocation Proclamation.\textsuperscript{71} It has been met with strong opposition by the five affected tribes, as well as other interested stakeholders. The continued failure to consult with the Tribes was also apparent during a recent Congressional hearing where the House Natural Resources Committee, Subcommittee on Federal Lands, failed to invite tribal leadership to testify at their first hearing in January, 2018. The Bears Ears Inter-Tribal Coalition, formed to advocate for the designation of the Bears Ears National Monument appeared at the hearing noting this grave omission:

\begin{quote}
At the outset we ask that the Subcommittee recognize the number of Tribes that were cut out of this hearing. Each of the Tribes making up the Bears Ears Inter-Tribal Coalition is its own sovereign government. Each of us have [sic] our own unique and negotiated relationship with the United States. This relationship is highlighted in the United States Constitution and began long before Utah became a state. Yet, at this hearing, our five Tribes are forced to share one seat, while every level of the State of Utah is represented, including: the state government, county government and a Utah stakeholder lobbying group. We ask that the Subcommittee recognize its government-to-government relationship with each of our Tribes and provide a full hearing of the impacts H.R. 4532 will have on our cultural, natural and sacred resources. Each of our
\end{quote}

\textsuperscript{69} Complaint at 45, \textit{Hopi Tribe}, No. 1:17-cv-02590.
\textsuperscript{70} Id. at 51.
\textsuperscript{71} H.R. 4532, 115th Cong. (2017).
Tribes have [sic] our own unique concerns and perspectives on H.R. 4532.\textsuperscript{72}

In addition, the Coalition noted in particular how the Revocation Proclamation, as enshrined in H.R. 4532, would undermine the government-to-government relationship by installing a management council with local government and non-federal representatives that the Tribes would report to instead of their federal trustee, by elevating the views of state and local government with no regard for the trust relationship, and by treating tribes as mere stakeholder interests without the ability to designate their own representatives to a management council.\textsuperscript{73}

In a last minute attempt to address the lack of engagement with tribal leaders, the Subcommittee on Federal Lands held a second hearing on H.R. 4532 on January 30, 2018, and invited tribal leadership from the five affected tribes. The Tribes strongly expressed their opposition to the bill, as well as the abysmal lack of tribal consultation or respect for tribal sovereignty, as poignantly stated by President Begaye of the Navajo Nation in his testimony:

> The Navajo Nation was never consulted on H.R. 4532, but the bill nevertheless uses the Navajo language in its title. In addition to providing a misleading bill name to suggest that the Navajo Nation supports the bill, H.R. 4532 also misleadingly states that its purpose is to “create the first Tribally-managed national monument.” In fact, the miniature monuments created by the bill would be managed by appointees of President Trump made in consultation with the Utah Congressional delegation, and would be composed of only a fraction of tribal members. Incredibly, no tribe would have any input on the tribal members appointed to the management councils and those individuals would not be required to be elected or appointed representatives of the five tribes’ governments. In essence, this bill’s “Tribal-management” is tribal in name only.\textsuperscript{74}

Most recently on February 12th, Rep. Curtis held a town hall meeting in Monticello, Utah, where he is reported as stating that “[w]e are not getting much support for this bill. It may die” and “[f]rankly, I care more about what this group thinks than the others I have met with.”\textsuperscript{75} At the time of submission of this paper, the bill had not moved out of the Federal Lands subcommittee.

The Trump administration has opted to take a legal risk by exercising its executive authority in an untested fashion in order to address a perceived abuse of federal overreach. Its allies in Congress are attempting to protect the President’s decision from legal review, although they have encountered some significant headwinds. At the end of the day, it is likely that the courts will decide whether President Trump’s drastic reduction of the Bears Ears National Monument was in accordance with his delegated authority from Congress under the Antiquities Act. Any such determination by the courts will necessarily

\begin{footnotes}
\footnote{72 Testimony of the Bears Ears Inter-tribal Coalition, Legislative Hearing on H.R. 4532, the Shash Jaah National Monument and the Indian Creek National Monument (Jan. 9, 2018).}
\footnote{73 Id.}
\footnote{74 Testimony of The Navajo Nation Submitted by President Russell Begaye, Before the U.S. House of Representatives, Committee on Natural Resources, Subcommittee on Federal Lands (Jan. 30, 2018).}
\footnote{75 Curtis Holds Meeting to Explain, Seek Input on Bill, SAN JUAN RECORD (Feb. 13, 2018), http://www sjrnews.com/view/full_story/27543817/article-Curtis-holds-meeting-to-explain--seek-input-on-bill?instance=news_roundup.}
\end{footnotes}
consider how the administration handled and considered the Tribes’ views given the purpose of the Antiquities Act and the inextricable and centuries-long connection of the Tribes to the Bears Ears region.

IV. Washington Culverts Treaty Rights Litigation: When Stakes Are High, Does Consultation Become Obsolete?

A final example illuminates how state governments may make calculated decisions to not consult and compromise because the political stakes are too high. This dynamic appears to be at play in the current treaty rights litigation in Washington State, involving tribal fishing rights and culverts, entitled State of Washington v. United States.\textsuperscript{76} The case will be heard by the U.S. Supreme Court this term. While the focus of the litigation is the scope of Pacific Northwest tribes’ (“Tribes”) treaty rights and the State of Washington’s (“State”) obligations thereunder, at the heart of the case is the fact that a resolution through government-to-government consultation has been historically elusive. This reality has persisted even though the State of Washington has suffered repeated losses in the courts and has had to face not only the tireless resistance of multiple tribes, but also the mighty weight of the United States. Most likely, the State is betting that the Supreme Court will come to its rescue. The summary below provides context to examine why consultation between the Tribes and State has not provided a path towards resolution.

The origins of the specific dispute in the culverts case originate from at least 48 years ago and are based on tribal fishing rights recognized under the “Stevens Treaties” signed in 1854 and 1855.\textsuperscript{77} In 1970, the United States and a number of Tribes initiated a case arguing, among other things, that the tribes were entitled to take a certain amount of fish passing through their traditional grounds.\textsuperscript{78} In 1974, Judge Boldt of the federal district court for the Western District of Washington in Phase I ruled in favor of the Tribes, holding that they were entitled to an equal share (50%) of the harvestable fish in the Case Area, subject to the right of non-treaty fishers to do the same.\textsuperscript{79} Judge Boldt further noted that while the State could regulate fish for preservation purposes, it must do so in a reasonable and non-discriminatory manner that did not impair the ‘Tribes’ treaty rights.\textsuperscript{80} The Supreme Court affirmed Judge Boldt’s reasoning in Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n.\textsuperscript{81} The Court further elaborated that the fishing right guaranteed “so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.”\textsuperscript{82}

\textsuperscript{76} United States v. Washington, 853 F.3d 946 (9th Cir. 2017)(amended decision), cert. granted, 2018 WL 386566 (Mem.).
\textsuperscript{77} See, e.g., Treaty of Medicine Creek, art. 3, Dec. 26, 1854, 10 Stat. 1132 (“The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory.”); see also Treaty of Point Elliot art. 5, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, art. 4, Jan. 26, 1855, 12 Stat. 933.
\textsuperscript{78} Washington, 853 F.3d at 958.
\textsuperscript{80} Id. at 402.
\textsuperscript{81} 443 U.S. 658 (1979).
\textsuperscript{82} Id. at 686.
In the related Phase II proceeding, in 1980, Judge Orrick ruled that it was “necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.”83 However, the Ninth Circuit ultimately vacated this ruling on the ground that it was too broad and general and that the issue of environmental degradation must be raised within the context of particular facts in a specific dispute, leaving both the State and Tribes to face the question another day.84 The district court kept jurisdiction over the matter in order to handle any “sub-proceedings” that arose under its original 1970 ruling.85 Dozens of these sub-proceedings have been filed over the years, including the 2001 case now pending before the Supreme Court.

In 2001, 21 Tribes and the United States filed a Request for Determination against the State of Washington, alleging that the State had violated and continued to violate their fishing treaty rights.86 The Tribes alleged that the State had built and maintained culverts for roads that blocked natural fish passage, in turn, diminishing the salmon population in usual and accustomed tribal fishing areas. The Tribes sought a permanent injunction that would require the State to repair and replace the harmful culverts within five years.87 Previously, the Washington Department of Transportation had estimated that there were over 1,000 state-owned culverts blocking 1,000 miles of streams that could support 200,000 adult salmon.88 It is well-established that the location, range, and angle of culverts block adult salmon returning from the ocean to spawn as well as smaller, juvenile salmon moving downstream, and prevent young salmon from seeking food and escaping predators. The State responded by emphatically asserting that there is “no treaty-based right or duty to fish habitat protection as described.”89 The State also unsuccessfully attempted to file a cross-claim against the United States for violating its own duty under the treaty, which was ultimately dismissed due to federal sovereign immunity.

The district court agreed with the Tribes and United States in 2007, referencing Judge Orrick’s prior opinion regarding environmental degradation, while also noting the Ninth Circuit’s admonition that there must be specific claims in order to provide a remedy. It issued an order stating “[t]he Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty.”90 The court further rejected the State’s argument that the term “moderate living” was ambiguous.

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84 Id.
85 Washington, 384 F. Supp. at 419.
87 Id. *1.
88 Washington Department of Transportation and Washington Department of Fish & Wildlife, Fish Passage Task Force Report to the State Legislature (1997) (SSSB 5886)(“Fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington.”)
89 State of Washington’s First Amended Answer and Counter Requests for Determination (Revised 2004), Washington, 2007 WL 2437166 at *11.
and not a requirement under the treaties, noting its origins in the Supreme Court’s *Fishing Vessel* ruling. In the aftermath of this decision, the court held a bench trial in 2009 and 2010 to determine a remedy.

After failed attempts at settlement, the district court issued a permanent injunction in 2013, requiring the State to consult with the Tribes and the United States to prepare a list of all state-owned barrier culverts within the Case Area and to correct them within a given amount of time. The district court’s memorandum and decision included 60 findings of fact. The court found that at the current rate of the State’s response effort, it would take the State more than 100 years to replace the high priority culverts that existed in 2009. The court further found that fixing the culverts was in the public interest because not just the tribes, but all commercial fishermen would benefit, resulting in increased economic return from fishing. Three agencies were required to correct all culvert barriers by the end of 2016, and the Washington Department of Transportation was required to correct their high priority barrier culverts within 17 years, with the remainder at the end of the culvert’s natural life or in connection with independently undertaken highway projects. The State declined to participate in the development of the injunction. The State estimated that it would cost $1.88 billion over the 17-year schedule or roughly $117 million per year of the injunction; however, the Ninth Circuit rejected this estimate and also noted the federal government would pay a portion of these costs.

On appeal, the Ninth Circuit affirmed the district court’s ruling and also recognized that this debate dates back much farther than 2001. “For over a hundred years,” it noted, “there has been conflict between Washington and the Tribes over fishing rights under the Treaties.” The court began with the *Winans* Supreme Court case, where the Court struck down the State’s fishing wheel license issued to the Winans, as its effect was to preclude the Tribes from exercising their treaty right through access to their “usual and accustomed” fishing rights across Winans’ patented lands. The Ninth Circuit recounted various state laws and policies over the decades that had restrained and inhibited the Tribes’ exercise of their treaty fishing rights, despite the Supreme Court striking down such practices, such as in *Tulee v. Washington*, which held that while the State had the power to regulate off-reservation fishing, it must be to a degree necessary for conservation of the fish without imposition on treaty rights.

The Ninth Circuit also relied upon the *Fishing Vessel* ruling to emphasize the Indians’ understanding of the treaty as providing a source of fish and a way of life forever, contrary to the State’s view that the treaty was a tool of white

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91 *Id.* at 895
93 Permanent Injunction, 20 F.Supp.3d at 1024.
94 Memorandum and Decision, 20 F.Supp.3d at 1001-20.
95 *Id.* at 1015.
96 *Id.* at 1022.
97 Permanent Injunction, 20 F.Supp.3d at 1024. The four agencies responsible for management culverts are the Washington Department of Transportation, the Washington Division of Natural Resources, the Washington State Parks and Recreation Commission, and the Washington Department of Fisheries and Wildlife.
98 Memorandum and Decision, 20 F.Supp.3d at 1022-23.
99 *Washington*, 853 F.3d at 976.
100 *Id.* at 954.
101 *Id.* at 955 (citing *United States v. Winans*, 198 U.S. 371 (1905)).
102 *Id.* at 956–57 (citing *Tulee v. Washington*, 315 U.S. 681 (1942)).
settlement that encompassed a power to destroy habitat and fish supply. Indeed, the Ninth Circuit expressly rejected the view espoused by the State’s Attorney at oral argument that the State had the power to block every salmon-bearing stream into the Puget Sound without violating the treaties. Referring to the district court’s finding that the reduce supply of salmon and damage to tribal economies was caused in part by the culverts, the Ninth Circuit found a direct violation of the treaties.

In 2017, the State’s petition for rehearing en banc was denied, with a strong dissent. The dissent argued that the injunction was too broad and costly, that the Tribes’ claims were barred by laches due to United States’ inaction, and that the Supreme Court Fishing Vessel ruling did not guarantee a minimum number of fish to the Tribes, just a percentage from available fish. In the concurrence in support of the denial, two judges emphasized that Fishing Vessel held that the Tribes needed to have enough fish in order to survive, that this includes a duty to protect supply, and that the Tribes’ 50% allocation would be meaningless if there were no fish to harvest. They also stressed that the Tribes had not sat on their rights, as they had continually asserted their fishing rights and had not left their reservations.

The State filed a petition for certiorari on August 17, 2017, making similar arguments, including the grave fiscal harm to the State and the perils of an unbounded burden on the State to ameliorate every form of environmental degradation that could impact tribal treaty rights, including in the area of development, construction, and farming practices. The State further noted the EPA’s use of the Ninth Circuit’s ruling to challenge state water quality standards in Washington and Maine. The State also asserted that the Ninth Circuit ruling created a conflict with Fishing Vessel by adopting a rule that the Tribes are entitled to salmon for a moderate living with a 50% cap, as opposed to the State’s view that the Supreme Court guaranteed a 50% cap from available fish, but not a duty to provide a certain quantity of fish. The State also argued that the Ninth Circuit was erroneous in its dismissal of equitable defenses of laches, waiver, and estoppel, based on City of Sherrill v. Oneida Indian Nation.

In response, the Tribes and United States opposed the State’s petition, arguing there was no circuit split on treaty interpretation or equitable defenses, nor any digression from precedent regarding the treaties, and that the precise, fact-based nature of the Ninth Circuit’s ruling was limited in scope and would not result in wide ranging, adverse consequences for the State. The United States argued that inaction by the government cannot give rise to laches, waiver or estoppel, distinguishing the City of Sherrill v. Oneida Indian Nation ruling from the case at bar where the Tribes have been in a “more or less continues state of conflict over treaty-based fishing rights for over one hundred years.”

103 Id. at 964–65.
104 Id. at 962.
105 Id. at 966.
106 United States v. Washington, 864 F.3d 1017 (9th Cir. 2017).
107 Id. at 1025, 1027, 1030 (O’Scannlain, J., dissenting).
108 Id. at 1019–20 (Fletcher, J., and Gould, J., concurring).
109 Id. at 1021.
111 Reply to Briefs in Opposition at *5, Washington, No. 17-269.
112 Id.
113 Brief of Respondent Tribes in Opposition, Washington, No. 17-269 (Nov. 27, 2017); Brief for the United States in Opposition, Washington, No. 17-269 (Nov. 27, 2017).
114 Brief of the United States in Opposition at *22, Washington, No. 17-269.
no conflict with *Fishing Vessel* as that decision dealt solely with the allocation question, and many of its principles regarding the treaty were reaffirmed by the courts in the culverts proceedings, as opposed to unduly expanded as the State asserts. The Tribes further noted certain state agencies’ laudable efforts to address the culverts issue, and pointed to the statement from the head of the Washington Division of Natural Resources urging the Washington Attorney General to not file a certiorari petition, stating that “[s]aving our salmon is not simply a tribal issue. It is a Washington issue.”115 The three other state agencies other than the Washington Department of Transportation have largely completed their culvert repairs by the injunction’s 2016 deadline.116

Indeed, the long legacy of state and private citizen resistance to tribal efforts to exercise their right to take fish from “usual and accustomed” places, which included off-reservation areas, greatly impacts their relationship today and the dispute over the culverts. From the “Fish Wars” of the 1960s and 1970s,117 to the multiple lawsuits over the decades, there has been little opportunity for trust-building between sovereigns. Yet a clear trend in the courts’ interpretation of the treaty rights indicates a recognition that these rights are not confined to the reservation, that there exists a legally-protected right to fish, and there are constraints on state law whereby the treaty right may preempt state prerogatives.118

So why has a negotiated solution eluded the parties? Modern day leadership in the State of Washington has proudly and officially espoused its support and recognition of tribal sovereignty, tribal self-determination, and government-to-government consultation at the state level.119 This sentiment, however, has not been universally applied when significant state interests are in jeopardy. In the context of the treaties, the State of Washington is incredibly fearful of the implications of a binding court interpretation that required the State to address habitat degradation issues to avoid harm to treaty rights.120 Taken to its logical extension, the State asserts it would wrongfully have to incur significant

116 Id. at *15.
117 United States v. Washington, 827 F.3d 836, 844-45 (9th Cir. 2016)(original decision); see also The White House, President Obama Names Recipients of the Presidential Medal Of Freedom, 2015 WL 7176128 (Nov. 16, 2015)(honoring Billy Frank, Jr. (posthumous), who was “a tireless advocate for Indian treaty rights and environmental stewardship, whose activism paved the way for the “Boldt decision,” which reaffirmed tribal co-management of salmon resources in the state of Washington. Frank led effective “fish-ins,” which were modeled after sit-ins of the civil rights movement, during the tribal “fish wars” of the 1960s and 1970s...Frank left in his wake an Indian Country strengthened by greater sovereignty and a nation fortified by his example of service to one's community, his humility, and his dedication to the principles of human rights and environmental sustainability.”)
118 See, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942) (holding that a treaty preempted a state fishing license fee as applied to the signing Tribe and its right to fish in a traditional fishing ground); *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 399 (1968) (holding that a treaty did not preempt state police powers expressed in nondiscriminatory measures for conserving fish resources); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (holding that state regulations barring Native Americans from using traditional fishing nets were discriminatory and therefore preempted).
fiscal and programmatic burdens for any habitat modifications that harm salmon. The State also resists any external restraints on how it decides to allocate its budget for salmon protection efforts. Lastly, the State claims that the federal government should share in the burden as the state-owned culverts are built to federal standards. At the heart of these arguments is a federalism theme where state rights collide with treaty rights.

Given the long history of state resistance to tribal fishing rights, particularly as they impact off-reservation activities, the mistrust grown out of this legacy, and the vast expanse of the challenge involving multiple tribes, waterways, and culverts, the State has likely found the price of negotiating and compromising with the Tribes to be too risky, too costly, and likely to set a bad precedent. To even open the door to the possibility of creating a state obligation to minimize environmental harms to salmon supply due to treaty rights is too politically risky. The fact that there are other culverts administered by local governments, and the federal government in particular, certainly adds to the State’s reluctance to shoulder the burden alone. The State’s calculus also includes the fact that they will likely be no worse off even if they lose in the Supreme Court, which is not necessarily a given based on the makeup of the Court and its modern trend of ruling against tribal interests. They are banking on the Court to find fault with the United States, favoring state rights under federalism principles, and reducing treaty rights to a vestige of the past in order to advance the goals of modern development, including any necessary environmental degradation that would be addressed through existing environmental laws. The benefits of any win from the Supreme Court are just too valuable for the State to forego.

Yet, arguably there is a loss for all involved by not reaching an agreement at the negotiating table. The good will generated through the efforts of tribal and state staff who worked tirelessly to meet the 2016 court ordered deadline for certain culverts is being eclipsed by the State leadership’s drive to engage in a zero-sum game in the Supreme Court. The historic mistrust and disharmony between the State and the Tribes will continue unabated. And should the State obtain the relief it seeks from the highest court, it will have less political cover than it does now to directly address the problem of culverts and salmon population decline, to the detriment of not only the Tribes, but commercial fishermen and others who rely upon the fishing industry and take pride in the unique history and culture of Washington. Ironically, the State’s strategy to pass the buck to the federal government may result in less local control over State assets. The imprint of this litigation will set the tone for the many other pressing intergovernmental issues facing the State and Tribes, such as taxation, law enforcement, water rights, economic development, and innumerable other topics. It is perhaps too late to reverse the path already traveled, but starting a new path may be worth the investment as countless challenging issues lie ahead on the horizon in search of resolution.