INDIGENOUS RIGHTS IN NATIONAL PARKS: THE UNITED STATES, CANADA, AND AUSTRALIA COMPARED

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National Park systems across the globe enjoy broad public support as custodians of nature’s majesty and protectors of our most popular public pleasure grounds. Nevertheless, one vital group of stakeholders – the native inhabitants of these federally protected lands – is seldom so enamoured with the concept. This is because preserving these iconic landscapes for the enjoyment of all has conventionally entailed the outright expulsion of an original few. In many cases indigenous people who cherished deep spiritual connections to these lands for generations were suddenly prohibited from utilising their traditional homesteads, hunting grounds, and ceremonial sites. Gradually, the dominant governments of many nations have come to realise that restoring customary resource use regimes, management rights, and even outright traditional ownership of these lands is not only just, but can help advance common interests. This paper utilises a comparative law approach to assess indigenous natural resource use and land management rights in the national parks of the United States, Canada, and Australia. It concludes with an assessment of each nation’s compliance with the United Nations Declaration on the Rights of Indigenous People, an agreement the three nations each initially rebuked but have since come to endorse, in their administration of national parks.

I. INTRODUCTION

The designation of national parks and other protected areas can have a range of environmental benefits, from preserving biodiversity and preventing deforestation to fostering a national stewardship ethic and a patriotic pride in the conservation of a country’s natural beauty. In colonised lands, however, this process all too often results in social injustices involving restrictions of the rights of indigenous people to inhabit and utilise their ancestral lands in a

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Indigenous Rights in National Parks

traditional manner. For example, the United States government has effectively maintained exclusive unilateral administration of its National Parks and even adopted policies that expressly limit the rights of native groups to utilise these public lands and resources for traditional purposes. By contrast, other national governments, including those of Canada and Australia, have established collaborative management regimes that allow indigenous governments to play an active role in the governance of federal protected areas. Allowing customary land management systems of indigenous populations to influence the natural resource tenure regimes of the dominant common law governments in these nations carries a number of social and ecological benefits, and comports with the spirit of multilateral international agreements such as the United Nations Declaration on the Rights of Indigenous People (UNDRIP).

This article begins by reviewing the history of America’s national park system and assessing of the state and nature of limits on indigenous peoples’ rights to use and co-manage federally protected resources and parklands in the United States. It then outlines parallel histories of the development of national parks in Canada and Australia and analyses the mechanisms those governments have employed to foster greater indigenous involvement in park administration. Finally, the article compares and contrasts these elements of the three national park systems and considers what lessons each nation can learn from the others. The final section of the article discusses relevant provisions of the United Nations Declaration on the Rights of Indigenous People and assesses whether and to what degree each country has complied with that agreement as it relates to the management and administration of their national parks.

II. THE UNITED STATES

A. Historical Background

America’s national identity is closely entwined with the image of its national parks system. This is at least partly due to the fact that the United States claims credit for developing the concept and establishing the original national park. The first non-native explorers of the land that became Yellowstone National Park returned from their 1869 expedition reluctant to fully recount the details of what they had discovered for fear of being perceived as minstrels or provocateurs. Nonetheless, word spread quickly of the remote expanse of stunning natural beauty and the spectacular geysers and hot mineral springs they had found, and with it spread enraptured curiosity. A series of government-sponsored expeditions followed, and before long a group of delegates from the surrounding Wyoming and Montana Territories presented a bill to Congress to declare Yellowstone ‘reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people.’ Both houses of Congress

1 The proper names of specific tribes and other groups and alternate terms such as ‘Aboriginal’ and ‘Inuit’ are used throughout where appropriate to the cultures being discussed, while the more general term ‘indigenous’ is used to describe all those who self-identify as the original inhabitants of any of the lands at issue or the descendants thereof.

2 Protected areas can fall into any number of classifications (forests, wilderness reserves, etc.). The scope of this analysis is limited to lands administered by the national parks agencies of these three countries: Parks Canada Agency, Parks Australia, and the United States’ National Parks Service, respectively.


4 Ibid 73-76.

passed this Act of Dedication without debate or significant opposition, and President Ulysses S. Grant signed it into law on March 1, 1872.\textsuperscript{6}

This concept of restricting the settlement of lands of remarkable natural beauty and preserving them for the use and recreation of countrymen and visitors has often been called ‘America’s greatest idea.’\textsuperscript{7} Understandably, American Indian groups have not been so eager to praise this model.\textsuperscript{8} Analysis of a lesser-known clause of the Act of Declaration’s statement of purpose shed light on the reasons why. That section of the Act reads, ‘all persons who locate, or settle upon, or occupy any part of the land thus set apart as a public park… shall be considered trespassers and removed therefrom.’\textsuperscript{9} An array of American Indian groups, including the Crow, Blackfeet, Shoshone, and Nez Perce are known to have lived, hunted, and traveled in what is now Yellowstone National Park as early as 11,000 years ago.\textsuperscript{10} As the United States Parks Service explains, ‘traditional uses of Yellowstone lands continued until a little over 200 years ago when the first people of European descent found their way into the park.’\textsuperscript{11}

In order to explain the absence of American Indians from the Yellowstone region, a myth has long been perpetuated that American Indians feared hydrothermal activity in the area and thought it was supernatural.\textsuperscript{12} In truth, the place was greatly revered by local tribes who held the hydrothermal features sacred.\textsuperscript{13} The disappearance of Yellowstone’s native inhabitants is in fact explained quite easily; they were forcibly removed to reservations, and regularly chased out of the park whenever they dared to return.\textsuperscript{14} As the Park’s first Superintendent, Philetus Norris made clear, ‘the surrounding tribes… can visit the park [only] at the peril of a conflict with… the civil and military officers of the government.’\textsuperscript{15}

As the National Parks program expanded and more parks were dedicated, the dispossession of the traditional lands of indigenous people was played out time and time again. Resident American Indians were forcibly moved from Glacier National Park to the Blackfeet Reservation, from Badlands to Pine Ridge, and from Mesa Verde to Ute Mountain.\textsuperscript{16} In each case, the story was the same. American Indians were no longer welcome to inhabit or utilize lands or resources in their traditional homes. They were relocated by military force and subterfuge through the use of treaties of cessation.\textsuperscript{17} In the years since, little restitution has been offered to tribes for the taking of their traditional homes and few concessions have been

\textsuperscript{6} See Chittenden, above n 3, 77.
\textsuperscript{7} This tagline is often attributed to writer Wallace Stegner, who said that, ‘National parks are the best idea we ever had. Absolutely American, absolutely democratic, they reflect us at our best rather than our worst.’ See U.S. National Park Service, Famous Quotes Concerning the National Parks (4 January 2014) National Park Service <http://www.cr.nps.gov/history/hisnps/NPSThinking/famousquotes.htm>.
\textsuperscript{8} See generally, Mark David Spence, Dispossessing the Wilderness: Indian Removal and the Making of the National Parks (Oxford University Press, 1999).
\textsuperscript{11} Ibid.
\textsuperscript{12} See Chittenden, above n 3.
\textsuperscript{13} Whittlesey, above n 11, 270.
\textsuperscript{14} See Spence, above n 8, 55-70.
\textsuperscript{15} Ibid 57.
\textsuperscript{16} See generally, Philip Burnham, Indian Country, God’s Country: Native Americans and the National Parks (Island Press, 1 April 2000).
\textsuperscript{17} Ibid.
made to restore usage rights or management authority.\textsuperscript{18} As historian Mark David Spense articulates:

Generations of preservationists, government officials, and park visitors have accepted and defended the uninhabited wilderness preserved in National Parks as remnants of a priori nature…. Such a conception of wilderness forgets that native peoples shaped these environments for millennia.\textsuperscript{19}

It is against this historical backdrop that the existing relationship between indigenous groups and the United States’ National Parks program must be assessed.

\textbf{B. The National Parks Service and the Tribal Self-Governance Act}

The National Parks Service Act of 1916 established a unified federal agency, the National Parks Service (NPS) to ‘promote and regulate the use of the Federal areas known as national parks, monuments, and reservations.’\textsuperscript{20} To this date, however, no broad federal program exists to require or allow the NPS to enact co-management arrangements with indigenous people, much less to cede control of park properties to their traditional owners. The little progress that has been made towards these ends typically entails insular agreements between tribes and individual parks level that cover only limited ceremonial usage rights and contracts for the employment of tribal members in park management roles, though always under the purview of government decision-makers.\textsuperscript{21}

The most directly applicable statutorily prescribed procedure for a tribe to use in petitioning the NPS to cede management authority of a National Park is the \textit{Tribal Self-Governance Act} of 1994 (TSGA).\textsuperscript{22} The TSGA allows tribes to petition the Department of Interior to ‘authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities’ of federal programs which have ‘special geographic, historical, or cultural significance.’\textsuperscript{23} This can be read to permit tribes to petition for management authority of federal lands and natural resources, including National Park lands. In purpose and in practice this provision is construed simply as a contracting clause that allows federal agencies to employ members of tribal communities to carry out government-managed programs. In fact, this section of the TSGA is entitled ‘funding agreements,’\textsuperscript{24} and agencies have been anathematic to interpret it as anything more. The TSGA’s prohibition on the transfer of management authority ‘with respect to functions that are inherently Federal,’\textsuperscript{25} an ambiguous term that is not defined in the Act,\textsuperscript{26} is frequently cited as a reason for denial of petitions for tribal management

\begin{footnotes}
\footnote{19 Spence, above n 8, 5.}
\footnote{20 \textit{National Park Service Act}, 16 USC § 1 (2012).}
\footnote{21 King, above n 20, 488-492; Public Employees for Environmental Responsibility, ‘Native American Plant Gathering in the National Park System’ (Research Report No 202 265-PEER, Public Employees for Environmental Responsibility, 2010) 9 <http://www.peer.org/assets/docs/nps/8_11_10_Indian_Plant_Take_from_National_Parks.pdf>}
\footnote{22 \textit{Tribal Self-Governance Act}, 25 USC § 450 (2012).}
\footnote{23 Ibid § 485cc.}
\footnote{24 Ibid.}
\footnote{25 Ibid § 485cc(k).}
\footnote{26 See ibid § 450(b).}
\end{footnotes}
authority. Furthermore, the TSGA is only applicable to federally recognised tribes, a classification that is often prohibitively difficult to obtain. This further narrows the field of potential petitioners.

The most successful use of the TSGA petition provision by a tribe to gain control over aspects of park administration involves the Grand Portage Band of Minnesota Chippewa and Grand Portage National Monument (GPNM). This small park was established at the site of an old fur-trading hub on a section of land that was ceded by the surrounding reservation. In exchange for relinquishing this land to the NPS, the GPNM’s enabling legislation grants the Band limited traditional usage rights, namely the right to traverse the park at designated locations in order to reach tribal hunting grounds, and economic benefits such as allowing the sale of tribal handicrafts within park boundaries and granting tribal members priority in hiring decisions.

The Band started negotiating this agreement in 1996 and originally sought ‘the assumption of the operation of the Grand Portage National Monument.’ Eventually, an Annual Funding Agreement was reached under the terms of the TSGA that allowed the Band to assume responsibility for administration of GPNM’s maintenance department. This agreement essentially positioned the Band as a contractor that is paid to provide services at the behest of the NPS and did not grant any real decision-making authority to the Band. Nevertheless, the success of this working relationship helped foster negotiation on a number of other informal cooperative arrangements, including collaboration between the NPS and the Band on the provision of emergency medical and firefighting services. It is important to note that despite the Band’s longstanding relationship with GPNM management, they had to overcome significant barriers to gain these relatively small victories, not least of which was the three years worth of legal fees the Band accrued during negotiations.

C. Resource Use Rights

The official position of the United States government on traditional and ceremonial resource use in National Parks is codified in NPS regulations. The relevant provisions prohibit,

- Possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state… wildlife or fish, or the parts or products thereof, [p]lants or the parts or products thereof…, [and] paleontological specimens, cultural or archeological resources, or the parts thereof.

Other prohibitions include ‘[u]sing or possessing wood gathered from within the park area,’ and ‘[w]alking on, climbing, entering, ascending, descending, or traversing an archeological or cultural resource.’ No exception to these wide-ranging restrictions exists for traditional or

27 See King, above n 20, 501–6.
28 See King, above n 20, 497.
29 16 USC § 450oo (2012).
30 See King, above n 20, 518, quoting Grand Portage Reservation Tribal Council, Resolution No. 45-96 (25 September 1996); Letter from Norman Deschampe, Grand Portage Band, to Pat Parker, National Park Service, 5 November 1996.
31 See King, above n 20.
32 See ibid 522-3.
33 See ibid 524.
34 36 CFR § 2.1(a) (2012).
35 Ibid.
spiritual uses by the original inhabitants of a park. To the contrary, the regulations state quite clearly that, ‘[t]his section shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, [or] treaty rights.’36 The preamble to these regulations explicitly notes that the provision is ‘intended to cover activities undertaken by Native Americans,’ and that while the NPS ‘recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations… the National Park Service is limited by law and regulation from authorizing the consumptive use of park resources.’37

Despite this well-defined directive, a strong undercurrent of dissatisfaction with this regulatory mandate has led a number of park administrators to enter conflicting agreements with tribes.38 These commonly take the form of Memoranda of Understanding (MOU). Between 1996, when the regulatory prohibition discussed above was enacted, and 2000, administrators of individual parks signed no less than six MOUs with local indigenous groups to permit the use and collection of natural resources within park boundaries, even though they lacked statutory authority to enter such agreements. The parks covered by these MOUs include some of the crown jewels of the National Parks system, including Yosemite, Redwood, Mount Rainier, and Zion.39 Other grants of statutorily improper usage rights include a permit the NPS issued to the Navajo Nation that allows members to collect a plant called ‘rock mat’ from Walnut Canyon National Monument in Arizona.40 Additionally, in a written response to public comments regarding the General Management Plan for Joshua Tree National Park, park administrators declared that the NPS ‘will work with the tribes to establish a process to gather renewable materials for traditional ceremonial and religious purposes.’41

Elsewhere, park administrators have been known to simply turn a blind eye to resource use by indigenous people. At Great Smokey Mountains National Park, for example, the NPS ‘informally allowed card-carrying tribal members to continue limited collection of [plants known as] ramps on Park lands,’ despite a policy of actively enforcing the prohibition on plant gathering by other visitors.42 This pervasive culture of selective enforcement has gained the attention of NPS leadership in recent years, and the response has been favorable to tribal interests. At a 2010 meeting with the Eastern Band of Cherokee Indians, NPS Director Jonathan Jarvis publicly characterised the prohibitions on indigenous resource use in National

36 Ibid § 2.1(d). No treaties are recognised by the NPS as granting such rights, despite the adamant insistence of some tribes that the terms of their treaties reserved usage rights and more. See, eg, Curt Sholar, ‘Glacier National Park and the Blackfoot Nation’s Reserved Rights: Does a Valid Tribal Co-Management Authority Exist?’ (2004-05) 29 American Indian Law Review 151. However, the enabling statutes of a number of parks do allow traditional activities and uses of specific resources on park grounds. See Public Employees for Environmental Responsibility, above n 23, s 3.B.
38 See Public Employees for Environmental Responsibility, above n 23.
39 See ibid s 2.6.
40 See ibid s 2.
41 Ibid.
42 See ibid.
Parks as ‘wrong,’ and vowed to take action to remedy the issue.\(^\text{43}\) When asked for a written clarification of the Director’s position, an NPS spokesman explained:

Director Jarvis has deep experience working in parks where the ties between First Americans and the lands that are now parks have never been broken. He believes that maintaining those ties can nourish our landscapes while supporting native cultural traditions and providing opportunities for all Americans to better understand the history of America’s first peoples.\(^\text{44}\)

This passionate defense of the rights of American Indians to utilise the lands from which they were forcibly removed indicates that long-overdue change is taking place on this issue, albeit at a near-glacial pace. A softening of the NPS’ stance on usage rights, however, does not begin to address the questions surrounding the possibility of restitution through transfers of ownership in National Park lands, or transferring the authority to make land management decisions.

\textbf{D. A Tribal National Park}

Several persistent land claim disputes between tribal groups and the NPS revolve around proposals to restore tribal ownership of parcels of National Parks that were ceded or otherwise reappropriated and to redesignate these areas as ‘Tribal National Parks.’ One well-publicised example in California is the Yurok Tribe’s effort to reclaim part of Redwood National Park.\(^\text{45}\) However, a separate dispute in South Dakota involving the Oglala Sioux Tribe (OST) and the land that now forms the South Unit of Badlands National Park has set the stage for the dedication of America’s first Tribal National Park.\(^\text{46}\)

The disputed land was taken from the OST during World War Two for use as a gunnery range and bomb-testing site. It was then declared excess by the military and transferred back to the OST in 1968 but has been held in trust by the Department of the Interior and, according to the terms of the trust, utilised as the southern part of Badlands ever since.\(^\text{47}\) Since 1976, the South Unit has been administered under the terms of a much-maligned MOU with the Oglala Sioux. The agreement calls for co-management, but has largely resulted in neglect. The annual budget for the South Unit of the park is a mere $166,000, or about 4% of the Park’s overall budget, \(^\text{48}\)

\(^{43}\) Ibid.

\(^{44}\) See \textit{Hearing on Issues Affecting Management of Archaeological, Cultural and Historic Resources at Mesa Verde National Park and Other Units of the National Park System Before the Senate Subcommittee on National Parks}, 112th Cong. 112-274 (2011) (statement of Reno Keoni Franklin, Chairman, National Association of Tribal Historic Preservation Officers).


and new infrastructure improvements that the NPS has promised, including a new visitor center and updates roadways, have failed to materialize.48

After years of unrelenting pressure from the Tribe, the NPS agreed to draft a separate General Management Plan (GMP) for the South Unit in 2002.49 The public comments the agency received in the process of formulating this plan indicated robust support a transfer of greater management authority to the Tribe.50 On April 26, 2012, the Final GMP for the South Unit of the Park was released. In it, the Department of the Interior recommends the establishment of the United States’ first Tribal National Park.51 As the GMP explains, this arrangement would allow the OST to,

manage, own, and operate their lands for the educational and recreational benefit of the general public, including both Tribal and nontribal visitors and residents.

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Resources would be managed to perpetuate and protect the natural environment and to preserve cultural and historic resources and values, following the ordinances and resolutions established by the OST and the laws, regulations, and policies pertaining to units of the National Park System. Hunting would be permitted for Tribal members only as regulated by the OST.52

The South Unit would be distinguished from the other half of the park by signage that identifies it as a Tribal National Park and displays the OST and NPS logos side-by-side. The Park would be funded as any other National Park, through appropriations by Congress and the collection of user fees. Existing Park staff would retain their current management positions only until such time as OST members were properly trained to take over and consultative support from the NPS would remain available thereafter. In time the Park would truly come to be administered by the OST itself, which would have autonomous control of management decisions so long as it complies with generally applicable laws and regulations.53

Final authorisation of this plan requires Congressional consent, but the mere fact that such a comprehensive shift of authority is even on the legislative agenda represents a watershed moment in the history of the NPS. As Secretary of the Interior Ken Salazar stated in announcing the new GMP, ‘Our National Park System is one of America's greatest storytellers. As we seek to tell a more inclusive story of America, a tribal national park would help celebrate and honor the history and culture of the Oglala Sioux people.'54 This new chapter in the history of the OST has been a long time coming. Still, indigenous groups across the nation are struggling to regain control of the lands where their ancestors’ stories played out. With luck, the Sioux’s success will foretell similar resolutions in other U.S. National Parks.

48 See Janiskee, above n 49.
49 Ibid.
50 Ibid.
52 Ibid 38-9.
53 Ibid.
54 Donley, above n 48.
III. CANADA

A. Historical Background

The birth of Canada’s National parks program was an unexpected result of the western expansion of the transcontinental railroad. Railroad workers laying track in the Selkirk Mountains of Alberta province discovered natural hot springs bubbling out of the side of Sulphur Mountain, near what is now the town of Banff. To many of these men, a pristine oasis situated among majestic mountain vistas with easy access from the new train line seemed like an ideal location for development. However, the Government of Canada had other ideas. Faced with settling a dispute over competing claims to the site, Canada’s first Prime Minister, Sir John A. Macdonald, decided instead to declare 26 square kilometers of land around the site a national treasure and to retain federal ownership of the property. In 1885, two years after the site was discovered and a mere two weeks after the final spike was driven in the Canadian Pacific Railway, an Order in Council was signed dedicating Banff Hot Springs Reserve. Another two years passed before Parliament passed the Rocky Mountains Park Act, thereby designating the area Rocky Mountains Park Reserve (now Banff National Park) and expanding the size of the protected area to 405 square kilometers.

The stated purpose of this legislation was to create a ‘public park and pleasure ground for the benefit, advantage and enjoyment of the people of Canada.’ The Park’s original inhabitants were deprived of all the benefits of access to these treasured lands. While towns were constructed within park boundaries to accommodate guests and new settlers, a number of Aboriginal groups, including the Stoney Indians, were excluded from their traditional hunting grounds. As new National Parks proliferated throughout Canada over the next several decades, the exclusion of Aboriginal people became a seemingly normal part of the dedication process. Fortunately this trend was not permanent and by the second half of the twentieth century indigenous people were granted special rights to use and access various parks, and in some cases were consulted on management decisions or even delegated official decision-making authority.

B. Treaty Rights

The framework for the Canadian government’s cooperation with indigenous communities on resource use and management issues can be traced to the James Bay and Northern Quebec Agreement of 1975. This groundbreaking settlement of territorial claims established the Northern Quebec Hunting, Fishing, and Trapping Coordinating Committee to ensure that Inuit and Cree representatives would share authority with the provincial and national governments on decisions regarding how best to ‘review, manage, and in certain cases, supervise and

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56 Ibid.
58 See ibid.
59 Luxton, above n. 57, 60.
60 Parks Canada, above n 59.
61 Ibid.
63 Ibid.
64 See below ss IIIB-C
Indigenous Rights in National Parks

regulate’ food resources on huge swaths of land in Quebec province.\textsuperscript{65} In addition, two other committees were established to consult on governance decisions related to ‘the formulation of laws and regulations relating to the environmental and social protection.’\textsuperscript{66}

The Inuvialuit Final Agreement, enacted in 1984, went even further in formalising the inclusion of traditional Aboriginal knowledge in management and planning decisions. In addition to granting Aboriginal groups exclusive ownership of 35,000 square miles of these contested lands,\textsuperscript{67} the agreement largely preserved and officially codified their rights to hunt, fish, harvest, and otherwise utilize natural resources of the area in a traditional manner.\textsuperscript{68} Co-management councils were established to oversee fisheries, wildlife management, and environmental impact reviews.\textsuperscript{69} The terms of the Inuvialuit Final Agreement also called for the establishment of a new National Park on the Yukon North Slope with the goals of ‘maintaining its present undeveloped state to the greatest extent possible, and to protect and manage the wildlife populations and the wildlife habitat within the area.’\textsuperscript{70}

The Wildlife Management Advisory Council, composed of seven members including no less than three Inuvialuit representatives, was granted an advisory role in park management. The Inuvialuit people were also given veto power over any plans to change the character of the park or its legal designation and retained exclusive rights to hunt, fish, trap, and harvest throughout. They were also granted economic benefits, including quotas on the number of Inuvialuit employed by the park and preferred development rights on adjacent lands.\textsuperscript{71} This new creation, Ivvavik National Park, was the first National Park in Canada to be designated as a condition of an Aboriginal land claim settlement.\textsuperscript{72} In the years since, the establishment of co-managed National Parks under the terms of Aboriginal land claim settlements has become commonplace, and twelve such parks are now in existence across Canada.\textsuperscript{73}

\textit{C. Administrative and Legislative Action}

Responsibility for the management of Canada’s National Parks has passed through numerous iterations of federal agencies in the years since Canada first established centralised administrative oversight of its forest reserves in 1911.\textsuperscript{74} As the nation’s environmental ethos evolved, priorities for the management of park resources changed at least as often as the name

\textsuperscript{65}Québec Province, \textit{James Bay and Northern Québec Agreement and Complementary Agreements} (Les Publications du Québec, 1998) s 24.4.
\textsuperscript{66}Ibid ss 22.3.24, 23.5.24. The James Bay Advisory Committee on the Environment has jurisdiction over land south of the 55 degrees north latitude while the Kativik Environmental Advisory Committee oversees land north of that parallel. See ibid ss 22.3, 23.5.
\textsuperscript{67}Western Arctic (Inuvialuit) Claims Settlement, SC 1984, c 49, s 7(5).
\textsuperscript{68}See ibid s 14.
\textsuperscript{69}Ibid ss 14(36)–(87).
\textsuperscript{70}Ibid s 12(6).
\textsuperscript{71}Ibid ss 12(8)–(10).
\textsuperscript{73}Parks Canada Agency, Aboriginal Affairs Secretariat (AAS), \textit{Aboriginal Affairs Fact Sheet} (7 May 2013) Parks Canada <http://www.pc.gc.ca/agen/aa/faits-facts.aspx>.
\textsuperscript{74}See Claire Elizabeth Campbell, ‘Governing a Kingdom: Parks Canada, 1911–2011’ in Claire Elizabeth Campbell (ed), \textit{A Century of Parks Canada 1911–2011} (University of Calgary Press, 2011) 1, 2 (‘Originally called the Dominion Parks Branch, the agency was renamed the National Parks Branch in 1930, the Parks Canada Program in 1973, the Canadian Parks Service in 1984, and the Parks Canada Agency in 1998.’).
of the relevant agency. Currently, oversight falls to the Parks Canada Agency, created in 1998 with passage of the Parks Canada Agency Act (PCAA). Parks Canada is tasked with ‘ensuring that Canada’s national parks, national historic sites and related heritage areas are protected and presented for this and future generations and… further[ing] the achievement of the national interest as it relates to those parks, sites and heritage areas.’ While the preamble of the PCAA plainly states that, ‘it is in the national interest… to commemorate places, people and events of national historic significance, including Canada’s rich and ongoing aboriginal traditions,’ it contains no requirement that Aboriginal communities be involved in management decisions.

Nevertheless, Parks Canada endeavored to integrate this principle into its management structure by establishing an internal Aboriginal Affairs Secretariat (AAS) in 1999. The AAS is charged with the ‘broad objective… to facilitate the participation of Aboriginal people in Canada’s natural and cultural heritage places.’ More specifically, the five priorities of the AAS are:

- Strengthening relationships with Aboriginal communities;
- Increasing presentation and interpretation of Aboriginal heritage;
- Encouraging economic partnerships and opportunities with Aboriginal peoples;
- Enhancing Aboriginal employment opportunities; and,
- Commemorating new national historic sites focusing on Aboriginal history.

The primary mechanism the AAS employs to achieve these ends is Parks Canada’s power to ‘enter into contracts, agreements, memoranda of understanding or other arrangements with… any other government or any of its agencies or with any person or organization.’ This authority has been exercised with fervor to establish an array of traditional resource use and cooperative land management agreements with Aboriginal groups throughout much of the country. Of the 36,583,087 hectares Parks Canada oversees, 27,506,850 hectares are now managed through either a formal or informal Aboriginal cultural advisory relationship. This represents roughly 68% of all federal lands.

In addition, Parks Canada established an Aboriginal Consultative Committee in 2001 as an ‘advisory structure to help advance areas of mutual interests.’ This executive-level council is made up of Aboriginal people from across Canada and must include elders, representatives of Canada’s three main Aboriginal groups (First Nations, Inuit, and Métis), spiritual and traditional culture experts, and conservation and land management experts. The Committee

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75 See ibid (‘Public demands, political strategy, environmental concern, cultural symbolism, and scientific debate have all been inscribed in [Canada’s] parks. And the agency created in 1911 has alternately guided and mirrored this dialogue between Canadians and their land.’).
76 Parks Canada Agency Act, SC 1998, c 31, s 3.
77 Ibid preamble para 1.
78 See ibid para 1(e).
80 Ibid.
81 Ibid.
82 Parks Canada Agency Act, SC 1998, c 31, s 8(a).
meets directly with the Chief Executive Officer of Parks Canada three times a year, and offers advice on all issues of mutual concern for the Agency and Aboriginal people, including how best to advance the five goals of the AAS.85

The federal legislature eventually took action to codify the roles and responsibilities of the Agency with respect to the rights of Aboriginal people. The Canada National Parks Act of 2000 sets out a comprehensive organizational scheme and structure for Parks Canada. It includes a formal process for establishing new parks and other protected areas and guidelines for their management.86 One particularly germane provision dictates that all proposed parklands currently ‘subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada’ must instead be designated as National Park Reserves until the outstanding land claim is settled.87 While under this intermediate designation, the land ‘is subject to the carrying on of traditional renewable resource harvesting activities by aboriginal persons.’88 The Act also vests Parks Canada with regulatory authority to protect the rights of Aboriginal people to carry on ‘traditional renewable resource harvesting activities or stone removal activities for carving purposes within any area of a park’ where those rights previously existed only where recognised by treaties or acts of Parliament.89 Under this provision, regulatory ‘authorisation of the use of park lands, and the use or removal of flora and other natural objects, by aboriginal people for traditional spiritual and ceremonial purposes’ is now permitted in the absence of a preexisting agreement to the contrary.90

The recent history of Canada's National Parks shows a steady progression of legislative and administrative efforts to include Aboriginal communities as partners in the designation and management of National Parks. In this manner, Canada has begun to take meaningful action to recognise and restore the rights of indigenous people to use and manage their traditional lands and resources. While this effort began through a bottom-up contractual approach of settling individual land claims, it has since been incorporated into many aspects of the Agency’s mission through top-down legislative and administrative mandates. In this manner, the Canadian parks system has demonstrated an increasing commitment to consideration of Aboriginal interests.

IV. AUSTRALIA

A. Historical Background

Australia’s National Parks program was born not from a naturalistic or conservationist ethic, but from a desire to construct a venue for Sydney’s city-dwellers to recreate outdoors and escape the hustle-and-bustle of urban life.91 In 1879 the government of New South Wales established the country’s first National Park a mere 32 kilometers from Sydney. It was named

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85 See ibid.
86 Canada National Parks Act, SC 2000, c 32.
87 Ibid s 4(1).
88 Ibid s 40.
89 Ibid s 17(2).
90 Ibid s 16(1)(w).
simply, National Park. The park, later renamed the Royal National Park, was intended as a lush green respite and the landscape and ecosystem were heavily modified to achieve this goal:

Mudflats and mangroves were replaced with grassed parklands, and some 3,700 ornamental trees were planted. Buildings, roads and exotic landscaped gardens were all installed. Areas were set aside for the ‘acclimatisation’ of exotic animals for farming in Australia. Native trees were extensively logged. Military exercises were carried out in the park and deer, rabbits and foxes were introduced for sport. They still live in the park, and are serious pests.

This exercise of dominion over the land begs the question of how the designation of this park impacted on the original inhabitants of the area, the Dharawal people who lived there thousands of years prior. Until the landmark High Court decision of Mabo (No 2), many Aboriginal native title rights to land, including non-exclusionary rights of hunting and fishing within the Royal National Park, simply did not exist in the common law under the doctrine of terra nullius. Mabo (No 2) demonstrated a need for the Commonwealth Government of Australia to implement a systematic approach for recognising native title claims beyond the ad hoc rights and exemptions enjoyed under state environmental legislation. Subsequent legislative developments have led to greater recognition of certain Aboriginal title rights. Australia now has a targeted legislative regime that incorporates native title rights with natural resource management, and bears special significance when there are social and cultural practices at play.

B. Organizational Structure and Legislative Mandates

While Royal National Park is considered Australia’s first national park, this title is misleading given it (and the vast majority of the nation’s 500 other ‘national parks’) are actually managed at the state level. Each Australian state and territory does maintain a co-management program for their protected areas, but these arrangements are far from uniform. The extent of resource use rights and management authority granted to indigenous people, as well as the tools used to

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93 Ibid.
95 Only clear legislative intention or measure that is necessarily inconsistent with native title rights can extinguish such claims: Mabo v Queensland (No 2) (1992) 175 CLR 1, 64, 111, 138, 195-6; Wik Peoples v Queensland (1996) 187 CLR 1, 125-6; Western Australia v Commonwealth (1995) 183 CLR 373, 423.
96 Under Australian native title laws, only clear legislative intention or a measure that is necessarily inconsistent with native title rights can extinguish such claims: Mabo v Queensland (No 2) (1992) 175 CLR 1, 64, 111, 138, 195-6; Wik Peoples v Queensland (1996) 187 CLR 1, 125-6; Western Australia v Commonwealth (1995) 183 CLR 373, 423.
97 For instance, see special consultation procedures for developing NPWS Plans of Management: National Parks and Wildlife Act 1971 (NSW) s 72(1); penalties exemption for collecting animals used for domestic purposes: National Parks and Wildlife Regulation 2009 (NSW) cl 74.
98 Native Title Act 1993 (Cth).
100 See Toni Bauman, Chris Haynes and Gabrielle Lauder, ‘Pathways to the Co-Management of Protected Areas and Native Title in Australia’ (Working Paper No 32, Australian Institute of Aboriginal and Torres Strait Islander Studies, May 2013).
formalise the terms of these arrangements, vary widely from state to state. Nonetheless, the Commonwealth government of Australia does control six National Parks in addition to a host of other protected areas. These lands make up the country’s Commonwealth Reserves, and are administered by Parks Australia.

The organisational structure of Park Australia and management protocols for all Commonwealth Reserves are laid out in a single comprehensive statute, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA). To some degree, the EBPCA supports the traditional resource use rights recognised in the *Native Title Act 1993* (NTA). The NTA provides for the recognition of Aboriginal and Torres Strait Islander rights to hunt, fish, harvest, or perform ceremonial activities on particular lands. The EPBCA supports these rights insofar as their exercise is non-commercial, and not expressly excluded by regulations enacted to conserve biodiversity in a particular area. Several of the EBPCA’s objectives directly or indirectly call for retention of traditional indigenous resource use rights and the establishment of co-management regimes. These include:

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and

(g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

The EPBCA does not merely state these goals as ideals, though. It also contains a number of provisions that explicitly dictate how these principles are put into practice.

C. Co-Management by Committee

The EPBCA sets forth a thorough set of clearly defined roles for Aboriginal and Torres Strait Islander people in the management of National Parks. First and foremost, the EPBCA dictates that the Director of National Parks, the federal executive in charge of the management of the National Reserve System, establish a Board to assist in the governance of any reserve that is even partially situated on Aboriginal or Torres Strait Islander-owned land. If the reserve in question is mostly or wholly situated on those lands, ‘a majority of the members of the Board must be indigenous persons nominated by the traditional owners of the indigenous people’s

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101 Ibid.
104 See *ibid* ch 1 [8].
105 *Native Title Act 1993* (Cth).
106 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 359A.
107 *Ibid* s 359B.
108 *Ibid* s 2(d)-(g).
109 See below s IVC.
110 *Ibid* s 377(4).
The traditional owners of a reserve are defined as, ‘a local descent group of indigenous persons who have… a primary spiritual responsibility for that site and for the land; and are entitled by indigenous tradition to forage as of right over the land.’ The Board of each reserve is tasked with assisting the Director in the design and implementation of a management plan for that land. These management plans must take into consideration, among other interests, those of the traditional owners of the reserve and of any other indigenous people who have an interest in that land.

These Reserve Boards are also tasked with much of the day-to-day management of their lands, including ensuring compliance with management plans and consulting on all future development plans. In the event that the Director and the Board disagree on the design of a management plan, or one feels the other is acting in contravention of the management plan or the EPBCA at any point, a formal conflict-resolution protocol allows Australia’s Minister of the Environment to act as the final arbiter. Three of Australia’s six Commonwealth-controlled National Parks, Kakadu, Uluru-Kata Tjuta, and Booderee, are co-managed under these procedures.

D. Indigenous Protected Areas

While the EPBCA’s co-management requirements represent significant steps forward in the effort to include Aboriginal and Torres Strait Islander people in resource use and land management decisions, the most progressive feature of Australia’s protected lands program is not set forth in that legislation. Instead, the concept of Indigenous Protected Areas (IPAs) developed organically from a recognition that the priorities of Parks Australia often converged with those of the indigenous owners of undeveloped lands. As defined by the Australian government, an IPA is ‘an area of land and/or sea over which the Indigenous traditional owners or custodians have entered into a voluntary agreement with the Australia Government for the purposes of promoting biodiversity and cultural resource conservation.’ The Aboriginal and Torres Strait Islander delegates to a 1997 national workshop developed their own definition. It states:

An Indigenous Protected Area is governed by the continuing responsibilities of Aboriginal and Torres Strait Islander peoples to care for and protect lands and waters for present and future generations.

* * *

IPAs may include areas of land and waters over which Aboriginal and Torres Strait Islanders are custodians, and which shall be managed for cultural
biodiversity and conservation, permitting customary sustainable resource use and sharing of benefit.\textsuperscript{119}

In essence, an IPA is a voluntary conservation easement agreed to between the Australian government and the traditional owners and titleholders of ecologically or culturally valuable lands. The legal mechanism used to establish these areas is entirely contractual.\textsuperscript{120} This allows Australia to increase the size of its protected areas by including private lands that would otherwise be unavailable for active conservation by the government and provides Aboriginal and Torres Strait Islander landowners with essential funding to help them manage their lands in keeping with traditional ecological values.

The process for establishing an IPA entails five steps. First, the landowners confer amongst themselves to decide whether pursuit of an IPA is worthwhile and appropriate. Government agencies offer counsel at this stage concerning the cultural, ecological, and legal implications of obtaining IPA status, and funding is available for landowners to travel to existing IPAs to discuss the pitfalls and benefits of the process with their owners.\textsuperscript{121} If the landowners decide to move ahead, they must then draft a land Management Plan for the next 5-7 years. This includes prescriptions of permissible uses for each section of the parcel and identification of any areas of particular ecological or cultural significance.\textsuperscript{122} Next, the landowners must formally and publically announce their intention to manage the land in keeping with this plan and to have it designated an IPA. The details of the property and its Management Plan are then officially registered on the Minister of the Environment’s Collaborative Australian Protected Area Database. If the documentation is in order, this step culminates in a festive community event wherein the indigenous landowners and government officials sign an official declaration of the new IPA.\textsuperscript{123} The fourth and fifth steps involve on-the-ground implementation of the management plan and continued monitoring to ensure compliance.\textsuperscript{124}

In order to receive annual grants to fund this process, landowners must apply anew to Australia’s Department of the Environment, Water, Heritage and the Arts (Environment Australia) each year. This application procedure requires Aboriginal and Torres Strait Islander communities to identify their own cash and in-kind contributions, which are often significant. Comments are sought from stakeholders as well as from an IPA Advisory Group\textsuperscript{125} composed of Aboriginal and Torres Strait Islander representatives, government officials, and civil society environmentalists.\textsuperscript{126} If a funding request is approved, contracts are drawn up dictating the management activities to be carried out in consideration for the grant. While these annual agreements have proven effective thus far, the lack of any assurance that funding will be provided in future years may be a troublesome aspect of the program.\textsuperscript{127} Multi-year contracts


\textsuperscript{120} See Szabo and Smyth, n 121. The authority for the Minister of the Environment to contract with private parties is, however, granted by statute; See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 305(5)(a) (Stating that the ‘Minister may enter into conservation agreements’ with indigenous individuals and organisations or their trustees who hold usage rights to land).

\textsuperscript{121} Szabo and Smyth, above n 121, 4.

\textsuperscript{122} Ibid.

\textsuperscript{123} Ibid.

\textsuperscript{124} Ibid 5.

\textsuperscript{125} Ibid.

\textsuperscript{126} Australian Government Department of the Environment, Water, Heritage and the Arts, above n 122.

\textsuperscript{127} See Szabo and Smyth, above n 121.
that match the term of years of an IPA’s management plan would provide greater fiscal stability and peace of mind to landowners and encourage the creation of additional IPAs.

Since the Nepabunna Community of South Australia established the first IPA in 1998, the program has grown by leaps and bounds. ‘There are 60 declared Indigenous Protected Areas covering just over 48 million hectares across Australia.’128 This accounts for 36% of the country’s National Reserve System.129

In addition to the ecological benefits that come with the conservation of such extensive areas of undeveloped land, the program has had a number of important cultural benefits for the Aboriginals and Torres Strait Islanders who call these places home. Increased employment opportunities have encouraged many Aboriginal and Torres Strait Islander people to return to their traditional homes. Additionally, intergenerational involvement in the management of IPAs, including the inclusion of schoolchildren, has helped strengthen cultural identities and improve the preservation of languages.130

Australia’s IPA program has largely succeeded in involving Aboriginal and Torres Strait Islander people in the management of protected lands and resources. The implementation of this program along with comprehensive statutory protocols for the co-management of National Parks demonstrates an increasing recognition that restoring traditional resource use and land management regimes is not only just, but can carry important sociological, economic, and ecological benefits for the Commonwealth as a whole.

V. SYNTHESIS AND ANALYSIS

The countries discussed above have markedly different perspectives on the rights of indigenous people to use and manage the land and resources in National Parks, and at various times each have employed strategies to both achieve and prevent these ends. Each country followed a unique path in establishing co-management and autonomous indigenous management regimes and each is at a different stage in the development of these programs. Thus, it is important to maintain a historical perspective in assessing the successes and failures of these three governments and, where applicable, to apply a uniform measuring stick, such as a multilateral international agreement, when drawing comparisons between nations.

A. Perspective and Prospects

As the birthplace of the National Park concept and a nation whose identity is deeply rooted in the quest to dominate and control wild new domains, America is amply motivated to establish itself as the standard bearer in all facets of park management. However, in reality the very pursuit of dominion over the land that caused the character of the nation to be so inextricably linked to its magnificent landscapes and bountiful resource reserves also compelled the dispossession of its revered National Park lands from their original inhabitants. As a result, a long history of mistreatment of Americans Indians and disregard for their cries for reconciliation has not easily faded from the consciousness of the suzerain or the subalterns.

129 Ibid.
130 See Szabo and Smyth, above n 121.
What little has been done to restore usage rights, management authority, and in rare cases even ownership, of park properties to their traditional inhabitants has been piecemeal and erratic. There are few formal procedures for U.S. tribal groups to follow in petitioning for recompense, and those that do exist are often frustratingly unfruitful. The rare successes that have occurred in the U.S. are overwhelmingly attributable to the tireless and tenacious efforts of the tribal members themselves and, in some cases, the willingness of individual park unit managers to be flexible in their enforcement of the applicable laws and regulations. Administrative reforms are slowly beginning to take hold, however. The creation of a Tribal National Park would be a significant step in the right direction. Still, no sweeping legislative reform of a patently unjust system is visible on the American horizon.

In Canada, the process of developing co-management regimes for park resources stemmed from the negotiation of bilateral treaties like the James Bay and Northern Quebec Agreement and the Inuvialuit Final Agreement. The establishment of National Parks has been a common condition of treaties with aboriginal groups for decades and the terms of these treaties require the sharing of management authority. Thus, a transition to uniform administrative procedures for the entire Parks system was a natural one and benefitted from a deep reservoir of experiential knowledge from which the most effective organisational structures could be drawn. While the Aboriginal inhabitants of Canada’s early parks were undoubtedly wronged, steady progress towards restoring a sense of justice has since taken hold. Aboriginal communities are now seen as vital partners in the preservation of Canada’s vibrant natural and cultural heritage and have become trusted consultants to Parks Canada’s highest-level administrators.131

Australia’s National Parks program was christened with earthmovers and toasted with the introduction of invasive species. Over time, however, the nation has come to understand the value of preserving undeveloped land in its natural state and built one of the most expansive and diverse networks of protected lands in the world. Despite maintaining a decentralised system, Australia has made attempts to cooperate and reconcile with the traditional owners of their National Park lands. The few parks that are managed by the Commonwealth itself are governed by a clear legal framework that dictates when shared management regimes must be instituted and how they must be organised. In addition, Australia has created practicable procedures for indigenous groups to follow in order to establish customarily-managed and government-funded protected areas on community-owned land. The growth of this program is a testament to the marked benefits it has delivered. As Australia’s Commonwealth Reserve system has expanded, its ties with the traditional inhabitants show promise of growing stronger.132

B. The United Nations Declaration on the Rights of Indigenous People

Given these divergent histories, the application of a uniform gauge to each nation is useful to fairly compare their successes and failures. Here, the best tool for the job is the United Nations Declaration on the Rights of Indigenous People (UNDRIP). This sweeping multilateral agreement established an exhaustive set of guiding principles for the world’s governments to follow in their dealings with indigenous people. Though non-binding, the overwhelming endorsement the declaration received from the U.N. General Assembly indicates that the
standards set forth therein represent widespread legal norms and thus hold the increased authority of recognised customary international law.\textsuperscript{133}

Only four nations voted against adoption of UNDRIP when it was brought to the General Assembly in September of 2007. Tellingly, perhaps, three of those nations were Canada, Australia, and the United States.\textsuperscript{134} Each has since endorsed the Declaration and is therefore accountable for non-compliance with its terms.\textsuperscript{135}

The primary concern these three nations raised in initially resisting passage of UNDRIP regarded the provisions concerning ownership and control of native land and resources. They protested that the language of the language of the Declaration was overly broad and subject to diverse interpretations.\textsuperscript{136} One sticking point was Article 26, which reads:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.\textsuperscript{137}

Similar themes are echoed elsewhere in UNDRIP. For example, Article 8 includes the right not to be dispossessed of lands or resources, or forced to assimilate into non-native cultures.\textsuperscript{138} The rights not to be forcibly removed from traditional lands and relocated and to be granted restitution and compensation for these actions whenever possible are articulated in Article 10, while the rights to practice traditional cultures and religions and to own, possess, and manage the artifacts of these practices are outlined in Article 11.\textsuperscript{139} Articles 18 and 19 discuss the rights of indigenous people to participate in the governance of all matters that affect their rights, and


\textsuperscript{138} Ibid art 8.

\textsuperscript{139} See ibid art 11-12.
the responsibilities of dominant governments to coordinate and consult with indigenous people in order to make this possible.\textsuperscript{140} The significance of these statements is immense and the causes for governmental concern over them evident. The restitution discussed in Article 26, for example, seems to envisage restoration of outright indigenous ownership of all traditionally owned lands. Practically, this standard is unattainable. There is little chance Manhattan Island will be returned to the Lenape or Canarsie people, for instance.\textsuperscript{141} Though Canada, and Australia, and the United States have each made progress towards fulfilling the promise of UNDRIP in the administration of the their national parks, more work undoubtedly remains to be done.

\textbf{C. Canada and Australia}

As the terms of UNDRIP relate to the management of National Park lands, Canada and Australia have each made strides towards putting these principles into practice. Each has systems in place to restore indigenous peoples’ rights to control and use their traditional lands. Co-management systems in these countries grant traditional owners high-level consultative privileges and substantive decision-making authority in land and resource management decisions, albeit often shared with government officials. In addition, traditional usage rights are reserved to indigenous people by default with only narrow restrictions recognised for biodiversity preservation on limited tracts of land.\textsuperscript{142}

Canada and Australia have both also worked with indigenous groups to establish land protection regimes that incorporate traditional resource management practices and allow for greater indigenous involvement in management decisions. Canada has done so largely through the inclusion of treaty obligations calling for the establishment of new National Parks to protect areas of cultural and spiritual significance to Inuit and Aboriginal people,\textsuperscript{143} while Australia has employed its contract power to establish funding agreements with indigenous groups that allow them to design and implement autonomous protected areas.\textsuperscript{144} In both cases, respect and consideration for the needs and desires of indigenous people is evident in the administration of these countries’ National Parks programs. At its most basic level, this is what compliance with UNDRIP entails.

\textbf{D. The United States}

America, on the other hand, has dug in its heels. Unlike its counterparts to the north and down under, the default position of the United States government on the rights of indigenous people to access and utilise traditional resources in National Parks is outright prohibition. Despite vehement disagreement with this policy among top Park Service officials, administrative avenues for obtaining exceptions to this rule are exceedingly narrow and difficult to navigate.\textsuperscript{145} While American Indian tribes have been contracted to perform specific management duties at the behest of Park administrators, there is no uniform procedure in place to facilitate the transfer of actual decision-making authority to tribal governments. As one

\textsuperscript{140} See ibid art 18-19.
\textsuperscript{141} For an account of the native sale of Manhattan, see National Museum of the American Indian, \textit{America’s first urban myth?} (3 August 2011) <http://blog.nmai.si.edu/main/2011/08/americas-first-urban-myth.html>.
\textsuperscript{143} See above s IIIB.
\textsuperscript{144} See above s IVD.
\textsuperscript{145} Ibid.
former Park Service official put it, shared and cooperative management regimes in the U.S. are largely just ‘genera thrown out there to make it seem like more is being done.’

The concept of autonomous indigenous management was not even considered in the United States for many decades. Recent events have demonstrated a new willingness to consider these proposals but, as in the case of co-management, no specialized administrative structure is in place to receive and evaluate this type of requests. The shortcomings of the United States’ National Parks system in complying with UNDRIP are considerable and must be remedied if the U.S. truly wishes to fulfill with the international agreements they endorse. Even more fundamentally, immediate action on this issue is required in order for the U.S. government to demonstrate basic respect for the native people who have contributed so much to the nation’s rich multicultural heritage.

E. Synthesis

In light of the range of indigenous co-management and resource use regimes presented above, several general benchmarks can be identified to help assess the efficacy and fundamental fairness of these programs. First and foremost, dominant governments must permit, not prohibit, indigenous use of traditional resources by default. Any exceptions to this rule should be narrow, clearly defined, and enacted in consultation with affected communities. Additionally, the power granted to indigenous groups in co-management agreements must be more than simply advisory and should include some measure of binding decision-making authority. If the final arbiter of disputes between agency and indigenous managers is a federal government official, some means of appeal to a disinterested person or panel should be available.

As for autonomous indigenous management of protected areas, it is vital that the land in question remain under traditional ownership and that exclusive decision-making authority rests with those owners. Dominant government agencies may be tasked with approving and monitoring indigenous management plans to ensure that these lands are maintained in keeping with the country’s criteria for a National Park designation. Any grants of government funding connected to these agreements should be reliable and predictable and have no ancillary strings attached. Perhaps most critically, any agreement between national governments and indigenous people should lucidly articulate the rights and responsibilities of all involved such that the terms of the agreement are roundly understood and agreed upon. Adherence to these best practices will ensure that the rights of indigenous people are protected, that ecological and cultural values of National Park lands are preserved, and that the tenets of international law are fulfilled.

VI. Conclusion

Much remains to be done to remedy the injustices of the conservation era and restore indigenous peoples’ rights to make traditional use of their ancestral lands and resources. The governments of Canada and Australia have made progress by establishing structured co-

146 Interview with David Ruppert, Assistant Director, National Park Service Office of Indian Affairs and American Culture (April 27, 2012).
147 An international tribunal comes to mind as an ideal venue. No examples of co-management regimes that call for this type of arbitration were identified in the course of researching this article.
management regimes for their national park systems, recognizing treaty rights, and enacting statutory protections for traditional resource use and ceremonial practices. Meanwhile, the United States government has largely resisted the efforts of tribes to participate in the management of their ancestral homes and is only now beginning to consider sharing management authority over federal lands. Reviewing and adapting the programs and policies of other nations, including Canada and Australia, can help the United States regain its reputation for progressive conservationism. Ultimately, the inclusion of indigenous interests in land management decisions is best for everyone. It can simultaneously help improve the ecological health of the landscape, repair relations between dominant governments and domestic sovereigns, foster greater cultural understanding, and comply with international law.