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IMAGINING WILDERNESS: THE WILDERNESS ACT'S SIXTY YEARS OF MODERN INDIGENOUS DISPOSSESSION

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ABSTRACT

The Wilderness Act of 1964 turns 60 in 2024. It preserves a problematic legacy of Indigenous dispossession in its core text, which seeks to manage designated wilderness lands “without permanent improvement or human habitation... [so that] the imprint of man’s work [is] substantially unnoticeable.” After discussion of the history of “wilderness” conservation strategies, which places their origins in the era of the United States’ ethnic cleansing of the land of its Indigenous stewards, the negative ecological and cultural impacts are analyzed in context of the limited flexibility of agencies to adapt the narrowly construed Act. The case of Big Cypress National Preserve, in which yet another study seeking to effect a wilderness designation has been proposed atop Miccosukee and Seminole Tribal reserved rights, will be discussed as a case study. After demonstrating that the Wilderness Act creates systemically inequitable outcomes for Indigenous peoples, a means forward, through amendment of the Wilderness Act to accommodate Native land rights, is proposed.

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Introduction

While this treatment of the harms of “wilderness” conservation strategies, as encapsulated by the Wilderness Act of 1964, necessarily begins in the 1800s, the harms of wilderness are not historic. As will be demonstrated, wilderness areas were forged through the ethnic cleansing of the continent, codified with the exclusionary and racist language underlying their founding, have resulted in the eviction and exclusion of Indigenous peoples from protected areas, ecologically harmed those protected areas by doing so, and will continue to cause harm until action is taken to amend the laws which authorize them (chief among them, the Wilderness Act).

2024 is the 60th anniversary of the Wilderness Act, and it continues to be employed to the detriment of Indigenous peoples. Now, the Biden administration has proposed a wilderness designation on top of almost 200,000 acres of reserved use and occupancy rights held by the sovereign Miccosukee Tribe of Indians of Florida and Seminole Tribe of Florida in their homeland.² After further discussion of the legislative history of the Wilderness Act and its harm to Native peoples and the environments stewarded by the same, the specific instance of the proposed designation in Big Cypress National Preserve will be treated as a case study and a call to action to prevent further wilderness designations that do not post-date an amendment to the Wilderness Act that first recognizes the aboriginal use and occupancy rights of Tribes within America’s public lands.

I. Imagining Wilderness

Helen Hunt Jackson was an author, conservationist, and activist for improved treatment of Native Americans in the 1800s.³ Fellow conservationist Ralph Waldo Emerson greatly enjoyed her poetry, performed readings of her poems, and included a number of her works in his poetic anthologies.⁴ They and their compatriots in the early conservation movement were birds of a feather, whose romantic notions about a vast continent set aside for their benefit drew from

² National Park Service, *Big Cypress National Preserve Supplemental Draft Backcountry Access Plan / Wilderness Study / Environmental Impact Statement* (Aug. 12, 2022),

<https://parkplanning.nps.gov/document.cfm?documentID=122584> [hereinafter Big Cypress EIS].

³ See *A Century of Dishonor* (1881); Ramona (1884), *The Way to Sing* October’s Bright Blue Weather

⁴ Renee Tursi, *Review of Kate Phillips, Helen Hunt Jackson: A Literary Life*, *NEW YORK TIMES* (Sept. 21, 2003), <https://www.nytimes.com/2003/09/21/books/books-in-brief-nonfiction-269921.html>.

the landscape paintings of the Hudson River School and the muses of Manifest Destiny.⁵ So it is not surprising that when Helen Hunt Jackson made her first visit to Yosemite Valley, she remarked on the presence of “filthy” Indians ruining the scenery, and that their “uncouth” minds, incapable of appreciating the sublime beauty around them, was an affront to God himself.⁶

The founding generation of America’s “conservation” movement could not abide by this injustice. The Indian Removal Act, and then the Homestead Act, cleared Native people from 93.9% of country.⁷ In Indigenous homelands, white men were able to have grand new adventures. George Bird Grinnell, a leading proponent of the preservation of wilderness and a self-acclaimed advocate for Indian peoples, “relied on Blackfeet guides and followed countless Indian trails” in order to discover areas which he described as “absolutely virgin ground... with no sign of previous passage.”⁸

Non-Native conservationists in the 1800s— having freshly ethnically cleansed the continent— had a grand time making ‘discoveries’ and ‘exploring’ an ‘uninhabited wilderness.’ Despite the removal of Indigenous peoples from public lands having happened in living memory, or ongoing in the lifetimes of the movement’s founders, the founders of the “wilderness” conservation movement in North America ignored the profound role of Indigenous people in shaping and molding every ecosystem on the continent.⁹ But America had a national identity to build. Ralph Waldo Emerson pronounced that “we have listened too long to the courtly muse of Europe,” and urged his contemporaries to turn to American wilderness for inspiration.¹⁰

“Wilderness” as such, was as organic to the landscape as the palatial hotels built by railroad and hospitality barons in the first National Parks.¹¹ As a general statement, there were no “wild” places “untrammelled by man” until the federal government had completed the main thrust of its concentration of Native peoples on reservations.¹² Wilderness conservation as a state science was based not on any legitimate understanding of wilderness to be preserved, but rather was a utilitarian project intent on bringing order to the rural spaces of European and European-descended colonies, which were still largely in the control of Indigenous peoples.¹³

The initial sweeping Indian removals and the rounding up and concentration of Indigenous peoples on reservations was a sea change in North American land use. Other countries were inspired to follow suit. One such country, blessed with rolling hills, misty mountains, and deep dark forests, shared in America’s romantic conservationist bent.¹⁴ Its Fuhrer

⁵ See Mark David Spence, *The American Wilderness Ideal and Blackfeet Exclusion*, 1 ENV'T'L HIST. 29, 30 (1996).

⁶ *Id.* at 32.

⁷ See Farrell, et al., Effects of land dispossession and forced migration on Indigenous peoples in North America, 374 SCIENCE (Oct. 29, 2021).

⁸ Mark David Spence, *supra* note 5 at 33.

⁹ *Id.* at 30.

¹⁰ RALPH WALDO EMERSON, THE AMERICAN SCHOLAR, IN THE COLLECTED WORKS OF RALPH WALDO EMERSON: NATURE, ADDRESSES, AND LECTURES, 69 (1849).

¹¹ Mark David Spence, *supra* note 5 at 30.

¹² *Id.*

¹³ Jaidev Singh, *Post-colonial nature conservation in Southern Africa: same emperors, new clothes?*, 58 POL. ECOLOGY, TERRITORIALITY AND SCALE 253, 253 (2002).

¹⁴ See PETER STAUDENMAIER, FASCIST ECOLOGY: THE “GREEN WING” OF THE NAZI PARTY AND ITS HISTORICAL ANTECEDENTS (2011).

wistfully remarked that “the Volga must be our Mississippi,”¹⁵ and observed from the American colonial example to “gu[n] down the millions of Redskins to a few hundred thousand, and now keep the modest remnant under observation in a cage.”¹⁶

From the American example of land conservation models which divide Indigenous peoples from their traditional lands, Adolf Hitler would directly model his own concentration camp system, even calling early concentration camps for Jews and Poles “reservations.”¹⁷ Just as in America, this was accompanied by Nazi nature preserves, Nazi sustainable forestry, and a Nazi rural highway network, all to bring the Aryan people closer to the natural spaces now reserved for their recreation.¹⁸

The American ideology of “wilderness” conservation is not problematic because Hitler liked it. After all, Hitler liked neoclassical paintings,¹⁹ puppies,²⁰ and flowers.²¹ “Wilderness” conservation is problematic because it folds within itself an exterminationist ethic forged through the genocide of a continent. When Karl Brandt, the Schutzstaffel (SS) Major General and physician charged with the administration of the “forced euthanasia” mass killings at the end of the Holocaust, was tried, convicted, and hung in *U.S. v. Karl Brandt, et al.* (NMT, 1947), his attorneys argued in his defense that he had been inspired by a founder of America’s own Wilderness Conservation Society.²²

Madison Grant, the co-founder of the organization now known as the Wilderness Conservation Society, led the campaign to save the redwoods, restocked the Plains with bison, and campaigned for the creation of Denali, Everglades, Glacier, and Olympic National Parks (some of which will be discussed further herein).²³ Grant’s “conservation” efforts even extended to what he considered the “native American” [sic] peoples.²⁴ His infamous 1916 tract, *The Passing of the Great Race*, showed his concern that the “Nordics,” the “native American” peoples “of Colonial descent,” would soon wither in the face of “[u]nlimited immigration” and intermarriage.²⁵

Nor are Grant’s comments an isolated case. National Parks Director Horace Albright wrote a letter to the whites-only Smoky Mountains Hiking Club (that spawned the similarly

¹⁵ Robert J. Miller, *Nazi Germany’s Race Laws, the United States, and American Indians*, 94 ST. JOHN’S L. REV. 751, 767 (2020) (quoting Adolf Hitler, Speech (October 1941)).

¹⁶ *Id.* (quoting Adolf Hitler, Speech in Oldenburg, Germany (Oct. 18, 1928)).

¹⁷ *Id.* at 770.

¹⁸ See FRANZ-JOSEF BRÜGGEMEIER, *HOW GREEN WERE THE NAZIS? NATURE, ENVIRONMENT, AND NATION IN THE THIRD REICH* (2005).

¹⁹ See BILLY F. PRICE, *ADOLF HITLER: THE UNKNOWN ARTIST* (1984) (or don’t).

²⁰ Henry Holloway, *Inside Adolf Hitler’s creepy relationship with ‘almost human’ dog Blondi*, DAILY STAR (Mar. 16, 2020), <https://www.dailystar.co.uk/news/latest-news/inside-adolf-hitlers-creepy-relationship-21626717> (subtitled: The Fuhrer would allow Blondi to sleep in his bed and kept her with him for much of the time – before killing her with cyanide just before taking his own life).

²¹ Maya Oppenheim, *Holocaust Memorial Day: Jewish woman recalls the day she gave Hitler flowers before escaping Nazi Germany*, INDEPENDENT (Jan. 27, 2019), <https://www.independent.co.uk/news/uk/home-news/holocaust-memorial-day-hitler-nazi-germany-jewish-woman-flowers-a8746976.html>.

²² Richard Conniff, *How a Notorious Racist Inspired America’s National Parks*, MOTHER JONES (Aug. 2016), <https://www.motherjones.com/environment/2016/07/anniversary-national-parks-racist-history-madison-grant/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

named Wilderness Society), in which the Director mused that hiking in the (newly cleansed) wilderness brought men feelings of “ownership in the universe.”²⁶ In closing, Director Albright wished that “the tribe of the Smoky Mountains Hiking Club grow and prosper.”²⁷ Among the Smoky Mountain Hiking Club’s many prominent members was Chief Forester in the Office of Indian Affairs Robert Marshall, who in 1937 went as far as preparing Order No. 486 which designated nearly five million acres of Tribal reservation land as “roadless,” without the support of the tribes.²⁸ Early versions of the Wilderness Act even included Tribal reservation lands as eligible for wilderness designations.²⁹

Only once America’s conservation community realizes that the founders of America’s “wilderness” conservation ideology were not just casual racists, but actively practicing their racism through conservation strategies intent on scrubbing clean the land of “filthy” Indians, can there be a reckoning with the policy implications. “Wilderness” conservation, that is, conservation which seeks – in the words of the Wilderness Act of 1964 – to manage land “where man himself is a visitor who does not remain” to “retai[n] its primeval character and influence, without permanent improvements or human habitation. . . with the imprint of man’s work substantially unnoticeable,” will always create systemically racist outcomes for the Indigenous peoples of the lands being managed as “wilderness.”³⁰

II. Conserving Wilderness

All this being said, there is true value in America’s conservation community, and there are plenty of positive impacts from the conservation strategies that they favor. And, despite notions of “wilderness” having fermented in the same intellectual swamp as the rest of 19th and early-20th century political philosophy, designated wilderness areas in the United States have allowed the global superpower to hedge against land conversion by unchecked development.³¹ Wilderness areas have, in a sense, preserved public lands from the worst impulses of the dominant society, and protected areas with comparatively clean air and water and greater protections for a variety of species.³² But in so doing, they have excluded Indigenous peoples from their traditional homelands and caused countless other cultural and ecological harms.

III. Dysfunctional Wilderness Ecology

There is an increasing understanding that Native peoples “effectively and often intensively managed” America’s “natural” landscapes for “food, culture, basketry, and wildlife

²⁶ Karl Rohr, *In a Lusty but Not Boastful Manner: Harvey Broome and the Crafting of a Wilderness Philosophy*, 13 J. APPALACHIAN S. 137, 143–44 (2007).

²⁷ *Id.*

²⁸ Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585, 624–26 (2008).

²⁹ See “National Wilderness Preservation Act”, SB 1176 (85th Congress, 1957).

³⁰ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006).

³¹ The White House, *Fact Sheet: Biden-Harris Administration Takes New Action to Conserve and Restore America’s Lands and Waters*, Executive Office of the President (Mar. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-biden-harris-administration-takes-new-action-to-serve-and-restore-americas-lands-and-waters/>.

³² The Wilderness Society, *Why Protect Wilderness*, <https://www.wilderness.org/articles/article/why-protect-wilderness> (last visited Apr. 5, 2024).

habitat,” and that these landscapes were, and are, “cultural or ethnocultural landscapes.”³³ As a consequence, in the words of Miwuk/Paiute NPS Cultural Ecologist Irene A. Vasquez, “[i]mposing non-Indigenous management paradigms by not actively managing specific habitats or gathering areas may be similar to introducing invasive species or promoting other changes to native ecosystems.”³⁴

Noted wildlife ecologist Dr. Charles E. Kay agrees that Indigenous peoples were “the ultimate keystone species” in pre-colonial American ecology.³⁵ The absence of Indigenous peoples from designated wilderness areas has led to ecosystem conversion and the decline of a number of culturally significant species in areas where they’re no longer stewarded with the same selectivity and rhythm as they had been for untold generations.³⁶ The scientific rationale for wilderness, the “natural self-regulation” theory, has been definitively refuted, including by Dr. Frank Craighead’s exhaustive NPS-funded research into grizzly bear population dynamics in Yellowstone National Park.³⁷

Few, if any, ecological activists or conservationists who support wilderness designations support the flawed ecological assumptions, outdated race science, and exterminationist rhetoric that was baked into the conservation strategy which they now favor. Some may hope that federal regulatory policy will mitigate harms to Tribes and the lands and waters which they steward.³⁸

Unfortunately, in the words of the late environmental law scholar John Copeland Nagle, the “sweeping language” of the Wilderness Act has earned it the reputation as one of “the most stringent law(s) governing the use of the natural environment,”³⁹ which is not amenable to regulatory carve outs at the discretion of implementing agencies.⁴⁰ And so, for these conservation strategies to remain viable without continuing to perpetuate the racist intentions of their founders, there must be comprehensive amendment to the underlying legislation which has codified a management strategy that seeks to vacate land of Indigenous habitation.

IV. Creating Wilderness

The founders of America’s “wilderness” conservation strategy created wilderness where villages once stood, where corn once swayed, where children once laughed. One Blackfoot elder remembered the “starvation winters” of 1883 through 1885 when the federal government “literally starved us for our park.”⁴¹ Glacier National Park (and its “wilderness”) was created

³³ Irene A. Vasquez, Restoring Reciprocal Relationship for Social and Ecological Health, 46 ECO. LAW Q. 1049, 1054 (2019).

³⁴ *Id.*

³⁵ Charles E. Kay, *Are ecosystems structured from the top-down or bottom-up: a new look at an old debate*, 26 WILDLIFE SOCIETY BULLETIN 484, 484 (1998).

³⁶ Irene A. Vasquez, *supra* note 33; Dennis Martinez, *Protected Areas, Indigenous Peoples, and The Western Idea of Nature*, 21 ECO. RESTO. 247, 248 (2003).

³⁷ See Dr. Frank Craighead, Bear Management Paper for Park Service: on grizzly bears and their management in Yellowstone National Park and in the Greater Yellowstone Ecosystem (1974); Dennis Martinez, *supra* note 36 at 248.

³⁸ See Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585 (2008).

³⁹ John Copeland Nagle, *Wilderness Exceptions*, 44 ENVTL L. 373, 374 (2014).

⁴⁰ Mark David Spence, *supra* note 5 at 30.

⁴¹ David R. Craig, et al., *Blackfeet Belong to the Mountains: Hope, Loss, and Blackfeet Claims to Glacier National Park, Montana*, 10 CONSERV. & SOC. 232, 238 (2012).

through the use of force to exclude the Blackfeet from their homeland, all while exhibiting Indian dancers at the entryways to the park's grand hotels, financed by the Great Northern Railroad.⁴² In the words of critical ethnohistorian Mark David Spence, "those Indians who continued to use the park illegally seemed simply un-American in their lack of appreciation for the national park and almost barbaric in their unwillingness to let go of traditional practices."⁴³

In 2011, the Secretary of the Interior recognized that its Parks are the "ancestral homelands of many American Indian tribes."⁴⁴ As of this writing in 2024, the sitting Interior Secretary Deb Haaland and National Parks Service Director Charles F. Sams III are both enrolled members of federally-recognized Native American Tribes who certainly acknowledge the importance of America's public lands to Indigenous peoples.⁴⁵ They have released a number of guidance memoranda instructing federal agencies to take the actions within their power to integrate Indigenous Knowledge and Tribal co-management on public lands.⁴⁶ But they, and the department and agency which they direct, are powerless to contradict the strict management criteria of the Wilderness Act as handed down by Congress without legislative intervention.⁴⁷

V. Codifying Wilderness

The core of the Wilderness Act is the simply drafted 16 U.S.C. 1131 (a), (b), and (c), which begins by establishing a National Wilderness Preservation System, composed of federally-owned areas designated by Congress as "wilderness areas."⁴⁸ The Act then provides flexibility that despite these designated areas' organization into the National Wilderness Preservation System, they shall continue to be managed by the agency that holds the lands.⁴⁹ This means that the National Wilderness Preservation System is today a network of more 800 designated wilderness areas managed by four federal agencies (NPS, BLM, USFWS, and USFS),⁵⁰ including more than 111 million acres of land and water.⁵¹

Finally, 16 U.S.C. 1131(c) defines "wilderness" as

⁴² Mark David Spence, *supra* note 5 at 29.

⁴³ *Id.*

⁴⁴ Sec. Ken Salazar Dep'tl Order No. 3317, Dec. 1 2011, Policy on Consultation with Indian Tribes, *available at* <https://www.doi.gov/document-library/secretary-order/3317-department-interior-policy-consultation-indian-tribes>.

⁴⁵ U.S. Department of Interior, *Charles F. Sams III Sworn In as National Park Service Director*, (Dec. 16, 2021), <https://www.doi.gov/pressreleases/charles-f-sams-iii-sworn-national-park-service-director>.

⁴⁶ The White House, *Press Release: White House Commits to Elevating Indigenous Knowledge in Federal Policy Decisions* (Nov. 15, 2021),

<https://www.whitehouse.gov/ostp/news-updates/2021/11/15/white-house-commits-to-elevating-indigenous-knowledge-in-federal-policy-decisions/>; The White House, *Fact Sheet: Building a New Era of Nation-to-Nation Engagement* (Nov. 15, 2021),

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/>; Statement of Charles F. Sams III, Director, National Park Service, U.S. Department of the Interior, Before the House Committee on Natural Resources, Regarding Tribal Co-Management of Federal Lands (Mar. 8, 2022),

<https://www.congress.gov/117/meeting/house/114483/witnesses/HHRG-117-II00-Wstate-SamsIIC-20220308.pdf>.

⁴⁷ *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny.

⁴⁸ 16 U.S.C. § 1131 (a).

⁴⁹ 16 U.S.C. § 1131 (b).

⁵⁰ The U.S. National Park Service, Bureau of Land Management, Fish and Wildlife Service, and Forest Service.

⁵¹ National Parks Service, *Wilderness: Other Federal Lands*,

<https://www.nps.gov/subjects/wilderness/other-federal-wilderness-lands.htm> (last updated Mar. 24, 2020).

“an area where the earth and its community of life are **untrammelled by man**, where man himself is a visitor **who does not remain** [and] is further defined [as] an area of undeveloped Federal land retaining its **primeval** character and influence, **without permanent improvements or human habitation**, which is **protected and managed so as to preserve its natural conditions** and which

(1) generally appears to have been affected primarily by the forces of nature, with **the imprint of man’s work substantially unnoticeable**;

(2) has outstanding opportunities for solitude or a **primitive** and unconfined type of recreation;

(3) has at least five thousand acres of land or is sufficient size as to make practicable its preservation and use in an **unimpaired** condition;

and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.” (emphasis added, line breaks added for clarity),

while the rest of the Act is mostly procedural (e.g. 1132(b): “Review by Secretary of Agriculture of Classifications As Primitive Areas; Presidential Recommendations to Congress; Approval of Congress; Size of Primitive Areas”). But there is a nice chunky subsection nearly the size of the substantive portion of the Act, codified as 16 U.S.C. 1133(d)(1)-(7), which doles out more than a few carve outs for continued mining activities, power projects, transmission lines, conditional road construction, livestock grazing, and commercial recreation, among other activities.⁵² Notably, protecting Indigenous use and occupancy rights is not contemplated.⁵³

Meanwhile, despite an advisory council, authorization of co-management agreements, and creation with a cooperative management and protection area, the Burns Paiute Tribe complains about the management of the Steens Mountain Wilderness Area because of prohibitions of access for traditional practices, particularly for tribal members of limited mobility, and limitations placed on group size.⁵⁴ The Ramah Navajo are only permitted highly limited vehicle access in certain limited ways and only with prior authorization in the El Malpais National Conservation Area, an unnecessarily arcane system the land manager notes has not yet been taken advantage of.⁵⁵ Several Ojibwe bands, including the Bois Forte Band of Chippewa, have reserved hunting and fishing rights in Superior National Forest and the Boundary Waters Canoe Area Wilderness, but two members of Bois Forte were cited for illegal motor vehicle use in the wilderness area.⁵⁶ The Eighth Circuit ruled that their Treaty didn’t specify “unrestricted travel,” and there was no taking of rights, just an inconvenience.⁵⁷ Many Blackfeet still feel

⁵² 16 U.S.C. 1133 (d)(1)-(7).

⁵³ 16 U.S.C. 1133 (d)(1)-(7).

⁵⁴ Martin Nie, *supra* note 38 at 632.

⁵⁵ *Id.* at 636-37.

⁵⁶ See *U.S. v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000).

⁵⁷ *Id.*

“traumatiz[ed],” “degrad[ed],” and “alienat[ed]” from their traditional lands by contemporary wilderness management and resulting access restrictions in Glacier National Park.⁵⁸ This is not an exhaustive list. Now, the Biden administration is proposing almost 200,000 acres of wilderness atop Miccosukee and Seminole reserved use and occupancy rights.⁵⁹

VI. Proposed Wilderness Study in Big Cypress National Preserve

For the Miccosukee, and their Seminole relatives, the Big Cypress National Preserve is a sacred space.⁶⁰ Chairman Talbert Cypress of the Miccosukee Tribe of Indians of Florida wrote in response to wilderness designations proposed in 2022, and advanced in the present, that would seek to manage Big Cypress lands “without permanent improvements or human habitation” by writing that “the Miccosukee and Seminole people are at home in the Big Cypress National Preserve. The entirety of the landscape has been shaped by human hands, and continues to be.”⁶¹ This is no exaggeration. There are 15 active traditional villages, multiple ceremonial grounds, and active burial grounds scattered throughout the Preserve, where Miccosukee and Seminole peoples are exercising their recognized rights to continuing and customary use and occupancy throughout the entire Preserve, as enshrined by the unit’s 1974 enabling legislation.⁶²

However, these rights were made porous by Congress and “subject to the reasonable regulation of the Secretary.”⁶³ This was neither the first nor the last legal manipulation endured by the Miccosukee people, who survived a half-century-long ethnic cleansing campaign (the First, Second, and Third Seminole Wars) that sought to remove Indigenous peoples from the State,⁶⁴ and had to force the hand of the U.S. to recognize the Tribal nation by visiting Fidel Castro and obtaining his diplomatic support in the midst of the Cold War.⁶⁵ The imposition of a tightly drafted and stringent legislative act like the Wilderness Act on Big Cypress management risks yet another substantial erosion of Tribal rights.

Even when Tribal reserved rights are recognized, federal courts generally read those rights narrowly in the context of wilderness designations.⁶⁶ Tribal rights are incredibly vulnerable to the imposition of wilderness management. The federal courts have articulated a wilderness jurisprudence, the “minimum requirements test,” which requires agencies to limit any mechanized equipment usage, or permanent improvements, or any other deviation from

⁵⁸ David R. Craig, *supra* note 41 at 237.

⁵⁹ Big Cypress EIS, *supra* note 2; *but see* Big Cypress National Preserve Enabling Legislation, PL 93-440, Section 5 (1974), *available at* <https://www.nps.gov/bicy/learn/management/upload/Enabling%20Legislation.pdf>.

⁶⁰ Chairman Talbert Cypress, Letter to a Congressional Representative Entitled: The Sacred Importance of Big Cypress National Preserve to the Miccosukee Tribe (Mar. 28, 2024).

⁶¹ Chairman Talbert Cypress, Letter to Superintendent of Big Cypress Entitled: Opposition to Wilderness Designations in Big Cypress National Preserve (Oct. 18th, 2023).

⁶² *Id.*

⁶³ Big Cypress National Preserve Enabling Legislation, PL 93-440, Section 5 (1974).

⁶⁴ Florida Department of State, *The Seminole Wars*, <https://dos.fl.gov/florida-facts/florida-history/seminole-history/the-seminole-wars/> (last visited Apr. 4, 2024); Ah-Tah-Thi-Ki Museum, *Introduction: A Struggle for Survival, 1817-1858*, <https://www.ahtahthiki.com/struggle-for-survival-18171858/struggle-for-survival-introduction/> (last visited Apr. 6, 2024).

⁶⁵ *See* Harry A. Kersey, Jr., *The Havana Connection: Buffalo Tiger, Fidel Castro, and the Origin of Miccosukee Tribal Sovereignty, 1959-1962*, 25 AMERICAN INDIAN Q. 491 (2001).

⁶⁶ U.S. v. Gotchnik, 222 F.3d 506 (8th Cir. 2000).

wilderness management to be the minimum possible imposition on the untrammelled wilderness to accomplish a necessary management objective, in accordance with 16 U.S.C. Sec. 1133(b) and 36 CFR 293.6.⁶⁷

This minimum requirements test has repeatedly bound the hands of managing agencies seeking more flexibility in wilderness management. In Kofa National Wildlife Refuge, when the bighorn sheep population collapsed from 700 to 390 during a drought, the Ninth Circuit ruled that the USFWS violated the Wilderness Act by building two drinking water troughs in the refuge for the sheep. Courts have even noted that it is a “rare case where machinery as intrusive as a helicopter could pass the minimum requirements test.”⁶⁸ And of course, Tribal citizens get arrested and charged with felonies for exercising their treaty reserved rights in wilderness areas when accessed in a manner that doesn’t pass the same minimum requirements test.⁶⁹

But in truth, the Preserve’s current management, without wilderness designations, is a model for the recognition of the role of Indigenous people in the ecosystem. The Preserve protects 9 federally listed, 31 state listed threatened and endangered or species of special concern animals, and 120 state listed threatened and endangered plant species,⁷⁰ not in spite of, but as a corollary to, continued recognition of Tribal stewardship of the land.

According to the National Park Service, what makes Big Cypress National Preserve’s foundation unique is its origin as a multi-use preserve, “an exercise in compromise [by] many [who] did not want this region merely added to nearby Everglades National Park that was created in the 1940s.”⁷¹ The Miccosukee remember that, when the neighboring Everglades National Park was created, their own villages were evicted.⁷² In addition to the Tribal reserved rights, “Hunting, oil and gas extraction, operation of off-road vehicles[,], private land ownership[,], fishing and frogging... [and c]attle [g]razing” are regulated by permit in the Preserve.⁷³ There are “[h]undreds of residences and primitive camps pepper[ing] the landscape of the Preserve; several [of which] can only be reached by off-road vehicle or airboat.”⁷⁴

While there are concerns with oil and gas development and insufficiently enforced off-road vehicle regulations, the proposed wilderness designation fails to address either. The proposed wilderness areas fail to capture the bulk of the existing drilling operations in the park, where new horizontal drilling and acidization (below fracking psi, and using hydrochloric acid

⁶⁷ See e.g., *Wilderness Watch v. U.S. Fish and Wildlife* 629 F.3d 1024 (2010); *U.S. v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000).

⁶⁸ See *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F. Supp. 2d 1264 (D. Idaho 2010).

⁶⁹ *U.S. v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000).

⁷⁰ National Park Service, *Foundation Document Overview: Big Cypress National Preserve, Florida*, <http://npshistory.com/publications/foundation-documents/bicy-fd-overview.pdf> (last visited Apr. 6, 2024).

⁷¹ National Park Service, *A National Preserve - One Land, Many Uses*, <https://www.nps.gov/bicy/learn/historyculture/preserve-one-land-many-uses.htm#:~:text=The%20concept%20of%20a%20Preserve,was%20created%20in%20the%201940s> (last visited Apr. 6, 2024).

⁷² Chairman Talbert Cypress, Letter to Superintendent of Big Cypress Entitled: Opposition to Wilderness Designations in Big Cypress National Preserve (Oct. 18th, 2023).

⁷³ National Park Service, *supra* note 71.

⁷⁴ *Id.*

instead of fracking fluid, but similar in nature) are proposed in the Raccoon Point complex,⁷⁵ and so fail to address oil and gas extraction concerns. The proposed wilderness designation also bundles 15–106 miles of expanded off-road vehicle trails and 24–83 new camping locations alongside 147,910–190,528 acres of proposed wilderness (depending which of the two action alternatives is adopted),⁷⁶ and so perpetuates the expansion of off-road vehicle use without expanding capacity to enforce existing off-road vehicle regulations. The Tribe noted in response to the planned trail expansions and wilderness designations that there is less than one law enforcement officer per 100,000 acres, areas the size of a small country, and further regulations will not solve a problem created by insufficient personnel capacity to enforce the existing and likely sufficient off-road vehicle use regulations.⁷⁷

For the Miccosukee's part, Chairman Cypress noted in response to the proposed expansion of public tourism facilities on culturally significant forested strands in the swamp that “[a]ll highland areas within the swamp have been traditionally occupied and used by the Tribes of Florida for thousands of years and disturbances of the same compromise Tribal rights to traditional use and occupancy.”⁷⁸ And in response to extraction threats, the team at Miccosukee has proposed an ambitious conservation plan to leverage hundreds of millions of dollars in offshore oil royalties held by Interior in the Land and Water Conservation Fund to acquire the private mineral, oil, and gas interests below the Preserve and complete the preservation of the park unit.⁷⁹ In fact, the owners of the balance of those rights are the Collier family (of Collier County, in which the Preserve is located), and the Tribe and conservation partner WildLandscapes International have secured a purchase option agreement transferable to Interior for acquisition of these rights at fair market value,⁸⁰ the same cost the federal government would pay if it condemned the mineral interests through regulatory action.

Besides the fact that Big Cypress National Preserve, with its multiple uses, hundreds of residences (Native and otherwise), legacy of mechanized vehicle use, and sacred sites throughout which would be rendered inaccessible by wilderness designations in a Preserve the size of Rhode Island,⁸¹ seems like a poor candidate for lands “untrammelled by man... without permanent improvements or human habitation,”⁸² there is no justification for the continued dispossession of Indigenous reserved rights.

⁷⁵ Compare the drilling maps in Burnett Oil Co., et al, Operations Permit Application for Drilling and Production at the Nobles Grade and Tamiami Prospects, Big Cypress National Preserve (Aug. 14, 2020, last updated Jan. 2022), to the action alternative maps for wilderness designations in Big Cypress EIS, *supra* note 2.

⁷⁶ Big Cypress EIS, *supra* note 2 at 21-30.

⁷⁷ Chairman Talbert Cypress: Letter to Big Cypress Superintendent Entitled: Rejection of Action Alternatives for the Supplemental Draft Backcountry Access Plan/Wilderness Study/Environmental Impact Statement for the Big Cypress National Preserve (Sept. 28, 2022).

⁷⁸ *Id.*

⁷⁹ Alex Harris, *A Miccosukee-led plan could finally end new oil drilling efforts in the Everglades*, MIAMI HERALD (Jan. 24, 2024); Chairman Talbert Cypress, *In Florida Everglades, our tribal conservation plan will end drilling in Big Cypress for good*, Tampa Bay Times (Jan. 9, 2024).

⁸⁰ *Id.*

⁸¹ National Park Service, *supra* note 71.

⁸² 16 U.S.C. § 1131.

This dispossession is occurring against the explicit demands of a federally-recognized Tribal government, a nation whose sovereignty is acknowledged by U.S. law,⁸³ with Congressionally-recognized rights therein.⁸⁴ So, this dispossession is also occurring in violation of the requirement of the United Nations Declaration on the Rights of Indigenous Peoples, Article 19, which mandates “free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect [Indigenous peoples.]”⁸⁵

Call to Action for Wilderness Act Amendment

As has been demonstrated, the Big Cypress National Preserve is not a unique case. Despite the administration’s best intentions to provide opportunities for Indigenous cooperative management of public lands and recognized Tribes’ rights therein, the executive is powerless to chart a clear path forward to a wilderness designation which does not impact Tribal rights without legislative action. In order to prevent continued Indigenous dispossession, an amendment to the Wilderness Act is needed to protect Tribal rights within designated wilderness.

Given the ample carve outs of 16 U.S.C. 1133(d)(1)–(7) for mining activities, power projects, transmission lines, conditional road construction, livestock grazing, and commercial recreation, it seems like a small ask to expect an amendment which codifies continuing recognition of Indigenous rights,⁸⁶ and means of access to employ them, in wilderness areas. Such an amendment could neatly fit in as 16 U.S.C. 1133(d)(8), which would demonstrate that Congress cares equally for the Indigenous peoples the federal government has a trust obligation to,⁸⁷ as it does for the mining, energy, construction, and cattle lobbies that Congress has made allowances for within the Act.

The Wilderness Act, as a legal mechanism, can be an effective tool for conservation, but not when it continues to result in the alienation of the keystone stewards of public lands: the Indigenous peoples which have historical lived in and cared for them. Advocates, activists, and conservationists who otherwise utilize the Wilderness Act and its protections in their work should cease doing so until such a time as an amendment to the Wilderness Act is accomplished, however challenging, which ensures that the most effective stewards of public lands, the peoples Indigenous to the lands themselves, are protected in their use and occupancy of the same.

⁸³ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and its progeny through *McGirt v. Oklahoma*, 591 U.S. ____ (2020) for this principle.

⁸⁴ Big Cypress National Preserve Enabling Legislation, PL 93-440, Section 5 (1974).

⁸⁵ United Nations Declaration on the Rights of Indigenous Peoples, Art. 19 (2007).

⁸⁶ For those unfamiliar with Federal Indian Law, the Supreme Court considers laws specifically protecting Tribes and their rights to not run afoul of the Equal Protection doctrine, as protections for Tribes are carried out in the course of the federal government’s nation-to-nation relationship with a sovereign, not on behalf of a minority class. See *Haaland v. Brackeen*, No. 21-376 (U.S. Jun. 15, 2023), and its antecedents for this principle.

⁸⁷ UNITED STATES DEP’T OF THE INTERIOR, DIRECTOR CHARLES F. SAMS III, POLICY MEMORANDUM 22-03: FULFILLING THE NATIONAL PARK SERVICE TRUST RESPONSIBILITY TO INDIAN TRIBES, ALASKA NATIVES, AND NATIVE HAWAIIANS IN THE STEWARDSHIP OF FEDERAL LANDS AND WATER (Sept. 12, 2022), https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf.