Detailed Discussion of Authorities

1. Section 307(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the BLM to "enter into contracts and cooperative agreements involving the management, protection, development, and sale of public lands."[1] BLM relied on section 307(b) of FLPMA to enter into an assistance agreement with the Pueblo de Cochiti for collaborative management of Kasha-Katuwe Tent Rocks National Monument in New Mexico.[2] This agreement carries out the direction in the monument's establishing proclamation to "manage the monument . . . in close cooperation with the Pueblo de Cochiti."[3] The BLM also relied on section 307(b) of FLPMA to enter into a cooperative agreement (alongside the U.S. Forest Service) with the five tribal nations represented on the Bears Ears Commission for cooperative management of Bears Ears National Monument.[4]

2. Section 501(a) of FLPMA allows BLM to issue rights-of-way (ROWs) for a variety of purposes.[5] While most of the enumerated purposes involve the transportation or transmission of people, goods, energy, or communications across public lands, the statute also includes a catch-all provision, which applies to "such other necessary . . . systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through [public] lands."[6] Under some circumstances, tribal activities on public lands could qualify as, or require the development of, a "system[] or facilit[y]"; in such a case, a ROW under section 501(a) of FLPMA could be a vehicle for facilitating these activities.

3. Section 302(b) of FLPMA allows the BLM to "regulate, through easements, permits, leases, [or] licenses, . . . the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns."[7] The BLM's regulations interpret this provision as complementing section

[1] 43 USC 1737(b); *see also* 1737(a) (authorizing the BLM to "conduct investigations, studies, and experiments, on [its] own initiative or in cooperation with others, involving the management, protection, development, acquisition, and conveying of the public lands").
[2] *See* BLM Rio Puerco Field Office, Record of Decision for Kasha-Katuwe Tent Rocks National Monument Resource Management Plan at ROD-9 (approved May 25, 2007), https://eplanning.blm.gov/public_projects/lup/73145/134985/165139/Rio_Puerco_Field_Office-_Kasha_Katuwe_Tent_Rocks_RMP_ROD_CB.pdf (describing the assistance agreement).
[3] Proclamation No. 7394, 66 Fed. Reg. 7343, 7344 (published Jan. 22, 2001).
[4] *See* BLM, U.S. Forest Service, Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation & Pueblo of Zuni, Inter-Governmental Cooperative Agreement for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument at 2 (effective June 18, 2022), https://www.blm.gov/sites/default/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf.
[5] 43 USC 1761(a).
[6] 43 USC 1761(a)(7); *accord* 43 CFR 2801.9(a)(7).
[7] 43 USC 1732(b).

501(a), providing that a lease, permit, or easement may be issued under section 302(b) for "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law," including "residential, agricultural, industrial, and commercial [uses], and uses that cannot be authorized under" section 501(a).[8] Specifically, "[l]eases shall be used to authorize uses of public lands involving substantial construction, development, or land improvement and the investment of large amounts of capital which are to be amortized over time," while "[p]ermits shall be used to authorize uses of public lands for not to exceed 3 years that involve either little or no land improvement, construction, or investment, or investment which can be amortized within the term of the permit."[9] Like ROWs under section 501(a), leases, permits, and easements under section 302(b) could in some circumstances be used to facilitate tribal activities on public lands – or, in the case of easements, to restrict activities on public lands that are incompatible with the tribes' needs.

4. The BLM's Good Neighbor authority allows the agency to enter into cooperative agreements or contracts with states, counties, Alaska Native Corporations, or Tribes to carry out "similar and complementary forest, rangeland, and watershed restoration services . . . on Federal land, non-Federal land, and land owned by an Indian tribe."[10] Activities that can be included in a Good Neighbor agreement include "activities to treat insect- and disease-infected trees" or "reduce hazardous fuels," or "any other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat," but generally exclude construction or repair of roads, parking areas, or public buildings or works.[11]

5. The BLM's Stewardship Contracting authority allows the agency to enter, "via agreement or contract as appropriate, . . . into stewardship contracting projects with private persons or other public or private entities to perform services to achieve land management goals for . . . the public lands that meet local and rural community need."[12] The land management goals that can be pursued under this authority include "[r]oad and trail maintenance or obliteration to restore or maintain water quality," improving "[s]oil productivity, habitat for wildlife and fisheries, or other resource values," "[s]etting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat," "[r]emoving vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives," "[w]atershed restoration and maintenance," "[r]estoration and maintenance of wildlife and fish," and "[c]ontrol of noxious and exotic weeds and reestablishing native plant species."[13]

6. Section 809 of the Alaska National Interest Lands Conservation Act (ANILCA) authorizes the Secretary to "enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, [Alaska] Native Corporations, other appropriate persons and

[8] 43 CFR 2920.1-1.
[9] 43 CFR 2920.1-1(a)-(b).
[10] *See* 16 USC 2113a(a)(1), (a)(5), (a)(6), (a)(7), (b)(1)(A). [11] 16 USC 2113a(a)(4).
[12] 16 USC 6591c(b).
[13] 16 USC 6591c(c).

organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of" Title VIII of ANILCA.[14] Title VIII of ANILCA, in turn, addresses the management of subsistence use of federal lands in Alaska by rural residents.[15] The Department, on behalf of the BLM, the National Park Service, and the U.S. Fish and Wildlife Service, relied on Section 809 of ANILCA to enter into a memorandum of agreement with the Ahtna Intertribal Resource Commission, a body representing eight tribes and two Alaska Native Corporations based in the Ahtna region of Alaska.[16]

7. As part of the Indian Self-Determination and Education Assistance Act, as amended, the Tribal Self-Governance Act (TSGA) allows the BLM to enter into funding agreements with eligible tribes, Alaska Native Corporations, or tribal consortia that "authorize the tribe to plan, conduct, . . . and administer" certain federal programs.[17] Such funding agreements may include, alongside programs that specifically serve tribes and their members, "other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe."[18] BLM's use of this authority has been very limited to date, but can be expanded based on individual opportunities.

8. The Tribal Forest Protection Act (TFPA) authorizes the BLM to enter into agreements with tribes "to carry out . . . project[s] to protect Indian forest land or rangeland (including . . . project[s] to restore Federal land that borders on or is adjacent to Indian forest land or rangeland)."[19] The statute defines "Indian forest land or rangeland" as "land that . . . is held in trust by, or with a restriction against alienation by, the United States for an Indian tribe or a member of an Indian tribe," and is "forest land . . . ; or . . . has a cover of grasses,

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[14] 16 USC 3119.

[15] *See, e.g.*, 16 USC 3111(1) (declaring the congressional finding that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the [federal] lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence").

[16] *See Memorandum of Agreement Between United States Department of the Interior and Ahtna Inter-Tribal Resource Commission for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region* at 2-3 (2016), https://www.doi.gov/sites/doi.gov/files/uploads/ahtna_doi_moa_with_signature_pages_final.pdf; *see also Who We Are*, Ahtna Intertribal Res. Comm'n, https://www.ahtnatribal.org/about (last visited July 18, 2022).

[17] 25 USC 5363(b)(2). The TSGA was enacted in 1994 as an amendment to the Indian Self-Determination and Education Assistance Act. *See* Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250.

[18] 5363(c); *see also* 25 CFR 1000.126 (defining "special geographic, historical or cultural [significance]"). While the TSGA generally allows tribes to "redesign or consolidate . . . or reallocate funds for programs" that specifically serve the tribes and their members, tribes can only redesign, consolidate, or reallocate funds for other-special-significance programs with the agreement of the Secretary. *See* 25 USC 5365(d).

[19] 25 USC 3115a(b)(1).

brush, or any similar vegetation; or . . . formerly had a forest cover or vegetative cover that is capable of restoration."[20] Covered projects must meet certain criteria, including that the BLM-managed lands involved must "border[] on or [be] adjacent to" the Tribe's trust lands; "pose[] a fire, disease, or other threat to" those trust lands or to "a tribal community," or be "in need of land restoration activities"; and "present[] or involve[] a feature or circumstance unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances)."[21] When a Tribe carries out a project under the TFPA, it may also "contract to perform administrative, management, and other functions" related to the project through a TSGA contract.[22]

9. The Native American Tourism and Improving Visitor Experience Act (NATIVE Act) is intended, among other purposes, to "increase coordination and collaboration between Federal tourism assets to support Native American tourism" and to "enhance and improve self-determination and self-governance capabilities in the Native American community."[23] Although the act focuses on tourism planning, rather than on land management, several provisions could authorize the BLM to undertake projects that would reflect tribal priorities, and that could be carried out by tribes under the authorities discussed above.[24] In particular, the act's provision requiring agencies to "support the efforts of Indian tribes . . . to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community" could be read as a broad mandate for land managers to accommodate and support tribal cultural practices on federal lands.[25]

[20] 25 USC 3115a(a)(2).
[21] 25 USC 3115a(c).
[22] 25 USC 3115b(a).
[23] 25 USC 4351(2), (4).
[24] These provisions direct federal agencies to incorporate into their plans proposals to "develop innovative visitor portals for parks, landmarks, heritage and cultural sites, and assets that showcase and respect the diversity of the indigenous peoples of the United States"; "share local Native American heritage through the development of bilingual interpretive and directional signage that could include or incorporate English and the local Native American language or languages"; "improve access to transportation programs related to Native American community capacity building for tourism and trade"; "take actions that help empower Indian tribes . . . to showcase the heritage, foods, traditions, history, and continuing vitality of Native American communities"; "support the efforts of Indian tribes . . . to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community" and "provide visitor experiences that are authentic and respectful"; and "provide assistance to interpret the connections between the indigenous peoples of the United States and the national identity of the United States." *See* 25 USC 4353(c)(1)(G)-(I), 4354(a).
[25] *See* 25 USC 4354(a)(2).