

# Pathways Alliance for Change and Transformation (PACT)<sup>1</sup>



## Key Strategies for Securing Land Rights Employed by Native Nations<sup>2</sup> in the United States: An Overview for International Indigenous Audiences<sup>3</sup>

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Savannah Whaley<sup>1</sup>, Deanna Geelhoed<sup>1</sup>, Dr. Andy White<sup>1</sup>, Dr. Kyle Whyte<sup>1</sup> (1) The School for Environment and Sustainability (SEAS), the University of Michigan<sup>4</sup>

This report was commissioned by PACT and prepared in collaboration with members of The Fond du Lac Band of Lake Superior Chippewa, The Confederated Salish & Kootenai Tribes, Former members of Utah Diné Bikéyah, and The Bois Forte Band of Chippewa Tribal Nation. The work was supervised by Drs Andy White and Kyle Whyte and conducted with financial support from the University of Michigan School for the Environment and Sustainability and the Rights and Resources Initiative. Its purpose is to inform international Indigenous and community advocates and allies of pathbreaking land return recently achieved by US-based Tribal Nations. This report accompanies a separate report that provides current case studies of U.S. Tribal Nations implementing land return. This report is entitled: [Land Return Strategies by Selected Tribal Nations in the United States: Case Studies for International Audiences](#)

### Introduction

Indigenous Peoples in what is now the continental United States once had sovereignty of all of this land.<sup>5 6 7</sup> Over the last few centuries, European-descended settlers have seized and driven Indigenous Peoples from their lands. They used tactics ranging from coercive treaties to acts of genocide, such as assimilative schooling.<sup>8</sup> Despite a concerted effort by the US government, its military, and its citizenry, Indigenous Peoples remain here. The US has also changed over time – in many ways

<sup>1</sup> [The Pathways Alliance for Change and Transformation \(PACT\)](#) is a small, strategic coalition of Indigenous Peoples and local community led research and activist institutions and academic allies. PACT's vision is to catalyze the system transformation at all levels to support the priorities and values of Indigenous Peoples and local communities and their organizations. The core strategy to achieve PACT's vision is to strengthen the self-determination of emerging Indigenous and community scholar-activists, strengthen Indigenous and community-led research, and deepen the relationships between them within and across regions.

<sup>2</sup> We are following the style guidelines of the Native Governance Center, which state that "Native nations are independent nations within a nation." We will also refer to federally recognized Tribes, or simply Tribes, as a distinct legal category, and the focus of the strategies within this typology, while noting that there are many Native nations that lack federal recognition. Tribal is sometimes used as a descriptor (i.e. Tribal ownership, Tribal citizen). When referring broadly to the inhabitants of Native nations, we will use the term Indigenous Peoples to indicate that this group has specific legal rights. We will specify names of Native nations when possible. <https://nativegov.org/news/how-to-talk-about-native-nations-a-guide/>

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<sup>5</sup> Fixico, D. (2021) Documenting Indigenous Dispossession. *Science*, 374 (6567). 536.

<sup>6</sup> Farrell, J., Berne Burrow, P., McConnell, K., Bayham, J., Whyte, K., & Koss, G. (2021). Effects of land dispossession and forced migration on Indigenous peoples in North America. *Science*, 374 (578).

<sup>7</sup> Indigenous economist Ron Trosper goes into detail about the concept of land ownership, and how it is not an appropriate descriptor for the relationships that Indigenous Peoples had to the land. While land was not seen as private property or national territory, the Indigenous Peoples engaged in all of the necessary practices to constitute what western legal tradition now defines as land "ownership". Trosper, R. L. (2022). *Indigenous Economics: Sustaining Peoples and their lands*. The University of Arizona Press.

<sup>8</sup> Racehorse, V., & Hohag, A. (2023). Achieving climate justice through land back: an overview of tribal dispossession, land return efforts, and practical mechanisms for #landback. *Colorado Environmental Law Journal*, 34(2), 175-212

for the better – in response to Indigenous peoples’ calls for respect for their rights, including equal opportunity, reparative redress of land loss, the ending of assimilation, economic fairness, and restoration of Indigenous self-determination and self-governance. Yet, today, almost half of historically known Native Nations have no federal- or state-recognized land base. Of those that do, their current lands are an average of 2.6% of the size of their historical land (Farrell et al., 2021). However, Indigenous peoples in the U.S. have used their rights, including some of their rights to self-governance and sovereignty, to pursue the securing of their lands. Tribal efforts in the U.S. to secure land rights offer important lessons to Indigenous Peoples everywhere who are engaged in the work of regaining and strengthening access to their ancestral homelands, as well as securing other land rights.<sup>9</sup> Some of the rights that are in practice by Tribes in the U.S. are examples of similar rights that Indigenous peoples in other places are calling on nations to develop and implement.

This brief introduction is intended to inform Indigenous leaders from the Global South of the range of major strategies that federally recognized Tribes in the continental United States are using to regain land and secure land rights.<sup>10 11</sup> It is a snapshot of the current tactics and opportunities whereby Tribes seek the return of land to Tribal ownership and/or the co-management of lands held by other entities.<sup>12</sup> It complements the much more detailed booklet “Let’s Get the Land Back: A Toolkit to Restore our Relations” published by NDN Collective in 2023 by Dr PennElys Droz, which is focused on helping Native Nations within the nation states of the US and Canada develop their own visions and strategies to restoring their relationships with their ancestral lands, language, medicine and each other. Some key conditions for Indigenous Peoples’ land loss, relevant for land return today, are described below.

### **Background: History and Current Status of Indigenous Land Rights Reservations Created by Treaties (1805-1889)**

Particularly in certain regions in the United States, [treaties](#) between federally recognized Tribes and the US government play a large role in land rights issues. Most of these treaties were signed between 1805–1889. Many treaties involved Tribes [ceding large swathes of land](#) to the United States and setting aside smaller parcels, called reservations, for Tribes’ exclusive use.<sup>13</sup> While some reservations are on a given Tribe’s ancestral land, many were not, and are instead located in areas to which Tribes were displaced after their land was deemed too desirable by settlers for Tribes to keep. Tribes often retained usufruct rights to hunt, fish, and gather on ceded land. However, the US government failed to honor many of these treaties. Tribes’ rights to access ceded lands have been frequently contested.<sup>14</sup> Even in the reservation areas, many, but not all, lands within these boundaries were subject to allotment (see below).

### **Allotment, Checkerboarding, and Fractionation (1887 onward)**

In the 1887 General Allotment Act, or Dawes Act, the US government initiated a set of actions, including through other statutes, to divide up reservation land (that had been reserved for Tribal usage in treaties) into individually-owned parcels. While some of the parcels would become owned by Tribal members, any “surplus” parcels would be opened up for sale to settlers.<sup>15</sup> Importantly, Indigenous land-owners faced financial and political challenges to their ability to maintain ownership. The Dawes and related acts resulted in the loss of an estimated 36.4 million hectares of Native land. As a result of this allotment, a number of reservation land ownership is “checkerboarded,” or split across many different parcels and landowners. The pattern resembles a checkerboard. Land stewardship and management are difficult [across checkerboarded areas](#), and private property may block access to Tribal land and resources.<sup>16</sup> Additionally, allotted parcels were further divided up in order

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<sup>9</sup> White, A., & Martin, A. (2002). Who Owns the World’s Forests? Forest Tenure and Public Forests in Transition. <https://rightsandresources.org/wp-content/uploads/exported-pdf/whoowns.pdf>

<sup>10</sup> There are 754+ federal recognized Tribes that share geography with the United States and many more not federally recognized. Each Tribe has distinct culture, but all Tribes share the story of colonization and land loss.

<sup>11</sup> For further reading, please see Stewarding Native Lands: Environmental Scan, August 2022. Longmont, Colorado: First Nations Development Institute; Middleton, B.R. (2011). Trust in the Land: New Directions in Tribal Conservation. The University of Arizona Press; Racehorse, Vanessa, & Hohag, Anna. (2023). Achieving climate justice through land back: an overview of tribal dispossession, land return efforts, and practical mechanisms for #landback. Colorado Environmental Law Journal, 34(2), 175-212.; Ellsworth, L., & White, A. (2003, June). Deeper roots; strengthening community tenure security and community livelihoods. [https://www.fordfoundation.org/wp-content/uploads/2015/03/2003-deeper\\_roots.pdf](https://www.fordfoundation.org/wp-content/uploads/2015/03/2003-deeper_roots.pdf); Washburn, Kevin K., Facilitating Tribal Co-Management of Federal Public Lands (October 27, 2021). 2022 Wis. L. Rev. 263-328 (2022), U Iowa Legal Studies Research Paper No. 2021-45; Monte Mills & Martin Nie, Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands. (Missoula, MT: Margery Hunter Brown Indian Law Clinic/Bolle Center for People and Forests, University of Montana, 2020)

<sup>12</sup> For more detail on several Tribes with pathbreaking land return cases, including Bois Forte, Fond du Lac, Confederated Salish and Kootenai Tribes, and the Bears Ears Inter-Tribal Coalition, please refer to the associated case studies.

<sup>13</sup> See Walker, D. (2020, April 30). Reservation life. The Red Road Project. <https://redroadproject.com/reservation-life/>

<sup>14</sup> Best Practices Guide. (2022). BIA. [https://www.bia.gov/sites/default/files/media\\_document/best\\_practices\\_guide.pdf](https://www.bia.gov/sites/default/files/media_document/best_practices_guide.pdf)

<sup>15</sup> Organizations such as the Indian Land Tenure Foundation have resources to help Tribes deal with checkerboarded and fractionated land, and many Tribes have made it a goal in recent years to buy back and consolidate allotment land. Indian Land Tenure Foundation. (2009). *From Removal to Recovery: Land Ownership in Indian Country*. The Message Runner. [https://iltf.org/wp-content/uploads/2016/11/message\\_runner\\_vol.4\\_fall\\_2009\\_rev.pdf](https://iltf.org/wp-content/uploads/2016/11/message_runner_vol.4_fall_2009_rev.pdf)

<sup>16</sup> Ibid.

to pass ownership rights down to eligible descendants, resulting in many owners for a single parcel of land.<sup>17</sup> This phenomenon is referred to as fractionation.

### **Present Status of Indigenous Land Ownership and Rights:**

According to the Bureau of Indian Affairs (BIA), the federal government currently holds 22.7 million hectares or 2.3% of the land in the continental US, in trust for “Indian tribes and individuals.”<sup>18</sup> This is an area approximately the size of Laos, making Tribes the 6th largest landholder in the US.<sup>19</sup> This is a vast undercount of total area where Tribes have rights to lands and natural resources, since it does not include land that Tribes hold in fee simple status, lands not held in trust that are still subject to Tribal governance (often called service areas’), ceded territories where Tribes are exercising usufruct rights, or areas where Tribes are engaged in co- stewardship or co-management with another government entity.

Almost all Native Nations that share geography with the US are working in some way to regain ownership or strengthen their use and access rights to lands within their original homelands, or in more recently established homelands where they were forcibly moved to historically. Tribal land rights often operate through diverse forms of title to and association with different land areas and parcels that indicate a Tribe’s ownership, sovereignty, or relationship to certain lands and possibly other adjacent territories.<sup>20</sup> Tribal authority, including sovereignty, is most commonly understood in relation to land ownership: Tribes have only [limited control](#) on reservation land not owned by the Tribe or Tribal members.

### **Trust Land vs. Fee Land**

The federally-owned trust land system is the most common form of land title for federally recognized Tribes. Under the land trust, or reserve title, regime, the U.S. government holds federal lands in reserve for “Indian tribes and individuals”. Through its trustee responsibility affords Tribes and Tribal citizens a unique set of rights and power associated with their beneficiary status: trust lands are tax-exempt, and access to government programs and services of the Bureau of Indian Affairs, and other agencies, is often only for trust land.<sup>21</sup> There are also disadvantages, including the inability to use trust or reservation land to build financial equity.<sup>22</sup> Native nations, whether they are federally recognized, and other Indigenous Peoples under the purview of the U.S., can also hold fee simple lands.<sup>23</sup> This land designation affords the owner all traditional property rights according to the laws of the United States. Native nations and citizens who own fee simple lands receive the total suite of rights afforded to any private landowner, and must pay taxes on the land, unlike trust land.<sup>24</sup> Restricted fee land, or restricted land, is eligible for some BIA services, and like trust land, can only be sold, gifted, or transferred with approval of the Secretary of the Interior.<sup>25</sup> Native nations that purchase land may hold it as fee simple or restricted land, or they may work to convert it into trust land.

### **Co-management**

When Native nations and citizens do not have title to land, they can still assert their land rights through a variety of co-management structures with local, state, and federal entities to have certain rights to usage, access, and/or shared governance. This strategy is common in cases where Tribes seek recognition of their rights on lands held by public agencies, such as the US Forest Service, Park Service, or similar state-level agencies.<sup>26</sup> While in some parts of the world, “co-management” is associated with coercive or fraudulent practices against Indigenous peoples, in the U.S. a number of recent efforts at co-management have been created and controlled by Tribal needs, visions, cultures, and economies.

Co-management can be an intermediary step for a Tribe and landholding entity, with or without the expectation of full land return. In the co-management cases described in section 5, land ownership does not necessarily change but Indigenous usufruct rights are recognized, as well as at least the right to co-govern. Co-management with large federal landholders is a strategy for strengthening access to larger swaths of ancestral homelands, as in the case of Bears Ears National Monument, where the land in question is sacred to several different Tribes. Some of the strategies listed, such as 638 contracts, under Public Law 93-638, the Indian Self-Determination and Education Assistance Act, are often applied to land that is under fee simple or trust Tribal ownership as well.

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<sup>17</sup> Home: Estate Planning. ILTF. (n.d.). <https://iltf.org/special-initiatives/estate-planning/>

<sup>18</sup> <https://www.bia.gov/frequently-asked-questions#:~:text=Approximately%2056.2%20million%20acres%20are,%2C%20communities%2C%20etc>

<sup>19</sup> Washburn, 267

<sup>20</sup> Land Back is a movement title as well as a guiding principle. NDN Collective has many resources on the movement: Pieratos, N. A., Manning, S.S., & Tilsen, N. (2021). *Land Back: A meta narrative to help indigenous people show up as movement leaders*. Leadership, Vol. 17(1) 47–61.

<sup>21</sup> Barbaro, Devin Nicole. (2024). Taking the land back: how to return stolen land to the Indigenous People of New York State through eminent domain. *Journal of Law and Policy*, 32(1), 50.

<sup>22</sup> Ibid.

<sup>23</sup> [https://www.law.cornell.edu/wex/fee\\_simple](https://www.law.cornell.edu/wex/fee_simple)

<sup>24</sup> Ibid, 49.

<sup>25</sup> <https://lawjournal.mcgill.ca/article/property-law-and-collective-self-government/>

<sup>26</sup> Washburn, 269.

Secretarial Order 3043, also known as “Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters,” has ushered in a new era of co-management.<sup>27</sup> The Order requires that US Department of Agriculture (USDA), Department of Interior (DOI), and, as of 2023, the Department of Commerce (DOC), evaluate and pursue agreements with federally-recognized Tribes to engage in the co-stewardship of Federal lands and waters within their jurisdictions while also supporting opportunities to consolidate tribal homelands and tribal stewardship of those resources.<sup>28</sup> This will likely drastically expand the number of co-management and co-stewardship projects that Tribes are able to access.

### Key Strategies with Examples

Below is an overview of some of the main strategies that modern-day, federally recognized Tribes in the continental United States are employing to secure land rights. The strategies are split into five broad categories—land purchase, land transfer, court settlements, strategic coordination and collaboration with outside entities, and co-management arrangements—with more detailed sub-categories and examples within each category.<sup>29</sup> Many Tribes use a combination of these strategies to secure land rights, due to the variety of entities that may own a Tribe’s lands.

1. **Land purchase:** Many US Tribes employ the strategy of [buying back](#) their land from its current owners on the private real estate market. Owners may include inheritors of allotted reservation land, private companies, or other private landowners. There are government and private sources of funding available but many Tribes are also finding creative ways to raise money to buy land.<sup>30</sup> When Tribes purchase land, it is generally classified as fee simple, and some Tribes may find it strategic to keep it that way; transferring fee simple land to Tribal trust land is also a goal of many Tribes. Examples of this strategy:
  - a. Buying up allotments, consolidating fractionated interests (using federal or other dollars)
    - i. [Case Study: Fond du Lac](#)
    - ii. [Case Study: Confederated Salish and Kootenai Tribes \(CSKT\)](#)
  - b. Buying land from organization / company / local government
    - i. [Case Study: Fond du Lac](#)
  - c. Purchasing/trading for tax forfeit land
    - i. [Case Study: Fond du Lac](#). The Band bought up desirable land and then traded it for reservation tax forfeited land.
  - d. Buying private land/homesteads from private landowners
    - i. [Case Study: Fond du Lac](#)
2. **Land transfer:** Some Tribes acquire land, either fee simple or trust, through land transfers. This can be from a public or private entity: examples range from small landholders who want to leave their house to a Tribe when they die, to the US federal government. Examples of this strategy:
  - a. Governmental:
    - i. Executive order by federal or municipal government: In 1981, New York State returned over 322 hectares of land to the Seneca Nation via executive action, as part of an agreement that would allow the construction of an expressway through their reservation.<sup>31</sup>
    - ii. Secretarial transfer: A process that involves the transfer of land from one federal agency to another. It is a common procedure, though less commonly used to transfer land to Tribes.
      - (1) Leech Lake: 4760ha were transferred from the US Forest Service to the Department of Interior-Bureau of Indian Affairs to be held in trust on behalf of the [Leech Lake Band of Ojibwe](#). The transfer was accomplished through an act of Congress, with the December 2020 passage of the bill entitled Leech Lake Band of Ojibwe Reservation Restoration Act.
      - (2) Case Study: Fond du Lac
    - iii. Other strategies, like the [National Forest Allotment Statute](#), and employing laws of eminent domain for landback, are areas with great potential that have not yet been fully explored.<sup>32</sup>
  - b. University

<sup>27</sup> *First Annual Report on Tribal Co-Stewardship*, Department of Agriculture Documents. (2022). <https://www.usda.gov/sites/default/files/documents/usda-iso-annual-report-11.29.2022-doi-signed.pdf>

<sup>28</sup> Tafoya, V., Dai, W., and Edwards, M. (2024) Tribal Initiatives and Opportunities for Land Return and Co-Stewardship in the Northern Great Plains: Chapter 7: The Momentum of Land Return Initiatives and Co-Management Advocacy. 51. <https://deepblue.lib.umich.edu/handle/2027.42/193044>

<sup>29</sup> Many other scholars have divided this up into different categories—see Racehorse and Adelzadeh for recent examples. The categories here were chosen given the audience of international Tribal advocates.

<sup>30</sup> Going into detail on the ways in which Tribes are raising funding for this strategy is beyond the scope of this work, but several strategies are mentioned where known.

<sup>31</sup> <https://www.nytimes.com/1981/09/22/nyregion/new-york-state-gives-795-acres-to-indian-tribe.html>

<sup>32</sup> Barbero, 51.

- i. [Case Study: Fond du Lac](#)
  - c. Private landholder
    - i. [Case Study: Fond du Lac](#)
- 3. **Court Settlements:** Some Tribes have won legal settlements and received monetary payments, or less commonly, land rights. This can take decades, and the award may be insufficient. Examples of this strategy, including where Tribes are still holding out for land rights:
  - a. Accepted settlement:
    - i. [The Confederated Salish and Kootenai Tribes](#) reached a \$1.9 billion settlement with the U.S. government that included not only financial compensation but also the return of Montana state land within their reservation boundaries and the right to manage the National Bison Range. However, this agreement came at a cost: in exchange for these gains, the tribes were required to relinquish certain treaty rights—highlighting the difficult trade-offs that can accompany such negotiations.
  - b. Rejected settlement:
    - i. In 1980, [the Lakota](#) were offered \$106 million in compensation for the U.S. government's theft of resource rich Black Hills land. However, the Lakota refused the money, standing firm in their demand for the return of the land itself. They believe that no sum of money can match the value of having the land returned. Moreover, accepting the payout would mean the land remains under federal ownership indefinitely, rather than being restored to the people to whom it rightfully belongs.
- 4. **Strategic coordination and collaboration with outside entities:** Examples of this strategy:
  - a. In some cases, Tribes coordinate with outside entities to secure rights to parcels via a conservation easement (land ownership does not change but development is restricted for some length of time). Often in this case, a non-Tribal entity holds the title to land that is managed by the Tribe.<sup>33</sup>
    - i. [Sogorea Te' Land Trust](#) is an Indigenous women-owned land trust working on behalf of the Lisjan Ohlone of the East Bay of California. Recently, the City of Oakland and Sogorea Te' worked together on a cultural conservation easement for [two hectares of land](#) that was granted to Sogorea Te' in perpetuity, while the City of Oakland remains the official owner.
  - b. Land trust or other intermediary purchases land on behalf of a Tribe
    - i. [Case Study: Bois Forte](#). Bois Forte Band was preparing to purchase back their reservation land from a timber company themselves, in stages, but a conservation organization bought it first. They offered to sell it to the Band and the Band was able to finance the transaction with a low-interest loan from the Indian Land Tenure Foundation.
    - ii. The [Eastern Band of Cherokee Indians \(EBCI\)](#) purchased 28ha of land in 2007 with financial assistance from 2 land trusts. There is a conservation easement on the land as well that protects it from development.
- 5. **Co-management and co-stewardship arrangements on lands held by the federal government:** Co-management occurs when Tribal nations share legal authority over lands with entities like the federal government. A step below this is co-stewardship, which involves collaboration in land management activities but does not grant Tribes decision-making power. Both co-management and co-stewardship are seen as important progress toward land return and advancing Tribal influence and leadership in managing ancestral lands. Examples of this strategy:
  - a. Tribal contracting with government agencies
    - i. [1975 Public Law 93-638](#) is a law that recognized Tribes' status as sovereign nations and allowed them to administer federal programs to Tribal members, now known as "638 contracts."<sup>34</sup> This program has been expanded over the years to include more agencies that Tribes can contract with.
    - ii. The [Tribal Forest Protection Act](#) (TFPA) allows for 638 contracts with USDA and USFS, in addition to other project types. Example: [The Lost Burros Tribal Forest Protection Act Project](#)<sup>35</sup>

<sup>33</sup> Cases of this strategy are described in extensive detail in Beth Middleton's book [Trust in the Land](#). Middleton, 10.

<sup>34</sup> <https://www.melvinconsultingplc.com/our-blog/2019/7/29/what-is-a-638-contract-a-review-of-public-law-93-638> and Washburn, 271.

<sup>35</sup> Tafoya, V., Dai, W., and Edwards, M. (2024) Tribal Initiatives and Opportunities for Land Return and Co-Stewardship in the Northern Great Plains: Chapter 7: The Momentum of Land Return Initiatives and Co-Management Advocacy. 54. <https://deepblue.lib.umich.edu/handle/2027.42/193044>

- iii. The [Good Neighbor Authority](#) allows the Bureau of Land Management (BLM) and USFS to engage with Tribes to execute specific projects on federal land.  
Example: Confederated Salish and Kootenai Tribes<sup>36</sup>
- b. Contract between Tribe and a non-governmental entity creating a co-management arrangement
  - i. [Case Study: Bears Ears National Monument.](#)
- c. National monuments created under the Antiquities Act
  - i. [Case Study: Bears Ears National Monument.](#)
  - ii. Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument
- d. Tribes retain treaty rights to hunt, fish, and conduct other cultural practices on land often recognized in so-called “ceded territory”
  - i. Common in Midwest, monitored by organizations like the [Chippewa Ottawa Resource Authority](#), [Great Lakes Indian Fish and Wildlife Commission](#), and the [1854 Treaty Authority](#)

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<sup>36</sup> Ibid, 55.

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