

# ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

---

VOLUME 09

FALL 2018

ISSUE 1

---

## THE SHIFTING LANDSCAPE OF ANCESTRAL LANDS: TRIBAL GATHERING OF TRADITIONAL PLANTS IN NATIONAL PARKS

*Andrew Schrack\**

I. Introduction	1
II. Historical Gathering Rights in National Parks	2
A. Treaties	3
B. Congressional Acts and Presidential Proclamations	5
C. Agreements	7
III. Shifting Legal Landscape	10
A. 2016 Regulatory Changes	12
1. Criticism of the Regulations	15
IV. Eastern Band of Cherokee Indians Case Study	17
A. <i>United States v. Burgess</i>	20
B. EBCI Actions Post-Trial	22
V. Conclusion	23

### **I. Introduction**

The National Park Service (“NPS”) acknowledges that Native American tribes have deep “historical, cultural, and religious” ties to the lands that the NPS was created to conserve.<sup>1</sup> The national park system was established through the National Park Service Organic Act of 1916 (“Organic Act”) to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>2</sup> However, in the process of conservation, the new legal regime stripped away the historic uses of these ancestral lands from many Native American tribes. In most national parks,

---

\* J.D. Candidate, May 2019, The University of Tennessee College of Law; B.A. Political Science, 2015, The University of Memphis. I am grateful to the Eastern Band of Cherokee Indians and James W. Kilbourne, Jr., for providing sources and research on this topic. I would also like to thank Professor Becky Jacobs for her guidance in writing this article.

<sup>1</sup> NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, MANAGEMENT POLICIES 2006 § 1.11 (2006), [https://www.nps.gov/policy/MP\\_2006.pdf](https://www.nps.gov/policy/MP_2006.pdf) [<https://perma.cc/Z3YW-9B7B>].

<sup>2</sup> National Park Service Organic Act of 1916, Pub. L. 64-235, 39 Stat. 535 (1916).

tribes could not gather traditional plants as it was deemed to contravene the conservation mandate.<sup>3</sup> A few tribes were able to gather plants either through prior treaties, congressional acts, presidential proclamations, memoranda of understanding, or even by nonenforcement of the regulations. However, in June 2016, after persistent efforts by tribes, the NPS enacted a final rule that enables federally-recognized tribes to enter into agreements with individual national parks with which the tribe has a historic connection to gather traditional plants.<sup>4</sup> This rule was opposed by environmental and watchdog groups that questioned the NPS's authority to promulgate such a rule.

This article begins by discussing the treaties, park enabling acts, and other agreements that give rise to tribal gathering rights within national parks. It next chronicles the evolution of NPS regulations and policy mindsets of NPS-tribal relations and how these mindsets affected tribal gathering rights. Following the section on historical regulations is an analysis of the 2016 final rule and criticisms thereof. This article concludes with a case study of the Eastern Band of Cherokee Indians, the first tribe to allocate funds for an environmental assessment, as required by the new rule, to gather sochan in the Great Smoky Mountains National Park ("GSMNP"), their relationship with the GSMNP, and how this struggle fits into the larger framework of tribal gathering rights.

## II. Historical Gathering Rights in National Parks

The national park system has come to symbolize some of the great ideals and cultural values of America. Likewise, the founding of the park system is sometimes viewed through rose-tinted lenses, and the parks are seen as a preservation of Native American cultural values, when, in actuality, it was often the exact opposite:

The national parks of the United States began by rescuing from the immediate dangers of private exploitation certain areas which were climax examples of Nature's scenic achievements.

With rapid expansion of frontiers to the end that European culture not only replaced that of the red man but actually altered the physical appearance of his environment, the national parks were quickly projected into a larger sphere of purpose.<sup>5</sup>

The NPS was created to preserve the natural wonders of the country.<sup>6</sup> However, many of these natural wonders also hold great cultural and religious significance to Native American peoples as part of their ancestral lands.<sup>7</sup> The historical relationships between Native American tribes and the NPS has been

---

<sup>3</sup> See Preservation of Public Property, Natural Features and Curiosities, 1 Fed. Reg. 672, 673 (June 27, 1936).

<sup>4</sup> Preservation of Natural, Cultural and Archeological Resources, 36 C.F.R. §§ 2.1, 2.6 (2017).

<sup>5</sup> GEORGE M. WRIGHT ET AL., U.S. DEP'T OF THE INTERIOR, FAUNA OF THE NATIONAL PARKS OF THE UNITED STATES: A PRELIMINARY SURVEY OF FAUNAL RELATIONS IN NATIONAL PARKS I (1933).

<sup>6</sup> National Park Service Organic Act of 1916, Pub. L. 64-235, 39 Stat. 535 (1916).

<sup>7</sup> Jeanette Wolfley, *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 Nat. Resources J. 55, 66 (2016).

characterized as “ongoing antagonism.”<sup>8</sup> Tribes and other communities were often removed from their ancestral homelands in order to preserve that land as a national park.<sup>9</sup> “Uninhabited wilderness had to be created before it could be preserved,” and the national park system has benefited from the erosion of Indian country.<sup>10</sup>

Native American tribes have largely been excluded from the traditional uses of lands within national parks. These traditional uses include ceremonial and religious uses, hunting, fishing, and traditional plants gathering. Focusing on plant gathering, several tribes have been able to maintain (or attempt to maintain) their rights to this traditional activity through treaties, congressional and presidential acts, and agreements with the NPS.

### A. Treaties

Many treaties with Native tribes retained certain usufructuary rights to the lands ceded to the United States. Some tribal claims for gathering traditional plants in national parks have been based upon these treaties with varying success. These rights are generally found in one of two types of treaties: (1) treaties ceding land to the U.S. government, as with the Blackfoot Nation,<sup>11</sup> or (2) treaties establishing Indian reservations, as in the case of the Shoshone and Bannock tribes.<sup>12</sup> These treaties were drafted years before the land was considered for national park status. Treaties sometimes would only explicitly address hunting and fishing rights, but these rights have been interpreted expansively to include broad hunting, fishing, and gathering rights as these usufructuary rights were part of the original Indian title to the land.<sup>13</sup> According to the Indian law canons of construction,<sup>14</sup> only the restrictions specifically enumerated within the treaty applied.<sup>15</sup>

As the initial national parks were created, existing treaties posed a problem to early NPS officials as the treaties created a foothold for tribes to claim usufructuary rights within parks at a time in history when the general public began “viewing Indian inhabitants as a blight on the landscape of true

---

<sup>8</sup> *Id.* at 57.

<sup>9</sup> Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 483 n.37 (2007) (noting the dispossession of fishermen from Isle Royale National Park and mountaineers from the Great Smoky Mountains National Park in addition to the dispossession of Native American tribes).

<sup>10</sup> *Id.* at 483–84 (quoting MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 4 (1999)).

<sup>11</sup> Agreement with the Indians of the Blackfoot Indian Reservation in Montana art. 1, Blackfoot-U.S., Sept. 26, 1895, 29 Stat. 353, 354.

<sup>12</sup> Treaty with the Shoshonees [sic] and Bannacks [sic], July 3, 1868, 15 Stat. 673.

<sup>13</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.04(2)(a) (Nell Jessup Newton ed., 2012); see also Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 68, 100–04 (2015).

<sup>14</sup> The Indian law canons of construction are unique legal principles used for interpreting Indian treaties and statutes. See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, at § 2.02.

<sup>15</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, at § 18.04(2)(a).

wilderness.”<sup>16</sup> In response to this “Indian problem,” park officials continuously complained to officials in Washington, D.C. about the “destruction” of natural resources that accompanied the hunting trips, which park officials characterized as an “unmitigated evil.”<sup>17</sup>

In 1895, the struggling Blackfeet Nation was forced to sell the Backbone of the World to the United States government in order to stave off possible starvation.<sup>18</sup> The Backbone of the World, or *Mistakis*, refers to the mountains on the western portion of the Blackfeet Indian Reservation that held cultural and spiritual significance to the tribe.<sup>19</sup> The Blackfeet attempted to maintain certain usufructuary rights to the land.<sup>20</sup> The agreement contained the stipulation that the Blackfeet shall have “the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States” and cut and remove wood and timber, hunt, and fish.<sup>21</sup> The land later became Glacier National Park, and the tribal rights to hunt and gather within the park became an ongoing battle.<sup>22</sup> The Department of the Interior’s Office of the Solicitor General issued an opinion in 1916 that those rights were terminated when the national park was formed.<sup>23</sup> The opinion relied on *Ward v. Race Horse*, wherein the Supreme Court determined that a similar provision in an 1868 treaty that the Bannock Tribe could hunt on the “unoccupied lands of the United States” was terminated upon the admission of Wyoming as a state.<sup>24</sup> Likewise, in the view of the Department of the Interior, a national park is not public land because the government cannot sell it. Therefore, the establishment of Glacier National Park meant that the land referenced in the 1896 cession was no longer public land.<sup>25</sup> The issue of hunting and gathering in the park evolved over the years with multiple court cases, and, several times, it culminated in armed stand-offs.<sup>26</sup> The dispute continues today, and it is still rooted in the 1896 treaty.<sup>27</sup>

The dispute over Indian treaty rights and national parks also played out between Yellowstone National Park and the Shoshone, Bannock, and Sheep Eaters tribes.<sup>28</sup> *Race Horse* was a test case brought as a compromise between the

---

<sup>16</sup> Isaac Kantor, *Ethnic Cleansing and America’s Creation of National Parks*, 28 Pub. Land & Resources L. Rev. 41, 48 (2007).

<sup>17</sup> Letter from Capt. Moses Harris, Superintendent, Yellowstone Nat’l Park, to Henry L. Muldrow, First Assistant Sec’y of the Interior (Feb. 12, 1889) reprinted in MOSES HARRIS, REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK, 1889 15–16 (1889) as quoted in MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 63 (1999).

<sup>18</sup> MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 80 (1999).

<sup>19</sup> *Id.* at 73–74.

<sup>20</sup> *Id.* at 80.

<sup>21</sup> Agreement with the Indians of the Blackfeet Indian Reservation in Montana art. 1, Blackfeet-U.S., Sept. 26, 1895, 29 Stat. 353, 354.

<sup>22</sup> SPENCE, *supra* note 18, at 88–89.

<sup>23</sup> *Id.* at 90.

<sup>24</sup> *Ward v. Race Horse*, 163 U.S. 504 (1896) (holding that a state was not “unoccupied lands”).

<sup>25</sup> SPENCE, *supra* note 18, at 90.

<sup>26</sup> Wolfley, *supra* note 7, at 61; see SPENCE, *supra* note 18, at 91–100.

<sup>27</sup> Wolfley, *supra* note 7, at 61.

<sup>28</sup> See SPENCE, *supra* note 18, at 41–70.

State of Wyoming, the Bureau of Indian Affairs, and the Bannock Tribe. The focus of the test case was to decide the Tribe's ability to hunt in Yellowstone.<sup>29</sup> Race Horse, a member of the Bannock Tribe, agreed to participate in the case and hunted seven elk outside of Jackson Hole, WY prior to turning himself in to law enforcement.<sup>30</sup> The U.S. Circuit Court for the District of Wyoming concluded that the Fort Bridger Treaty of 1868<sup>31</sup> guaranteed Race Horse the right to hunt on Wyoming's public lands.<sup>32</sup> Following the circuit court's decision, the Bannock and Shoshone tribes made plans to resume their hunting trips through Yellowstone, and Bureau of Indian Affairs Agent Thomas B. Teter urged the government to negotiate a new agreement that would financially compensate the tribes in exchange for the tribes terminating their rights within the park.<sup>33</sup> However, before the negotiations could begin or the hunting trip could commence, the Wyoming attorney general appealed the case to the U.S. Supreme Court. The Supreme Court reversed the circuit court's decision, holding that the treaty was never intended to be in force indefinitely.<sup>34</sup> The Court noted, "[T]he march of advancing civilization foreshadowed the fact that the wilderness. . . was destined to be occupied and settled by the white man."<sup>35</sup> The right to hunt on unoccupied land existed only "so long as the necessities of civilization did not require otherwise."<sup>36</sup> The Court's decision shaped the policies of the national park system and the future NPS when dealing with existing treaties.<sup>37</sup>

Alternatively, other tribes have had their rights restored. The Apostle Islands National Lakeshore was established in 1970 on lands ceded as part of the 1854 treaty at La Pointe, which reserved the hunting and fishing rights of the Chippewas.<sup>38</sup> Following protracted legal battles, the signatory tribes had their usufructuary rights confirmed through an out-of-court agreement.<sup>39</sup> These rights included the right to traditional gathering.<sup>40</sup>

## B. Congressional Acts and Presidential Proclamations

Several lands within the NPS's purview allow tribal traditional gathering due to the original enabling acts passed by Congress or the original presidential

---

<sup>29</sup> *Id.* at 67; *see generally* Ward v. Race Horse, 163 U.S. 504 (1896).

<sup>30</sup> SPENCE, *supra* note 18, at 67.

<sup>31</sup> Treaty with the Shoshonees [sic] and Bannacks [sic], July 3, 1868, 15 Stat. 673.

<sup>32</sup> *In re* Race Horse, 70 F. 598 (C.C.D. Wyo. 1895), *rev'd sub nom.* Ward v. Race Horse, 163 U.S. 504 (1896); SPENCE, *supra* note 18, at 67.

<sup>33</sup> SPENCE, *supra* note 18, at 67.

<sup>34</sup> *Race Horse*, 163 U.S. at 509.

<sup>35</sup> *Id.* at 508–09.

<sup>36</sup> *Id.* at 509.

<sup>37</sup> Several national parks, including Glacier National Park and Yellowstone National Park, were created before the establishment of the National Park Service. This case was decided twenty years before the founding of the NPS.

<sup>38</sup> 1854 Treaty of La Pointe art. 11, Chippewas-U.S., Sept. 30, 1854, 10 Stat. 1109 (stating the tribes "shall have the right to hunt and fish therein").

<sup>39</sup> *See generally* DOUGLAS P. THOMPSON, 1854 TREATY AUTH., THE RIGHT TO HUNT AND FISH THEREIN: UNDERSTANDING CHIPPEWA TREATY RIGHTS IN MINNESOTA'S 1854 CEDED TERRITORY (2017).

<sup>40</sup> *Id.*

proclamations creating national parks. This section reviews several of the acts that deal specifically with traditional plant gathering and other traditional usage rights. This section is not intended to be an exhaustive analysis of all Native traditional use rights within the national park system but instead provides a broad overview of some parks that have specific tribal gathering rights.

One of the earliest examples of reserved rights within an enabling act was the 1919 establishment of the Grand Canyon National Park.<sup>41</sup> The legislation, that created the park, retained the existing rights of the Havasupai Tribe to occupy the bottom of the Canyon of Cataract Creek and authorized the Secretary of the Interior to issue permits to tribal members to use other lands in the park for agricultural purposes.<sup>42</sup> In 1975, as part of the Grand Canyon National Park Enlargement Act, 185,000 acres were returned the Havasupai Tribe for “traditional purposes, including. . .the gathering of, or hunting for, wild or native foods, materials for paints and medicines.”<sup>43</sup>

Some of the enabling acts were very specific about which traditional plants could be gathered. In 1936, when President Franklin D. Roosevelt created Organ Pipe Cactus National Monument, he specifically reserved the rights of the “Indians of the Papago<sup>44</sup> Reservation” (the Tohono O’odham tribe) to “pick the fruits of the organ pipe cactus and other cacti” within the national monument under regulations to be made by the Secretary of the Interior.<sup>45</sup> Similarly, in the enabling act for El Malpais National Monument in New Mexico, Congress, “[i]n recognition of the past use” of the land, reserved the rights of “Indian people for traditional cultural and religious purposes” and explicitly reserved the right for the “harvesting of pine nuts.”<sup>46</sup>

Other acts did not explicitly reserve the right of traditional gathering. For example, in 1931, Congress enabled the President to designate Canyon de Chelly on the Navajo Indian Reservation<sup>47</sup> in northeastern Arizona as a national monument.<sup>48</sup> This enabling act reserved broad rights and interests to the Navajo Nation to “all lands and minerals, including oil and gas, and the surface use of such lands for agricultural, grazing, and other purposes” within Canyon de Chelly National Monument.<sup>49</sup> Other examples include the Hualapai Tribe and the Crow Tribe, which retained hunting and fishing rights within Lake Mead National Recreation Area<sup>50</sup> and Bighorn Canyon National Recreation Area<sup>51</sup> respectively.<sup>52</sup>

---

<sup>41</sup> Act of Feb. 26, 1919, Pub. L. No. 65-277, 40 Stat. 1175 (repealed 1975).

<sup>42</sup> *Id.* at § 4.

<sup>43</sup> Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228i(b)(1) (2012); King, *supra* note 9, at 491 n.81.

<sup>44</sup> This article uses the preferred name of “Tohono O’odham” but retains the name “Papago” in quotations.

<sup>45</sup> Proclamation No. 2232, 50 Stat. 1827 (Apr. 13, 1937).

<sup>46</sup> Act of Dec. 31, 1987, Pub. L. No. 100-225, 101 Stat. 1539 § 507(a) (codified at 16 U.S.C. § 460uu-47).

<sup>47</sup> The tribe changed the official name of the reservation to “Navajo Nation” in 1969.

<sup>48</sup> Act of Feb. 14, 1931, Pub. L. No. 71-667, 46 Stat. 1161.

<sup>49</sup> *Id.* at § 2.

<sup>50</sup> Act of Oct. 8, 1964, Pub. L. No. 88-639, 78 Stat. 1039 § 3.

<sup>51</sup> Act of Oct. 15, 1966, Pub. L. No. 89-664, 80 Stat. 913 § 4.

As another example, in 1974 Congress established the Big Cypress National Preserve and explicitly reserved the rights of the Miccosukee Tribe and Seminole Tribe to “continue their usual and customary use and occupancy. . .including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonials.”<sup>53</sup> On occasion, Congress has set aside only very specific rights, such as the right of “quarrying of the red pipestone” at Pipestone National Monument to “Indians of all tribes.”<sup>54</sup>

Congress has, on occasion, returned rights to tribes years after the establishment of the national park lands.<sup>55</sup> While tribal traditional use rights were not included in the original 1916 Presidential Proclamation establishing Bandelier National Monument,<sup>56</sup> Congress authorized traditional gathering rights within the monument in 2000 to the Pueblo of San Ildefonso and the Pueblo of Santa Clara following the Cerro Grande Fire.<sup>57</sup> Similarly, in recognition that the tribe had occupied their “ancestral homeland” since “time immemorial,”<sup>58</sup> Congress gave the Timbisha Shoshone Tribe rights to continue traditional practices in special use areas of Death Valley National Park.<sup>59</sup>

### C. Agreements

Beginning in the 1990s, several individual parks entered into agreements with tribes to allow traditional gathering and other accommodations. These agreements usually premised their authority on the American Indian Religious Freedom Act;<sup>60</sup> although some opponents assert that this authority may have been misplaced.<sup>61</sup> These agreements typically took the form of written memoranda of understanding, specific sections within the General Management Plans (“GMPs”),

---

<sup>52</sup> Although these enabling acts use similar language to the treaties discussed in Section II(A) reserving hunting and fishing rights, the language of the enabling acts would likely not be interpreted expansively to include other traditional use rights in the same manner as the treaty language. The courts use several canons specific to the interpretation of Indian treaties to account for factors such as the legal understanding of tribal signatories, language barriers, inequality of bargaining power, historical context, and cultural and legal traditions of the tribes. *See generally* Charlton, *supra* note 13, at 85–93. These concerns are not present in the 20th century statutes the same way they were in the 19th century treaties. These enabling acts were not the result of unequal treaty negotiations, and therefore a court is unlikely to interpret the enabling acts to expansively include gathering rights unless it was specifically enumerated.

<sup>53</sup> Act of Oct. 11, 1974, Pub. L. No. 93-440, 88 Stat. 1258 § 5.

<sup>54</sup> 16 U.S.C. § 445c(c) (2012).

<sup>55</sup> *See, e.g.*, Cerro Grande Fire Supplemental, Pub. L. No. 106-246, § 2101, 114 Stat. 592 (2000); Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, § 2(1), 114 Stat. 1875 (2000).

<sup>56</sup> Proclamation No. 1322, 39 Stat. 1764 (Feb. 11, 1916).

<sup>57</sup> Cerro Grande Fire Supplemental, Pub. L. No. 106-246, § 2101, 114 Stat. 592 (2000).

<sup>58</sup> Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, § 2(1), 114 Stat. 1875 (2000).

<sup>59</sup> *Id.* at § 5(e)(1), 114 Stat. at 1879.

<sup>60</sup> American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012).

<sup>61</sup> PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, NATIVE AMERICAN PLANT GATHERING IN THE NATIONAL PARK SYSTEM 8–9 (2010) [hereinafter “PEER PLANT GATHERING”], [https://www.peer.org/assets/docs/nps/8\\_11\\_10\\_Indian\\_Plant\\_Take\\_from\\_National\\_Parks.pdf](https://www.peer.org/assets/docs/nps/8_11_10_Indian_Plant_Take_from_National_Parks.pdf) [https://perma.cc/9HHU-DEWN]; *see also infra* Section III (discussing AIRFA).

permit programs, or, sometimes, by simply turning a blind eye (nonenforcement of the regulations).

Some parks established memoranda of understanding with the local tribes. These memoranda were generally signed by the superintendents of the specific park and were not the result of a regional or national NPS directive. As these memoranda were not widely published, it is unclear how many were signed and when or if they have expired.<sup>62</sup> Some of the parks and tribes that entered into memoranda of understanding include Redwood National Park (Yurok Tribe); Yosemite National Park (The American Indian Council of Mariposa County, Inc.); Mount Rainier National Park (Nisqually Tribe); Zion National Park together with Cedar Breaks National Monument and Pipe Springs National Monument (Kaibab Band of Paiute Indians, Moapa Band of Paiute Indians, and the Paiute Tribe of Utah); Lassen Volcanic National Park (Mooretown Rancheria of Maidu Indians); and Hawaii Volcanoes National Park (Native Hawaiian ancestry).<sup>63</sup>

Another way that individual parks have *sua sponte* created gathering agreements are by writing the agreements into the park's GMP. Zion National Park's GMP, for example, incorporates the memorandum of understanding and incorporates it as part the GMP.<sup>64</sup> These agreements and consultations with tribes are generally classified as "ethnographic resources" in the GMPs.<sup>65</sup>

Another form of agreement that individual parks have implemented are permit systems. An example of this permit system exists at Walnut Canyon National Monument where the NPS issued permits to Navajo tribal members to gather rock mat (*Petrophyllum caespitosum*) from cliff faces.<sup>66</sup> A similar permit process is used in Saguaro National Park. When the eastern and western portions of Saguaro National Monument<sup>67</sup> were established by President Hoover<sup>68</sup> and President Kennedy<sup>69</sup> respectively, their proclamations did not reserve the gathering rights of the Tohono O'odham Nation as had been done with Organ Pipe Cactus National Monument.<sup>70</sup> In June 1962, the first summer following the new designation of the Tucson Mountain District portion of the monument, between 225 and 255 gatherers from the Tohono O'odham Nation arrived for

---

<sup>62</sup> PEER PLANT GATHERING, *supra* note 61, at 8.

<sup>63</sup> *Id.*; see also King, *supra* note 9, at 492 n.86. The memoranda of understanding are usually discovered by whistleblowers or Freedom of Information Act ("FOIA") requests. These sources list these parks as having such agreements.

<sup>64</sup> NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, ZION NATIONAL PARK: GENERAL MANAGEMENT PLAN 8-9 (2001) ("[The NPS and the tribes have] jointly developed a memorandum of understanding that allows, under prescribed conditions, tribal members to gather plants found within the park that are used for traditional and customary purposes.").

<sup>65</sup> David Ruppert, *Rethinking Ethnography in the National Park Service*, 26 GEORGE WRIGHT F., no. 3, 2009, at 51, 52 (2009), <http://www.georgewright.org/263.pdf> [<https://perma.cc/KM7G-NYZE>]; PEER PLANT GATHERING, *supra* note 61, at 5.

<sup>66</sup> PEER PLANT GATHERING, *supra* note 61, at 5.

<sup>67</sup> The original Saguaro National Monument is the present-day Rincon Mountain District of Saguaro National Park (SNP). The western portion is the present-day Tucson Mountain District of SNP. The monument was changed to a national park in 1994.

<sup>68</sup> Proclamation No. 2031, 47 Stat. 2557 (Mar. 1, 1933).

<sup>69</sup> Proclamation No. 3439, 76 Stat. 1437 (Nov. 15, 1961).

<sup>70</sup> See *supra* Section II(B) (discussing Organ Pipe Cactus National Monument).

their annual harvest.<sup>71</sup> Park officials tentatively allowed the harvest, but they began discussions with tribal leaders about discontinuing the harvest pursuant to federal regulations.<sup>72</sup> The Secretary of the Interior, Stewart Udall, approved of the harvest when he later learned of it, and he amended the regulations to allow for the gathering.<sup>73</sup> The amended regulation stated that the prohibition on plant gathering in the national park system “shall not apply to the Indians of the Papago Reservation in Arizona, who are permitted to pick and remove from the Tucson Mountain District of Saguaro National Monument the fruits of the Saguaro Cactus and other cacti.”<sup>74</sup> The regulation also stated that there would be a written agreement between the park superintendent and the Chairman of the Papago Tribal Council as to the logistics and details of the harvest.<sup>75</sup> The extensive rewrite of the NPS regulation in 1966 “apparently unintentionally” omitted the saguaro fruit gathering provision,<sup>76</sup> but a Solicitor’s opinion determined that the regulations were worded in a way that would allow for the gathering to continue.<sup>77</sup> Clans and families within the Tohono O’odham have traditional ties to very specific stands of saguaros in the park.<sup>78</sup> Since the Solicitor’s opinion, NPS has annually issued permits to Tohono O’odham families to gather saguaro fruit at their family’s specific traditional saguaro sites within the park.<sup>79</sup>

---

<sup>71</sup> REBECCA S. TOUPAL, ET AL., TRADITIONAL SAGUARO HARVEST IN THE TUCSON MOUNTAIN DISTRICT, SAGUARO NATIONAL PARK 33 (2006), <http://arizona.openrepository.com/arizona/handle/10150/279692> [<http://hdl.handle.net/10150/279692>].

<sup>72</sup> *Id.* at 33–34; NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, RESOURCE BRIEF: TUCSON MOUNTAIN DISTRICT 1 (2015), <https://www.nps.gov/sagu/learn/historyculture/upload/Saguaro-Fruit-A-Traditional-Harvest-Brief.pdf> [<https://perma.cc/UE6L-NBND>].

<sup>73</sup> TOUPAL, *supra* note 71, at 34; NAT’L PARK SERV., *supra* note 72, at 1.

<sup>74</sup> Preservation of Public Property, Natural Features and Curiosities; Picking of Cactus Fruit at Saguaro National Monument by Indians of Papago Reservation, 27 Fed. Reg. 8830 (Sept. 5, 1962) [hereinafter “1962 Preservation of Public Property”] (to be codified at 36 C.F.R. pt. 1.2).

<sup>75</sup> *Id.*; see also Memorandum of Understanding between Paul A. Judge, Superintendent, Saguaro Nat’l Monument, and Eugene J. Johnson, Chairman, Papago Tribal Council (June 6, 1963), in SAGUARO NAT’L PARK, NAT’L PARK SERV., PLANT GATHERING FOR TRADITIONAL PURPOSES: ENVIRONMENTAL ASSESSMENT app. B (2018) <https://parkplanning.nps.gov/showFile.cfm?projectID=71180&MIMEType=application%252Fpdf&filename=Saguaro%20NP%20Plant%20Gathering%20for%20Traditional%20Purposes%20EA%2Epdf&sfid=326191> [<https://perma.cc/25E2-BEJ7>].

<sup>76</sup> TOUPAL, *supra* note 71, at 35; see also Preservation of Public Property, Natural Features, Curiosities, and Resources, 31 Fed. Reg. 16,650, 16,653 (Dec. 29, 1966) [hereinafter “1966 Preservation of Public Property”] (to be codified at 36 C.F.R. pt. 1.).

<sup>77</sup> NAT’L PARK SERV., *supra* note 72, at 1.

<sup>78</sup> LLOYD BURTON, WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN THE MANAGEMENT OF PUBLIC LANDS AND RESOURCES 211 (2002).

<sup>79</sup> *Id.* at 212–213. The Tohono O’odham Nation has recently begun the process of formalizing the permitting process under the purview of the new final rule. On March 7, 2018, the tribe sent the formal request to the superintendent. Letter from Edward D. Manuel, Chairman, Tohono O’odham Nation, to Leah McGinnis, Superintendent, Saguaro Nat’l Park (Mar. 7, 2018) in SAGUARO NAT’L PARK, *supra* note 76, at app. C. A few months later, the NPS published the environmental assessment and the Finding of No Significant Impact was signed on May 30, 2018. Saguaro Nat’l Park, Nat’l Park Serv., Plant Gathering for Traditional Purposes: Finding of No Significant Impact (2018),

The final method of implementing traditional gathering is for local park officials to quietly endorse the gathering vis-à-vis non-enforcement of regulations. In other words, park officials turn a blind eye to violations by tribal members. The organization Public Employees for Environmental Responsibility reports that, in 2009, the acting superintendent of Yosemite National Park told a group of Native Americans that they could gather as they please within the park and that they did not need to file any reports or acquire permits.<sup>80</sup> A similar agreement was in place with the GSMNP and the Eastern Band of Cherokee Indians until 2002.<sup>81</sup>

### III. Shifting Legal Landscape

The National Park System has had a general prohibition against gathering plants within parks since the early years of the system. However, during the 1930s, the political era of the Indian New Deal was at its height, and this prompted many of the proposed national parks to be established with enabling acts that reserved gathering rights to tribes.<sup>82</sup> This was followed by a several-decade long down-turn in tribal rights within the park system.<sup>83</sup>

The NPS regulated the gathering of plants in the first iteration of the NPS rules in 1936 with a general prohibition.<sup>84</sup> “The destruction, injury, defacement, removal or disturbance in any way. . .of any tree, flower, [or] vegetation. . .is prohibited: *Provided*, [t]hat flowers may be gathered in small quantities when. . .their removal will not impair the beauty of the park or monument.”<sup>85</sup> The regulations later allowed for park visitors to pick and eat specific fruits and berries that the park superintendent had approved, but there was still a ban on removing these plants from the parks.<sup>86</sup> The definition was also expanded to

<https://parkplanning.nps.gov/showFile.cfm?projectID=71180&MIMETType=application%252Fpdf&filename=SAGU%20Plant%20Gathering%20for%20Tradl%20Purposes%20FONSI%20Signed%20May%2030%202018%2Epdf&sfid=329470> [<https://perma.cc/LA86-4S5A>]. See generally *infra* Section III(A) (discussing the process under the new rule).

<sup>80</sup> PEER PLANT GATHERING, *supra* note 61, at 5; Letter from Jeff Ruch, Exec. Dir, PEER, to Mary Kendall, Acting Inspector Gen., Dep’t of the Interior (Aug. 11, 2010), [https://www.peer.org/assets/docs/nps/8\\_11\\_10\\_PEER\\_complaint\\_to\\_Interior\\_OIG\\_Indian\\_plant-gather.pdf](https://www.peer.org/assets/docs/nps/8_11_10_PEER_complaint_to_Interior_OIG_Indian_plant-gather.pdf) [<https://perma.cc/LH8K-NUW3>] (complaining of official noncompliance by NPS and requesting an official investigation). Several facts are unclear from the report such as the tribal identity of the group, whether the acting superintendent’s comments were regarding the 1997 MoU or a new agreement, and also specific details of the meeting. Because of the nature of these meetings and agreements, PEER (a public employees whistleblower/watchdog organization) is often the sole source of information.

<sup>81</sup> Brief for Eastern Band of the Cherokee Indians as Amicus Curiae at 4, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) [hereinafter “EBCI Amicus Brief”] (on file with author); see also discussion *infra* Section IV.

<sup>82</sup> King, *supra* note 9, at 485; see *supra* Section II(B).

<sup>83</sup> See King, *supra* note 9, at 485–86.

<sup>84</sup> See Preservation of Public Property, Natural Features and Curiosities, 1 Fed. Reg. 672, 673 (June 27, 1936).

<sup>85</sup> *Id.*

<sup>86</sup> Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 Fed. Reg. 45,024, 45,025 (July 12, 2016) (noting that picking and eating native fruits and berries had been allowed “since at least 1960”); see 1962 Preservation of Public Property, 27 Fed. Reg. at 8830.

include “plant matter and direct or indirect products thereof, including but not limited to petrified wood, flower, cone or other fruit.”<sup>87</sup>

In the Self-Determination Era,<sup>88</sup> Congress passed the American Indian Religious Freedom Act (“AIRFA”).<sup>89</sup> AIRFA was aimed at rectifying “such laws [that] were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions.”<sup>90</sup> It also directed the President to have all administrative departments evaluate their regulations, policies, and procedures and report back to Congress any changes made and any legislative action needed.<sup>91</sup> As part of the review, the Department of the Interior’s Office of the Solicitor sent a memorandum to the directors of the NPS, Fish and Wildlife Service, and the Heritage Conservation and Recreation Service which detailed how AIRFA would impact each of their respective agencies.<sup>92</sup> The Associate Solicitor determined that, based on the legislative record, there is “an overriding governmental interest in the protection of park resources and values” and that the NPS specifically should seek congressional guidance on any conflicts.<sup>93</sup> The next major updates to the NPS regulations included the following analysis regarding AIRFA:

The [National Park] Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations. The Service intends to provide reasonable access to, and use of, park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is limited by law and regulations from authorizing the consumptive use of park resources.<sup>94</sup>

The NPS regulations specifically state that none of the regulations “authoriz[e] the taking, use or possession of. . .plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights”<sup>95</sup> and the preamble reiterated that the NPS is limited by law in authorizing consumptive use by Native Americans.<sup>96</sup>

During the 1990s, President Bill Clinton’s administration established government-to-government relationships with tribes and directed that federal land

---

<sup>87</sup> 1966 Preservation of Public Property, 31 Fed. Reg. at 16,653.

<sup>88</sup> King, *supra* note 9, at 486.

<sup>89</sup> American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012).

<sup>90</sup> American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) [hereinafter “AIRFA Resolution”].

<sup>91</sup> AIRFA Resolution § 2.

<sup>92</sup> Memorandum from James D. Webb, Assoc. Solicitor, Office of the Solicitor, U.S. Dep’t of the Interior, to the Director, Nat’l Park Serv., et al., (Sept. 21, 1978), [https://www.peer.org/assets/docs/nps/8\\_11\\_10\\_Legal\\_opinion.pdf](https://www.peer.org/assets/docs/nps/8_11_10_Legal_opinion.pdf) [<https://perma.cc/63WY-KKR2>].

<sup>93</sup> *Id.* at 5.

<sup>94</sup> General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,255 (June 30, 1983).

<sup>95</sup> *Id.* at 30,282.

<sup>96</sup> *Id.* at 30,264.

management must consult with tribal governments.<sup>97</sup> During this time, many of the traditional plant gathering memoranda of understanding were created.<sup>98</sup> Opponents argued that, since Congress found it necessary to reserve traditional plant gathering rights in the park enabling acts, allowing traditional gathering must therefore be outside of the NPS's statutory authority of "conserve[ing] the scenery and the natural. . . objects and the wild life therein"<sup>99</sup> for the NPS to attempt to enter into such agreements.<sup>100</sup> Furthermore, opponents contended that the AIRFA citations in the memoranda of understanding were misplaced based on the 1978 Department of the Interior's memorandum.<sup>101</sup>

In 2006, the NPS officially recognized the parks as ancestral lands for the first time.<sup>102</sup> The NPS stated, "As the ancestral homelands of many American Indian tribes, parks protect resources, sites, and vistas that are highly significant for the tribes."<sup>103</sup> This was the first official recognition by the NPS that many national parks are the ancestral lands of Native Americans; no previous NPS document had ever acknowledged this fact.<sup>104</sup> "Within the constraints of legal authority and its duty to protect park resources, the [NPS] will work with tribal governments to provide access to park resources and places that are essential for the continuation of traditional American Indian cultural or religious practices."<sup>105</sup> This language begins the shift away from the comments of the 1983 regulations that NPS is "limited by law and regulations from authorizing the consumptive use of park resources."<sup>106</sup>

#### A. 2016 Regulatory Changes

In 2009, Jon Jarvis was appointed and confirmed as the Director of the NPS.<sup>107</sup> Soon after becoming director, Mr. Jarvis began to work towards changing the regulations that prohibited traditional gathering.<sup>108</sup> "Unfortunately, the NPS regulations prohibit gathering by tribes. I think that is wrong. I know that the traditions practiced by the tribes have never been broken. It is my mission to fix the problem during my time as [d]irector."<sup>109</sup> Under Director Jarvis, the NPS set out to draft new regulations and held seven tribal consultation meetings during the summer of 2010 in the contiguous United States regarding the proposed

<sup>97</sup> Wolfley, *supra* note 7, at 62–64.

<sup>98</sup> See *supra* Section II(C); PEER PLANT GATHERING, *supra* note 61, at 7.

<sup>99</sup> National Park Service Organic Act of 1916, Pub. L. 64-235, 39 Stat. 535 (1916).

<sup>100</sup> PEER PLANT GATHERING, *supra* note 61, at 8–9.

<sup>101</sup> *Id.*; see Webb, *supra* note 92.

<sup>102</sup> Wolfley, *supra* note 7, at 66.

<sup>103</sup> NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES 2006 § 1.11 (2006), [https://www.nps.gov/policy/MP\\_2006.pdf](https://www.nps.gov/policy/MP_2006.pdf) [<https://perma.cc/Z3YW-9B7B>].

<sup>104</sup> Wolfley, *supra* note 7, at 66 n.61.

<sup>105</sup> NAT'L PARK SERV., *supra* note 103, at § 1.11.

<sup>106</sup> General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. at 30,255.

<sup>107</sup> 155 Cong. Rec. S9860 (2009).

<sup>108</sup> Jon Jarvis, Dir., Nat'l Park Serv., Remarks at Consultation Meeting with Eastern Band of Cherokee Indians 3 (July 16, 2010), (minutes available at [https://www.peer.org/assets/docs/nps/7\\_20\\_11\\_Cherokee\\_meeting\\_minutes.pdf](https://www.peer.org/assets/docs/nps/7_20_11_Cherokee_meeting_minutes.pdf) [<https://perma.cc/3K3J-GG5C>]).

<sup>109</sup> *Id.*

regulations.<sup>110</sup> These meetings were attended by 150 tribal members from 50 tribes.<sup>111</sup> Additionally, the NPS contacted over 70 federally-recognized tribes in Alaska, gave presentations at statewide conventions in Alaska, and held a conference call with nongovernmental tribal elders.<sup>112</sup>

After several years of consultation and work, the rule was officially proposed on April 20, 2015, amending the previous regulation that prohibited plant gathering to read:

(d) This section shall not be construed as authorizing the taking, use, or possession of fish, wildlife, or plants, except for the gathering and removal for traditional purposes of plants or plant parts by members of an Indian tribe under an agreement in accordance with § 2.6, or where specifically authorized by Federal statutory law, treaty rights, or in accordance with § 2.2 or § 2.3.<sup>113</sup>

The proposed rule also included the new section 2.6, which contained definitions and the framework for entering into such an agreement with the NPS.<sup>114</sup> Two comment periods<sup>115</sup> yielded ninety comments from thirty-seven federally recognized tribes, forty private citizens, ten non-profit organizations, and three state governments.<sup>116</sup>

Following the comment period, NPS edited the language regarding the NPS-tribal agreement process and also made minor changes to the main portion of the rule.<sup>117</sup> The enacted rule states:

(d) This section shall not be construed as authorizing the taking, use, or possession of fish, wildlife, or plants for ceremonial or religious purposes, except for the gathering and removal for traditional purposes of plants or plant parts by enrolled members of

---

<sup>110</sup> Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 Fed. Reg. 45,024, 45,026 (July 12, 2016) [hereinafter “Promulgated Rule”] (to be codified at 36 C.F.R. pt. 2).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 80 Fed. Reg. 21,674, 21,680 (Apr. 20, 2015) [hereinafter “Proposed Rule”] (to be codified at 36 C.F.R. pt. 2).

<sup>114</sup> *Id.* at 21,680–81.

<sup>115</sup> The comment period was reopened in response to a lawsuit by PEER. PEER filed a Freedom of Information Act (“FOIA”) request for documents relating to the NPS’s assertions in the proposed rule regarding the environmental impact of traditional gathering, an inventory of current impacts on park resources, and a NEPA analysis. After the initial comment period closed, the NPS conceded that it did not have these documents. PEER filed suit alleging that the NPS had violated FOIA and therefore, the NPS reopened the comment period to allow for supplementary comments. Press Release, Pub. Emps. for Envtl. Responsibility, Park Service Mised the Public on Plant Harvest Plan: Public Comments Reopened Due to Unsupported Statements in Federal Register Notice (Aug. 12, 2015), <https://www.peer.org/news/news-releases/park-service-mised-the-public-on-plant-harvest-plan.html> [<https://perma.cc/QD5W-MW53>]; see Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes—Reopening of Public Comment Period, 80 Fed. Reg. 48280 (Aug. 12, 2015).

<sup>116</sup> Promulgated Rule, 81 Fed. Reg. at 45,028.

<sup>117</sup> Promulgated Rule, 81 Fed. Reg. at 45,034.

an Indian tribe in accordance with § 2.6, or where specifically authorized by federal statutory law, treaty, or in accordance with § 2.2 or § 2.3.<sup>118</sup>

The final rule also established several definitions that narrow the scope of gathering agreements.<sup>119</sup> The rule only allows for federally-recognized tribes that have a “traditional association” with a park to conduct “traditional gathering” of vascular plants or vascular plant parts for “traditional purposes.”<sup>120</sup> To establish a “traditional association,” a tribe must have a “longstanding relationship of historical or cultural significance. . . predating the establishment of the park area,” and therefore, cannot enter into agreements for other distant parks.<sup>121</sup> The NPS’s rationale for the traditional association requirement is that the entire purpose of the rule is to allow the continuance of cultural traditions on ancestral lands.<sup>122</sup> If the agreements were to extend to tribes without a traditional association, the regulation would exceed the purpose of preserving ancestral lands. The rule also requires that the gathering is “traditional gathering,” which is defined as using hand or hand tools only.<sup>123</sup> This is narrower than the broadly interpreted treaty-based gathering rights that may be applicable within a park.<sup>124</sup>

The requirement of a “traditional purpose” means that it is for a “customary activity or practice that is rooted in the history of an Indian tribe and is important to the continuation of that tribe’s distinct culture.”<sup>125</sup> Traditional purpose is not limited to merely subsistence eating, but also includes spiritual, medicinal, artistic, and crafting use.<sup>126</sup> The intent with the traditional use language is to prohibit tribal members from gathering for modern commercial use or selling to non-tribal members.<sup>127</sup> This is similarly reflected within the prohibition against gathering non-vascular plants, such as mosses, lichens, liverworts, and

---

<sup>118</sup> Preservation of Natural, Cultural and Archeological Resources, 36 C.F.R. § 2.1 (2017).

<sup>119</sup> Gathering of Plants or Plant Parts by Federally Recognized Indian Tribes, 36 C.F.R. § 2.6 (2017).

<sup>120</sup> 36 C.F.R. § 2.6(a).

<sup>121</sup> *Id.*

<sup>122</sup> Promulgated Rule, 81 Fed. Reg. at 45,027.

<sup>123</sup> 36 C.F.R. § 2.6(a).

<sup>124</sup> Compare 36 C.F.R. § 2.6(a) (“Traditional gathering does not include the use of tools or machinery powered by electricity, fossil fuels, or any other source of power except human power.”) with Charlton, *supra* note 13, at 83 (“[T]he rights reserved by the treaty are not ‘frozen’ in time. The tribe, like any non-Indian user, can utilize modern harvesting methods and engage in modern commercial type activities involving harvest natural resources.”).

<sup>125</sup> 36 C.F.R. § 2.6(a).

<sup>126</sup> NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, DRAFT COST-BENEFIT ANALYSIS AND REGULATORY FLEXIBILITY ANALYSIS: PROPOSED REGULATION TO REVISE CERTAIN SECTIONS OF 36 CFR PARTS 1 AND 2 TO ADDRESS “GATHERING OF PLANTS OR PLANT PARTS BY FEDERALLY RECOGNIZED TRIBES FOR TRADITIONAL PURPOSES” 8–9 (2016) [hereinafter “NPS COST-BENEFIT ANALYSIS”], <https://www.nps.gov/history/tribes/Documents/CostBenefitgatheringruleFINALDRAFT.pdf> [https://perma.cc/8EN7-Q5BU].

<sup>127</sup> The final NPS-tribal agreements must contain a statement that the sale or commercial use of plants is prohibited within the park; however, NPS acknowledges that it cannot regulate activity outside of a park. NPS does encourage the use of traditional plants for making traditional handicrafts, such as baskets, for commercial use, but states that NPS does have the authority to adjust the amount of plants that can be gathered if these limited commercial uses affect the park resources or values. Promulgated Rule, 81 Fed. Reg. at 45,033.

mushrooms, as the NPS only found “limited historical evidence” that these were gathered for traditional purposes, and the NPS anticipated that non-vascular plant gathering would primarily be done for commercial purposes.<sup>128</sup>

The process and requirements for a tribe entering into a gathering agreement with the NPS are delineated within the final rule.<sup>129</sup> The tribe must first submit a written request to the superintendent of the park that details the tribe’s traditional association, traditional purposes, and the plants that the tribe intends to traditionally gather.<sup>130</sup> The tribe and the park superintendent then collaborate to form a draft agreement and must receive the concurrence of the NPS regional director.<sup>131</sup> The major hurdle to entering into an NPS-tribal gathering agreement is compliance with the National Environmental Policy Act of 1969 (“NEPA”), which requires an environmental assessment (“EA”) and a Finding of No Significant Impact (“FONSI”).<sup>132</sup> The draft agreement forms the basis for the EA, and the agreement cannot be signed until there has been a FONSI.<sup>133</sup>

Once an agreement has been established, the NPS will issue a permit to the tribe, and the tribe will be responsible for monitoring the gathering activities and identifying which tribal members are authorized to gather in the park.<sup>134</sup> Although the regulation does not put a specific time period in place for the renewal of the agreements, the NPS has stated that the agreements will be valid for five years.<sup>135</sup> The NPS may terminate or suspend an agreement early for several reasons, including the violation by a tribal member of the terms of the agreement or an unanticipated adverse environmental impact.<sup>136</sup>

### 1. Criticism of the Regulations

Some groups quickly began to oppose the regulation as an “[u]njustified U-Turn” by the NPS, even before the draft rule was officially proposed.<sup>137</sup> These

---

<sup>128</sup> Promulgated Rule, 81 Fed. Reg. at 45,034.

<sup>129</sup> See generally 36 C.F.R. § 2.6.

<sup>130</sup> 36 C.F.R. § 2.6(c); AM. INDIAN LIAISON OFFICE, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, TRIBAL LEADERS GUIDE TO THE NATIONAL PARK SERVICE PLANT GATHERING REGULATION 1 (2017), [https://www.nps.gov/history/tribes/Documents/Public\\_NPSPlantGathering\\_Guide\\_July2017.pdf](https://www.nps.gov/history/tribes/Documents/Public_NPSPlantGathering_Guide_July2017.pdf) [<https://perma.cc/ULL5-7CD7>].

<sup>131</sup> 36 C.F.R. § 2.6(c)(2), (g); AM. INDIAN LIAISON OFFICE, *supra* note 130, at 1–2.

<sup>132</sup> 36 C.F.R. § 2.6(d)(2); AM. INDIAN LIAISON OFFICE, *supra* note 130, at 3; see also Promulgated Rule, 81 Fed. Reg. at 45,030 (responding to comments requesting an EA that the final rule is too broad to necessitate an EA and that it would be unneeded as the rule itself requires an individual EA before entering into an agreement).

<sup>133</sup> 36 C.F.R. § 2.6(d)(2); AM. INDIAN LIAISON OFFICE, *supra* note 130, at 3.

<sup>134</sup> 36 C.F.R. § 2.6(b), (f)(1); AM. INDIAN LIAISON OFFICE, *supra* note 130, at 3.

<sup>135</sup> Compare 36 C.F.R. § 2.6(f)(1)(xi) (“An agreement. . . must contain. . . [a] requirement that the NPS and the tribe engage in periodic reviews of the status of traditional gathering activities under the agreement through consultation[.]”) with AM. INDIAN LIAISON OFFICE, *supra* note 130, at 3 (“Agreements have a maximum duration of five years before they must be reviewed and renewed.”).

<sup>136</sup> 36 C.F.R. § 2.6(i); AM. INDIAN LIAISON OFFICE, *supra* note 130, at 3.

<sup>137</sup> PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PEER ANALYSIS OF EXISTING AND PROPOSED RULE 36 CFR 2.1: PRESERVATION OF NATURAL, CULTURAL AND ARCHEOLOGICAL RESOURCES 1 (2011) [hereinafter “PEER ANALYSIS”], [https://www.peer.org/assets/docs/nps/7\\_20\\_11\\_PEER\\_Analysis\\_Proposed\\_NPS\\_Plant\\_Rule.pdf](https://www.peer.org/assets/docs/nps/7_20_11_PEER_Analysis_Proposed_NPS_Plant_Rule.pdf) [<https://perma.cc/54WK-FTCM>].

concerns came from watchdog groups<sup>138</sup> and even from within Indian country.<sup>139</sup> Some groups, such as the Coalition to Protect America's National Parks, "support[ed], in concept, the intended policy goal underlying the proposal," but "[r]egrettably" opposed the rule itself.<sup>140</sup>

The largest and most prevalent concern questioned the NPS's authority to promulgate such a rule. The NPS is premised on the National Park Service Organic Act of 1916 ("Organic Act"), under which it is mandated to "conserve the scenery and the natural and historic objects and the wild life therein."<sup>141</sup> Several groups called into question the NPS's ability to create a regulation that appears to contravene this conservation mandate and to advocate for the consumptive use of park resources.<sup>142</sup> This argument was bolstered by the fact that Congress had previously authorized certain tribes to gather within the park system.<sup>143</sup>

The NPS responded that this rule is entirely within the conservation mandate of the Organic Act and that the NPS is not required to "preserve every individual member of every species of plant and animal and every rock, mineral, and other inorganic feature in a park area."<sup>144</sup> The NPS further responded that congressional acts do not undermine the NPS's authority but instead demonstrate "Congress's awareness that the NPS's now-longstanding regulatory limitation. . . has had a negative impact on tribes and traditional tribal cultural practices" and are not to be interpreted to mean that the NPS lacks regulatory authority.<sup>145</sup> The NPS maintains that this rule is consistent with its written interpretation of the Organic Act found within the NPS Management Policies as the rule does not create either an impairment or an unacceptable impact on the park resources.<sup>146</sup> At least one group has hinted at future litigation over this issue.<sup>147</sup>

<sup>138</sup> Corbin Hiar, *Watchdog Group Urges NPS to Kill Tribal Plant-Gathering Plan*, GREENWIRE (Aug. 13, 2015).

<sup>139</sup> Michelle Tirado, *National Park Service Does Face-Plant with New Rule on Gathering Plants*, INDIAN COUNTRY TODAY (Aug. 20, 2015), <https://indiancountrymedianetwork.com/news/politics/national-park-service-does-face-plant-with-new-rule-on-gathering-plants> [<https://perma.cc/9DYY-BVRT>]; see also Miccosukee Tribe of Indians of Florida, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (May 20, 2015), [www.reginfo.gov/public/do/DownloadDocument?objectID=67184300](http://www.reginfo.gov/public/do/DownloadDocument?objectID=67184300) (commenting on concerns of ambiguity and revealing traditional knowledge).

<sup>140</sup> Coalition to Protect America's National Parks, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (July 15, 2015), <https://protectnps.org/proposed-regulation-on-native-american-plant-collection/> [<https://perma.cc/GE4L-RTR3>].

<sup>141</sup> National Park Service Organic Act of 1916, Pub. L. No. 64-235, 39 Stat. 535 (1916).

<sup>142</sup> PEER ANALYSIS, *supra* note 137, at 1–2; Public Employees for Environmental Responsibility, Comment Letter on Proposed Rules Regarding Gathering of Certain Plants (June 9, 2015) [hereinafter "PEER Comments"], [https://www.peer.org/assets/docs/nps/6\\_9\\_15\\_IndianGatheringRule\\_PEER\\_comments.pdf](https://www.peer.org/assets/docs/nps/6_9_15_IndianGatheringRule_PEER_comments.pdf) [<https://perma.cc/8HWN-X3HB>]; Coalition to Protect America's National Parks, *supra* note 140.

<sup>143</sup> PEER Comments, *supra* note 142, at 6–8; see *supra* Section II(B).

<sup>144</sup> Promulgated Rule, 81 Fed Reg. at 45,028.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 45,028–30 (citing NAT'L PARK SERV., *supra* note 103, at §§ 1.4.3, 1.4.5, 1.4.7.1).

<sup>147</sup> Letter from Maureen Finnerty, Chair, Coal. to Protect Am.'s Nat'l Parks, to Jon Jarvis, Dir., Nat'l Park Serv. (Aug. 9, 2016), <https://protectnps.org/regulation-on-native-american-plant->

Another concern expressed pertains to the ability of the NPS to protect traditional knowledge.<sup>148</sup> As part of the agreement process, tribes must identify the locations of traditional plants, how to gather them, and the traditional use of the plants.<sup>149</sup> Some tribes objected to this requirement because “reducing the foregoing information and practices to a few written words goes against our [Colorado River Indian Tribe’s] oral traditions[.]”<sup>150</sup> and others commented that disclosing “our [Miccosukee Tribe’s] cultural and ceremonial practices is counter to our customary practice.”<sup>151</sup> Many tribes specifically commented on the lack of sufficient assurance that the information would be kept confidential.<sup>152</sup> In response, in the final rule, the NPS commits that it will, during the consultative phase of the process, “discuss ways to limit the scope of such information to the extent possible and to avoid releasing such information to the extent permitted by applicable laws.”<sup>153</sup> The NPS suggested using anonymous identifiers to protect the identity of tribal gatherers, but did not offer similar suggestions in the rule on how to protect the site locations and the traditional methods.<sup>154</sup>

There were many other concerns that were raised during the comment phase. Some were fixed in the final rule, while others were justified by the NPS. One of the lasting concerns that has yet to be addressed relates to the ability of the NPS to actually implement the rule. “The rationale set forth in support of the Final Rule seems filled with a utopian vision, one that suggests easy agreement among groups and governments with very different history, religions, values, perspectives, goals, and even laws. Fitting reality into this idealism is now delegated to park managers, and passed to future administrations.”<sup>155</sup>

#### IV. Eastern Band of Cherokee Indians Case Study

---

collection/ [<https://perma.cc/H688-KA43>] (“Perhaps a Federal Court will one day address that question.”).

<sup>148</sup> Tirado, *supra* note 139.

<sup>149</sup> 36 C.F.R. § 2.6(c).

<sup>150</sup> Colorado River Indian Tribes, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants by Federally Recognized Indian Tribes for Traditional Purposes (Sept. 28, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0091>.

<sup>151</sup> Miccosukee Tribe of Indians of Florida, *supra* note 139, at 3.

<sup>152</sup> See, e.g., Yurok Tribe, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (May 22, 2015), <https://www.regulations.gov/contentStreamer?documentId=NPS-2015-0002-0036>; Hopi Cultural Preservation Office, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (July 20, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0058>; Ohkay Owingeh, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (Sept. 3, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0092>; United South and Eastern Tribes, Inc., Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (July 20, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0063>; Confederated Tribes of the Umatilla Indian Reservation, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (Sept. 28, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0063>.

<sup>153</sup> Final Rule, 81 Fed. Reg. at 45,032.

<sup>154</sup> Final Rule, 81 Fed. Reg. at 45,032.

<sup>155</sup> Letter from Maureen Finnerty to Jon Jarvis, *supra* note 147.

The Eastern Band of Cherokee Indians (“EBCI”) has a long history with the NPS. The tribe’s current homeland, the Qualla Boundary, borders their ancestral lands, the GSMNP.<sup>156</sup> Since the establishment of the GSMNP in 1934, the EBCI has sought to gather two of its traditional plants within the park: sochan and ramps.<sup>157</sup> Sochan (*Rudbeckia laciniata*), also called the green-headed coneflower, is a flowering plant similar to a black-eyed Susan.<sup>158</sup> Sochan can grow up to ten feet tall and is harvested for its shoots and leaves.<sup>159</sup> Nutritionally, sochan is very similar to kale.<sup>160</sup> Ramps (*Allium tricoccum*) are similar to wild onions or leeks.<sup>161</sup>

Over the years, the EBCI has had varying success in gathering sochan and ramps within the GSMNP. Following the founding of the park in 1934, GSMNP officials did not make any official efforts to restrict the tribe’s traditional gathering.<sup>162</sup> Similar to the Tohono O’odham in Saguaro National Park, families of the EBCI would return to specific familial patches of ramps in the park, with some families gathering from the same patch for over five generations.<sup>163</sup> “[The EBCI] can show evidence that tribal members have followed traditional native religious and cultural practices with regard to ramps generally and at specific sites within the [p]ark for thousands of years, up to the present, and that such practices continue to be of great significance to tribal members.”<sup>164</sup>

In 1989, a seven-year study began on the effects of ramp harvesting within the GSMNP.<sup>165</sup> In 1999, while awaiting the results of the study, the NPS preemptively began to limit the amount of ramps that one person could gather.<sup>166</sup> The study concluded that gathering 25% of a ramp patch was “detrimental to the populations” and that it would take approximately twenty two years for the ramp

<sup>156</sup> Eastern Band of Cherokee Indians, Comment Letter on Proposed Rule Regarding Gathering of Certain Plants (July 20, 2015), <https://www.regulations.gov/document?D=NPS-2015-0002-0064>.

<sup>157</sup> Courtney Lewis, *The Case of the Wild Onions: The Impact of Ramps on Cherokee Rights*, SOUTHERN CULTURES, Summer 2012, at 104, 105–06.

<sup>158</sup> GEORGE ELLISON, MOUNTAIN PASSAGES: NATURAL AND CULTURAL HISTORY OF WESTERN NORTH CAROLINA AND THE GREAT SMOKY MOUNTAINS 52 (2005).

<sup>159</sup> *Id.* at 52–53.

<sup>160</sup> *EBCI and Smokies Work Toward Agreement for Plant Gathering in Park Boundaries*, SMOKY MOUNTAIN NEWS (Oct. 25, 2017), <http://www.smokymountainnews.com/archives/item/21028-ebci-and-smokies-work-toward-agreement-for-plant-gathering-in-park-boundaries> [<https://perma.cc/28V5-HYT8>].

<sup>161</sup> Janet H. Rock, Brian Beckage & Louis J. Gross, *Population Recovery Following Differential Harvesting of Allium Tricoccum Ait. In the Southern Appalachians*, 116 BIOLOGICAL CONSERVATION 227, 228 (2004).

<sup>162</sup> Brief for the Defendants at 7, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) (on file with author).

<sup>163</sup> *Id.* at 4.

<sup>164</sup> *Id.* at 2 (quoting Letter from Leon Jones, Principal Chief, Eastern Band of Cherokee Indians, to Michael F. Tollefson, Superintendent, Great Smoky Mountains Nat’l Park (April 2, 2002)).

<sup>165</sup> Rock, *supra* note 161, at 229.

<sup>166</sup> Brief for the Defendants, *supra* note 162, at 8 (citing NAT’L PARK SERV., GREAT SMOKY MOUNTAINS COMPENDIUM OF DESIGNATIONS, CLOSURES, REQUEST REQUIREMENTS AND OTHER RESTRICTIONS IMPOSED UNDER THE DISCRETIONARY AUTHORITY OF THE SUPERINTENDENT 8 (1999)).

population to recover.<sup>167</sup> The results of this study, coupled with the increasing popularity of ramps with non-tribal communities, prompted the NPS, in 2002, to ban the gathering of ramps within the GSMNP:<sup>168</sup>

For many years, the GSMNP, (through the *Superintendent's Compendium*) allowed ramps to be collected on a limited basis (described as small quantities for personal use), as it was a long-standing custom among local residents. The [p]ark had hoped that as older generations passed on that the custom would decline. Instead, the [p]ark discovered that the tradition was actually becoming more and more popular. The increasing numbers of attendees at Cocke County[, Tennessee]'s annual Ramp Festival are a continuing testament to the old tradition's resurgence into the 21st century.<sup>169</sup>

Following the 2002 prohibition on ramp gathering, the EBCI consulted with the GSMNP superintendent and began to come to an agreement regarding the traditional gathering of ramps.<sup>170</sup> Before entering into a memorandum of understanding, the superintendent requested a legal review from the Office of the Field Solicitor regarding the tribe's rights.<sup>171</sup> While awaiting the legal review, the superintendent agreed to continue the ramp gathering policy that the NPS and EBCI had previously agreed upon in their consultations.<sup>172</sup> The legal opinion from the Office of the Field Solicitor stated that the regulation regarding the superintendent's authority to allow consumptive gathering of "certain fruits, berries, and nuts" was still controlling but that a ramp was not "botanically classified" as such.<sup>173</sup> Although the gathering would be for traditional purpose, the legal memorandum stated that the GSMNP did not have the authority to enter into an agreement with the tribe.<sup>174</sup> "Political and cultural considerations aside, the Eastern Band of Cherokee Indians have no inherent legal rights separate and apart from the citizenry at large to the use and enjoyment of the Great Smoky Mountains National Park."<sup>175</sup>

Despite this legal opinion to the contrary, GSMNP officials entered into informal agreements with the EBCI in 2004 and renewed the agreements in 2005.<sup>176</sup> These agreements contained a map specifying where the tribe could gather ramps and specifically requested that the tribe not widely publish the

---

<sup>167</sup> Rock, *supra* note 161, at 232. *But see infra* Section IV(A) (discussing the cross-examination of Ms. Rock regarding her ramp gathering methods.).

<sup>168</sup> Memorandum from John P. Coleman, Jr., Staff Attorney, Office of the Field Solicitor, U.S. Dep't of the Interior, to Phillip A. Francis, Acting Superintendent, Great Smoky Mountains Nat'l Park (Feb. 13, 2004); EBCI Amicus Brief, *supra* note 81, at 4.

<sup>169</sup> *Id.* at 1.

<sup>170</sup> EBCI Amicus Brief, *supra* note 81, at 5.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (citing Letter from Michael J. Tollefson, Superintendent, Great Smoky Mountains Nat'l Park, to Cynthia Holman, Assoc. Counsel, Office of the Attorney Gen., Eastern Band of Cherokee Indians (July 25, 2002)).

<sup>173</sup> Memorandum from John P. Coleman, Jr. to Phillip A. Francis, *supra* note 168, at 4–5.

<sup>174</sup> *Id.* at 8.

<sup>175</sup> *Id.* at 6.

<sup>176</sup> EBCI Amicus Brief, *supra* note 81, at 6–7.

agreement in the *Cherokee One Feather*, the tribe's newspaper.<sup>177</sup> Instead, the NPS requested that the EBCI post the agreements on community bulletin boards and "quietly (by word of mouth) spread among community leaders."<sup>178</sup> An agreement was reached again in 2006, but it is unclear if it was memorialized in writing.<sup>179</sup>

On January 10, 2007, NPS officials met with EBCI officials to inform them that ramp gathering would not be permitted after the spring of 2007.<sup>180</sup> At this meeting, the NPS reiterated a previous offer to assist the EBCI in restoring the Qualla Boundary ramp population by transplanting ramps from GSMNP, but it was not accepted by the tribe.<sup>181</sup>

On February 15, 2008, Principal Chief Michell Hicks wrote a letter to the NPS requesting that tribal members be allowed to continue gathering ramps within the GSMNP.<sup>182</sup> A consultation meeting between the NPS and the EBCI was held on April 18, 2008 to discuss the traditional gathering situation, and NPS officials informed the tribe that ramp gathering would continue to be prohibited within the park.<sup>183</sup> The offer was again made to assist the tribe with transplanting ramps to the Qualla Boundary, but again it was not accepted.<sup>184</sup> The NPS sent a letter to the EBCI memorializing the meeting and giving notice to the tribe that all ramp gathering within the GSMNP must cease.<sup>185</sup> This letter was subsequently published in the *Cherokee One Feather*.<sup>186</sup>

#### **A. *United States v. Burgess***

On March 22, 2009, four EBCI members were gathering ramps in the GSMNP with their horses tied up nearby when they encountered several NPS law enforcement rangers.<sup>187</sup> The tribal members were harvesting ramps as they had always done, by digging with their hands and with pocket knives.<sup>188</sup> Upon investigating the saddle bags, the NPS law enforcement officers determined that the four men had gathered 4,990 ramp tops.<sup>189</sup> Mr. George Burgess specifically was responsible for 1,980 of those ramp tops.<sup>190</sup> A citation was issued, and the

---

<sup>177</sup> *Id.* at 7.

<sup>178</sup> *Id.* (quoting E-mail from Jim Northup, Chief Park Ranger, to Michael McConnell, Assoc. Counsel, Office of the Attorney Gen., Eastern Band of Cherokee Indians (Feb. 28, 2006)).

<sup>179</sup> *Id.*

<sup>180</sup> Letter from Art Frederick, Acting Se. Reg'l Dir., Nat'l Park Serv., to Michell Hicks, Principal Chief, Eastern Band of Cherokee Indians (May 30, 2008) (on file with author).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> Courtney Lewis, *supra* note 157, at 108; PEER PLANT GATHERING, *supra* note 61, at 6.

<sup>187</sup> Statement of Probable Cause for George Burgess, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) (on file with author).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

four gatherers were charged with “Preservation of Natural Resources – Digging Ramps.”<sup>191</sup>

The following week, on March 28, 2009, park rangers discovered an EBCI member with 215 ramps in his backpack, which he had gathered within the GSMNP.<sup>192</sup> The next weekend, on April 5, 2009, two EBCI members were discovered by park rangers gathering sochan in the GSMNP under the belief that it was permissible for tribal members to do so.<sup>193</sup> It was determined that one of the gatherers had 3.92 ounces of sochan.<sup>194</sup>

Ten members of the EBCI were cited for gathering traditional plants in the GSMNP.<sup>195</sup> These sorts of violations in national parks result in a citation through the Central Violations Bureau (“CVB”) and are placed on a CVB docket in federal court to be overseen by a magistrate judge.<sup>196</sup> It is rare for one of these CVB violations to result in a trial, the cited EBCI members went to trial to assert their traditional gathering rights.<sup>197</sup>

Prior to trial, the EBCI’s Office of the Attorney General submitted an amicus curiae brief arguing that an agreement existed between the NPS and the tribe at the time of the alleged offenses.<sup>198</sup> The EBCI also referenced similar NPS agreements with other tribes in other parks to show the legitimacy and precedent of such an agreement.<sup>199</sup> Alternatively, if an agreement did not exist at the time, EBCI members argued that insufficient notice was given to tribal members that the agreements had been terminated.<sup>200</sup>

The combined day-long trial<sup>201</sup> took place on November 23, 2009, with Magistrate Judge Dennis Howell presiding.<sup>202</sup> Defense counsel, James W. Kilbourne, Jr., presented the primary defense that the tribe had acquired a *profit a pendre* to gather traditional plants within the GSMNP.<sup>203</sup> “A *profit a pendre* is a right created in its owner to enter upon the land of another and take part of. . .the products of the soil from the land of another person.”<sup>204</sup> The defendants’ direct

---

<sup>191</sup> *Id.*

<sup>192</sup> Jamison French’s Motion to Dismiss, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) (on file with author).

<sup>193</sup> Statement of Probable Cause for Marvel Welch, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) (on file with author).

<sup>194</sup> *Id.*

<sup>195</sup> Scheduling Order, *United States v. Burgess*, CVB No. 1455169 (W.D.N.C. Nov. 23, 2009) (on file with author).

<sup>196</sup> Telephone Interview with James W. Kilbourne, Jr., Partner, Dungan, Kilbourne & Stahl, P.A. (Feb. 20, 2018).

<sup>197</sup> *Id.*

<sup>198</sup> EBCI Amicus Brief, *supra* note 81.

<sup>199</sup> *Id.* at 7–8.

<sup>200</sup> *Id.* at 7.

<sup>201</sup> For citation purposes, the CVB docket number referenced is the CVB number for George Burgess. All defendants had individual CVB docket numbers from their initial violations before the cases were combined for trial.

<sup>202</sup> Scheduling Order, *supra* note 195.

<sup>203</sup> Brief for the Defendants, *supra* note 162, at 9–13.

<sup>204</sup> Brief for the Defendants, *supra* note 162, at 10 (citing WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA 750 § 15–36).

predecessors had claimed the right to take plants while the land was still in private title, previous to the federal government's acquisition of title.<sup>205</sup> The defense argued that EBCI members had obtained the *profit a pendre* by prescription, and, therefore, there was a prescriptive servitude on the land prior to the transfer into the GSMNP.<sup>206</sup>

During the trial, Janet Rock was called to testify regarding her ramps study, the study that prompted the ramp gathering prohibition in the GSMNP.<sup>207</sup> On cross-examination, it was revealed that the gathering methods used in Ms. Rock's study were vastly different from the traditional methods used by EBCI members.<sup>208</sup> The method tested in Ms. Rock's study involved digging up the entire plant, while the traditional method involved cutting portions from the plant.<sup>209</sup> Ms. Rock had never consulted with the tribe as to the traditional way to harvest ramps, and her study could not accurately determine the sustainability of traditional methods.<sup>210</sup> When an EBCI tribal member later testified about the traditional methods, Ms. Rock was observed "furiously taking notes" as the traditional harvesting process was described.<sup>211</sup>

Ultimately, Judge Howell had "to apply the law in the way it is, not in the way [he] might like it to be" and delivered a guilty verdict.<sup>212</sup> This legal setback proved to be only temporary as NPS Director Jarvis was already fashioning a new avenue for traditional gathering.

## B. EBCI Actions Post-Trial

On July 16, 2010, six and a half months after the trial, Director Jarvis, and eleven other NPS employees travelled to the Qualla Boundary and held a consultation meeting with EBCI in Cherokee, NC.<sup>213</sup> This meeting was one of the seven tribal consultation meetings referenced in section III(A) of this article when the NPS began consulting with tribes on amending the regulations. At this meeting with the EBCI, Director Jarvis made the statement, "Unfortunately, the NPS regulations prohibit gathering by tribes. I think that is wrong."<sup>214</sup> This statement at the EBCI meeting that the old regulation was "wrong" was then

<sup>205</sup> *Id.* at 10.

<sup>206</sup> *Id.* at 11–12.

<sup>207</sup> Courtney Lewis, *supra* note 157, at 108–112; *see generally* Rock, *supra* note 161.

<sup>208</sup> Courtney Lewis, *supra* note 157, at 109.

<sup>209</sup> *Id.* at 110.

<sup>210</sup> *Id.* at 111–12.

<sup>211</sup> Telephone Interview with James W. Kilbourne, Jr., *supra* note 196.

<sup>212</sup> Courtney Lewis, *supra* note 157, at 112 (quoting Courtney Lewis' own transcription made during the trial).

<sup>213</sup> Scott McKie B.P., *Tribal Consultation Meeting Held Between EBCI and NPS*, CHEROKEE ONE FEATHER, (July 19, 2010), <https://theonefeather.com/2010/07/tribal-consultation-meeting-held-between-ebci-and-nps/> [<https://perma.cc/5AVG-G69W>].

<sup>214</sup> Jon Jarvis, Dir., Nat'l Park Serv., Remarks at Consultation Meeting with Eastern Band of Cherokee Indians 3 (July 16, 2010), (minutes available at [https://www.peer.org/assets/docs/nps/7\\_20\\_11\\_Cherokee\\_meeting\\_minutes.pdf](https://www.peer.org/assets/docs/nps/7_20_11_Cherokee_meeting_minutes.pdf) [<https://perma.cc/3K3J-GG5C>]).

quoted and used multiple times by organizations in opposition to the new regulation.<sup>215</sup>

The new regulation was enacted on July 12, 2016, and, in August 2016, the EBCI initiated the process with the NPS to enter into a gathering agreement for sochan and ramps.<sup>216</sup> The Tribe and the NPS then officially began collaborating on the consultation process in December 2016.<sup>217</sup> As previously stated, the largest burden in the process is the EA. The EBCI was confident that an EA would yield a FONSI because the EBCI had performed a similar study using traditional gathering methods on a test plot of sochan within the Qualla Boundary.<sup>218</sup> However, the funding for the EA became a hurdle in the process. Since both sochan and ramps would require individual EAs, the decision was made to focus first on sochan as that would be the easiest to complete since the EBCI study could be used as the foundation.<sup>219</sup> A funding resolution was presented to the EBCI Tribal Council to fund the EA in the amount of \$68,100.00.<sup>220</sup> This funding requirement was met with concern and hesitation by Tribal Council members. During discussions with the Tribal Council, Principal Chief Richard Sneed acknowledged that the EBCI would be setting a negative precedent: tribes must self-fund EAs to seek rights to which they feel they already are legally and culturally entitled. This is universally a negative precedent but could have particularly adverse consequences for smaller tribes with limited financial means. However, at the time of the resolution, no other tribe had thus far began the process of an EA, so the EBCI's funding of an EA would be precedential in its own right.<sup>221</sup> Given that no other options were available, the resolution was passed unanimously.<sup>222</sup>

## V. Conclusion

The gathering rights of Native American tribes on their ancestral lands have persisted, yet they remain in a state of flux since the inception of the national park system. While some tribes have been able to successfully assert their rights through treaties, Congressional acts, Presidential proclamations, and formal and informal agreements, the majority of Native American tribes have been unsuccessful to legally continue their traditional practices.

Recent shifts in the legal landscape present an unprecedented opportunity for these tribes to regain their legal rights to their traditional plant gathering, but some concerns still exist. The funding for EAs may prove difficult for tribes with

---

<sup>215</sup> See, e.g., Letter from Maureen Finnerty to Jon Jarvis, *supra* note 147, at 2; PEER Comments, *supra* note 142, at 24; PEER ANALYSIS, *supra* note 137, at 9.

<sup>216</sup> Video Recording: Tribal Council (Eastern Band of Cherokee Indians), at 02:20:45 (Oct. 16, 2017) (on file with author).

<sup>217</sup> *Id.*

<sup>218</sup> *EBCI and Smokies Work Toward Agreement for Plant Gathering in Park Boundaries*, *supra* note 160.

<sup>219</sup> Video Recording: Tribal Council, *supra* note 216, at 02:23:01.

<sup>220</sup> Council Res. 6, 2017 Tribal Council (Eastern Band of Cherokee Indians) (Oct. 16, 2017).

<sup>221</sup> Video Recording: Tribal Council, *supra* note 216, at 02:27:40.

<sup>222</sup> Council Res. 6, 2017 Tribal Council (Eastern Band of Cherokee Indians) (Oct. 16, 2017); Video Recording: Tribal Council, *supra* note 216, at 02:45:28.

fewer resources. Changes in federal and NPS administrations may result in the degradation of the “idealistic,” “utopian vision” of a collaborative relationship between tribal governments and the NPS.<sup>223</sup> There is also the ever-looming threat of litigation over the NPS’s statutory authority to allow traditional plant gathering. This litigation is likely to surface when the first NPS-tribal agreement is completed. However, if a court were to rule that the NPS acted outside its statutory authority, it would just be a temporary setback for Native American tribes. “The federal government has only been here for 300 years. When they’re gone, we’ll go back to picking ramps on that land.”<sup>224</sup>

---

<sup>223</sup> Letter from Maureen Finnerty to Jon Jarvis, *supra* note 147.

<sup>224</sup> Telephone Interview with James W. Kilbourne, Jr., *supra* note 196 (paraphrasing a conversation with an EBCI tribal member after the decision in *United States v. Burgess*).