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“Subsistence is Cultural Survival”: Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes within the National Historic Preservation Act

Wesley James Furlong¹

This Article is dedicated to Dr. Alan S. Boraas, Ph.D.
(1947-2019)

ABSTRACT

Over the past thirty years, Tribes have exercised growing influence in federal land management and permitting decisions, precipitated, in part, by amendments to the National Historic Preservation Act (“NHPA”) and evolving perspectives in cultural resource management and historic preservation. Despite the increased influence Tribes have gained in federal decision-making processes with the NHPA, it is often an ineffective tool to protect tribal cultural resources. Indigenous cultural resources and perspectives on cultural resource stewardship often do not fit easily within the NHPA’s framework. Nevertheless, until federal law is changed to actually protect Indigenous cultural resources, Tribes must operate within this existing legal framework. To do so effectively, Tribes, practitioners, and some federal agencies have developed tools, resources, and guidance intended to better protect Indigenous cultural resources and represent Indigenous ways of knowing within the NHPA. Still, these efforts often fall short, while Tribes’ ambitions to utilize the existing legal framework to protect their cultural resources grow. Out of this has developed the “traditional cultural landscape” as a more effective and culturally appropriate way of advancing Indigenous culture, perspectives, and stewardship

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within the NHPA's existing legal framework. Traditional cultural landscapes provide a framework within the NHPA that Tribes can utilize to meaningfully influence federal decision-making and achieve more holistic approaches to cultural resource management and protection in federal land management and permitting decisions. This, of course, has spurned vehement opposition from industry, many in the cultural resource management and historic preservation profession, and even federal and state agencies, who argue that traditional cultural landscapes, and landscape-level resources and preservation generally, have no place within the NHPA and the federal preservation framework more broadly. This Article examines the need and legal framework for the recognition and incorporation of traditional cultural landscapes within the NHPA and hopefully serves as a resource for Tribes and other Indigenous and traditional communities working to protect their own traditional cultural landscapes.

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“Well, wealth is not going to buy you . . . happiness. [It] will probably buy you good things but . . . our ancestors didn’t have all that, and they lived a good life. So if you talk to me about what is wealth, I would say, well, I got a moose, I’m rich. If I got fish in my freezer, I’m rich.”

—Max Chickalusion, Jr.²

² Alan S. Boraas et al., *The Ch’u’itnu Traditional Cultural Landscape: A District Eligible for the National Register of Historic Places* 89 (Apr. 3, 2015) (quoting Aug. 2, 2013 interview of Max Chickalusion Jr.) (alterations in original), <https://livinglandscapeobserver.net/wp-content/uploads/2019/03/Chu-TCP-Alaksa.pdf>.

I. INTRODUCTION

Over the past 4,000 years, salmon have provided Indigenous peoples throughout Alaska with the subsistence, cultural, social, and spiritual resources necessary to develop rich, complex, and thriving cultures.³ “This immense time depth has shaped all aspects of the cultures, including social and spiritual dimensions.”⁴ As one resident of Bristol Bay, Alaska, described:

Salmon more or less defines this area. It defines who we are. When you look at our art, you will see salmon. . . . It is who we are. When you listen to our stories and take a team, even in the middle of winter, people talk about salmon. It is in our stories; it is in our art. It is who we are; it defines us.⁵

While other subsistence resources have been and continue to be vital, salmon “shap[ed] each culture such that mythological stories depict the people and the salmon as one inseparable entity.”⁶ The continued abundance of salmon in Alaska has allowed many Indigenous communities in Alaska to maintain their traditional subsistence lifeways and connection to their past that is rare elsewhere in North America.⁷

Salmon’s importance to Indigenous cultures is not unique to Alaska. Indigenous salmon cultures exist throughout the world—from the Sami in present-day Scandinavia, to the Ainu in present-day Japan, to Indigenous peoples in present-day western and eastern Canada and the continental United States.⁸ Today, however, “[t]he salmon are dying.”⁹ Habitat fragmentation and destruction, commercial overfishing, pollution, and climate change are just some of the stressors that have contributed to a drastic decline in salmon populations.¹⁰ With this,

³ Alan S. Boraas & Catherine H. Knott, *The Indigenous Salmon Cultures of the Bristol Bay Watershed*, in BRISTOL BAY ALASKA: NATURAL RESOURCES OF THE AQUATIC AND TERRESTRIAL ECOSYSTEM 3 (Carol Ann Woody ed., 2018).

⁴ *Id.*

⁵ Alan S. Boraas & Catherine H. Knott, *Traditional Ecological Knowledge and Characterization of the Indigenous Cultures of the Nushagak and Kvichak Watersheds, Alaska* 1 (Oct. 13, 2013) (quoting M-16, 9/16/11) (emphasis in original), in U.E. Env’tl. Protection Agency, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Jan. 2014) (on file with author).

⁶ Boraas & Knott, *supra* note 3, at 3.

⁷ *Id.*

⁸ *Id.*

⁹ Wesley James Furlong, *Restoring the Skagit River Delta: Habitat Restoration and Farmland Reclamation on Fir Island*, 38 PUB. LAND & RESOURCES L. REV. 103, 104 (2017).

¹⁰ See Wesley J. Furlong, “Salmon is Culture, and Culture is Salmon”: Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation, 37 PUB. LAND & RESOURCES L. REV. 113, 115-16 (2016).

Indigenous peoples face ever-increasing existential threats to their cultures, traditions, and ways of life.¹¹ While parts of Alaska have seen consistently high salmon runs,¹² other parts of the state have experienced catastrophic collapses, threatening Alaska Native communities with existential consequences.¹³

In the face of threats like climate change and resource development, Tribes¹⁴ are looking for new ways to protect their cultural resources,¹⁵ lifeways,

¹¹ Cf. Boraas & Knott, *supra* note 3, at 3 (“For most, the traditional first salmon ceremony that marked world renewal and an affirmation of the identity of people with salmon is nothing more than a symbolic expression of what once was.”).

¹² See, e.g., Jessica Hathaway, *Bristol Bay blows salmon record out of the water; pushes Pebble opposition forward*, NAT’L FISHERMAN (July 22, 2021), <https://www.nationalfisherman.com/alaska/bristol-bay-blows-salmon-record-out-of-the-water-pushes-pebble-opposition-forward> [<https://perma.cc/SQP8-J2DM>]; Elizabeth Earl, *Bristol Bay remains lone bright spot for sockeye harvest across state*, ALASKA J. COM. (July 22, 2020), <https://www.alaskajournal.com/2020-07-22/bristol-bay-remains-lone-bright-spot-sockeye-harvest-across-state> [<https://perma.cc/5X4K-5NP3>].

¹³ See, e.g., Nathan Howard & Gillian Flaccus, *Dwindling Alaska salmon leave Yukon River tribes in crisis*, AP NEWS (Oct. 2, 2021), <https://apnews.com/article/climate-change-science-lifestyle-business-environment-and-nature-cb0c966f43e52fd9559857969f1203a0> [<https://perma.cc/ERC9-MN3J>].

¹⁴ This Article discusses “Tribes,” that is, federally recognized Indian tribes. See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4,636 (Jan. 28, 2022); Pub. L. No. 103-454, § 102(a), 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 5130(2)). This is not meant to diminish the importance of cultural resources to Native Hawaiians, non-federally recognized or state-recognized tribes, and other Indigenous and traditional communities. Tribes are sovereign governments that have a unique political and trust relationship with the United States. See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.03[3][a], at 412-15 (Nell Jessup Newton et al. eds., 2012 ed.) (Supp. 2019) [hereinafter COHEN’S HANDBOOK]. This relationship recognizes specific rights of Tribes and obligations the United States has to Tribes, distinct from any relationship or obligation the federal government has with other Indigenous peoples. While this Article focuses on Tribes, it is important to recognize that Native Hawaiians and Native Hawaiian organizations have codified rights and roles in some federal cultural resource statutes, see, e.g., 25 U.S.C. § 3010; 54 U.S.C. § 302706, and that many of the National Historic Preservation Act’s provisions discussed herein can be utilized by any Indigenous and traditional peoples and communities.

¹⁵ “Cultural resources are the tangible and intangible things that represent, give meaning to, or are part of a community’s cultural identity, expression, and beliefs. For example, art, stories, songs and music, dances, food, clothing and regalia, ceremonies, and significant places are examples of cultural resources.” Wesley James Furlong, *The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Landscape*, 42 PUB. LAND & RESOURCES L. REV. 1, 2 (2020). For tribes, cultural resources are often associated with, tied to, or are lands and landscapes.

“Cultural resources” should be understood as those aspects of the environment—both physical and intangible, both natural and built—that have cultural value of some kind to a group of people. . . . The definition should include those nonmaterial human social institutions that help make up the environment in our heads—our social institutions, our beliefs, our accustomed practices, and our perceptions of what makes the environment cultural comfortable.

and the landscapes to which they are connected. One community leading this work in Alaska is the Native Village of Tyonek. The Native Village of Tyonek has engaged in precedent-setting work in the area of traditional cultural landscapes, working to protect its homeland and subsistence lifeway through the recognition of the Ch'u'itnu watershed as traditional cultural landscape, a historic property eligible for inclusion on the National Register of Historic Places ("National Register"). The Native Village of Tyonek's experience demonstrates Tribes' ability to utilize the existing framework of federal cultural resource and historic preservation law,¹⁶ specifically the National Historic Preservation Act ("NHPA"),¹⁷ to advance culture resource stewardship in a way that is consistent with their experiences, expressions, and understandings of the significance of place.¹⁸

The Native Village of Tyonek's experience also demonstrates the challenges these efforts pose. The NHPA, like the entirety of federal law, does not provide substantive protections for Tribes' cultural resources. Moreover, these laws were not usually designed to recognize or protect Indigenous cultural resources, much less advance Indigenous concepts of stewardship; indeed, these laws were often specifically enacted, or have come to be used, to exploit or erase Indigenous cultures.¹⁹ While federal law requires wholesale change to actually protect

THOMAS F. KING, CULTURAL RESOURCES LAWS & PRACTICE 3 (4th ed. 2013).

¹⁶ See, e.g., Native American Graves Repatriation Act, 25 U.S.C. §§ 3001-3013; Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm; Antiquities Act, 54 U.S.C. §§ 320101-320106, 320301-320303; Archaeological and Historic Preservation Act, 54 U.S.C. §§ 312501-312508; Department of Transportation Act Section 4(f), 49 U.S.C. § 303(c); Surface Mining Control Reclamation Act Section 522(e)(3), 30 U.S.C. § 1272(e)(3); Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). See generally Furlong, *supra* note 16, at 2-6.

¹⁷ See 54 U.S.C. §§ 300101-307108.

¹⁸ See Wesley James Furlong, "That Chuit River Is Ours": *Traditional Cultural Landscapes and the National Historic Preservation Act*, 2018 US/ICOMOS SYMPOSIUM PROC. (2019), <https://www.usicomos.org/wp-content/uploads/2019/07/Furlong-2019-US-ICOMOS-Proceedings.pdf> [<https://perma.cc/NZ8L-UR8Z>]; Elizaveta Barrett Ristroph, *Traditional Cultural District: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211 (2014).

¹⁹ See generally HILLARY HOFFMANN & MONTE MILLS, A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION 70-93 (2020); Rebecca A. Hawkins, *A Great Unconformity: American Indian Tribes and the National Historic Preservation Act*, in THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT, AND FUTURE 90 (Kimball M. Banks & Ann M. Scott eds., 2016) ("The message these laws send has always been pretty clear in Indian Country; it might be your stuff, but it's our laws."); Allison M. Dussias, *Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects*, 38 AM. INDIAN L. REV. 333, 420 (2014) ("[D]espite these congressional and executive measures, a gap still exists between the support for tribal religious exercise that the measures purport to provide and the protection that tribal religions actually receive."); Tonia Woods Horton, *Writing Ethnographic History: Historic Preservation, Cultural Landscapes, and Traditional Cultural Properties*, in ETHNOGRAPHIC LANDSCAPES: PERSPECTIVES FROM CIRCUMPOLAR NATIONS 66 (Igor Krupnik et al. eds., 2004) ("What the National Register [of Historic Places] has not provided

Indigenous cultural resources,²⁰ Tribes must operate within the existing legal framework to protect their cultural resources, lifeways, and landscapes.²¹ The emergence of traditional cultural landscapes in the past two decades as a more effective and culturally appropriate way of conveying the significance of Indigenous cultural resources and advancing Indigenous concepts of stewardship with the NHPA has been widely embraced by Tribes, some federal and state agencies, and practitioners. Unsurprisingly, traditional cultural landscapes and landscape-level resources and preservation more generally has spurned vehement opposition from some federal and state agencies, industry, and some practitioners who claim it is unsupported within the framework of federal preservation law. This opposition is rooted in racist and colonialist beliefs of cultural superiority and a fundamentally incorrect understanding of federal law.

The purpose of this Article is two-fold. First, this Article examines the need and legal foundation for the recognition and incorporation of traditional cultural landscapes within the NHPA. Second, this Article hopefully will serve as a resource for Tribes, Native Hawaiian organizations, and other Indigenous and traditional communities working to protect their own traditional cultural resources. Part II of this Article discusses the Ch'u'itnu watershed and its cultural, spiritual, social, and subsistence importance to the Native Village of Tyonek. This discussion grounds this Article in the fundamental importance traditional cultural landscapes have to Indigenous communities. Part III discusses the current legal framework of the NHPA, including its 1992 amendments, the National Register, and the section 106 process. Part IV examines the legal framework for the recognition and incorporation of traditional cultural landscapes within the NHPA. Finally, Part V examines the Native Village of Tyonek's experience advocating for the protection of the Ch'u'itnu Traditional Cultural Landscape through the section 106 process and by nominating it to the National Register.

is a framework within which Native American history is not only actively written, but commemorated in terms of associated peoples' homelands, memory-places, and as fields encounter where landscape is ethnographically constructed as cultural place—in a word, heritage.”); Madeline Roe Flores, *May the Spirit of Section 106 Yet Prevail?: Recognizing the Environmental Elements of Native American Intangible Heritage*, 92 TUL. L. REV. 667 (2018) (examining shortfalls of section 106).

²⁰ See HOFFMANN & MILLS, *supra* note 20, at 94-112.

²¹ See *id.* at 73 (“[T]ribes and their advocates have still found ways to overcome the limitations of federal cultural protection statutes and utilize those laws to protect important cultural resources.”).

II. SALMON IS SURVIVANCE

A. “They Called Tyonek Elnen Bunkda”²²

Qaggeyshlat (the village of Tyonek) is located forty-five miles west of Anchorage, Alaska, along the north shore of Tikahtnu (Cook Inlet) at the mouth of the Ch’u’itnu.²³ It is home to nearly two hundred year-round residents, most of whom are Tubughna. The Tubughna are Dena’ina Athabascans.²⁴ Tyonek, besides being a small, rural Alaska village, is the home of the Native Village of Tyonek, a federally recognized Indian tribe.²⁵ Tyonek is off the road system, accessible only by air.

Historically, the Dena’ina occupied vast swaths of present-day Alaska. This traditional territory, Dena’ina Elnena, was one of the largest traditional territories of any Indigenous people in North America, an area covering over 50,000 square miles.²⁶ The traditional territory of the Tubughna spans over 4,000 square miles of present-day Southcentral Alaska,²⁷ encompassing the Ch’u’itnu, Beluga River, and McArthur River watersheds, from the northern shore of Cook Inlet to the Alaska Range in the north and west.²⁸ The Tubughna “simply call [this area] Tubughna, it’s traditional ground.”²⁹ While the Tubughna lived within these three watersheds, the Ch’u’itnu has always been “the lifeblood of the people.”³⁰

The Ch’u’itnu watershed encompasses nearly 170 square miles, stretching from the shores of Cook Inlet north to the foothills of the Tordrillo Mountains in the Alaska Range. The Ch’u’itnu watershed is a mostly undeveloped landscape. Past the rocky shoreline and steep, sandy bluffs, the lower part of the Ch’u’itnu watershed is mostly flat, shaped by Pleistocene glaciers.³¹ Here, bogs and boreal

²² Boraas et al., *supra* note 2, at 13 (quoting SHEM PETE’S ALASKA: THE TERRITORY OF THE UPPER COOK INLET DENA’INA 49 (James Kari & James Fall eds., 2d ed. 2003) (quoting Shem Pete)).

²³ In Dena’ina, the suffix “-nu” or “-na” means “river” or “stream”; thus, Ch’u’itnu can be translated as Chuit River. *Id.* at 17.

²⁴ In Dena’ina, “Tubughna” means “people of the beach,” and refers to the people who live near and at Tyonek. *Id.* at 15 n.5.

²⁵ See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2,112, 2,116 (Jan. 12, 2023).

²⁶ Boraas et al., *supra* note 2, at 29-30.

²⁷ See Comment from Wesley James Furlong, Staff Att’y, Native Am. Rights Fund, to Joy Beasley, Keeper of the Nat’l Register of Historic Places, Nat’l Park Serv., *Comments of the Native Village of Tyonek on the National Park Service’s Proposed Rulemaking Regarding the National Register of Historic Places: National Park Service (NPS) RIN 1024-AE49*, at 4 (Apr. 30, 2019).

²⁸ Boraas et al., *supra* note 2, at 30.

²⁹ *Id.* at 6 (quoting Interview of Max Chickalusion).

³⁰ *Id.* at 37.

³¹ *Id.* at 35.

forests dominate the landscape.³² Spruce, alder, and birch blanket for the watershed.³³ Five miles up the Ch'u'itnu, at Beluga Plateau, the landscape begins to change.³⁴ Not as flat, the watershed becomes "a modernly hummocky area of glacial moraine and glacial river deposits of gravel."³⁵ The boreal forest recedes, "grading to brush and ultimately alpine tundra at higher elevations in the foothills of the Tordrillo Mountains."³⁶

Weaving this landscape together is the Ch'u'itnu. Undammed and unobstructed,³⁷ all five species of salmon spawn in the Ch'u'itnu.³⁸ The glacial gravel beds of the Ch'u'itnu and its tributaries provide ideal spawning habitat.³⁹ After hatching, juvenile salmon eventually migrate down river to Cook Inlet and the Pacific Ocean, where they mature and then return to the Ch'u'itnu to spawn and die. The reliability of this system has made the Ch'u'itnu watershed a focal point for Dena'ina subsistence and Tubughna identity.

For at least the past 1,000 years, the Tubughna have harvested the salmon that spawn in the Ch'u'itnu.⁴⁰ The predictability and abundance of the salmon runs' return to the Ch'u'itnu have allowed the Tubughna to develop and maintain a mostly sedentary lifeway based on subsistence.⁴¹ "Without the river, the salmon, and the other species it nurtures, there would be no appreciable subsistence for the Tyonek people."⁴²

The Tubughna carry with them a sense of cultural entitlement to the river and its resources.⁴³ Their relationship with salmon has shaped their use of the landscape in which they live.⁴⁴ Salmon and salmon subsistence have defined the social organization and settlement patterns of the Tubughna and have greatly influenced their spiritual beliefs and practices.⁴⁵ "The relationship between the people, the land, and the salmon has been imprinted on the landscape through

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 16.

³⁸ *Id.* at 34. Chinook (King), Sockeye (red), Coho (silver), Pink (humpy), and Chum (dog) all spawn in the Ch'u'itnu.

³⁹ *Id.* at 35.

⁴⁰ *Id.* at 36.

⁴¹ *Id.* at 56.

⁴² *Id.* at 37.

⁴³ *Id.*

⁴⁴ *Id.* at 112.

⁴⁵ *Id.*

centuries of subsistence use, and is fundamental to the people's sense of freedom, identity, and self-worth."⁴⁶ Tyonek and the surrounding Ch'u'itnu landscape is called Elnen Bunkda, or "Mother of the Earth."⁴⁷

The continued abundance of salmon has allowed the subsistence-based cultural, social, and spiritual practices, beliefs, and identities of the Tubughna to continue uninterrupted over the past millennia.⁴⁸ The Tubughna continue to rely on salmon and salmon subsistence today, as they have for generations:

The Tubughna people have used and occupied the Ch'u'itnu drainage as an essential part of their traditional territory since time immemorial. The landscape along the river, including the river mouth, has been and continues to be a place where the Tubughna carry out subsistence resource harvests, settlement, celebrations of life, and travel to accomplish these purposes.

....

During early historic times, the [Tubughna] relied heavily on wild salmon as a principal food source, supplemented by other wild foods. This pattern has been maintained by contemporary [Tubughna]. While fishing technology and techniques have changed over time . . . , the harvest of salmon and other wild foods [is] . . . as significant to contemporary [Tubughna] as in the past.⁴⁹

The Ch'u'itnu watershed is one "of the few remaining areas in Cook Inlet where the story of salmon and salmon-related subsistence is still clearly represented in the natural and cultural environment."⁵⁰ The Ch'u'itnu is a living cultural landscape, "testimony to the [Tubughna's] ability to maintain identity in the modern world while engaging in the heritage of their ancestors."⁵¹

B. "Subsistence is Cultural Survival"⁵²

Today, the Tubughna affirm the cultural practices that define themselves within the modern world by their "continued ability to harvest wild salmon and

⁴⁶ *Id.*

⁴⁷ SHEM PETE'S ALASKA, *supra* note 23, at 49 (quoting Shem Pete).

⁴⁸ See Boraas et al., *supra* note 2, at 42 ("[T]he events that have made significant contributions to the broad patterns of our (Tubughna) history are the sustained subsistence and related indigenous social and spiritual practices that have operated without interruption from pre-contact times to the present, based on the same keystone species—salmon.").

⁴⁹ *Id.* at 1, 3; *see also id.* at 71-89 (examining "Contemporary [Tubughna] Subsistence in the Ch'u'itnu Area").

⁵⁰ *Id.* at 36.

⁵¹ *Id.* at 42.

⁵² *Id.* at 25.

other wild foods in the manner of their ancestors, to practice sharing, and to pay homage to traditional interaction with the forces of nature through rituals of place.”⁵³ This is cultural survivance.

According to Anishinaabe scholar Gerald Vizenor, “Native survivance is an active sense of presence over absence, deracination, and oblivion; survivance is the continuance of stories, not a mere reaction, however pertinent.”⁵⁴ Reflecting on Vizenor’s concept of survivance, Karl Kroeber states: “Survivance subtly reduces the power of the destroyer,” thus “orienting its connotations not towards loss but renewal and continuity into the future rather than memorializing the past.”⁵⁵

The Native Village of Tyonek is “an example of survivance.”⁵⁶ For the Tubughna, survivance is manifest in the Ch’u’itnu:

Survivance comes in the form of wild food subsistence and its associated social and spiritual practices. The survivance of the [Tubughna] involves a broad understanding of subsistence; the specific technologies and techniques have been adapted over time, but the principles of living off the land by hunting, fishing, and gathering animals and plants have largely remained unchanged.⁵⁷

Tubughna survivance “is based on the continued ability to harvest wild salmon and other wild foods in the manner of their ancestors, to practice sharing, and to pay homage to traditional interactions with the forces of nature through the rituals of place.”⁵⁸ As Dr. Borass observes, “without the Ch’u’itnu and its salmon, there would be no Tyonek.”⁵⁹

To the Tubughna, subsistence does not mean eking out a hard, marginal living. Subsistence “means a way of life—far from being marginal—subsistence fills spiritual as well as economic needs.”⁶⁰ Of course, subsistence means hunting,

⁵³ *Id.* at 20.

⁵⁴ Gerald Vizenor, *Aesthetics of Survivance: Literary Theory and Practice*, in SURVIVANCE: NARRATIVES OF NATIVE PRESENCE 1 (Gerald Vizenor ed., 2008); *see also id.* at 11 (“Survivance is an active resistance and repudiation of dominance, obtrusive themes of tragedy, nihilism, and victimry. The practices of survivance create an active presence, more than the instincts of survival, function, or subsistence.”).

⁵⁵ Karl Kroeber, *Why It’s A Good Thing Gerald Vizenor Is Not An Indian*, in SURVIVANCE: NARRATIVES OF NATIVE PRESENCE, at 25.

⁵⁶ Boraas et al., *supra* note 2, at 4 (citing Vizenor, *supra* note 55).

⁵⁷ *Id.* at 21.

⁵⁸ *Id.* at 20.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 24 (quoting THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 5 (1985)).

fishing, and gathering resources necessary to survive, but it also means much more. Subsistence “mean[s] the acts and knowledge of hunting, fishing and gathering *and* the associated social and spiritual practices that are derived from living off the wild, non-domesticated, landscape.”⁶¹

The thousand or more years of reliance on salmon-dominated wild foods have shaped social organization, spirituality, and cultural values in a dynamic adaptation that continues to be practiced by the Tubughna today. Their subsistence activities and practices inextricably connect the acts of hunting, fishing, and gathering to their social and spiritual practices. Together, they give cultural meaning to life.⁶²

In Dena’ina, ye’uh qach’ dalts’iy means “what we live on from outdoors” and ey’uh qa ts’dalts’iy means “living upon the outdoors.”⁶³ These phrases “connect subsistence with interaction with the natural environment.”⁶⁴

Western culture perceives Indigenous traditions and culture as static, as emblematic of bygone practices or ways of being. Through this perception, Western culture attempts to impose a binary choice on Indigenous people about how they can express their culture and identity in the “modern,” Western world: “return to an ancient and ‘primitive’ way of life, or to abandon traditional beliefs and practices and become assimilated into the dominant society.”⁶⁵ Yet, tradition and culture are not static—they evolve and adapt. Native communities can choose “to retain culturally significant elements of a traditional way of life, combining the old with the new in ways that maintain and enhance their identity while allowing their society and economy to evolve.”⁶⁶ This evolution and adaptation is cultural survivance.

The Tubughna’s continuation of their subsistence culture and identity reflects this evolution and adaptation. Today, the Tubughna fish with nylon set nets, aluminum skiffs, and rod and reel; they hunt with rifles and shotguns; and traverse the Ch’u’itnu landscape on four-wheelers, side-by-sides, and snowmachines. This modern equipment is merely the evolution of culture and does not make today’s subsistence culture and identity any less “traditional.”

⁶¹ Boraas et al., *supra* note 2, at 25 (emphasis added).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citation omitted).

⁶⁵ *Id.* at 23 (quoting FIKRET BERKES, SACRED ECOLOGY 271 (2012)).

⁶⁶ *Id.* (quoting BERKES, *supra* note 66, at 271).

The continuity of subsistence lifeways “represents a preferred way of life” that incorporates important social and cultural practices and shared beliefs about “interaction with animals, the environment, and landscape.”⁶⁷ “Survivance acknowledges spirituality in the landscape.”⁶⁸ It is “a consciousness and sense of incontestable presence that arises from experiences in the natural world.”⁶⁹ According to Tubughna Elder Fred Bismark, “If they take subsistence away from us they’re taking our life away from us.”⁷⁰

III. THE EXISTING FRAMEWORK OF THE NHPA

Enacted in 1966, the NHPA seeks “to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”⁷¹ When Congress first enacted the NHPA, it found and declared “that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American People.”⁷² The NHPA is the most comprehensive federal law aimed at protecting cultural and historic resources, although none of its provisions mandate preservation.⁷³

Two provisions of the NHPA in particular are relevant to this Article: the section 106 process⁷⁴ and the National Register.⁷⁵ The section 106 process is the most important tool Tribes have within federal law to protect culturally important places by influencing federal decision-making. As the section 106 process applies only to “historic properties,” the National Register and its nomination and determination of eligibility processes are fundamentally tied to section 106. The section 106 process, and with it the National Register, establish the legal framework within which Tribes must operate to protect traditional cultural landscapes.

A. Recognizing Indigenous Voices in the NHPA

⁶⁷ *Id.* at 24-25.

⁶⁸ *Id.* at 20.

⁶⁹ Vizenor, *supra* note 55, at 11.

⁷⁰ Boraas et al., *supra* note 2, at 25 (quoting Fred Bismark as interviewed in Tubughna Foundation, *Tubughna: The Beach People*, YOUTUBE (Oct. 11, 2021), <https://www.youtube.com/watch?v=4vJsfj-oysY> [<https://perma.cc/675E-C9ZY>]).

⁷¹ 54 U.S.C. § 300101(1).

⁷² Pub. L. No. 89-665(b), 80 Stat. 915 (1966).

⁷³ SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW 107* (2012) (“The [NHPA] does not require agencies to preserve any properties[.]”).

⁷⁴ *See generally* 54 U.S.C. § 306108; Protection of Historic Properties, 36 C.F.R. § 800.

⁷⁵ *See generally* 54 U.S.C. § 302101; National Register of Historic Places, 36 C.F.R. § 60; Determinations of Eligibility for Inclusion in the National Register of Historic Places, 36 C.F.R. § 63.

Over its sixty-year history, the NHPA has largely overlooked the historic and cultural foundations of Native America.⁷⁶ This began to change in the 1980s, with efforts to more systematically address “traditional cultural resources, both those that are associated with historic properties and those without specific property reference,” within the national preservation system.⁷⁷ In 1989, Congress directed the National Park Service (“NPS”) “to determine and report . . . on the funding needs for the management, research, interpretation, protection, and development of sites of historical significance on Indian lands throughout the Nation.”⁷⁸ The NPS held meetings with Tribes “in order to learn directly from Indian tribes what their concerns and needs were for preserving their cultural heritage.”⁷⁹

In 1990, the NPS submitted its report, *Keepers of the Treasures: Protecting Historic Properties and Cultural Traditions on Indian Lands*, to Congress. The NPS reported that historic preservation as ordinarily practiced by federal and state governments was often very different from how Tribes viewed preservation: “Tribes seek to preserve their cultural heritage as a living part of contemporary life. This means preserving not only historic properties but languages, traditions, and lifeways.”⁸⁰ As the NPS reported:

From a tribal perspective, preservation is approached holistically; the past lives on in the present. Land, water, trees, animals, birds, rocks, human remains, and man-made objects are instilled with vital and sacred qualities. Historic properties important for the “retention and preservation of the American Indian way of life” include not only the places where significant events happen or have happened, but also whole classes of natural elements: plants, animals, fish, birds, rocks, mountains. These natural elements are incorporated

⁷⁶ See generally Horton, *supra* note 19.

⁷⁷ Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, 38 *KNat'l Reg. Bull.* 2 (rev. ed. 1992) (discussing Am. Folklife Ctr., *Cultural Conservation: The Protection of Cultural Heritage in the United States* (1983)); see Pub. L. No. 96-515, § 502, 94 Stat. 2987 (1980) (directing the Secretary of the Interior to report “on preserving and conserving the intangible elements of our cultural heritage . . . [and] include recommendations for legislative and administrative actions . . . to preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage.”); see generally THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT 21-44 (2003).

⁷⁸ S. REP. NO. 101-85, at 21-22 (1989).

⁷⁹ NAT'L PARK SERV., *KEEPERS OF THE TREASURES: PROTECTING HISTORIC PROPERTIES AND CULTURAL TRADITIONS ON INDIAN LANDS* 3 (1990) [hereinafter NPS, *KEEPERS OF THE TREASURES*], <https://www.nps.gov/subjects/tellingallamericansstories/upload/Keepers.pdf> [<https://perma.cc/K32X-ZR2P>].

⁸⁰ *Id.* at i.

into tribal tradition and help form the matrix of spiritual, ceremonial, political, social, and economic life.⁸¹

Critically, the NPS recognized:

American Indian cultures are not expressed only on reservations The ancestral homelands of the Indian tribes cover the entire nation. Sacred and historic places critical to the continuation of cultural traditions are often not under tribal control, but rather are owned or managed by Federal, State, [and] local governments, and other non-Indians. The cultural commitments and concerns of Indian people with ancestral places on non-Indian lands bring them . . . into the national historic preservation program, particularly in connection with the review of proposed actions by Federal agencies under Sections 106 and 110 of the [NHPA].⁸²

The NPS made thirteen recommendations for protecting tribal cultural heritage. Among them, the NPS recommended that “Federal policy should require Federal agencies . . . to ensure that Indian tribes are involved to the maximum extent feasible in decisions that affect properties of cultural importance to them.”⁸³ The

⁸¹ *Id.* at 7; *see also id.* at 3 (“[P]reservation from a tribal perspective is conceived more broadly. It addresses the traditional aspects of unique, living cultures, only some of which are related to places.”).

⁸² *Id.* at 1-2. The NPS further found:

While tribes are certainly concerned about preserving historic properties and other cultural resources on reservation lands, they are often equally or even more concerned about preserving ancestral sites and traditional use areas on lands that they no longer control, whether these lands are now under Federal, State, or local control or in private ownership. *This concern indicates a need for tribes to be more involved in the management and planning activities of Federal agencies and State and local governments.* These activities include, but are not limited to, those carried out by federal agencies and State Historic Preservation Officers [(SHPO)] under sections 106 and 110 of the [NHPA] as well as those by State and local governments under State and local environmental policy and historic preservation statutes.

Id. at 67 (emphasis added). Section 110 of the NHPA, Pub. L. No. 96-515, § 206, 94 Stat. 2987 (1980), requires each federal agency to establish its own preservation programs, 54 U.S.C. § 306102(a); identify, evaluate, and nominate to the National Register historic property under federal jurisdiction or control, *id.* § 306102(b)(1); and manage and maintain such properties “in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section [106] . . . and gives special consideration to the preservation of those values in the case of property designated as having national significance,” *id.* § 306102(b)(2). *See also* Protection and Enhancement of the Cultural Environment, Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 13, 1971).

⁸³ NPS, KEEPERS OF THE TREASURES, *supra* note 79, at iv.

NPS found that “much could be gained through more systematic tribal participation in Federal agency planning under Sections 106 and 110 of the [NHPA].”⁸⁴

In response to this report, Congress amended the NHPA in 1992 to provide a greater role for Tribes and Native Hawaiian organizations within the existing national preservation programs.⁸⁵ As Congress stated at that time, these amendments, “for the first time, specifically include[d] Indian tribes and Native Hawaiian organizations in the historic preservation partnership.”⁸⁶ These amendments established a series of new programs that would help “establish and define the role of tribal and Native Hawaiian organization preservation programs.”⁸⁷

Two provisions within these amendments are particularly relevant to this Article:

(a) In General.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) Consultation.—In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).⁸⁸

These two provisions require the consideration of tribal and Native Hawaiian cultural resources and perspectives in federal permitting and land management decision-making through consultation. The tribal consultation mandate and the recognition of properties of traditional religious and cultural significance provide Tribes (and Native Hawaiian organizations) with powerful tools to ensure their participation and influence in federal management, planning, and permitting, and in broader conversations about cultural resource management and historic preservation.⁸⁹ These changes have provided Tribes with the most effective tool they have to advocate for the protection of their culture, history, and ways of life within existing law.⁹⁰

⁸⁴ *Id.* at iii.

⁸⁵ Pub. L. No. 102-575, § 4006, 106 Stat. 4600 (1992).

⁸⁶ S. REP. NO. 102-336, at 13 (1992).

⁸⁷ *Id.* at 15.

⁸⁸ 54 U.S.C. § 302706(a)-(b) (codifying Pub. L. No. 102-575, § 4006(a)(2)) (emphasis in original).

⁸⁹ *Cf.* Hawkins, *supra* note 20, at 85.

⁹⁰ *See generally* Furlong, *supra* note 19, at 4.

Since the inclusion of Tribes⁹¹ (and Native Hawaiian organizations) in the NHPA and the section 106 process specifically, cultural resource management and historic preservation throughout the United States have fundamentally changed, and changed quickly. While the Advisory Council on Historic Preservation (“ACHP”)—the agency established by the NHPA⁹² to administer and promulgate regulations implementing section 106⁹³—updated its section 106 regulations implementing the 1992 amendments, including the tribal consultation requirement, the updated regulations did not become fully effective until 2004.⁹⁴ It has, therefore, only been within the last twenty years that Tribes have been able to fully exercise their agency, authority, and rights within the section 106 process.⁹⁵ The NPS, the

⁹¹ The NHPA defines “Indian tribe” as “an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act ([43 U.S.C. § 1602]), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 54 U.S.C. § 300309. Despite their inclusion in the definition of Indian tribe, Alaska Native Claims Settlement Act (“ANCSA”) corporations *are not* Tribes. *See Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 534 (1998) (observing that ANCSA corporations are “state-chartered and state-regulated private business corporations”); *but see Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021) (holding that while ANCSA corporations are not sovereign and lack federal recognition, they are nevertheless Indian tribes for the purpose of the Indian Self Determination and Education Assistance Act (“ISDEAA”). The ISDEAA defines “Indian tribe” nearly identically to the NHPA. *Accord* 25 U.S.C. § 5304(e); 54 U.S.C. § 300309. For a detailed discussion about the ANCSA and ANCSA corporations, see DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, 165-99 (3d ed. 2012).

⁹² *See* 54 U.S.C. § 304101(a) (“There is established as an independent agency of the United States Government an Advisory Council on Historic Preservation . . .”).

⁹³ *See id.* § 304108(a) (“The [ACHP] may promulgate regulations as it considers necessary to govern the implementation of section [106] . . . in its entirety.”). The ACHP’s section 106 rulemaking authority is exclusive. *See CTIA-Wireless Ass’n v. Fed. Commc’ns Comm’n*, 466 F.3d 105, 116 (D.C. Cir. 2006) (“Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the [ACHP].”); *see also Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010); *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166 (1st Cir. 2003).

⁹⁴ The ACHP initiated rulemaking implementing the 1992 amendments in 1994, *see* 59 Fed. Reg. 50,396 (Oct. 3, 1994), and reinitiated in 1996, *see* 61 Fed. Reg. 48,580 (Sept. 13, 1996). The ACHP published its final rule in 1999, *see* 64 Fed. Reg. 27,044 (May 18, 1999); it immediately was challenged but was largely upheld. *See Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) (*Fowler*), *rev’g in part Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001). During the course of the litigation, the ACHP published an updated final rule in 2000. *See* 65 Fed. Reg. 77,698 (Dec. 12, 2000). Following the conclusion of the litigation, the ACHP reinitiated rulemaking, *see* 68 Fed. Reg. 55,354 (Sept. 25, 2003), and published the *final* rule, consistent with the courts’ opinions, in 2004, *see* 69 Fed. Reg. 40,544 (July 6, 2004). The 2004 final rule is the most current version of the ACHP’s section 106 regulations.

⁹⁵ The ACHP required tribal consultation in certain circumstances as early as 1987:

The Agency Official, the [SHPO], and the [ACHP] should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will

only other agency responsible for administering provisions of the NHPA, specifically the National Register,⁹⁶ has not undertaken rulemaking to codify the amendments' recognition that properties of traditional religious and cultural significance to Tribes and Native Hawaiian organizations are eligible for inclusion on the National Register. The closest the NPS has come to implementing the 1992 amendments is the publication of revised versions of Bulletin 38.⁹⁷

The NHPA is by no means a perfect—or even an ideal—preservation initiative for Tribes and other Indigenous communities. The National Register and the section 106 process both have systemic flaws, Euro-American preservation biases, and ultimately provide no substantive protections, only process. Nevertheless, the National Register and the section 106 process, in particular, are the only provisions of federal law that offer Tribes any real ability to influence federal decision-making to protect their cultural resources. While there is a desperate need to enact new laws that actually protect Indigenous cultural resources, landscapes, and heritages, and more meaningfully involve Tribes in that process, in the meantime, Tribes must work within the existing legal framework to achieve their goals.

B. The National Register of Historic Places

When Congress enacted the NHPA, it directed the Secretary of the Interior to establish a national register of historic places, cataloging the “districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.”⁹⁸ The NPS administers the National

affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. . . . When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons.

36 C.F.R. § 800.1(c)(2)(iii) (1987). Prior to the 1987 regulations, the ACHP only required that “[t]he [ACHP], Federal agencies, and [SHPOs] should seek assistance from . . . federally recognized Indian tribes in evaluating National Register and eligible properties, determining effect, and developing alternatives to avoid or mitigate an adverse effect.” 36 C.F.R. § 800.15 (1986).

⁹⁶ See *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir. 2019) (noting that the ACHP and the NPS are “the two [agencies] actually responsible for administering” the NHPA).

⁹⁷ See *Parker & King*, *supra* note 78. The National Park Service began revising Bulletin 38 in 2014, but stopped in 2017. These efforts were subsequently rested and, in October 2022, the National Park Service published an updated draft of Bulletin 38. See *National Register Traditional Cultural Places Bulletin Update*, NAT'L PARK SERV., <https://parkplanning.nps.gov/projectHome.cfm?projectId=107663> [<https://perma.cc/5DCR-ME22>].

⁹⁸ 54 U.S.C. § 302101.

Register,⁹⁹ and has promulgated regulations defining the criteria and processes for listing eligible properties.¹⁰⁰ The Keeper of the National Register exercises delegated authority from the Secretary of the Interior to determine a property's eligibility for inclusion on the National Register.¹⁰¹

Historic properties must be at least fifty years old and be one of five recognized property types.¹⁰² The National Register recognizes five property types: districts, sites, buildings, structures, and objects.¹⁰³ Traditional cultural landscapes,

⁹⁹ U.S. Dep't of Interior, *Departmental Manual: Part 245: National Park Service*, 425 DM 1, 2, § 1.1(C)(15) (May 31, 2007), <https://www.doi.gov/sites/doi.gov/files/elips/documents/245-dm-1.pdf> [<https://perma.cc/W2XV-9CCW>].

¹⁰⁰ See 36 C.F.R. pt. 60 (1981).

¹⁰¹ *Id.* § 60.3(f).

¹⁰² *Id.* § 60.4 There are, of course, exceptions to the fifty-year requirement. See *id.*

¹⁰³ *Id.*; 54 U.S.C. § 302101. While the National Register is eponymously a register of historic *places*, neither the NHPA nor the regulations require that a historic property actually be a "place." In *Okinawa Dugong (Dugong Dugong) v. Rumsfeld*, the United States District Court for the Northern District of California determined that the Okinawa dugong was a "property" for the purposes of section 402 of the NHPA. No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005). Section 402 requires federal agencies to take into account the effects "of any undertaking outside the United States that may directly and adversely affect a property that is on the World Heritage List or on the applicable country's equivalent of the National Register." 54 U.S.C. § 307101(e). Listed as a natural monument under Japan's Cultural Resource Protection Law, section 402 only applied "if the Okinawa dugong can be understood as property within the NHPA statutory scheme." *Dugong*, 2005 WL 522106, at *8. The court reasoned:

An "object" is defined as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." Plaintiffs have satisfied their burden to show that the dugong fulfills each element of the CFR's definition. The dugong is indisputably a "material thing," as opposed to something of a spiritual or intellectual nature. The plaintiffs have provided evidence that the dugong possesses "functional, aesthetic, cultural, historical or scientific value," particularly a special cultural significance in Okinawa. . . . Finally, there can be no dispute that the Okinawa dugong is "movable yet related to a specific setting or environment," namely, Henoko Bay, which is in the "middle" of the offshore area where "the dugongs and the seabeds they use for feeding and habitat are located.

Id. at *9 (internal citations omitted). The Court concluded, "The Dugong may . . . fall under the category of 'object' as 'a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.'" *Id.* at *10 (citation omitted).

Some have theorized that particular animal species could be listed or determined eligible for inclusion on the National Register. See, e.g., D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENV'T'L L. REP. 10,366 (2012) (arguing that Copper River salmon are a National Register-eligible property triggering section 106 review); Ingrid Brostrom, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 HASTINGS W.-NW. J. ENV'T'L L. & POL'Y 147 (2006) (examining whether the

traditional cultural properties, and places of traditional religious and cultural significance are most often, but not always, districts or sites.¹⁰⁴ A district is “a geographically definable area . . . possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development.”¹⁰⁵ A site is “the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archaeological value regardless of the value of any existing structure.”¹⁰⁶ Historic properties must also retain “integrity of location, design, setting, materials, workmanship, feeling, and association.”¹⁰⁷ Integrity is “the authenticity of a property’s historic identity.”¹⁰⁸

Finally, historic properties must also meet at least one of the four National Register criteria; that is, that they (1) “are associated with events that have made a significant contribution to the broad patterns of our history” (Criterion A); (2) “are associated with the lives of persons significant in our past” (Criterion B); (3) “embody the distinctive characteristics of a type, period, or method of construction,

NHPA can be used to protect certain animal species). *But see* Thomas F. King, *Animals and the National Register of Historic Places*, 26 THE APPLIED ANTHROPOLOGIST 129 (2006) (arguing that the Keeper would never accept a nomination or determination of eligibility of an animal). Actual efforts to do so, however, have been unsuccessful. *See* Wishtoyo Found. v. U.S. Fish & Wildlife Serv., 505 F. Supp. 3d 1025, 1030 (C.D. Cal. 2020) (discussing *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 917-18 (9th Cir. 2020) (Bea, J., concurring)) (holding that the California condor is not a historic property and criticizing *Dugong*).

Dugong relies, in part, on *Hatmaker v. Shackelford ex rel. Georgia Department of Transportation*, in which the United States District Court for the Middle District of Georgia held that a specific tree, the “Friendship Oak,” met the criteria for a National Register-eligible property, triggering Department of Transportation Act section 4(f) analysis. 973 F. Supp. 1047, 1055 (M.D. Ga. 1995). Section 4(f) provides that Department of Transportation programs or projects can adversely affect a “historic site” only if “there is no prudent and feasible alternative” and “the program or project includes all possible planning to minimize harm.” 49 U.S.C. § 303(c)(1)-(2); *see* SARA C. BRONIN & RYAN ROWBERRY, *HISTORIC PRESERVATION LAW IN A NUTSHELL* 155 (2d ed. 2018) (noting that section 4(f) “provides the most substantive protection for historic resources threatened by federal action”). For in-depth discussions of section 4(f), *see id.* at 155-94; BRONIN & BYRNE, *supra* note 75, at 212-67. The determination that a tree, as opposed to an animal species, is a National Register-eligible property is, perhaps, better grounded in existing guidance. *See* Parker & King, *supra* note 79, at 11 (“A natural object such as a tree or a rock outcrop may be eligible if it is associated with a significant tradition or use.”).

¹⁰⁴ Advisory Council on Historic Pres., *Native American Traditional Cultural Landscapes and the Section 106 Process: Questions and Answers* 2 (July 11, 2012) [hereinafter ACHP, *TCLs and Section 106*].

¹⁰⁵ National Register of Historic Places, Definitions, 36 C.F.R. § 60.3(d).

¹⁰⁶ *Id.* § 60.3(l).

¹⁰⁷ Criteria for evaluation, 36 C.F.R. § 60.4.

¹⁰⁸ Nat’l Park Serv., *Guidelines for Completing National Register of Historic Places Forms: Part A: How to Complete the National Register Registration Form 4* (rev. ed. 1997).

or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction” (Criterion C); or (4) “have yielded, or may be likely to yield, information important in prehistory” (Criterion D).¹⁰⁹

Historic properties may be listed on the National Register through the unilateral action of the Secretary of the Interior,¹¹⁰ by nominations from State Historic Preservation Officers (“SHPO”), Federal Preservation Officers (“FPO”), or both,¹¹¹ or through requests for nominations submitted to the appropriate SHPOs or FPOs by individuals or organizations.¹¹² Historic properties may also be determined eligible for inclusion on the National Register but not formally listed.¹¹³ Despite the 1992 NHPA amendments providing Tribal Historic Preservation Officers (“THPO”) the authority to assume the functions of the SHPOs “with respect to tribal lands,”¹¹⁴ including SHPOs’ authority to nominate property to the National Register,¹¹⁵ the NPS has not codified a process for nominations from Tribes, Native Hawaiian organizations, or THPOs.¹¹⁶

The inclusion of a property on the National Register is largely a symbolic act; it is recognition that a property has cultural and historic importance. Inclusion on the National Register does not confer any substantive protections to historic

¹⁰⁹ 36 C.F.R. § 60.4. Some have argued that the National Register regulations should be amended to include a fifth National Register criterion, recognizing properties that retain cultural significance or social value to a community. *See, e.g.,* Holly Taylor, *Recognizing the Contemporary Cultural Significance of Historic Places: A Proposal to Amend National Register Criteria to Include Social Value* (2016), <https://usicomos.org/wp-content/uploads/2019/11/Taylor.pdf> [<https://perma.cc/PM88-EAVR>]; *see also infra* note 235.

¹¹⁰ National Register of Historic Places, Nomination appeals, 36 C.F.R. § 60.12(d).

¹¹¹ *See* Nominations by the State Historic Preservation Officer, 36 C.F.R. § 60.6; Nominations by Federal agencies, § 60.9; Concurrent State and Federal Nominations, § 60.10. A historic property cannot be listed on the National Register “[i]f the owner of any privately owned property, or a majority of the owners of privately owned properties within the district in the case of a historic district, object to inclusion[.]” 54 U.S.C. § 302105(b). *See generally* Sierra Club v. Salazar, 177 F. Supp. 3d 512 (D.D.C. 2016). If such objections are properly made, *see* Definitions, 36 C.F.R. § 60.3(k); Nominations by the State Historic Preservation Officer, § 60.6(d), (g), (r), (v), the Keeper must still determine whether the property is *eligible* for inclusion on the National Register. *Id.* § 60.6(s), (n).

¹¹² 54 U.S.C. § 302104(b); Requests for nominations, 36 C.F.R. § 60.11.

¹¹³ Determinations of Eligibility To Be Included In The National Register of Historic Places, 36 C.F.R. § 63.

¹¹⁴ 54 U.S.C. § 302702.

¹¹⁵ *Id.* § 302303(b)(2).

¹¹⁶ “Tribal lands means all lands within the exterior boundaries of an Indian reservation and all dependent Indian communities.” Protection of Historic Properties, Definitions, 36 C.F.R. § 800.16(x). For a detailed discussion of the definition of dependent Indian communities, *see* COHEN’S HANDBOOK § 3.04[2][c][iii], *supra* note 14, at 193-96.

properties.¹¹⁷ Instead, inclusion on the National Register ensures that historic properties are taken into account in the section 106 process.¹¹⁸ Nominating properties, especially traditional cultural landscapes, to the National Register is a politically fraught and resource- and time-intensive process, as shown by the Native Village of Tyonek's experience discussed in Part V of this Article. The process also requires Tribes to prove the significance and integrity of their culturally important places to state and federal officials and agencies, something that is often antithetical to tribal sovereignty and culture.

C. Section 106 of the NHPA

Section 106 of the NHPA provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any

¹¹⁷ National Register of Historic Places, Effects of listing under Federal law, 36 C.F.R. § 60.2. *But see* § 60.2(d) (“If a property contains surface coal resources and is listed on the National Register, certain provisions of the Surface Mining and Control Act of 1977 require consideration of the property’s historic values in the determination on issuance of a surface coal mining permit.”). The Surface Mining Control and Reclamation Act (“SMCRA”) section 522(e)(3) prohibits surface coal mining operations “which will adversely affect any publicly owned park or place included in the National Register[.]” 30 U.S.C. § 1272(e)(3); Mineral Resources, Areas unsuitable for mining, Areas designated by act of Congress, 30 C.F.R. § 761.11(c). This prohibition applies only to properties *listed* on the National Register, not properties that are merely *eligible* for inclusion on the National Register. *See* Ind. Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1399 (D.D.C. 1991), *vac’d as moot sub nom.* Ind. Coal Council, Inc. v. Babbitt, No. 91-5397, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993). This prohibition does not apply (1) if the operator has valid existing rights, 30 C.F.R. § 761.11 (citing *id.* § 761.16); (2) to a qualifying existing operation, *id.* § 761.11 (citing *id.* § 761.12); or (3) if “the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place jointly approve the operation.” *Id.* § 761.11(c) (citing *id.* § 761.17(d)). While neither the SMCRA nor its implementing regulations set forth a process for how adverse effects are assessed or joint approvals are made, the section 106 process may provide a reasonable procedure for doing so. For example, applicants must include in their application package “[a] statement of the classes of properties of potential significance within the disturbed area, and a plan for the identification and treatment, in accordance with 36 CFR part 800, or properties significant and listed or eligible for listing on the National Register[.]” *Id.* § 740.13(b)(3)(iii)(D). That said, it is an open question whether surface coal mining operations permitted by states under delegated authority from the United States Office of Surface Mining, Reclamation and Enforcement (“OSMRE”) trigger section 106 review. *Compare Lujan*, 774 F. Supp. at 1401 (holding state permitting of surface coal mining under delegated authority is an undertaking triggering section 106 review), *with Fowler*, 324 F.3d at 760 (citation omitted) (observing that “undertakings that are merely ‘subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency’” do not trigger section 106), *with Consolidation Coal Co. v. U.S. Dep’t of Interior*, No. 2:00cv2120, 2006 WL 845672 (W.D. Pa. Feb. 17, 2006) (dismissing section 106 claims against OSMRE based on *Fowler*).

¹¹⁸ National Register of Historic Places, Effects of listing under Federal law, 36 C.F.R. § 60.2(a); *see also* 54 U.S.C. § 306108 (Effect of Undertaking on historic property); Protection of Historic Properties, 36 C.F.R. § 800.

State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [ACHP] a reasonable opportunity to comment with respect to the undertaking.¹¹⁹

When the NHPA was amended in 1992, Congress noted: “One of the most important provisions of the National Historic Preservation Act—the responsibilities of Federal agencies for the protection of historic resources—is set forth in sections 106 and 110.”¹²⁰ Simply put, section 106 “is a ‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs” on historic properties.¹²¹ Despite not mandating conservation or preservation,¹²² section 106 provides Tribes the best, if not the only, tool to engage federal agencies in the protection of culturally significant places.

The ACHP possesses the exclusive authority to promulgate regulations implementing and interpreting section 106 of the NHPA.¹²³ These regulations, promulgated at 36 C.F.R. Part 800, and binding on all federal agencies.¹²⁴ ACHP’s regulations establish a four-step process by which federal agencies fulfill their section 106 obligations.¹²⁵ The ACHP’s regulations and its interpretations of its

¹¹⁹ 54 U.S.C. § 306108.

¹²⁰ S. REP. NO. 102-336, at 12 (1992).

¹²¹ *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994)).

¹²² *See Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006) (quoting *Bus. & Residents Alliance of E. Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005)) (“It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places.”).

¹²³ 54 U.S.C. § 304108(a); *see supra* note 95.

¹²⁴ *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006); *Muckleshoot Indian Tribe*, 177 F.3d at 805)) (“We have previously determined that federal agencies must comply with these regulations.”).

¹²⁵ *See* Protection of Historic Properties, The section 106 Process, 36 C.F.R. §§ 800.3-800.6; *Concerned Citizens Coal. v. Fed. Highway Admin.*, 330 F. Supp. 2d 787, 798 (W.D. La. 2004) (“These regulations provide for a four-step review process.”). The ACHP’s regulations also allow for the development of “program alternatives.” *See* Federal agency program alternatives, 36 C.F.R. § 800.14. Program alternatives allow federal agencies to “tailor the Section 106 process for a group of undertakings or an entire program”; any may be used in lieu of the standard section 106 process. *Program Alternatives*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/program_alternatives (last visited Mar. 6, 2023). There are five types of program alternatives: alternate procedures, 36 C.F.R. § 800.14(a); programmatic agreements, *id.*

regulations and the meaning of section 106 must be afforded substantial deference.¹²⁶

1. Initiation

The first step of the section 106 process requires federal agencies to “determine whether the proposed Federal action is an undertaking . . . and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.”¹²⁷ The section 106 process must be initiated early enough in the planning process so that it informs the development and selection of the undertaking’s alternatives.¹²⁸ The section 106 process must also be complete before the undertaking is commenced or approved.¹²⁹

In the section 106 process, historic properties include both properties listed on the National Register, as well as those that are eligible for inclusion on the National Register.¹³⁰ Eligible properties include both those that have been formally determined eligible and any others that meet the National Register criteria that have not previously been evaluated for National Register-eligibility.¹³¹ Historic properties also include “properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that meet the National Register criteria.”¹³²

An undertaking is any “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those

§ 800.14(b); exempt categories, *id.* § 800.14(c); standard treatments, *id.* § 800.14(d); and program comments, *id.* § 800.14(e).

¹²⁶ See *McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992) (“[T]he [AChP] regulations command substantial judicial deference.”); *CTIA-Wireless Ass’n v. Fed. Commc’ns Comm’n*, 466 F.3d 105, 117 (D.C. Cir. 2006) (emphasis in original) (citation omitted) (“Given that *we* must defer under *Andrus v. Sierra Club*, 442 U.S. 347 (1979),] and *McMillan Park* to the [AChP]’s reasonable interpretation of the meaning of section 106, we cannot see how it was arbitrary and capricious for the [Federal Communication Commission (“FCC”)] to choose to do so as well.”); *cf.* *United Keetowah Band of Cherokee Indians in Okla. v. Fed. Commc’ns Comm’n*, 933 F.3d 728, 738 (D.C. Cir. 2019) (“We owe no deference to the FCC’s interpretations of the NHPA.”); *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir. 2019) (quoting *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999)) (“[W]e ‘owe no deference to the [United States Army Corps of Engineers’] interpretation of a statute it does not administer.’” (bracket omitted)).

¹²⁷ 36 C.F.R. § 800.3(a) (initiating the section 106 process).

¹²⁸ *Id.* § 800.1(c) (describing the purposes and noting “[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.”).

¹²⁹ *Id.* (quoting 54 U.S.C. § 306108).

¹³⁰ *Id.* § 800.16(l)(1) (providing definitions).

¹³¹ *Id.* § 800.16(l)(2).

¹³² *Id.* § 800.16(l)(1); see *infra* Part III.C.

carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”¹³³ Federal funding is not necessary to trigger section 106.¹³⁴ The undertaking is the underlying project, activity, or program receiving federal funding, permits, licenses, or approvals; it is *not* the federal agency’s funding, permitting, licensing, or approval,¹³⁵ although it can be a project that is carried out by a federal agency.¹³⁶

¹³³ 36 C.F.R. § 800.16(y); 54 U.S.C. § 300320. The Archaeological and Historic Preservation Act (“AHPA”) uses similar language:

When any Federal agency finds, or is notified, in writing, by an appropriate historical or archaeological authority, that its activities in connection with any Federal construction project or *federally licensed project, activity, or program* may cause irreparable loss or destruction of significant scientific, prehistorical, historical or archaeological data, the agency shall notify the Secretary [of the Interior], in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity.

54 U.S.C. § 312502(a)(1) (emphasis added). The AHPA has been described as “a substantive complement to [the] NHPA. It secures preservation of historical and archaeological resources discovered during the construction phase of a project.” *Nat’l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 680 (D.N.M. 1980); *but see* Post-review discoveries, 36 C.F.R. § 800.13. The AHPA “was originally known as the ‘Reservoir Salvage Act’ when the legislation was first enacted in 1960.” NAT’L PARK SERV., FEDERAL HISTORIC PRESERVATION LAWS: THE OFFICIAL COMPILATION OF U.S. CULTURAL HERITAGE STATUTES 34 (5th ed. 2018). The AHPA is also referred to as the Archaeological Data Protection Act, the Archaeological Recovery Act, or the Moss-Bennett Act. For more information on the AHPA, see KING, *supra* note 16, at 278-81; BRONIN & ROWBERRY, *supra* note 105, at 342.

¹³⁴ See *CTIA-Wireless Ass’n v. Fed. Comm’n Comm’n*, 466 F.3d 105, 112 (D.C. Cir. 2006) (citations omitted) (discussing *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995)) (“[A] ‘project, activity, or program’ does not require federal funding to be an ‘undertaking’ under section 106 of the NHPA. Instead, only a ‘Federal permit, license or approval’ is required.”); *Fein v. Peltier*, 949 F. Supp. 374, 379 (D.V.I. 1996).

¹³⁵ See Letter from Reid J. Nelson, Dir., Office of Fed. Agency Programs, Advisory Council on Historic Pres., to Col. John W. Henderson, Dist. Eng’r, U.S. Army Corps of Eng’rs, *Dakota Access Pipeline Project 1* (May 6, 2016), <https://turtletalk.files.wordpress.com/2016/05/achpdakota-access-pipeline-con-06may16.pdf> (“[T]he ACHP’s Section 106 regulations define the undertaking as the entire project, portions of which may require federal authorization or assistance.”).

¹³⁶ “Undertaking” is often conflated with NEPA’s “major federal action.” See, e.g., *Karst Envtl. Educ. & Protection, Inc. v. Envtl. Protection Agency*, 475 F.3d 1291, 1295-96 (D.C. Cr. 2007) (citing *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005)) (“Because of the ‘operational similarity’ between NEPA and NHPA, . . . courts treat ‘major federal actions’ under NEPA similarly to ‘federal undertakings’ under NHPA.”). The terms, however, are not coextensive. Compare Protection of Historic Properties, Definitions, 36 C.F.R. § 800.16(y), with National Environmental Policy Act Implementing Regulations, Definitions, 40 C.F.R. § 1508.1(q). “Undertaking” encompasses a far broader range of activities than major federal actions. See BRONIN & BYRNE, *supra* note 75, at 116 (“Thus, an undertaking embraces any identifiable or discrete unit of action. Congress plainly intended the word “undertaking” to be read broadly, encompassing most specific agency activities.”); Hunter S. Edwards, *The Guide for Future*

During the first step, the federal agency must identify and invite consulting parties to participate in the section 106 process.¹³⁷ When an undertaking occurs on tribal lands, the federal agency must invite that Tribe or the THPO to become a consulting party.¹³⁸ When an undertaking occurs off tribal lands, the federal agency must “make a reasonable and good faith effort to identify any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to become consulting parties.”¹³⁹ Any Tribe or Native Hawaiian organization that requests to become a consulting party must become one.¹⁴⁰

2. Identification and Evaluation

The second step of the section 106 process requires the federal agency to identify and evaluate historic properties within the undertaking’s area of potential effects (“APE”).¹⁴¹ The APE is “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.”¹⁴² Federal agencies are required to identify historic properties and assess and resolve adverse effects only within the APE.

Upon establishing the APE, federal agencies must “take the steps necessary to identify historic properties within the area of potential effects.”¹⁴³ Federal agencies are required to “make a reasonable and good faith effort to carry out

Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina’s Contextual Approach to Historic Preservation, 20 U. FLA. J.L. & PUB. POL’Y 221, 232 n.57 (2009) (quoting JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 9 (2007)) (“[T]he NHPA ‘applies to a broader range of federal agency undertakings.’”). In fact, section 106 review may be required for undertakings even if *no* level of review under the NEPA is required. See Coordination with the National Environmental Policy Act, 36 C.F.R. § 800.8(b) (“If a project, activity or program is categorically excluded from NEPA review under an agency’s NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a).”); BRONIN & ROWBERRY, *supra* note 105, at 145 (“Some undertakings requiring Section 106 compliance, however, will not be considered major federal actions requiring NEPA review. Similarly, even if an agency decides that a project qualifies for a categorical exclusion under NEPA . . . , the agency must still perform a NHPA Section 106 review for the project.”).

¹³⁷ 36 C.F.R. § 800.3(c), (d), (f) (initiating the section 106 process).

¹³⁸ *Id.* § 800.2(c)(2)(i) (describing participants in the Section 106 process).

¹³⁹ *Id.* § 800.3(f)(2); 36 C.F.R. § 800.2(c)(2)(ii).

¹⁴⁰ *Id.* § 800.3(f)(2).

¹⁴¹ *Id.* § 800.4 (describing identification of historic properties).

¹⁴² *Id.* § 800.16(d) (providing definitions).

¹⁴³ *Id.* § 800.4(b).

appropriate identification efforts.”¹⁴⁴ What constitutes reasonable and good faith identification varies between every section 106 processes and is informed by the totality of the circumstances surrounding each process.¹⁴⁵ No matter what, the identification of historic properties as well as the determination about appropriate identification efforts must be done in consultation with Indian tribes participating in the section 106 process.¹⁴⁶

*Pueblo of Sandia v. United States*¹⁴⁷ illustrates how the circumstances inform what constitutes a reasonable and good faith effort. In *Pueblo of Sandia*, the United States Court of Appeals for the Tenth Circuit held that the United States Forest Service (“USFS”) failed to make reasonable and good faith efforts to identify traditional cultural properties of importance to the Pueblo of Sandia and other Tribes.¹⁴⁸ The USFS sent letters to the Pueblo and other Tribes requesting detailed documentation about historic properties but received little information in return¹⁴⁹ due to their “reticence to disclose details of their culture and religious practices.”¹⁵⁰ Based on the Pueblo’s and the other Tribes’ silence, the USFS determined no traditional cultural properties would be affected.¹⁵¹

The Tenth Circuit held that “a mere request for information is not necessarily sufficient to constitute the ‘reasonable effort’ section 106 requires”¹⁵² and “that the information that the tribes did communicate to the agency was sufficient to require the [USFS] to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought.”¹⁵³ Addressing Bulletin 38, the court reminded the USFS that “[d]etermining what constitutes a reasonable effort to identify traditional cultural properties ‘depends in part on the likelihood that such properties may be

¹⁴⁴ *Id.* § 800.4(b)(1).

¹⁴⁵ *Id.* (noting that a reasonable and good faith effort “may include background research, consultation, oral history interviews, sample field investigations, and field survey”); Advisory Council on Historic Pres., *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review* (Nov. 15, 2011) [hereinafter ACHP, *Reasonable and Good Faith*].

¹⁴⁶ 36 C.F.R. § 800.4(b).

¹⁴⁷ 50 F.3d 856 (10th Cir. 1995).

¹⁴⁸ *Id.* at 860-63.

¹⁴⁹ *Id.* at 860.

¹⁵⁰ *Id.* at 861.

¹⁵¹ *Id.* at 860.

¹⁵² *Id.*

¹⁵³ *Id.*; see The section 106 process, Identification of historic properties, 36 C.F.R. § 800.4(b)(1) (“The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.”).

present.”¹⁵⁴ The court, therefore, held that the USFS failed to make reasonable efforts to identify historic properties “[b]ecause communications from the tribes indicated the existence of traditional cultural properties and because the USFS should have known that tribal customs might restrict the ready disclosure of specific information.”¹⁵⁵

An agency’s identification efforts are not limited to identifying historic properties previously listed on or determined eligible for inclusion on the National Register. The federal agency must apply the National Register criteria¹⁵⁶ to properties “that have not been previously evaluated for National Register eligibility.”¹⁵⁷ Previously evaluated historic properties may also need to be reevaluated due to the passage of time or potential changes in the properties’ integrity and significance.¹⁵⁸ The federal agency must “acknowledge the Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”¹⁵⁹ If the consulting parties cannot agree with the federal agency about the eligibility of a property, they may request an official determination of eligibility from the Keeper.¹⁶⁰

The proper identification and evaluation of historic properties—especially traditional cultural properties, traditional cultural landscapes, and properties of traditional religious and cultural significance—is essential, as the assessment and resolution of adverse effects is dependent upon the characteristics, significance, and integrity of each specific historic property.¹⁶¹ Thus, identification and evaluation usually require more than simply stating that a property is eligible for the National Register or that it meets the National Register criteria and retains integrity.¹⁶²

¹⁵⁴ *Pueblo of Sandia*, 50 F.3d at 861 (quoting Parker & King, *supra* note 78, at 6). While Bulletin 38 is only guidance, it “provides the recognized criteria for [the] identification and assessment of places of cultural significance” in the section 106 processes. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999). Nonetheless, “[c]ontravention of [Bulletin 38’s] recommendations, standing alone, probably does not constitute a violation of NHPA.” *Id.*

¹⁵⁵ *Pueblo of Sandia*, 50 F.3d at 860. The court also held that the USFS failed to make good faith identification efforts because it withheld information from the SHPO regarding the identification of historic properties. *Id.* at 862-63.

¹⁵⁶ See National Register of Historic Places, Criteria for evaluation, 36 C.F.R. § 60.4.

¹⁵⁷ *Id.*; Protection of Historic Properties, Identification of historic properties, § 800.4(c)(1).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* § 800.4(c)(2)

¹⁶¹ See Assessment of adverse effects, 36 C.F.R. § 800.5(a)(1); Resolution of adverse effects, 36 C.F.R. § 800.6(b).

¹⁶² The NHPA requires federal agencies “responsible for the protection of historic property . . . [to] ensure that . . . all actions taken by employees or contractors of the agency meet

Instead, the identification process must document how the property conveys its significance, identify its contributing resources, detail how that significance meets the applicable National Register criteria, and describe what type of integrity it retains and how.¹⁶³

3. Assessment

The third step of the section 106 process requires the federal agency to “apply the criteria of adverse effects to historic properties within the [APE].”¹⁶⁴ Adverse effects are found when an undertaking may alter “any of the characteristics of a historic property that qualify it for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”¹⁶⁵ Adverse effects can be direct, indirect, and reasonably foreseeable, including those “that may occur later in time, be farther removed in distance or be cumulative.”¹⁶⁶

professional standards under regulations developed by the Secretary [of the Interior] . . . [and] agency personal or contractors responsible for historic property meet [these] qualification standards[.]” 54 U.S.C. § 306131(a)(1)(A)-(B). Accordingly, proper identification must be “carried out by a qualified individual or individuals who meet the Secretary of the Interior’s qualification standards and have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics.” ACHP, *Reasonable and Good Faith*, *supra* note 145, at 2; see Participants in the Section 106 process, 36 C.F.R. § 800.2(a)(1); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1191 (D. Or. 2010) (“A federal agency must ensure that the employees or contractors conducting this review meet professional standards established by regulation.”). The Secretary of Interior’s Professional Qualification Standards set forth professional standards for history, archaeology (including prehistoric archaeology), architectural history, architecture, and historic architecture. See *Professional Qualification Standards*, NAT’L PARK SERV., <https://www.nps.gov/articles/sec-standards-prof-quals.htm> [<https://perma.cc/V2WM-VU4K>] (last accessed Oct. 16, 2021). Proposed comprehensive updates to these standards were never adopted. See *The Secretary of the Interior’s Historic Preservation Professional Qualification Standards*, 62 Fed. Reg. 33,708 (June 30, 1997).

¹⁶³ See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-09 (9th Cir. 1999) (finding that the USFS failed to adequately resolve effects to historic properties by utilizing resolution measures inappropriate for the significance and integrity of the affected historic properties); *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1086-87 (D.C. Cir. 2019) (questioning sufficiency of mitigation measures outlined in the USACE’s memorandum of agreement based on the significance and integrity of the affected historic properties).

¹⁶⁴ Protection of Historic Properties, Assessment of adverse effects, 36 C.F.R. § 800.5(a).

¹⁶⁵ *Id.* § 800.5(a)(1). The regulations provide a non-exhaustive list of examples of adverse effects. See *id.* § 800.5(a)(2).

¹⁶⁶ *Id.* § 800.5(a)(1). Direct “specifically refers to the causation of the effect, not its physical nature.” Memorandum from Office of Gen. Counsel, Advisory Council on Historic Pres., to Staff, Advisory Council on Historic Pres., *Recent Court Decision Regarding the Meaning of “Direct” in Section 106 and 110(f) of the National Historic Preservation Act 3* (June 7, 2019) (on file with author); *id.* at 2 (“[I]f the effect comes from the undertaking at the same time and place with no intervening cause, it is considered ‘direct’ regardless of its specific type (e.g., whether it is visual, physical, auditory, etc.)”); *cf. Semonite*, 916 F.3d at 1087-88.

If the federal agency determines that the undertaking will have no adverse effects on historic properties identified within the APE, it will notify all consulting parties of that determination.¹⁶⁷ The federal agency must also “seek the concurrence of any Indian tribe . . . that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the findings.”¹⁶⁸ Should a Tribe disagree with the agency’s finding of no adverse effects, it may request that the ACHP review and object to the finding.¹⁶⁹ The ACHP will review the federal agency’s determination and provide the agency with its opinion regarding the adverse effects of the undertaking.¹⁷⁰ If the ACHP’s opinion contradicts the agency’s initial determination, the agency may take the ACHP’s opinion under advisement and revise its determination or reaffirm its determination of no adverse effect.¹⁷¹

In cases where the agency reaffirms its finding of no adverse effect, the agency’s section 106 obligations—at least with respect to that historic property—are complete.¹⁷² Where the agency revises its initial finding to a finding of adverse effect, or if the agency initially determined there would be adverse effects, the section 106 process progresses to the resolution phase.¹⁷³

4. Resolution

The fourth and final step of the section 106 process requires federal agencies to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”¹⁷⁴ The section 106 process is designed to be flexible,¹⁷⁵ ensuring that the consulting parties can develop avoidance, minimization, and mitigation measures tailored to the specific undertaking, adverse effects, and historic properties. There is no one-size-fits-all resolution strategy, but the preference is always avoidance first, minimization second, and mitigation last.

Establishing meaningful resolution measures for an undertaking’s adverse effects requires properly identifying, documenting, and evaluating the significance

¹⁶⁷ 36 C.F.R. § 800.5(b)-(c).

¹⁶⁸ *Id.* § 800.5(c)(2)(iii).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 800.5(c)(3)(i).

¹⁷¹ *Id.* § 800.5(c)(3)(ii)(A)-(B).

¹⁷² *Id.* § 800.5(c)(3)(ii)(B), (d)(1).

¹⁷³ *Id.* § 800.5(d)(2).

¹⁷⁴ Resolution of adverse effects, 36 C.F.R. § 800.6(a).

¹⁷⁵ *See* KING, *supra* note 16, at 112 (“The stepwise process is not supposed to be rigid; on the other hand, it’s [sic] not supposed to be spineless. As interpreted by its various participants, however, it can be either—or even both at the same time.”).

and integrity of historic properties.¹⁷⁶ This is particularly important for traditional cultural properties, traditional cultural landscapes, and properties of traditional religious and cultural significance, as adverse effects to such properties tend to be particularly hard, if not impossible, to resolve.

After developing resolution measures, the consulting parties may execute a memorandum of agreement or programmatic agreement that prescribes how the measures will be implemented.¹⁷⁷ The memorandum of agreement or programmatic agreement may also contain provisions for future and phased identification efforts for complex undertakings or undertakings that will occur over an extended period of time.¹⁷⁸ The federal agency must “ensure that the undertaking is carried out in accordance with the memorandum of agreement.”¹⁷⁹ If the consulting parties cannot agree on how to resolve any adverse effects, the federal agency, the SHPO or the THPO, or the ACHP may terminate consultation.¹⁸⁰ If consultation is terminated, the ACHP will provide formal comments on the undertaking that the federal agency must consider in making its final decision.¹⁸¹

5. Consultation

The most important component of the section 106 process is consultation. “The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings *through consultation* among the agency official and other parties with an interest in the effects of the undertaking on historic properties.”¹⁸² Consultation occurs throughout the section 106 process. “The goal of consultation is to identify historic properties affected by the undertaking, assess its effects, and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”¹⁸³

The ACHP defines consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.”¹⁸⁴ Consultation means more than merely paying lip service to the concerns, needs, and knowledge

¹⁷⁶ See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-09 (9th Cir. 1999); *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1086-87 (D.C. Cir. 2019).

¹⁷⁷ 36 C.F.R. § 800.6(c); Federal agency program alternatives, 36 C.F.R. § 800.14(b).

¹⁷⁸ Identification of historic properties, 36 C.F.R. § 800.4(b)(2).

¹⁷⁹ Resolution of adverse effects, 36 C.F.R. § 800.6(c).

¹⁸⁰ Failure to resolve adverse effects, 36 C.F.R. § 800.7(a).

¹⁸¹ *Id.* § 800.7(c)(4).

¹⁸² Purposes, 36 C.F.R. § 800.1(a) (emphasis added).

¹⁸³ *Id.*

¹⁸⁴ Definitions, 36 C.F.R. § 800.16(f).

of consulting parties.¹⁸⁵ Section 106’s “consultative process—designed to be inclusive and facilitate consensus—ensures competing interests are appropriately considered and adequately addressed.”¹⁸⁶

While federal agencies have a regulatory obligation to consult with consulting parties during the section 106 process,¹⁸⁷ they bear an additional statutory obligation to consult with Tribes and Native Hawaiian organizations during the process.¹⁸⁸

The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.¹⁸⁹

This obligation “applies regardless of the location of the historic property.”¹⁹⁰ The tribal consultation requirement is codified throughout the section 106 regulations. Federal agencies must consult with Tribes in identifying and evaluating historic properties,¹⁹¹ in applying the criteria for adverse effects,¹⁹² and in resolving those

¹⁸⁵ *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) (“The consultation requirement is not an empty formality.”).

¹⁸⁶ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-5259, slip op. at 2 (D.C. Cir. Oct. 9, 2016) (*per curiam* order), https://turtletalk.files.wordpress.com/2016/10/164002_dccir_100916.pdf [<https://perma.cc/PS6K-2334>].

¹⁸⁷ Protection of Historic Properties, Participants in the Section 106 process, 36 C.F.R. § 800.2(b), (c)(1), (c)(3)-(5).

¹⁸⁸ See 54 U.S.C. § 302706(b); *Quechan Tribe*, 755 F. Supp. 2d at 1109 (emphasis in original) (“Indian tribes are entitled to *special consideration* in the [section 106 process.]”); *cf.* *Wyoming v. U.S. Dep’t of Interior*, 136 F. Supp. 3d 1317, 1345-46 (D. Wyo. 2015), *vacated as moot sub nom.* *Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016) (emphasis in original) (citation omitted) (“The [United States Bureau of Land Management’s (“BLM”)] efforts, however, reflect little more than that offered to the public in general. The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process. . . . However, despite acknowledging ‘the importance of tribal sovereignty and self-determination,’ the BLM summarily dismissed these legitimate tribal concerns . . .”).

¹⁸⁹ 36 C.F.R. § 800.2(c)(2)(ii)(A).

¹⁹⁰ *Id.* § 800.2(c)(2)(ii).

¹⁹¹ Identification of historic properties, 36 C.F.R. § 800.4(a)(4), (b), (c)(1)-(2).

¹⁹² Assessment of adverse effects, 36 C.F.R. § 800.5(a), (c), (c)(2)(iii).

adverse effects.¹⁹³ Federal agencies must initiate tribal consultation early in the process.¹⁹⁴

Tribal consultation, even within the section 106 process, is a function of the federal government's trust responsibility to Tribes.¹⁹⁵ In the section 106 process, consultation must therefore "be conducted in a sensitive manner respectful of tribal sovereignty,"¹⁹⁶ "recognize the government-to-government relationship between the Federal Government and Indian tribes,"¹⁹⁷ and "be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization."¹⁹⁸ Indeed, some courts have suggested that the federal government owes a heightened—fiduciary—duty to comply with the tribal consultation requirements of the NHPA.¹⁹⁹ It is the federal agencies', not the Tribes', obligation to consult.²⁰⁰

¹⁹³ Resolution of adverse effects, 36 C.F.R. § 800.6(a).

¹⁹⁴ Participants in the Section 106 process, 36 C.F.R. § 800.2(c)(2)(ii)(A).

¹⁹⁵ Advisory Council on Historic Pres., *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* 6 (Dec. 2012) [hereinafter ACHP, *Tribal Consultation Handbook*].

¹⁹⁶ 36 C.F.R. § 800.2(c)(2)(ii)(B).

¹⁹⁷ *Id.* § 800.2(c)(2)(ii)(C).

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1108-10 (S.D. Cal. 2008) (discussing the NHPA, the Archaeological Resources Protection Act, the AHPA, and the Antiquities Act, and finding that "various federal statutes aimed at protecting Indian cultural resources, located both on Indian land and public land, demonstrate the government's comprehensive responsibility to protect those resources and[] thereby establishes a fiduciary duty"); *Quechan Tribe*, 755 F. Supp. 2d at 1110 ("Violations of this fiduciary duty to comply with NHPA . . . requirements during the process of reviewing and approving projects vitiates the validity of that approval."); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) ("Because we conclude that the agencies violated . . . NHPA . . . , it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe."); cf. *O Centro Espirita Beneficiente Uniao Do Vegeta v. Ashcroft*, 282 F. Supp. 2d 1271, 1277 (D.N.M. 2002) (quoting *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991)) (recognizing "the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans.").

²⁰⁰ 36 C.F.R. § 800.2(c)(ii)(A) (emphasis added) ("*It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process.*"); *Quechan Tribe of Fort Yuma Indian Reservation*, 755 F. Supp. 2d at 1118 ("First, the sheer volume of documents is not meaningful. The number of letters, reports, meetings, etc. and the size of the various documents doesn't in itself show the NHPA-required consultation occurred. Second, the BLM's communications are replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult with the Tribe. But mere *pro forma* recitals do not, by themselves, show BLM actually complied with the law."). *But see* *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 608-10 (9th Cir. 2010) (finding a single letter and two telephone messages satisfied the BLM's consultation requirement because it has engaged in consultation with the tribe for an earlier project and there was no evidence that the tribe would have provided new information had it been consulted); *San Juan Citizens Alliance v. Norton*, 586

Meaningful consultation with Tribes is essential in ensuring the goal of the section 106 process is achieved and that Tribes are afforded their greatest agency and authority within the process.²⁰¹ The NHPA's tribal consultation mandate is a powerful tool for Tribes to advocate for and protect places of cultural importance.

D. TCPs and Properties of Traditional Religious and Cultural Significance

Two years before Congress enacted the 1992 NHPA amendments, the NPS published Bulletin 38, which provides guidance on the identification and evaluation of "traditional cultural properties."²⁰² Although Bulletin 38 is by no means perfect, prior to its development, the National Register largely ignored places of importance to Tribes:

Properties such as Native American spiritual places[and] culturally valued landscapes . . . were often given short shrift because of their perceived incompatibility with established methodologies for identifying, surveying, and nominating more common "historic" properties such as houses, bridges, dams, and archaeological sites.²⁰³

The intent of Bulletin 38 was to "broaden the scope of properties that could be considered eligible for listing in the [National Register] and provide more direct guidance regarding . . . working with such sites."²⁰⁴ Bulletin 38 sought to address "traditional cultural resources, both those that are associated with historic properties and those without specific property referents."²⁰⁵

Bulletin 38 was originally drafted as guidance for the ACHP, detailing to federal agencies how the section 106 process applies to places of cultural significance to Tribes and other Indigenous and traditional communities.²⁰⁶ The United States Department of Interior ("DOI") objected to the ACHP's publishing

F. Supp. 2d 1270, 1293-94 (D.N.M. 2008) (documenting a litany of contacts without addressing the substance of consultation, while also stating that the Tribe's decision to sue the BLM "suggests that its concerns have been or are being addressed").

²⁰¹ See generally Furlong, *supra* note 16, at 13-14; Matthew J. Rowe et al., *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENVTL. L. & POL'Y 1 (2018).

²⁰² Parker & King, *supra* note 79, at 2.

²⁰³ Paul R. Lusignan, *Traditional Cultural Places and the National Register*, 26 GEORGE WRIGHT FORUM 37, 37 (2009), <http://www.georgewright.org/261lusignan.pdf> [<https://perma.cc/2WDC-MV55>].

²⁰⁴ *Id.*

²⁰⁵ Parker & King, *supra* note 79, at 2; see KING, *supra* note 79, at 21-40.

²⁰⁶ KING, *supra* note 79, at 33.

such guidance, as it discussed how to evaluate the significance of National Register-eligible historic properties, and insisted that it be published by the National Park Service as a National Register bulletin.²⁰⁷

Bulletin 38 provides guidance on how the National Register criteria apply to historic properties that reflect traditional cultural significance to a community—not necessarily a Tribe or Indigenous community.²⁰⁸ Generally, properties included on the National Register “reflect many kinds of significance in architecture, history, archaeology, engineering, and culture.”²⁰⁹ The National Register program defines culture as “the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community.”²¹⁰ One type of cultural significance a place may reflect is “traditional cultural significance.”²¹¹ In this context, traditional means “those beliefs, customs, and practices of a living community . . . that have been passed down through the generations.”²¹² Thus, the traditional cultural significance of a place eligible for inclusion on the National Register is “derived from the role the [place] plays in a community’s historically rooted beliefs, customs, and practice.”²¹³ Bulletin 38 defines these places as traditional cultural properties, or TCPs.²¹⁴

A traditional cultural property “is eligible for inclusion on the National Register because of its association with cultural practices and beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continued cultural identity of the community.”²¹⁵ Examples include

location[s] associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world; . . . location[s] where Native American religious practitioners have historically gone, and are known or thought to go

²⁰⁷ *Id.* at 34.

²⁰⁸ Parker & King, *supra* note 79, at 2 (“[Bulletin 38] is intended to be an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register.”).

²⁰⁹ *Id.* at 1.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The 2022 updated draft Bulletin 38 redefines traditional cultural properties as traditional cultural *places*. Nat’l Park Serv., [Draft Text] *National Register Bulletin 38; Guidelines for Evaluating and Documenting Traditional Cultural Places* 11 (Oct. 27, 2022) [hereinafter NPS, Draft Bulletin 38] (on file with author) (“[T]he 1998 *TCP Bulletin* used the term ‘traditional cultural properties.’ However, some traditional communities have objected, and continue to object, to the word ‘properties’ because to them it implies a commodification of their heritage.”).

²¹⁵ Parker & King, *supra* note 79, at 1.

today, to perform ceremonial activities in accordance with traditional cultural rules of practice; and . . . location[s] where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.²¹⁶

The significance of a traditional cultural property thus is “based on its value in the eyes of the traditional community.”²¹⁷

Traditional cultural properties are not their own, distinct property type eligible for inclusion on the National Register: they still must be a district, site, building, structure, or object;²¹⁸ retain integrity;²¹⁹ and must meet at least one of the four National Register criteria.²²⁰ Instead, Bulletin 38—together with the concept of traditional cultural properties—provides a framework to evaluate a historic property’s traditional cultural significance against the National Register criteria. Even before the publication of Bulletin 38, historic properties that would now be described as traditional cultural properties were listed on and determined eligible for the National Register.²²¹ As Bulletin 38 recognizes:

Traditional cultural values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group’s sense of identity and self-respect. Properties to which traditional cultural value is ascribed often take on this kind of vital significance, so that any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them. As a result, it is extremely important that traditional cultural properties be considered carefully in planning; hence it is important that such properties, when they are eligible for inclusion in the National Register, be nominated to the [National] Register or otherwise identified in inventories for planning purposes.²²²

Unlike most historic properties included or eligible for inclusion on the National Register, traditional cultural properties “do not have to be the products of, or contain, the work of human beings in order to be classified as [historic] properties.”²²³ Indeed, Bulletin 38 counsels: “A culturally significant natural

216 *Id.*

217 KING, *supra* note 79, at 34.

218 Parker & King, *supra* note 79, at 9.

219 *Id.* at 10-11.

220 *Id.* at 10-12.

221 KING, *supra* note 79, at 35.

222 Parker & King, *supra*, note 79, at 2.

223 *Id.* at 9.

landscape may be classified as a site, as may the specific location where significant traditional events, activities, or cultural observances have taken place. A natural rock outcrop may be an eligible object if it is associated with a significant tradition or use.”²²⁴

Traditional cultural properties are of significance to *any* community that ascribes them value.²²⁵ This very well may be a Tribe. While the section 106 process requires federal agencies to take into account the effects of undertakings on historic properties—including traditional cultural properties—it *also* requires them to specifically take into account the effects of undertakings on properties of traditional religious and cultural significance to Tribes (and Native Hawaiian organizations).²²⁶ The term traditional cultural property has become shorthand for properties of traditional religious and cultural significance in the section 106 process because of the prevalence traditional cultural properties have gained within the cultural resource and historic preservation profession since 1990. This conflation is not always accurate.

The ACHP reminds practitioners that the term "property of traditional religious and cultural significance" applies (strictly) to tribal sites, unlike the term TCP. Furthermore, . . . the NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register.”²²⁷ The ACHP also points out that the term traditional cultural property has been interpreted as requiring a demonstration of “continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38.”²²⁸ The ACHP notes that this is problematic for Tribes when the use of “property may be dictated by cyclical religious or cultural timeframes that do not comport with mainstream conceptions of ‘continuous’ use” and where tribes have been separated from or denied access to culturally significant places.²²⁹ Within the section 106 process, the consideration of a property of traditional religious and cultural significance “is not tied to continual or physical use.”²³⁰

²²⁴ *Id.*

²²⁵ *Id.* at 3 (“The fact that this Bulletin gives special emphasis to Native American properties should not be taken to imply that only Native Americans ascribe traditional cultural value to historic properties, or that such ascription is common only to ethnic minority groups in general. Americans of every ethnic origin have properties to which they ascribe traditional cultural value.”).

²²⁶ 54 U.S.C. §§ 302706, 306108; Protection of Historic Properties, Definitions, 36 C.F.R. § 800.16(1)(1).

²²⁷ ACHP, *Tribal Consultation Handbook*, *supra* note 195, at 21 (emphasis omitted).

²²⁸ *Id.*; see Parker & King, *supra* note 79, at 1.

²²⁹ ACHP, *Tribal Consultation Handbook*, *supra* note 195, at 21.

²³⁰ *Id.*

The recognition that both traditional cultural properties and properties of traditional religious and cultural significance are eligible for inclusion on the National Register has provided tribes significant space within the NHPA to advocate for the protection of their significant places.²³¹ Nevertheless, traditional cultural properties and properties of traditional religious and cultural significance are often associated with small, discrete places and thus fail to reflect Indigenous peoples' more holistic understandings and expressions of the historic and cultural significance of place.²³² This shortfall can be overcome, in part, by the recognition that traditional cultural *landscapes* may be eligible for inclusion on the National Register.²³³

²³¹ ANCSA section 14(h)(1) authorizes the Secretary of the Interior to “withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places.” 43 U.S.C. § 1613(h)(1)(A). The BLM’s regulations detailing the criteria for evaluating and determining eligible for conveyance a “historical place” are nearly identical to the National Register criteria for evaluation, with one significant addition:

For purposes of evaluating and determining the eligibility of properties as historical places, the quality of significance in Native history or culture shall be considered to be present in places that possess integrity of location, design, setting, materials, workmanship, feeling and association, and:

- (1) That are associated with events that have made a significant contribution to the history of Alaska Indians, Eskimos or Aleuts, or
- (2) That are associated with the lives of persons significant in the past of Alaska Indians, Eskimos or Aleutes, or
- (3) *That possess outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of Alaska Indians, Eskimos or Aleutes, or*
- (4) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or
- (5) That have yielded, or are demonstrably likely to yield information important in prehistory or history.

Alaska Native Selections, Lands available for selection, 43 C.F.R. § 2653.5(d)(1)-(5) (emphasis added); see National Register of Historic Places, Criteria for evaluation, 36 C.F.R. § 60.4. The regulations also set forth “criteria considerations” for historical places identical to those outlined in the National Register regulations. *Compare* Cemetery sites and historical places, 43 C.F.R. § 2653.5(e), *with* 36 C.F.R. § 60.4. The regulations also require the significance of historical places to be determined in consultation with the NPS. See 43 C.F.R. § 2653.5(h), (j)-(k). The BLM first codified these criteria in 1976. See 41 Fed. Reg. 14,734, 14,738 (Apr. 7, 1976). Well before the publication of Bulletin 38 and the passage of the 1992 NHPA amendments, the BLM, at least, recognized the significance of a historical place (i.e. historic property) may include its “value in the traditions and cultural beliefs and practices of” Native people. 43 C.F.R. § 2653.5(d)(3).

²³² Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 171 (1996) (“The term TCP has gained acceptance in federal, state, and tribal programs, but many people still find it less than ideal.”).

²³³ See Native Am. Rights Fund, *Indigenous Environmental Stewardship—NARF 45th Anniversary CLE*, at 31:10 to 32:12, YouTube.com,

IV. BEYOND PROPERTY: TRADITIONAL CULTURAL LANDSCAPES

Since Bulletin 38 was first published, traditional cultural properties have gained acceptance within the cultural resource management and historic preservation professions. Nevertheless, there remains resistance to recognizing and acknowledging that places of traditional religious and cultural significance can encompass entire landscapes.²³⁴ The resistance to recognizing this simple fact is mostly rooted in fundamental misunderstandings of the existing law and guidance, colonial and racist beliefs about historic preservation and Indigenous cultures, and development-oriented interests of federal and state agencies, the cultural resource management and historic preservation profession, and project proponents. The NHPA, its regulations, and the NPS's and the ACHP's guidance not only recognize that places of traditional religious and cultural significance can encompass entire natural landscapes, but require and encourage their identification and consideration within the NHPA and section 106.

Traditional cultural landscapes reflect the relationship between people and place; they are landscapes that shape the traditional and cultural identity, practices, and beliefs of a community, and, in turn, are shaped by the community's identity, practices, and beliefs.²³⁵ Where traditional cultural properties represent the

<https://www.youtube.com/watch?v=4XXXEmZWPTk> [<https://perma.cc/K68H-H6C7>] (presentation by Heather Kendall-Miller) (“From the Native American perspective, the values that are placed on lands are much more holistic. They include elements and characteristics that are sometimes intangible because Native American communities have a much longer relationship to the land and one that is, frequently, based very much on a spiritual relationship. So, how do you capture those kinds of values? . . . [O]ne of the things that has come to be in the most recent years is the whole concept of a traditional cultural landscape.” (quotation edited for clarity)); Dean B. Suagee & Peter Bungart, *Taking Care of Native American Cultural Landscapes*, 27 NAT. RESOURCES & ENV'T 23, 26 (2013) (“The TCP concept has proven useful in providing recognition for places that tribes consider important, but in some ways this approach falls short. In many cases, it is not so much a particular place that matters but rather how that place fits within the landscape, how it connects to other important places.”); KING, *supra* note 16, at 255 (“The broadest cultural land resource is the landscape—embracing a whole big chunk of natural or not-so-natural land and all that’s in it.”).

²³⁴ Furlong, *supra* note 19, at 4.

²³⁵ See Carl O. Sauer, *The Morphology of Landscape*, 2 UNIV. CAL. PUBLS. IN GEOGRAPHY 19 (1925), in FOUNDATION PAPERS IN LANDSCAPE ECOLOGY 63 (John A. Wiens et al. eds., 2007) (“The cultural landscape is fashioned out of a natural landscape by a culture group. Culture is the agent, the natural area is the medium, the cultural landscape is the result.”); NICHOLAS A. ROBINSON & SHELBY D. GREEN, HISTORIC PRESERVATION: LAW AND CULTURE: CASES AND MATERIALS 650 (2018) (“Sauer’s point was that culture shaped nature as much as the nature shaped culture, nature determining only the outer contours of cultural choices. In this way, the history of ‘cultural landscapes’ can be seen as an examination of how spaces evolve, are constructed, and lived in.”).

significance of *a place* to a culture, traditional cultural landscapes represent the significance of *place* to a culture. As described by Heather Kendall-Miller:

A traditional cultural landscape is an area, viewed from the Native perspective, that is part of their Indigenous use and occupancy areas, contemplates the relationship of the people to the land, and takes into consideration all of these other elements: the spiritual elements; the use and occupancy of the resources there; the reliance upon the fish. It is a much more holistic view.²³⁶

Traditional cultural landscapes are not static. While their significance is rooted in traditional cultural practices and beliefs passed down through generations, they are dynamic and evolving systems, reflecting both the historic and contemporary traditional cultural uses, practices, beliefs, and needs of a community.²³⁷

This Section surveys the NPS's and the ACHP's existing guidance that establishes the legal framework for the recognition and incorporation of traditional cultural landscapes within the NHPA. This Section then examines three examples of traditional cultural landscapes listed on or determined eligible for inclusion on the National Register. This Section then discusses attempts to amend the NHPA to include landscape as a National Register property type. Finally, this Section discusses examples of cultural landscapes in federal preservation contexts outside of the NHPA.

A. Recognizing Traditional Cultural Landscapes within Existing Law

The failure or refusal to recognize or accept that places of traditional religious and cultural significance can, and do, encompass entire landscapes is often rooted in a fundamental misunderstanding of the NHPA, its implementing regulations, and its guidance, as well as dangerous notions of cultural superiority, racism, and colonialism. Traditional cultural landscapes are firmly established in the cultural resource management and historic preservation vernacular, recognized by NPS and ACHP guidance, and fit within the framework of the NHPA.

²³⁶ Native Am. Rights Fund, *supra* note 234, at 32:12 to 32:52 (quotation edited for clarity); DARBY C. STAPP & MICHAEL S. BURNEY, TRIBAL CULTURAL RESOURCE MANAGEMENT: THE FULL CIRCLE OF STEWARDSHIP 156 (2002) ("Cultural landscapes can be viewed as analogous with ecosystems: an inseparable single unit of an ecological community with its physical environment.").

²³⁷ See Horton, *supra* note 20, at 66 ("Thus defined, landscape is essentially a dialogue between humans and place, articulated in multiple realms: the artful shaping of land, the active use and management of resources, the embeddedness of creation stories, and the shapes of enduring heritage. Landscapes are synthetic, integrative, encompassing processes of evolution, mind-boggling in scale.").

Traditional cultural landscapes provide Tribes a mechanism within existing federal law to advance and incorporate their own expressions and understandings of the cultural significance of place into federal decision-making.²³⁸ Ideally, the recognition of traditional cultural landscapes within the NHPA's framework reframes and reorients the protection of cultural and natural resources to reflect Indigenous perspectives. Tribes' active engagement in reframing and reorienting these efforts through the recognition of traditional cultural landscapes is cultural survivance.²³⁹

1. The NPS's National Register Guidance

The NPS's guidance recognizes the place traditional cultural landscapes fit within the National Register, even while never using the precise term. For example, Bulletin 38 explicitly recognizes that TCPs can encompass entire natural landscapes. Indeed, the second sentence of Bulletin 38 reads: "Buildings, structures, and sites; groups of buildings, structures or sites forming historic districts; *landscapes*; and individual objects are included in the [National] Register if they meet the criteria."²⁴⁰ Bulletin 38 goes on to recognize, without discussion or qualification, that "[a] culturally significant natural landscape may be classified as a site, as may be the specific location where significant traditional events, activities, or cultural observations have taken place."²⁴¹

²³⁸ See Allyson Brooks, *Challenges of Landscape Preservation in the American West*, 2018 US/ICOMOS SYMPOSIUM PROC. 8 (2019), <https://www.usicomos.org/wp-content/uploads/2019/07/Brooks-2019-US-ICOMOS-Proceedings.pdf> [<https://perma.cc/8KJ9-NMUR>]. ("This brings us to the question of how innovative processes can be utilized to help maintain and protect important landscapes in the American West particularly as the pressures of energy development increase. The reality is, the United States already has multiple innovative approaches. The cultural resource community needs to utilize them more effectively and frequently."); *ACHP Policy Statement on Balancing Cultural and Natural Values on Federal Lands*, ADVISORY COUNCIL ON HISTORIC PRES. (Dec. 2, 2002), <https://www.achp.gov/digital-library-section-106-landing/achp-policy-statement-balancing-cultural-and-natural-values> [<https://perma.cc/ZMQ3-6P9F>] ("Many times the interests of tribes do not focus on cultural resources as defined by the [NHPA] but include a broad array of issues including natural and cultural values. In fact, the very concept of separating our cultural concerns from natural interest when assessing the merits of a particular action is unconscionable to many tribes and Native Hawaiians. Since Indian tribes tend to view cultural and natural resource values as inextricably linked, rather than in conflict, land managers should pay particular attention to their views when considering these issues.").

²³⁹ *Accord Horton*, *supra* note 20, at 66 (quoting ANNE WHISTON SPIRN, *THE LANGUAGE OF LANDSCAPE* 16, 22 (1998)) ("Most importantly, Spirn's description of landscape as an evolutionary process—one developed, lost, recovered, reshaped, or forgotten through time—is intrinsically linked to cultural survival: 'The language of landscape uncovers the dynamic connection between place and those who live there.'").

²⁴⁰ Parker & King, *supra* note 79, at 1.

²⁴¹ *Id.* at 11. The 2022 updated draft Bulletin 38 acknowledges that "a landscape or geographic feature—with or without evidence of human modification or other activity—whose existence is important to a community's knowledge about its origins, its cultural history, or the

Preservation Brief 36 also describes in detail “cultural landscapes” as “geographic area[s], including both cultural and natural resources and wildlife or domestic animals therein, associated with a historic event, activity, or person exhibiting other cultural or aesthetic values.”²⁴² Preservation Brief 36 describes one type of cultural landscape in particular, namely, an ethnographic landscape.²⁴³

[An] ethnographic landscape [is] a landscape containing a variety of natural and cultural resources that associated people define as heritage resources. Examples are contemporary settlements, religious and sacred sites and massive geological features. Small plant communities, animals, subsistence and ceremonial grounds are often components.²⁴⁴

The NPS recognizes in Preservation Brief 36 that “[m]ost historic properties have a cultural landscape component that is integral to the significance of the

nature of the world[.]” “may possess significance as a traditional cultural place.” NPS, Draft Bulletin 38, *supra* note 214, at 11. The 2022 draft also explicitly recognizes that “[m]any TCPs are landscapes with many components—hills, springs, rock outcrops, plant communities, former habitation sites—and may be considered districts under Criterion C, although they are usually eligible under Criterion A as well[.]” *Id.* at 33.

²⁴² Charles A. Birnbaum, *Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes*, 36 Preservation Briefs 1 (1994) (internal quotation marks omitted), <https://www.nps.gov/orgs/1739/upload/preservation-brief-36-cultural-landscapes.pdf> [<https://perma.cc/C84D-VJTX>]; *see also The Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes* (Charles A. Birnbaum & Christine Capella Peters eds., 1997), <https://www.seattle.gov/documents/Departments/Neighborhoods/HistoricPreservation/Landmarks/Guidelines%20for%20the%20Treatment%20of%20Cultural%20Landscapes.pdf> [<https://perma.cc/KZP7-Y57H>].

²⁴³ KING, LAWS & PRACTICE, *supra* note 16, at 256 (“The name ‘ethnographic landscape’ was invented as a tag for landscapes to which living communities assign cultural significance; it’s rather an insulting term, I think, suggesting that these communities and their heritage places are significance as objects of anthropological research rather than in their own right.”); *see* HOFFMANN & MILLS, *supra* note 20, at 72 n.12 (quoting Mona Domosh, *A “Civilized” Commerce: Gender, “Race”, and Empire at the 1893 Chicago Exposition*, 9 CULTURAL GEOGRAPHIES 181, 185 (2002)) (“[T]he entire field of ethnography was premised on the idea that native cultures were eternally in a state of ‘precontact “ethnographic present” always temporally outside of modernity.’”).

²⁴⁴ Birnbaum, *supra* note 243, at 2. Other cultural landscapes include “historic designed landscapes,” “historic sites,” and “historic vernacular landscapes.” *Id.* Historic vernacular landscapes are “landscape[s] that evolved through use by the people whose activities or occupancy shaped th[ose] landscape[s] through social or cultural attitudes of an individual, family or a community, the landscape reflects the physical, biological, and cultural character of those everyday lives. Function plays a significant role in vernacular landscapes.” *Id.*

resource.”²⁴⁵ Mirroring Bulletin 38, Preservation Brief 36 notes that “[i]n some cultural landscapes, there may be a total lack of buildings.”²⁴⁶

The NPS guidance describes other National Register-eligible historic properties that encompass landscapes. For example, National Register Bulletin 30 describes rural historic landscapes as “geographical area[s] that historically ha[ve] been used by people, or shaped or modified by human activity, occupancy, or intervention, and that possess[] a significant concentration, linkage, or continuity of areas of land use, vegetation, buildings and structures, roads and waterways, and natural features.”²⁴⁷ Like other cultural landscapes, rural historic landscapes are characterized by “the natural and cultural forces that have shaped [them].”²⁴⁸

In the late 1980s, the NPS began addressing how to manage cultural landscapes within the National Park system. “At this time, policy was established to mandate the recognition and protection of significant historic, design, archeology, and ethnographic values. The policy recognized the importance of considering both built and natural features, the dynamics inherent in natural processes, and continued use.”²⁴⁹

In developing documentation, identification, and management strategies for cultural landscapes within the National Park system, the NPS developed thirteen “landscape characteristics.” These “tangible and intangible aspects of landscape . . . individually and collectively give a landscape its historic character and aid in understanding its cultural value.”²⁵⁰ These landscape characteristics include natural systems and features; special organization; land use; cultural traditions; cluster arrangements; circulation; topography; vegetation; buildings and structures; views and vistas; constructs; water features; small-scale features; and archaeological sites.²⁵¹

Some landscape features, more than others, have direct relevance to traditional cultural landscapes. For example, land use includes “the principal

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Linda Flint McClelland et al., *Guidelines for Evaluating and Documenting Rural Historic Landscapes*, 30 NAT’L REG. BULL. 1-2 (rev. ed. 1999).

²⁴⁸ *Id.* at 3; *see also id.* at 15-18. National Register Bulletin 18 describes designed historic landscapes as only “one type of landscape within the broader category of historic landscape[s].” J. Timothy Keller & Genevieve P. Keller, *How to Evaluate and Nominate Designed Historic Landscapes*, 18 NAT’L REG. BULL. 2 (n.d.).

²⁴⁹ Robert R. Page et al., *A Guide to Cultural Landscape Reports: Contents, Process, and Techniques* 7 (1998) [<https://perma.cc/SAM4-SUE9>].

²⁵⁰ *Id.* at 53.

²⁵¹ *Id.*; *see Nat’l Park Serv., Cultural Landscapes Inventory Professional Procedures Guide* 7-6 to 7-10 (2009) [<https://perma.cc/S67P-NZSW>].

activities in the landscape that have formed, shaped, or organized the landscape as a result of human interaction.”²⁵² Cultural traditions include “the practices that have influenced the development of the landscape in terms of land use, patterns of land division, building forms, stylistic preferences, and the use of materials.”²⁵³ Circulation includes “the spaces, features, and applied material finishes that constitute systems of movement in a landscape.”²⁵⁴ And archaeological sites include “the location of ruins, traces, or deposited artifacts in the landscape, evidenced by the presence of either surface or subsurface features.”²⁵⁵

The NPS’s landscape characteristics “appl[y] to either culturally-driven and naturally occurring processes or to cultural and natural physical forms that have influenced the historical development of the landscape.”²⁵⁶ Cultural landscapes “are the tangible evidence of the historic and current uses of the land.”²⁵⁷ While these landscape characteristics are not specifically tied to the National Register criteria, they help orient the documentation of how traditional cultural landscapes meet these criteria in formal nominations and determinations of eligibility.

The National Register framework allows for the identification and recognition of traditional cultural landscapes.²⁵⁸ While the National Register guidance largely focuses on “cultural landscapes,” Bulletin 38 counsils that “*traditional cultural significance*” is “[o]ne kind of cultural significance a property may possess.”²⁵⁹ Therefore, *traditional* cultural landscapes fit within the National Register.

The recognition that historic properties can and do encompass traditional cultural landscapes begins to realize the capacity of the National Register to reflect the cultural, traditional, spiritual, and historic significance of place experienced and understood by Indigenous communities. This capacity ultimately allows for more holistic approaches to cultural and natural resource management and preservation. While the concept of traditional cultural landscapes must be teased out of the

252 Page et al., *supra* note 250, at 53.

253 *Id.*

254 *Id.*

255 *Id.*

256 Nat’l Park Serv., *A Guide to Landscape Characteristics: Landscape Lines 3: Landscape Characteristics* 4 (1998), <https://perma.cc/Z7BQ-9E5U>.

257 *Id.*

258 See Comment from Thomas F. King to Alaska Historic Comm’n, 3330-1-1 *Ch’u’itnu Historic District, Traditional Cultural Property* 2 (Nov. 13, 2017) (on file with author) (emphasis in original) (“I don’t think that it occurred either to Dr. [Patricia L.] Parker or to me that anyone would *not* understand that landscapes—along with such specific landforms as rocks, mountains, and canyons—were ‘properties’ as the term is understood by the [National Register].”).

259 Parker & King, *supra* note 79, at 1 (emphasis in original).

existing criteria and guidance for the National Register, it is firmly and explicitly established in the ACHP's section 106 guidance.²⁶⁰

2. The ACHP's Section 106 Guidance

In 2011, the ACHP published the *Native American Traditional Cultural Landscape Action Plan* ("Action Plan").²⁶¹ The ACHP began developing the Action Plan in 2009 after seeing "an increased number of section 106 reviews involving large scale historic properties which have included multiple, linked features that form a cohesive landscape of significance to a tribe"²⁶² and hearing "growing concerns about the impacts to these properties."²⁶³ The Action Plan focuses on educating cultural resource management and historic preservation professionals about traditional cultural landscapes and developing tools to address these properties within the section 106 process.²⁶⁴ The ACHP "recognized the importance of identifying and considering historic properties at landscape level and avoiding inappropriately breaking these larger properties into smaller units that are managed separately and out of context."²⁶⁵

Like traditional cultural properties, traditional cultural landscapes are "a type of significance rather than a property type."²⁶⁶ While the ACHP acknowledges that there is no formal National Register definition of traditional cultural landscape,²⁶⁷ it also notes that "the [National] Register includes criteria that recognize the significance of these places."²⁶⁸ The ACHP notes that its "work on traditional cultural landscapes" "is closely related to" Bulletin 38.²⁶⁹

²⁶⁰ See Advisory Council on Historic Pres., *Information Paper on Cultural Landscapes: Understanding and Interpreting Indigenous Places and Landscapes* 1 (Oct. 11, 2016) [hereinafter ACHP, *Understanding Landscapes*] ("Section 106 . . . requires federal agencies engaged in undertakings to identify and assess effects of their actions on historic properties, including indigenous landscapes considered eligible for the National Register.").

²⁶¹ Advisory Council on Historic Pres., *Native American Traditional Cultural Landscapes Action Plan* 1 (Nov. 23, 2011) [hereinafter ACHP, *TCL Action Plan*].

²⁶² ACHP, *TCLs and Section 106*, *supra* note 104, at 1.

²⁶³ ACHP, *TCL Action Plan*, *supra* note 261, at 1.

²⁶⁴ *Id.* at 1-2.

²⁶⁵ *Id.* at 1.

²⁶⁶ Advisory Council on Historic Pres., *Native American Traditional Cultural Landscapes in the Section 106 Review Process: Questions and Answers* 1 (July 11, 2012) [hereinafter ACHP, *TCLs Q & A*].

²⁶⁷ *Id.*

²⁶⁸ ACHP, *TCLs Q & A*, *supra* note 266, at 2.

²⁶⁹ *Traditional Cultural Landscapes*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/index.php/indian-tribes-and-native-hawaiians/traditional-cultural-landscapes> (last visited Mar. 6, 2023) [<https://perma.cc/7G2L-YTLS>]. The NPS's guidance about and recognition of traditional cultural landscapes is particularly relevant to the section 106 process as it concerns solely historic properties.

According to the ACHP, traditional cultural landscapes are “large-scale properties often comprised of multiple, linked features that form a cohesive area or place” and “have cultural and historical meanings attached to them by the peoples who have traveled, used, and interwoven these places into generations of practices.”²⁷⁰ They often encompass “broad areas well beyond the conventional area of a ‘site.’”²⁷¹ Indeed, they “can and often do embrace one or more of” the National Register property types.²⁷² As the ACHP instructs, recognizing and comprehending traditional cultural landscapes “requires looking up and not being site-specific and myopic.”²⁷³

Traditional cultural landscapes are not defined by a single feature or set of features.²⁷⁴ Instead, the ACHP notes:

Such places could be comprised of natural features such as mountains, caves, plateaus, and outcroppings; water courses and bodies such as rivers, streams, lakes, bays, and inlets; views and view sheds from them, including the overlook or similar locations; vegetation that contributes to its significance; and, manmade features including archaeological sites; buildings and structures; circulation features such as trails; land use patterns; evidence of cultural traditions, such as petroglyphs and evidence of burial practices; and markers of monuments, such as cairns, sleeping circles, or geoglyphs.²⁷⁵

The significance of traditional cultural landscapes is not always found in their physical features, as visual, audio, and atmospheric elements can contribute to the religious and cultural significance of these places.²⁷⁶ “For example, an indigenous landscape used for ceremonial practices could be affected by the presence of structures that impede a viewshed or by noise interrupting an otherwise quiet area.”²⁷⁷ The significance or National Register eligibility of a traditional cultural landscape cannot be affected by its size.²⁷⁸

²⁷⁰ ACHP, *Understanding Landscapes*, *supra* note 260, at 1.

²⁷¹ *Id.* at 2.

²⁷² ACHP, *TCLs Q & A*, *supra* note 266, at 2.

²⁷³ ACHP, *Understanding Landscapes*, *supra* note 260, at 2.

²⁷⁴ ACHP, *TCLs Q & A*, *supra* note 266, at 4.

²⁷⁵ *Id.*

²⁷⁶ ACHP, *Understanding Landscapes*, *supra* note 260, at 1.

²⁷⁷ *Id.*

²⁷⁸ ACHP, *TCLs Q & A*, *supra* note 266, at 2 (“It is important to note that the size of such properties or the potential challenges in the management of them should not be considerations in the evaluation of their significance.”).

Recognizing and evaluating traditional cultural landscapes within the section 106 process is not just about achieving more holistic cultural resource management. It also acknowledges the importance and validity of Indigenous cultures and perspectives and incorporates that into the management and protection of these culturally significant places. Traditional cultural “landscapes are the foundational landscapes of America. . . . Even after 500 years of contact, indigenous understandings, meanings, and uses continue to define the landscapes all around us.”²⁷⁹

[T]hinking about places on the landscape level is fundamental to preservation; part of this knowledge base must include indigenous perspectives. Rather than seeing indigenous knowledge and perspectives as marginal, “additional” to, or “other” than Western perspectives of place, (or included only because federal law requires consultation, as in the Section 106 process) they are central to interpretations of assessments and identifications that determine significance.²⁸⁰

The ACHP’s guidance explicitly recognizes traditional cultural landscapes and requires their identification and consideration in the section 106 process.

* * *

Traditional cultural landscapes are a well-established part of the cultural resource vernacular and their existence is unavoidable and undeniable. The NPS’s and the ACHP’s guidance clearly established their role in the federal preservation system under the NHPA. As Tribes, Native Hawaiians, and other Indigenous and traditional communities throughout the United States continue to exercise their rights and powers under the NHPA to protect the places of traditional, religious, and cultural significance to them, it is imperative for federal agencies, states, project proponents, and cultural resource management and historic preservation practitioners to understand the body of law, regulations, guidance, and policies that require the recognition and protection of traditional cultural landscapes and a landscape-level approach to cultural resource protection.

3. Amending the NHPA to Include Landscapes

In 1991, Congress considered amendments to the NHPA that would have included “landscape” as a National Register property type. Even though the NHPA was not ultimately amended to include landscape as a property type, the failure of this effort does not mean that the NHPA cannot recognize landscapes, cultural

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ACHP, *Understanding Landscapes*, *supra* note 260, at 3.

²⁸⁰

Id. at 4.

landscapes, and, indeed, traditional cultural landscapes. In the original draft of the proposed amendments, Congress proposed amending the definition of historic property to be “any prehistoric or historic district, *landscape*, site, building, structure, or object included on, or eligible for inclusion on, the National Register.”²⁸¹

The inclusion of landscape as part of the definition of historic property faced some opposition. In particular, then-Alaska Senator Frank H. Murkowski stated:

It appears the proposed amendments are designed to solve problems perceived by the historic preservation community and the National Park Service. Very little regard is given to solve the problems of the regulated community.

As a case in point, Mr. Chairman, the proposed legislation broadly expands protection to landscapes, trails, roads, and places that have figured in traditions and lifestyles of ethnic groups.

Under the definition, I fear that 99% of my State of Alaska would be classified as a historic landscape.²⁸²

The DOI also opposed the inclusion of landscapes into the definition of historic property, suggesting that their inclusion would give a false impression that natural landscapes were eligible for inclusion in the National Register. “Even though we currently view landscapes as eligible for inclusion on the National register, we object to its inclusion in this definition. A man-made landscape is already eligible under this definition, and its addition would create confusion as to what constitutes a landscape for the purposes of this Act.”²⁸³ This “confusion” can only have been understood as referring to the possible inclusion of natural, as opposed to man-made, landscapes, a sentiment contradicted by the DOI’s own National Register guidance, including Bulletin 38, which was published two years before these comments were submitted to Congress, and expressly recognized

²⁸¹ *Hearing on S. 684: To Amend the National Historic Preservation Act and the National Historic Preservation Act Amendments of 1980 to Strengthen the Preservation of our Historic Heritage and Resources, and for other Purposes: Hearing Before the Subcomm. on Public Lands, Nat’l Parks & Forests of the S. Comm. on Energy & Natural Res.*, S. Hrg. 102-418 pt. 1, 102nd Cong. 39 (1991) (emphasis added).

²⁸² *Hearing on S. 684: To Amend the National Historic Preservation Act and the National Historic Preservation Act Amendments of 1980 to Strengthen the Preservation of our Historic Heritage and Resources, and for other Purposes: Hearing Before the Subcomm. on Public Lands, Nat’l Parks & Forests of the S. Comm. on Energy & Natural Res.*, S. Hrg. 102-418 pt. 2, 102d Cong. 3-4 (1992) (prepared statement of Sen. Frank M. Murkowski, Alaska).

²⁸³ S. REP. No. 102-336, at 39 (1992) (section-by-section comments of the DOI). The only other opposition to the inclusion of landscape to the definition of historic property, and indeed the only other comments submitted to both the Senate and the House of Representatives on the amendment, came from Transcontinental Gas Pipeline Corporation. *See* S. Hrg. 102-418 pt. 2, 102d Cong. 65-66.

landscapes as eligible properties²⁸⁴ and that “[a] culturally significant natural landscape may be classified as a site”²⁸⁵ In any event, subsequent NPS guidance has irrefutably recognized that landscapes, including natural and cultural landscapes, are eligible for inclusion on the National Register.²⁸⁶

The attempt to amend the definition of historic property to include landscape coincided with the successful effort to recognize properties of traditional religious and cultural significance as eligible for inclusion on the National Register. Congress’s failure to amend the definition of historic property to include landscape does not mean that historic properties cannot encompass entire landscapes, be a component of a larger cultural landscape, or be described as a landscape or with landscape characteristics. The recognition of these culturally significant places and the increased agency Tribes possess within NHPA-established programs has ultimately pushed the NHPA—in particular, the National Register and the section 106 process—to recognize and protect traditional cultural landscapes.

B. Examples of Traditional Cultural Landscapes

Many properties have been listed on or determined eligible for inclusion on the National Register that are, encompass, or are components of traditional cultural landscapes.²⁸⁷ While some of these properties are not specifically described as “traditional cultural landscapes,” they nevertheless exhibit the characteristics of traditional cultural landscapes. Understanding how these places have been documented and listed or determined eligible provides Tribes with a framework to recognize, document, and list or determine eligible their own traditional cultural landscapes. This Section examines only three traditional cultural landscapes.²⁸⁸

²⁸⁴ Parker & King, *supra* note 79, at 1.

²⁸⁵ *Id.* at 11.

²⁸⁶ *See supra* Part IV.A.1.

²⁸⁷ ACHP, *Understanding Landscapes*, *supra* note 260, at 1 (“A number of landscape-level examples exist on the National Register or have been determined eligible—including indigenous landscapes”).

²⁸⁸ Other examples include Mount Saint Helens in Washington, and Mount Taylor in New Mexico. Called Lawetlat’la by the Cowlitz Indian Tribe and the Confederated Tribes and Bands of the Yakama Nation, Mount Saint Helens was listed on the National Register as a 12,501-acre traditional cultural property in 2013. Richard H. McClure & Nathaniel D. Reynolds, *Making the List: Mount St. Helens as a Traditional Cultural Property, a Case Study in Tribal/Government Cooperation*, 49 J. NW. ANTHROPOLOGY 117, 117-18 (2015). Called Kaweshtima by the Pueblo of Acoma, Tsodzil by the Navajo Nation, Tsiipiya by the Hopi Tribe, Tsibina by the Pueblo of Laguna, Dewankwi Kyabachu Yalanee to the Pueblo of Zuni, zu-wee-pa (phonetic) by the Pueblo of Jemez, Tuwie-‘ai by the Pueblo of Isleta, and dzil nii yedi by the Jicarilla Apache Nation, *see* Cynthia Buttery Benedict & Erin Hudson, *Mt. Taylor Traditional Cultural Property Determination of Eligibility* 17-27 (Feb. 8, 2008), <https://www.nrc.gov/docs/ML0904/ML090440287.pdf> [<https://perma.cc/B4KV-ZQ5X>], Mount Taylor was determined eligible for inclusion on the National Register as a 400,000-acre traditional

1. Nantucket Sound

Nantucket Sound, off the southern coast of Cape Cod, Massachusetts, provides one of the most recognizable examples of a traditional cultural landscape officially determined eligible for inclusion on the National Register by the NPS.²⁸⁹ On January 4, 2010, the Keeper determined that Nantucket Sound was eligible, recognizing that it is part of a “*traditional cultural landscape* that comprises and encompasses the Sound and its surrounding area.”²⁹⁰ “The Sound is integrally related to the traditional cultural practices and beliefs of the Wampanoag tribes,”²⁹¹ both the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah).

The Wampanoag are the “People of the Light or Dawn” and “ha[ve] a direct relationship to the juncture of the water and sun rising over the Sound.”²⁹² The viewshed east across Nantucket Sound “is essential to the Wampanoag People for [their] cultural beliefs, identity and spirituality. The viewshed is one of the places where [their] People historically had, and continue[] to have[,] a connection in practicing [their] cultural ceremony and traditions.”²⁹³ “These ceremonial, spiritual and religious practices require an unobstructed view of the sunrise over Nantucket Sound.”²⁹⁴

The Wampanoag “tribe[s] derive[] [their] cultural identity from [their] relationship with the natural environment of the Sound, Cape Code, and [Martha’s Vineyard and Nantucket] Islands.”²⁹⁵ As the Keeper noted,

each tribe has maintained a continuous association with and use of the Sound for economic and other purposes such as shell fishing, fishing, making practical and ceremonial objects from species taken from Nantucket Sound, recreation and tourism, and as a central

cultural property in 2008. *See* Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., 319 P.3d 639, 644 (N.M. 2014).

²⁸⁹ *See* Dussias, *supra* note 20, at 336-71 (providing detailed discussion on the history of the Wampanoag Tribes’ fight to protect Nantucket Sound from off-shore wind development).

²⁹⁰ Nat’l Park Serv., *Determination of Eligibility Notification: Nantucket Sound 4* (Jan. 4, 2010) (emphasis added) <https://www.boem.gov/sites/default/files/renewable-energy-program/Studies/NPS-to-MMS-Nantucket-Sound-Determination.pdf> [<https://perma.cc/PW68-F4UV>].

²⁹¹ *Id.*

²⁹² *Id.* at 5.

²⁹³ *Id.* (citation and internal quotation marks omitted).

²⁹⁴ *Id.* (citation and internal quotation marks omitted).

²⁹⁵ *Id.*

focus of traditional cultural practices and beliefs such as those relating to the Maushop and Squant/Squannit stories, greeting the new day, and for celestial observations.²⁹⁶

The cultural, spiritual, and historic importance of Nantucket Sound to the Wampanoag tribes is found not only in their historic relationship with the landscape. “Both tribes continue to share cultural practices, customs, and beliefs rooted in their common history, which are important in maintaining their continuing cultural identity.”²⁹⁷ In the determination of eligibility, the Keeper found that “the Sound is part of a larger culturally significant landscape treasured by the Wampanoag tribes and inseparably associated with their history and traditional cultural practices and beliefs, as well as with Native American exploration and settlement of Cape Code and [Martha’s Vineyard and Nantucket] Islands.”²⁹⁸

According to the Keeper, “[n]either the size of the Sound nor the fact that it is a body of water disqualify it from being found eligible for inclusion on the National Register.”²⁹⁹ The Keeper’s determination of eligibility does not prescribe boundaries for the traditional cultural landscape that encompasses and comprises Nantucket Sound. “The Sound is eligible under Criteria A, as a part of a district with boundaries that have not been precisely defined.”³⁰⁰ Nantucket Sound encompasses roughly 580 square miles, between Cape Code, Nantucket, and Martha’s Vineyard.

²⁹⁶ *Id.* at 4.

²⁹⁷ *Id.* at 4-5.

²⁹⁸ *Id.* at 3.

²⁹⁹ *Id.* (“The National Register includes a number of properties that are larger than Nantucket Sound, and although the National Register generally discourages the nomination of natural bodies of water, a number of properties listed in the National Register or determined eligible do include them.”).

³⁰⁰ *Id.* at 4; *see also id.* at 3 (“Additional documentation is necessary to define the precise boundaries of the district of which the Sound is a contributing part . . .”). Traditional cultural landscapes, as well as traditional cultural properties and properties of traditional religious and cultural significance, can be any size; yet, the scale of such a place should have no bearing on its eligibility for inclusion on the National Register, either as part of the National Register nomination process or within section 106. *See generally* THOMAS F. KING, THINKING ABOUT CULTURAL RESOURCE MANAGEMENT: ESSAYS FROM THE EDGE 129-33 (2002) [hereinafter King, Thinking about CRM]. There is no size limit for historic properties. *Cf.* Parker & King, *supra* note 79, at 20 (“Defining boundaries of a traditional cultural property can present considerable challenges. . . . In defining boundaries, the traditional uses to which the property is put must be carefully considered.”). Size becomes a problem when the SHPO or the FPO, the NPS, or a section 106 consulting party (usually the lead federal agency), insists that a boundary be drawn around the property. “The problem arises from the fact that many kinds of TCPs—notably Indian, Native Hawaiian, and other indigenous spiritual places—aren’t easily bounded.” KING, THINKING ABOUT CRM, *supra* note 300, at 117. Unfortunately, the rigidity of the National Register requires boundaries for properties nominated to the National Register. *Id.* at 117-18. Fortunately, however, the section 106 process is flexible enough to allow consulting parties to consider places eligible for the National Register without defining boundaries. *Id.* at 118.

2. Badger-Two Medicine

The Badger-Two Medicine Blackfoot Traditional Cultural District (“the Badger-Two Medicine”), located along the Rocky Mountain Front in Montana abutting the western edge of the Blackfeet Indian Reservation, was first determined eligible for inclusion on the National Register in 2002,³⁰¹ as a “remote wilderness area . . . associated with the significant oral traditions and cultural practices of the Blackfoot people, who have used the lands for traditional purposes for generations and continue to value the area as important to maintaining their community’s continued identity.”³⁰² In 2014, the Badger-Two Medicine traditional cultural district was expanded to “represent[] a place of extreme power for the Blackfoot tribal community, providing tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities.”³⁰³

For the Blackfoot, “the Badger-Two Medicine District is a culturally meaningful landscape containing peaks associated with particular events and sacred beings connected with the creation of the world as well as plant and water sources critical for vision questing.”³⁰⁴ As stated in the National Register nomination form:

The Badger-Two Medicine area is still a place where Blackfoot go for spiritual power, as their ancestors did before them. The relatively pristine natural environment and the relative isolation of the area from other human activity are a vital part of what gives the area its importance and power. It is there that the spirits remain and where the Blackfoot can go, as they have for centuries in accordance with their beliefs and traditions, to be along near Creator Sun while still standing on Mother Earth so that their prayers can be heard by these two Creators (i.e., Creator Sun and Mother Earth).³⁰⁵

³⁰¹ See Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RESOURCES L. REV. 205 (2017) (discussing in detail the history of the Blackfeet Nation’s fight to protect the Badger-Two Medicine from oil and gas development).

³⁰² Nat’l Park Serv., *Determination of Eligibility Notification: Badger-Two Medicine Blackfoot Traditional Cultural District* (Jan. 31, 2002) (on file with author).

³⁰³ Nat’l Park Serv., *Determination of Eligibility Notification: Badger-Two Medicine Traditional Cultural District (Boundary Increase) 2* (May 5, 2014) [hereinafter *Badger-Two Medicine 2014 DOE*] (on file with author).

³⁰⁴ Sandra French et al., *Multiple Property Documentation Form: The Badger-Two Medicine Blackfoot Traditional Cultural District* 10 (Dec. 14, 2001) (on file with author).

³⁰⁵ *Id.* at 4.

To the Blackfoot, “there is no distinction between the natural and cultural values of the [Badger-Two Medicine].”³⁰⁶

The Badger-Two Medicine “is a landscape virtually unmarred by modern development and intrusions.”³⁰⁷ In defining its original boundaries, the United States Forest Service noted:

There are sites and current use areas in the district, but their distribution and density is not critical to the boundary definition. Within the district individual properties are divided arbitrarily on the basis of topographical features, i.e., valleys that separate the various mountains and drainages. These boundaries are an attempt to reconcile two worldviews, that of the traditional Blackfoot which does not recognize boundaries on spiritual aspects of the world and that of western historians, scientists and land managers which see all properties as being bounded.³⁰⁸

In expanding the Badger-Two Medicine’s boundaries in 2014, the Keeper noted that “the new documentation provides a more holistic and inclusive view of the region . . . , as guided by ongoing oral and ethnographic dialog with Blackfoot elders, traditional cultural practitioners, and land users intimately knowledgeable about the project area.”³⁰⁹ Today, the Badger-Two Medicine encompasses 165,588 acres,³¹⁰ and remains under threat for oil and gas development.³¹¹

3. Chi’chil Bildagoteel

³⁰⁶ Advisory Council on Historic Pres., *Comments of the Advisory Council on Historic Preservation Regarding the Release from Suspension of the Permit to Drill by Solenex LLC In Lewis and Clark National Forest, Montana 6* (Sept. 21, 2015) (on file with author).

³⁰⁷ *Id.*

³⁰⁸ French et al., *supra* note 304, at 12; *see also id.* (“[T]he legal definition of a property under NHPA assumes that it is a location with particular physical and cultural characteristics which can be documented and bounded. Traditionalists, on the other hand, assume that sites, in addition to having particular physical and spiritual characteristics, also have intrinsic spiritual attributes that cannot be segregated from other aspects of the ecosystem. . . . [T]he spiritual aspects associated with these sites and/or landscapes are by definition boundless.”).

³⁰⁹ *Badger-Two Medicine 2014 DOE, supra* note 303, at 2.

³¹⁰ Mark Bodily, *Determination of Adverse Effects: Solenex LLC Application for Permit to Drill Within the Badger-Two Medicine Traditional Cultural District (24FH1103/24GL1153/25PN0160/24TT0705), Lewis and Clark National Forest, Montana 1* (Dec. 3, 2014) (on file with author).

³¹¹ *See generally* Solenex LLC v. Jewell, 334 F. Supp. 3d 174 (D.D.C. 2018) (reinstating oil and gas lease canceled by BLM and USFS to protect the Badger-Two Medicine), *vacated sub nom.* Solenex LLC v. Bernhardt, 962 F.3d 520 (D.C. Cir. 2020), *on remand sub nom.* Solenex, LLC v. Haaland, No. 13-993 (RJL), ___ F. Supp. 3d ___, 2022 WL 4119776 (D.D.C. Sept. 9, 2022) (reinstating lease), *appeal filed* No. 22-5291 (D.C. Cir. filed Nov. 4, 2022).

The Chí'chil Bıldagoteel Historic District, Traditional Cultural Property,³¹² in Arizona, was listed on the National Register on March 4, 2016.³¹³ Chí'chil Bıldagoteel is “a place of profound religious, spiritual, and cultural importance. It is a traditional Apache camp and territory valued as a place that contains everything traditional Apaches need to thrive: food, medicine, shelter, prayer and healing sites, ceremony grounds, and protection.”³¹⁴ As the nomination further elaborates:

Apaches have been coming to Chí'chil Bıldagoteel for generations. Returning to ancestral sites such as this to live, gather food, and conduct ceremonies strengthens individual, family, and clan bonds to the land and to ancestors. This in turn strengthens and maintains Apache identity and needed bonds to the specific natural elements of Chí'chil Bıldagoteel. The land and the elements found within, and the identity associated with family, clan, and place, in part form the basis for the traditional Apache support systems that directly contributes to cultural vitality and good health.³¹⁵

Chí'chil Bıldagoteel is an important feature in the broader “Western Apache landscape as a sacred site, as a course of supernatural power, and as a staple in their traditional lifeway.”³¹⁶ In its nomination form, the USFS describes Chí'chil Bıldagoteel as “a culturally and geographically defined landscape within the Tonto National Forest whose physical and spiritual integrity is vital to the continuation of fully effective Western Apache cultural practices.”³¹⁷ Chí'chil Bıldagoteel is “a geocultural landscape of place names and holy sites.”³¹⁸ While some modern intrusions exist within its boundaries, they do “not irreparably compromise[] the integrity of this culturally important landscape.”³¹⁹

³¹² Chí'chil Bıldagoteel, otherwise known as Oak Flats, means “a broad flat of Emory oak trees” in Western Apache. Nanabah Nez, *National Register of Historic Places Registration Form: Chí'chil Bıldagoteel Historic District, Traditional Cultural Property* 4 (Sept. 22, 2014) [hereinafter *Chí'chil Bıldagoteel Nomination*], <https://www.resolutionmineeis.us/sites/default/files/references/nez-2016.pdf> [<https://perma.cc/Z8FF-Z7UU>].

³¹³ *National Register of Historic Places Program: Weekly List*, NAT'L PARK SERV. (Mar. 11, 2016), <https://www.nps.gov/subjects/nationalregister/upload/weekly-list-2016-national-register-of-historic-places.pdf> [<https://perma.cc/YHA5-4JUC>].

³¹⁴ *Chí'chil Bıldagoteel Nomination*, *supra* note 312, at 9.

³¹⁵ *Id.* at 14 (emphases omitted).

³¹⁶ *Id.* at 8.

³¹⁷ *Id.* at 4.

³¹⁸ *Id.* at 30.

³¹⁹ *Id.* at 22.

The nomination recognizes that drawing boundaries to encompass Chí'chil Bildagoteel "is not consistent with Apache cultural sensibilities."³²⁰ As noted in the nomination, to the Western Apache:

Landscapes are not viewed as pieces of a puzzle sewn together with separate and segregated attributes. Chí'chil Bildagoteel is viewed as one large body, with each of the unique attributes contributing elements to make a whole. Elders could explain the elements as similar to bones, and veins and appendages. All of these elements are necessary to make a whole body, and for that body to be healthy.³²¹

As with most traditional cultural landscapes (and properties), the cultural significance of Chí'chil Bildagoteel "does not stop at artificial boundaries."³²² Chí'chil Bildagoteel is threatened by the development of a copper mine directly on top of the landscape following the proposed transfer of the land from the USFS to a foreign mining company.³²³

C. Cultural Landscapes beyond the NHPA

The recognition of traditional cultural landscapes and places exhibiting similar characteristics is not limited to only the NHPA. Indeed, the NHPA often falls short of being able to adequately convey the significance of traditional cultural landscapes and ensure their consideration in management and preservation. The NHPA is not the only authority by which federal agencies consider, manage, and protect cultural landscapes. Several federal agencies have implemented cultural resource management initiatives and guidelines that incorporate cultural landscapes and operate outside the NHPA. This Section describes just a few examples of cultural landscape management schemes outside the NHPA.³²⁴

³²⁰ *Id.* at 11; *see* French et al., *supra* note 304, at 12 (discussing how defining boundaries for the Badger-Two Medicine is inconsistent with Blackfoot tradition, culture, and worldview).

³²¹ *Chi'chil Bildagoteel Nomination*, *supra* note 312, at 11 (emphasis omitted).

³²² *Id.* at 12.

³²³ *See generally* Apache Stronghold v. United States, 519 F. Supp. 3d 591 (D. Ariz. 2021) (denying preliminary injunction enjoining transfer), *aff'd* 38 F.4th 742 (9th Cir. 2022), *vacated pending en banc rehearing*, 56 F.4th 636 (9th Cir. 2022) (mem.).

³²⁴ Cultural landscapes are also recognized within international preservation frameworks. *See, e.g.*, United Nations Educ., Scientific & Cultural Org., *Operational Guidelines for the Implementation of the World Heritage Convention* 85 (Jan. 2008) (Cultural landscapes are "illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal."); *The International Scientific Committee of Cultural Landscapes ICOMOS-IFLA*, INT'L COUNCIL FOR MONUMENTS & SITES, <http://landscapes.icomos.org/> (last visited Mar. 6, 2023) ("Cultural landscapes are increasingly

1. Indigenous Cultural Landscapes

Beyond the NHPA, the NPS utilizes the framework of “indigenous cultural landscapes” to inform holistic, landscape-level management and preservation initiatives from the perspective of Native Americans.³²⁵ An Indigenous cultural landscape is a “large area[] of land and water which an indigenous community would know intimately, because it contained most of what they needed physically and culturally.”³²⁶ It “depicts combined natural and cultural landscape features that together could have supported an indigenous community in its entirety.”³²⁷ As described in a 2010 essay:

The concept of the Indigenous Cultural Landscape . . . is intended to represent large landscapes from the perspective of American Indian nations at the time of their first contact with Europeans. These landscapes comprise the cultural and natural resources that would have supported the historic lifestyles and settlement patterns of an Indian group in their totality. The concept attempts to demonstrate that American Indian places were not confined to the sites of houses, towns, or settlements, and that the concept of the American Indian view of the one’s homeland is holistic rather than compartmentalized into the discrete site elements typically used in our language today such as “hunting grounds”, “villages”, or sacred sites”.³²⁸

The Indigenous cultural landscape framework was developed to explain an Indigenous perspective of landscape in the Chesapeake Bay watershed in response to President Obama’s issuance of the Chesapeake Bay Protection and Restoration executive order.³²⁹ The NPS’s use of Indigenous cultural landscapes is not about preservation *per se*, but about developing “a structure and language to work with

understood as complex systems where cultural relationships are developed within an ecological context, recognizing the mutual and reciprocal influence of nature and culture.”)

³²⁵ *Indigenous Cultural Landscapes*, NAT’L PARK SERV. (June 11, 2019), <https://www.nps.gov/cajo/learn/indigenous-cultural-landscapes.htm> [<https://perma.cc/HDM3-85W4>].

³²⁶ Deanna Beacham et al., *Indigenous Cultural Landscapes: A 21st-Century Landscape-scale Conservation and Stewardship Framework*, 34 *GEORGE WRIGHT FORUM* 343, 345 (2017), <http://www.georgewright.org/343beacham.pdf> [<https://perma.cc/BD52-AA3H>].

³²⁷ *Id.* at 343.

³²⁸ Deanna Beacham, *The Indigenous Cultural Landscape of the Eastern Woodlands: A Model for Conservation, Interpretation, and Tourism* 3 (2010), <https://www.nps.gov/chba/learn/news/upload/ICL-Banner-Update-April2015-Updated.pdf> [<https://perma.cc/NM45-YUM5>].

³²⁹ *Indigenous Cultural Landscapes*, *supra* note 325 (discussing Chesapeake Bay Protection and Restoration, Exec. Order No. 13,508, 74 Fed. Ref. 23,099 (May 12, 2009)).

tribes who still live on or near their ancestral lands” and implementing values-based management of landscape-level resources.³³⁰ While Indigenous cultural landscapes do not “fit within existing preservation constructs,” such as the NHPA and the National Register,³³¹ the concept can “be used to document and recognize the cultural aspects of a natural-appearing landscape within the construct of the National Register.”³³²

2. Tribal Cultural Landscapes

In 2015, the United States Bureau of Ocean Energy Management (“BOEM”) published guidance “present[ing] a method for agencies to consult with tribes more effectively and appropriately” and “suggest[ing] a means for tribes and other indigenous communities to relate their interests and concepts of landscape to federal agencies and other land and water management entities.”³³³ To accomplish this, the guidance introduced the concept of “tribal cultural landscapes.” The BOEM guidance document defines a tribal cultural landscape as

[a]ny place in which a relationship, past or present, exists between a spatial area, resource, and an associated group of indigenous people whose cultural practices, beliefs, or identity connects them to that place. A tribal cultural landscape is determined by and known to a culturally related group of indigenous people with relationships to that place.³³⁴

Tribal cultural landscapes are distinct from both TCPs and cultural landscapes recognized by the NPS and the ACHP,³³⁵ and represent what the BOEM calls a “holistic approach” to management and preservation “beyond the site-level definition” employed by the NHPA.³³⁶ While the recognition, management, and protection of TCPs and cultural landscapes under the NHPA rely on external, agency-driven criteria and determinations, tribal cultural landscapes “provide a method in which interests of an indigenous community can be recorded by that

³³⁰ Beacham et al., *supra* note 326, at 334-35.

³³¹ *Id.* at 351.

³³² *Id.* at 352.

³³³ David Ball et al., *A Guidance Document for Characterizing Tribal Cultural Landscapes: OSC Study, BOEM 2015-047* 1 (Nov. 30, 2015), [https://www.boem.gov/2015-047/\[https://perma.cc/A6Z6-FJX4\]](https://www.boem.gov/2015-047/[https://perma.cc/A6Z6-FJX4]).

³³⁴ *Id.* at 5.

³³⁵ *See id.* at 6 (“A key difference between TCPs and [tribal cultural landscapes] is that the latter are defined as significant by indigenous communities, rather than by exterior criteria. Whether or not a TCP may be eligible for the National Register is largely at the discretion of the nomination evaluator.”); *see also id.* 6-7 (discussing differences between tribal cultural landscapes and NPS-defined cultural landscapes).

³³⁶ *Id.* at 7.

group, and summarized results and concerns can be applied in a culturally sensitive and relevant manner for use in planning and regulatory compliance by federal agencies.”³³⁷

Both the Indigenous cultural landscape and tribal cultural landscape frameworks provide a framework for the management and protection of culturally significant natural landscapes outside of the NHPA. As the BOEM recognizes, these sorts of management frameworks can “help minimize conflicts, controversy, legal challenges and procedural delays” by incorporating the consideration of cultural landscapes into management and policy decisions that do not trigger sections 106 or 110 obligations.³³⁸ This cuts both ways, however, as Tribes may be hard-pressed to hold agencies accountable for failing to apply, or for inconsistently applying, these management frameworks.³³⁹ Despite its shortcomings, the NHPA is still the best tool Tribes have to ensure the consideration and protection of traditional cultural landscapes.³⁴⁰

V. THE CH’U’ITNU TRADITIONAL CULTURAL LANDSCAPE

For decades, the Native Village of Tyonek has fought to protect the Ch’u’itnu watershed from large-scale development, and with that, to protect the Village’s subsistence culture. The most recent threat to the Ch’u’itnu and the Tubughna’s subsistence culture was the Chuitna Coal Project, a proposed open-pit coal mine that would be located in the headwaters of the Ch’u’itnu.³⁴¹ PacRim Coal, LP, proposed to mine 300 million tons of coal out of the Ch’u’itnu watershed.³⁴² The mine and associated infrastructure, including conveyors, loadings areas, a landing strip, housing, and port facilities, would have been located only twelve miles from the village of Tyonek.³⁴³ For nearly eleven years, the Native Village of Tyonek fought the development of the coal mine until PacRim withdrew its Clean Water Act (“CWA”) permit application in March 2017.³⁴⁴ The mine’s potential

³³⁷ *Id.* at 2.

³³⁸ *Id.* at 8.

³³⁹ *Cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004) (“Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them [A]llowing general enforcement of plan terms would lead to pervasive interference with [the agency’s] own ordering of priorities.”).

³⁴⁰ *Cf. Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1178 (D. Or. 2010) (“The NHPA, NEPA, and § 4(f) are powerful legal mechanisms intended to assure that federal agencies analyze the impacts of their projects on the cultural, historical, and environmental resources of our nation.”).

³⁴¹ *See* 71 Fed. Reg. 33,446 (June 6, 2006).

³⁴² Boraas et al., *supra* note 2, at 17.

³⁴³ *Id.*

³⁴⁴ *See* Withdrawal of Notice of Intent, 82 Fed. Reg. 29,285 (June 28, 2017).

destruction of the salmon spawning and rearing habitat in the headwaters of the Ch'u'itnu posed an existential threat to Tubughna culture, subsistence lifeway, and the Village's very existence.

In response to the proposed mine, the Native Village of Tyonek took steps to ensure the protection of the Ch'u'itnu, the salmon, and Tubughna subsistence and culture by becoming a cooperating agency in the NEPA process used by the United States Army Corps of Engineers ("USACE")³⁴⁵ and a consulting party in USACE's section 106 process. Through the section 106 process, the Native Village of Tyonek pushed the USACE to consider and protect the Ch'u'itnu as a traditional cultural landscape.

A. The Section 106 Process

Prior to PacRim submitting its CWA permit application to the USACE, its cultural resource contractors conducted an archaeological survey of the proposed mine site.³⁴⁶ This survey identified an area, now known as the Ch'u'itnu Archaeological District, which was initially determined eligible for inclusion on the National Register under Criterion D.³⁴⁷ The Ch'u'itnu Archaeological District is roughly 2,000 acres, located along the shore of Cook Inlet and includes the mouth of the Ch'u'itnu.³⁴⁸ Its eastern boundary abuts what would have been the proposed terminal that would have extended out into Cook Inlet to load container ships with coal mined in the watershed.

In 2013, the Native Village of Tyonek pressed the USACE and the Alaska SHPO to reconsider the Ch'u'itnu Archaeological District's eligibility under Criteria A and C based specifically on the Tubughna's salmon subsistence culture and the archaeological record of continued occupation in the Ch'u'itnu watershed, as evidenced by house pits and cold storage pits located within the Ch'u'itnu Archaeological District.

³⁴⁵ See generally NEPA and Agency Planning, Cooperating agencies, 40 C.F.R. § 1501.8; Definitions, 40 C.F.R. § 1508.1(e).

³⁴⁶ Boraas et al., *supra* note 2, at 18.

³⁴⁷ Comment from Arthur Standifer, Tribal President, Native Vill. of Tyonek, to Lieutenant Governor Byron Mallott, Chair, Alaska Historical Comm'n, *Comments in Support of the Ch'u'itnu Historic District, Traditional Cultural Property: 3330-1-1 Ch'u'itnu Historic District, Traditional Cultural Property* 1 (Nov. 30, 2017) (on file with author).

³⁴⁸ Comment from Arthur Standifer, Tribal President, Native Vill. of Tyonek, to Joy Beasley, Acting Keeper of the Nat'l Register of Historic Places, Nat'l Park Serv., *Native Village of Tyonek Comments in Support of the Ch'u'itnu Historic District for Inclusion in the National Register of Historic Places—SG100002618*, at 3 n.11 (June 25, 2018) (on file with author).

The Alaska SHPO agreed that the Ch'u'itnu Archaeological District was eligible under Criterion A.³⁴⁹ The Keeper also agreed, issuing a formal determination of eligibility finding the Ch'u'itnu Archaeological District eligible for inclusion in the National Register under Criterion A. Specifically, the Keeper found:

While the district may be eligible as part of a larger landscape, it is the Keeper's opinion that the [Ch'u'itnu Archaeological District] is individually eligible under Criterion A because it conveys its significance as a place that represents the broad patterns of history regarding the uninterrupted use, from precontact times to the present, of salmon subsistence not merely as a dietary supplement, but as an integral part of contemporary Tyonek life. Specifically, the documentation shows that the tangible, archaeological record reflects salmon subsistence as a key and central theme in a sharing/economic system that defines community membership, a spiritual system of sacred water, and gave rise to social and political complexity through the qeshqa [chief] system of governance and reciprocity.³⁵⁰

The Native Village of Tyonek's work to secure this determination of eligibility was the springboard to determine the entire Ch'u'itnu watershed eligible for inclusion in the National Register. In April 2015, the Native Village of Tyonek submitted a report to the USACE documenting National Register eligibility of the Ch'u'itnu watershed under Criteria A, C, and D, and identifying it as a traditional cultural landscape.³⁵¹ The Native Village of Tyonek was forced to undertake this work itself, as the USACE refused to consult with the Tribe regarding the eligibility of the Ch'u'itnu watershed in the ongoing section 106 process. Regarding Criterion A, the report concluded:

The culturally and historically significant events that have taken place and continue to take place in the Ch'u'itnu watershed comprise complex patterns of human activity and belief, all organized around and fundamentally influenced by salmon subsistence. The Tubughna relationship with salmon has defined the culture's use of the land and its places and animals; it has defined Tubughna social organization and settlement patterns; and it has greatly influenced the people's spiritual beliefs and practices. The

³⁴⁹ See Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to Heather Kendall Miller, Native Am. Rights Fund (Dec. 9, 2013) (on file with author).

³⁵⁰ Nat'l Park Serv., *Determination of Eligibility Notification: Ch'u'itnu Archaeological District*, at 2 (May 5, 2014) (on file with author).

³⁵¹ See Boraas et al., *supra* note 2.

relationship between the people, the land, and the salmon has been imprinted on the landscape through centuries of subsistence use, and is fundamental to the people's sense of freedom, identity, and self-worth.³⁵²

Regarding Criterion C, the report concluded that the Ch'u'itnu Traditional Cultural Landscape "constitutes an historically and culturally significant entity even if its individual components within it—such as an individual residence, a cold storage pit, or a fishing site—are regarded as lacking distinction."³⁵³ The report also presented a number of potential research hypotheses to establish the Ch'u'itnu Traditional Cultural Landscape's eligibility under Criterion D.³⁵⁴

After receiving the report, the USACE refused to consider the National Register-eligibility of the Ch'u'itnu Traditional Cultural Landscape. After over a year, in May 2016, the Advisory Council on Historic Preservation sent a letter directing the USACE to obtain from the Keeper a formal determination of eligibility for the Ch'u'itnu Traditional Cultural Landscape.³⁵⁵ In its letter, the ACHP stated that it was "apparent that the [Ch'u'itnu Traditional Cultural Landscape] is a living cultural landscape that continues to be utilized by and is of great cultural importance to the members of the tribe."³⁵⁶

Finally, in July 2016, the USACE made a determination of eligibility for the Ch'u'itnu Traditional Cultural Landscape and requested the Alaska SHPO's concurrence.³⁵⁷ While the USACE determined that the Ch'u'itnu Traditional Cultural Landscape was eligible under Criteria A and D,³⁵⁸ it determined that only the bottom third of the watershed was part of the eligible property. The USACE's determination was made without consultation with the Native Village of Tyonek and conveniently excluded the uplands and headwaters of the Ch'u'itnu, including the actual proposed mine site.³⁵⁹ The Alaska SHPO chose "not to comment on the

³⁵² *Id.* at 112.

³⁵³ *Id.* at 113.

³⁵⁴ *Id.* at 113-16.

³⁵⁵ Letter from Charlene Dwin Vaughn, Assistant Dir., Office of Fed. Agency Programs, Advisory Council on Historic Pres., to Colonel Michael Brooks, Commander, U.S. Army Corps of Eng'rs, (May 25, 2016) (on file with author).

³⁵⁶ *Id.* at 1.

³⁵⁷ Letter from Sheila Newman, Chief, Special Actions Branch, U.S. Army Corps of Eng'rs, to Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology (July 15, 2016) (on file with author).

³⁵⁸ *Id.* at 3-5.

³⁵⁹ *Id.* at 2-3.

eligibility of the property in question and . . . defer[red] to the Keeper's final decision,"³⁶⁰ asserting:

The currently proposed revisions to National Register Bulletin 38^[361] . . . has generated some uncertainty and fluctuating opinions on how to define this category of properties. Lack of resolution around the definition of TCPs/TCLs is a challenge for cultural resources management professionals nationwide. There is little precedent for the application of these guidelines to places in Alaska.³⁶²

The USACE never forwarded its determination to the Keeper.

In the fall of 2016, the USACE administratively suspended its review of PacRim's permit application. By then, the Native Village of Tyonek had not received any notice from the USACE that it had sought a formal determination of eligibility from the Keeper. Sensing that the permitting process was about to end without a formal determination of eligibility on the Ch'u'itnu Traditional Cultural Landscape, over the winter the Native Village of Tyonek decided to take proactive steps to ensure that the entire Ch'u'itnu Traditional Cultural Landscape would be considered in any future undertaking in the watershed by nominating it to the National Register.³⁶³

B. The Nomination Process

On February 8, 2017, the Native Village of Tyonek submitted a formal request for nomination of the Ch'u'itnu Traditional Cultural Landscape to the Alaska SHPO.³⁶⁴ The nomination mirrors the determination of eligibility report the Native Village of Tyonek submitted to the USACE in 2015, documenting its eligibility under Criteria A, C, and D. The majority of the nomination is focused on Criterion A:

³⁶⁰ Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to Sheila Newman, Chief, Special Actions Branch, U.S. Army Corps of Eng'rs (Aug. 8, 2016) (emphasis omitted) (on file with author).

³⁶¹ See generally *supra* note 97.

³⁶² Letter from Judith E. Bittner, *supra* note 349, at 1.

³⁶³ On March 30, 2017, PacRim formally suspended its permit application, and the USACE announced the withdrawal of its notice of intent to prepare a supplemental EIS on June 28, 2017, ending the project. See *Withdrawal of Notice of Intent*, 82 Fed. Reg. 29,285 (June 28, 2017).

³⁶⁴ See Heather Kendall-Miller et al., *National Register of Historic Places Registration Form: Ch'u'itnu (Ch'u'itnu Traditional Cultural Landscape)* (Feb. 8, 2017) [hereinafter *Ch'u'itnu Nomination I*] (on file with author); see also *National Register of Historic Places, Requests for nominations*, 36 C.F.R. § 60.11.

[T]he general events in the Ch'u'itnu Historic District that have made significant contributions to the broad patterns of Tubughna history comprise the sustained subsistence and related indigenous social and spiritual practices that have operated without interruption from pre-contact times to the present, based on interactions with the same keystone species—salmon. The key components are the river, including the entire watershed where anadromous salmon spawn, and the traditional and cultural practices of the Tubughna people associated with the watershed and salmon, shaped by the last 1,000 years of continued practice of salmon subsistence. The Ch'u'itnu is a living cultural landscape that is testimony to the Dena'ina's ability to maintain identity in the modern world while engaging in the heritage of their ancestors.³⁶⁵

As defined in the nomination, the Ch'u'itnu Traditional Cultural Landscape encompasses 109,282 acres of the Ch'u'itnu watershed and the Cook Inlet coastline.³⁶⁶

The Alaska SHPO returned the nomination form with a technical opinion outlining her concerns with the adequacy of the nomination's documentation, which the Native Village of Tyonek addressed, submitting an amended nomination form on May 2, 2017.³⁶⁷ Following the Native Village of Tyonek's revisions to the nomination, the Alaska SHPO placed the Ch'u'itnu Traditional Cultural Landscape on the agenda for consideration at the Alaska Historical Commission's³⁶⁸ July 17, 2017 meeting.³⁶⁹ By placing the nomination on the Commission's agenda for consideration, the Alaska SHPO certified that the Ch'u'itnu Traditional Cultural Landscape "nomination form appear[ed] to be adequately documented and [that] the property appear[ed] to meet the National Register criteria for evaluation"³⁷⁰

³⁶⁵ Alan S. Boraas et al., *National Register of Historic Places Registration Form: Ch'u'itnu Historic District, Traditional Cultural Property 19-20* (Sept. 19, 2018) [hereinafter *Ch'u'itnu Nomination IV*] (on file with author). For a more detailed description of the significance of the Ch'u'itnu Traditional Cultural Landscape to the Native Village of Tyonek and the Tubughna, see *supra* Part II.

³⁶⁶ *Id.* at 49.

³⁶⁷ See Heather Kendall-Miller et al., *National Register of Historic Places Registration Form: Ch'u'itnu (Ch'u'itnu Traditional Cultural Landscape)* (May 2, 2017) [hereinafter *Ch'u'itnu Nomination II*] (on file with author); see National Register of Historic Places, Requests for nominations, 36 C.F.R. § 60.11(a)-(b).

³⁶⁸ The Commission is Alaska's State Review Board. See Definitions, 36 C.F.R. § 60.3(o); Alaska Stat. § 41.35.350(a)(10).

³⁶⁹ See Letter from Joan M. Antonson, Deputy State Historic Pres. Officer, Alaska Office of History & Archaeology (June 16, 2017) (on file with author).

³⁷⁰ 36 C.F.R. § 60.11(c).

At the Commission's July 17 meeting, a dozen members of the Native Village of Tyonek, including the President, testified in support of the nomination. Nevertheless, the Commission refused to act on the nomination, instead delaying its decision until its next meeting. The Commission expressed concerns that the Native Village of Tyonek was making up a new National Register property type by calling the nomination "Traditional Cultural Landscape."³⁷¹ Commission members stated that while Bulletin 38 provides guidance for evaluating traditional cultural *properties*, it did not provide guidance for evaluating traditional cultural *landscapes*.³⁷² One Commission member even commented that while the Ch'u'itnu Traditional Cultural Landscape appeared to resemble a district, it could not be a district because the property did not identify any built structures as contributing resources.³⁷³

The Native Village of Tyonek's response to the Commission's decision to delay consideration of the Ch'u'itnu Traditional Cultural Landscape was twofold. First, the Native Village of Tyonek invited the Keeper and his staff, along with the Alaska SHPO, to conduct a site visit of the Ch'u'itnu watershed in Tyonek.³⁷⁴ On October 18, 2017, National Register staff, along with the Alaska SHPO, traveled to Tyonek, did a fly-over of the Ch'u'itnu watershed, met with the Native Village of Tyonek Tribal Council, visited the Ch'u'itnu Archaeological District, and visited fish camp along the shores of Cook Inlet.

Second, the Native Village of Tyonek submitted a revised nomination form, "correct[ing] the name of the property to better reflect the Ch'u'itnu's property type and type of significance."³⁷⁵ The Native Village of Tyonek explained that "'Traditional Cultural Landscape' was a descriptive term[]" only.³⁷⁶ On September 27, 2017, the Native Village of Tyonek resubmitted the nomination form, changing only the name of the property to the "Ch'u'itnu Historic District, Traditional Cultural Property."³⁷⁷

³⁷¹ Letter from Wesley James Furlong, Alaska Fellow Att'y, Native Am. Rights Fund, to Alaska Historical Comm'n, 1 (Sept. 27, 2017) (on file with author).

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ See Letter from Arthur Standifer, Tribal President, Native Vill. of Tyonek, to Paul Loether, Nat'l Register Chief, Nat'l Park Serv., *Ch'u'itnu Technical Site Visit* (Aug. 21, 2017) (on file with author).

³⁷⁵ Letter from Wesley James Furlong, *supra* note 371, at 2.

³⁷⁶ *Id.*

³⁷⁷ See Heather Kendall-Miller et al., *National Register of Historic Places Registration Form: Ch'u'itnu Historic District, Traditional Cultural Property* (Sept. 27, 2017) [hereinafter *Ch'u'itnu Nomination III*] (on file with author); Letter from Wesley James Furlong, *supra* note 371, at 2 ("[T]he changes reflected in the Corrected Nomination are not substantive; the changes are related only to the name of the nomination.").

On December 6, 2017, the Commission met again with the “Ch’u’itnu Historic District, Traditional Cultural Property” nomination on its agenda for consideration. Instead of discussing the nomination, the Commission removed the nomination from its agenda and tabled it for a future meeting.³⁷⁸ The Commission claimed that consideration of the nomination would violate the State of Alaska’s open meetings laws because the Alaska SHPO’s notice of the meeting did not provide landowners adequate notice that the Commission was considering a new nomination.³⁷⁹ The Commission stated that because the Native Village of Tyonek changed the name of the property from the Ch’u’itnu Traditional Cultural Landscape to the Ch’u’itnu Historic District, Traditional Cultural Property, it had changed the nomination’s property type and would require the application of different National Register criteria.³⁸⁰ In response, the Native Village of Tyonek appealed to the Keeper the Commission’s refusal to consider the nomination at its December 6 meeting.³⁸¹ The Keeper denied the appeal.³⁸²

On April 4, 2018, the Commission, for the third time, met to consider the Native Village of Tyonek’s nomination.³⁸³ At this meeting, the Commission finally considered the substance of the Native Village of Tyonek’s nomination. The Commission determined that the Ch’u’itnu Historic District, Traditional Cultural Property was eligible for inclusion in the National Register under Criteria A and D and recommended that the Alaska SHPO approve the nomination for listing on the National Register.³⁸⁴ The Alaska SHPO disagreed with the Commission’s determination, but on May 15, 2018, nevertheless forwarded the nomination to the Keeper for a final determination on the listing of the Ch’u’itnu Historic District,

³⁷⁸ Letter from Wesley James Furlong, Staff Att’y, Native Am. Rights Fund, to Paul Loether, Keeper of the Nat’l Register of Historic Places, Nat’l Park Serv. 2 (Dec. 20, 2017) (on file with author).

³⁷⁹ *Id.*, at 3.

³⁸⁰ *Id.*; see also Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to J. Paul Loether, Chief, Nat’l Register of Historic Places, Nat’l Park Serv., (Jan 25, 2018) (on file with author). In every iteration of the nomination, the Native Village of Tyonek always selected “District” under the “Category of Property” in the nomination forms. See *Ch’u’itnu Nomination I*, *supra* note 364, at 3; *Ch’u’itnu Nomination II*, *supra* note 367, at 3; *Ch’u’itnu Nomination III*, *supra* note 377, at 3; *Ch’u’itnu Nomination IV*, *supra* note 365, at 3.

³⁸¹ See Letter from Wesley James Furlong, *supra* note 383; see also National Register of Historic Places, Nomination appeals, 36 C.F.R. § 60.12.

³⁸² See Letter from J. Paul Loether, Chief, Nat’l Register of Historic Landmarks & Keeper of the Nat’l Register of Historic Places, to Judith Bittner, State Historic Pres. Officer, Alaska Dep’t of Natural Res. (Feb. 1, 2019) (on file with author).

³⁸³ See Alaska Dep’t of Natural Res., *Alaska Historical Commission to Meet April 4* (Mar. 2, 2018) (on file with author).

³⁸⁴ See Letter from Wesley James Furlong, Staff Att’y, Native Am. Rights Fund, to Judith Bittner, State Historic Pres. Officer, Office of History & Archaeology (Apr. 11, 2018) (on file with author); see also Nominations by the State Historic Preservation Officer, 36 C.F.R. § 60.6(j); Requests for nominations, 36 C.F.R. § 60.11(e).

Traditional Cultural Property.³⁸⁵ In her transmission to the Keeper, the Alaska SHPO stated that she supported revising the boundaries to comport with those proposed by the USACE in 2016, which excluded the upper half of the Ch'u'itnu watershed.³⁸⁶ She also stated that in her opinion, the property was not adequately documented.³⁸⁷ The Alaska SHPO did affirm that the Alaska Office of History and Archaeology did not receive notarized objections from a majority of the private landowners within the boundaries of the property.³⁸⁸

On June 13, 2018, the National Park Service published a notice in the Federal Register that it was considering the Ch'u'itnu Historic District, Traditional Cultural Property for inclusion in the National Register.³⁸⁹ In a letter dated June 27, 2018, however, the Keeper returned the Ch'u'itnu Historic District, Traditional Cultural Property to the Alaska SHPO.³⁹⁰ The Keeper noted that there were procedural, technical, and substantive issues with the nomination that prevented its listing at that time.³⁹¹ The Keeper specifically stated: "Reconsideration of the nomination will be given upon correction of the items noted below and resubmission of the required materials to the National Park Service."³⁹²

After consultations with the National Register staff, on September 10, 2018, the Native Village of Tyonek submitted a revised Ch'u'itnu Historic District, Traditional Cultural Property nomination to the Alaska SHPO addressing the concerns raised by the Keeper.³⁹³ The Native Village of Tyonek requested the Alaska SHPO forward the revised nomination to the Keeper for a final determination on the property's listing.³⁹⁴ Over the next six months, the Alaska SHPO did not forward the revised nomination to the Keeper. On March 11, 2019, the Native Village of Tyonek appealed to the Keeper the Alaska SHPO's failure and refusal to nominate the Ch'u'itnu Historic District, Traditional Cultural

385 Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to J. Paul Loether, Keeper of the Nat'l Register of Historic Places, Nat'l Park Serv. (May 15, 2018) (on file with author); see 36 C.F.R. §§ 60.6(k)-(l), 60.11(e).

386 Letter from Bittner, *supra* note 385, at 5.

387 *Id.* at 3-5; see 36 C.F.R. § 60.6(p).

388 Letter from Bittner, *supra* note 385, at 2.

389 83 Fed. Reg. 27,625 (June 28, 2019); see 36 C.F.R. § 60.6(q).

390 See Letter from Joy Beasley, Acting Assoc. Dir., Cultural Res., P'ships, & Sci., Nat'l Park Serv., to Judith Bittner, State Historic Pres. Officer, Office of History & Archaeology (June 27, 2018) (on file with author).

391 *Id.* at 1-3.

392 *Id.*; see Nominations by the State Historic Preservation Officer, 36 C.F.R. § 60.6(r).

393 See *Ch'u'itnu Nomination IV*, *supra* note 365.

394 See Letter from Wesley James Furlong, Staff Att'y, Native Am. Rights Fund, to Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology (Oct. 19, 2018) (on file with author).

Property to the National Register.³⁹⁵ In response, the Alaska SHPO stated that her staff needed more time to review the revised nomination and determine whether it had been substantively revised and should be treated as a new nomination,³⁹⁶ beginning the entire request for the nomination process over.³⁹⁷

On May 2, 2019, the Keeper denied the appeal but directed the Alaska SHPO to conclude her review within 59 days and either determine that the nomination should be treated as a new submission or forward the revised nomination to the Keeper.³⁹⁸ On June 27, 2019, the Alaska SHPO forwarded the revised nomination to the Keeper.³⁹⁹ Despite the revisions the Native Village of Tyonek made to the nomination in response to the Keeper's June 27, 2018, letter, on August 16, 2019, the Keeper returned the nomination again, requesting additional revisions.⁴⁰⁰

Addressing the Keeper's second request for additional information would have required the nomination form to be entirely rewritten. Based on the Alaska SHPO's position during the previous round of revisions, the Native Village of Tyonek believed that the Alaska SHPO could treat such a substantially revised nomination form as a new nomination and restart the entire request for nomination process.⁴⁰¹ Moreover, it was apparent that even if a revised nomination was resubmitted to the Keeper, under political pressure from then-Secretary of the Interior David L. Bernhardt,⁴⁰² it was highly likely that the Keeper would formally

³⁹⁵ See Letter from Wesley James Furlong, Staff Att'y, Native Am. Rights Fund, to Joy Beasley, Keeper of the Nat'l Register of Historic Places, Nat'l Park Serv., (Mar. 11, 2019) (on file with author); see also Nomination appeals, 36 C.F.R. § 60.12.

³⁹⁶ See Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to Joy Beasley, Keeper, Nat'l Register of Historic Places, 3 (Apr. 15, 2019) (on file with author).

³⁹⁷ See Requests for nominations, 36 C.F.R. § 60.11(f) ("If the applicant substantially revises a nomination as a result of comments by the State of Federal agency, it may be treated by the [SHPO] or [FPO] as a new submittal and reprocessed in accord with the requirements of this section.").

³⁹⁸ See Letter from Joy Beasley, Acting Assistant Dir. Cultural Res., P'ships, & Science, Keeper, Nat'l Register of Historic Places, to Judith Bittner, State Historic Pres. Officer, Alaska Dep't of Natural Res. (May 2, 2019) (on file with author).

³⁹⁹ See Letter from Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology, to Joy Beasley, Keeper, Nat'l Register of Historic Places, (June 27, 2019) (on file with author).

⁴⁰⁰ See Letter from Joy Beasley, Associate Dir. (Acting), Cultural Res., P'Ships, & Science & Keeper of the Nat'l Register, Nat'l Park Serv., to Judith Bittner, State Historic Pres. Officer, Alaska Dep't of Natural Res. (Aug. 16, 2019) (on file with author); see also Nominations by the State Historic Preservation Officer, 36 C.F.R. § 60.6(r).

⁴⁰¹ See 36 C.F.R. § 60.11(f).

⁴⁰² In 2019, the NPS proposed revisions to the National Register regulations that would have prevented Tribes from listing traditional cultural landscapes and large traditional cultural properties on the National Register. See 84 Fed. Reg. 6,996 (Mar. 1, 2019). The rulemaking was

determine the Ch'u'itnu Historic District, Traditional Cultural Property ineligible for the National Register. This determination would potentially prevent the Ch'u'itnu Traditional Cultural Landscape from ever being considered in future section 106 processes, defeating the entire purpose of the nomination. This risk was unacceptable to the Native Village of Tyonek. As of this publication, the Ch'u'itnu Traditional Cultural Landscape is not listed on the National Register. For now, the Commission's determination that the Ch'u'itnu Historic District, Traditional Cultural Property is eligible for inclusion on the National Register under Criteria A and D must be sufficient to ensure its consideration in future section 106 processes.

The Native Village of Tyonek's experience nominating the Ch'u'itnu Traditional Cultural Landscape to the National Register highlights the weaknesses of the National Historic Preservation Act and the obstacles Tribes face when they attempt to use the NHPA to protect their culturally significant places. Nonetheless, the Native Village of Tyonek's experience is cultural survivance, and it illustrates the prominent place traditional cultural landscapes should and must occupy within the NHPA framework. The Ch'u'itnu Traditional Cultural Landscape is not listed on the National Register, but the Chuitna Coal Mine was never built, thanks in no small part to the Native Village of Tyonek's steadfast commitment to protecting the Ch'u'itnu. Moreover, the Commission determined the Ch'u'itnu eligible under Criteria A and D.

CONCLUSION

The Native Village of Tyonek's experience in protecting the Ch'u'itnu watershed and nominating the Ch'u'itnu Traditional Cultural Landscape to the

universally opposed by Tribes, SHPOs, and historic preservation and cultural resource management organizations. *See, e.g.*, Comment from Wesley James Furlong, *supra* note 27. Some viewed the rulemaking as a response to a number of nominations of landscape-level historic properties, including the Ch'u'itnu Traditional Cultural Landscape. *See, e.g.*, Comment from Marion F. Werkheiser, Policy Dir., Coal. for Am. Heritage, to Nat'l Register of Historic Places, Nat'l Park Serv., *NPS Proposed Rule-National Register; NPS-WASO-NHPA; PPWONRADE2, PMP00I05.YP0000; RIN 1024-AE49*, at 12 (Apr. 30, 2019), <https://www.regulations.gov/document?D=NPS-2019-0001-3052> [<https://perma.cc/S37K-XJBG>]. Many of the proposed changes reflect complaints made by State of Alaska during the Ch'u'itnu nomination process. *See, e.g.*, Comment from Andrew T. Mack, Commissioner, Dep't of Natural Res., to Judith E. Bittner, State Historic Pres. Officer, Office of History & Archaeology 1-3 (July 13, 2017) (on file with author); Comment from John Morrison, Exec. Dir., Trust Land Office, to Alaska Historical Comm'n 1-3 (July 14, 2017) (on file with author). Indeed, in its comments on the proposed rulemaking, the Alaska Department of Natural Resources noted that the Ch'u'itnu Traditional Cultural Landscape "illustrates the importance of these proposed rule changes." Comment from Martin W. Parsons, Dir., Div. of Mining, Land & Water, Dep't of Natural Res., to Joy Beasley, Acting Assoc. Dir., Cultural Res. P'ships, & Sci., Nat'l Park Serv., *National Park Service 36 C.F.R. Parts 60 & 63 Proposed Rule RIN 1024-AE49*, at 1 (Apr. 30, 2019), <https://www.regulations.gov/document?D=NPS-2019-0001-3117>. The rulemaking was not finalized before the end of the Trump Administration and was subsequently withdrawn by the Biden Administration. *See* 86 Fed. Reg. 40,392 (July 28, 2021).

National Register illustrates the strengths and weaknesses of the National Historic Preservation Act. It highlights the shortcomings of the NHPA and the obstacles Tribes face when they attempt to use the NHPA to protect their culturally significant places, while at the same time demonstrating that Tribes can use the existing framework of federal law to pursue cultural resource stewardship that aligns with their own ways of knowing. To be sure, the Ch'u'itnu Traditional Cultural Landscape is not listed on the National Register, but the Chuitna Coal Mine was never built and the Commission determined that the entire watershed is eligible for inclusion on the National Register.

New federal laws are needed to provide meaningful protection for Indigenous cultural resources. Until the current laws are changed or new laws passed, Tribes must operate within the existing framework of federal law. Traditional cultural landscapes provide Tribes the potential to meaningfully influence federal decision-making regarding cultural resources within the existing legal framework, in a way that reflects their cultural values, ways of knowing, and word views. As the Native Village of Tyonek's experience illustrates, however, there remains significant resistance to simply recognizing traditional cultural landscapes, much less *protecting* them.⁴⁰³ Any objections to the recognition and protection of traditional cultural landscapes are without merit and are rooted in racism and colonialism.

⁴⁰³ The Native Village of Tyonek is not the only Tribe to face staunch opposition and political roadblocks to the nomination of historic properties to the National Register. In 2018, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians in Oregon began the National Register request for nomination process for Q'alya Ta Kukwis shichdii me (Jordan Cove and Coos Bay), a 16,656-acre traditional cultural landscape. Stacy Scott, *National Register of Historic Places Registration Form: Q'alya ta Kukwis shichdii me Traditional Cultural Property Historic District* 58 (Sept. 7, 2018), https://ctclusi.org/wp-content/uploads/2020/11/REDACTED_CoosCounty_QalyataKukwisShichdiimeTCPHistoricDistrict.pdf. The Confederated Tribes' experience is eerily similar to the Native Village of Tyonek's experience. Local landowners vehemently opposed the nomination. See generally COOS CONCERNED PROPERTY OWNERS, <https://coosconcernedpropertyowners.com/> (last visited Mar. 6, 2022). The Oregon State Advisory Committee on Historic Preservation unanimously recommended the Q'alya Ta Kukwis shichdii me for listing on the National Register under Criteria A, B, and D. See Or. State Advisory Comm. on Historic Pres., Meeting Minutes 4 (Feb. 22, 2019), https://www.oregon.gov/oprd/OH/Documents/2019February_SACHPminutes.pdf [<https://perma.cc/72NF-F4JJ>]. Enough landowners objected to the property's listing, however, that the nomination was forwarded to the Keeper only for a determination of eligibility. See Parks & Recreation Dep't, *Q'alya ta Kukwis shichdii me (Jordan Cove and the Bay of the Coos People) Traditional Cultural Property Historic District*, STATE OF OR., <https://web.archive.org/web/20190717085430/https://www.oregon.gov/oprd/HCD/NATREG/Pages/Jordan-Cove-TCP.aspx> [<https://perma.cc/L5C6-PDSM>] (last visited Mar. 6, 2023). In 2019, the NPS refused to make a formal determination and returned the nomination "cit[ing] process and documentation deficiencies." *Id.*

There is an unquestionable legal framework for the recognition and consideration of traditional cultural landscapes within the NHPA, and more specifically the National Register and section 106. This framework is firmly rooted in the implementing regulations and guidance of the NPS and the ACHP. The Native Village of Tyonek's experience protecting the Ch'u'itnu Traditional Cultural Landscape hopefully serves as a lesson to other Tribes, Native Hawaiian organizations, and other Indigenous and traditional communities who may undertake similar efforts. Likewise, this Article hopefully serves as a resource to those communities as they work to protect their traditional cultural landscapes.