III. THE EXISTING FRAMEWORK OF PRESERVATION

Enacted in 1966, the National Historic Preservation Act ("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."[1] When Congress first enacted the NHPA, it found and declared "that the historical and cultural foundations of the Nation should be persevered as a living part of our community life and development in order to give a sense of orientation to the American People."[2] The NHPA established a number of discrete programs to achieve this, including the National Register of Historic Places ("National Register") and the Section 106 process.

Over its fifty-four-year history, the NHPA has mostly overlooked Native America's history, culture, and heritage.[3] This began to change with the National Park Service's ("NPS") publication of *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* ("Bulletin 38")[4] in 1990 and Congress's 1992 amendments to the NHPA.[5] Both Bulletin 38 and the 1992 NHPA amendments fundamentally changed how tribes have engaged with and participated in the NHPA.

A. Protecting Indigenous Places

In response to 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,[6] Congress, in 1989, 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

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1 54 U.S.C. § 300101(1).

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

3 *See generally* HILLARY HOFFMAN & 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 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, Comment, *May the Spirit of Section 106 Yet Prevail?: Recognizing the Environmental Elements of Native American Intangible Heritage*, 92 TUL. L. REV. 667 (2018).

4 Patricia L. Parker & Thomas F. King, *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* (rev. ed. 1992).

5 Pub. L. No. 102-575, 106 Stat. 4600 (1992).

6 Parker & King, *supra* note 4, at 2 (discussing Am. Folklife Ctr., *Cultural Conservation: The Protection of Cultural Heritage in the United States* (1983)); THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT 21-44 (2003) [hereinafter KING, PLACES THAT COUNT].

Nation."[7] In response to that directive, 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."[8]

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."[9] 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 scared 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 into tribal tradition and help form the matrix of spiritual, ceremonial, political, social, and economic life.[10]

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, 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]."[11]

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[7] S. Rep. No. 101-85, at 21-22 (1989).

[8] 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].

[9] *Id*. at i.

[10] *Id*. at 7; *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.").

[11] *Id*. at 1-2. Section 110 of the NHPA requires established federal preservation programs; requires that "historic property under federal jurisdiction and control of [an] agency is identified, evaluated, and nominated to the National Register"; and that "historic property under the jurisdiction and control of [an] agency is managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section [106]." Pub. L. No. 96-515, § 206, 94 Stat. 2987 (1980) (codified as amended at 54 U.S.C. § 306102(a), (b)(1)-(2)); *see also* Protection and Enhancement of the Cultural Environment, Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 13, 1971). The NPS further found:

> While tribes are certainly concerned about preserving historic properties and other cultural resources on private lands, they are often equally or even more concerned about preserving ancestral sites and traditional use areas on lands that no longer control, whether these lands are 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 for Federal agencies and State and local governments*. These activities include, but are not limited to, those carried out by federal agencies and [SHPOs] under Sections 106 and 110 of the [NHPA] as well as those by State and local governments.

The NPS made thirteen recommendations for protecting Indigenous 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."[12] The NPS found that "much could be gained through more systematic tribal participation in Federal agency planning under Sections 106 and 110 of the [NHPA]."[13]

In response, Congress amended the NHPA in 1992 to provide a greater role for Tribes within the existing national preservation programs.[14] As Congress stated, the 1992 NHPA amendments "would, for the first time, specifically include Indian tribes and Native Hawaiian organizations in the historic preservation partnership."[15] The amendments provided for the initiation of a series of new programs that would help "establish and define the role of tribal and Native Hawaiian organization preservation programs."[16]

Relevant to this paper, the 1992 NHPA amendments recognized that properties of religious and cultural significance to Tribes and Native Hawaiian organizations may be eligible for inclusion on the National Register,[17] and required that Tribes ascribing significance to such properties must be consulted with during the Section 106 process.[18] The explicit recognition that properties of traditional religious and cultural significance are eligible for inclusion on the National Register and the specific requirement to consult with Tribes during the Section 106 process has precipitated a sea change in cultural resource and historic preservation throughout the United States.

In effect, the 1992 NHPA amendments legitimized Indigenous perspectives, expressions, experiences, and understandings of the significance of place within the existing legal framework of the NHPA. The 1992 NHPA amendments' tribal consultation mandate and the recognition of properties of traditional religious and cultural significance provides Tribes with a powerful tool to ensure their participation and influence in federal planning, permitting, and within the broader conversation of cultural and historic preservation.[19] The NHPA today, because of the 1992 amendments, is the most powerful tool tribes have to advocate for the protection of their culture, history, and ways of life within existing law.

NPS, KEEPERS OF THE TREASURES, *supra* note 8, at 67 (emphasis added).

[12] *Id.* at iv.

[13] *Id.* at iii.

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

[15] S. Rep. No. 102-336, at 13 (1992).

[16] *Id*. at 15; *see id*. at 15-16 (summarizing tribal historic preservation programs established by the 1992 amendments).

[17] Pub. L. No. 102-575, § 4006(a)(2) (codified at 54 U.S.C. § 302706(a)) ("Properties 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.").

[18] *Id*. (codified as amended at 54 U.S.C. § 302706(b)) ("In carrying out its responsibility 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).").

[19] *C.f.* Hawkins, *supra* note 3, at 85.

This change, however, has come quickly. While the NHPA was amended in 1992, the Advisory Council on Historic Preservation's ("ACHP")—the agency established by the NHPA[20] to administer and promulgate regulations for the Section 106 process[21]—updated Section 106 regulations implementing the 1992 amendments, including the tribal consultation requirement, did not fully come into effect until 2004.[22] The ACHP first initiated its rulemaking in 1994,[23] and reinitiated the rulemaking in 1996 "[a]fter reviewing the comments on the October 1995 proposal and in response to agency downsizing and restricting . . . and substantially chang[ing] [the] proposal to better meet the streamlining goals of the [ACHP]."[24] The ACHP did not publish its final rule implementing the 1992 amendments until 1999.[25] These rules were quickly challenged but largely upheld by the United States Court of Appeals for the District of Columbia Circuit in 2003.[26] Following the conclusion of this litigation, the ACHP initiated rulemaking consistent with the District of Columbia Circuit's opinion,[27] and published its final regulations in 2004.[28] It has therefore only been over the past fifteen years where Tribes' agency, authority, and rights in the Section 106 process have been exercised.

While the ACHP has undertaken significant rulemaking to implement the Section 106 tribal consultation requirements of the 1992 NHPA amendments, the NPS has undergone no rulemaking to codify the amendments' recognition that properties of traditional religious and cultural significance are eligible for inclusion on the National Register. The closest the NPS has come to implementing the 1992 amendments—specifically, the recognition that places of traditional

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[20] 54 U.S.C. § 304101.

[21] 54 U.S.C. § 304108(a) ("The [ACHP] may promulgate regulations as it considers necessary to govern the implementation of section [106] . . . in its entirety."). The ACHP's authority to promulgate Section 106 regulations is exclusive. *See* Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 607 (9th Cir. 2010) (quoting 16 U.S.C. § 470s (recodified as amended at 54 U.S.C. § 304108(a))) ("The NHPA explicitly delegates authority to the [ACHP] 'to promulgate such rules and regulations as it deems necessary to govern the implementation' of section 106."); 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]. . . . Congress has authorized the [ACHP] to administer the provision at issue here: section 106."); Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161, 166 (1st Cir. 2003) ("Fortunately, the NHPA explicitly delegates authority to the [ACHP] . . . to promulgate regulations interpreting and implementing § 106.").

[22] *See* 69 Fed. Reg. 40,544 (July 6, 2004). The ACHP revised its Section 106 regulations to include a tribal consultation requirement in 1986; although, at the time, there was no statutory consultation mandate. *See* Hawkins, *supra* note 3, at 93. This tribal consultation requirement was codified in the ACHP's regulations in 1987:

> The Agency Official, the [SHPO], and the [ACHP] should be sensitive to the concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will 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 and adverse effect." 36 C.F.R. § 800.15 (1986).

[23] 59 Fed. Reg. 50,396 (Oct. 3, 1994).

[24] 61 Fed. Reg. 48,580 (Sept. 13, 1996).

[25] 64 Fed. Reg. 27,044 (May 18, 1999).

[26] *See* Nat'l Mining Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003) [hereinafter *Nat'l Mining Ass'n II*], *rev'g in part* Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001).

[27] 68 Fed. Reg. 55,354 (Sept. 25, 2003).

[28] 69 Fed. Reg. at 40,544.

religious and cultural significance are eligible for inclusion in the National Register—is publishing revised versions of Bulletin 38 in 1992 and 1998.[29]

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 deep flaws, Euro-American preservation biases,[30] and ultimately provided no substantive protections, only process.[31] Nevertheless, these initiatives are the only preservation programs that offer tribes any sort of agency, authority, and rights to shape preservation outcomes and resource management within existing law. While there is plenty of opportunity to fashion new laws that better protect tribal cultural resources, landscapes, and heritages, and better involve tribes in that process, pragmatically, we must work within the existing legal framework to advocate for tribal preservation priorities until better laws are developed.

B. The National Register of Historic Places

In passing the NHPA, Congress 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."[32] The NPS administers the National Register, and has promulgated regulations defining the criteria and processes for listing eligible properties.[33] The Keeper of the National Register has the ultimate authority to determine a property's eligibility for inclusion on the National Register.[34] Properties may either be listed on, or determined eligible for inclusion on, the National Register.[35]

Historic properties must be just what they are: both "historic" and "properties." Historic properties must be at least fifty years old.[36] There are, of course, exceptions to this requirement.[37] Historic properties must also be properties. The National Register recognizes five property types: districts, sites, buildings, structures, and objects.[38] Relevant to this paper are district and sites. Traditional

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[29] *See* Parker & King, *supra* note 4. Efforts initiated in 2012 to update Bulletin 38 were scuttled in 2017 under Secretary of the Interior Ryan K. Zinke. *See generally* Thomas F. King, *What's Happened to the Update of National Register Bulletin 38?*, TOM KING'S CRM PLUS (Sept. 22, 2015), http://crmplus.blogspot.com/2015/09/whats-happened-to-update-of-national.html [hereinafter King, *What's Happened*].

[30] *See supra* note 3.

[31] Wesley James Furlong, *The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Landscape*, 42 PUB. LAND & RESOURCES L. REV. 1, 4 (2020).

[32] 54 U.S.C. § 302101.

[33] *See* 36 C.F.R. pt. 60.

[34] *See id* §§ 60.6-60.11; *id*. pt. 63.

[35] *Id*. § 60.4.

[36] *Id*. There are, of course, exceptions to the fifty-year requirement. *See id*.

[37] *Id*.

[38] *Id*.; 54 U.S.C. § 302101. While the National Register is eponymously a register of historic *places*, there is actually no requirement in the statute or regulations that a historic property actually be a "place." Indeed, in *Okinawa Dugong (Dugong Dugong) v. Gates*, No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005), the United States District Court for the Northern District of California determined that the Okinawa dugong is a "property" for the purposes of Section 402 of the NHPA. 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 county's equivalent of the National Register." 54 U.S.C. § 307101(e) (formally codified at 16 U.S.C. § 470a-2). In *Okinawa Dugong*, the court required the Department of Defense to conduct Section

cultural landscapes, traditional cultural properties, and places of traditional religious and cultural significance are often, but not always, identified as districts or sites.[39]

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402 review of the effects of the construction of a Marine Corps base in Okinawa on the Okinawa dugong, as the dugong was listed as a natural monument under the Japan's Cultural Resources Protection Law. 2005 WL 522106, at *12. The dugong is a marine mammal and a relative of the manatee. *Dugong*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/animals/mammals/d/dugong/ (last visited Jan. 4, 2019). While the Okinawa dugong was listed under Japan's equivalent of the National Register, Section 402 applied only if it met the NHPA's definition of a "property." The court reasoned:

> Without the untenable focus on significance in American history, "property" becomes simply a "district, site, building, structure, or object." An "object" is defined as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, moveable yet related to a specific settling." 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. Plaintiffs have provided uncontroverted evidence that in Okinawan creation mythology, the dugong is considered the ancestor of human beings, and that in traditional Okinawan folklore and ritual, the dugong is revered as a "female mermaid spirit," worshiped as special shrines as a deity responsible for successful fishing expeditions, and feared as an "ocean spirit" capable of creating tsunamis. Songs concerning the dugong are "regularly sung" by shamans and residents of the Henoko Bay area, further suggesting a contemporary cultural value beyond the dugong's status as a "wild animal." 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). 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, moveable yet related to a specific setting or environment.'" *Id*. at *10 (citing 36 C.F.R. § 60.3(j)).

Following *Okinawa Dugong*, some have argued that particular animal species in the United States could be listed or determined eligible for inclusion on the National Register. *See* D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENVT'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. ENVT'L L. & POL'Y 147 (2006) (examining whether the 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).

Okinawa 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 of 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 the most substantive protection for historic resources threatened by federal action." SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 155 (2d ed. 2018). 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); *accord* Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 1178, 1198 (D. Or. 2010) ("The NHPA, [the National Environmental Policy Act ("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."). For a more in depth discussion of Section 4(f), *see* BRONIN & ROWBERRY, *supra* note 38, at 155-94; SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 212-67 (2012). The determination that a tree is a National Register-eligible property is less theoretical that the determination that an animal species is. Bulletin 38 specifically counsels that "[a] natural object such as a tree or a rock outcrop may be eligible if it is associated with a significant tradition or use." Parker & King, *supra* note 4, at 11.

[39] 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*].

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.[40] 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."[41]

Historic properties must also retain "integrity of location, design, setting, materials, workmanship, feeling, and association."[42] NPS guidance describes integrity as "the authenticity of a property's historic identity."[43] Finally, historic properties must also meet at least one of the four National Register criteria for evaluation.[44] Thus, historic properties are eligible for inclusion on the National Register only if they: "are associated with events that have made a significant contribution to the broad patterns of our history" (Criterion A); "are associated with the lives of persons significant in our past" (Criterion B); "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 that represent a significant and distinguishable entity whose components may lack individual distinction" (Criterion C); or "have yielded, or may be likely to yield, information important in prehistory" (Criterion D).[45]

Historic properties may be listed on the National Register through the unilateral action of the Secretary of the Interior,[46] by nominations from state historic preservation officers ("SHPO") and federal preservation officers ("FPO"),[47] or through requests for nominations submitted by individuals or organizations to SHPOs or FPOs.[48] Historic properties may also be determined eligible for inclusion on the National Register but not formally listed.[49]

Under certain circumstances, however, historic properties cannot be listed on the National Register if the owner of the property, the majority of the owners of the property, or the majority of the owners of private property within the boundary of a proposed historic district object to its listing.[50]

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[40] 36 C.F.R. § 60.3(d).

[41] *Id*. § 60.3(l).

[42] *Id*. § 60.4.

[43] 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).

[44] 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), *available at* https://www.usicomos.org/wp-content/uploads/2016/09/Taylor.pdf.

[45] 36 C.F.R. § 60.4.

[46] *Id*. § 60.12(d).

[47] 54 U.S.C. § 302104(a), (c); 36 C.F.R. §§ 60.6, 60.9, 60.10.

[48] 54 U.S.C. § 302104(b); 36 C.F.R. § 60.11.

[49] 36 C.F.R. pt. 63.

[50] 54 U.S.C. § 302105(b) ("If 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 or designation, the property shall not be included in the National Register or designated as a National Historic Landmark until the objection is withdrawn."); 36 C.F.R. §§ 60.6(d), (g), (r), (v), 60.10(d), 60.13(c); *see generally* Sierra Club v. Salazar, 177 F. Supp. 3d 512 (D.D.C. 2016).

Only owners of private land who hold fee simple title can object.[51] Each eligible owner gets one vote regardless of how much of the property or how many properties within a historic district they own.[52] While a property cannot be listed on the National Register if such objections are made, the Keeper is still required to determine whether the property is eligible for inclusion on the National Register.[53]

Inclusion of a property on the National Register is largely a symbolic act; it is recognition that the property is important to the cultural and historic heritage of the United States. Nominating properties, especially traditional cultural landscapes, to the National Register is an incredibly fraught, political, and resource- and time-intensive process. The process also requires Tribes to prove the significance and integrity of their culturally important places to state and federal officials and agencies. Inclusion on the National Register does not confer any substantive protections to historic properties.[54] Instead, inclusion on the National Register ensures that historic properties are considered in the Section 106 process.[55]

C. Section 106 of the NHPA

In its entirety, Section 106 of the NHPA provides:

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[51] 36 C.F.R. § 60.3(k).

[52] *Id*. § 60.6(g).

[53] *Id*. § 60.6(s), (n).

[54] 36 C.F.R. § 60.2; *but see id*. § 60.2(d) ("If a property contains surface coal resources and is listed on the National Register, certain provisions of the [Surface Mining Control and Reclamation Act ("SMCRA")] of 1977 require consideration of the property's historic values in the determination on issuance of a surface coal mining permit."). Section 522(e)(3) of SMCRA prohibits surface coal mining operations on lands "which will adversely affect any publicly owned park of place included in the National Register[.]" 30 U.S.C. § 1272(e)(3); 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 listing 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)). The regulatory authority is the Office of Surface Mining Reclamation and Enforcement or the state office of surface mining approved under the SMCRA. *See id.* pts. 900-950. The agency with jurisdiction over the place is most likely the SHPO. *C.f. id*. § 761.16(d)(2)(ii) (In making a valid existing rights determination, the regulatory authority must provide notice to "[t]he owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, the agency with primary jurisdiction over the feature . . . . For example, both the landowner and the [SHPO] must be notified if the surface coal mining operations would adversely impact any site listed on the National Register[.]"). While neither the SMCRA nor its implementing regulations provide guidance on how adverse effects are assessed or how joint approvals are made, the Section 106 process, 36 C.F.R. §§ 800.3-800.6, may provide a reasonable procedure by which these determinations are made. *C.f.* 30 C.F.R. § 740.13(b)(3)(iii)(D) (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[.]"); *Lujan*, 774 F. Supp. at 1401 (holding state permitting of surface coal mining under delegated authority from the SMCRA is an undertaking triggering Section 106 review); *but see Nat'l Mining Ass'n II*, 324 F.3d at 760 ("[U]ndertakings 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. (citation omitted)).

[55] 36 C.F.R. § 60.2(a); *see* 54 U.S.C. § 306108; 36 C.F.R. pt. 800.

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any 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.[56]

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."[57]

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.[58] Section 106 does not mandate conservation or preservation; it simply requires federal agencies to understand the effects of their programs on historic properties and, if possible, seek to resolve any adverse effects.[59] Nevertheless, it provides tribes the most proactive and meaningful tool to engage in and advocate for the conservation of cultural resources.

The ACHP possesses the exclusive authority to promulgate regulations implementing and interpreting Section 106 of the NHPA.[60] These regulations are promulgated at 36 C.F.R. Part 800. The ACHP's regulations are binding on every federal agency.[61] The ACHP's regulations and its interpretation of the meaning of Section 106 must be afforded substantial deference.[62] The ACHP's

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[56] 54 U.S.C. § 306108.

[57] S. Rep. No. 102-336, at 12.

[58] 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)).

[59] *See, e.g.*, BRONIN & BYRNE, *supra* note 38, at 107 ("The [NHPA] does not require agencies to preserve any properties, but only requires that they 'take into account' the effects of undertakings on listed or eligible properties.").

[60] 54 U.S.C. § 304108(a); *see Te-Moak Tribe*, 608 F.3d at 607 (affirming the ACHP's exclusive authority to promulgate Section 106 regulations); *CTIA-Wireless*, 466 F.3d at 116 (same). While the ACHP has the exclusive authority to promulgate Section 106 regulations, it has developed regulations allowing other federal agencies to develop "program alternatives" in lieu of following the normal Section 106 procedures established in 36 C.F.R. Part 800. *See* 36 C.F.R. § 800.14. These regulations allow agencies to "develop procedures to implement section 106 and substitute them for all or part of" the ACHP's regulations, *id*. § 800.14(a) (alternate procedures); negotiate with the ACHP "a programmatic agreement to govern the implementation of a particular program" consistent with the ACHP's regulations, 36 C.F.R. § 800.14(b) (programmatic agreements); and "propose a program or category of undertakings that may be exempted from review under the" ACHP's regulations, *id*. § 800.14(c)(1) (exempted categories). The ACHP may also "establish standard methods for the treatment of" categories of historic properties, undertakings, or effects "to assist Federal agencies in satisfying the requirements of" the ACHP's regulations, *id*. § 800.14(d) (standard treatments), and "comment on a category of undertakings in lieu of [a federal agency] conducing individual reviews" pursuant to the ACHP's regulations. *Id*. § 800.14(e) (program comments).

[61] *See Te-Moak Tribe*, 608 F.3d at 607 (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.").

[62] *See* McMillian 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*, 466 F.3d at 117 ("Given that *we* must defer under *Andrus*[*v. Sierra Club*, 442 U.S. 347 (1979),] and *McMillan Park* to the [ACHP]'s

regulations establish a four-step process by which federal agencies fulfill their Section 106 obligations.[63]

1. Initiation

The first step of the Section 106 process is "Initiation."[64] The federal agency must first "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."[65] 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.[66] The Section 106 process must also be complete before the undertaking is commenced or approved.[67]

Historic properties, for the purpose of Section 106, are any properties listed or eligible for inclusion on the National Register.[68] Eligible properties include both those formally determined eligible by the Keeper and those that meet the National Register criteria.[69] 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."[70]

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 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."[71] The definition of undertaking is unfortunately complicated.

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reasonable interpretation of the meaning of section 106, we cannot see how it was arbitrary and capricious . . . for the FCC to choose to do so as well." (emphasis in original, internal citation omitted)); *c.f.* 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 [U.S. Army Corps of Engineers's ("Army Corps")] interpretation of a statute it does not administer.'" (brackets omitted from original)); Sayler Park Vill. Council v. U.S. Army Corps of Eng'rs, No. C-1-02-832, 2002 WL 32191511, at *7 (S.D. Ohio Dec. 30, 2002) ("Consequently, the [Army] Corps Interim [Section 106] Guidance is inconsistent with the ACHP Interim [Section 106] Guidance and irrelevant.").

[63] *An Introduction to Section 106*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106 (last accessed Nov. 28, 2018); *see* Presidio Historical Ass'n v. Presidio Trust, No. C12-00522 LB, 2013 WL 2435089, at *4 (N.D. Cal. June 3, 2013) ("The regulations establish a four-step process.").

[64] 36 C.F.R. § 800.3.

[65] *Id*. § 800.3(a).

[66] *Id*. § 800.1(c) ("The 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.").

[67] *Id*. (quoting 54 U.S.C. § 306108).

[68] *Id*. § 800.16(l)(1).

[69] *Id*. § 800.16(l)(2).

[70] *Id*. § 800.16(l)(1).

[71] *Id*. § 800.16(y); 54 U.S.C. § 300320. Part of the definition of "undertaking" is also used in the AHPA to define the scope of federal activities that fall under its jurisdiction:

> When a 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 for *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],

> The first part of that provision indicates that the words project, activity, and program are all synonymous with undertaking. Thus, an undertaking embraces any identifiable or discrete unit of action. Congress plainly untended the word "undertaking" to be read broadly, encompassing most specific agency activities.[72]

The undertaking is the underlying project, activity, or program receiving federal funding, permits, licenses, or approvals. The undertaking is *not* the federal agency's funding, permitting, licensing, or approval;[73] although, it can be a project that is carried out by a federal agency. A number of courts have held that undertakings need not be federally funded in order to trigger Section 106 review.[74]

During the first step, the federal agency must also identify and invite consulting parties to participate in the Section 106 process.[75] Consulting parties include SHPOs or Tribal Historic Preservation Officers ("THPO"),[76] Indian tribes and Native Hawaiian organizations,[77] local

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> 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 was enacted in 1974 and 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); *accord* 36 C.F.R. § 800.13 (Post-Review Discoveries). 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); *see* Pub. L. No. 86-532, 74 Stat. 220 (1960). Today, 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* THOMAS F. KING, CULTURAL RESOURCES LAWS & PRACTICE 278-81 (4th ed. 2013) [hereinafter KING, LAWS & PRACTICE]; BRONIN & ROWBERRY, *supra* note 38, at 342.

[72] BRONIN & BYRNE, *supra* note 38, at 116.

[73] While "undertaking" is often conflated with "major federal action," the trigger for environmental review pursuant to the NEPA, *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 circumstances triggering Section 106 and the NEPA are distinct. *Compare* 54 U.S.C. § 306108 ("undertaking"), *and* 36 C.F.R. § 800.16(y) ("undertaking"), *with* 42 U.S.C. § 4332(C), *and* 40 C.F.R. § 1508.18 ("major federal action"); *accord* 36 C.F.R. § 800.8(b). Federal agencies may very well be required to initiate the Section 106 process for undertakings even when they determine that any level of environmental review pursuant to the NEPA is not required. *See* BRONIN & ROWBERRY, *supra* note 38, 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."); *c.f.* Hunter S. Edwards, *The Guide for Future 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.'").

[74] *See, e.g.*, *CTIA-Wireless*, 466 F.3d at 112 ("Thus, under *Sheridan Kalorama*[*Historical Association 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." (internal citations omitted)); Fein v. Peltier, 949 F. Supp. 374, 379 (D.V.I. 1996).

[75] 36 C.F.R. § 800.3(c), (d), (f).

[76] *Id*. § 800.2(c)(1).

[77] *Id*. § 800.2(c)(2); 54 U.S.C. § 302706(b).

governments,[78] applications for federal permits,[79] and additional consulting parties that demonstrate an interest in the undertaking.[80] The federal agency may also invite the ACHP to participate as a consulting party;[81] although the ACHP, itself, may elect to participate in any particular Section 106 process if "its involvement is necessary to ensure that the purposes of section 106 and the [NHPA] are met."[82] The ACHP may also become involved in a Section 106 process more informally by providing advice, guidance, or assistance to consulting parties.[83]

When an undertaking occurs on "tribal lands,"[84] the federal agency must invite that Tribe or the Tribe's THPO to become a consulting party.[85] 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."[86] Any Indian Tribe or Native Hawaiian organization that requests to become a consulting party must become one.[87]

2. Identification

The second step of the Section 106 process is "Identification."[88] As an initial matter, the federal agency must define the undertaking's area of potential effects ("APE").[89] The APE is "the geographic area or areas within which an undertaking may directly or indirectly cause alternations in the character or use of historic properties, if any such properties exist."[90] The APE should be determined by the scale and nature of the undertaking.[91] Federal agencies' efforts to identify and evaluate historic properties and evaluate and resolve adverse effects are limited to the APE and historic properties therein.

Upon establishing the APE, federal agencies must "take the steps necessary to identify historic properties within the [undertaking's] area of potential effects."[92] This requires federal agencies to

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78 36 C.F.R. § 800.2(c)(3).

79 *Id*. § 800.2(c)(4).

80 *Id*. § 800.2(c)(5).

81 *Id*. § 800.2(b).

82 *Id*. § 800.2(b)(1); *see id*. pt. 800, app. A.

83 *Id*. § 800.2(b)(2).

84 *Id*. § 800.16(x) ("Tribal lands means all lands within the exterior boundaries of an Indian reservation and all dependent Indian communities."). For a detailed discussion on the definition of dependent Indian communities, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 3.04[2][c][iii], 193-96 (Nell Jessup Newton ed., 2012 ed. Supp. 2017) [hereinafter COHEN'S HANDBOOK].

85 36 C.F.R. § 800.2(c)(2)(i).

86 *Id*. § 800.3(f)(2); *id*. § 800.2(c)(2)(ii). If an undertaking occurs on tribal land, the federal agency may still be required to invite tribes other than the tribe whose land it is to participate in the Section 106 process if they ascribe traditional religious and cultural significance to a place on the other tribe's tribal land. *C.f.* Attakai v. United States, 746 F. Supp. 1395, 1408-9 (D. Ariz. 1990) ("The conclusion of the defendants that the Navajo [Nation] is to be afforded no participation since the lands in question are Hopi [Tribe] lands and not 'non-Indian lands' is contrary to the language and evident intent of the regulations.").

87 36 C.F.R. § 800.3(f)(2).

88 *Id*. § 800.4.

89 *Id*. § 800.4(a)(1).

90 *Id*. § 800.16(d).

91 *Id*.

92 *Id*. § 800.4(b).

"make a reasonable and good faith effort to carry out appropriate identification efforts."[93] The regulations provide a number of factors that federal agencies should consider in determining what level of effort is reasonable and good faith.[94] 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,[95] and must take into account tribes' concerns about the confidentiality of the location, existence, character, or significance of certain properties.[96]

Adequate identification efforts may vary between different Section 106 processes, but they must be informed by the totality to the circumstances surrounded each process. For example, in *Pueblo of Sandia v. United States*, the United States Court of Appeals for the Tenth Circuit held that the United States Forest Service ("Forest Service") failed to make reasonable and good faith efforts to identify traditional cultural properties of importance to the Pueblo of Sandia and other Tribes.[97] The Forest Service had sent letters to the Pueblo and other Tribes requesting detailed documentation about historic properties but received little information in return,[98] due to the Pueblo's and other Tribes' "reticence to disclose details of their culture and religious practices."[99] The Forest Service therefore determined no traditional cultural properties would be affected.[100]

The Court, however, stated that "a mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires."[101] The court found "that the information that the tribes did community to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought."[102] Addressing Bulletin 38, the court reminded the Forest Service that "[d]etermining what constitutes a reasonable effort to identify traditional cultural properties 'depends in part on the likelihood that such properties may be present."[103] The court therefore held that the Forest Service failed to make reasonable efforts to identify historic properties "[b]ecause communications from the tribes indicated the existence of traditional cultural

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93 *Id*. § 800.4(b)(1). Reasonable and good faith efforts "may include background research, consultation, oral history interviews, sample field investigations, and field survey." *Id*.; *see also* Advisory Council on Historic Pres., *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review* (n.d.) [hereinafter ACHP, *Reasonable and Good Faith*].

94 *See* 36 C.F.R. § 800.4(a)(2)-(4), (b)(1)-(2).

95 *Id*. § 800.4(b).

96 *Id*. § 800.4(b)(1). The NHPA requires federal agencies to "withhold from disclosure to the public information about the location, character, or ownership of a historic property if . . . disclosure may[] (1) cause a significant invasion of privacy; (2) risk harm to the historic property; or (3) impede the use of a traditional religious site by practitioners." 54 U.S.C. § 307103(a)(1)-(3); *see* 36 C.F.R. § 800.11(c).

97 Pueblo of Sandia v. United States, 50 F.3d 856, 860-63 (10th Cir. 1995).

98 *Id*. at 860.

99 *Id*. at 861.

100 *Id*. at 860.

101 *Id*.

102 *Id*.

103 *Id*. at 861 (quoting Parker & King, *supra* note 4, at 6). While Bulletin 38 is not legally binding regulation, it "provides the recognized criteria for [federal agencies'] identification and assessment of places of cultural significance" in Section 106 processes. *Muckleshoot Indian Tribe*, 177 F.3d at 807; *Pueblo of Sandia*, 50 F.3d at 861; *but see Muckleshoot Indian Tribe*, 177 F.3d at 807 ("Contravention of [Bulletin 38's] recommendations, standing alone, probably does not constitute a violation of NHPA.").

properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information."[104]

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 criteria[105] to properties "that have not been previously evaluated for National Register eligibility."[106] 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.[107]

In evaluating whether properties of traditional religious and cultural significance meet the National Register criteria, the federal agency must "acknowledge the Indian tribes . . . possess special expertise in assessing the eligibility of" such properties.[108] If a Tribe disagrees with the federal agency's determination about the eligibility of a historic property of traditional religious and cultural significance, it may request an official determination of eligibility from the Keeper.[109]

Properly identifying historic properties—especially traditional cultural properties, traditional cultural landscapes, and properties of traditional religious and cultural significance—is essential, as the evaluation and resolution of adverse effects is so closely tied to the characteristics, significance, and integrity of historic properties documented in the identification phase.[110] Identification, thus, requires more than simply stating that a property is eligible for the National Register, or that it meets the National Register criteria and retains integrity.[111] Instead, the identification process must document the how the property conveys its significance, detail how that significance meets the applicable National Register criteria, and describe what type of integrity it retains and how. Fully documented a property's significance and integrity is vital is ensuring that adverse effects are property assessed and resolved.

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

105 *See* 36 C.F.R. § 60.4.

106 *Id*. § 800.4(c)(1); *accord id*. § 800.16(l).

107 *Id*. § 800.4(c)(1).

108 *Id*. § 800.4(c)(2).

109 *Id*.

110 *See id*. §§ 800.5(a)(1), 800.6(b).

111 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 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 94, at 2; *see* 36 C.F.R. § 800.2(a)(1); *Slockish*, 682 F. Supp. 2d at 1191 ("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 in archaeology establish the minimum qualifications as a "graduate degree in archaeology, anthropology, or [a] closely related field," as well as "[a]t least one year of full-time professional experience or equivalent specialized training," "[a]t least four months of supervised field and analytic experience," and a "[d]emonstrated ability to carry research to completion." *Professional Qualification Standards*, NAT'L PARK SERV., https://www.nps.gov/history/local-law/arch_stnds_9.htm (last accessed Nov. 18, 2020).

3. Assessment

The third step of the Section 106 process is "Assessment."[112] In consultation with Tribes and other consulting parties, the federal agency must "apply the criteria of adverse effects to historic properties within the [APE]."[113] 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."[114] Adverse effects can be direct, indirect, are reasonably foreseeable, including those "that may occur later in time, be farther removed in distance or be cumulative."[115]

Direct effects are not limited to only those that may *physically* alter a property. Direct "refers to the causality, and not the physicality, of the effect.[116] In *National Parks Conservation Association v. Semonite*, the Army Corps had determined that the construction of a high voltage transmission line across the James River would only indirectly affect the Carter's Grove National Historic Landmark because the transmission line would cause only "visual impacts on the historic resources along the James River"[117] and would "not 'physically' intrude on the plantation's grounds."[118] Because the Army Corps concluded that these visual effects were indirect, rather than direct, it determined that NHPA Section 110(f) was inapplicable to the project.[119]

The United States Court of Appeals for the District of Columbia Circuit overturned the Army Corps's determination, agreeing with the ACHP's and NPS's understanding that directly "refer[s] to causation and not physicality."[120] While neither the ACHP nor the NPS has published binding regulations implementing Section 110(f), the ACHP interprets the holding in *National Parks Conservation Association* to apply to both Section 106 and 110(f) reviews.[121] Therefore, under ACHP guidance, direct effects are those that "come from the undertaking at the same time and

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112 *Id*. § 800.5.

113 *Id*. § 800.5(a).

114 *Id*. § 800.5(a)(1). Adverse effects may include, but are not limited to, the physical destruction or damage to the property, *id.* § 800.5(a)(2)(i); alternations, including restoration, rehabilitation, and repairs, *id*. § 800.5(a)(2)(ii); removing the property from its historic location, *id*. § 800.5(a)(2)(iii); changing the character of use or physical features that contributed to this property's significance, *id*. § 800.5(a)(2)(iv); visual, audible, or olfactory changes that diminish the property's integrity, *id*. § 800.5(a)(2)(v); neglect and deterioration, *id*. § 800.5(a)(2)(vi); and transferring, leasing, or selling a property without adequate preservation measures in place. *Id*. § 800.5(a)(2)(vii). The regulations specifically recognize that neglect and deterioration may not necessarily be an adverse effect when they "are recognized qualities of religious and cultural significance." *Id*. § 800.5(a)(2)(vi).

115 *Id*. § 800.5(a)(1).

116 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*, at 2 (June 7, 2019) [hereinafter ACHP Memo.] (on file with author).

117 *Nat'l Parks Conservation Ass'n*, 916 F.3d at 1087.

118 *Id*. at 1088.

119 *Id*. Section 110(f) provides: "Prior to the approval of any Federal undertaking that may directly adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertaking such planning and actions as may be necessary to minimize harm to the landmark." 54 U.S.C. § 306107.

120 *Nat'l Parks Conservation Ass'n*, 916 F.3d at 1088 (citations omitted).

121 *See* ACHP Memo., *supra* note 117, at 1.

place with no intervening cause[] . . . regardless of its specific type (e.g., whether it is visual, physical, auditory, etc.)."[122]

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.[123] 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."[124] Should that Tribe disagree with the agency's finding of no adverse effects, it may request that the ACHP review and object to the finding.[125] The ACHP will review the federal agency's determination, and provide the agency with its opinion regarding the adverse effects of the undertaking.[126] 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.[127]

In cases where the agency reaffirms its finding of no adverse effect, the agency's Section 106 obligations—at least in relationship to that historic property—are complete.[128] 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.[129]

4. Resolution

The fourth, and final, step of the Section 106 process is "Resolution."[130] Through consultation with all consulting parties, including tribes, the agency must "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties."[131] The Section 106 process is designed to be flexible,[132] 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 and integrity of historic

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122 *Id*. at 2; *id*. at 3 ("While it does not impact when Section 106 applies, it does instruct how effects should be categorized in Section 106 review. For many, this will change the approach to defining effects based on physicality and recognize instances when direct effects may be visual, auditory, or atmospheric. This clarification should inform an agency's efforts to determine [APE]s and consideration of how an undertaking amy affect historic properties.").

123 36 C.F.R. § 800.5(b)-(c).

124 *Id*. § 800.5(c)(2)(iii).

125 *Id*.

126 *Id*. § 800.5(c)(3)(i).

127 *Id*. § 800.5(c)(3)(ii)(A)-(B).

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

129 *Id*. § 800.5(d)(2).

130 *Id*. § 800.6.

131 *Id*. § 800.6(a).

132 *See* KING, LAWS & PRACTICE, *supra* note 72, 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.").

properties.[133] 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 to resolve.

The consulting parties then execute a memorandum of agreement enshrining the avoidance, minimization, and mitigation measures agreed to by the consulting parties.[134] The memorandum of agreement may also contain provisions for future and phased identification efforts.[135] The federal agency must "ensure that the undertaking is carried out in accordance with the memorandum of agreement."[136] In cases where the undertaking is especially complex, or where the undertaking will occur over years and phased identification and resolution efforts will occur, the consulting parties will execute a programmatic agreement.[137]

5. Consultation

The most important component of the Section 106 process is consultation. Indeed, as the ACHP's regulations make clear, "[t]he 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."[138] Consultation must occur 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."[139]

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."[140] This means that consultation must be more than just "mere *pro forma* recitals."[141] Consultation means more than merely playing lip service to the concerns, needs, and knowledge of consulting parties.[142] Section 106's "consultative process—designed to be inclusive and facilitate consensus—ensures competing interest are appropriately considered and adequately addressed."[143]

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133 *See, e.g.*, *Muckleshoot Indian Tribe*, 177 F.3d at 807-09 (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*, 916 F.3d at 1086-87 (questioning sufficiency of mitigation measures outlined in the Army Corps's memorandum of agreement based on the significance and integrity of the affected historic properties).

134 36 C.F.R. § 800.6(c).

135 *Id*. § 800.4(b)(2).

136 *Id*. § 800.6(c).

137 *Id*. § 800.14(b).

138 *Id*. § 800.1(a) (emphasis added).

139 *Id*.

140 *Id*. § 800.16(f).

141 Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) (emphasis in original).

142 *Id*. at 1108 ("The consultation requirement is not an empty formality.").

143 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).

While federal agencies have a regulatory obligations to consult with consulting parties during the Section 106 process,[144] they bear an additional, statutory obligation to consult with Tribes during the process as well.[145] The tribal consultation requirements enshrined in the 1992 NHPA amendments requires federal agencies to consult with tribes throughout the Section 106 process.[146]

> 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.[147]

This obligation "applies regardless of the location of the historic property."[148] The tribal consultation requirement is codified throughout the Section 106 regulations. Federal agencies must consult with Tribes in identifying and evaluating historic properties,[149] in applying the criteria for adverse effects,[150] and in resolving those adverse effects.[151] Federal agencies must initiation tribal consultation early in the process.[152]

Tribal consultation, even within the Section 106 process, is a function of the federal government's trust responsibility towards Tribes.[153] In the Section 106 process, consultation must therefore "be conducted in a sensitive manner respectful of tribal sovereignty,"[154] "recognize the government-to-government relationship between the Federal Government and Indian tribes,"[155] and "be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization."[156] Indeed, some courts have suggested that the federal government owes a

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144 36 C.F.R. § 800.2(b), (c)(1), (c)(3)-(5).

145 *See* 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(ii).

146 36 C.F.R. 800.2(c)(2)(ii) ("[T]he [NHPA] requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attached religious and cultural significance to historic properties that may be affected by an undertaking."

147 *Id*. § 800.2(c)(2)(ii)(A).

148 *Id*. § 800.2(c)(ii); *accord id.* § 800.2(c)(i), (d) (consultation on tribal lands).

149 *Id*. § 800.4(a)(4), (b), (c)(1)-(2).

150 *Id*. § 800.5(a), (c), (c)(iii).

151 *Id*. § 800.6(a)

152 *Id*. § 800.2(c)(2)(ii)(A).

153 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*].

154 36 C.F.R. § 800.2(c)(2)(ii)(B).

155 *Id*. § 800.2(c)(2)(ii)(C).

156 *Id*.

heightened duty to comply with the tribal consultation requirements of the NHPA.[157] The federal agency bears the obligation to consult, not the Tribe.[158]

The NHPA's tribal consultation requirement cannot be given short shrift. For example, in *Quechan Tribe of Fort Yuma Indian Reservation v. United States Department of Interior*, the United States District Court for the Southern District of California held that "government agencies are not free to glide over the requirements imposed by Congressionally-approved statues and duly adopted regulations. The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early."[159] The Quechan Tribe of the Fort Yuma Indian Reservation had alleged that the United States Bureau of Land Management ("BLM") had failed to meaningfully consult with them during the Section 106 review for a proposed solar farm.[160]

While the BLM provided a "string citation to materials in the record which they say document 'extensive consultation with tribes,"[161] the court was unimpressed. The court stated that "the sheer volume of documents is not meaningful. The number of letters reports, meetings, etc. and the size of various documents doesn't [sic] in itself show the NHPA-required consultation occurred."[162] The court noted that "Indian tribes are entitled to *special consideration* in the course of an agency's fulfillment of its consultation obligation."[163] The court ultimately held that while "the BLM's communications are replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult with the Tribe," "mere *pro forma* recitals do not, by themselves, show BLM actually complied with the law."[164] *Quechan Tribe* provides a good example of a court looking to the substance of the consultation, rather than its purported frequency, in reviewing whether a federal agency engaged in meaningful consultation.[165]

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157 *See, e.g.*, Quechan Indian Tribe v. United States, 535 F. Supp. 2d 1072, 1108-10 (S.D. Cal. 2008) (discussing the NHPA, the ARPA, the AHPA, and the Antiquities Act, the court held 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*, 469 F.3d at 788 ("Because we conclude that the agencies violated . . . NHPA . . . , it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe."); *accord* COHEN'S HANDBOOK § 20.02[3][e], 1298 n.204; 36 C.F.R. § 800.2(c)(2)(ii)(B)-(C).

158 36 C.F.R. § 800.2(c)(ii)(A) ("*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." (emphasis added)); *id*. § 800.3(f)(2) (same); *id*. § 800.2(a) ("*It is the statutory obligation of the Federal agency* to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance." (emphasis added)).

159 *Quechan Tribe*, 755 F. Supp. 2d at 1120.

160 *Id*. at 1107.

161 *Id*. at 1111 (internal quotation marks and citation omitted).

162 *Id*. at 1118.

163 *Id*. at 1109 (emphasis in original); *c.f.* 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) ("The BLM's 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." (emphasis in original)).

164 *Quechan Tribe*, 755 F. Supp. 2d at 1118.

165 *But see Te-Moak Tribe*, 608 F.3d at 608-10 (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

Consultation is the most important component of the Section 106 process. Meaningful consultation with tribes is essential to ensuring the goal of the Section 106 process is achieved and that tribes are afforded their greatest agency and authority within the process.[166] The NHPA's tribal consultation mandate provides a powerful tool for tribes to advocate for and protect places of culturally importance.

D. TCPs and Properties of Traditional Religious and Cultural Significance

Two years prior to the 1992 NHPA amendments explicitly recognizing that properties of traditional religious and cultural significance may be eligible for inclusion in the National Register, the NPS published Bulletin 38, guidance on the identification and evaluation of "traditional cultural properties."[167] Although not perfect, prior to Bulletin 38, 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.[168]

The intent of Bulletin 38, then, 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."[169]

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, indigenous communities, and others.[170] The Department of Interior objected to the ACHP publishing such guidance, and instead published to guidance as a National Register bulletin, as the guidance discussed the significance of National Register-eligible historic properties.[171] Bulletin 38 sought to address "traditional cultural resources, both those that are associated with historic properties and those without specific property reference."[172]

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and there was no evidence that the tribe would have provided new information had it been consulted); San Juan Citizens Alliance v. Norton, 586 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").

166 *See generally* Furlong, *Non-Renewable Resource*, *supra* note 31, 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).

167 Parker & King, *supra* note 4.

168 Paul R. Lusignan, *Traditional Cultural Places and the National Register*, 26 GEORGE WRIGHT FORUM 37, 37 (2009).

169 *Id*.

170 KING, PLACES THAT COUNT, *supra* note 6, at 33.

171 *Id*. at 34.

172 Parker & King, *supra* note 4, at 2; *see* KING, PLACES THAT COUNT, *supra* note 6 at 21-40.

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.[173] Generally, properties included on the National Register "reflect many kinds of significance in architecture, history, archaeology, engineering, and culture."[174] The National Register program defines culture as "the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community."[175] One type of cultural significance a place may reflect is "traditional cultural significance."[176] In this context, traditional means "those beliefs, customs, and practices of a living community . . . that have been passed down through the generations."[177] 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."[178]

Bulletin 38 defines these places as traditional cultural properties, or TCPs. 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."[179] Bulletin 38 provides examples of traditional cultural properties, including:

> 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 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.[180]

The significance of a traditional cultural property is "based on its value in the eyes of the traditional community."[181]

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,[182] retain integrity,[183] and must meet at least one of the four National Register criteria.[184] Instead, Bulletin

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173 Parker & King, *supra* note 4, 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.").

174 *Id*. at 1.

175 *Id*.

176 *Id*.

177 *Id*.

178 *Id*.

179 *Id*.

180 *Id*.

181 KING, PLACES THAT COUNT, *supra* note 6, at 34.

182 Parker & King, *supra* note 4, at 11.

183 *Id*. at 11-12.

184 *Id*. at 12-14. Some argue that the 1992 NHPA amendments allow tribes to nominate properties of traditional religious and cultural significance to the National Register without needing to demonstrate that such properties meet any of the National Register criteria. This argument is based on a strict interpretation of the statutory

38—and the concept of traditional cultural properties—provides a framework by which the National Register criteria can be applied to properties of traditional cultural significance. Even before the publication of Bulletin 38—and even the 1992 NHPA amendments—properties that would know be described as traditional cultural properties were listed on and determined eligible for the National Register.[185]

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 groups 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.[186]

Unlike most historic properties included 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."[187] Indeed, Bulletin 38 councils: "A culturally significant natural landscape may be classified as a site, as may the specific location where significance 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."[188]

In the National Register context—that is, nominating historic properties to the National Register—places of traditional cultural significance to tribes are most often described as traditional cultural properties. In the Section 106 context, that is not always the case. Traditional cultural properties are significance to *any* community that ascribes them value.[189] This very well may be a Tribe. While the Section 106 process requires federal agencies to take into account effects of undertakings

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language: "Property of traditional religious and cultural importance to an Indian tribe . . . may be determined eligible for inclusion on the National Register." 54 U.S.C. § 302706(a). This argument relies on the amendment's failure to use the term *historic* property, *id*. § 300308 ("[T]he term 'historic property' means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register."), and its lack of reference to the National Register criteria at 36 C.F.R. § 60.4. *C.f. Dugong*, 2005 WL 522106, *9 ("Without the untenable focus on significance in American history, 'property' becomes simply a 'district, site, building, structure, or object.'"). Therefore, tribes and Native Hawaiian organizations would only need to provide documentation sufficient to established that they ascribe traditional religious or cultural significance to a property (a district, site, building, structure, or object) for it to be eligible for inclusion on the National Register.

185 KING, PLACES THAT COUNT, *supra* note 6, at 35.

186 Parker & King, *supra*, note 4, at 2.

187 *Id*. at 11.

188 *Id.*

189 *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.").

on historic properties[190]—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.[191]

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. While properties of traditional religious and cultural significance may almost certainly always be described as traditional cultural properties, the opposite is not necessarily true.

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."[192] 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."[193] 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.[194] Within the Section 106 process, the consideration of a property of traditional religious and cultural significance "is not tied to continual or physical use."[195]

The recognition that both traditional cultural properties and properties of traditional religious and cultural significance are eligible for inclusion on the National Register have provided tribes significant space within the NHPA to meaningfully advocate for the protection of their significance places.[196] Nevertheless, traditional cultural properties and properties of traditional religious and

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190 54 U.S.C. § 306108; 36 C.F.R. § 800.16(l)(1) ("Historic property means any prehistoric district, site, building, structure, or object included in, or eligible for inclusion in the National Register.").

191 54 U.S.C. § 302706(b); 36 C.F.R. § 800.16(l)(1) ("The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.").

192 ACHP, *Tribal Consultation Handbook*, *supra* note 154, at 21 (emphasis removed).

193 *Id.*; *see* Parker & King, *supra* note 4, at 1.

194 ACHP, *Tribal Consultation Handbook*, *supra* note 154, at 21.

195 *Id.*

196 The Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1600-1629h), was enacted in 1971. For a detailed discussion about the ANCSA, *see* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS, 165-99 (3d ed. 2012). ANCSA Section 14(h)(1) authorized 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). In 1976, the BLM promulgated regulations implementing this provision. *See* 43 C.F.R. § 2653.5. The regulations detail the criteria for evaluating and determining eligible for conveyance a "historical place" and 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 Aleutes, or

cultural significance often fall short of recognizing many places significant to tribes and reflecting their understandings, experiences, and expressions of the historic and cultural significance of place.[197] This shortfall can be overcome, in part, by the recognition that historic properties can encompass traditional cultural landscapes.[198]

> (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.

Id. § 2653.5(d)(1)-(5) (emphasis added); *accord* 36 C.F.R. § 60.4. The regulations go on to discuss "criteria considerations" for historical places identical to those outlined in the National Register regulations. *Compare* 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). Well before the publication of Bulletin 38 and the passage of the 1992 NHPA amendments, Congress and the BLM recognized, and codified into law, that the significance of a historical place (*viz.* historic property) may include its "value in the traditions and cultural beliefs and practices of" Native people. *Id*. § 2653.5(d)(3); *accord* 54 U.S.C. § 302706(a); Parker & King, *supra* note 4, at 1; Taylor, *supra* note 44.

[197] 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.").

[198] *See* Native Am. Rights Fund, *Indigenous Environmental Stewardship – NARF 45th Anniversary CLE* at 31:10 to 32:12, YouTube.com, https://www.youtube.com/watch?v=4XXXEmZWPTk (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.").