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Sent via E-Mail

Paul J. Ray, Administrator
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Re: Comments of Native Village of Tyonek and National Association of Tribal Historic Preservation Officers on the National Park Service's Final Rulemaking for the National Register of Historic Places
RIN 1024-AE49 | 1024-DOI/NPS | National Register of Historic Places

Dear Administrator Ray:

These comments are submitted by the Native American Rights Fund on behalf of Native Village of Tyonek and the National Association of Tribal Historic Preservation Officers, in response to the Office of Information and Regulatory Affairs' ("OIRA") review of the National Park Service's ("NPS") final rulemaking for the regulations implementing the National Register of Historic Places ("National Register") and the Section 106 process.

Native Village of Tyonek is a federally recognized Indian tribe located within the exterior boundaries of the State of Alaska.[1] The Native Village of Tyonek is located in Qaggeyshlat (the village of Tyonek), nearly fifty air-miles West of Anchorage, Alaska, along the Northern shore of Tikahtnu (Cook Inlet). It is completely off the road system; accessible only by light aircraft. Tyonek is home to nearly two-hundred year-round residents, most of whom are Tubughna. The Tubughna are Dena'ina Athabascans. Tubughna means "People of the Beach" in Dena'ina and refers to the people who live in and near the village of Tyonek.

The National Association of Tribal Historic Preservation Officers ("NATHPO") is a national non-profit membership organization, comprising tribal government officials, specifically Tribal Historic Preservation Officers ("THPO"), who implement federal tribal preservation laws. NATHPO's overarching purpose is to support the preservation, maintenance, and revitalization of the culture and traditions of Native peoples of the United States. This is accomplished most importantly thought the support of Tribal Historic Preservation Programs as acknowledged by the

[1] 85 Fed. Reg. 5,462, 5,467 (Jan. 30, 2020).

NPS.[2] There are currently 195 THPOS recognized by the NPS. NATHPO is a member of the Advisory Council on Historic Preservation ("ACHP").[3]

BACKGROUND

I. The Dispossession of Native America

Just over two hundred years ago, all of North American was Indian Country. Over the past two centuries, justified by its "manifest destiny," the United States took Indian County from Native America. Whether through forced removals,[4] treaties,[5] reservations,[6] the allotment system,[7] the termination of tribal status,[8] or legal fictions,[9] the United States systematically dispossesses Native America of its land. Today, federally recognized Indian tribes are confined to small areas, just fractions of their traditional and historic homelands. While there are 574 federally recognized Indian tribes in the United States,[10] there are only 326 places around the country administered as Indian reservations.[11] Today, Indian Country comprises only 56.2 million acres.[12]

The history of the disposition of Alaska Native lands is similar to that in the Lower 48. Allotment and townsite policies and the establishment of reservations meant to consolidate Native land holdings,[13] the extinguishment of aboriginal title,[14] the revocation of every reservation in Alaska, except one, and most trust land status,[15] and use of aboriginal lands to collateralize for-profit, state-

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[2] 54 U.S.C. §§ 302701-302706.

[3] *Id*. § 304101(a)(8).

[4] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[4][a], 41 (Nell Jessup Newton ed., 2015, sup. 2017) ("For the next 30 years Indian treaty making was concerned primarily with removing certain tribes to western territories, thus making a vast area available for white settlement." (footnote omitted)).

[5] *See id*. § 1.03[1], 26 ("The overriding goal of the United States during the treaty-making period was to obtain Indian lands, particularly those lands that became encircled by non-Indian settlements. Indian treaties typically included cessions of land from tribes to the United States.").

[6] *See id*. § 1.03[6][a], 60-61 ("On these reservations, the government would provide 'only sufficient land for actual occupancy.'" (citation omitted)).

[7] *See id*. § 1.03[6][b], 61 ("An important component of the reservation policy was the device of allotment . . . . Federal officials saw the policy as a means to both free land for white settlement and to instill in Indians the idea of individual property and, through it, civilization." (citation omitted)).

[8] *See id*. § 1.06, 85 (describing the federal policy of "tribal termination and individual tribal member relocation" as "'the most concerted drive against Indian property and Indian survival since the removals following the [Indian Removal] [A]ct of 1830 and the liquidation of tribes and reservations following 1887.'" (citation omitted)).

[9] *See, e.g., Johnson v. M'Intosh*, 21 U.S. 543 (1823) (justified by the "doctrine of discovery," holding that tribes cannot possess full legal title to their land).

[10] *See generally* 85 Fed. Reg. at 5,462-67.

[11] *What is a Federal Indian Reservation*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/frequently-asked-questions (last visited Oct. 30, 2020).

[12] *Id*.

[13] *See* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 53-164 (3d ed., 2012); Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197 (1906); Alaska Native Townsite Act of May 25, 1926, 44 Stat. 629 (1926).

[14] *See* Case & Voluck, *supra* note 13, at 165-98; Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629h).

[15] *See* Case & Voluck, *supra* note 13, at 109; 43 U.S.C. § 1618(a); Federal Land Policy Management Act, 43 U.S.C. §§ 1701-1782.

chartered corporations[16] systematically dispossessed nearly every Alaska Native tribe of their land and rights to land.[17] Today, what little land Alaska Native tribes own is often confined to their village boundaries. For almost every Alaska Native tribe, their traditional and historic homelands are owned by private land owners, corporations, or the federal or state government. Native Hawaiians have also been similarly dispossessed of their lands.[18]

II. The Protection of Native Cultural Heritage

In 1992, Congress amended the National Historic Preservation Act ("NHPA") to provide federally recognized tribes and Native Hawaiian organizations a greater role within the existing national preservation programs.[19] At the time, Congress stated that these amendments "would, for the first time, specifically include Indian tribes and Native Hawaiian organizations in the historic preservation partnership."[20] Significantly, the 1992 amendments recognized that "[p]roperties of traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."[21] The 1992 amendments also, for the first time, required federal agencies to consult with Tribes and Native Hawaiian organizations during the Section 106 process[22] regarding effects to properties of traditional religious and cultural significance.[23]

The 1992 NHPA amendments came out of broader 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.[24] In 1989, Congress directed the NPS "to determine and report . . . on the funding needs for the management, research, interpretation, protection, and development of sites of historical significance on Indians lands throughout the Nation."[25] In response to this directive, the NPS held a series of meetings with Tribes around the county "in order to learn directly from Indian tribes what their concerns and needs were for preserving their cultural heritage."[26]

In 1990, the NPS submitted its report, *Keepers of the Treasures: Protecting Historic Properties and Cultural Traditions on Indian Lands*, to Congress.[27] The NPS reported that historic preservation as ordinarily practiced by federal and state governments was very different from how Tribes viewed preservation. "Tribes seek to preserve their cultural heritage as a living part of

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16 *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-33 (1998).

17 *See* Case & Voluck, *supra* note 13, at 109.

18 *See* NATIVE HAWAIIAN LAW: A TREATISE 5-521 (Melody Kapilialoha MacKenzie ed., 2015) (discussing the history of land ownership, administration, and law in Hawai'i).

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

20 S. Rep. No. 102-336, at 13 (1992).

21 Pub. L. No. 102-575, § 4006(a)(2) (codified at 54 U.S.C. § 302706(a)).

22 *See* 54 U.S.C. § 306108; 36 C.F.R. pt. 800.

23 Pub. L. No. 102-575, § 4006(a)(2) (codified at 54 U.S.C. § 302706(b)).

24 Patricia L. Parker & Thomas F. King, *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties* 2 (rev. ed. 1998).

25 S. Rep. No. 101-85, at 21-22 (1989).

26 NAT'L PARK SERV., KEEPERS OF THE TREASURES: PROTECTING HISTORIC PROPERTIES AND CULTURAL TRADITIONS ON INDIAN LANDS 3 (May 1990).

27 *Id.* at i.

contemporary life. This means preserving not only historic properties but language, traditions, and lifeways."[28] As the NPS reported in *Keepers of the Treasures*:

> From a tribal perspective, preservation is approached holistically; the past lives on in the present. Land, water trees, animals, birds, rocks, human remains, and man-made objects are instilled with vital and sacred qualities. Historic properties important for the "retention and preservation of the American Indian way of life" include not only the places where significant events happen or have happened, but also whole classes of natural elements: places, 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.[29]

Critically, the NPS recognized:

> American Indian cultures are not expressed only on reservations, those areas remaining in the control of Indian people. 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 government, 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.[30]

And:

> Many, if not most, places of historical significance lie outside the boundaries of reservations, perhaps thousands of miles away on lands now controlled by private parties, local and State governments, and Federal agencies. Despite great distance and long periods of separation, American Indians often retain deep emotional ties to the ancestral lands that were ceded by treaty or lost in war.[31]

The NPS recognized that tribal concern over the protection of culturally significant places off reservations "indicates a need for tribes to be more involved in the management and planning activities for Federal agencies and State and local governments."[32] *Keepers of the Treasures* recommended that federal policy "ensure that Indian tribes are involved to the maximum extent feasible in decisions that affect properties of culture importance to them,"[33] and the NHPA must "be amended to establish . . . programs, policies and procedures for tribal heritage preservation":[34]

> While tribes are certainly concerned about preserving historic properties and other cultural resources on private lands, they are often equally or even more concerned

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28 *Id*. at i.
29 *Id*. at 7.
30 *Id*. at 1-2.
31 *Id*. at 19.
32 *Id*. at 67.
33 *Id*. at iv.
34 *Id*. at v.

> about preserving ancestral sites and traditional use areas on lands that they no longer control, whether these lands are now under Federal, State, or local control or in private ownership. This concern indicates a need for tribes to be more involved in the management and planning activities for Federal agencies and State and local governments. These activities include, but are not limited to, those carried out by Federal agencies and State Historic Preservation Officers [("SHPO")] under Sections 106 and 110 of the [NHPA] as well as those by State and local governments.[35]

Accordingly, the 1992 NHPA amendments providing Tribes, and Native Hawaiian organizations, a greater role in national preservation programs did not limit their participation to only their own lands.[36] The ability of Tribes to nominate or determine eligible for inclusion on the National Register, and protect through the Section 106 process, places of cultural and historic importance off tribally-owned lands is vital for Tribes' continued cultural survival.

III. Procedural History of the Rulemaking

On March 1, 2019, the NPS published a notice of proposed rulemaking amending the regulations implementing the National Register and the Section 106 process.[37] In the notice, and consistently throughout the rulemaking process, the NPS cited the 2016 amendments to the NHPA, contained in the National Park Service Centennial Act ("Centennial Act"),[38] as the primary impetus for this rulemaking:

> One group of changes would implement the 2016 Amendments to the NHPA. Another group of changes would ensure that if the owners of a majority of the land area in a proposed historic district object to the listing, the proposed district will not be listed over their objection. The rule would also extend the timeline for the Keeper to respond to appeals of the failure of a nominating authority to nominate a property for inclusion in the National Register. Finally, the rule would make a number of minor, non-substantive changes.[39]

The Centennial Act contained only one amendment to the National Register program: it established the process by which federal agencies and FPOs nominate historic properties for inclusion in the National Register.[40] This process was codified at 54 U.S.C. § 302104(c). In codifying this process, the Centennial Act made three changes to the statute: first, the Centennial Act re-designated the existing statutory provision at 54 U.S.C. § 302104(*c*) as 54 U.S.C. § 302104(*d*);[41] second, the Centennial Act inserted the new federal agency and FPO nomination process at 54 U.S.C. §

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35 *Id*. at 67.

36 *C.f.* 36 C.F.R. § 800.2(c)(2)(ii)(D) ("Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes or Native Hawaiian organizations and should consider that when complying with [Section 106 of the NHPA].").

37 84 Fed Reg. 6,996 (Mar. 1, 2019).

38 *See* Pub. L. No. 114-289, §§ 801-802, 130 Stat. 1482 (2016).

39 84 Fed Reg. at 6,997.

40 Pub. L. No. 114-289, § 802(b), 130 Stat. 1494-95.

41 *Id*. § 802(b)(3), 130 Stat. at 1495.

302104(c);[42] and third, the Centennial Act replaced references to "subsection (c)" with "subsection (d)" in 54 U.S.C. § 302104(a) and (b).[43] The Centennial Act did not include any other amendments to the National Register program and does not provide the statutory basis for the changes addressed herein.

When the notice of proposed rulemaking was published, the NPS "determined that tribal consultation is not required because the rule will not have a substantial direct effect on federally recognized Indian tribes."[44] Nevertheless, the NPS stated that it would engage in consultation with "SHPOs, [Federal Preservation Officers ("FPO")], the National Trust for Historic Preservation, and other national historical and archaeological associations."[45]

On April 30, 2019, Native Village of Tyonek, through its legal counsel, and NATHPO submitted comments on the rulemaking, objecting to it;[46] the NPS's lack of rulemaking authority to promulgate the new regulations; the lack of statutory authority for the new regulations; their inconsistency with other parts of the National Register regulations; their discriminatory effect on Tribes' and Native Hawaiian organizations' ability to protect places of traditional religious and cultural significance; and the NPS's refusal to engage in government-to-government consultation with federally recognized Tribes regarding the potential impacts of the rulemaking, in violation of Executive Order 13,175,[47] Presidential Memorandum of November 5, 2009,[48] and the Department of Interior Policy on Consultation with Indian Tribes ("DOI Consultation Policy").[49]

On May 24, 2019, the NPS published a notice in the Federal Register of tribal consultation regarding rulemaking. The notice stated that the NPS would hold a single consultation meeting on June 24, 2019, in Sparks, Nevada, in association with the National Conference of American Indian's ("NCAI") mid-year conference, and a single teleconference on July 1, 2019. This notice also extended the deadline for Tribes to comment on the rulemaking until July 8, 2019.

On June 7, 2019, through its legal counsel, Native Village of Tyonek submitted a letter to the NPS objecting to the adequacy of the proposed consultation.[50] Through its legal counsel, Native Village of Tyonek nevertheless attended the NPS's "consultation" in Sparks. Tribal leaders, representatives, and THPOs from about a dozen other Tribes attended. Deputy Assistant Secretary for Fish and Wildlife and Parks Ryan Hambleton and Joy Beasley, Keeper of the National Register of Historic Places ("the Keeper"), hosted the "consultation" on behalf of the Department of the Interior ("DOI") and the NPS. Through its legal counsel, Native Village of Tyonek reiterated its

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[42] *Id*. § 802(b)(2), 130 Stat. at 1494-95

[43] *Id*. § 802(b)(1), 130 Stat. at 1494.

[44] 84 Fed Reg. at 7,000.

[45] *Id*. at 6,997.

[46] Both comments attached.

[47] *See* Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

[48] *See* Presidential Memorandum—Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

[49] *See* Dep't of Interior, *Department of Interior Policy on Consultation with Indian Tribes* (2001), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf [hereinafter DOI Consultation Policy]; *see also* Department of the Interior Policy on Consultation with Indian Tribes, Secretarial Order No. 3,317 (Dec. 1, 2011), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf.

[50] Letter attached.

objections to and concerns, comments, and questions about the rulemaking. At the "consultation," the NPS took verbatim notes by a stenographer, and Keeper Beasley, at the request of the present tribal representatives, promised to look into whether the NPS could publish the transcript online for Tribes' review and reference, as well as the comments submitted by Tribes directly to the NPS, the DOI, and their officials, or through www.regulations.gov. The NPS did not provide Tribes unable to travel to Nevada an option to call into the "consultation." Keeper Beasley stated that the DOI, the NPS, and their officials had received comments from over seventy Tribes submitted through www.regulations.gov and by other means.

On July 1, 2019, through its legal counsel, Native Village of Tyonek attended the teleconference "consultation." NATHPO's Executive Director also attended the teleconference "consultation." Deputy Assistant Secretary Hambleton and Keeper Beasley hosted the teleconference "consultation" on behalf of the DOI and the NPS. Native Village of Tyonek, through its legal counsel, and NATHPO raised their objections to and concerns, comments, and questions about the rulemaking during the teleconference "consultation." Keeper Beasley stated that the NPS was taking notes of the teleconference and promised that the NPS would publish the notes and transcripts from both the June 24 "consultation" meeting and the July 1 teleconference "consultation" on the NPS's website on the webpage dedicated to the rulemaking. Keeper Beasley also indicated that the NPS would also post on that webpage the comments it, the DOI, and their officials received from Tribes though www.regulations.gov and by other means. As of the date of this comment, the NPS has not posted those comments, notes, andtranscripts online, as Keeper Beasley promised.[51]

On July 8, 2019, Native Village of Tyonek, through its legal counsel, and NATHPO submitted additional, extensive comments on the rulemaking, strongly objecting to its substance and the NPS's lack of meaningful consultation.[52]

The NPS's rulemaking has been roundly criticized by the vast majority of commenters. Indeed, of the over 3,300 comments submitted on www.regulations.gov, almost no comments were submitted in support of the rulemaking.[53] National, state, and local historic preservation organizations were unanimously opposed to the rulemaking. Every Tribe, THPO, and SHPO that commented on the rulemaking objected to it. Even the ACHP objected to the rulemaking, stating:

> The ACHP has identified several points where the proposed rule is likely inconsistent with the plain language of the NHPA as well as the requirements of the Section 106 regulations, which could impede efficient implementation of the Section 106 review process. Further, the proposed rule likely conflicts with federal agencies' compliance with the requirements of Section 110 of the NHPA to established a "preservation program for the identification, evaluation, and

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[51] *See Proposed Regulations on the Listing of Properties in the National Register of Historic Places*, NAT'L PARK SERV., https://www.nps.gov/subjects/historicpreservation/nhparegs2019.htm (last visited Oct. 30, 2020).

[52] Both comments attached.

[53] *See* Alaska Office of History & Archaeology, *Heritage Newsletter: Monthly News Update from the Office of Historic and Archaeology, State of Alaska, Department of Natural Resources: July 2019*, at 2 (July 2019), *available at* http://dnr.alaska.gov/parks/oha/heritage/2019/heritage2019-07.pdf ("The NPS received more than 3,300 comments to the proposed rule changes, and only five of them in support of them.").

> nomination to the National Register, and protection, of historic property." Finally, the ACHP is concerned that the process for developing and publishing this proposed rule did not include, nor was informed by, any coordination or consultation with affected federal agencies, states, Indian tribes, or Native Hawaiian organizations (NHOs).[54]

It appears that every single federal, tribal, state, and territorial agency delegated authorities and responsibilities under the NHPA and its implementing regulations, except the NPS, objected to the rulemaking.

Congress, too, has repeatedly objected to the rulemaking and the NPS's lack of meaningful consultation. For example, the United States House of Representatives, in its report on fiscal year 2020 appropriations for the DOI, stated:

> *Proposed Rulemaking.*—The [House Appropriations] Committee is concerned with the [NPS]'s proposal to modify the long-standing procedures to nominate properties of the National Register. It remains unclear to the Committee what problems the [NPS] is trying to solve by its proposal. *The Committee does not believe that the proposed changes are required by the minor amendments that Congress made to the* [*NHPA*] *in 2016*. Further, the Committee is troubled that the [NPS] has failed to consult with other federal land managing agencies, [SHPOs] and [THPOs], and other key stakeholders during the proposal's development or conduct required consultation. *The Committee urges the Service to withdraw the proposed rule* and consult with key stakeholders on the underlying issues the [NPS] is trying to resolve. Such stakeholders should include other federal land management agencies, including the Department of Defense, [SHPOs] and [THPOs], and the National Trust for Historic Preservation. *The Committee also expects the United States to enter into meaningful government-to-government consultation with affected tribes prior to finalizing any changes to the regulation*.[55]

The United States Senate, in its report on fiscal year 2020 appropriations for the DOI, similarly stated:

> *National Register of Historic Places.*—The [Senate Appropriations] Committee is concerned by the March 1, 2019, proposal by the [NPS] to modify the long-standing procedure used to nominate properties for inclusion on the National Register . . . . The Committee is aware of the concerns from the Historic Preservation Community that *the proposed changes are not required by the minor amendments Congress made to the* [*NHPA*] *in 2016 as part of Public Law 114-29*8. Further, *the Committee is troubled that the* [*NPS*] *has failed to appropriately conduct meaningful tribal consultation* or adequately consult with other Federal land management agencies,

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[54] Letter from John. M. Fowler, Exec. Dir., Advisory Council on Historic Pres., to Joy Beasley, Keeper of the Nat'l Register of Historic Places, Nat'l Park Serv., *Regulation Identification Number 1024-AAE49*, at 1 (Apr. 26, 2019), *available at* https://www.regulations.gov/document?D=NPS-2019-0001-2039.

[55] H. Rep. No. 116-100, at 39 (2019) (emphasis added), *available at* https://www.congress.gov/116/crpt/hrpt100/CRPT-116hrpt100.pdf.

> [SHPOs] and [THPOs] or other key stakeholders during the proposal's development. *The Committee directs the* [*DOI*] *to complete meaningful government-to-government consultation with Tribes pursuant to Executive Order 13174* and consult with these key stakeholders prior to finalizing or implementing the rule.[56]

And in its explanatory statement for the 2020 Further Consolidated Appropriations Act,[57] Congress stated: "*National Register of Historic Places.*—The agreement includes the directives contained in House Report 116-100 and Senate Report 116-123 pertaining to the proposed rule-making regarding the National Register of Historic Places."[58]

DISCUSSION

I. Proposed Changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13

The NPS's proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 are unlawful. These proposed changes conflict with the clear statutory language of the NHPA and exceed the NPS's rulemaking authority. In relevant part, the NHPA provides: "If the owner of any privately owned property, or *a majority of the owners of privately owned property within the district* in the case of a historic district, object to inclusion . . . , the property shall not be included on the National Register . . . until the objection is withdrawn."[59] The NHPA goes on to authorize the DOI (and, accordingly, the NPS) to promulgate regulations consistent with this provision:

> The Secretary [of the Interior] shall promulgate regulations requiring that before any property may be included on the National Register . . . , the owner of the property, or *a majority of the owners of individual properties within the district* in the case of a historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property for inclusion [on the National Register].[60]

The NPS has promulgated National Register regulations consistent with these provisions: "In nominations with multiple ownership of a single private property or of districts, the property will not be listed if a majority of the owners object to listing."[61]

The proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 would "provide that a property shall not be listed in the National Register if objections are received from either: (i) a majority of the land owners, as existing regulations provide; or (ii) *owners of a majority of the land area of the property*."[62] If the proposed changes to 36 C.F.R. §§60.6, 60.10, and 60.13 were implemented, the

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[56] S. Rep. No. 116-123, at 41 (2019) (internal citation omitted, emphasis added), *available at* https://www.congress.gov/116/crpt/srpt123/CRPT-116srpt123.pdf.

[57] Pub. L. No. 116-94, 133 Stat. 2534 (2019)

[58] 165 Cong. Rec. H11286 (daily ed. Dec. 17, 2019), *available at* https://www.congress.gov/116/crec/2019/12/17/CREC-2019-12-17.pdf-bk3.

[59] 54 U.S.C. § 302105(b) (emphasis added).

[60] *Id.* § 302105(a) (emphasis added).

[61] 36 C.F.R. § 60.6(g); *see also id.* §§ 60.6(d), (n), (r), (s), (v), 60.10(d), 60.13(c).

[62] 84 Fed. Reg. at 6,997 (emphasis added).

National Register regulations would provide: "For nominations with more than one owner of a property, the property will not be listed if either a majority of the owners object to listing; or *the owners of a majority of the land area of the property* object to listing."[63]

The proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 conflict with the clear statutory language of the NHPA and exceed the scope of the NPS's rulemaking authority. The NHPA is not ambiguous; it explicitly provides that a property will not be listed on the National Register if the "*majority of the owners of privately owned property within the district* in the case of a historic district[] object to [its] inclusion"[64] and authorizes the NPS to promulgate regulations consistent with this provision.[65] On their face, the proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 conflict with the clear statutory language of the NHPA and exceed the NPS's rulemaking authority, and are therefore unlawful. The proposed changes would allow the owners of the majority of the land within a district to prevent a property from being listed on the National Register, even if they were the *minority* of land owners. This outcome violates the plain language and intent of the NHPA.

The NPS has failed to provide a reasoned explanation for the proposed changes to 36 C.F.R. §§60.6, 60.10, and 60.13. The NPS cites the 2016 amendments to the NHPA as the basis for the proposed changes. This reliance is misplaced. The 2016 amendments simply codify the process by which federal agencies may nominate properties to the National Register at 54 U.S.C. § 302104(c).[66] The 2016 amendments do no alter, amend, modify, change, or update the owner-objection provisions of the NHPA.

The NPS also cites "the rights of land owners" as the basis for the proposed changes. Yet, the NPS is unable to explain what these "rights" are. Indeed, the inclusion of a property on the National Register does not impair any rights of a landowner or impose any obligations, covenants, or restrictions on the land or the landowner.[67] Instead, a property's inclusion on the National Register imposes obligations only on the *federal government* when an undertaking, as defined in the NHPA,[68] may affect that particular property under Section 106 of the NHPA.[69] The obligation to comply with Section 106 is the federal government's alone, not a private property owner's or private project proponent.[70]

This position also disregards the statutorily-codified rights of Tribes and Native Hawaiian organizations. Specifically, the NHPA recognizes that "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be

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63 *Id*. at 7,002 (proposed changes to 36 C.F.R. § 60.6(g)) (emphasis added); *see also id*. at 7,002-04 (proposed changes to 36 C.F.R. §§ 60.6(n), (r), (s), (v), 60.10(d), 60.13(d)).

64 54 U.S.C. § 302105(b)

65 *Id*. § 302105(a)

66 *See* Pub. L. No. 114-289, § 802(b), 130 Stat. 1482.

67 *See* 36 C.F.R. § 60.2.

68 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y).

69 36 C.F.R. § 60.2(a); *see* 54 U.S.C. § 306108; 36 C.F.R. pt. 800.

70 *See* 36 C.F.R. § 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.").

eligible for inclusion on the National Register[]"[71] and requires federal agencies to consult with them in the Section 106 process regarding such properties.[72] The NHPA, the current National Register regulations, and the Section 106 regulations do not limit Tribes' and Native Hawaiian organizations' ability to nominate properties and participate in the Section 106 process to only lands they own.[73]

The proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 erect unlawful and arbitrary barriers to Tribes' and Native Hawaiian organizations' ability to list places of traditional religious and cultural significance on the National Register. The proposed changes violate the NHPA, restrict the ability of Tribes and Native Hawaiian organizations to exercise their rights under the NHPA, and frustrates the purpose and intent of the NHPA. For decades, the NPS has recognized that "[m]any, if not most, places of historical significance [to Tribes] lie outside the boundaries of reservations, perhaps thousands of miles away on lands now controlled by private parties, local and State governments, and federal agencies."[74] The proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 undermine the ability of Tribes and Native Hawaiian organizations to exercise their rights under the NHPA to protect places of traditional religious and cultural significance off their lands.[75]

The proposed changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 are unlawful as they conflict with the clear statutory language of the NHPA and exceed the NPS's rulemaking authority.

II. Proposed Changes to 36 C.F.R. § 60.12

The NPS's proposed changes to 36 C.F.R. § 60.12 are unlawful. These proposed changes conflict with the clear statutory language of the NHPA and are internally inconsistent. In relevant part, the NHPA provides: "Any person or local government may appeal to the Secretary[of the Interior]. . . the failure of a nominating authority to nominate a property in accordance with this chapter."[76] The NPS has promulgated regulations codifying the procedures by which such an appeal can be taken: "Any person or local government may appeal to the Keeper the failure or refusal of a nominating authority to nominate a property that the person or local government considers to meet the National Register criteria."[77] The appeal process established by the NPS at 36 C.F.R. § 60.12 applies to both SHPOs and FPOs.

The proposed changes to 36 C.F.R. § 60.12 would allow the Keeper to hear an appeal of an FPO's failure to nominate a property to the National Register only if certain criteria are met: first, the SHPO and chief elected official have reviewed and commented on the nomination;[78] second "[t]he

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71 54 U.S.C. § 302706(a).

72 *Id*. § 302706(b).

73 *Accord* 36 C.F.R. § 800.2(c)(2)(ii)(D) ("Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when compliance with the procedures in this part.").

74 NAT'L PARK SERV., *supra* note 25, at 19; *id*. at 1 ("Sacred and historic places critical to the continuation of tribal cultural traditions are often not under tribal control.").

75 *See* 54 U.S.C. § 302706(a)-(b).

76 *Id*. § 302104(d)(2).

77 36 C.F.R. § 60.12(a).

78 84 Fed. Reg. at 7,004 (proposed changes to 36 C.F.R. § 60.12(b)(1)(i)-(iii)).

[FPO] has *forwarded* the nomination to the Keeper . . . after determining all the procedural requirements are met";[79] third, the Keeper has published notice "in the Federal register [sic] that the property *is being considered for listing in the National Register*";[80] and fourth, the Keeper has responded to the SHPO's comments if they do not support the nomination.[81] As the rulemaking states: "The proposed rule would clarify that the Keeper cannot hear an appeal of a Federal agency's failure to nominate a property unless all of the conditions precedent listed in 54 U.S.C. 302104(c) are met, *including a requirement that the FPO forwards the nomination to the Keeper*."[82]

The conditions imposed on the Keeper to hear an appeal of an FPO's failure to nominate property to the National Register make it impossible for the Keeper to ever hear an appeal of an FPO's failure to nominate a property. The proposed changes would give the Keeper jurisdiction to hear an appeal only after the FPO has: (1) completed all procedural requirements for a nomination; and (2) forwarded the nomination to the Keeper. These conditions require the FPO to nominate the property to the National Register before the Keeper can hear an appeal of that FPO's failure to nominate that property to the National Register.

The conditions established by the proposed changes make it impossible to appeal an FPO's actual failure or refusal to nominate properties to the National Register. For example, Section 110 of the NHPA requires federal agencies to identify, inventory, and manage historic properties owned or controlled by or located on land owned or managed by that agency.[83] This includes nominating such properties to the National Register.[84] If an FPO, acting under Section 110, determines that a property under that agency's control or ownership is not eligible for inclusion on the National Register and, therefore, does not forward a nomination to the Keeper, the proposed changes to 36 C.F.R. § 60.12 would not allow anyone to appeal the FPO's failure to nominate that property to the National Register. This conflicts with the clear statutory language of the NHPA.

Additionally, the NHPA and its implementing regulations allow individuals to initiate the nomination process by submitting "requests for nomination" to either a SHPO or an FPO, as appropriate.[85] The regulations require the FPO to review a request for nomination and determine whether the property is adequately documented.[86] If it is, the FPO must forward the nomination to the Keeper unless the FPO determines that the property is not eligible for inclusion on the National Register.[87] If the FPO determines that the property is not eligible for inclusion on the National Register and, therefore, does not forward the nomination to the Keeper, the proposed changes to 36 C.F.R. § 60.12 would not allow the proponent of that request for nomination to appeal the FPO's failure to nominate that property to the National Register. This conflicts with the clear statutory language of the NHPA.

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79 *Id*. (proposed changes to 36 C.F.R. § 60.12(b)(1)(iv)) (emphasis added).
80 *Id*. (proposed changes to 36 C.F.R. § 60.12(b)(1)(v)) (emphasis added).
81 *Id*. (proposed changes to 36 C.F.R. § 60.12(b)(1)(vi)).
82 *Id*. at 6,998 (emphasis added).
83 *See* 54 U.S.C. § 306101(a)(1).
84 36 C.F.R. § 60.9; 54 U.S.C. § 306102(b)(1).
85 36 C.F.R. § 60.11(a); 54 U.S.C. § 302104(a).
86 36 C.F.R. § 60.11(g).
87 *Id*.

The proposed changes to 36 C.F.R. § 60.12 would also arbitrarily establish separate procedures for appealing the failure of FPOs and SHPOs to nominate properties to the National Register. The procedures for appealing SHPOs' failure and refusal to nominate properties to the National Register do not impose the same conditions on the Keeper's ability to exercise jurisdiction over an appeal as the proposed changes do for FPO appeals. The NHPA itself does not contemplate separate appeal processes for SHPOs' and FPOs' failure to nominate properties[88] and the current National Register regulations reflect this;[89] there is one appeal process for both SHPO and FPO nominations. Thus, the proposed changes are arbitrary, internally inconsistent, and conflict with the clear statutory language of the NHPA.

The NPS has failed to provide a reasoned explanation for the proposed changes to 36 C.F.R. § 60.12. The NPS cites the 2016 amendments to the NHPA as the basis for the proposed changes. This reliance is misplaced. The 2016 amendments simply codify the process by which federal agencies may *nominate* properties to the National Register at 54 U.S.C. § 302104(c).[90] The 2016 amendments do recodify the appeals provision of the NHPA to a new subsection within that section of the statute at 54 U.S.C. § 302104(d),[91] but they do not alter, amend, modify, change, or update the appeal provision's language or its applicability to FPO nominations.

The inability to appeal FPOs' failure to nominate properties to the National Register either under 36 C.F.R. §§ 60.9 and 60.11 or Section 110 of the NHPA is particularly concerning to Tribes and Native Hawaiian organizations. For decades, the NPS has recognized that "[m]any, if not most, places of historical significance [to Tribes] lie outside the boundaries of reservations, perhaps thousands of miles away on lands now controlled by private parties, local and State governments, and federal agencies."[92] The proposed changes to 36 C.F.R. § 60.12 undermine the ability of Tribes and Native Hawaiian organizations to exercise their rights under the NHPA to list places of traditional religious and cultural significance on federal lands on the National Register.[93]

The proposed changes to 36 C.F.R. § 60.12 are unlawful as they conflict with the clear statutory language and intent of the NHPA, are arbitrary, and internally inconsistent.

III. Proposed Changes to 36 C.F.R. § 63.4

The NPS's proposed changes to 36 C.F.R. § 63.4 are unlawful. These proposed changes unlawfully restrict the Keeper's ability to determine properties eligible for inclusion on the National Register, delegate to other federal agencies and states the Keeper's responsibility to determine properties eligible, and infringe on the ACHP's rulemaking authority. Currently, the National Register regulations provide:

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88 *See* 54 U.S.C. § 302104(d)(2).

89 *See* 36 C.F.R. § 60.12.

90 Pub. L. No. 114-289, § 802(b)(2), 130 Stat. 1482.

91 *Id*. § 802(b)(1).

92 NAT'L PARK SERV., *supra* note 25, at 19; *id*. at 1 ("Sacred and historic places critical to the continuation of tribal cultural traditions are often not under tribal control.").

93 *See* 54 U.S.C. § 302706(a)-(b).

> If necessary to assist in the protection of historic resources, the Keeper, upon consultation with the appropriate [SHPO] and concerned federal agency, if any, may determine properties eligible for listing under the Criteria established by 36 C.F.R. part 60 and shall publish such determinations in the Federal Register. *Such determinations may be made without specific request from the Federal agency or, in effect, may reverse the findings on eligibility made by a Federal agency and* [*SHPO*]. Such determinations will be made after an investigation and an onsite inspection of the property in question.[94]

The proposed changes to 36 C.F.R. § 63.4 would provide:

> If necessary to assist in the protection of historic resources, the Keeper, upon consultation with *and request from* the appropriate [SHPO] and concerned federal agency, if any, may determine properties eligible for listing under the Criteria established in part 60 of this chapter and shall publish such determinations in the Federal Register. Such determinations will be made after an investigation and an onsite inspection of the property in question.[95]

The proposed changes to 36 C.F.R. § 63.4 would restrict the Keeper's authority to make determinations of eligibility in three ways. First, they would unlawfully and inappropriately restrict the Keeper's ability to make determinations of eligibility, by making the exercise of this authority contingent on a SHPO's approval. Second, they would unlawfully and inappropriately restrict the Keeper's ability to make determinations of eligibility regarding properties owned or administered by federal agencies or located on federally-owned or -administered lands contingent on federal agencies' and the SHPO's approval. Third, they would unlawfully and inappropriately restrict the Keeper's ability to make final determinations of eligibility, by eliminating the Keeper's ability to overturn the determinations of eligibility made by federal agencies and SHPOs.

Congress delegated to the Secretary of the Interior the authority to determine properties eligible for inclusion on the National Register.[96] This authority has been delegated to the Keeper.[97] The NHPA does not give states, SHPOs, and other federal agencies the authority to veto the Keeper's determinations of eligibility or restrict the Keeper's ability to make determinations of eligibility.[98] The proposed changes to 36 C.F.R. § 63.4 unlawfully abdicate the Keeper's ultimate authority to make determinations of eligibility and delegate the Keeper's authorities to other federal agencies and states.

Additionally, the proposed changes to 36 C.F.R. § 63.4 unlawfully infringe on the ACHP's rulemaking authority. Congress delegated to the ACHP the exclusive authority to "promulgate

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94 36 C.F.R. § 63.4(c) (emphasis added).

95 84 Fed. Reg. at 7,005 (proposed changes to 36 C.F.R. § 63.4(c)) (emphasis added).

96 *See* 54 U.S.C. §§ 302101-302104.

97 *See* 36 C.F.R. § 60.3(f).

98 *Accord* 54 U.S.C. §§ 302303(b) (outlining the statutory responsibilities of SHPO), 306102 (outlining the statutory responsibilities of federal agencies' preservation programs).

regulations as it considers necessary to govern the implementation of section [106] of th[e] [NHPA] in its entirety."[99] The ACHP has promulgated such regulations at 36 C.F.R. Part 800.

Section 106 of the NHPA requires federal agencies to "take into account the effect of [their] undertaking[s] on any historic property."[100] As part of the Section 106 process codified at 36 C.F.R. Part 800, federal agencies must determine whether historic properties are located within the undertaking's area of potential effect.[101] This requires the federal agency to "apply the National Register criteria (36 CFR part 63 [sic]) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility."[102]

The ACHP's regulations provide further:

> If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the [ACHP] or the Secretary [of the Interior] so request, the agency official *shall obtain a determination of eligibility from the Secretary* [*of the Interior*] *pursuant to 36 CFR part 63*. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.[103]

The proposed changes to 36 C.F.R. § 63.4 would prohibit the Keeper from resolving contested determinations of eligibility in the Section 106 process. By prohibiting the Keeper from making determinations of eligibility unless requested by both the SHPO and the federal agency, and by prohibiting the Keeper from overturning the determination of eligibility of the SHPO and federal agency, the proposed changes make it impossible for Tribes, Native Hawaiian organizations, THPOs, and the ACHP to require a federal agency to obtain a determination of eligibility from the Keeper when they disagree with the federal agency's determination. This result undermines the purpose of Section 106 of the NHPA, unlawfully infringes upon the ACHP's rulemaking authority, unlawfully delegates to SHPOs and other federal agencies the authority to make final determination of eligibility and prevent the Keeper from making determinations of eligibility, unlawfully abdicates the Keeper's ultimate authority to make determinations of eligibility, and unlawfully restricts the rights of Tribes and Native Hawaiian organizations.

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[99] *Id*. § 304108(a); *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.").

[100] 54 U.S.C. § 306108.

[101] 36 C.F.R. § 800.4(b).

[102] *Id*. § 800.4(c)(1).

[103] *Id*. § 800.4(c)(2).

The NPS has failed to provide a reasoned explanation for the proposed changes to 36 C.F.R. § 63.4. The NPS states that the proposed changes are "consistent with the 2016 Amendments and other provisions of the NHPA that dictate the roles and responsibilities of SHPOs and FPOs" and cites 54 U.S.C. §§ 302104(a) and 306101(a) and (c).[104] The NPS is incorrect. The 2016 amendments simply codify the process by which federal agencies may nominate properties to the National Register.[105] 54 U.S.C. § 302104(a) provides that states, through their preservation programs (*i.e.*, SHPOs), may nominate properties to the National Register; it does not limit SHPOs' authority to only nominate historic properties on state or private land and it does not allow SHPOs to veto the Keeper's determinations of eligibility or prevent the Keeper from making a determination of eligibility.[106] Likewise, 54 U.S.C. § 306101 simply requires federal agencies to "assume responsibility for the preservation of historic property that is owned or controlled by the agency,"[107] comply with Executive Order 13,006,[108] and undertake preservation measures for historic properties it controls or owns,[109] and requires certain agencies to "establish . . . professional standards for the preservation of historic property in Federal ownership or control."[110] Neither the 2016 amendments, nor 54 U.S.C. §§ 302104(a) and 306101(a) and (c) alter, amend, modify, change, update, or qualify the Keeper's authority to make determinations of eligibility.

The proposed changes to 36 C.F.R. § 63.4 are particularly concerning for Tribes and Native Hawaiian organizations. Both have statutory rights to nominate and determine eligible properties of traditional religious and cultural significance,[111] and to be consulted with in the Section 106 process regarding such properties.[112] The proposed changes give federal agencies and SHPOs an effective veto over Tribes' and Native Hawaiian organizations' ability to secure determinations of eligibility for properties of traditional religious and cultural significance. This is particularly concerning, because "[m]any, if not most, places of historical significance [to Tribes] lie outside the boundaries of reservations, perhaps thousands of miles away on lands now controlled by private parties, local and State governments, and federal agencies."[113] The result of the proposed changes is that Tribes and Native Hawaiian organizations must rely entirely on federal agencies and SHPOs to secure determinations of eligibility for such properties.

The proposed changes to 36 C.F.R. § 63.4 unlawfully restrict the Keeper's authority to make determinations of eligibility, delegate the Keeper's authority to make determinations of eligibility to other federal agencies and states, infringe on the ACHP's rulemaking authority, and restrict the rights of Tribes and Native Hawaiian organizations.

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104 84 Fed. Reg. at 6,998.

105 Pub. L. No. 114-289, § 802(b)(2), 130 Stat. 1482.

106 54 U.S.C. § 302104(a).

107 *Id*. § 306101(a)(1).

108 *Id*. § 306101(a)(2) (citing Exec. Order No. 13,006, 61 Fed. Reg. 26,071 (May 21, 1996)).

109 *Id*. § 306101(a)(3).

110 *Id*. § 306101(c).

111 *Id*. § 302706(a).

112 *Id*. § 302706(b).

113 NAT'L PARK SERV., *supra* note 25, at 19; *id*. at 1 ("Sacred and historic places critical to the continuation of tribal cultural traditions are often not under tribal control.").

IV. Proposed Elimination of 36 C.F.R. § 60.6(y)

The NPS's proposed elimination of 36 C.F.R. § 60.6(y) is unlawful. This proposed elimination conflicts with and lacks statutory authority and arbitrarily restricts SHPOs' authority, and Tribes' and Native Hawaiian organizations' ability, to nominate properties to the National Register.

Currently, the National Register regulations provide: "With regard to property under Federal ownership or control, completed nomination forms shall be submitted to the [FPO] for review and comment. The [FPO] may approve the nomination and forward it to the Keeper."[114] The NPS proposes to entirely eliminate this subsection of 36 C.F.R. § 60.6. The NPS stated at the Sparks "consultation" that the elimination of this subsection is required by the 2016 amendments, which, the NPS contends, affirm that the exclusive authority to nominate to the National Register properties under federal control or ownership rests with the appropriate FPO. The NPS contends that SHPOs lack any authority to nominate to the National Register properties under federal control or ownership. The NPS is incorrect.

The NHPA does not restrict SHPOs' ability to nominate to the National Register properties under federal ownership or control, nor does it provide FPOs with the exclusive authority to nominate such properties. Regarding the authority of states to nominate properties to the National Register, the NHPA simply states: "[A]ny State that is carrying out a program approved under [54 U.S.C. §§ 302301-302304] shall nominate to the Secretary [of the Interior] *property* that meets the criteria promulgated under section 302103 of this title for inclusion on the National Register."[115] The NHPA also affirms that it is the SHPO's responsibility to "identify and nominate *eligible property* to the National Register and otherwise administer applications for listing historic property on the National Register."[116] Nothing in these provisions restricts SHPOs' authority to nominate to the National Register properties under federal control or ownership.

Furthermore, the 2016 amendments do not restrict SHPOs' authority to nominate to the National Register properties under federal ownership or control, nor do they provide FPOs with the exclusive authority to nominate such properties. Instead, the 2016 amendments simply codify the process by which FPOs may nominate properties to the National Register.[117] The 2016 amendments contain no language restricting SHPOs' ability to nominate property or providing FPOs with exclusive authority to nominate properties under federal control or ownership. The NHPA and the 2016 amendments do not support the NPS's position that FPOs possess exclusive authority to nominate to the National Register properties under federal control or ownership. Therefore, the elimination of 36 C.F.R. § 60.6(y) is arbitrary, conflicts with, and is unsupported by the plain statutory language of the NHPA.

The elimination of 36 C.F.R. § 60.6(y) and the NPS's position that SHPOs cannot nominate to the National Register properties under federal control or ownership is especially troubling to Tribes and Native Hawaiian organizations. "Many, if not most, places of historical significance [to Tribes] lie outside the boundaries of reservations, perhaps thousands of miles away on lands now

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114 36 C.F.R. § 60.6(y).

115 54 U.S.C. § 302104(a) (emphasis added).

116 *Id*. § 302303(b)(2) (emphasis added).

117 *See* Pub. L. No. 114-289, § 802(b)(2), 130 Stat. 1482.

controlled by private parties, local and State governments, and federal agencies."[118] The NHPA and its implementing regulations do not provide Tribes, THPOs, and Native Hawaiian organizations with the authority to nominate properties to the Keeper on their own. Therefore, to nominate properties under federal control or ownership, Tribes and Native Hawaiian organizations must utilize the request for nomination process established in the National Register regulations.[119] In circumstances where there is either no relevant FPO, or the FPO refuses to accept or forward a request for nomination, Tribes and Native Hawaiian organizations must submit request for nominations to the appropriate SHPO. The elimination of 36 C.F.R. § 60.6(y), therefore, places significant barriers on Tribes' and Native Hawaiian organizations' ability to secure the nomination of properties under federal control or ownership when there is either no FPO or the FPO refuses to nominate the property.

The proposed elimination of 36 C.F.R. § 60.6(y) and the NPS's position that SHPOs cannot nominate to the National Register properties under federal control and ownership is arbitrary and conflicts with and is unsupported by the clear statutory language of the NHPA.

V. Failure to Engage in Government-to-Government Consultation

The NPS failed to engage in government-to-government consultation with Tribes regarding the rulemaking, as required by Executive Order 13,175,[120] Presidential Memorandum of November 5, 2009,[121] and the DOI Consultation Policy.[122]

Executive Order 13,175 mandates: "[N]o agency shall promulgate any regulation that has tribal implications . . . , unless . . . the agency, prior to the formal promulgation of the regulation . . . consulted with tribal officials early in the process of developing the proposed regulations."[123] Executive Order 13,175 defines "policies that have tribal implications" as:

> [R]egulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribe, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.[124]

Presidential Memorandum of November 5, 2009, further directs every federal agency to adopt a tribal consultation policy "implement[ing] the policies and directives of Executive Order 13,175."[125] Pursuant to this directive, the Department of the Interior developed and adopted its Tribal Consultation Policy.

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118 NAT'L PARK SERV., *supra* note 25, at 19; *id*. at 1 ("Sacred and historic places critical to the continuation of tribal cultural traditions are often not under tribal control.").

119 *See* 36 C.F.R. § 60.11.

120 *See* Exec. Order No. 13,175, 65 Fed. Ref. at 67,249.

121 *See* 74 Fed. Reg. 57,881.

122 *See* DOI Consultation Policy, *supra* note 49; *see also* Secretarial Order No. 3,317.

123 Exec. Order No. 13,175, § 5(b)(2)(A), 65 Fed. Reg. at 67,249.

124 *Id*. § 1(a), 65 Fed. Reg. at 67,249.

125 74 Fed. Reg. at 57,881.

The DOI Consultation Policy requires that every bureau and office within the DOI, including the NPS,[126] "will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications."[127] The DOI Consultation Policy defines "Departmental Action with Tribal Implications" as:

> Any Departmental regulation[or] rulemaking . . . that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to: [(1)] Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands; . . . [(2)] An Indian Tribe's formal relationship with the Department; or [(3)] The consideration of the Department's trust responsibilities to Indian Tribes.[128]

It is the obligation of each bureau and office to "notify the appropriate Indian Tribe(s) of the opportunity to consult pursuant to this Policy" when considering a department action with tribal implications.[129]

Consultation is not an amorphous concept. Instead:

> Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes of the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices.[130]

The NPS has failed to properly consult with the Native Village of Tyonek, NATHPO's members, and other Tribes regarding the rulemaking. Initially, the NPS refused to engage in consultation with Tribes, stating "that tribal consultation is not required because the rule will not have a substantial direct effect on federally recognized Indian tribes,"[131] while nevertheless committing to consult with "SHPOs, FPOs, the National Trust for Historic Preservation, and other national historical and archaeological associations."[132] After receiving scores of comments from Tribes and tribal organizations, including Native Village of Tyonek and NATHPO, objecting to the NPS's refusal to engage in consultation, the NPS backtracked. On June 24, 2019, the NPS held a single consultation meeting in Sparks in coordination with NCAI's mid-year conference, and a single teleconference on July 1, 2019. Neither of these "consultations" satisfy the NPS's consultation obligation.

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126 *See Government-to-Government Consultation*, NAT'L PARK SERV. (June 12, 2017), https://www.nps.gov/subjects/tek/g2g.htm (last visited Apr. 28, 2019).

127 DOI Consultation Policy, *supra* note 49, at § VII(E)(1), 11 (emphasis added).

128 *Id*. § III, 3.

129 *Id*. § VII(A), 7.

130 *Id*. § II, 2.

131 *Id*. at 7,000.

132 *Id*. at 6,997. Despite being a member of the ACHP, 54 U.S.C. § 304101(a)(8), along with the National Trust for Historic Preservation, *id*. § 304101(a)(9), the NPS did not commit to consulting with NATHPO.

The NPS's purported consultation was commenced too late in the process. Executive Order 13,175 requires the NPS to "consult[] with tribal officials early in the process of *developing* the proposed regulations" and mandates that "no agency shall promulgate any regulation that has tribal implications" until such consultation has occurred.[133] Indeed, the DOI Consultation Policy requires the NPS to "consult with Indian Tribes as early as possible when *considering* a Departmental Action with Tribal Implications."[134]

The NPS's purported consultation did not occur while the NPS was "developing" or "considering" the rulemaking. Instead, the purported consultation occurred *after* the NPS developed the proposed changes to the National Register regulations. The NPS did not inform Tribes that it was considering changes to the National Register regulations until it published its notice of proposed rulemaking in the Federal Register on March 1, 2019. Therefore, the proposed changes to the National Register regulations were not developed with input and consultation from Tribes; tribal concerns were not taken into account when the proposed regulations were drafted.[135] Instead, Tribes were only allowed to comment on the draft language along with the general public. This process undercut the purpose of tribal consultation and violated the explicit mandates of Executive Order 13,175 and the DOI Consultation Policy.

The NPS's purported consultation was not consultation. First, the consultation was not held with the appropriate DOI and NPS officials. The DOI Consultation Policy states:

> This Policy requires a government-to-government consultation between appropriate Tribal Officials and Department officials. The appropriate Department officials are those individuals who are *knowledgeable about the matters at hand*, are authorized to speak for the department, and *exercise delegated authority in the disposition and implementation of* [*the*] *agency action*.[136]

Neither Deputy Assistant Secretary Hambleton nor Keeper Beasley—who hosted both "consultations"—were the appropriate department officials. Neither one was able to speak knowledgeably about the impetus for the rulemaking or DOI's and NPS's intent behind the proposed changes. Furthermore, both informed tribal representatives at the Sparks meeting that the rulemaking was initiated and implemented by the Secretary of the Interior's office directly, not

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[133] Exec. Order No. 13,175, § 5(b)(2)(A), 65 Fed. Reg. at 67,249 (emphasis added).

[134] DOI Consultation Policy, *supra* note 49, at § VII(E)(1), 11 (emphasis added); *see also* 36 C.F.R. § 800.2(c)(2)(ii)(A) ("Consultation should commence early in the process, in order to identify and discuss relevant preservation issues."); *see* Secretarial Order No. 3,317, § 4(a) ("Government-to-government consultation between appropriate Tribal officials and the Department requires Department officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representatives in a meaningful way *early in the planning process*." (emphasis added)).

[135] *Accord Wyoming v. U.S. Dep't of Interior*, 136 F. Supp. 1317, 1346 (D. Wyo. 2015), *vacated as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016) (holding that Bureau of Land Management's initiation of tribal consultation *after* it has drafted the proposed rule violated the DOI Consultation Policy and was unlawful).

[136] DOI Consultation Policy, *supra* note 49, at § II, 2 (emphasis added); *see* Secretarial Order No. 3,317, § 4(a) ("Government-to-government consultation *between appropriate Tribal officials and the Department* requires Department officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representatives in a meaningful way early in the planning process." (emphasis added)).

the NPS. Both stated multiple times that they would take the Tribes' comments and concerns back to Washington, D.C., and relay them to those in charge of the rulemaking. While both Deputy Assistant Secretary Hambleton and Keeper Beasley have delegated authority over the NPS and the National Register, respectively, neither one appeared to have the authority to implement this rulemaking, respond to tribal comments and concerns, and make changes to the final rule. Consultation with anyone other than the Secretary of the Interior, therefore, was not government-to-government consultation and did not meet the requirements of the Executive Order 13,175 and the DOI Consultation Policy.

Second, the Sparks meeting and the teleconference were not actual consultations. "The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the *decision-making process*."[137] Because Deputy Assistant Secretary Hambleton and Keeper Beasley were not the appropriate department officials, the Sparks meeting and the teleconference were not consultations, but listening sessions.[138] Deputy Assistant Secretary Hambleton and Keeper Beasley repeatedly responded to Tribes' questions, comments, and concerns by telling them that they would bring these issues to the attention of other agency officials in Washington, D.C. The Sparks meeting, the teleconference, and the extended tribal comment period are not "*meaningful* efforts to involve tribes in the *decision-making process*," but a glorified public comment period.[139] Every Tribe that participated in the Sparks meeting and the teleconference, including Native Village of Tyonek, stated that the meeting and the teleconference were not consultations and that the NPS failed to fulfill is consultation obligation.

Third, the NPS's efforts to engage in consultations have been woefully inadequate. The DOI Consultation Policy states that a series of open tribal "meetings can be used for *national*, regional or *subject-matter specific* issues" and that "[s]ingle meetings are particularly appropriate for *local* or regional issues, or a *Tribe-specific* issue."[140] The rulemaking is a national issue; it applies to the National Register program generally and will affect Tribes and other organizations across the nation. This is evidenced by the over seventy comments submitted by Tribes throughout the United States, including Alaska, as well as national and regional tribal organizations.[141] The single meeting held in Sparks and the single teleconference are woefully inadequate to satisfy the NPS's tribal consultation requirements.

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137 *Wyoming*, 136 F. Supp. 3d at 1346; *see also* 36 C.F.R. § 800.2(c)(2)(ii)(A)-(D).

138 *See* DOI Consultation Policy, note 49, at § II, 2 ("Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices."); *see also* Secretarial Order No. 3,317, § 4(b) ("Consultation is a process that aims to create effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process.").

139 *Wyoming*, 136 F. Supp. 3d at 1345-46 (holding that "BLM's efforts . . . reflect little more than that offered to the public in general" and therefore violate the DOI Consultation policy and are unlawful).

140 DOI Consultation Policy, *supra* note 49, at § VII(E)(2), 13 (emphasis added).

141 Comments were also submitted from Hawai'i, Guam, and Puerto Rico.

It is the NPS's obligation to shoulder the burden of consultation and to uphold its trust responsibility.[142] The NPS cannot expect or require Tribes to shoulder the financial burden of consultation and incur the costs of traveling to Sparks. This burden is particularly acute for Native Village of Tyonek and other Tribes in rural Alaska. Additionally, while teleconferences are convenient, they are not consultation and do not satisfy the NPS's overarching trust responsibility to engage in meaningful consultation. Teleconferences do not facilitate "a discussion, conference, or forum in which advice or information is sought or given, or information or ideas are exchanged,"[143] nor do they facilitate "seeking, discussing, and considering the view of other participants."[144] Neither the Sparks meeting nor the teleconference met this standard.

Native Village of Tyonek and NATHPO requested that the NPS hold additional consultation meetings throughout the United States, suggesting that such consultations occur in every Bureau of Indian Affairs region, including Alaska.[145] This request was also made by other Tribes at the Sparks meeting. The NPS never responded to these request and never held additional consultations with Native Village of Tyonek, NATHPO, NATHPO's members, or other Tribes.

Furthermore, Native Village of Tyonek and NATHPO requested that the NPS hold in-person consultations with Native Hawaiian organizations in Hawai'i. The NHPA specifically provides that Native Hawaiian organizations, along with Tribes, can nominate to the National Register properties of traditional religious and cultural significance.[146] The NHPA also requires federal agencies to consult with Native Hawaiian organizations as they would Tribes in the Section 106 process.[147] While the United States does not maintain a government-to-government with Native Hawaiian organizations, the NHPA explicitly mandates consultation with them when federal undertakings have the potential to affect historic properties to which they ascribe traditional religious and cultural significance. Because the rulemaking affects Native Hawaiians' and Native Hawaiian organizations' ability to nominate and protect historic properties of traditional religious and cultural significance to them. There is no indication in the public record that the NPS engaged in consultation with Native Hawaiian organizations on the rulemaking.

VI. The Rulemaking does not Satisfy Executive Order 12,866 Review

As detailed above, the NPS's rulemaking is deeply flawed; many of its provisions are unlawful; and the NPS failed to fulfill its obligation to engage in meaningful government-to-government consultation with Tribes during the rulemaking process. Based on the extensive legal and procedural deficiencies identified above, the OIRA must return the final rule to the NPS for

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142 *Accord* 36 C.F.R. § 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.").

143 Nat'l Park Serv., *National Park Service Management Policies*, 156 (2006), *available at* https://www.nps.gov/policy/MP_2006.pdf.

144 36 C.F.R. § 800.16(f).

145 These regions are: Alaska Region; Eastern Region; Eastern Oklahoma Region; Great Plains Region; Midwest Region; Navajo Region; Northwest Region; Pacific Region; Rocky Mountain Region; Southern Plains Region; Southwest Region; and Western Region.

146 54 U.S.C. § 302706(a).

147 *Id*. § 302706(b).

additional consideration because the rulemaking is not "consistent with applicable law[.]"[148] Executive Order 12,866 requires the OIRA to review "significant regulatory actions" proposed by federal agencies.[149] Significant regulatory actions include rulemakings that are likely to result in rule that may "adversely effect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal communities;"[150] "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency;"[151] and "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."[152]

The OIRA's review "is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[153] Executive Order 12,866 requires the Administrator of the OIRA to "provide meaningful oversight so that each agency's regulatory actions are consistent with applicable law[.]"[154] if the OIRA determines that a rulemaking is not consistent with applicable law, the Administrator must return the rulemaking to the agency for further consideration.[155]

On October 8, 2020, the NPS submitted its final rule to the OIRA for review under Executive Order 12,866. It is particularly troubling that the NPS did not submit the *draft* rulemaking to OIRA for Executive Order 12,866 review in 2019. At the time, the NPS stated that "this rule is not significant under Executive Order 12866."[156] Native Village of Tyonek and NATHPO understand that the final rule remains largely unchanged from draft rule published in 2019—despite substantial and substantive comments on the rulemaking's unlawfulness. This begs the question: why is the NPS now submitting the rulemaking to OIRA for review under Executive Order 12,866, but did not do so for the draft rule? The NPS's lack of transparency regarding this rulemaking is disturbing and undermines the credibility of the asserted purpose and need of the rulemaking.

The rulemaking's changes to 36 C.F.R. §§ 60.6, 60.10, and 60.13 "adversely effect in a material way . . . the environment, public health or safety, [and] State, local, and tribal communities[]"[157] and "[r]aise novel legal [and] policy issues arising out of legal mandates[.]"[158] Tribes and Native Hawaiian organizations have a statutory right to list and determine eligible for inclusion on the National Register historic properties of traditional religious and cultural significance.[159] The rulemaking's changes to the owner objection provisions conflict with the clear and unambiguous

148 Exec. Order No. 12,866, § 2(b), 58 Fed. Reg. 51,735 (1993).
149 *Id*. § 6(b)(1).
150 *Id*. § 3(f)(1).
151 *Id*. § 3(4)(2).
152 *Id*. § 3(f)(4).
153 *Id*. § (2)(b).
154 *Id*. § 6(b).
155 *Id*. § 6(3).
156 84 Fed Reg. at 7,000.
157 Exec. Order No. 12,866, § 3(f)(1).
158 *Id*. § 3(f)(4).
159 *See* 54 U.S.C. § 302706(a).

language of the NHPA and exceed the NPS's rulemaking authority.[160] The result would restrict Tribes' and Native Hawaiian organizations' ability to exercise their rights under the NHPA.

The rulemaking's changes to 36 C.F.R. § 60.12 "adversely effect in a material way . . . the environment, public health or safety, [and] State, local, and tribal communities[,]"[161] "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency[,]"[162] and "[r]aise novel legal [and] policy issues arising out of legal mandates[.]"[163] The rulemaking establishes a Kafkaesque appeals process for historic properties located on federal lands, in effect prohibiting Tribes and Native Hawaiian organizations from appealing a federal agency's or FPO's failure or refusal to nominate a historic property to the National Register. The changes undermine Tribes' and Native Hawaiian organizations' ability to nominate places of traditional religious and cultural significance to the National Register,[164] alter the responsibilities of federal agencies and FPOs by infringing on federal agencies' ability to carry out their Federal Preservation Programs,[165] and are inconsistent with the clear statutory language of the NHPA.[166]

The rulemaking's changes to 36 C.F.R. § 63.4 "adversely effect in a material way . . . the environment, public health or safety, [and] State, local, and tribal communities[,]"[167] "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency[,]"[168] and "[r]aise novel legal [and] policy issues arising out of legal mandates[.]"[169] The changes would inhibit Tribes' and Native Hawaiian organizations' ability to participate fully in the Section 106 process[170] and secure determinations of eligibility for places of traditional religious and cultural significance in the Section 106 process.[171] The changes would unlawfully abdicate the Keeper's ultimate authority to determine properties eligible for inclusion on the National Register by delegating that authority to other agencies and states.[172] The changes would also unlawfully interfere with the ACHP's rulemaking authority and ability to administer the Section 106 process.[173]

The rulemaking's elimination of 36 C.F.R. §§ 60.(y) "adversely effect[s] in a material way . . . the environment, public health or safety, [and] State, local, and tribal communities[]"[174] and "[r]aise[s] novel legal [and] policy issues arising out of legal mandates[.]"[175] Tribes and Native Hawaiian organizations cannot nominate directly to the National Register historic properties, and must

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160 *See id*. § 302105(a)-(b).
161 Exec. Order No. 12,866, § 3(f)(1).
162 *Id*. § 3(f)(2).
163 *Id*. § 3(f)(4).
164 *See* 54 U.S.C. § 302706(a).
165 *See id*. § 306102; Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 13, 1971).
166 *See* 54 U.S.C. § 302104(d)(1).
167 Exec. Order No. 12,866, § 3(f)(1).
168 *Id*. § 3(f)(2).
169 *Id*. § 3(f)(4).
170 *See* 54 U.S.C. § 302706(b).
171 *See* 36 C.F.R. § 800.4(c)(2).
172 *See* 54 U.S.C. § 302101; 36 C.F.R. § 60.3(f).
173 *See* 54 U.S.C. § 304108(a).
174 Exec. Order No. 12,866, § 3(f)(1).
175 *Id*. § 3(f)(4).

instead submit requests for nominations to the appropriate SHPO or FPO.[176] The elimination of SHPOs' ability to nominate historic properties on federal lands undermines Tribes' and Native Hawaiian organizations' ability to nominate to the National Register historic properties of traditional religious and cultural significance[177] and is unsupported by the plain language of the NHPA.[178]

The NPS's failure to engage in government-to-government consultation "adversely effect[s] in a material way . . . tribal communities[]"[179] and "[r]aise[s] novel legal [and] policy issues arising out of legal mandates[.]"[180] The NPS is mandated by Executive Order 13,175 and its own tribal consultation policy to engage in government-to-government consultation with Tribes for any "regulation that has tribal implications[.]"[181] The NPS's failure to engage in consultation was unlawful and violated the Executive Branch's consultation policy and mandate.[182]

CONCLUSION

The rulemaking is unlawful and the process by which the NPS promulgated it was unlawful. The OIRA should return the rulemaking to the NPS for further consideration and consultation. Attached with this letter are comments submitted to the NPS during the rulemaking on behalf of Native Village of Tyonek and by NATHPO. There should be five total attachments. Should you have any questions, please do not hesitate to contact me at: wfurlong@narf.org.

Respectfully,

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176 *See* 54 U.S.C. § 302104(a)-(c); 36 C.F.R. §§ 60.6, 60.9-60.11.
177 *See* 54 U.S.C. § 302706(a).
178 *See id*. § 302104(a).
179 Exec. Order No. 12,866, § 3(f)(1).
180 *Id*. § 3(f)(4).
181 Exec. Order No. 13,175, § 5(b)(2)(A); *see* DOI Consultation Policy, *supra* note 49.
182 *Wyoming*, 136 F. Supp. at 1346.