Scattered to the Winds?: Strengthening the National Historic Preservation Act's Tribal Consultation Mandate to Protect Native American Sacred Sites in the Renewable Energy Development Era

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As renewable energy development, and particularly wind energy development, ascends to prominence in the United States' national energy agenda, significant attention has been paid to developing these resources on and adjacent to lands currently or ancestrally occupied by Native American Indian tribes. While many tribes have demonstrated eagerness to develop renewable energy resources, including in partnership with private developers, conflict has emerged where tribes have not been adequately consulted under mandatory review procedures such as those provided for under the National Historic Preservation Act (NHPA). This Article argues that tribal communication and consultation requirements and procedures must be defined with greater clarity and specificity in order to adequately protect tribes' most sacred resources in the face of surging interest in renewable energy development on tribal lands, particularly given the legacy of colonialist exploitation perpetrated against Indigenous peoples and lands. Accordingly, this Article proposes to revise key provisions of the regulatory guidance at 36 C.F.R. § 800 to better promote meaningful tribal consultation and facilitate greater alignment between the legal frameworks that provide protections for historic sites under the NHPA and the Indigenous knowledge systems that give meaning to the resources that the law seeks to protect.

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I. INTRODUCTION

For millennia, the Wampanoag people have inhabited Cape Cod, its surrounding islands, and portions of the shores and coastal inlands of southern Massachusetts.[1] Today, the tribal members continue to maintain deep cultural and spiritual ties to their ancestral lands.[2] Among the tribe's most sacrosanct and culturally vital sites is Nantucket Sound, a body of water that lies between the islands of Martha's Vineyard and Nantucket.[3] Since time immemorial, the Wampanoag have held a sacred relationship with the sunrise[4]—so important is the sunrise to the Wampanoag identity that the tribe's very name translates from Algonquin to "People of the First

1. *See* MINERALS MGMT. SERV., CAPE WIND ENERGY PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT, at 309 (Dec. 2012); *Wampanoag History*, Wampanoag Tribe, https://wampanoagtribe-nsn.gov/wampanoag-history [https://perma.cc/TT4L-HDNA?type=image] (last visited June 24, 2021) (stating that the Wampanoag have inhabited their ancestral homelands, which include the island of Martha's Vineyard, for at least 10,000 years).

2. MINERALS MGMT. SERV., CAPE WIND ENERGY PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT, VOL. 1, at 4-159 (Jan. 2009). The Mashpee Wampanoag and the Aquinnah (Gay Head) Wampanoag Tribes have continuously "maintained physical and cultural presence on their ancestral homelands." *Wampanoag History*, *supra* note 1.

3. MINERALS MGMT. SERV., *supra* note 2, at 4-159.

4. KAREN A. ALEXANDER, CONFLICTS OVER MARINE AND COASTAL COMMON RESOURCES: CAUSES, GOVERNANCE AND PREVENTION, 89-90 (2019).

Light"[5] or "People of the Light of Dawn."[6] The tribe has long honored and celebrated this connection through "ceremony and prayers of thanksgiving to the first light," many of which require an unobstructed view of the rising sun over the Sound to be performed properly.[7]

In 2001, Cape Wind Associates (CWA) announced groundbreaking plans to build what was to be the United States' first commercial-scale offshore wind farm, set to be located in the middle of Nantucket Sound.[8] The proposal called for the construction of a 130-turbine wind farm to be sited on Horseshoe Shoal, which lies in federal waters approximately nine miles east of Martha's Vineyard and squarely within the Wampanoag's sacred view.[9] The turbines were to be arranged in a gird formation encompassing an area roughly the size of Manhattan,[10] with each turbine unit standing 400 feet above sea level.[11] The plan would have amounted to total sacred destruction.

The Wampanoag tribe was among a diverse group of organizations and communities opposing the project,[12] though the tribe's objections were largely overshadowed by those raised by the famously "billionaire-backed" Alliance to Protect Nantucket Sound, which eventually

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5. *Assessing the Efficiency and Effectiveness of Wind Energy Incentives: Hearing Before the H. Subcomm. on Oversight Joint with the H. Subcomm. on Energy, H. Comm. on Sci., Space, & Tech.*, 113th Cong. 354 (2011) (exhibit to written testimony of Audra Parker, Alliance to Protect Nantucket Sound) [hereinafter *Assessing the Efficiency and Effectiveness of Wind Energy Incentives*].

6. NAT'L PARK SERV., NATIONAL REGISTER OF HISTORIC PLACES DETERMINATION OF ELIGIBILITY NOTIFICATION FOR NANTUCKET SOUND 5 (Jan. 4, 2010), https://www.achp.gov/sites/default/files/2018-05/National%20Register%20of%20Historic%20Places%20determination%20of%20eligibility%20of%20Nantucket%20Sound.pdf [https://perma.cc/YL4J-TMJ5?type=image]. Members of the Wampanoag Tribes have stated that "other tribes recognize" the Wampanoag according to this label as well. *Id.*

7. MINERALS MGMT. SERV., *supra* note 2, at 4-159.

8. 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, 334 (2014).

9. *Id.* at 334-35. *See also* BUREAU OF OCEAN ENERGY MGMT., FINDING OF ADVERSE EFFECT FOR THE VINEYARD WIND PROJECT CONSTRUCTION AND OPERATIONS PLAN 16 (revised June 2019), https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/HP/Finding-of-Adverse-Effect-Vineyard-Wind.pdf [https://perma.cc/SB6H-T8EW?type=image] (defining the "viewshed area of potential effects" of the CWEP—the "point at which no part" of the equipment "would be visible due to the Earth's curvature and horizon line"—as 35.3 miles from the site). The proposed wind farm would, at least in certain visibility conditions, make the wind farm visible from the Wampanoag's ceremonial vantage point.

10. Dussias, *supra* at note 8, at 334.

11. *Tribes: Wind Farm Would Harm Sacred Rituals*, ASSOCIATED PRESS, Nov. 2, 2009, http://www.nbcnews.com/id/33585078/ns/us_news-environment/t/tribes-wind-farm-would-harm-sacred-rituals/#.XlSplRNKiL4 [https://perma.cc/9ZT5-URE2?type=image] (last visited Feb. 25, 2020).

12. *Id.*

succeeded in burying the project in litigation in 2017.[13] The project's defeat came at enormous financial cost to CWA and to state and federal governments—perhaps even to the nation's renewable energy interests as a whole.[14]

But often lost in the popular narrative is the importance of Wampanoag's independent litigation. The Mashpee and Aquinnah Wampanoag tribes sought review of what they believed to be anemic consultation efforts and insufficient recognition their concerns by the U.S. Army Corps of Engineers and other state and federal agencies.[15] While most of the Wampanoag's claims were dismissed on summary judgment, the litigation process triggered the registry of Nantucket Sound on the National Historic Preservation's National Register of Historic Places (NRHP) in 2010.[16] In listing Nantucket Sound, the National Park Service (NPS) recognized that "the Sound is part of a larger, culturally significant landscape treasured by the Wampanoag tribes and inseparably associated with their history and traditional cultural practices and beliefs."[17] That listing now affords Nantucket Sound certain protections under the National Historic Preservation Act (NHPA) that it did not enjoy prior to the tribes' litigation.[18]

However, the NHPA frequently proves an inadequate protective mechanism to ensure the protection of sacred spiritual landscapes in the face of tribal resource development that may be adverse to cultural or

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13. *See* Bill Eville, *Cape Wind Pulls Out of Nantucket Sound Wind Farm Project*, VINEYARD GAZETTE (Dec. 2, 2017), https://vineyardgazette.com/news/2017/12/02/cape-wind-pulls-out-nantucket-sound-wind-farm-project [https://perma.cc/A4YB-27WQ?type=image] (reporting that Cape Wind Associates, the energy development company behind the Nantucket Sound wind farm, issued a press release following the withdrawal of its development bid that blamed the project's failure on "an opposition group funded largely by wealthy waterfront homeowners and led by a fossil fuel billionaire").

14. *See* Casey O'Brien, *Continuing Controversy Over Cape Wind: The Lasting Effects of Legal and Regulatory Hurdles on the Offshore Wind Farm*, 26 GEO. INT'L ENV'T L. REV. 411, 411-12 (2014).

15. *See id.* at 418.

16. NAT'L PARK SERV., *supra* note 6, at 2. Nantucket Sound was determined to be "eligible for listing in the Natural Register as a traditional cultural property and as an historic and archaeological property associated with and that has yielded and has the potential to yield important information about the Native American exploration and settlement of Cape Cod and the Islands." *Id.*

17. *Id.* at 3.

18. *See* National Historic Preservation Act of 1966, 54 U.S.C. § 306108 (2018). *See also* Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1625 (2004) (explaining that due to its identification as a historic property under the NHPA, Bear Lodge, a sacred site to the Lakota Tribe, has greater protections than Indian Pass, which is of spiritual significance to the Quechan Tribes).

spiritual resources. Distrust and failures of communication between agencies and tribes create potential obstacles to tribal wind development: tribes are hesitant to work with agencies to promote wind development, project delays arise as agencies discover tribal concerns late in the planning process, and projects are not as mutually beneficial as they could be otherwise. Given the profound and urgent need for alternative, sustainable energy sources, and the mutual interest in developing tribes' tremendous wind and other renewable energy resources, it is essential that the NHPA process better facilitate consultation between agencies and tribes at early stages of the planning process. This Article argues that existing legal and regulatory frameworks applicable to the protection of Native American sacred sites and other land-based cultural or spiritual resources are, in a certain sense, fundamentally incompatible with those resources they seek to safeguard. As a consequence of this essential mismatch, the law frequently fails to register key elements of sacred sites, spiritualities, ceremonies, cultural practices, and traditional lifeways and belief systems. Working within the constraints and limitations of the existing procedural rights framework, this Article first identifies gaps and ambiguities in the tribal consultation provisions under the NHPA's regulatory guidance, and second, proposes specific revisions to the regulatory language that would promote and strengthen robust tribal consultation practices by defining the consultation protocol with more clarity and greater detail. This Article posits that clearer and better-understood tribal consultation requirements can facilitate tribal sovereignty goals and advance tribal interests broadly by, at a minimum, removing certain barriers—even minor obstacles like confusion—that impede productive communications with tribal stakeholders.

The NHPA as it currently stands lacks the statutory vocabulary to adequately understand, recognize, and safeguard these resources within their appropriate cultural context. This Article approaches communication with tribes as both a primary obstacle and a central opportunity to strengthen the NHPA's protective efficacy, framing the tribal consultation provisions in the NHPA's regulatory guidance as a productive site of focus for revision efforts. Toward this end, Part II of this Article discusses wind energy facilities and the current wind energy development landscape in the United States, including how such development implicates the concerns of Native American tribes with respect to sacred landscapes and viewsheds. Part III provides an overview of the NHPA, focusing primarily on the identification of historic properties, including traditional cultural properties of significance to Native American tribes, as well as the

procedural right to review agency determinations under a process known as "Section 106 review." Part IV begins by analyzing the fundamental limitations of the NHPA as a protective mechanism for Native American sacred sites and spiritual resources, especially the vast, complex, and frequently misunderstood viewshed spaces that are most threatened by wind energy development. Next, this section identifies and discusses certain barriers to effective tribal consultation, including the lack of clarity and detail provided in these provisions of the regulatory guidance. Part V proposes to revise the regulatory guidance to remove certain barriers to the eligibility of sacred sites under the NHPA as well as to clarify and strengthen tribal consultation requirements under the Act.

II. FACTUAL BACKGROUND

A. Wind Energy in the United States

Although wind energy accounted for less than three percent of electricity in the United States in 2019,[19] the federal government has identified the development of renewable energy, including wind, as a major energy policy priority since 2005.[20] Indeed, the United States has made steady gains in wind energy development, increasing overall wind capacity by 166 percent between 2010 and 2020.[21] The current total wind capacity in the United States is nearly108 GW, with an estimated 59,900 utility-scale wind turbines installed across the country.[22]

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19. *Factsheet: Wind Energy*, UNIV. MICH. CTR. FOR SUSTAINABLE SYS. (Sept. 2020), http://css.umich.edu/sites/default/files/Wind%20Energy_CSS07-09_e2020.pdf. *See also Wind Turbine Heights and Capacities Have Increased Over the Past Decade*, U.S. ENERGY INFO. ADMIN. (Nov. 29, 2017), https://www.eia.gov/todayinenergy/detail.php?id=33912 [https://perma.cc/AS7N-4PED?type=image] (stating that "[w]ind turbines accounted for 8% of the operating electric generating *capacity* in the United States in 2016") (emphasis added). Capacity versus output may account for the disparity.

20. *See generally* Energy Policy Act of 2005, Pub. L. No. 109-58. The Act specifically articulates a focus on developing the nation's renewable energy resources, including wind energy. *See also* Kevin L. Shaw & Richard D. Deutsch, *Wind Power and Other Renewable Energy Projects: The New Wave of Power Project Development on Indian Lands*, *in* MANUAL OF THE SPECIAL INSTITUTE ON NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY, ROCKY MOUNTAIN MINERAL LAW FOUNDATION 9 (2005), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2005/11/wind-power-and-other-renewable-energy-projects-the/files/windpower-renewableenergyprojects/fileattachment/windpower-renewableenergyprojects.pdf (explaining that the Act "places an emphasis on renewable energy").

21. *Factsheet: Wind Energy, supra* note 19.

22. *Id.*

1. Utility-Scale Wind Energy Facilities

The term "utility-scale projects," often used interchangeably with "commercial-scale projects," typically refers to renewable energy facilities that are designed to supply electricity to commercial markets and have generation capacity levels at or above 10 MW.[23] Some utility-scale wind farms encompass areas up to "tens of thousands of acres" in size,[24] while others may be much smaller. In general, utility-scale wind facilities require "very large physical footprints" to produce the necessary economies of scale.[25]

Commercial wind turbines are enormous and imposing pieces of machinery: They typically rise to heights of several hundred feet,[26] with blades extending hundreds of feet in length on larger turbine models.[27] Wind energy generation is primarily a function of turbine height and rotor diameter coupled with blade length[28] because the stronger, steadier winds that are ideal for commercial-scale output are found at higher atmospheric heights,[29] and the larger the area swept by the blades, the greater the energy

23. ROBERT SULLIVAN & MARK MEYER, NAT'L PARK SERV., GUIDE TO EVALUATING VISUAL IMPACT ASSESSMENTS FOR RENEWABLE ENERGY PROJECTS, NAT. RES. REP. NPS/ARD/NRR—2014/836, ii, 1 n.1 (2014).

24. *Wind Turbine Heights and Capacities Have Increased Over the Past Decade*, U.S. ENERGY INFO. ADMIN. (Nov. 29, 2017), https://www.eia.gov/todayinenergy/detail.php?id=33912 [https://perma.cc/2FKN-QYLS?type=image] [hereinafter *Wind Turbine Heights and Capacities*]. The Horse Hollow Wind Energy Center in Texas is among "the world's largest wind farms," with "420 wind turbines spread over about 47,000 areas" with a "combined electricity generating capacity of about 735 MW." *Id. See also* ROBERT G. SULLIVAN ET. AL., BUREAU OF LAND MGMT., WIND TURBINE VISIBILITY AND VISUAL IMPACT THRESHOLD DISTANCES IN WESTERN LANDSCAPES 6 (2012), http://blmwyomingvisual.anl.gov/docs/WindVITD.pdf [https://perma.cc/B4EF-9V69?type=image] [hereinafter WIND TURBINE VISIBILITY AND VISUAL IMPACT].

25. David A. Lewis, *Identifying and Avoiding Conflicts Between Historic Preservation the Development of Renewable Energy*, 22 N.Y.U. ENV'T L.J. 275, 280 (2015).

26. *Factsheet: Wind Energy*, *supra* note 19. The average hub height of U.S. wind turbines is 88 meters (approximately 289 feet). *Id.*

27. *Wind Turbine Heights and Capacities*, *supra* note 24. "Wind turbine capacity is based largely on the length of the blades, and taller turbines are not only able to have longer blades, but they can also take advantage of the better wind resources available at greater heights." *Id. See also* David Roberts, *These Huge New Wind Turbines Are a Marvel. They're Also the Future*, VOX (May 20, 2019), https://www.vox.com/energy-and-environment/2018/3/8/17084158/wind-turbine-power-energy-blades [https://web.archive.org/web/20210613054948/https://www.vox.com/energy-and-environment/2018/3/8/17084158/wind-turbine-power-energy-blades].

28. Roberts, *supra* note 27; Shaw & Deutsch, *supra* note 20, at 6 ("The larger the wind turbine, the more capable it is of generating large amounts of electricity.").

29. *See* Shaw & Deutsch, *supra* note 20, at 6 (stating that turbines maximize energy production when they "intercept stronger and less turbulent winds," which are found higher up in the atmosphere). *See also* Ari Brisman, *Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENV'T L.J. 1, 79 (2005) (noting that taller turbines are typically more economically efficient for commercial developers due to the faster winds that blow higher up in the atmosphere).

intake.[30] As a result, turbines tend to be very large, and they are growing larger.[31]

2. Visual Impact of Wind Energy Facilities

In addition to being physically large, modern turbines are highly visible by design.[32] Wind turbines are intentionally designed with "conspicuous, reflective surfaces."[33] Equipment is typically coated in bright, highly light-reflective white paint in order to meet Federal Aviation Administration (FAA) visibility requirements.[34] Under FAA regulations, wind facilities are also required to flash red lights in darkness, typically at least at a wind farm's perimeters.[35]

Turbines produce significant visual contrast, in shadow and in light, that is often visible within an expansive geographic radius.[36] Turbine blades have been observed to contribute significantly to wind facility visibility through "transient visual effects," including light flashes bouncing off metallic blades known as "glinting" and rotating shadows that "can cause a strobe-light effect" in some landscape conditions.[37] Both glinting and shadowing are highly visible, including at significant geographic distances.[38]

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30. *See Factsheet: Wind Energy, supra* note 19.

31. *See id.* In the span of just one year, between 2017 and 2018, the average wind turbine increased from 2.32 MW to 2.43 MW. *See also Wind Turbine Heights and Capacities*, *supra* note 24 ("Wind turbines in the United States have grown in both average height and capacity over the past decade, according to data on utility-scale electricity generators collected by EIA.").

32. *See* Brisman, *supra* note 29, at 77 (noting that "wind turbines will always be highly visible elements in their landscapes").

33. WIND TURBINE VISIBILITY AND VISUAL IMPACT, *supra* note 24, at 6.

34. DEAN APOSTOL ET AL., THE RENEWABLE ENERGY LANDSCAPE: PRESERVING SCENIC VALUES IN OUR SUSTAINABLE FUTURE 155 (2017). The FAA "requires that utility-scale wind turbines exhibit a color contrast with their surroundings when viewed from the air as an aide to aerial navigation safety, which usually means they are painted white." *Id.*

35. *Id. See also* O'Brien, *supra* note 14, at 423 (explaining that the FAA "generally reviews wind turbines for risks involved with airplane collisions and radar disruptions," as well as imposes visibility requirements).

36. APOSTOL ET AL., *supra* note 34, at 145.

37. WIND TURBINE VISIBILITY AND VISUAL IMPACT, *supra* note 24, at 42. *See also* Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 338 (2011) (explaining that turbines "cause shadow 'flicker' and are highly visible on the landscape").

38. WIND TURBINE VISIBILITY AND VISUAL IMPACT, *supra* note 24, at 42-43. Researchers observed blade glinting from as far as 16 miles away, although their findings overall suggested that this phenomenon is more commonly visible only within a smaller geographic radius of around 10 miles. *Id.* at 4. The "strobe-light" shadow effects over the bodies of turbines were visible from even further distances—nearly 18 miles—and were noted by researchers as visually "striking,"

Utility-scale wind facilities have had a profound impact on visual landscapes.[39] Research published by the Bureau of Land Management (BLM) examining the visual impact of wind facilities in Wyoming and Colorado concluded that facilities may be visible at distances of up to thirty-six miles.[40] Additionally, the BLM found that the "turbine blade movement" can often be seen from up to twenty-four miles away from the site, and found facilities to be "major sources of visual contrast" and "major foci of visual attention" and at distances up to ten and twelve miles, respectively.[41] Moreover, the study registered a direct relationship between the visibility radius and the turbines' size and number.[42]

B. Resource Development on Native American Tribal Lands

1. Wind Resources and Wind Energy Development in Indian Country

Wind resources are particularly plentiful in the upper Great Plains region of the United States.[43] This area is home to many Native American tribes with reservation lands that have been identified as "disproportionately rich" in wind resources.[44] Tribal lands in this region hold upward of 300 GW wind energy potential.[45] According to estimates from the U.S. Department of Energy (DOE), if developed to capacity, "wind power from tribal lands could satisfy 32% of the nation's total electricity demand."[46]

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particularly when the effect co-occurred simultaneously on turbines across entire farms. *Id.* at 42-43.

39. SULLIVAN & MEYER, *supra* note 23, at 6.

40. *Id.*

41. *Id.*

42. WIND TURBINE VISIBILITY AND VISUAL IMPACT, *supra* note 33, at 42. The wind turbines in the three facilities evaluated in the study ranged in maximum blade height from approximately 300 to 400 feet. *Id.* at 14-15. The largest facility included in the research, Cedar Creek I Wind Farm in Chalk Bluff, Colorado comprised 274 wind turbines ranging in blade height from just shy of 300 feet to 390 feet. *Id. See* SULLIVAN & MEYER, *supra* note 23, at 14.

43. Robert Gough, *Tribal Wind Power Development in the Northern Great Plains*, 19 NAT. RES. & ENV'T 57 (2004); Crystal D. Masterson, *Wind-Energy Ventures in Indian Country: Fashioning a Functional Paradigm*, 34 AM. INDIAN L. REV. 317, 327 (2009) (noting the region's "extraordinary wind resources" and "prodigious potential for wind projects").

44. Mark Wolf, *Renewable Energy Can Be Key to Tribal Energy Development*, NAT'L CONF. STATE LEGISLATURES BLOG (May 3, 2017), http://www.ncsl.org/blog/2017/05/03/renewable-energy-can-be-key-to-tribal-energy-development.aspx [https://perma.cc/583Z-U3P5?type=image]. Overall, the two percent of land area in the lower forty-eight states occupied by federally recognized Native American tribes is home to five percent of the country's total renewable energy resource capacity, including significant wind and solar resources, especially in the American Great Plains and Southwestern regions. *Id.*

45. Masterson, *supra* note 43, at 327.

46. Wolf, *supra* note 44.

2. Indigenous Sacred Sites and Land-Based Spirituality

There are "tens of thousands of [Native American] sacred sites" throughout the United States.[47] Some "encompass vast expanses of land," while others are geographically particularized.[48] In some cases, the local ecology may be particularly important for medicinal or ceremonial purposes;[49] in others, physical access to sites may be an essential element.[50] Sometimes "[i]t is the view of the landscape itself that may matter, with views from particular vantage points perhaps having separate significance."[51]

Land is a fundamental component of many Native American and Indigenous cultural and spiritual traditions, meaning "the sacred is encountered at the specific places" within the natural environment.[52] Culture and religion are often deeply connected to the land.[53] For most tribes, "land is itself a sacred, living being."[54] Spiritually significant sites

47. Yablon, *supra* note 18, at 1625.

48. *Id.* (citing examples of sacred sites, such as Indian Pass in southern California, that encompass hundreds or even thousands of miles of land—Yablon notes that "the entire 1100-mile length of the California coast is … considered a sacred site"—while clarifying that other sacred sites are highly geographically particularized, such as those within the Black Hills, which are believed to contain thousands of unique sites).

49. *See, e.g.*, Emily Cousins, *Mountains Made Me Alive: Native American Relationships with Sacred Land*, 46 CROSSCURRENTS 497, 506 (1996-97) (noting that the Chippewa-Cree, for example, utilize some 350 different plant species that grow in the Sweet Grass Hills for "medicinal and ceremonial" purposes). *See also* Cassie Sheets, *The Sweet Grass Hills and Blackfeet Indians: Sacredness, Land, and Institutional Discrimination*, U. MONT. GRADUATE STUDENT THESES, DISSERTATIONS & PRO. PAPERS 7 (2013), https://scholarworks.umt.edu/etd/1091 [https://perma.cc/LF94-9J9J?type=image] (explaining that several spiritually significant plants used in the Blackfeet's religious practices are unique to the higher elevations of Sweet Grass Hills—including 'sweetpine' (alpine fir) and 'sweetgrass' (vanilla grass), both of which are used "to connect with spirits . . . during vision quests or other traditional ceremonies"—as is the uniquely rich confluence of animal wildlife found in the Hills, which historically included bison, pronghorns, grizzly bears, mountain sheep, wolves, and bald eagles, among other species with cultural significance to tribes in the area).

50. *See generally* Sheets, *supra* note 49, at 7 (identifying medicinal plant-gathering and vision quests—both of which require physical access to sites—as among the numerous activities performed within the sacred space of the Sweet Grass Hills).

51. Dussias, *supra* note 8, at 413.

52. Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 800 (1992).

53. *See* Elizabeth Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENV'T L. 42, 48 (2014).

54. Joel Brady, *"Land Is Itself a Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 186 (1999) (quoting Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 461 (1988)). *See also* Cousins, *supra* note 49, at 500 (stating that "[p]erhaps one of the most pervasive concepts [among various Native American religious traditions] is the belief that the land is alive").

include "discrete geological monuments,"[55] like Rainbow Bridge, a rainbow-colored rock formation in the ancestral lands of the Diné (Navajo)[56] in the American Southwest.[57] They may encompass "wide swaths of land,"[58] like Bighorn Medicine Wheel,[59] a plateau that has served as a spiritual site for northern Great Plains tribes including the Arapaho, Blackfeet, Cheyenne, Crow, Cree, Shoshone, and Sioux since ancient times, or they may be bodies of water, like Nantucket Sound.[60]

Sacred sites vary in purpose, frequency or regularity of use, and degree or type of spiritual significance, among other characteristics.[61] Some areas are central to a tribe's sense of cultural or spiritual belonging.[62] Others, such as the Sweet Grass Hills in northern Montana, are notable for creating peaceful conditions under which traditional enemies, like the

55. Yablon, *supra* note 18, at 1624.

56. "Diné" is an Indigenous word meaning "The People" that has traditionally been used self-referentially by (many) tribal members and is typically regarded as the preferred term to "Navajo," which is a term that become attached to the Diné via colonization. *See Hubbell Trading Post: Frequently Asked Questions*, NAT'L PARK SERV., https://www.nps.gov/hutr/faqs.htm [https://perma.cc/K27K-SJXD?type=image] (last visited June 24, 2021). Nevertheless, the word "Navajo" is properly used to refer to the Navajo Nation as a sovereign tribal government. *See Navajo Nation Council Rejects Changing Name to Diné*, ARIZ. IND. NEWS NETWORK (Apr. 20, 2017), https://arizonadailyindependent.com/2017/04/20/navajo-nation-council-rejects-changing-name-to-dine/ [https://perma.cc/U4GT-MQ3F?type=image]. This Article will use the term "Diné" in recognition of its preferred status among the Diné themselves but will also include "Navajo" in an accompanying parenthetical for clarity.

57. *See Rainbow Bridge, Indigenous Religious Traditions*, COLO. COLL., https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/rainbow-bridge/ [https://perma.cc/K9FA-3QAC?type=image] (last visited Feb. 25, 2020). The Diné (Navajo) ascribe particular spiritual importance to this site as a location where male and female beings unite "in perfect union" and are "frozen in time." *Id.* The flooding of the location with waters from Lake Powell is considered to have significantly compromised the tribe's ability to communicate with spiritually sacred "rock beings" and "prevents the Navajo from properly conducting [many] ceremonies" associated with this unique geological site. *Id.*

58. Yablon, *supra* note 18, at 1624.

59. *See* Fred Chapman, *Medicine Wheel/Medicine Mountain: Celebrated and Controversial Landmark*, WYO. ST. HIST. SOC'Y (Apr. 10, 2019), https://www.wyohistory.org/encyclopedia/medicine-wheel [https://perma.cc/WQ2X-9EUU?type=image]. The Bighorn Medicine Wheel historic property site now spans an area of nearly 5,000 acres, thanks to a 2011 decision to expand the site, which had previously comprised a mere 110 acres. *Id.* Medicine wheels are manmade rock formations resembling a spoked wheel. *Id.* Use of medicine wheels is a shared practice among numerous tribes in interior regions of the northern United States and southern Canada. *Id.* There are at least 150 known medicine wheels in this area. *Id.*

60. *Assessing the Efficiency and Effectiveness of Wind Energy Incentives*, *supra* note 5, at 353 (discussing the spiritual and cultural significance of Nantucket Sound as an open viewscape and concluding that the Sound plays a central role in Wampanoag culture and religion, justifying its inclusion on the National Register).

61. Yablon, *supra* note 18, at 1625.

62. *Cf.* MIN. MGMT. SERV., *supra* note 1, at 4-159.

Blackfeet and Dakota, co-exist harmoniously.[63] Others derive significance from their association with human events and traditions, such as traditional agricultural or hunting grounds.[64] Many tribes have ancestral burial grounds they consider sacred.[65] They may reserve these sites "for human remembrance."[66] Some spaces are "set aside for the divine" as "dwelling places" and are inhabited by spirits, deities, and mythic figures.[67]

In many cases, "the beings who inhabit the land are not thought of as gods and goddesses who rule over mountains or rivers. Rather, they *are* the mountains and rivers."[68] Certain land is vivified by communion with ancestors[69] or its ecological or medicinal properties.[70] Tribes often maintain the vitality of these spaces through "symbiotic," reciprocal interactions with the land.[71] For example, members of the Chippewa-Cree Tribe have traditionally performed grueling vision quests within the Sweet Grass Hills; the Hills in turn "repay" the tribe's spiritual labors with "songs . . . to communicate with the spirits."[72] The Bitterroot Salish engage in "a balanced relationship between the land and the people," in which the Salish access "the power that surrounds them" in the landscape through an exchange of gratitude.[73]

As such, scholars including James Taylor Carson have "challenged historians to 'see the native landscape as both a cultural and a moral space, a place where mythical beings, ancestral spirits, and daily life' intersected," and "where 'geopolitical concerns coexisted and

63. *See* Cousins, *supra* note 49, at 505.

64. *See id.*

65. *See* Yablon, *supra* note 18, at 1627 (referencing the Little Tennessee River Valley as the site of sacred Cherokee "burial grounds" considered "integral to their religious practices"). *See also, e.g.*, Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

66. Rossalyn LaPier, *What Makes a Mountain, Hill or Prairie a 'Sacred' Place for Native Americans?*, THE CONVERSATION (Feb. 16, 2017, 3:32PM), http://theconversation.com/what-makes-a-mountain-hill-or-prairie-a-sacred-place-for-native-americans-73169 [https://perma.cc/4VF2-GA27?type=image].

67. *Id.*

68. Cousins, *supra* note 49, at 500. *See* Sheets, *supra* note 49, at 10 (explaining that the Blackfeet generally "understand the Sweet Grass Hills to be as animate and alive as humans").

69. Cousins, *supra* note 49, at 502 (paraphrasing Salish archaeologist Marcia Pablo Cross, who describes how the Tribe's homelands, where their ancestors still rest, are activated by Salish prayers—she says that "the mountains, the river, and the creeks seem to soak up the Salish words").

70. *See id.* at 506; *see also* Sheets, *supra* note 49, at 7.

71. Ward, *supra* note 52, at 800.

72. Cousins, *supra* note 49, at 506.

73. *Id.* at 502.

interplayed.'"[74] Under this formulation, tribal homelands are essential to Indigenous identity and cultural well-being not only because they are inscribed with deep spiritual and ancestral ties, but also in the sense that historically, the "physical features of their landscapes also provided invaluable cultural and social lessons, notably relaying culturally-specific and significant more, laws, and taboos," while "[t]he cosmography and stories" surrounding particular landscape features "served as cultural reminders" critical to the continuation of certain cultural traditions or even the tribe as a whole.[75]

Yet, according to historian Mathias Bergmann, the "efficacy" of these vital cultural and social exchanges "depended upon continued contact with those locales" such that the "extreme disruption and upheaval wrought by removals" and "coerced migrations . . . from those familiar landscapes" fundamentally transformed key aspects of many tribes' cultural practices.[76] For example, Bergmann observes that Indigenous communities in the Pacific Northwest region did not come to "rely . . . on oral communication to maintain . . . vital traditions" until *after* they had been systematically "denied access to their traditional spaces" and separated from those teachings that had been "grafted onto the [tribes' ancestral] terrain."[77] In other words, the forcible appropriation of tribal lands, and more broadly, the separation of Indigenous people from their traditional environs and/or lifeways, is intimately bound up in partially-obscured legacies of cultural (as well as literal) violence and genocide.[78]

Indeed, culturally or spiritually significant lands and other Indigenous land-based sacred sites may be desecrated as a result of these kinds of changes.[79] A landscape or a particular space or geographic feature's heightened "spiritual presence is not necessarily a permanent condition, but rather, can only exist within the context of an undisturbed natural setting."[80] Actions that degrade or even simply change the character, use, function, or nature of sacred or culturally significant sites, or that otherwise alter long-standing relationships between the land and its Indigenous inhabitants, may have significant consequences: For example,

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74. Mathias D. Bergmann, *Landscapes' Lessons: Native American Cultural Geography in Nineteenth-Century Oregon and Washington*, 2 IK: OTHER WAYS OF KNOWING 45, 47 (2016).

75. *Id.*

76. *Id.*

77. *Id.* at 48.

78. *Cf.* Bergmann, *supra* note 74, at 74.

79. Cousins, *supra* note 49, at 502 (Pollution and other forms of environmental degradation and destruction may, notably, cause this type of desecration.).

80. *Id.* at 507.

in many Native traditions, "[s]ubstantial disruption" to natural ecologies and landscapes "will displease the spirit life and spirit powers, and may cause them to leave forever."[81]

In other words, the stakes are extremely high: According to the Diné (Navajo) tribe, "hell is land that has no spirits to claim it."[82] Similarly, Assiniboine Chief John Snow has explained that "the spirits will leave" sites that are "destroyed, marred, or polluted,"[83] while Salish archaeologist Marcia Pablo Cross describes how when the Salish "were forcibly removed from their homeland . . . to a reservation a hundred miles north," they were forced to leave behind generations of ancestors who rest eternally in the sacred Bitterroot Valley, causing incomprehensible confusion and sorrow among the dead as well as the living.[84]

III. LEGAL BACKGROUND: THE NATIONAL HISTORIC PRESERVATION ACT OF 1966

Not unlike commercial-scale renewable energy development in the present day, the real estate and infrastructure development boom of the post-war era dramatically reshaped the American landscape and raised novel concerns about built environmental impact. The era's refrain of "out with the old, in with the new" reflected a new cultural ethos of a kind of aggressive, optimistic progress[85] and supplied a popular rhetoric to justify the rampant destruction of historic properties that occurred during the post-war period.[86] But as time went on, the felling of beloved historical landmarks such as the original Pennsylvania Station in New York City began to elicit public outcry and eventually helped ignite a national interest in historic preservation.[87] As the extent of the destruction became clear—according to congressional reports, approximately half of the nation's

81. *Id.*

82. *Id.* at 508 (paraphrasing Mamie Salt, a member of the Diné (Navajo) Tribe).

83. *Id.* at 502.

84. *Id.* at 502 (quoting and paraphrasing Marcia Pablo Cross, who goes on to recount how when she visits the valley, she hears the ancestors "whispering, 'Where are you? Why haven't you been doing your dances?'").

85. *See National Historic Preservation Act*, NAT'L PARK SERV., https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm [https://perma.cc/S3XD-JYXM?type=image] (last visited Apr. 10, 2020) [hereinafter *National Historic Preservation Act*, NAT'L PARK SERV.]

86. Marion F. Werkheiser, L. Eden Burgess & Cameron Green, *The National Historic Preservation Act and 36 CFR 800*, *in* THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT, AND FUTURE 18, 19 (Kimball M. Banks & Ann M. Scott eds., 2016).

87. *Id.*

historic properties had already been destroyed by the mid-1960s[88]—public concern reached a tipping point,[89] and there emerged a strong and growing demand for a legislative response to the problem.[90]

As a result, Congress enacted the National Historic Preservation Act of 1966 as a means of addressing historic preservation issues on a national scale.[91] The original text of the Act codified a national commitment "to foster[ing] 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."[92] This landmark legislation sought to preserve the nation's history by stemming the irretrievable loss of historic sites and properties that represent tangible connection points between past and present.[93]

An acute interest in posterity lies at the heart of the NHPA. Its drafters sought to establish mechanisms to ensure the ongoing protection of certain resources deemed essential to national interests and put at risk by modern human activity. In this sense, the NHPA reflects the period's broader preservation-oriented policy goals and interests.[94] The NHPA attaches significance to historic resources and registers the need for their protection based largely on the twin notions that these resources are irreplaceable and that they confer social value beyond their potential for economic use.[95] Thus, the Act's underlying ethos aligns the NHPA with other contemporaneously enacted laws focused on resource protection, such as the National Environmental Policy Act of 1969 and the Endangered Species Act of 1966, the latter of which, for example, recognized species

88. Nearly 6,000 historic properties were destroyed. *Id.*

89. *See* Roger K. Lewis, *Historic Preservation Doesn't Have a Long History in U.S.*, WASH. POST (Sept. 11, 2015), https://www.washingtonpost.com/realestate/historic-preservation-doesnt-have-a-long-history-in-us/2015/09/10/36458684-50c4-11e5-8c19-0b6825aa4a3a_story.html [https://perma.cc/3BNF-WY3K?type=image]

90. Werkheiser et al., *supra* note 86, at 19.

91. *Id.* at 20.

92. *Id.* at 21 (quoting 16 U.S.C. § 470-1).

93. *Id.* at 20-21.

94. *Id.* at 20 (noting that the goals of the NHPA "fit in well" with the Johnson Administration's "set of domestic programs known as the Great Society," which included numerous "key pieces of socially and environmentally progressive legislation," such as the Endangered Species Act of 1966 and the National Environmental Policy Act of 1969, both of which reflect an understanding that natural resources are finite and exist within a delicate balance that requires robust federal protection to guard against their irreversible extinction).

95. *Id.*

loss as irreversible and placed incalculable value on preserving biodiversity.[96]

The NHPA established the nation's "first comprehensive federal historic preservation program,"[97] which featured as its centerpiece "a clearly defined process" for identifying, cataloguing, and extending specific protections to historic properties.[98] In service of the NHPA's goals, the Advisory Council for Historic Preservation (ACHP) promulgates regulatory guidance outlining a comprehensive, standard set of procedures and protocols for federal agencies to follow in implementing the NHPA.[99] The ACHP's regulations, which are codified at 36 C.F.R. § 800, are binding on federal agencies.[100]

A. The NHPA's Protections: A Procedural Right to Review

The NHPA requires federal agencies to formally identify, consider, and appropriately document the potential negative effects a proposed project might have on any historic properties that would be impacted as a result of the agency's actions.[101] (To be consistent with the traditional nomenclature, this Article will refer to the process described in the preceding sentence as the "Section 106 process," "Section 106 review," or simply "Section 106." "Section 106" refers to the section of the statute under which the review process was originally codified (§ 106).[102])

This is purely a procedural right, and it is the sole protection afforded to historic properties falling under the umbrella of the Act's protection and threatened with adverse and even destructive potential government activity.[103] In other words, while the NHPA does require agencies to consider the impacts of their proposed actions (Section 106 review), the Act does not require agencies to take action to preserve qualifying historic

96. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'").

97. Werkheiser et al., *supra* note 86, at 20.

98. *National Historic Preservation Act*, NAT'L PARK SERV., *supra* note 85.

99. *Id.*

100. Werkheiser et al., *supra* note 86, at 23.

101. *Id.*

102. Dean B. Suagee, *NHPA § 106 Consultation: A Primer for Tribal Advocates*, 65 FED. LAW. 40, 41 (2018). Although subsequent amendments to the NHPA have resulted in changes to the numerical ordering of the sections and this process is no longer outlined at § 106, according to Suagee, "Section 106" remains widely used in the field. *Id.*

103. *See* KRISTINA ALEXANDER, CONG. RESEARCH SERV., R42538, A SECTION 106 SECTION UNDER THE NATIONAL HISTORIC PRESERVATION ACT (NHPA): HOW IT WORKS 2-3 (2012).

properties, nor does it require them to refrain from taking action that would harm or even totally destroy such properties.[104] NHPA does guarantee certain historic sites an enforceable right of review to ensure that agencies have satisfied the NHPA's minimum *procedural* requirements, but it does not confer any *substantive* rights or protections.[105]

1. The Section 106 Review Process

The central goal of Section 106 review is to mitigate or eliminate the adverse effects of federal agency actions on historic resources by identifying and addressing risks early on in the project proposal process, "before damage is done."[106] Section 106 mandates that federal agencies consider the impact of any proposed action or undertaking on any historic property that is either currently listed on the NRHP or that may be eligible for such listing.[107]

The NHPA's procedural protections are only triggered by certain federal actions that constitute "undertakings" as defined within the text of the statute.[108] An "undertaking" is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency."[109] This definition includes all direct agency actions (i.e., projects undertaken by agencies themselves) as well as any "projects that federal agencies carry out, approve, fund, permit, or license."[110]

If the action constitutes an undertaking, the agency must next determine the "area of potential effects" of the proposed action (APE). The APE is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist."[111] A single undertaking may encompass multiple APEs, each of which may separately register "different kinds of effects caused by the undertaking."[112] In

104. *See id.* at 3.

105. Suagee, *supra* note 102, at 41.

106. NAT'L PARK. SERV., NATIONAL HISTORIC PRESERVATION ACT: 50 YEAR ANNIVERSARY TOOL KIT 7 (2016), https://www.nps.gov/articles/upload/NHPAToolKit.pdf [https://perma.cc/T25H-AKDH?type=image].

107. Werkheiser et al., *supra* note 86, at 22.

108. Kimball M. Banks & Renee M. Boen, *Who's on First: Federal Agencies and Compliance with the National Historic Preservation Act*, *in* THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT, AND FUTURE 47, 50 (Kimball M. Banks & Ann M. Scott eds., 2016).

109. 36 C.F.R. § 800.16(y).

110. *Id.*

111. 36 C.F.R. § 800.16(d).

112. *Id.*

determining an APE, agencies should focus on "the scale and nature of an undertaking."[113]

Once the APE has been defined, the agency tasked with overseeing the project must determine whether there are any historic properties within the APE(s) that would merit protection under the NHPA.[114] If agency concludes that there are no historic properties within the APE, the Section 106 review process will terminate, and the agency will be deemed to have complied with the NHPA's procedural requirements.[115]

If the APE encompasses one or more such historic properties, the agency must engage in an "adverse effects" inquiry with respect to each identified property.[116] In making an adverse effects determination, agencies must consider the impact of the proposed action on the historic property itself.[117] Agencies have wide latitude to consider both direct and indirect impacts.[118] In addition, agencies may assess "cumulative" impact, but they are not required to do so.[119] A finding of no adverse effects will conclude the Section 106 review process and the agency may move forward with the proposed action.[120]

If there is a finding of adverse effects, the overseeing agency must work with other interested parties to come up with alternatives to eliminate or mitigate the identified adverse effects.[121] If the agency cannot reach an alternative agreement that is satisfactory to all stakeholders, officials may proceed with the original proposed action and need only "document the failure to resolve effects" and report this outcome to the ACHP in order to terminate the Section 106 review process.[122]

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113. *Id.*

114. *See Section 106 Applicant Toolkit*, ADVISORY COUNCIL HIST. PRES., https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit [https://perma.cc/PYG4-NM8F?type=image] (last visited Feb. 26, 2020) [hereinafter *Section 106 Applicant Toolkit*].

115. *Id.*

116. *Id.*

117. 36 C.F.R. § 800.5(a)(1).

118. *Id.*

119. *Id.*

120. Suagee, *supra* note 102, at 45.

121. *Id.* (explaining that the agency must "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties" in consultation with tribes and other identified parties).

122. *Id.* at 46. The ACHP has no power "to block an agency from going ahead with an undertaking that will result in adverse effects on a historic property," and an agency may proceed even where the ACHP has explicitly condemned the action and urged the agency to pursue an alternative plan. *Id.*

2. Applicability of Section 106: Historic Properties

The NHPA defines "historic property" as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register [of Historic Places], including artifacts, records, and material remains relating to the district, site, building, structure, or object."[123] To be eligible for inclusion on the National Register (NR), historic properties must satisfy a two-step eligibility requirement, as outlined in the regulations at 36 C.F.R. § 60.[124] First, the NPS must find that there is at least one "quality of significance in American history, architecture, archeology, engineering, and culture" present in the property and that the property under consideration "posses[es] integrity of location, design setting, materials, workmanship, feeling, and association."[125] A property possesses the requisite integrity if it has "the ability," in its present form, "to convey [its] significance through physical features and context."[126]

Second, the NPS must find that the property meets at least one of four additional eligibility criteria.[127] The additional eligibility criteria cover for types of historic properties: (1) those "that are associated with events that have made a significant contribution to the broad patterns of our history;" (2) those "that are associated with the lives of persons significant in our past;" (3) those "that embody the distinctive characteristics of a type, period, or method of construction, or . . . 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;" and (4) those which "have yielded, or may be likely to yield, information important in prehistory or history."[128]

The ACHP also outlines seven additional *in*eligibility criteria, any one of which will generally be sufficient to disqualify a property from inclusion on the NRHP.[129] For example, properties that have only achieved historical significance within the past fifty years are generally ineligible for listing.[130]

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123. 54 U.S.C. § 300308.

124. *See generally* 36 C.F.R. § 60.4.

125. *Id.*

126. *Section 106 Archaeology Guidance—Terms Defined*, ADVISORY COUNCIL HIST. PRES., https://www.achp.gov/Section_106_Archaeology_Guidance/Terms%20Defined [https://perma.cc/72MZ-3LA4?type=image] (last visited Apr. 4, 2020).

127. 36 C.F.R. § 60.4.

128. 36 C.F.R. § 60.4(a)–(d).

129. *See* 36 C.F.R. § 60.4.

130. *Id.*

An historic property may be listed in the NRHP through one of two distinct processes: (a) a federal agency or some other governmental historic preservation entity may proactively nominate a property for listing, or (b) an agency may find a property found eligible for NRHP inclusion as a result of the Section 106 process.[131] This second pathway is possible because the NHPA extends procedural protections to both listed and eligible historic properties.[132]

a. Traditional Cultural Properties

In 1992, the NHPA was amended to extend protections to "traditional cultural properties" (TCP)—sites that held particular historical, cultural, or spiritual significance to Native American tribes, but which had previously fallen outside the scope of eligibility.[133] TCPs are properties "eligible for inclusion in the [NRHP] based on [their] associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community[,]" and which "are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of a community."[134] They are subject to the same eligibility requirements as other historic properties.[135] However, some properties excluded from listing under the NHPA can be categorized as TCPs, including "cemeteries, birthplaces, graves of historical figures, properties . . . used for religious purposes" and other sites that are "primarily commemorative in nature."[136]

The primary inquiry in determining whether a property constitutes a TCP involves two questions: first, "whether the property . . . has an integral relationship to the traditional cultural practices or beliefs," and second,

131. Suagee, *supra* note 102, at 42.

132. *Id.*

133. *See* Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RES. L. REV. 205, 210 (2017) (noting that "American Indian interests were initially excluded from the NHPA"); Suagee, *supra* note 102, at 41.

134. NAT'L PARK. SERV., NATIONAL REGISTER OF HISTORIC PLACES—TRADITIONAL CULTURAL PROPERTIES (TCP): A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES 1 (2012), https://www.nps.gov/history/tribes/Documents/TCP.pdf [https://perma.cc/NN4M-B4NC?type=image] [hereinafter A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES].

135. *Id.*; *see also* 36 C.F.R. § 60.4.

136. 36 C.F.R. § 60.4; A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES, *supra* note 134.

"whether the condition of the property is such that the relevant relationships survive."[137]

B. Tribal Consultation Requirement Provisions

The NHPA's Section 106 review process includes a requirement to consult with "interested parties," including, specifically, Native American tribes whose interests are impacted by the proposed action.[138] Title 36 C.F.R. § 800.16(f) defines "consultation" as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them."[139] The regulations also mandate that consultation "be appropriate to the scale of the project," occur "early in the planning process," and allow for "reasonable opportunity to identify . . . concerns[,] . . . advise on the identification and evaluation of historic properties[,] . . . and participate in the resolution of adverse effects."[140]

Agencies must identify and consult with tribes at various points throughout the Section 106 review process. For example, if an APE is found to encompass tribal lands, agency officials must identify and eventually consult with any tribes whose reservation lands fall within the APE, as well as any tribes "that may attach religious and cultural significance to any historic properties within the APE," whether or not those tribes have a current property claim to such lands.[141]

Consultation typically involves working with tribes to identify historic properties that may be eligible for inclusion on the NRHP.[142] Dean B. Suagee notes that "[f]rom a tribal perspective, this step is particularly important, since many places that hold religious and cultural significance have not yet been evaluated for National Register eligibility."[143] Federal agencies are bound to work with Native American tribes in "good faith" to identify and evaluate such properties, a process which might include "contract[ing] with a tribe to develop information on particular

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137. MICHAEL D. MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 140 (2020).

138. Suagee, *supra* note 102, at 43.

139. 36 C.F.R. § 800.16(f).

140. 36 C.F.R. § 800.2(c)(2)(ii)(A).

141. ADVISORY COUNCIL ON HIST. PRES., CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK 18 (2012), https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf [https://perma.cc/8358-SLAG?type=image] [hereinafter SECTION 106 TRIBAL CONSULTATION HANDBOOK].

142. *See* Suagee, *supra* note 102, at 44.

143. *Id.*

properties . . . [or] to conduct a survey" or, in the cases of traditional cultural properties, "conducting interviews with elders and others who hold traditional knowledge." However, agencies are "not required to identify *every* historic property that may be affected."[144]

1. Judicial Interpretations of the Tribal Consultation Requirement

A number of courts have displayed at least some "willingness . . . to enforce agency consultation."[145] Indeed, in *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of Interior*, the U.S. District Court for the Southern District of California emphasized that the NHPA's "consultation requirement is not an empty formality."[146] Citing to the ACHP regulations, the court explained that consultation compels agency actors to "recognize the government-to-government relationship between the Federal Government and Indian tribes" and must "be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'"[147]

a. "Reasonable and Good Faith Effort"

Federal agencies are required to make a "reasonable and good faith effort" to consult with affected Native American tribes.[148] Former Minnesota State Archaeologist Scott Anfinson has noted that this "reasonable and good faith effort" language only attaches to consultation with Native American tribes and not to any other would-be consultees.[149] Research conducted with Native American tribal representatives suggests that "good faith effort in communication" would include initiating discussions with tribes "early and often," as well as "face-to-face communication" and "listening and truly considering a tribe's concerns," including with respect to confidentiality and transparency.[150]

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144. *Id.*

145. Yablon, *supra* note 18, at 1643 (citing to Attakai v. United States, 764 F. Supp. 1395 (D. Ariz. 1990), in which, Yablon explains, the court granted the Navajo Nation's request for injunction against the BIA, finding that the agency had not engaged in proper tribal consultation "despite the fact that the lands involved were of historic interest to the tribe").

146. Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010).

147. *Id.* at 1109 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)).

148. SECTION 106 TRIBAL CONSULTATION HANDBOOK, *supra* note 141, at 10.

149. SCOTT ANFINSON, OFF. OF THE STATE ARCHAEOLOGIST, STATE ARCHEOLOGIST'S MANUAL FOR ARCHAEOLOGICAL PROJECTS IN MINNESOTA 37 (2011).

150. Kate Monti Barcalow, Contested Landscapes: An Analysis of Using the National Historic Preservation Act (NHPA) for Traditional Cultural Properties (TCPs) in the Western United States 29-30 (Fall 2015) (unpublished M.A. thesis, Portland State University) (on file with Portland State University Library).

Courts have affirmed that there is at least *some* minimum effort required. In *Comanche Nation v. United States*, the U.S. District Court for the Western District of Oklahoma found that the U.S. Army Corps of Engineers failed to engage in "reasonable and good faith efforts" to consult with the Comanche, entitling the tribal nation to injunctive relief.[151] The court emphasized that "the NHPA requires that the government 'stop, look, and listen' before approving a project" and declared that "merely pausing, glancing, and turning a deaf ear . . . does not constitute 'the reasonable and good faith efforts required by the law.'"[152]

Other courts have similarly found agencies in violation of the "reasonable and good faith effort" requirement attached to Section 106 consultation duties.[153] For example, in *Pueblo of Sandia v. United States*, the Tenth Circuit found that the U.S. Forest Service failed to meet its consultation obligations where its "efforts" to consult were limited to the distribution of "form letters" soliciting "information about tribal cultural activities" at tribal meetings.[154] The court determined that the agency had failed to "reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion in the National Register" and that it had not acted "in good faith."[155] The decision in *Sandia* affirmed that agencies have at least a baseline duty to genuinely seek the opinion and perspective of any Native American tribes potentially impacted by a project.

Most recently, however, the District Court for the District of Columbia (D.D.C.) determined in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* that the agency had "likely satisfied" its obligations under NHPA, departing from previous decisions issued by other courts.[156] The court noted that "Section 106 required no particular form for the Corps' consultation with tribes, nor any particular standard for assessment of potentially adverse impacts to historic sites."[157] The court observed that, for example, none of the regulatory guidance "require[s] that *any* cultural

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151. Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla. Sept. 23, 2008).

152. Dussias, *supra* note 8, at 394 (quoting *Comanche Nation*, 2008 WL 4426621, at *19).

153. *See generally* Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

154. Yablon, *supra* note 18, at 1642 (citing *Sandia*, 50 F.3d at 856).

155. *Id.*

156. Madeline Roe Flores, *May the Spirit of Section 106 Yet Prevail: Recognizing the Environmental Elements of Native American Intangible Cultural Heritage*, 92 TUL. L. REV. 667, 681 (2018) (citing Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 30 (D.D.C. 2016)).

157. *Id.* (citing *Standing Rock Sioux*, 205 F. Supp. 3d at 33).

surveys be conducted for a federal undertaking," nor does it anywhere *obligate* agencies to conduct "background research, consultation, oral history interviews, sample field investigations, [or] field survey," all of which are simply mentioned as activities an agency "*may*" engage in during a review process.[158]

While the *Standing Rock Sioux* court's observation that no specific form of tribal consultation is required under Section 106 is accurate, at least in a technical sense, the court in this case notably ultimately "deferred to the Corps' rather than the ACHP's interpretation of responsibilities under the NHPA."[159] The court found that the Corps possessed the requisite "expertise" to earn the court's deference with respect to this determination, even though, as Madeline Roe Flores explains, the Corps' "expertise" was "determining what navigable waters need permits," and it does not necessarily follow that the agency possessed any specific "expertise in determining what effects will impact nearby historic sites," which is more typically regarded as falling under the ACHP's purview.[160] Even though the court found that the Corps was not required to take into account the ACHP's recommendations or guidance around tribal consultation or Indigenous cultural preservation best practices in this case, the ACHP's guidelines are given more significant judicial deference under different circumstances (for example, where an agency is not accorded deference by the court) such that clarifying tribal consultation guidelines is still a productive recommendation in light of the *Standing Rock Sioux* decision.

Additionally, construing tribal consultation requirements in the NHPA context narrowly, the D.D.C. concluded that an agency is only obligated to "make a 'reasonable and good faith effort' to consult on identifying cultural properties."[161] The Court also stated that the "good faith effort" obligation does not extend so far as to confer upon tribes "an absolute right to participate in cultural surveying at every permitted undertaking."[162] In *Standing Rock Sioux*, "the court deferred to the Corps' rather than the ACHP's interpretation of responsibilities under the NHPA," and in so doing, "set a damaging precedent where the undertaking agency that has no expertise in cultural heritage may ignore the ACHP's interpretations of cultural meaning," which arguably "frustrat[es] the

158. *Standing Rock Sioux*, 205 F. Supp. 3d at 33.
159. *Id.*
160. Roe Flores, *supra* note 156, at 681.
161. *Id.* at 33.
162. *Id.*

purpose of the ACHP and NHPA."[163] Navajo Nation Department of Justice attorney Jason Searle has criticized the D.D.C.'s 2016 ruling, contending that although the court "may have been correct that a 'good faith effort' does not need to include all of the due diligence measures" included under 36 C.F.R. § 800.4(b)(1), "the regulation cannot dispense with soliciting tribes and taking seriously their views about how to best identify historic properties."[164] Searle further emphasized that the regulations clearly envision "significant tribal involvement in the identification process" and opined that, as such, the decision in *Standing Rock Sioux* was fundamentally inconsistent with the regulatory intent and language.[165]

b. Early Consultation Mandate

In *Pit River Tribe v. U.S. Forest Service*, the Ninth Circuit framed early consultation as part of agencies' obligation to consult with tribes on a "government-to-government" basis, concluding that the unique relationship between Native American tribes and the U.S. government mandates "early tribal consultation on the important issues."[166] Moreover, the court in *Pit River* drew a distinction between an agency's duty to provide members of the public with an opportunity to comment on the proposed action and its obligation to consult with tribes, clarifying that tribal consultation is a "higher standard" that "requires meaningful interaction, which integrates tribal views into decisions."[167]

Subsequent cases in the Ninth Circuit have reaffirmed that early consultation with tribes is "encouraged," but none have defined "early consultation" with further specificity, nor have any meaningfully enhanced our understanding of what precisely would constitute an appropriate consultation timeline.[168]

IV. DISCUSSION AND LEGAL ANALYSIS

As discussed earlier in this Article, wind farms and their accompanying machinery pose particular problems where they disturb or

163. Flores, *supra* note 156, at 682-83.

164. Jason Searle, *Exploring Alternatives to the "Consultation or Consent" Paradigm*, 6 MICH. J. ENV'T & ADMIN. L. 485, 518 (2017).

165. *Id.*

166. *Id.* at 498 (quoting Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006)).

167. *Id.* at 499 (quoting *Pit River*, 469 F.3d at 788).

168. *See e.g.*, Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592 (9th Cir. 2010).

desecrate sacred viewsheds and landscapes.[169] For many Native American tribes, a "sacred place must remain in its natural state" in order to maintain its spiritual properties.[170]

Wind farms have heightened potential to disturb sacred landscapes and viewsheds because of their uniquely significant visual impact. For one, dense concentrations of hundreds or even thousands of hulking wind turbines obstruct visibility. Tribes such as the Wampanoag, the Osage, and the Comanche require uninterrupted open space or full panoramic views or other specific site conditions in order to maintain their cultural identities, practice their religion, and engage in traditional ways of life.[171] In such situations, changes to the environment can "destroy [a] site by disrupting the sense of isolation necessary for ceremonies," or, in the case of the Comanche and the Wampanoag, by preventing tribes from engaging in traditional ceremonies and religious practices.[172]

Wind energy facilities may also disrupt delicate balances among landscape features, deities, ancestors, and Indigenous people that are necessary to generate and maintain spiritual power. Some tribes believe that "[a]ltering the landscape or use" of certain sites can "driv[e] the spirits away."[173] Even ostensibly minor changes to the natural environment can threaten a site's spiritual integrity—for example, the introduction of disruptive visual effects like the unnatural shadowing and light distribution patterns created by the turbines.[174]

However, wind turbines and wind farms need not be spiritually disruptive in all tribal development contexts. Small-scale wind projects may be compatible with some tribes' environmental values and well serve their economic needs and development vision. Tribes may also avoid conflict with environmental and spiritual values by building wind farms far away from sacred sites or by engaging in smaller-scale operations that

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169. *See generally*, *e.g.,* Dussias, *supra* note 8.

170. Ward, *supra* note 52, at 802.

171. *See* MIN. MGMT. SERV., *supra* note 1, at 4-165 (registering the Wampanoag's viewshed-related concerns); Geoffrey M. Standing Bear, *Business Viewpoint with Osage Chief Standing Bear: Wind Farms Cause Cultural, Economic Damage*, TULSA WORLD (Apr. 22, 2017), https://www.tulsaworld.com/business/businessviewpoint/business-viewpoint-with-osage-chief-standing-bear-wind-farms-cause/article_b18980bb-d5c3-5f7d-aaf4-7fe1a20ef36c.html [https://perma.cc/4BAX-28PT?type=image] (explaining the spiritual significance of horizon viewsheds to the Osage tribe and describing the Osage Nation's opposition to a planned wind farm on its tribal lands); Dussias, *supra* note 8, at 335-36 (noting concerns raised by the Comanche, who maintained that the construction "would have marred the viewscape of Medicine Bluffs," an important sacred site to the tribe).

172. Ward, *supra* note 52, at 802.

173. *Id.*

174. *See* SULLIVAN ET. AL., *supra* note 23, at 17.

are less visually imposing on the surrounding landscape.[175] Positive outcomes occur when tribes have meaningful input and control over projects on or impacting their lands or interests.[176] Some tribes have initiated their own wind energy projects, often smaller-scale projects (single or several-turbine facilities) designed to power reservations.[177] Several—including, notably, the Campo Band of Kumeyaay Indians in California—have engaged in commercial-scale ventures.[178] Wind energy development is extremely "capital-intensive," however, which prevents many tribes from engaging in these larger-scale projects.[179]

While underscoring the diversity of beliefs and approaches to tribal natural resource development as critical context, and reemphasizing tribal sovereignty values and goals, this Article centers the concerns of tribes that have experienced the destruction of sacred spaces inscribed with deep cultural meaning by specific wind development projects. For example, like the Wampanoag Tribes, whose concerns were explored in this Article's introduction, the Osage Nation expressed a similar view of wind energy equipment as disruptive to the full horizon views that are critical to the tribal members' spiritual wholeness.[180] Osage Chief Geoffrey M. Standing Bear explains that "littering the landscape" with wind turbines "destroys [the tribe's] connection to the horizon and disconnects us from our ancestors."[181] Another member of the Osage Nation described wind

175. *See, e.g.*, *Three Native American Tribes Leading the Way on Clean Energy*, THE CLIMATE REALITY PROJECT (Aug. 8, 2019), https://www.climaterealityproject.org/blog/3-native-american-tribes-leading-way-clean-energy [https://perma.cc/NZJ4-8MNU?type=image].

176. *See*, *e.g.*, *id.*

177. *See id.* The Standing Rock Sioux and Winnebago Tribes have both engaged in successful local-scale renewable energy projects to power portions of their reservation communities. *See also* Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 461 (2010) (noting local-scale projects on the Blackfeet and Spirit Lake Sioux reservations, both of which supply electricity for tribal community buildings, namely, a community college in the case of the Blackfeet and a small casino in the case of the Spirit Lake Sioux).

178. *See* Kronk Warner, *supra* note 177, at 461 (noting the Campo Band of Kumeyaay Indian Tribe's "lucrative" wind farm).

179. Shaw & Deutsch, *supra* note 20, at 18 (estimating that the total cost of increasing U.S. wind energy capacity to ten percent of the nation's overall power generation would be around $240 billion). A single state-of-the-art, utility-scale wind turbine costs upward of $1.5 million to purchase and site*, and* transmission lines cost an additional $100,000 or more per mile. *Id.*

180. Michael Overall, *Osage Nation Prays for the End of Wind Developments*, TULSA WORLD (July 12, 2015), https://www.tulsaworld.com/news/local/osage-nation-prays-for-the-end-of-wind-developments/article_278a9e60-9446-5451-aec3-4610c11fc4fa.html [https://perma.cc/9388-RUHK?type=image].

181. Standing Bear, *supra* note 171.

turbines as "monsters . . . eating up the landscape" and "devouring [the tribe's] history and culture."[182]

Focusing on the concerns of these and similarly situated tribes, this Article demonstrates the inadequacies of the NHPA's weak procedural protections for Native American sacred sites. It highlights and problematizes the precariousness of culturally essential spaces due to the current lack of substantive legal protections and argues that ambiguous and unclear regulatory language exacerbate the challenges tribes experience in asserting their procedural rights under Section 106. These are critical, urgent discourses given the tremendous renewable energy potential on native lands and the country's desperate need to transition to sustainable energy sources as quickly as possible to outpace the destruction of climate change. In view of legacies of exploitation of Indigenous people, lands, and resources, and the troubling signs of history threatening to repeat itself, tribes need clearer and stronger procedural protections.

A. The NHPA's Procedures for Determining the Eligibility of Historic Properties Are Ill-suited to the Recognition and Protection of the Native American Cultural Spiritual Resources Because the Act Trades in Conceptual Frameworks of Western Property Ownership That Are Often Fundamentally Incompatible with Indigenous Beliefs and Knowledge Systems

Though the TCP classification has been instrumental in securing protection for a number of sites that would have otherwise been ineligible for protection under the NHPA, it is not a panacea. Although establishing the TCP category attempted to ameliorate some of the inherent incompatibilities with respect to Western versus Indigenous knowledge systems, these tensions remain embedded in the NHPA as a whole and continue to serve as obstacles to the protection of tribal resources that do not fit within the NHPA's Eurocentric property paradigm.

The ideological disconnect between Western and Indigenous theories of land, ownership, and interconnectedness often creates obstacles for tribes seeking to protect sacred sites under the NHPA. Because the federal government, through NHPA, ultimately retains "the power to validate or reject a tribe's claim of importance," tribes may experience difficulty

182. Overall, *supra* note 180.

securing protections for cultural resources that fall outside of the four criteria enumerated in the regulatory guidance.[183]

The NHPA eligibility scheme "imposes a Western framework of analyzing the land onto tribal knowledge" and ultimately requires "tribes to filter traditional values through a Western framework" that is fundamentally incompatible with most Indigenous knowledge systems.[184] The NHPA is in many ways steeped in "[t]he mystique of private property."[185] Specifically, Western vocabulary of space and ownership "permeates the language" of the Act.[186] For example, the Act clearly presumes that any site or space can (and must) be translated into a cognizable form of "property," as it uses no other terminology to describe the historic resources it takes as its primary subjects.[187] A Western-capitalist conceptual framework may be especially inappropriate for sacred sites, which are particularly resistant to "the vocabulary of property or ownership."[188]

1. Boundaries

The conceptual discord between Western and Indigenous knowledge systems and lifeways is particularly pronounced in boundary-setting, which is a required component of determining a site's eligibility for inclusion on the NRHP. In some cases,"[t]he imposition of boundaries may not fit with how Native Americans understand the landscape."[189] Tribes may delimit sacred spaces by intangible or nongeographic factors, and a site's boundaries may even fluctuate according to ceremonial use, seasons, or the human beings, ancestors, or spirits currently inhabiting the space.

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183. Kate Monti Barcalow & Jeremy Spoon, *Traditional Cultural Properties or Places, Consultation, and the Restoration of Native American Relationships with Aboriginal Lands in the Western United States*, 77 HUM. ORG. 291, 296 (2018). *See also* Yablon, *supra* note 18, at 1633-34 (noting that "Indian conceptions of property . . . view the land as utterly incapable of reduction to ownership as property by human beings," typically in stark contrast with "Anglo-American conceptions of property, which rest on the notion that property rights identify a private owner who has title to a set of valued resources with a presumption of full power over those resources").

184. *Id.*

185. *Id.*

186. Monti Barcalow, *supra* note 150, at 45.

187. *See generally* 36 C.F.R. § 800 (referring to the "historic property" as the object of protection throughout).

188. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1139 (2005).

189. Monti Barcalow & Spoon, *supra* note 183, at 296.

Under the NHPA, however, an eligible site must typically be defined by concrete, identifiable geographic boundaries.[190] This requirement can be problematic where tribes do not conceive of a place as bounded or do not use a Western spatial vocabulary in delimiting sites.[191] Contrary to the Western-capitalist notion of property, under which unbounded spaces are necessarily splintered into discrete parcels of land for individual purchase, many Indigenous worldviews encounter the natural landscape as an indivisible, living being.[192] Yet, NHPA regulations require tribes to articulate traditional values within a framework that may be fundamentally unable to capture the cultural or religious significance of a site to a tribe where such significance extends beyond the dimensions of Eurocentric religious and/or property ownership paradigms.[193]

Sacred sites that do not lend themselves to the kind of discrete, geographic, or geometric boundaries envisioned by the NHPA and ACHP regulations may be particularly vulnerable in the context of large-scale wind energy development. If boundaries are misidentified during the eligibility determination and listing process, if they remain intentionally undisclosed by tribal members due confidentiality concerns, or if the site is one that is difficult to bound or is bounded by intangible or interactive factors (e.g., experiences, ceremonies, feelings, seasons), an adverse effects inquiry may fail to register detrimental impact to these resources because the assessment has bounded a site improperly.[194] Overly narrow or inaccurate boundary-setting could result in unmeasured impact in the context of a visual impact analysis for a commercial-scale wind facility.

2. Confidentiality

The NHPA often fails to adequately address tribes' confidentiality concerns with respect to sacred cultural and spiritual sites. For many Native American tribes, it is imperative that the location or precise character or significance of certain sacred sites and practices remain

190. *See* 36 C.F.R. § 800.4.

191. *See* Cousins, *supra* note 49, at 507.

192. *Id.* at 499. *See also* Sheets, *supra* note 49, at 10 (noting that Indigenous perspectives "tend to lend to conceptualizations of land that differ from non-Indigenous understandings" and frequently diverge from "dominant Western constructions" of property ownership).

193. Monti Barcalow, *supra* note 150, at 46 (emphasis added).

194. *See id.* (noting, for example, that boundary requirements under the NHPA may be fundamentally incompatible with tribes' understanding of their own cultural resources in certain cases , such as "where tribes did not traditional conceive of the place being bounded").

confidential to outsiders.[195] However, the current confidentiality protocols under the NHPA are insufficient.

Native American tribes often view "traditional knowledge" as a tribal cultural resource that "may not be common or public property to be shared outside the tribe."[196] Moreover, a site "may be so sacred that it cannot be specifically identified," so it is critical "to consider that sacred sites may have certain restrictions on access, or specific protocols that must be followed."[197] Additionally, some tribes may be unable to discuss certain aspects of a site with outsiders, or may only be able to do so during certain times of the year or under certain conditions.[198]

Confidentiality concerns may dissuade or prevent tribes from sharing information necessary for inclusion on the NHPA list.[199] The "reluctance to discuss sensitive information" may be "misconstrued as attempts to delay or derail a particular project or process," despite having a legitimate basis in culture or tradition.[200]

Although agencies are empowered to keep certain information confidential pursuant to 36 C.F.R. § 800.11 and the ACHP has consistently emphasized in supplemental guidance documents that "it is vital that the federal agency work with tribes . . . to identify sensitive locations while

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195. ADVISORY COUNCIL ON HISTORIC PRESERVATION, NATIVE AMERICAN TRADITIONAL CULTURAL LANDSCAPES AND THE SECTION 106 REVIEW PROCESS: QUESTIONS AND ANSWERS 3 (2012), https://www.achp.gov/sites/default/files/guidance/2018-06/NativeAmericanTCLsinthe Section106ReviewProcessQandAs.pdf [https://perma.cc/9SAC-PL7X?type=image] [hereinafter TRADITIONAL CULTURAL LANDSCAPES UNDER SECTION 106 Q&A] (observing that numerous tribes "have belief systems that require the location and even the existence of properties of traditional religious and cultural significance, including traditional cultural landscapes, not be divulged"). *See also* BUREAU OF OCEAN ENERGY MGMT., CHARACTERIZING TRIBAL LANDSCAPES VOLUME I: PROJECT FRAMEWORK, BOEM 2017-001 at 12 (2017), https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Studies/Pacific-Region/Studies/BOEM-2017-001_Vol1.pdf [https://perma.cc/7JXN-6A83?type=image] [hereinafter CHARACTERIZING TRIBAL LANDSCAPES] (emphasizing that, in many cases, "sharing knowledge with non-tribal members may be contrary to tribal practices," meaning that working with tribes to ensure adequate confidentiality protections "is of paramount importance in negotiating consultation and project protocols").

196. CHARACTERIZING TRIBAL LANDSCAPES, *supra* note 195, at 12.

197. *See* Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT. RES. L. 297, 301 (2014).

198. Sarah Palmer, Cherie Shanteau & Deborah Osborne, *Strategies for Addressing Native Traditional Cultural Properties*, 20 NAT. RES. & ENV'T 45, 49 (2005) (noting that, for example, the Thong O'odham Nation in Arizona "maintains oral traditions and ceremonies that correspond to seasons" such that certain stories may be told only during certain times of the year).

199. *Id.* (stating that "[c]onfidentiality issues can also play a key role in TCP consultations," particularly where tribes express concerns about an agency's "capacity to handle confidential information appropriately").

200. *Id.* (adding that time-anchored confidentiality "is true of many tribes and is an often-overlooked consideration for agencies seeking input or consultation").

respecting desires to withhold specific information about such sites," many tribes remain unwilling—or unable—to disclose the information necessary to establish historic property protections.[201]

Notwithstanding the NHPA's confidentiality provisions, scholars have argued that protections are not particularly robust because the maintenance of ongoing confidentiality is ultimately a matter of agency discretion, though in consultation with the Secretary of the Interior.[202] The guidance makes clear that tribes do not have absolute decision-making power over confidentiality determinations. Once a tribe has raised confidentiality concerns, the agency head is directed to consult with the Secretary of the Interior, who is ultimately charged with deciding "who, if anyone, may have access to the information for purposes of the NHPA."[203] Similarly, if a tribe shares sensitive information with an agency but requests that it be withheld from "non-federal consulting parties," tribal representatives are excluded from that decision-making process.[204] Instead, the ACHP recommends that agencies facing such situations confer with the ACHP or NR to determine an appropriate resolution.[205]

Some tribes have urged the ACHP to revise these provisions to make "documentation standards for listing traditional cultural properties and landscapes" less "onerous" and "more flexible." These tribes have questioned the assumption that agency officials "need to know everything about a historic property to make decisions in the Section 106" and have proposed replacing the current procedure with an "ethnographic approach to the collection of information from tribes."[206]

Additionally, "confidentiality provisions only apply to properties that are listed or eligible for listing in the NRHP," leaving open the possibility "that information disclosed prior to an eligibility determination may not

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201. *See, e.g.*, TRADITIONAL CULTURAL LANDSCAPES UNDER SECTION 106 Q&A, *supra* note 195, at 3.

202. *See* Monti Barcalow, *supra* note 150, at 36; 36 C.F.R. § 800.11(c)(1).

203. TRADITIONAL CULTURAL LANDSCAPES UNDER SECTION 106 Q&A, *supra* note 195, at 3. The regulations further specify that the Secretary of the Interior should work with the ACHP in making such determinations "[w]hen the information in questions has been developed in the course of an agency's compliance with Section 106." *Id.*

204. *Id.*

205. *Id.* at 4.

206. ADVISORY COUNCIL ON HISTORIC PRESERVATION, FORUM ON TRADITIONAL CULTURAL LANDSCAPES (Seattle, Wash., Aug. 10, 2011), at 3, https://www.achp.gov/sites/default/files/2018-06/ForumonTraditionalCulturalLandscapesAugust102011SeattleWASummaryNotes.pdf [https://perma.cc/2P97 Y266?type=image] [hereinafter FORUM ON TRADITIONAL CULTURAL LANDSCAPES].

be protected."[207] ACHP's official guidance places this burden squarely on tribes, directing those with confidentiality concerns to "contact NR staff . . . regarding the amount of information and detail needed to make a determination of eligibility when such information may be at risk of disclosure."[208] But identifying this as an affirmative duty of tribes assumes a potentially unrealistic level of familiarity with the regulations, and may even run counter to tribes' expectations that the government should act in good faith to protect tribal interests.

3. Limitations of Historic Image Receptor Framework

As a result of the NHPA's specific, singular focus on a site's "historic" characteristics, the Act fails to provide a functional framework for the protection of "site[s] with significant sacred value to American Indians."[209] While the TCP category provides an avenue for recognizing spiritual and cultural resources under the rubric of historic property, Section 106 applies a focus on the historic property and its historical characteristics irrespective of whether a resource is classified as a TCP or a "conventional" historic property.

Although a TCP's eligibility-qualifying characteristics will, in many situations, function as workable proxies for tribal cultural and religious interests, the subject of the adverse effects assessment cannot be a tribe itself, individual tribal members, or the tribe's culture or religion broadly. In other words, tribal interests are indirectly considered under Section 106—and only to extent they are sufficiently captured by TCP.

The stakes of the inquiry are particularly high for sacred landscapes threatened with desecration by commercial-scale wind farms. For these projects, the adverse effects assessment must include a robust and thorough consideration of visual impact.[210] The efficacy of this assessment will be substantially comprised if officials have an incomplete understanding of the important qualities of the TCP, which may overlap with whatever qualities provided the basis for the property's eligibility under the NHPA.

Another major limitation is that the scope of assessment required under the NHPA focuses narrowly and exclusively on the historic *property*

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207. TRADITIONAL CULTURAL LANDSCAPES UNDER SECTION 106 Q&A, *supra* note 195, at 3.

208. *Id.*

209. Elizabeth G. Pianca, *Protecting American Indian Sacred Sites on Federal Lands*, 45 SANTA CLARA L. REV. 461, 483 (2005).

210. *See* 36 C.F.R. § 800.5(a)(2)(v).

itself—and more specifically, on the "characteristics of a historic property that qualify the property for inclusion in the National Register."[211] ACHP regulations expressly enumerate visual impact as a potential adverse effect to be considered under Section 106 review,[212] but pursuant to the NHPA's overall statutory scheme as well as the specific regulatory language under 36 C.F.R. § 800.5, an action's visual impact will be assessed solely in connection with "the integrity of the property's significant historic features."[213]

Because the NHPA specifies the historic property itself as the sole "impact receptor" for the purposes of Section 106 analysis, there is no direct consideration of human-centered, cultural, or spiritual impacts to the extent they may exist independently from tangible property.[214] In fact, the National Park Service states explicitly that "[w]hile the beliefs or practices associated with a TCP are of central importance, the NRHP does not include intangible resources," stressing that TCPs are the physical sites themselves.[215]

B. Tribal Consultation Procedures Are Defined Vaguely and Non-specifically, Are Frequently Ignored, and Generally Fail to Ensure Meaningful Engagement with Native American Tribes

Consultation with tribes, even where explicitly required under the NHPA, does not always occur, and even when it does occur, consultation does not always sufficiently consider relevant concerns or effectively work with tribes to understand and protect the unique nature of sacred

211. 36 C.F.R. § 800.5(a)(1).

212. 36 C.F.R. § 800.5(a)(2)(v). The regulations expressly state that the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features" may constitute an "adverse effect" on a historic property under the NHPA. *Id.*

213. *See* ROBERT G. SULLIVAN ET AL., COMPARISON OF VISUAL IMPACT ANALYSIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT, NAT'L PARK SERV., VISUAL STEWARDSHIP CONF. PROCS., GT8-NRS-P-183, 206 (2018) https://www.fs.fed.us/nrs/pubs/gtr/gtr-nrs-p-183papers/20-sullivan-VRS-gtr-p-183.pdf [https://perma.cc/2KJW-SD7Z?type=image] [hereinafter VISUAL IMPACT ANALYSIS UNDER SECTION 106 VERSUS UNDER NEPA]. *See also generally* 36 C.F.R. § 800.

214. VISUAL IMPACT ANALYSIS UNDER SECTION 106 VERSUS UNDER NEPA, *supra* note 213, at 208.

215. A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES, *supra* note 134.

sites, nor does it always occur within an appropriate timeframe.[216] In other words, meaningful consultation remains an elusive concept.[217]

As a result, many Native American tribes express that they continue to view tribal consultation under the NHPA's Section 106 as "lip service"[218] or "a mere formality."[219] Indeed, numerous tribes have "reported that despite the fact that agencies are mandated to consult with tribes, formal consultation simply [does] not occur."[220] Multiple tribes have reported that agencies have provided insufficient notice, hindering tribes' ability to "provide meaningful input,"[221] and that consultation had "simply occurred too infrequently and unpredictably" to inure trust.[222] Tribes may even be "involuntarily excluded from the 106 consultation process" if their spiritual or cultural resources remain unrecognized by NHPA.[223] Tribes have also highlighted inconsistencies in consultation processes among different federal agencies.[224]

C. The NHPA Does Not Establish a Concrete Timeframe for Tribal, which Undermines Tribes' Procedural Consultation Rights and Negatively Impacts a Diverse Group of Project Stakeholders

1. Consultation Timeline and "Early" Consultation

The ACHP stresses that early consultation with Indian tribes to identify areas of religious and cultural significance *prior* to project siting decisions is an effective means to avoid impacts to these places and to

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216. *See* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 444 (2013).

217. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENV'T L. REV. 1, 47 (2012).

218. *Id.*

219. Diana Coronel David, *Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on a [sic] Inter-American and Colombian Legal Systems to Redefine the Right to Consultation*, 38 ENVIRONS: ENV'T & POL'Y J. 223, 225 (2015). *Accord.* Searle, *supra* note 164, at 487 (stating that "agencies have often turned consultation into a *pro forma* box to check, rendering tribal consultation inconsequential").

220. Amanda Rogerson, *The Tribal Trust and Government-to-Government Consultation in a New Ecological Age*, 93 OR. L. REV. 771, 788 (2015). *See also* Routel & Holth, *supra* note 216, at 444 (noting that "implementation of the federal duty to consult with Indian tribes has been lacking").

221. Rogerson, *supra* note 220, at 788.

222. *Id.*

223. S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historical Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 908 (2012).

224. Tarah Bailey, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, 29 COLO. NAT. RES. ENERGY & ENV'T L. REV. 195, 197 (2018).

minimize project delays.[225] Although "early consultation" is often cited as a key feature of meaningful engagement with tribes, the term is vaguely defined—the result is a process "that almost guarantees late identification of preservation-development conflicts, which greatly limits opportunities for resolution."[226] Indeed, many tribes and others report that early consultation is rare: A forum held jointly by the ACHP and the NPS revealed that despite widespread agreement as to the importance of early engagement with tribes, "consultation rarely occurs early in project planning when there is the widest range of alternatives."[227] In fact, tribal representatives indicated that agencies initiate consultation only "after fundamental decisions are made about project location and siting."[228]

There is a gulf between what tribes, scholars, and practitioners tend to view as an appropriate consultation timeline and that which is actually required in the Section 106 review process. Research suggests that "timely communication" under NHPA's Section 106 process should begin as soon as an agency "become[s] aware of a potential project that might affect a TCP" or occur on tribal lands.[229] However, there is no statutory basis for this timeline, which represents a substantial obstacle.

Agencies are not required to consult with tribes until after officials have already made at least two key decisions. First, agencies have wide latitude to determine whether their proposed projects constitute undertakings under the NHPA. Second, though agencies are required to *identify* "consulting parties" as part of the process of defining an undertaking's APE(s), they have no obligation to seek input from or consult with tribes in actually setting the APE(s).[230] Although impacted tribes *may* be consulted during the "information-gathering" phase of Section 106 review, where officials are tasked with identifying historic properties within the defined APE(s),[231] agencies are not formally required to notify and solicit input from tribes until *after* historic properties have been identified (or determined not to be present) in the APE(s).[232] In other

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225. *Tribal Coordination and Consultation for Infrastructure Projects*, ADVISORY COUNCIL ON HISTORIC PRESERVATION (Jan. 2017), https://www.achp.gov/indian-tribes-and-native-hawaiians/tribal-coordination-consultation-infrastructure-projects [https://perma.cc/W7Z5-2LVK?type=image].

226. THOMAS KING, FEDERAL PLANNING AND HISTORIC PLACES: THE SECTION 106 PROCESS 25 (2000).

227. FORUM ON TRADITIONAL CULTURAL LANDSCAPES, *supra* note 206, at 1.

228. *Id.* at 2.

229. Monti Barcalow, *supra* note 150, at 30.

230. *See* ALEXANDER, *supra* note 103, at 6-7.

231. *See Section 106 Applicant Toolkit*, *supra* note 114.

232. *See id.*

words, the tribal consultation mandate does not attach to agencies engaged in the Section 106 review process until after numerous threshold substantive determinations have been made.

Once historic properties have been identified in the APE(s), tribes may nevertheless be excluded from the consultation process if an agency determines that there are no "adverse effects" to the historic property. Because a finding terminates the Section 106 review process, agencies are only obligated to engage in further consultation with tribes if officials determine the proposed action would have adverse effects on one or more historic properties within the APE(s).[233] Only then are agencies bound to work with interested parties to reach a mutually agreeable resolution by proposing viable alternatives that would eliminate or mitigate any adverse effects identified.[234] While the goal "is to reach an agreement on acceptable measures to resolve the adverse effects,"[235] there is no enforceable obligation to do so, and agencies may proceed even the face of profound objection from consulting parties.[236]

2. Detrimental Impact and Need for Clarity

Inappropriately truncated consultation timelines negatively impact tribes and wind projects in myriad ways. For one, abbreviated consultation frequently denies tribes meaningful opportunities to engage in the consultation process. Anemic consultation is also inconsistent with tribal sovereignty, and may in some cases constitute a violation of tribes' procedural rights under the NHPA. Additionally, "a very strong motivation on the part of project proponents and oversight agencies to short-circuit consultation to get the damn thing done" leads actors to frequently "exclude key parties and ignore important effects."[237] This urgency may translate into shortened consultation timelines under which agencies simply notify tribes after decisions have already been made.[238] In fact, even the ACHP acknowledges in its guidance that consultation often

233. Suagee, *supra* note 102, at 45.

234. *Id.* (explaining that the agency must "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties" in consultation with tribes and other identified parties).

235. *Id.*

236. *Id.* at 46. The ACHP has no power "to block an agency from going ahead with an undertaking that will result in adverse effects on a historic property" and an agency may proceed even when the ACHP has explicitly condemned the action and urged the agency to pursue an alternative plan. *Id.*

237. THOMAS F. KING ED., CULTURAL RESOURCE MANAGEMENT: A COLLABORATIVE PRIMER FOR ARCHAEOLOGISTS 79 (2020).

238. Routel & Holth, *supra* note 216, at 461.

"begin[s] after significant preparations and a great many investments have been made about project location."[239]

However, lackluster consultation may pose substantial risks to project development. Early consultation is instrumental to a wind energy project's success or failure.[240] "When agencies communicate early in the consultation process, they create a more collaborative environment between tribes and federal agencies and ensure federal agencies and potential developers consider major issues in the design."[241] Engaging with tribes early on in the consultation process is also associated with "decreased . . . risk of delays . . . and improved . . . overall quality of projects."[242] In other words, even if developers fail to recognize the importance of engaging in meaningful consultation for the benefit of tribes and in recognition of their sovereignty, they may nevertheless be incentivized by the role consultation plays in risk management and mitigation. Given all of these factors, there is an evident need for greater clarity as to more detailed requirements of the ACHP's tribal consultation provisions.

3. Consultation, Not "Education"

In the renewable energy context, it is imperative that government agencies not use "education" programs to substitute for robust, sovereign-to-sovereign consultation with tribes whose lands, resources, and interests are impacted by development actions. Certain renewable energy resource development discourses presume and indeed, to varying degrees, emphasize the need to "educate" those who express concerns or raise opposition to wind or solar projects as to the benefits of renewable energy sources.[243] Legal scholar Ari Brisman, for example, has argued that "aesthetic education [to] . . . foster an appreciation for wind farms—coupled with "environmental education about the impacts of fossil fuels . . . and the benefits of wind energy"—can increase the chances of

239. ADVISORY COUNCIL ON HISTORIC PRESERVATION, EARLY COORDINATION WITH INDIAN TRIBES DURING THE PRE-APPLICATION PROCESS: A HANDBOOK 2 (Oct. 2019), https://www.achp.gov/sites/default/files/documents/2019-10/EarlyCoordinationHandbook_102819_highRes.pdf [https://perma.cc/2ZSR-K7JJ?type=image] [hereinafter EARLY COORDINATION HANDBOOK].

240. *See* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 166 (1966).

241. Monti Barcalow, *supra* note 150, at 30.

242. Alexander, *supra* note 223, at 905.

243. *See, e.g.*, Peter Meisen & Trevor Erberich, *Renewable Energy on Tribal Lands*, GLOB. ENERGY NETWORK INST. at 3 (2009).

support for a wind energy project.[244] But while (re)education efforts may be appropriate and worthwhile in many situations, (re)education is wholly anathema to sovereign-to-sovereign consultation.

An educative affect fundamentally undermines the efficacy of tribal consultation, not to mention, much of the "education" that agencies have to offer in response to tribal concerns is fundamentally incompatible with Indigenous and/or tribal knowledge and, in any case, simply may not understand or address tribes' actual concerns. First, placing an emphasis on education presumes that tribal resistance to commercial-scale renewable energy projects is typically driven by a lack of environmental or scientific knowledge, illegitimate superstitious beliefs, misplaced aesthetic anxieties, or something else "correctible," which marginalizes or erases tribes' valid concerns and interests around environmental impacts. Indeed, tribes have criticized this type of "education" as a "one-sided exchange" that is disrespectful of tribes and counterproductive to meaningful consultation.[245] Non-natives trivialize tribes' legitimate concerns by presuming that such concerns derive from fantastical or erroneously held beliefs that can be "solved" through education efforts.[246]

For example, in one instance where U.S. government researchers appear to have dismissed potentially valid concerns raised by members of the Hopi tribe regarding a planned solar panel installation on their reservation land, the resulting report narrated the research team's purportedly successful efforts to ameliorate tribal members' concerns by educating them on the scientific processes of solar and wind energy conversion.[247] The report explained that "after years of education on solar energy," the researchers eventually were able to dissuade the Hopi from their initially-held belief that "solar panels were stealing from the sun."[248] But this problematically seems to presuppose that the Hopi's concerns were rooted in supernaturalism and thus ultimately, scientific ignorance.

In fact, solar resources are among the most abundant and sacred features of the Hopi landscape, and the Hopi's practical and spiritual relationship to the sun affords tribal members an unique knowledge and sensitivity of perception with respect to solar energy in their natural

244. Brisman, *supra* note 29, at 80.

245. Victoria Sutton, *Wind and Wisdom*, 1 ENV'T & ENERGY L. & POL'Y J. 345, 367 (2007) (stating that "[t]he suggestion that cultural beliefs must be changed through 'education' does not value or respect the concerns of the tribes").

246. Meisen & Erberich, *supra* note 243, at 3.

247. *Id.*

248. *Id.*

environment.[249] The Hopi have, for thousands of years, performed a wide range of ceremonies, rituals, and other cultural practices that require a deep understanding of sun, light, and landscape.[250] Therefore, not only are tribal members likely more aware of the impact any alterations to the solar landscape—especially changes affecting exposure to sunlight, light distribution or composition, or solar-spatial patterning—even certain changes that non-Indigenous scientists might regard as imperceptible have significant negative impact on the tribe's ability to continue to perform these sacred rituals. Thus, in their interactions with researchers, the Hopi may well have been referring to forms of visual-solar landscape impact that are uniquely tied to their religion, ways of life, and traditional knowledge systems. Ultimately, this example highlights the importance of distinguishing education from meaningful tribal consultation by illustrating a situation in which prioritizing educative efforts that seek to "Westernize" tribal viewpoints undermined true collaboration with tribes on important renewable energy projects.

Second, most "education"—especially where it overlaps with or muddies mandatory tribal consultation—ignores and disrespects Indigenous peoples' overall robust knowledge of and deep, intergenerational commitment to environmentalism, and falsely presumes the inferiority of Indigenous environmental knowledge in comparison to Western scientific knowledge—meanwhile, emerging evidence seems to confirm that, if anything, Indigenous conservation frameworks and environmental and land use practices are actually more advanced than those utilized by Western societies.[251] Dialogues steeped in didacticism may also frequently fail to adequately acknowledge that demanding sacrifices from Indigenous communities for the proverbial greater good when it comes to climate change, which plainly runs counter to environmental justice values consistent with decolonization.

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249. JOHN D. LOFTIN, RELIGION AND HOPI LIFE 30 (2d ed. 2003).

250. *Id.*

251. *Cf.* Chase Blair, *Indigenous Sacred Sites & Lands: Pursuing Preservation Through Colonial Constitutional Frameworks*, 25 APPEAL 73, 75 (2020) (noting that in most Indigenous cultures, "there is an acknowledgment that natural resources exist without humanity but that humanity does not exist without those same natural resources"); Cousins, *supra* note X, at 501 (quoting Virginia Poole of the Seminole/Miccosukee Tribe as explaining that "[w]e said we'd watch over [the land], because that's our responsibility. You take care of the land, and it takes care of you"). *Cf. generally* Kronk Warner, *supra* note 177 (discussing throughout a kind of conservation ethic shared among many North American Indigenous communities centered on making decisions with an eye toward the "seventh generation").

V. PROPOSALS

Overall, tribes should have greater flexibility in identifying and protecting traditional cultural resources, and agencies should be held to more specific and robust obligations throughout the Section 106 review process. These proposals seek to facilitate a shared goal of promoting more frequent, more robust, and ultimately more meaningful tribal input aligned with tribal sovereignty values and goals, particularly during the identification of and assessment of adverse effects on historic properties and throughout consultation. Tribes and Indigenous people must be allowed to lead both energy development and cultural preservation work and dialogues at every level.

A. More Inclusive, Functional, Indigenous-Aligned Listing Categories and Processes

The ACHP should amend its regulatory guidance in two key places to mitigate the incompatibility between the NHPA's listing requirements and protocols and tribes' conceptualizations of their own resources. First, the ACHP should amend the language at 36 C.F.R. § 60.14 to enable tribes to change and update historic property boundaries where they do not properly encompass a sacred site. Second, the ACHP should amend the language at 36 C.F.R. § 800.11 to clarify and strengthen expectations and protocols to ensure that tribes can keep confidential that which is sacrosanct and must not be shared externally.

1. Boundary-(Re)setting

First, Title 36 C.F.R. § 60.14 (a)(2) enumerates only four situations in which parties may request a boundary alteration on an existing historic property: (1) "[p]rofessional error in the initial nomination," (2) "loss of historic integrity," (3) "recognition of additional significance," and (4) "additional research documenting that a larger or smaller area should be listed."[252] These enumerated criteria do not necessarily provide adequate or sufficiently firm ground for tribes seeking to alter boundaries based on an agency's ongoing failure to properly understand and measure the boundaries or a sacred site. Although some such errors may be rightfully categorized under "professional error," others may not be adequately recognized or understood within these simultaneously vague and restrictive terms, and, in any case, historical and/or contemporary

252. 36 C.F.R. § 60.14 (a)(2).

Western archaeological and anthropological professional standards and practices themselves may be at the root of the problem.[253]

The ACHP should amend the regulatory language at 36 C.F.R. § 60.14(a)(2) to specify a fifth justification for boundary alteration that would apply specifically to tribes seeking to rectify previously misidentified boundaries of TCPs. This addition would enable tribes to more freely request boundary alterations in circumstances where boundaries have been drawn in ways that are inconsistent with tribal knowledge or belief systems. Tribes could potentially request alteration by asserting misunderstanding beyond "professional error" on the part of agency officials; challenging boundaries that were drawn inaccurately at the time of listing (due, for example, to misinformation or incomplete information given due to tribal members' legitimate confidentiality concerns); inadequate consultation; or sheer inability to attach suitable geographic boundaries to certain sites that are defined by characteristics that do not lend themselves neatly to categorization within Western property frameworks.

Second, 36 C.F.R. § 60.14(a)(1) provides that "[a] boundary alteration shall be considered as a new property nomination" and further specifies that "[a]ll forms, criteria and procedures used in nominating a property to the National Register must be used."[254] This attaches a burdensome and time-consuming process to the project of boundary resetting, and the regulatory guidance entirely fails to contemplate reasonable exceptions for tribal and Indigenous properties. A new provision should be added under 36 C.F.R. § 60.14(a)(3) to create an alternative, streamlined boundary alteration process for tribal properties that would not necessarily require these properties to go through the nomination process anew in all cases. Any new processes, however, must be created in direct consultation and collaboration with individual tribes, with tribal representatives setting the agenda and leading these efforts on all levels.

The proposed new provision should also likely include language exempting tribes from the requirement to use standard nomination forms for the purposes of requesting boundary alterations. Particularly where there has been prior error in measuring, documenting, translating, or otherwise understanding or memorializing some aspect of a sacred site's

253. *Cf.* Margaret Bruchac, *Indigenous Knowledge and Traditional Knowledge*, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1172&context=anthro_papers [https://perma.cc/QP8M-5JVH?type=image]

254. 36 C.F.R. § 60.14(a)(1).

boundary or other spatial or geographic characteristics, standard forms may be inadequate and lead to further error. Thus, tribes should be expressly permitted to use alternative or altered versions of forms, and federal agencies should concurrently support tribes in developing culturally appropriate forms and documentation paperwork and protocols. Similarly, any other standard procedures, criteria, definitions or other terminology, and so on that are incompatible with tribal cultural preservation goals or practices should be susceptible of being reworked for greater efficacy in the tribal consultation context.

Third, the regulatory guidance should be amended to establish a waiver of the photographic documentation requirement that would be available to tribes where the obligation to provide such evidence would jeopardize confidentiality or a site or tradition's cultural or spiritual integrity, for example, where this would require the disclosure of elements of a sacred or closed practice or location.[255] The current language provides that "[a]ny proposal to alter a boundary" must "be documented in detail including photographing the historic resources falling between the existing boundary and the other proposed boundary."[256] However, producing and sharing this sort of photographic documentation of a sacred site, especially with non-tribal members, may be broadly inconsistent with tribal beliefs, specifically prohibited in accordance with cultural norms and traditions, or sanctioned under spiritual or other tribal law.[257]

The proposed waiver would broadly enable and facilitate the use of comparable, alternative forms of evidence as a substitute for photographic documentation where requiring documentation in such form would sufficiently harm a historic property and/or otherwise jeopardize any of the tribal cultural or spiritual resources contained within the site, or where a tribe can demonstrate that the value of having the documentation in photographic form does *not* outweigh the substantial burden of gathering and/or submitting this evidence for the purposes of boundary alteration *and* the proposed or proffered alternative documentation is deemed sufficient in aggregate.

2. Confidentiality

Confidentiality protections must likewise be more robust. The current regulatory scheme creates too much risk for many tribes,

255. 36 C.F.R. § 60.14 (a)(2).
256. *Id.*
257. *Cf.* Palmer et al., *supra* note 198, at 49.

particularly given the rational distrust many tribes have toward the U.S. government. The ACHP should tighten the regulatory language to ensure that sensitive information remains strictly confidential whenever it is provided in connection with a sacred site or potentially listable historic property. Information that was disclosed with the expectation of confidentiality should never made be public, even if that disclosure occurred outside of the specific identification inquiry under the NHPA for purposes of NRHP eligibility. Strengthening confidentiality provisions is necessary in order to ensure that tribes are able to adequately weigh the costs and benefits of pursuing NRHP listing based on the disclosure potentially sensitive information.[258] The ACHP thus should amend 36 C.F.R. § 800.11 ("Documentation Standards") to provide stronger protections for sensitive disclosures, as well as to provide more detailed guidance to agencies directing officials to protect confidential information in all situations where the expectation of confidentiality has been established.

First, § 800.11(c)(1) should be amended to strengthen protections against disclosure of sensitive information and guarantee protections for tribes where information is given with the express expectation of confidentiality. The ACHP should add a subsection under § 800.11(c)(1) clarifying the existence of special protections for tribal knowledge and identifying a heightened need for protection of information related to spiritual resources and practices. Additionally, the ACHP should establish and codify a specific recourse procedure for tribes to oppose the sharing of confidential information. Sufficiently direct language could create an enforceable procedural right that would allow tribes to challenge agencies' disclosure of sensitive information.

3. Rethinking Documentation Standards

In order for any the aforementioned proposals to be efficacious, it is imperative that agencies allow tribes and Indigenous people and communities to set the preservation agenda when it comes to their own resources, and this may require a broad reframing of the overarching purpose and goals of historic preservation, in addition to the reformulation of certain specific documentation procedures or practices. In other words, agency officials must approach this work with an acknowledgment and a

258. *See* Monti Barcalow, *supra* note 150, at 63 (noting that "evaluating a place as eligible is not something by itself that a tribe would desire in order to validate the cultural importance of a place," meaning that "the benefits must . . . outweigh any drawbacks of pursuing a determination of eligibility or listing in the National Register").

respect for the fact that tribal perspectives are rooted in Indigenous knowledge systems that are eminently valid irrespective of their correspondence or dissonance with Western beliefs (whether to do with science, environment, history, land ownership, religion, or anything else). On a practical level, this means that agencies should strive to flexible and frankly, defer to tribes when it comes to the type, form, and amount of information and/or documentation required to set or, perhaps especially, alter the boundary of a tribal cultural property.

As Marisa Elena Duarte and Miranda Belarde-Lewis emphasize in their scholarship, "[f]or non-Indigenous individuals[,] decolonization work means stepping back from normative expectations," including, notably, "that all knowledge in the world can be represented in document form."[259] Moreover, Duarte and Belarde-Lewis and other Indigenous scholars challenge the assumption ingrained in Western colonialist thinking that "Indigenous ways of knowing *belong* in state-funded university and government library, archive, and museum collections."[260] In other words, truly meaningful reform efforts in this area would likely require a fundamental re-envisioning of the entire purpose and goal of documentation mandates for tribal historic preservation purposes and a shift in perspective to more adequately "acknowledge *the reasons why* Indigenous peoples might prefer to develop their own approaches" based on the distinct "ontological and epistemological ways the documents and knowledge artifacts about their peoples cohere and interrelate."[261]

Ultimately, the goal as articulated by Duarte and Belarde-Lewis, is to be able to "forge partnerships for building systems that reflect, as appropriate, Indigenous epistemologies and local needs."[262] They propose utilizing "knowledge organization specialists who are interested in supporting Indigenous decolonization and self-determination work," as well as "Indigenous theorists and information professionals" and others "who study how epistemological distinctiveness relates to the cataloging and classification of knowledge," as essential components of decolonization work.[263] These and similarly-oriented suggestions can and should be implemented in the sacred sites protection context, particularly

259. Marisa Elena Duarte & Miranda Belarde-Lewis, *Imagining: Creating Spaces for Indigenous Ontologies*, 53 Cataloging & Classification Q. 677, 678 (2015).

260. *Id.*

261. *Id.* at 679.

262. *Id.*

263. *Id.*

with respect to reevaluating the existing documentation requirements under the NHPA.

B. Clarify Tribal Consultation Requirements and Protocol

1. Defining "Early Consultation": Toward a Concrete Consultation Timeline

The ACHP should define "early consultation" with more specificity so as to clarify that agencies should involve tribes before developing—and certainly before committing to—a timeline for review. The ACHP could accomplish this by amending 36 C.F.R. § 800.4 to mandate tribal involvement as early in the Section 106 process as defining the "undertaking," and certainly before defining the "area of potential effects." Defining a specific timeline for the initiation of tribal consultation—and, moreover, by attaching that timeline to the existing terminology and procedural sequencing of the NHPA Section 106 review process—will ensure greater clarity of consultation obligations among agencies as well as provide tribes with more predictability and heightened enforcement power should agencies fail to comply.

At a minimum, the ACHP could issue non-binding regulatory guidance directing agencies to consult with impacted tribes in the timeline creation process. The ACHP could send a stronger message by amending the regulations to require federal agencies to involve tribes at this stage, which would enable courts to draw a more bright-line rule consultation.

By involving tribes at this initial step of the process, agencies can avoid conflicts further down the line and ultimately promote successful, mutually beneficial outcomes that translate into well-sited wind and other renewable energy development facilities that are not plagued by costly delays and rancorous battles in court. This should ultimately contribute to the success of renewable energy projects on federal lands, which as this Article has previously observed, have often been stymied by tribal opposition arising from insufficient consultation.

2. Specifying What Constitutes a "Reasonable and Good Faith" Effort

The term "reasonable and good faith effort" should be more specifically defined. Identifying appropriate consultation timelines in greater detail will also aid in clarifying the "reasonable and good faith effort" standard, though it will also be necessary to identify specific procedures that must occur during the consultation process in order for it to meet the "reasonable and good faith effort" requirement. To accomplish

this, the ACHP should amend 36 C.F.R. § 800.13 to clarify that in addition to consulting with tribes early on in the process (ideally during the identification of the undertaking stage), agencies are required to document more extensive attempts to notify tribes. The ACHP should also identify points in the process past which agencies may not proceed without special authorization unless they have either initiated consultation with impacted tribes or been notified in writing that a tribe does not wish to participate in Section 106 consultation.

Additionally, the ACHP should ensure that agencies do treat consultation as opportunity to "educate" tribes about Western ideals or to "correct" traditional beliefs. Although there are many situations in which it may be appropriate to provide tribes with resources and engage in dialogues about concerns and misconceptions about renewable energy facilities or extraction methods, agency staff must treat tribes as full intellectual equals. In other words, Indigenous views should not be dismissed or rejected simply because they that do not fit into Eurocentric scientific frameworks or diverge from western conceptualizations of property ownership and land use.

3. Amend the Property Removal Petitioning Guidance to Mandate Consultation Where Tribal Intersects Are Implicated

The procedure for petitioning for the removal of a historic property from the National Register should be amended to include a provision triggering mandatory consultation where tribal interests are implicated. Currently, the procedure for attempting to effectuate the removal of a property from the National Register, outlined at 36 C.F.R. § 60.15, provides that "[a]ny person or organization may petition in writing" for such removal "by setting forth the reasons the property should be removed on the grounds" enumerated in a preceding subsection of the provision and further, that "anyone may petition for reconsideration of whether or not [a] property meets the criteria for evaluation" under the same procedure.[264] These petitions do not trigger the tribal consultation mandate because Section 106 requirements only adhere very narrowly to certain proposed government actions and not these adjacent protocols. Rather, these petitions are submitted to and evaluated by a central oversight figure who is not required to consult with tribes.

Although the regulatory guidance presently provides that "[n]o diminution of a boundary [of an historic property listed on the National

264. 36 C.F.R. § 60.15(c).

Register] should be recommended unless the properties being removed do not meet the National Register criteria for evaluation," there is no correlative mandate that the government oversight entity tasked with issuing determination in these cases engage in any consultation efforts, even where tribal interests would be directly and detrimentally impacted by the requested action.[265]

VI. CONCLUSION

Although many scholars frame protectionist concerns around tribal cultural resources in direct opposition to renewable energy development interests, to the extent that strengthening protections promotes tribal sovereignty, such an approach might actually spur renewable energy development.[266] At the very least, more robust consideration of cultural impact and consultation to determine tribal interests could prevent unnecessary delays caused when developers or agencies fail to undergo adequate consultation or insufficiently consider adverse effects to cultural resources. For example, had Nantucket Sound's National Register eligibility come up earlier in the Cape Wind project development, it would not have risked "add[ing] months to the approval process by forcing developers to comply with the designation's various standards."[267]

Therefore, while there are legitimate practical considerations around cost and delay associated with imposing further regulatory hurdles to development, it is very possible that more specific requirements—where they directly support tribal sovereignty—may actually facilitate development. Moreover, strengthening sacred sites protections in this way may help the government in its goal of developing renewable energy resources on tribal lands by indicating to tribes that agencies and developers understand their unique cultural concerns and potentially encouraging tribes to partner with private developers to develop their own resources in a way that is in accordance with their distinct tribal values.

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265. *See* 36 C.F.R. § 60.14(a)(2) (containing no mentions of tribal consultation, tribes, or tribal cultural property).

266. *See* Palmer et al., *supra* note 198, at 47 (arguing that "early collaboration[] may produce more durable outcomes (preferred alternatives) with mitigation measures that are met with broader stakeholder satisfaction"). Additionally, the authors note that "[i]f the time is not taken in the beginning to attend to important details, resulting conflicts can slow projects or even completely halt their progress." *Id.* at 49; *see also* EARLY COORDINATION HANDBOOK, *supra* note 239, at 13 ("[i]t is far more efficient to learn of potential issues as early as possible so they can be addressed before making investments and preparations that might be difficult to revisit"). Furthermore, according to the ACHP "early coordination with Indian tribes may lead to more efficient review processes and better historic preservation outcomes." *Id.* at 17.

267. *Tribes: Wind Farm Would Harm Sacred Rituals*, *supra* note 11.