

TRADITIONAL CULTURAL DISTRICTS: AN OPPORTUNITY FOR ALASKA TRIBES TO PROTECT SUBSISTENCE RIGHTS AND TRADITIONAL LANDS

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ABSTRACT

Alaska tribes have limited control over their traditional lands and waters. Tribes may increase their influence through a Traditional Cultural District designation under Section 106 of the National Historic Preservation Act. This designation does not stop development, but requires federal agencies to consult with tribes regarding potential development that may impact the district. The consultation right applies regardless of whether a tribe owns or has formally designated the district. In Alaska, where no Traditional Cultural Districts exist as of 2014, there is potential for designating large areas of land or water that correspond to the range of traditionally important species.

INTRODUCTION

Alaska tribes¹ have limited tools for protecting the lands that they have traditionally used for subsistence and cultural activities. Since the Alaska Native Claims Settlement Act of 1971 (ANCSA), most Alaska tribes do not own their land² and have no treaties to protect their

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1. In this article, I define “Alaska tribes” as Alaska-based federally registered tribes, including tribes associated with villages (i.e., the Native Village of Barrow) and regions (i.e., the Inupiat Community of the Arctic Slope). My definition excludes Alaska Native Corporations, as they are defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602 (2012). The National Historic Preservation Act (NHPA) has a broader definition of tribes that includes Alaska Native Corporations and Hawaiian Native Organizations. NHPA § 301, 16 U.S.C. § 470w(4) (2012).

2. ANCSA extinguished all existing Indian reservations in Alaska (except the Annette Island Reserve) and allowed the tribes on those former reservations to take title to the land if they forwent all other ANCSA benefits. 43 U.S.C. § 1618(a)-(b) (2012). Tribes on four reservations covering nearly four million acres

subsistence rights. ANCSA granted 44 million acres of land to Alaska Native Corporations.³ These corporations do not have government powers and not all tribe members are corporate shareholders.⁴ While the Alaska National Interest Lands Conservation Act of 1981 (ANILCA)⁵ withdrew large areas of federal land from development⁶ and established prioritized subsistence uses,⁷ it did not grant an Alaska native priority⁸ and does not apply to non-federal lands.⁹

This article examines the Traditional Cultural District (TCD) designation as an opportunity for tribes to conserve culturally significant land. A TCD eligible for listing on the National Register of Historic Places (the “Register”) is entitled to consideration under the National Historic Preservation Act of 1966 (NHPA).¹⁰ Once entitled for

took advantage of this provision. Statement of Julie Kitka, President, Alaska Federation of Natives, Before the Secretarial Commission on Indian Trust Administration and Reform (Aug. 19, 2013), <http://www.doi.gov/cobell/commission/upload/Trust-Statement-of-Julie-Kitka-81913.pdf>. In 1976, Congress amended ANCSA to provide for another tribe to obtain title to its former reserve (800 acres). *Id.* The rest of Alaska’s ownership is divided, with the federal government owning about 64%, the state owning about 25%, and Alaska Native Corporations owning about 10%. Nancy Gates, THE ALASKA ALMANAC: FACTS ABOUT ALASKA 112, 113 (30th ed. 2006).

3. ALASKA DEP’T OF NAT. RESOURCES, FACT SHEET, TITLE: LAND OWNERSHIP IN ALASKA (2000).

4. Phone Interview with Rosemary Ahtuanguaruak, Board Member, Inupiat Community of the Arctic Slope (June 15, 2014) (noting that only about half of the residents in the Native Village of Nuiqsut are shareholders in the Village Corporation Kuukpik). Further evidence of the divide between corporate interests and tribes can be found in the many positions taken on development of native lands. For example, Tikigaq Corporation from Point Hope entered into an agreement with Shell Exploration and Production Company to pursue Chukchi Sea development, while the Native Village of Point Hope fought a legal battle to avoid this development. Yereth Rosen, *Shell, Native corporations unveil joint venture in Chukchi Sea leases*, ALASKA DISPATCH (July 31, 2014), <http://www.adn.com/article/20140731/shell-native-corporations-unveil-joint-venture-chukchi-sea-leases>; *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 492–94 (9th Cir. 2014); see also Elizabeth Barrett Ristroph, *Alaska Tribes’ Melting Subsistence Rights*, 1 ARIZ. J. ENVTL L. & POL’Y 47, 75–79 (2010) (discussing differences between tribes and corporations).

5. Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2012)) [hereinafter ANILCA].

6. See *id.* (establishing National Parks, Preserves, Wildlife Refuges, Forests, and Wilderness Areas).

7. *Id.* § 3112.

8. See *id.* (granting a subsistence priority to “rural” residents).

9. See Ristroph, *supra* note 4, at 69 (citing *State v. Morry*, 836 P.2d 358, 368 (Alaska 1992); *McDowell v. State*, 785 P.2d 1, 10–11 (Alaska 1989); David S. Case & David A. Voluck, ALASKA NATIVES AND AMERICAN LAWS 301 (Univ. of Alaska Press, 2d ed. 2002)).

10. National Historic Preservation Act (NHPA) of 1966, Pub. L. No. 89-665, 80 Stat. 915, 915–19 (1966) (codified as amended at 16 U.S.C. § 470a (2012))

consideration under NHPA, federal decisions that may affect historic or cultural aspects of the land must take into consideration TCDs. TCD designation does not completely prohibit development.¹¹ Rather, such a designation only requires federal agencies to communicate with tribes and consider mitigation measures in their decision making process.

A TCD designation could help conserve Alaska lands without running afoul of provisions in ANILCA that limit the Executive Branch's ability to withdraw more land.¹² While a TCD designation may result in a modification of development plans, it would not qualify as a "withdrawal" of lands from the public domain.¹³

Part I of this Article addresses the requirements that culturally significant land must meet to be considered for a TCD designation. Part II discusses the geographical challenges to a TCD designation. Part III analyzes the process for attaining a TCD designation, the decision whether to acquire a formal or independent agency TCD designation, and the advantages and disadvantages of both processes. Lastly, Part IV discusses the effects of a TCD designation.

I. REQUIREMENTS FOR LISTING IN THE REGISTER

To be considered for TCD designation, a piece of land must first be eligible for registration on the Register. The National Park Service (NPS) is responsible for developing regulations on eligibility for listing on the Register.¹⁴ The Advisory Council on Historic Protection issues

[hereinafter NHPA].

11. *See id.* Nothing in NHPA specifically prohibits development of lands that are eligible for listing on the National Register, although, as discussed *infra*, consultation and mitigation are required.

12. Those who oppose the withdrawal of additional land for conservation purposes often refer to the "no more" clauses in ANILCA. *E.g.*, Letter from State of Alaska Office of Project Mgmt. and Permitting to Garry Owy, Nat'l Park Serv. (Mar. 10, 2011), available at http://dnr.alaska.gov/commis/opmp/anilca/pdf/110310_NPSDO41SOA.pdf; SALLY GIBERT, CITIZENS' ADVISORY COMM'N, ANILCA CONEXT, KEY PROVISIONS, AND IMPLEMENTATION 3 (2013), available at <http://dnr.alaska.gov/commis/cacfa/documents/FOSDocuments/GibertPresentaiton.pdf> (describing the "no more" clauses in ANILCA).

13. *See* Southeast Conference v. Vilsack, 684 F. Supp. 2d 135, 143-45 (D.D.C. 2010) (finding that the Tongass National Forest Plan, which prohibited harvesting of 1.22 million acres of forest classified as "old growth reserves," did not constitute a withdrawal requiring congressional permission under ANILCA; rather, the land-use designations were merely examples of the statutory responsibility to provide for multiple use and sustained yield of forest products and services).

14. *See* 36 C.F.R. §§ 60.1-60.15 (2014) (enumerating the authority and criteria for registration on the National Register of Historic Places). In other words, a federal land manager such as the Bureau of Land Management (BLM) would not determine the eligibility of BLM-managed lands for listing in the Register—NPS

regulations governing the protection of listed and eligible sites.¹⁵ NPS's regulations containing criteria for eligibility appear in 36 C.F.R. § 60.4.¹⁶

As of this writing, NPS is in the process of updating its guidelines on identifying, evaluating, and documenting Traditional Cultural Properties and Native American Landscapes.¹⁷ This update may lead to recommendations for revising the 36 C.F.R. § 60.4 criteria.¹⁸ In the meantime, the current version of NPS's Bulletin 38—1998 Guidelines for Evaluating and Documenting Traditional Cultural Properties¹⁹—may be used to understand how the criteria in 36 C.F.R. § 60.4 apply to Traditional Cultural Properties.

To be eligible for listing on the Register, a property must first meet threshold requirements concerning the existence of a physical place or object and its integrity.²⁰ The place or object must then meet one of four criteria listed in 36 C.F.R. § 60.4 and described below²¹ and must not have any disqualifying characteristics.²²

A. Existence Of Physical Place With A Historic Context

1. Definitions and Typical Examples

The Register includes a wide range of Traditional Cultural Properties, ranging from landscapes to structures and objects.²³ There is no requirement for the existence of a building or human-made improvement—"a culturally significant natural landscape may be classified as a site, as may the specific location where significant traditional events, activities, or cultural observances have taken place."²⁴

has this authority.

15. See *id.* §§ 800.1–800.16 (detailing the protections for registered historic places).

16. *Id.* § 60.4.

17. The latest information regarding the update is available at *National Register of Historic Places*, <http://www.nps.gov/nr/> (last visited Aug. 5, 2014).

18. Telephone Interview with Alexis Abernathy, NPS National Register Reviewer, Historian, Bulletin 38 Update Team Coordinator (May 6, 2013).

19. PATRICIA L. PARKER & THOMAS F. KING, U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1998), available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf> [hereinafter GUIDELINES]. The criteria in 36 C.F.R. § 60.4 do not actually mention traditional cultural significance, but this is the focus of the Parker and King Department of the Interior (DOI) bulletin on Traditional Cultural Properties.

20. *Id.* at 11.

21. *Id.* at 12–14; see *infra* Part I.C.

22. GUIDELINES, *supra* note 19, at 14–18.

23. 16 U.S.C. § 470a(a)(1)(A) (2012).

24. GUIDELINES, *supra* note 19, at 11.

A collection of properties comprising a culturally significant entity may be classified as a TCD (a type of Traditional Cultural Property).²⁵ A district is a unified entity that usually consists of historically-, functionally-, or archeologically-related properties.²⁶ Examples of districts include groups of habitation sites, rural villages, and transportation networks.²⁷

2. *Alternative Eligibility*

Sites where culturally significant species are found (i.e., the habitat of a caribou herd or the path of the bowhead whale) could potentially be eligible for listing on the Register, even if historic events did not take place at these sites.²⁸ Legal commentator D.S. Pensley has taken this proposition one step further, arguing that Copper River salmon are “objects” eligible for listing in the Register.²⁹ Pensley suggests that an animal can be a “structure” made up of bone, flesh, sinew, and skin, while a group of animals can comprise a “district.”³⁰

Pensley discusses the case of *Dugong v. Rumsfeld*,³¹ in which a U.S. District Court found that a culturally important species listed on the Japanese Register of Cultural Properties—here, the dugong—merited consideration under NHPA³² in connection with plans for a U.S. military base.³³ The court held that the dugong species could meet the definition

25. *Id.*

26. *How to Apply the National Register Criteria for Evaluation*, NPS, U.S. DEP'T OF THE INTERIOR 5 (1997), available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf> [hereinafter *Criteria*].

27. *Id.* at 6.

28. Ingrid Brostrom, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 147, 155 (2006); see also Charles A. Birnbaum, *Protecting Cultural Landscapes: Planning, Treatment, and Management of Historic Landscapes*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR 2 (1994) (defining an ethnographic landscape to include natural and cultural components such as small plant communities, animals, subsistence, and ceremonial grounds).

29. D.S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10366 (2012).

30. *Id.* at 10375.

31. No. C-03-4350-MHP, 2005 WL 522106 (N.D. Cal. 2005).

32. *Id.* at *9. NHPA § 470a-2 requires consideration of impacts to sites outside of the United States that are on the World Heritage List or on the applicable country's equivalent of the National Register. NHPA § 470a-2. Because culturally significant species are eligible for listing on Japan's equivalent of the National Register, the Okinawan dugong was eligible for protection under NHPA.

33. *Dugong*, 2005 WL 522106, at *3 (discussing how the construction of a military base could destroy the dugong habitat).

of “property” under NHPA § 470a-2.³⁴ It further observed that “[t]he presence of culturally significant animals had been the basis of many listings and determinations of eligibility for the National Register, including several animal habitats important in Native American tribal histories.”³⁵ The court also pointed out that the U.S. National Register could include wildlife refuges culturally associated with certain species.³⁶

Pensley notes that Copper River salmon possess traditional cultural value.³⁷ They figure largely in the Eyak mythology of the two villages established near the Copper River Delta and in the traditional ritual of the first salmon.³⁸ The fish continue to be culturally significant and are distinctly linked with a place—the Copper River Basin—through which they migrate each year.³⁹ Even if NPS would not consider Copper River salmon to be a property eligible for listing on the Register, it is possible that the habitat and migration route could be eligible for a TCD designation.

B. Integrity

Integrity is another threshold requirement for listing. A property must have “integrity of location, design, setting, materials, workmanship, feeling, and association.”⁴⁰ This requires that the property have an “integral relationship to traditional cultural practices or beliefs” (i.e., the specific location is needed for cultural practices), and that the property must be in good enough condition such that the relevant relationships survive.⁴¹ This requirement generally requires documentation showing that a tribe or group actually uses the property

34. *Id.* at *9-10.

35. *Id.* at *7.

36. *Id.* at *8. The listed refuges at the time of the court decision included the Lower Klamath Wildlife Refuge, the Lake Merritt Wild Duck Refuge, and the Pelican Island Wildlife Refuge. See Nat'l Park Serv., *National Register of Historic Places: Research*, <http://www.nps.gov/nr/research/> (the list can be found by downloading the spreadsheet of listed properties). Another relevant case is *Hatmaker v. Georgia Dep't of Trans.*, 973 F. Supp. 1047, 1056-57 (M.D. Ga. 1995), which found that the Georgia Department of Transportation had a duty to report that a federally funded project would involve removing an oak tree of potential historic significance. The fact that a single tree had not previously been included in the Register did not preclude this oak from being eligible. *Id.*

37. Pensley, *supra* note 29, at 10375.

38. *Id.* at 10376.

39. *Id.*

40. 36 C.F.R. § 60.4.

41. GUIDELINES, *supra* note 19, at 11.

in question.⁴² Proof that a property forms an integral part of the habitat used by a culturally important species might satisfy the integrity requirement, based on an interpretation consistent with the *Dugong* decision.

C. Criteria Under 36 C.F.R. § 60.4

Once a piece of property meets the threshold requirements of physical place with a historic context and integrity, it must also meet any one of the four criteria discussed below to be listed on the Register.

Criterion A requires the land to be “associated with events that have made a significant contribution to the broad patterns of our history.”⁴³ The word “our” in this criterion refers to the group that has traditionally inhabited or used the property.⁴⁴ The word “events” may include “specific moments in history or a series of events reflecting a broad pattern or theme.”⁴⁵ Important subsistence hunting sites arguably meet this criterion. They have been important in maintaining the nutritional and spiritual wellbeing of the tribe that uses them, and tribal members have passed down information about their locations from generation to generation.

Criterion B requires the land to be “associated with the lives of persons significant in our past.”⁴⁶ “Persons” includes previously living individuals as well as legendary figures who are featured in the traditions of a group.⁴⁷ This criterion could be met if there are specific tribal elders (real or legendary) associated with the property.

Criterion C requires that the land “embody the distinctive

42. For example, the determination of eligibility for the Badger-Two Traditional Cultural District required extensive documentation of the Blackfeet’s occupation of the area. See *Part 1: Determination of Eligibility Notification for The Badger-Two Medicine Blackfoot Traditional Cultural District Listing in the National Register of Historic Places*, GREAT FALLS TRIBUNE (June 11, 2004), <http://www.greatfallstribune.com/news/stories/20040611/hallcreek/625643.html>; *Part 2: Determination of Eligibility Notification for The Badger-Two Medicine Blackfoot Traditional Cultural District Listing in the National Register of Historic Places*, GREAT FALLS TRIBUNE (June 11, 2004), <http://www.greatfallstribune.com/news/stories/20040611/hallcreek/625644.html>; *Part 3: Determination of Eligibility Notification for The Badger-Two Medicine Blackfoot Traditional Cultural District Listing in the National Register of Historic Places*, GREAT FALLS TRIBUNE (June 11, 2004), <http://www.greatfallstribune.com/news/stories/20040611/hallcreek/625645.html> [collectively, hereinafter *Badger-Two Medicine Eligibility Determination*].

43. 36 C.F.R. § 60.4(a).

44. GUIDELINES, *supra* note 19, at 12.

45. *Id.*

46. 36 C.F.R. § 60.4(b).

47. GUIDELINES, *supra* note 19, at 13.

characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction.” Since these characteristics are generally associated with built properties, this criterion would not be applicable to the large undeveloped landscapes associated with TCDs.⁴⁸

Criterion D requires that the land has “yielded, or may be likely to yield, information important in prehistory or history.”⁴⁹ Traditional tribal village sites may qualify for the Register if they are archeological sites that “can provide important information about the history and prehistory of the group that lived there.”⁵⁰ Alaska likely has many archeological sites that could meet this requirement.

One example of a piece of property determined eligible for listing based on all of the above criteria is the Nantucket Sound, which consists of the waterway and coastline along Nantucket Island, Massachusetts.⁵¹ It meets Criterion A by virtue of “its associations with the ancient and historic period of Native American exploration and settlement.”⁵² It meets Criterion B based on the area’s association with figures described in Native American stories.⁵³ It meets Criterion C by being “a significant and distinguishable entity integral to [Native American] . . . traditions, practices, . . . religion, . . . foodways,” and culture.⁵⁴ Finally, it satisfies Criterion D because of the “important cultural, historical, and scientific information the area had yielded [and was] likely to yield through archeology, history, and ethnography.”⁵⁵

D. Absence of Disqualifying Characteristics

As a fourth requirement, 36 C.F.R. § 60.4 lists qualities that make properties ineligible or require additional justification, such as being a religious institution or consisting of relocated buildings.⁵⁶ Properties that have achieved significance only within the 50 years preceding their evaluation are generally not eligible,⁵⁷ nor are cemeteries unless

48. 36 C.F.R. § 60.4(c).

49. 36 C.F.R. § 60.4(d).

50. GUIDELINES, *supra* note 19, at 14.

51. NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, DETERMINATION OF ELIGIBILITY, NANTUCKET SOUND, MASSACHUSETTS (2010), available at <http://www.nps.gov/nr/publications/guidance/NantucketSoundDOE.pdf>.

52. *Id.* at 2

53. *Id.*

54. *Id.*

55. *Id.*

56. 36 C.F.R. § 60.4(d).

57. GUIDELINES, *supra* note 19, at 17.

associated with historic events or people of transcendent importance.⁵⁸

II. GEOGRAPHICAL CHALLENGES TO TCD DESIGNATION

While it may be easier to pinpoint specific sites than to justify the eligibility of an entire district, the designation of a large district would bring greater benefits for subsistence and conservation purposes. To understand the benefits of a large district, imagine a designation that only consists of specific sites spread over a tribe's hunting area. Oil and gas development could be routed around the individual sites, which could impede the access of hunters as well as wildlife to the sites.

Determining a district's boundaries may be challenging. However, one strategy would be to choose a group of hunting sites used by a particular group of people (such as hunters in one village) and the travel routes between these sites. Another possibility is to base the designation on a culturally important animal (such as the caribou or the polar bear), and include highly important habitat areas that may or may not be subsistence areas. Though establishing a boundary encompassing the full range of the animal's habitat could be politically and legally difficult,⁵⁹ extensive research would be needed to document the full range of the district and demonstrate the district's historical and cultural significance. This kind of research can be fairly expensive.⁶⁰

One model for identifying the boundaries of a large district is the Badger-Two Medicine area in Montana, which is important to the Blackfeet tribe for cultural, spiritual, and subsistence purposes.⁶¹ Over

58. *Id.* Many traditional cultural properties do contain cemeteries whose presence contributes to their significance. An example is Tahquitz Canyon, which contains a number of cemeteries that have historically been important to the Cahuilla people. *Id.* at 16. Alternatively, a burial site could be eligible based on its archeological significance or as part of a larger cultural district (with subsistence sites being the focal points of the district). See *Criteria, supra* note 26, at 34 (discussing National Historic Register requirements for cemeteries).

59. This has been made apparent in a lawsuit by the State of Alaska, the North Slope Borough, the Arctic Slope Regional Corporation, and other North Slope stakeholders against the U.S. Fish and Wildlife Service regarding its designation of critical habitat encompassing the polar bear's expansive range. *Alaska Oil & Gas Assoc. v. Salazar*, 916 F. Supp. 2d 974, 988 (D. Alaska 2013).

60. Phone Interview with Paul Lusignan, National Park Service (Reviewer of eligibility for properties in western states) (March 19, 2013); CHARLES CARROLL, 16 ADMINISTERING FEDERAL LAWS AND REGULATIONS RELATED TO NATIVE AMERICANS, PRACTICAL PROCESSES AND PARADOXES, CULTURAL RESOURCE MANAGEMENT 20 (1993) available at <http://npshistory.com/newsletters/crm/crm-v16-special.pdf> (suggesting that the ethnographic and archeological research associated with identifying traditional cultural properties can be expensive).

61. See Martin Nie, *The Use of Co-Management and Protected Land-Use*

89,000 acres of the area have been deemed eligible for designation as a TCD.⁶² The boundaries were based on various ethnographic studies identifying the Blackfeet's specific localities and specific uses of plant, animal, and mineral resources.⁶³

Land designated as a LCD could conceivably be much larger than the Badger-Two Medicine District. The Mount Taylor Traditional Cultural Property is an example, though it was designated under the State of New Mexico's system rather than the federal system.⁶⁴ The land area consists of 344,729 acres, not including 89,938 acres of private lands within the boundaries.⁶⁵ The boundaries were decided by the location of six "guardian peaks" surrounding Mount Taylor.⁶⁶ The boundaries roughly follow those of the Cibola National Forest Mount Taylor Ranger District, an area determined by NPS to be eligible for listing on the Register.⁶⁷

III. DESIGNATION PROCESS

An area may gain a TCD designation through formal nomination or independent agency discovery. Before seeking a formal nomination, however, an Alaska native tribe should be aware of the advantages and disadvantages of a formal TCD designation as well as the process of gaining the TCD designation.

A. Considerations In Pursuing A Formal Nomination

1. *Right of Consultation*

When a property is designated as eligible for listing on the Register, agencies must ensure that it is preserved to maintain its historic,

Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands, 48 NAT. RESOURCES J. 585, 588 (2008) (discussing the Badger-Two Medicine area as an illustration of ways for Native Nations to protect rights on federal lands).

62. *Id.* at 593. Although the Badger-Two Medicine lands are eligible for listing on the Register, they have not been formally listed. See *Badger-Two Medicine Application for Permits to Drill (APDS)*, BUREAU OF LAND MGMT. (Aug. 12, 2011), available at http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_information/bps.Par.23367.File.dat/FINA.pdf.

63. Nie, *supra* note 61, at 593.

64. News Release, N.M. Historic Pres. Div., Collaboration Results in New Mount Taylor State Register Listing (June 5, 2009), http://www.nmhistoricpreservation.org/documents/cprc/passage_release.pdf.

65. *Id.*

66. *Id.*

67. *Id.*

archaeological, architectural, and cultural values.⁶⁸ A federal agency is required to consult not only with historic preservation officers,⁶⁹ but also “with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to a property that is listed or is eligible for listing in the Register.⁷⁰ “Tribe” is defined broadly to include Alaska Native Corporations as well as Alaska Native Villages.⁷¹ The right to consultation exists regardless of land ownership,⁷² which is important in Alaska and Hawaii since there is little or no tribal or community ownership of traditional lands.⁷³

Where a federal, federally assisted, or federally licensed undertaking⁷⁴ could affect an eligible or listed property, a process akin to that of the National Environmental Policy Act is triggered requiring consultation, consideration of alternatives, and identification of mitigation measures.⁷⁵ This process is often referred to as Section 106

68. Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (1971).

69. See 16 U.S.C. § 470f (requiring the agency to allow the Advisory Council on Historic Preservation to comment on the proposal); 36 C.F.R. § 800.4(b) (requiring consultation with a State or Tribal Historic Preservation Officer).

70. 16 U.S.C. § 470a(d)(6)(B); accord 36 C.F.R. § 800.2(c)(2).

71. NHPA § 301, 16 U.S.C. § 470w(4) (“‘Indian tribe’ or ‘tribe’ means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in [section 3 of the Alaska Native Claims Settlement Act.]”); see also 36 C.F.R. § 800.16(m) (defining “Indian tribe” identically).

72. 16 U.S.C. § 470a(d)(6); 36 C.F.R. § 800.2(c)(2). Consultation with the federal Advisory Council on Historic Preservation and the State Historic Preservation Office is also required. 16 U.S.C. § 470a(b)(3)(I); 36 C.F.R. § 800.2.

73. See Alaska Native Claims Settlement Act § 19, 43 U.S.C. § 1618 (eliminating most reservations). There are no reservations in Hawaii akin to those in the continental United States. One million eight-hundred thousand acres of land that once belonged to the Kingdom of Hawaii were confiscated by the Provisional Government and the Republic of Hawaii in the late 1800s and purportedly transferred by the Republic of Hawaii in 1898 to the United States by a Joint Resolution of annexation. At statehood the United States “ceded” the public lands it no longer needed back to the State of Hawaii for management by the Office of Hawaiian Affairs. See generally Rice v. Cayetano, 528 U.S. 495 (2000) (discussing the history of Hawaiian lands); Williamson Chang, *Hawaii’s “Ceded Lands”: The Ongoing Quest for Justice in Hawai’i*, University of Hawaii at Manoa, Faculty Lecture Series (Oct. 1, 2014).

74. “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, including (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” NHPA § 301(7), 16 U.S.C. 470w(7).

75. Compare NHPA § 106 (requiring such consultation, consideration of alternatives, and identification of mitigating measures) with 42 U.S.C. § 4321 (requiring consideration of alternatives for actions impacting the environment).

consultation as it is based on NHPA § 106.

2. *Strength of the Right of Consultation*

For purposes of cultural protection, the right to consultation under section 106 may be stronger than the right to consultation provided for tribes in Executive Order 13,175.⁷⁶ First, section 106 is a statute rather than an executive order. Statutes cannot be changed by the unilateral action of a future president—only by an act of Congress. Moreover, section 106 gives tribes the right to sue for inadequate consultation.⁷⁷ Executive order 13,175, on the other hand, carries no such right. Executive orders are typically unenforceable unless a plaintiff can show both that the President issued the order pursuant to a statutory mandate and that the President intended to create a private cause of action.⁷⁸ In this case, Executive Order 13,175 specifically states that it does not create a right of action.⁷⁹

Second, section 106 of NHPA applies to any tribe that attaches cultural or religious significance to a property, regardless of any federal decision concerning tribal issues.⁸⁰ By comparison, agencies charged with implementing Executive Order 13,175 may independently find that a project does not have sufficient “tribal implications”⁸¹ to trigger the

76. Compare NHPA § 106 (requiring federal agencies to consult with tribes when they attach religious or cultural significance to a property) with Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), (superseding Executive Order No. 13,084) (requiring, at 3(c), federal agencies to consult with tribes when “undertaking to formulate and implement policies that have tribal implications”).

77. This was one of the claims in *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 n.22 (9th Cir. 2006).

78. *E.g.*, *Zhang v. Slattery*, 55 F.3d 732, 747–48 (2d Cir. 1995) (citing *Facchiano Constr. Co. v. U.S. Dep’t of Labor*, 987 F.2d 206, 210 (3d Cir. 1993)); *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975).

79. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,252 (Nov. 6, 2000) (“This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.”).

80. See 36 C.F.R. § 800.2(c)(2)(ii) (“[S]ection 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.”).

81. 65 Fed. Reg. at 67,250 (requiring agencies to consult with tribal officials when a policy has tribal implications). “Policies that have tribal implications” are defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and

right of consultation.

While the right of consultation under section 106 of NHPA does not guarantee tribal satisfaction with the resulting consultation,⁸² it is a useful procedural tool for protecting traditional land.

3. *Disadvantages of a Formal TCD Designation*

It is not clear how much an Alaska tribe would benefit from *formal listing* as a TCD on public land.⁸³ While private property owners can benefit from the tax incentives a listing on the Register would bring,⁸⁴ most Alaska tribes do not own land that tribe members use for subsistence and cultural purposes.⁸⁵ And while some grants are restricted to protection of properties listed on the Register,⁸⁶ there are grants available to tribes for cultural property regardless of listing.⁸⁷

Moreover, a formal nomination does not give a tribe any additional

Indian tribes, or on the distribution of power and responsibilities between Federal Government and Indian tribes." *Id.* at 67,249.

82. See generally Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 444 (2013) (noting that inadequacies in the various statutes and orders requiring consultation, as well as inconsistencies between different agency policies, have not alleviated ineffective tribal consultations).

83. Phone Interview with Alexis Abernathy, National Register Reviewer/Historian and coordinator of the team working on the Bulletin 38 Update, National Park Service (May 6, 2013) (suggesting that there would not really be a benefit to a landless tribe of having a TCD formally nominated for listing on the Register, as opposed to simply being eligible for listing, since the tribe would be able to participate in the 106 consultation process either way).

84. See *Tax Incentives for Preserving Historic Properties*, NAT'L PARK SERVICE, <http://www.nps.gov/tps/tax-incentives.htm> (last visited Oct. 7, 2014) (explaining the tax benefits available for the restoration of historic buildings).

85. See Gates, *supra* note 2.

86. See 36 C.F.R. § 60.3(c) ("A determination of eligibility does not make the property eligible for such benefits as grants, loans, or tax incentives that have listing on the National Register as a prerequisite.").

87. See *Tribal Project Grants*, NAT'L PARK SERV., <http://www.nps.gov/hps/HPG/Tribal/program.html> (last updated Sept. 14, 2014) (describing the NPS Tribal Preservation Program, which assists tribes in preserving their properties and traditions); *Fiscal Year 2014 Historic Preservation Fund Grants to Indian Tribes, Alaskan Natives, and Native Hawaiian Organizations, Grant Program Guidelines and Application Instructions*, NAT'L PARK SERV., at 3, available at http://www.nps.gov/history/tribal_heritage/downloads/2014_Tribal_Guidelines.docx (explaining that Historic Preservation Fund Grants are available to Tribes, Alaska Native Corporations, and Native Hawaiian Organizations to identify cultural resources, plan for preservation of a historic or cultural property that is either listed on, or determined eligible for the Register, developing a comprehensive preservation plan, and documenting cultural traditions; the only grant funds limited to properties actually listed on the Register are those for repairs to properties).

rights of consultation—the right is the same whether the property is eligible to be listed or is actually listed.⁸⁸ A tribe may decide that pursuing nomination is not worth spending additional time and resources,⁸⁹ even though the most expensive part of the process—hiring consultants to research the property’s cultural significance—has already taken place.⁹⁰ Alternatively, a tribe may worry that its property listed on the Register could attract outside hunters and tourists or lead to vandalism and grave robbing.⁹¹

Despite the fact that a formal TCD listing may attract regional or national attention and build support for greater protection, a tribe may not want to draw attention to its land. In any event, the designation may attract such attention regardless of whether the property is formally listed.

B. Independent Agency Determination Of Eligibility

NHPA requires federal agencies to establish programs to identify, evaluate, and nominate sites to the Register.⁹² A federal agency, therefore, may find a property eligible for listing even when a tribe or cultural group is not involved. Such an instance could arise as part of the agency’s regular land management process or because the agency is evaluating the impacts of an undertaking that may affect cultural or historical properties. Each agency has its own procedures for evaluating properties.⁹³

88. 16 U.S.C. § 470a(d)(6) (2012); 36 C.F.R. § 800.2(c)(2).

89. In the case of the Badger-Two Medicine Area, nomination was not a priority for the tribe. Nomination was more of a concern when there were more oil and gas leases in the area, but many of the leases were bought out with assistance from non-profits. Phone Interview with Keith Tatsey, Member on Badger-Two Medicine Area, Blackfeet Tribe (April 30, 2013). Another reason why the Blackfeet did not pursue a nomination may relate to the difficulty in singling out a particular portion of the Blackfeet’s traditional land as being worthy of the Register: one tribe elder noted that there is no specific part of the land that is more important than the rest of the land. *Id.*

90. Phone Interview with Paul Lusignan, Reviewer of Eligibility for Properties in Western States, National Park Service (Mar. 19, 2013).

91. *Id.* To alleviate this concern, tribes should be aware that the exact location of a site in the Register can remain confidential. NHPA § 304, 16 U.S.C. § 470w-3 (stating that information about traditional cultural properties must be kept confidential if disclosure may result in an “invasion of privacy,” “risk harm to the historic” property, or “impede the use of a traditional religious site”).

92. 16 U.S.C. § 470h-2(a)(2).

93. For example, BLM, which manages nearly 366 million acres of land in Alaska, has entered into a Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers to address procedures for reviewing historical properties and conducting consultation prior to undertakings. BUREAU OF LAND MGMT.,

C. Eligibility Determination And Nomination Process

When an agency has not independently determined a land's eligibility, a tribe may seek a formal nomination from the state or federal government. The first step in designating a Traditional Cultural District is to conduct research to demonstrate the property's eligibility and the extent of its boundaries. This research, required regardless of whether a tribe plans to formally nominate a property for listing on the Register, includes review of existing studies, archaeological surveys, and interviews.⁹⁴ To ensure credibility, a professional archaeologist or anthropologist who meets the Interior Secretary's Professional Qualification Standards should conduct or supervise the research.⁹⁵

1. Non-federal Lands

If property is not located on federal land, a State Historic Preservation Officer generally takes the lead in nominating the property

PROGRAMMATIC AGREEMENT AMONG THE BUREAU OF LAND MANAGEMENT, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS REGARDING THE MANNER IN WHICH THE BLM WILL MEET ITS RESPONSIBILITIES UNDER THE NATIONAL HISTORIC PRESERVATION ACT (2012), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies/cr_publications.Par.51382.File.dat/PA_Signed_Package.pdf [hereinafter PROGRAMMATIC AGREEMENT]; see also BUREAU OF LAND MGMT., SUBJECT 8100 - THE FOUNDATION FOR MANAGING CULTURAL RESOURCES (2004), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.71969.File.dat/8100.pdf [hereinafter BLM MANUAL] (noting the Programmatic Agreement's authority as the procedural basis for BLM managers). The Programmatic Agreement requires BLM to work with tribes at the beginning of the land management process to identify properties of religious and cultural significance that may be eligible for listing. PROGRAMMATIC AGREEMENT, *supra*, at 7.

94. See GUIDELINES, *supra* note 19, 6-10 (describing factors to consider in identifying cultural properties); *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines for Identification*, NAT'L PARK SERVICE, http://www.nps.gov/history/local-law/arch_stnds_2.htm (last visited Oct. 1, 2014). In the case of the Badger-Two Medicine Area, research was funded by federal agencies, including the Forest Service and the U.S. Army Corps of Engineers. Telephone Interview with Keith Tatsey & Terry Tatsey, Members of Badger-Two Medicine Area, Blackfeet Tribe (April 30, 2013). The Forest Service office responsible for managing the Lewis and Clark National Forest (which encompasses the Badger-Two Medicine Area) requested that the Keeper of the Register consider the eligibility of the property for listing, although the Forest Service did not pursue a formal nomination. *Badger-Two Medicine Eligibility Determination*, *supra* note 42.

95. See NHPA § 112 ("contractors responsible for historic resources shall meet qualification standards established by the Office of Personnel Management in consultation with the Secretary").

to the Register.⁹⁶ If the Alaska State Historic Preservation Office (which is housed within the Alaska Department of Natural Resources) chooses not to nominate property to the Register, the other sources of nomination would be (1) the Secretary of the Interior (by designation as a National Historic Landmark), (2) the President (by Executive Order), or (3) Congress.⁹⁷

2. *Federal Lands*

The review and nomination process varies when the property is located on federal land, since each agency has its own process for the identifying, evaluating, and nominating properties to the Register, and for protecting historic properties.⁹⁸ The Federal Preservation Officer generally takes the lead, though the State Historic Preservation Officer has a role.⁹⁹

IV. EFFECT OF DESIGNATION

A. The Section 106 Process

When a federal undertaking has the potential to affect cultural or historic aspects of a property eligible for listing on the Register, whether or not it is actually listed, Section 106 protections kick in. As discussed above, these protections initially consist of consultation with tribes.¹⁰⁰ The Section 106 process also requires that agencies assess the effects of their undertakings on eligible properties, determine whether the effect will be adverse, and avoid, minimize, or mitigate the adverse effects.¹⁰¹ Adverse effects can include “[i]ntroduction of visual, atmospheric or

96. 36 C.F.R. § 60.6 (2014); *see also* National Register of Historic Places Program: Nomination Forms, NAT’L PARK SERV., <http://www.nps.gov/nr/publications/forms.htm> (last visited Oct. 1, 2014) (instructing potential applicants to contact a State Historic Preservation Office before completing the form).

97. 36 C.F.R. § 60.1. A nomination could not come from a private individual, since Alaska has an approved State Historic Preservation Office. *See id.* (stating that nominations from any person are only applicable in a State with no approved State Historic Preservation Program).

98. 16 U.S.C. § 470h-2(a)(2).

99. 16 U.S.C. §§ 470h-2(a)(2)(E)(ii), 470h-2(c).

100. Consultation with BLM is conducted pursuant to its Programmatic Agreement, which requires each state director to contact “Indian tribes that are affected by BLM undertakings within his or her jurisdiction on a regular basis for the purpose of initiating a discussion about ways in which BLM and each Indian tribe can foster better communication.” PROGRAMMATIC AGREEMENT, *supra* note 93, at 8.

101. 36 C.F.R. §§ 800.5, 800.6, 800.7.

audible elements that diminish the integrity of the property's significant historic features."¹⁰² If a Traditional Cultural District is designated in part because of its quiet, undeveloped setting, the development of nearby, offsite areas could be interpreted as adversely affecting the designation.

B. Eligibility/Designation Guarantees Process But Not An Outcome

The Section 106 process neither prohibits development nor guarantees that an agency will follow a tribe's recommendations regarding development. A court considering a claim that the National Historic Preservation Act of 1966 (NHPA) was not properly followed may defer to an agency's finding that the procedural requirements of NHPA have been satisfied. For example, Nantucket Sound's eligibility, did not prevent the Cape Wind Energy Project—a plan to put 130 windmills in the Sound—from securing all of its required state and federal permits.¹⁰³

Another example can be found in the facts of *Navajo Nation v. U.S. Forest Service*.¹⁰⁴ In *Navajo Nation*, several tribes challenged the Forest Service's decision to use wastewater for artificial snow production in a ski resort located within a TCD eligible to be listed on the Register.¹⁰⁵ Plaintiffs alleged that the decision violated the Religious Freedom Restoration Act,¹⁰⁶ the National Environmental Policy Act,¹⁰⁷ and NHPA.¹⁰⁸ The Ninth Circuit upheld a lower court ruling finding the Forest Service in full compliance with NHPA as the Service attempted to consult with affected tribes.¹⁰⁹ The lower court rejected plaintiffs' contention that the consultation was meaningless because the Forest Service had prejudged the matter.¹¹⁰

In other cases, however, NHPA claims regarding a lack of consultation have been successful. In *Pueblo of Sandia v. United States*, Pueblo tribes sued the Forest Service for failure to comply with NHPA

102. 36 C.F.R. § 800.5(a)(2).

103. *Frequently Asked Questions: Permitting Process and Cape Wind*, CAPE WIND, <http://www.capewind.org/faqs/permitting-process-and-cape-wind> (last visited Nov. 8, 2014).

104. 535 F.3d 1058 (9th Cir. 2008).

105. *Id.* at 1062.

106. 535 F.3d at 1063.

107. *Id.*

108. *Id.*

109. *See id.* at 1080 (affirming the district courts holding that consultation process was adequate to fulfill NHPA).

110. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1060 (9th Cir. 2007).

in its evaluation of Las Huertas Canyon in the Cibola National Forest.¹¹¹ The Pueblos asserted that the canyon contained sites of religious and cultural significance, qualifying the canyon as a traditional cultural property eligible for listing on the Register.¹¹² The Forest Service argued that though it had sent numerous letters to tribes and individuals and attended Pueblo Council meetings, it had not received the type of information requested in the letters and meetings.¹¹³ As a result, the Forest Service found that the canyon did not constitute a traditional cultural property and instituted a new management strategy for it.¹¹⁴

The Tenth Circuit Court found that “the information the tribes did communicate to the Forest Service agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought.”¹¹⁵ The court concluded that the Forest Service’s requests for information did not constitute reasonable efforts to identify historic properties as required by NHPA regulations. Simply put, the Service “did not make good faith effort to identify historic properties.”¹¹⁶

C. Eligibility Can Support Agency’s Decision To Limit Detrimental Activities

Eligibility determinations can influence agency decisions limiting development and activities allowed on the property. When agency decisions are challenged in court, TCD eligibility helps to justify the limitations placed on the property.

The Forest Service’s action on the Badger-Two Medicine Travel Management Plan is an example a TCD designation contributing to and justifying limitations placed on motorized travel. In that instance, tribe members worked with the Forest Service on an environmental impact statement and requested that the Forest Service develop a plan to limit motorized travel in the area significantly.¹¹⁷ As a result of their input, the tribe’s plan was selected and, ultimately, challenged in court.¹¹⁸ In

111. Pueblo of Sandia v. United States, 50 F.3d 856, 857 (10th Cir. 1995).

112. *Id.*

113. *Id.* at 860.

114. *Id.*

115. *Id.* at 861.

116. *Id.* at 862–63.

117. Phone Interview with Keith Tatsey & Terry Tatsey, Members on Badger-Two Medicine Area, Blackfeet Tribe (April 30, 2013); *see also Agency releases Rocky Mountain Front rec plan*, MISSOULIAN, June 15, 2005, available at http://missoulian.com/breaker/agency-releases-rocky-mountain-front-rec-planposted-at-p-m/article_7976fbe3-92f6-5a04-ae4e-c390c96b489c.html.

118. *See Fortune v. Thomson*, No. 09-98, 2011 WL 206164, at *1 (D. Mont. Jan.

Fortune v. Thomson, plaintiffs claimed that the plan's prohibition on motor vehicle access violated the Establishment Clause of the Constitution by favoring a religious purpose.¹¹⁹ The Montana District Court, considering the TCD resources governed by NHPA and finding secular purposes, upheld the plan.¹²⁰

Similarly, the Montana District Court upheld a Forest Service decision not to issue oil and gas leases in the Lewis and Clark National Forest.¹²¹ In its decision, the court pointed to several supporting factors, including the presence of a TCD.¹²²

CONCLUSION

More often than not, Alaska native tribes do not own lands they depend on for subsistence and cultural survival. In these lands, they have little control over development and activities.¹²³ A property eligible for listing on the National Register of Historic Properties may give tribes and cultural organizations a stronger role in making decisions regarding development. Determining the eligibility of property for listing can be challenging given the difficulty of identifying and justifying boundaries and the expense of the anthropological research required. The benefits of Traditional Cultural District designation, however, may significantly aid a tribe's efforts in maintaining control over lands and traditions important to it.

20, 2011) (challenging the Badger-Two Medicine Travel Plan).

119. *Id.*

120. *Id.* at *3.

121. *Rocky Mountain Oil & Gas Ass'n v. U.S. Forest Serv.*, 157 F. Supp. 2d 1142, 1144 (D. Mont. 2000).

122. *Id.* at 1144–45 n.3.

123. *Gates*, *supra* note 2.