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## The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Future

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# The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Future

Wesley James Furlong\*

*“Our way of life is based on our relationship to the land. We must care for and respect the land and animals given to us by the Creator.”*

—First Chief Galen Gilbert<sup>1</sup>

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## I. AMERICA FIRST, NATIVE AMERICA LAST

President Donald J. Trump’s administration touts its “America First Energy Plan” and push for “energy dominance” as a resounding victory. A recent White House “fact sheet” states “President Donald J. Trump has implemented policies that increase energy production and advance energy independence”; “President Trump ended the costly war on energy that hurt America’s vital energy producers and cost American workers their jobs”; and “The Trump Administration is unleashing an unprecedented energy production boom and improving infrastructure.”<sup>2</sup>

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1. *H.R. 1146, “Arctic Cultural and Coastal Plain Protection Act”*: *Hearing Before the Subcomm. on Energy and Mineral Res. of the H.R. Comm. on Natural Res.*, 116th Cong. 11 (2019) (statement of First Chief Galen Gilbert, Arctic Village).

2. *President Donald J. Trump is Ending the War on American Energy and Delivering a New Era of Energy Dominance*, WHITE HOUSE (Oct. 23, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-war-american-energy-delivering-new-era-energy-dominance/>.

Ending this “war,” however, has come at the expense of Native America. The Trump Administration’s push for “energy dominance” has been nothing less than an all-out assault on Indian Country—as well as public lands. From almost, quite literally, his first day in office, tribes<sup>3</sup> and the protection of tribal cultural resources have been *explicitly* targeted by the Trump Administration’s energy policy.

The administration’s push for “energy dominance” has brought the seemingly-existential conflict between the protection of tribal cultural resources and the development of non-renewable energies and extractive resources into stark relief. Yet these conflicts have always existed, under both Democratic and Republican administrations, and they will continue to persist even as future administrations pursue renewable energy development, so long as federal agencies fail to recognize why these conflicts arise and fail reevaluate their approach to energy development.

## II. PROTECTING TRIBAL CULTURAL RESOURCES

There is no overarching definition of “cultural resources” under federal law. Very broadly, cultural resources are the tangible and intangible things that represent, give meaning to, or are part of a community’s cultural identity, expression, and beliefs. For example, art, stories, songs and music, dances, food, clothing and regalia, ceremonies, and significant places are examples of cultural resources.

For tribes, and other Indigenous people, cultural resources are often intimately associated with, tied to, or are, lands. In this context, Dr. Thomas F. King, Ph.D., defines cultural resources thusly:

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

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3. This essay focuses on federally recognized tribes because they retain and possess unique rights and privileges as part of their government-to-government relationship with the United States. These threats are not exclusive to tribes, however. Native Hawaiians, non-federally and state recognized tribes, and Indigenous people and communities in the states and territories, face the same threats. *But see* 25 U.S.C. § 3002; 54 U.S.C. § 302706 (conferring similar rights to tribes and Native Hawaiian organizations under the Native American Graves Protection and Repatriation Act and the National Historic Preservation Act).

perceptions of what makes the environment culturally comfortable.<sup>4</sup>

Because of the intimate association between Indigenous culture and land, and the historical dispossession of Indian Country,<sup>5</sup> these cultural resources are often threatened by energy development.

Accordingly, a number of federal laws are designed to protect tribal cultural resources and places that retain traditional, religious, or cultural significance to tribes. In particular, the National Historic Preservation Act (“NHPA”) provides tribes and Native Hawaiian organizations the most authority within federal law to “to engage in and advocate for the holistic management and protection of such places.”<sup>6</sup> The NHPA applies to historic properties,<sup>7</sup> including properties of traditional religious and cultural significance to tribes and Native Hawaiian organizations.<sup>8</sup> These types of historic properties are often also referred to as traditional cultural properties (or “TCPs”)<sup>9</sup> and cultural landscapes.<sup>10</sup>

While the NHPA does not mandate preservation,<sup>11</sup> §106 and §110 affirm the federal government’s responsibility to manage historic resources in a manner that promotes preservation.<sup>12</sup> Section 110, for example, requires federal agencies to “manage . . . and maintain . . . in a way

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

5. *Accord* NAT’L PARK SERV., KEEPERS OF THE TREASURES: PROTECTING HISTORIC PROPERTIES AND CULTURAL TRADITIONS OF INDIAN LANDS 1–2 (1992) (“The ancestral homelands of the Indian tribes cover the entire nation. Sacred and historic places critical to the continuation of cultural traditions are often not under tribal control, but rather are owned or managed by Federal, State, local governments, and other non-Indians.”).

6. Wesley James Furlong, “*That Chuitt River Is Ours*”: *Traditional Cultural Landscapes and the National Historic Preservation Act*, 2018 US/ICOMOS SYMPOSIUM PROCS. 5 (2019), available at <https://www.usicomos.org/wp-content/uploads/2019/07/Furlong-2019-US-ICOMOS-Proceedings.pdf>.

7. 54 U.S.C. § 300308.

8. *Id.* § 302706(a).

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

10. See Charles A. Birnbaum, *Preservation Briefs: Protecting Landscapes: Planning, Treatment and Management of Historic Landscapes* (1994).

11. Furlong, *supra* note 6, at 5.

12. *Accord* S. Rep. No. 102-336, at 12 (1992) (“One of the most important provisions of the [NHPA]—the responsibilities of Federal agencies for the protection of historic resources—is set forth in sections 106 and 110.”).

that considers the preservation of their historic, archaeological, architectural, and cultural values” “historic properties under the[ir] jurisdiction and control.”<sup>13</sup>

Section 106 further requires federal agencies to take into account the effects of undertakings on historic properties<sup>14</sup> and develop and consider alternatives or modifications to avoid, minimize, or mitigate adverse effects.<sup>15</sup> The purpose of §106 is “to accommodate historic preservation concerns with the needs of Federal undertakings.”<sup>16</sup>

In carrying out their § 106 obligations, the NHPA requires federal agencies to consult with tribes and Native Hawaiian organizations regarding undertakings’ effects on historic properties of traditional religious and cultural significance.<sup>17</sup> Federal agencies must consult with tribes and Native Hawaiian organizations in identifying and evaluating the significance of historic properties, particularly properties of traditional religious and cultural significance, assessing the undertaking’s effects on those places, and resolving adverse effects.<sup>18</sup> “Indian tribes are entitled to *special consideration* in the course of the agency’s fulfillment of its consultation obligations.”<sup>19</sup>

The NHPA’s tribal consultation mandate and the explicit recognition of places of traditional religious and cultural significance provide tribes “unprecedented agency and authority within [federal] preservation programs to advocate for protection more consistent with their experience, expression, and understanding of the significance of place.”<sup>20</sup>

The NHPA is unique in its consultation mandate and for the role it provides tribes and Native Hawaiian organizations. Nonetheless, other federal laws provide protections for different types of cultural resources and some also include requirements for tribes and Native Hawaiian organizations to be engaged in the preservation and management of these re-

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13. 54 U.S.C. § 306102(b)(2).

14. *Id.* § 306108; 36 C.F.R. pt. 800.

15. 36 C.F.R. § 800.6(a).

16. *Id.* § 800.1(a).

17. 54 U.S.C. § 302706(b).

18. 36 C.F.R. § 800.2(c)(2)(ii)(A).

19. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010) (emphasis in original). Additionally, Executive Order 13175 requires federal agencies to consult with tribes “in the development of Federal policies that have tribal implications.” Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); *see also* Memorandum—Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

20. Furlong, *supra* note 6, at 5.

sources. For example, the Native American Graves Protection and Repatriation Act (“NAGPRA”)<sup>21</sup> protects and “determine[s] the rights of lineal descendants and Indian Tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated” discovered on federal lands.<sup>22</sup> It establishes a consultation process for determining the tribal lineage, ownership, and repatriation of discovered human remains and cultural items.<sup>23</sup>

The Archaeological Resources Protection Act (“ARPA”)<sup>24</sup> protects against the excavation, removal, damage, alteration, or defacement<sup>25</sup> of “archaeological resources and sites which are on public lands and Indian lands.”<sup>26</sup> Before issuing a permit for the excavation and removal of archaeological materials that “may result in harm to, or destruction of, any religious or cultural sites, . . . the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance.”<sup>27</sup>

Additionally, the Antiquities Act<sup>28</sup> protects “historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest that are situated on land owned or controlled by the Federal Government,”<sup>29</sup> as well as “ruins, . . . archaeological sites, . . . and objects of antiquity.”<sup>30</sup> And Executive Order 13007 requires federal agencies to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and . . . avoid adversely affecting the physical integrity of such sacred sites.”<sup>31</sup>

Together, these laws and other “federal statutes aimed at protecting Indian cultural resources, located on both Indian and public land, demonstrate the government’s comprehensive responsibility to protect those resources and . . . thereby establishes a fiduciary duty.”<sup>32</sup> Beyond

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21. 25 U.S.C. §§ 3001–3013.

22. 40 C.F.R. § 10.1(a).

23. 25 U.S.C. § 3002; *see* 43 C.F.R. § 10.5.

24. 16 U.S.C. §§ 470aa–470mm.

25. *Id.* § 470ee(a).

26. *Id.* § 470aa(b).

27. *Id.* § 470cc(c); *see* 43 C.F.R. § 7.7.

28. 54 U.S.C. §§ 320101–320106, 320301–320303.

29. *Id.* § 320301(a).

30. *Id.* § 320302(a).

31. Indian Sacred Sites, Exec. Order No. 13007, § 1(a), 61 Fed. Reg. 26,771 (May 24, 1996).

32. *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008) (discussing the ARPA, the Antiquities Act, the Archaeological Historic and Preservation Act (Archaeological Data Protection Act or Archaeological and

statutory, administrative, and executive law, treaty rights may also impose a trust obligation on the federal government to protect cultural resources on and off tribal lands and provide tribes with a powerful tool to protect those resources.<sup>33</sup>

The protections these laws afford are meaningful only if federal agencies uphold their legal and trust responsibilities and if courts hold them accountable when they do not.

### III. TRUMP'S WAR ON INDIAN COUNTRY

After four days in office, on January 24, 2017, President Trump signed two executive orders clearing the way for the construction of the Keystone XL Pipeline and the Dakota Access Pipeline (“DAPL”).<sup>34</sup> If built, the Keystone XL Pipeline would transport up to 35,700,000 gallons per day of tar sands crude oil over a thousand miles from Alberta, Canada, to the Gulf Coast. The construction, operation, and inevitable spill of the pipeline threatens cultural resources and culturally and spiritually important sites, as well as the water, land, and other natural resources of tribes along its route.<sup>35</sup> Since TransCanada (now TC Energy) first applied for a Presidential Permit to construct the Keystone XL Pipeline across the United States-Canada border in 2008, tribes have been fighting the project. This fight was successful during the Obama Administration, when then-

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Historic Data Protection Act), 54 U.S.C. §§ 312501–312508, and the NHPA); *see also* 49 U.S.C. § 303(c) (Department of Transportation Act Section 4(f)).

33. *See* Wesley J. Furlong, “*Salmon is Culture, and Culture is Salmon*”: *Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, 37 PUB. LAND & RESOURCES L. REV. 113, 125 (2016) (quoting *United States v. Washington*, 506 F. Supp. 187, 204 (D. Wash. 1980), *aff’d in part, rev’d in part* 694 F.2d 1347 (9th Cir. 1982), *aff’d in part, vac’d in part* 759 F.2d 1353 (9th Cir. 1985)) (“The district court found there could be ‘no doubt that one of the primary purposes of the [Stevens] [T]reaties . . . was to reserve the tribes the right to continue fishing as an economic and *cultural way of life*.’” (emphasis added)); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 514 (2005) (“Where treaty rights, either explicit of reserved, exist and are applicable, they are important claims for Native American tribes seeking to protect their cultural use of public lands.”).

34. *See* Memorandum—Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663 (Jan. 24, 2017); Memorandum—Construction of Dakota Access Pipeline, 82 Fed. Reg. 8,661 (Jan. 24, 2017). Six Days later, President Trump signed an executive order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 30, 2017).

35. *See generally* James MacPherson, *Land Affected by Keystone Pipeline Leak Bigger than Thought*, ASSOCIATED PRESS (Nov. 18, 2019), <https://ap-news.com/d3f301c4e5014981949be28fae8e15d7>.

Secretary of State John F. Kerry twice denied a Presidential Permit for the pipeline.

Yet, on March 23, 2017, the U.S. Department of State issued a Presidential Permit for the Keystone XL Pipeline.<sup>36</sup> This permit was initially challenged by conservation organizations, and in November 2018, the United States District Court for the District of Montana held the permit unlawful and vacated the record of decision.<sup>37</sup> While that decision was on appeal, on March 29, 2019, President Trump personally revoked the 2017 permit and purported to issue a new permit to TransCanada in his own capacity,<sup>38</sup> in an attempt to circumvent judicial review of the permit and the pipeline.<sup>39</sup> The Rosebud Sioux Tribe and the Fort Belknap Indian Community now lead the legal challenge against the Keystone XL Pipeline, as it crosses through their lands and threatens their water, cultural, and natural resources, treaty rights, and members.<sup>40</sup>

Soon after first permitting the Keystone XL Pipeline, on April 26, 2017, President Trump directed then-Secretary of the Interior Ryan K. Zinke to review all national monument designation made since January 1, 1996, where the monument covered more than 100,000 acres or “where the Secretary [of the Interior] determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.”<sup>41</sup> This “review” was specifically targeted at the Bears Ears National Monument, which was proclaimed by President Barack H. Obama on December 28, 2016.<sup>42</sup>

The Bears Ears National Monument encompassed 1.35 million acres of federal land in southeast Utah. It was the first truly Native American national monument, advocated for by the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zune Tribe, and proclaimed for its importance to Indigenous cultures. President Obama’s proclamation recognized that Hoon’Naqvut, Shash Jáa, Kwiyagatu Nukavachi, or Anash An Lashokdiwe (Bears Ears) “constitute[s] one of the

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36. 82 Fed. Reg. 16,467 (Apr. 4, 2017).

37. See *Indigenous Envtl. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561 (D. Mont. 2018).

38. 84 Fed. Reg. 13,101 (Mar. 29, 2019).

39. See Robert Tuttle & Jennifer A. Dlouhy, *Trump Doubles Down on Keystone Oil Pipeline with New Permit*, REUTERS (Mar. 29, 2019), available at <https://www.bloomberg.com/news/articles/2019-03-29/trump-doubles-down-on-keystone-xl-pipeline-issuing-new-permit>.

40. See *Rosebud Sioux Tribe v. Trump*, No. 4:18-cv-00118-BMM (D. Mont. filed Sept. 10, 2018).

41. Review of Designations under the Antiquities Act, Exec. Order No. 13,792, § 2, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

42. Proclamation No. 9,558, 82 Fed. Reg. 1,139 (Dec. 28, 2016).



densest and most significant cultural landscapes in the United States.”<sup>43</sup> Bears Ears is “closely tied to native stories of creation, danger, protection, and healing.”<sup>44</sup> Its “cultural importance to Native American tribes continues today,” as “tribes and tribal members come here for ceremonies and to visit sacred sites.”<sup>45</sup>

On December 4, 2017, President Trump purported to revoke the Bears Ears National Monument and establish two different, smaller “units”: “Indian Creek” and “Shash Jáa.”<sup>46</sup> These two “monuments” consist of only 201,397 acres. With the purported revocation of monument protections for over 1.1 million acres, Bears Ears is now threatened by oil, gas, coal, and uranium development. The tribes (Hopi, Navajo, Ute, Ute Mountain, and Zuni) are leading the legal challenges to President Trump’s unlawful and unconstitutional purported revocation of the Bears Ears National Monument.<sup>47</sup>

Following his attack on Bears Ears, on December 22, 2017, President Trump signed the Tax Cut and Jobs Act of 2017 (“the Tax Act”).<sup>48</sup> Among other things, the Tax Act directed the Secretary of the Interior and the Bureau of Land Management to “establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in to and from the Coastal Plain” of the Arctic National Wildlife Refuge (“the Refuge”).<sup>49</sup> The Tax Act mandates that the BLM hold no fewer than two oil and gas leases sales within the Coastal Plain by 2027.

To the Neets’ąjį Gwich’in of Vashraįį K’óó (Arctic Village) and Vįįhtąjį (Venite), the Coastal Plain of the Refuge is Izhik Gwats’an Gwandaii Goodlit (the Sacred Place Where Life Begins). The Sacred Place Where Life Begins is the calving ground for the Porcupine Caribou Herd and the place of creation for the Gwich’in. The caribou and this cultural landscape have sustained the culture, religion, and subsistence lifeways of the Neets’ąjį Gwich’in for countless generations. With the Tax Act’s mandate to develop the Coastal Plain, the integrity of the Sacred Place Where

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43. *Id.* at 1,140.

44. *Id.*

45. *Id.*

46. *See* Modifying the Bears Ears National Monument, Proclamation No. 9,681, 82 Fed. Reg. 58,081 (Dec. 4, 2017). The same day, President Trump purported to revoke half of the Grand Staircase-Escalante National Monument designation. *See* Modifying the Grand Staircase-Escalante National Monument, Proclamation No. 9,682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

47. *See* Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017).

48. Pub. L. No. 115-97, § 20001(b)2)(A), 131, Stat. 2054, 2236 (2017).

49. *Id.* § 20001(b)2)(A), 131, Stat. at 2236.

Life Beings and the continued cultural, religious, and subsistence identity and lifeway of the Neets'ąıı Gwich'in face an existential threat.

The Keystone XL Pipeline, the DAPL, Bears Ears, and the Refuge are just a few, highly visible examples of how tribes and tribal cultural resources are directly targeted by the Trump Administration's "energy dominance" policy.<sup>50</sup> Some efforts have been quieter, such as proposed rulemaking by the National Park Service aimed at preventing tribes and Native Hawaiian organizations from exercising their statutory rights under the NHPA,<sup>51</sup> and an executive order rolling back an Obama-era protections for the Bering Sea from oil development and requiring tribal co-management and the incorporation of traditional knowledge in the management of the Bering Sea.<sup>52</sup> The Trump Administration's "energy dominance" policy epitomizes the conflict between non-renewable energy development and the protection of tribal cultural resources.

#### IV. THE GRASS IS NOT ALWAYS GREENER

While the Trump Administration bulldozes its way through Indian Country in pursuit of "energy dominance," the rest of the nation (and the world) are turning away from non-renewable energy development,<sup>53</sup> and the short-term economic incentive to develop and non-renewable energy sources is falling away.<sup>54</sup> Indeed, the four leading candidates for the 2020 Democratic primaries have aggressive plans to tackle climate change, all

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50. *But see* Scott Streater, *Bernhardt Commits to Leasing Moratorium Near Chaco Canyon*, E&E NEWS (May 29, 2019), <https://www.eenews.net/stories/1060424895>.

51. *See* 84 Fed. Reg. 6,996 (Mar. 1, 2019).

52. *See* Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 9, 2016), *revoked by* Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). Other portions of President Trump's executive order, rolling back President Obama's withdraw of portions of the outer continental shelf in the Beaufort and Chukchi Seas from oil development, was held unconstitutional. *See League of Conservation Voters v. Trump*, 363 F. Supp. 1013 (D. Alaska 2019).

53. *See* Shane Croucher, *Defying Trump, Governors Who Represent Over Half the U.S. Population Pledge to Uphold Paris Climate Agreement*, NEWSWEEK (Nov. 5, 2019), *available at* <https://www.newsweek.com/trump-paris-climate-change-agreement-governors-republican-democrat-1469769>.

54. James Ellsmoor, *Renewable Energy Is Now the Cheapest Option – Even without Subsidies*, FORBES (June 15, 2019), *available at* <https://www.forbes.com/sites/jamesellsmoor/2019/06/15/renewable-energy-is-now-the-cheapest-option-even-without-subsidies/#497ea8695a6b>.

of which rely heavily on large investments in renewable energy development.<sup>55</sup> In January 2021, a new administration may bring with it a sea-change to the Nation's energy landscape. This possible shift in national energy priorities, towards developing renewable energy—wind, solar, geothermal<sup>56</sup>—threatens the protection of tribal cultural resources, just as non-renewable energy development does.

While often less public than fights over non-renewable energy development, tribes have for decades opposed renewable energy development projects that threaten their cultural resources. Perhaps the most high-profile example is the Wampanoag tribes' opposition to the Cape Wind Energy Project—an offshore wind farm in Nantucket Sound, off the coast of Massachusetts. The Cape Wind Energy Project called for the construction of 130 off-shore wind turbines in Nantucket Sound, between Martha's Vineyard, Nantucket Island, and Cape Cod.<sup>57</sup> While the project would have generated “clean,” renewable energy, it would have come at considerable costs—costs to the Wampanoag tribes, both the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah).<sup>58</sup>

To the Wampanoag tribes, Nantucket Sound was not simply a body of water, convenient for off-shore wind development. Instead, “the Sound is part of a larger culturally significant landscape treasured by the Wampanoag tribes and inseparably associated with their history and traditional practices and beliefs.”<sup>59</sup> While the project may have provided renewable energy, it would have “desecrat[ed] [the] viewscapes that hold religious and cultural significance for [the Wampanoag] tribes that have

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55. See *Climate: Joe's Plan for a Clean Energy Revolution and Environmental Justice*, JOE BIDEN (n.d.), <https://joebiden.com/climate/>; *Climate Change: Rising to the Climate Challenge*, PETE FOR AM. (n.d.), <https://peteforamerica.com/policies/climate/>; *Issues: The Green New Deal*, BERNIE SANDERS (n.d.), <https://berniesanders.com/issues/green-new-deal/>; *100% Clean Energy for America*, ELIZABETH WARREN (n.d.), <https://elizabethwarren.com/plans/100-clean-energy>.

56. This essay does not discuss hydroelectric and nuclear power generation, both of which many say are a necessary part of a transition away from fossil fuels. Besides the obvious landscape-level ecological destruction caused by flooding rivers and mining uranium, not to mention storing spent nuclear fuel, these activities often directly threaten the tribal cultural resources. See, e.g., *Havasupai Tribe v. Provenio*, 906 F.3d 1155 (9th Cir. 2018); *Freeing the Elwa: Lower Elwa Tribe Celebrates Dam Removal*, N.W. Treaty Tribes (Sept. 20, 2011), <https://nwtreaty-tribes.org/freeing-the-elwha-lower-elwha-tribe-celebrates-dam-removal/>.

57. Allison M. Dussias, *Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects*, 33 AM. INDIAN L. REV. 333, 340 (2014).

58. *Id.* at 337.

59. Nat'l Park Serv., *Determination of Eligibility Notification: Nantucket Sound 3* (Jan. 4, 2010) (on file with author).

lived near the sites since time immemorial.”<sup>60</sup> According to the Aquinnah Wampanoag: “The Nantucket Sound viewscape is essential to our spiritual well-being and the Cape Wind project will destroy this sacred site.”<sup>61</sup>

Despite the Aquinnah Wampanoag’s objections and the project’s documented potential to “have a significant adverse effects on traditional cultural practices as carried out in relation to” Nantucket Sound and the viewscape, the Bureau of Ocean Energy Management (“BOEM”) approved the project.<sup>62</sup> The Aquinnah Wampanoag tribe sued, arguing, *inter alia*, that the BOEM had fundamentally failed to engaged in good faith consultation with them during the Section 106 process.<sup>63</sup> The United States District Court for the District of Columbia upheld the approval, finding, *inter alia*, that the BOEM had substantively complied with Section 106 of the NHPA.<sup>64</sup> The project was ultimately scrapped, but not because of its impacts on the Wampanoag tribes’ cultural resources, beliefs, and practices.<sup>65</sup>

In California, the Quechan Tribe of the Fort Yuma Indian Reservation fought the approval of a 709-megawatt solar farm near El Centro.<sup>66</sup> The solar farm would have destroyed hundreds of cultural sites significant to the Quechan Tribe. The 6,500-acre area contained over 400 identified cultural sites, “include[ing] over 300 locations of prehistoric use or settlement, and ancient trails.”<sup>67</sup> Perhaps most significantly, the Quechan Tribe’s ancestors cremated their dead in the project area.<sup>68</sup>

Despite the solar farm’s unavoidable impacts to the Quechan Tribe’s cultural resources, the Bureau of Land Management (“BLM”) permitted it.<sup>69</sup> The Tribe sued, challenging the sufficiency of the BLM’s §106 process.<sup>70</sup> The United States District Court for the Southern District of California enjoined the construction of solar farm, finding that the BLM had failed to engage in meaningful consultation with the Quechan Tribe.<sup>71</sup>

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60. Dussias, *supra* note 57, at 337.

61. *Id.* at 336 (alterations, citation, and quotation marks omitted).

62. *Id.* at 360–61.

63. *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 118 (D.D.C. 2014).

64. *Id.* at 118–22.

65. *See It’s Over: Cape Wind Ends Controversial Project*, CAPE COD TIMES (Dec. 1, 2017), available at <https://www.capecod-times.com/news11/20171201/its-over-cape-wind-ends-controversial-project>.

66. *Quechan Tribe*, 755 F. Supp. 2d at 1106–7.

67. *Id.* at 1107.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1122.

In Northern California, the Pit River Tribe has fought to protect the Medicine Lake highlands from the development of a geothermal steam power plant. The Medicine Lake “Highlands are considered sacred by the [Pit River] Tribe and contain a number of important spiritual and cultural sites that are still used by [tribal] members.”<sup>72</sup> At early as 1984, the BLM and the U.S. Forest Service (“USFS”) acknowledged that geothermal energy development would adversely affect the spiritual significance of the Medicine Lake Highlands: “Any landscape altering activities have the potential to adversely affect the spiritual significance of natural features important to Native American groups.”<sup>73</sup>

The Pit River Tribe sued the BLM and the USFS in 2002 over the extension of geothermal leases, challenging the sufficiency of the federal agencies’ Section 106 process.<sup>74</sup> The United States Court of Appeals for the Ninth Circuit vacated the lease renewals, holding “that no consultation or consideration of historic sites occurred in connection with the lease extensions.”<sup>75</sup>

The Aquinnah Wampanoag, the Quechan Tribe, and the Pit River Tribe did not oppose these wind, solar, and geothermal projects because they opposed renewable energy development. The tribes opposed these projects because of the unacceptable risk they posed to the tribes’ cultural resources and because the federal agencies in charge failed to uphold “their minimum fiduciary duty to” protect their cultural resources.<sup>76</sup>

## V. CONCLUSION

The federal cultural resource laws described in this essay do not, unfortunately, mandate preservation.<sup>77</sup> Instead, they require federal agencies to take into account the effects of their actions on cultural resources,

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72. Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929, 934 (E.D. Cal. 2004), *rev’d sub nom.* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006) [hereinafter *Pit River Tribe II*].

73. *Pit River Tribe II*, 469 F.3d at 774.

74. *Id.* at 787.

75. *Id.*

76. *Id.* at 788.

77. *Accord* SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 155 (2d ed. 2018) (Section 4(f) “provides the most substantive protection for historic resources threatened by federal action.”).

balance the seemingly and often competing interests of preservation and development, and, most importantly, consult with tribes.<sup>78</sup> All too often, federal agencies and officials, as well as developers, view these laws as impediments to their mission and development and view tribes' insistence they follow these laws as obstructionism. This is a dangerous attitude that serves only to perpetuate these seemingly intractable conflicts, and something that will not change simply by electing a new president or reprioritizing energy development on renewables.

The inherent conflict between both renewable and non-renewable energy development, and the protection of tribal cultural resources cannot be changed. What can be changed, however, is how federal agencies pursue development and address these conflicts. Federal agencies must fundamentally reevaluate how they work with tribes; how they understand their trust responsibility to tribes and their fiduciary obligation to protect tribal cultural resources; the roles tribes play in federal permitting, land management, and cultural resource protection; their special expertise in managing and protecting these resources; and the statutory, regulatory, and treaty reserved rights tribes possess. Federal agencies must view and treat tribes not as obstacles, but as partners. This begins with consultation.

Consultation is not simply meeting with tribes, sending a few letters or email;<sup>79</sup> consultation, as the Advisory Council on Historic Preservation defines it, is “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement.”<sup>80</sup> Consultation must respect tribal sovereignty and the government-to-government relationship.<sup>81</sup> Consultation will not solve every conflict—some risks to cultural resources are too serious to compromise on. Nonetheless,

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78. See, e.g., 36 C.F.R. § 800.1(c) (“The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation.”).

79. *Accord Wyoming v. U.S. Dep’t of Interior*, 136 F. Supp. 3d 1317, 1345–46 (D. Wyo. 2015), *vacated as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016) (“The BLM’s efforts, however, reflect little more than that offered to the public in general. The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process. . . . However, despite acknowledging ‘the importance of tribal sovereignty and self-determination,’ the BLM summarily dismissed these legitimate tribal concerns.” (emphasis in original)).

80. 36 C.F.R. § 800.16(f). Surprisingly, the U.S. Army Corps of Engineers has a great definition of consultation. “Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility.” U.S. Army Corps of Eng’rs, *Tribal Consultation Policy and Related Documents* 5 (2013).

81. See, e.g., 36 C.F.R. §800.2(c)(2)(ii)(B)–(C).

regardless of the project, its impacts, and tribes' positions, federal agencies must engage in meaningful consultation, initiated early in any undertaking's planning process.

Cultural resources are not renewable—once lost, they are lost forever. Protecting cultural resources is essential for tribes to continue their cultural identity, beliefs, and ways of life and to maintain their sovereignty.