Case No. 24-3659

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOHONO O'ODHAM NATION *et al.*,
Appellants/Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR *et al.*,
Appellees/Defendants,

and

SUNZIA TRANSMISSION, LLC,
Appellee/Intervenor-Defendant.

On Appeal from the United States District Court for the District of Arizona
Hon. Jennifer G. Zipps, District Judge | Case No. 4:24-cv-00034-JGZ

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Civil 26.1(a) and 29(a)(4)(A), undersigned counsel certifies that *Amicus Curiae* National Association of Tribal Historic Preservation Officers is a non-profit corporation with no parent corporation and does not issue stock.

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INTEREST OF *AMICUS CURIAE*[2]

Amicus Curiae National Association of Tribal Historic Preservation Officers ("NATHPO") is a national, non-profit membership organization founded in 1998. NATHPO's membership is comprised of Tribal governmental officials—primarily Tribal Historic Preservation Officers ("THPO")—who implement federal and Tribal cultural resource and historic preservation laws. NATHPO's overarching purpose is to support the preservation, maintenance, and revitalization of the culture and traditions of Native peoples in the United States. This is accomplished most importantly through support of THPOs and Tribal Historic Preservation Programs ("THPP"), as certified by the National Park Service ("NPS"). *See* 54 U.S.C. §§ 302701–302706.

THPOs exercise the responsibility of State Historic Preservation Officers ("SHPO") under Section 106 of the National Historic Preservation Act ("NHPA") for undertakings that occur on "Tribal lands."[3] *See id*. §§

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[2] This brief is filed without leave of the Court because the parties have consented to its filing. Fed. R. App. Pro. 29(a)(2). None of the parties' counsel authored this brief in whole or in part, and no other person including the parties' counsel—other than NATHPO, its members, and its counsel—contributed money that was intended to fund the preparation of this brief. Fed. R. App. P. 29(a)(4)(E).

[3] The NHPA defines "Tribal land" as "(1) all land within the exterior boundaries of any Indian reservation; and (2) all dependent Indian communities." 54 U.S.C. § 300319.

302303(b)(9), 302702; 36 C.F.R. § 800.3(c)(1). THPOs and Indian Tribes[4] are required consulting parties in the Section 106 process when an undertaking occurs on Tribal lands or has the potential to effect historic properties of traditional religious and cultural importance to Indian Tribes, regardless of where these properties are located. *See* 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2). Currently, there are 222 NPS-certified THPOs.

NATHPO monitors congressional, administrative, and state cultural resource and historic preservation and management issues that affect its members, and Indian Tribes and THPOs generally, as well as the effectiveness and implementation of federal cultural resource and historic preservation laws and policies, such as the NHPA, Native American Graves Protection and Repatriation Act, the National Environmental Policy Act ("NEPA"), and the Archaeological Resources Protection Act ("ARPA"), among others. NATHPO advises and works with federal agencies on the management and protection of cultural and historic resources, and on their compliance with these laws and policies. NATHPO also advises Congress on the development and implementation of federal cultural resource and historic

[4] This brief uses the term "Indian Tribe" to be consistent with the NHPA. *See* 54 U.S.C. § 300309; *but see* Wambdi A. Was'teWinyan, *The Capitalization of "Tribal Nations" and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623 (2023).

preservation legislation. NATHPO is a voting member of the Advisory Council on Historic Preservation ("ACHP"). *See* 54 U.S.C. § 304101(a)(8).

NATHPO and its members participate daily in the programs and procedures established by the NHPA, including the Section 106 process, *see* 54 U.S.C. § 306108; 36 C.F.R. §§ 800.3–800.6, and the development of Section 106 program alternatives. *See* 36 C.F.R. § 800.14. The outcome of this case has the potential to affect how federal agencies undertake Section 106 reviews and fulfill their obligations to consult with Indian Tribes and THPOs in the process, and thus affects the interests of NATHPO and its members. NATHPO is uniquely positioned to provide this Court with additional information and context about the application and importance of Section 106 and Tribal consultation that is relevant to this disposition of this case.

SUMMARY OF ARGUMENT

In their complaint, Appellants Tohono O'odham Nation, San Carlos Apache Tribe, Archaeology Southwest, and Center for Biological Diversity (collectively "Appellants") allege that Appellees United States Department of the Interior, United States Bureau of Land Management ("BLM"), and Debra A. Haaland, in her official capacity as Secretary of the Interior ("the Secretary"), violated the NHPA when they issued of a right-of-way ("ROW") to Intervenor-Appellee SunZia Transmission, LLC, ("SunZia") to construct a transmission line through the San Pedro Valley in Arizona. Specifically,

Appellants allege that the "BLM precluded meaningful consultation [with Tohono Odham Nation and San Carlos Apache Tribe] and consideration of alternatives in violation of the NHPA[.]" ER_93, ¶ 136.

Federal agencies have a statutory obligation to consult early and meaningfully with Indian Tribes throughout the Section 106 process. This consultation is foundational to the Section 106 process and is grounded in the United States's trust responsibility to Indian Tribes. Consultation must fully take into account the potential effects of undertakings on traditional cultural places ("TCP") and places of traditional religious and cultural importance to Indian Tribes. Federal agencies must initiate and complete the Section 106 process early enough so that it informs the development, evaluation, and selection of project alternatives.

LEGAL BACKGROUND

Considered to be "the most far-reaching preservation legislation ever enacted in the United States[,]" Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 1, 11 (Robert E. Stipe ed., 2003), the NHPA seeks to "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." 54 U.S.C. § 300101(1). When Congress enacted the NHPA in 1966, it found and declared "that the

historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." Pub. L. No. 89-665, § 1, 80 Stat. 915, 915 (1966). The NHPA is "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093–94 (9th Cir. 2005)) (quotation marks omitted).

The NHPA's "productive harmony" is achieved, most importantly, through Section 106. In full, Section 106 provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306108. Congress has called Section 106 "[o]ne of the most important provisions of the National Historic Preservation Act[.]" S. REP. NO. 102-336, at 12 (1992).

Congress delegated to the ACHP authority to "promulgate regulations as it considers necessary to implement section [106] of th[e] [NHPA] in its

entirety." *Id.* § 304108(a). These regulations are promulgated at 36 C.F.R. Part 800. This Court "ha[s] previously determined that federal agencies must comply with these regulations." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (citing *Pit River Tribe*, 469 F.3d at 787; *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)). The ACHP's regulations establish a four-step process to take into account the effects of undertakings on historic properties.

First, federal agencies must: (a) "determine whether the proposed Federal action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause adverse effects on historic properties[,]" 36 C.F.R. § 800.3(a); and (b) identify and invite consulting parties, including Indian Tribes, to consult in the Section 106 process. *Id.* § 800.3(f).

Second, federal agencies must: (a) define the undertaking's area of potential effects, *id.* § 800.4(a)(1); (b) make a reasonable and good faith effort "to identify historic properties within the area of potential effects[,]" *id.* § 800.4(b); and (c) "apply the National Register [of Historic Places ('National Register')] criteria . . . to properties that have not been previously evaluated for National Register eligibility." *Id.* § 800.4(c)(1).

Third, federal agencies must "apply the adverse effect criteria to historic properties within the area of potential effects." *Id.* § 800.5(a). Finally,

federal agencies must "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." *Id.* § 800.6(a).

Section 106 only applies to historic properties. A historic property is "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register[.]" *Id.* § 800.16(l)(1); 54 U.S.C. § 300308. The NHPA directs the Secretary to maintain the National Register, which is composed of historic properties "significant in American history, architecture, archaeology, engineering, and culture." 54 U.S.C. § 302101. Historic properties include places of traditional religious and cultural importance to Indian Tribes. *Id.* § 302706(a). The NPS has codified the criteria for determining the National Register eligibility of historic properties at 36 C.F.R. § 60.4.

Federal agencies are not free to proceed through the Section 106 process unilaterally. Instead, the Section 106 process must be completed "through consultation among the [federal agency] and other parties with an interest in the effects of the undertaking on historic properties." *Id.* § 800.1(a). Consultation is the cornerstone of the Section 106 process. This "consultative process—designed to be inclusive and facilitate consensus—ensures competing interests are appropriately considered and adequately addressed." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-

5259, slip op. at *2 (D.C. Cir. Oct. 9, 2016) (ECF No. 1640062); 36 C.F.R. § 800.1(a) ("The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."). In particular, the ACHP's regulations require federal agencies to complete the second, third, and fourth steps of the Section 106 process *in consultation* with the consulting parties. As discussed in greater detail below, federal agencies bear a unique and specific statutory obligation to consult with Indian Tribes—as sovereign Nations—in the Section 106 process. *See* 54 U.S.C. § 302706(b).

ARGUMENT

I. The NHPA requires federal agencies to engage in early and meaningful consultation with Indian Tribes.

For nearly four decades, the NHPA largely excluded and ignored Indian Tribes and their historic and cultural resources. *See* HILLARY HOFFMAN & MONTE MILLS, A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION 89 (2020) ("As initially adopted in 1966, the NHPA was silent as to the indigenous concerns or cultural values relating to historic properties and their protection."). Instead, the NHPA mostly focused on the preservation of post-colonial American history, especially architectural, aesthetic, and archeological resources. *See* Michael D. McNally, *The Sacred*

and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated, 111 CAL. LAW REV. 395, 439 (2023). This focus meant that the NHPA's application to the built history of European Americans "eclipsed efforts by Native American peoples whose relationships with sacred and culturally significant places are not merely matters of aesthetic or scientific value." *Id*. This began to change in the 1980s.

In 1980, Congress amended the NHPA, authorizing the Secretary, in consultation with the "appropriate" SHPOs, to make grants and loans to Indian Tribes "for the preservation of their cultural heritage." Pub. L. No. 96-515, § 201, 94 Stat 2987, 2993 (1980). In 1986, the ACHP revised its Section 106 regulations "to creat[e] a more prominent role for affected Native Americans" in the Section 106 process "and inserted specific references to promote notification and consultation." 51 Fed. Reg. 31,115, 31,117 (Sept. 2, 1986). The new regulations provided:

> When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. . . . When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons.

36 C.F.R. § 800.1(c)(2)(iii) (1987). And in in 1989, Congress directed the NPS "to determine and report . . . on the funding needs for the management, research, interpretation, protection, and development of sites of historical

significance on Indian lands throughout the Nation." S. REP. NO. 101-85, at 21–22 (1989).

In its report, submitted to Congress in 1990, the NPS found that Indian Tribes were "concerned about preserving ancestral sites and traditional use areas on lands that they no longer control, whether these lands are under Federal, State, or local control or in private ownership." NAT'L PARK SERV., KEEPERS OF THE TREASURES: PROTECTING HISTORIC PROPERTIES AND CULTURAL TRADITIONS ON INDIAN LANDS 67 (1990) [hereinafter NPS, KEEPERS OF THE TREASURES], https://www.nps.gov/subjects/tellingallamericansstories/upload/Keepers.pdf. The NPS concluded that "[t]his concern indicates a need for tribes to be more involved in the management and planning of Federal agencies and State and local governments." *Id.*

The NPS made thirteen recommendations, including: "Federal policy should require Federal agencies . . . to ensure that Indian tribes are involved to the maximum extent feasible in decisions that affect properties of cultural importance to them." *Id.* at iv. The NPS noted that "much could be gained through more systematic tribal participation in Federal agency planning under Section[] 106[.]" *Id.* at iii. These recommendations were largely reflected in amendments to the NHPA passed by Congress in 1992. *See* Pub. L. No. 102-575, § 4006, 106 Stat. 4600, 4755–57 (1992).

The 1992 NHPA amendments established THPPs and authorized THPOs to assume the role of SHPOs for undertakings occurring on Tribal lands. *See* 54 U.S.C. §§ 302303(b)(9), 302702. The amendments also explicitly recognized that historic "[p]ropert[ies] of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." *Id.* § 302706(a). And most important, the amendments required that "[i]n carrying out [their] responsibilities under section [106 of the NHPA], Federal agencies shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to propert[ies]" potentially affected by an undertaking. *Id.* § 302706(b). Over the past thirty-two years, these amendments have empowered Indian Tribes to engage in and influence federal land management, planning, and permitting decisions, and to protect their culturally important places from adverse effects in a way not previously possible under federal law. *See* Wesley James Furlong, *"Subsistence is Cultural Survival": Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes within the National Historic Preservation Act*, 22 TRIBAL L.J. 51, 66–68 (2023) [hereinafter Furlong, *Subsistence*], https://digitalrepository.unm.edu/tlj/vol22/iss/4/.

Today, the ACHP's Section 106 implementing regulations codify a robust Tribal consultation process. The regulations require federal agencies

to provide Indian Tribes "a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate [their] views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A). The ACHP's regulations explicitly codify federal agencies' obligations to consult with Indian Tribes at each step in the Section 106 process: in identifying historic properties, *id.* § 800.4(b); in evaluating the National Register eligibility of historic properties, *id.* § 800.4(c)(1); in assessing potential effects, *id.* § 800.5(a); and in resolving adverse effects. *Id.* § 800.6(a).

Federal agencies must consult with "*any* Indian tribes . . . that *might* attach religious and cultural significance to historic properties[,]" *id.* § 800.3(f)(2) (emphasis added), "that *may* be affected by an undertaking." *Id.* § 800.2(c)(2)(ii) (emphasis added). The requirement to consult with Indian Tribes "applies regardless of the location of the historic property." *Id.* Federal agencies should initiate this consultation "early in the planning process." *Id.* § 800.2(c)(2)(ii)(A).

Section 106's Tribal "consultation requirement is not an empty formality[.]" *Quechan Tribe of Fort Yuma Indian Res. v. U.S. Dep't of Interior,* 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010). Instead, "Indian tribes are entitled to *special consideration* in the course of an agency's fulfillment of its

consultation obligations." *Id*. at 1109; *c.f. Wyoming v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1317, 1346 (D. Wyo. 2015), *vac'd as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016) ("The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process.").

This special consideration arises from the federal government's trust responsibility to Indian Tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("Under a humane and self imposed policy . . . [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct[] . . . should therefore be judged by the most exacting fiduciary standards."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a], at 412 (Nell Jessup Newton ed., 2023) ("[T]he trust doctrine is one of the cornerstones of Indian law."). The ACHP's regulations remind federal agencies that Tribal consultation in the Section 106 process must be conducted in a manner consistent with the trust responsibility, Indian Tribes' sovereignty, and the government-to-government relationship between the United States and Indian Tribes. S*ee* 36 C.F.R. § 800.2(c)(2)(ii)(B)–(C); *c.f. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1044 (D.C. Cir. 2021) ("The Tribes' unique role and their government-to-government relationship with the United States demand that their criticisms be treated with appropriate solicitude.").

This Court has previous held that by violating the NHPA, federal agencies "violate[] their minimum fiduciary duty to [Indian Tribes.]" *Pit River Tribe*, 469 F.3d at 788. More broadly, "various federal statutes aimed at protecting Indian cultural resources, located both on Indian land and public land," including the NHPA, "demonstrate the government's comprehensive responsibility to protect those resources and[] thereby establishes a fiduciary relationship." *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008); *c.f. Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991) (recognizing the "legitimate governmental objective in preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans.").

II. The recognition and protection of traditional cultural places and places of traditional religious and cultural significance in the Section 106 process is critical for the cultural survival of Indian Tribes.

Historic properties of traditional religious and cultural significance and TCPs are essential to the continuation of Indian Tribes' cultural identities, religions, and ways of life. It is therefore paramount that federal agencies meaningfully consider undertakings' potential adverse effects to them in the Section 106 process and not discount, dismiss, or ignore Indian Tribes' concerns.

As discussed *supra* Section I, prior to 1992, Indian Tribes were largely excluded from the NHPA, including the Section 106 process. Additionally, for decades after its enactment, the NHPA also overlooked places of cultural and historic importance to Indian Tribes, instead focusing primarily on the built history of European Americans. *See* Paul R. Lusignan, *Traditional Cultural Places and the National Register*, 26 GEORGE WRIGHT FORUM 37, 37 (2009), http://www.georgewright.org/261lusignan.pdf ("Properties such as Native American spiritual places [and] culturally valued landscapes . . . were often given short shrift because of their perceived incompatibility with established methodologies for identifying, surveying, and nominating more common 'historic' properties such as houses, bridges, dams, and archaeological sites.").

The NHPA and other early federal historic preservation laws were designed "to exploit or erase Indigenous cultures[,]" Furlong, *Subsistence*, *supra* at 56, by divorcing Indigenous cultural and historic resources from Indigenous communities and setting them aside "for the enjoyment of visitors and for scientific study." Rebecca A. Hawkins, *A Great Unconformity: American Indian Tribes and the National Historic Preservation Act*, *in* THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT, AND FUTURE 85, 90

(Kimball M. Banks & Ann M. Scott eds. 2016).[5] During the 1980s, the NPS undertook "efforts to more systematically address 'traditional cultural resources, both those that are associated with historic properties and those without specific property reference,' within the national preservation system." Furlong, *Subsistence*, *supra* at 64 (citation omitted). One outcome of this work was the NPS's guidelines for documenting and evaluating TCPs, published in 1990 as National Register Bulletin 38 ("Bulletin 38").[6] *See* Patricia L. Parker & Thomas F. King, *National Register Bulletin: Guidelines for Documenting and Evaluating Traditional Cultural Properties* (rev. ed. 1992).[7] The intent of Bulletin 38 was to "broaden the scope of properties that could be considered eligible for listing in the [National Register] and provide more direct guidance regarding . . . working with such sites." Lusignan, *supra* at 37.

A TCP is a historic property that is "eligible for inclusion on the National Register because of its association with cultural practices and

[5] *See, e.g.*, the Antiquities Act, 34 Stat. 225 (1906) (codified at 54 U.S.C. §§ 320301–320303), the Historic Sites Act, 49 Stat. 666 (1935) (codified at 54 U.S.C. §§ 320101–320106), and the ARPA, 16 U.S.C. §§ 470aa–470mm.
[6] Bulletin 38 was published the same year as *Keepers of the Treasures*.
[7] Proposed revisions to Bulletin 38 would change the name traditional cultural "property" to "place." *See* Nat'l Park Serv., *National Register Bulleting: Identifying, Evaluating, and Documenting Traditional Cultural Places: DRAFT* (Nov. 6, 2023), https://parkplanning.nps.gov/document.cfm?parkID=442&projectID=107663&documentID=133455.

beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." Parker & King, *supra* at 1. TCPs are not their own, distinct property type eligible for inclusion on the National Register simply because they meet Bulletin 38's definition. TCPs must still meet all of the National Register criteria codified at 36 C.F.R. § 60.4. *See* Parker & King, *supra* at 9–16. Bulletin 38 simply "provides a framework to evaluate a property's traditional cultural significance against the National Register criteria." Furlong, *Subsistence*, *supra* at 86.

The traditional cultural significance of a TCP is "derived from the role the property plays in a community's historically rooted beliefs, customs, and practices." Parker & King, *supra* at 1. As Bulletin 38 discusses, these "values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group's sense of identity and self respect." *Id.* at 2. Therefore, "any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them." *Id.* Accordingly, Bulletin 38 emphasizes the importance of addressing TCPs in the Section 106 process. *See id.* ("As a result, it is extremely important that traditional cultural properties be considered carefully in planning[.]").

Two years after Bulletin 38 was published, Congress amended the NHPA, recognizing that historic "[p]ropert[ies] of traditional religious and cultural importance" to Indian Tribes are eligible for inclusion on the National Register, 54 U.S.C. § 302706(a), and requiring federal agencies to consult with Indian Tribes about such properties in the Section 106 process. *Id*. § 302706(b). Congress enacted these provisions, in part, to ensure federal agencies consulted with Indian Tribes about TCPs in the Section 106 process. *See* THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT 35–36 (2003); *see also Te-Moak Tribe*, 608 F.3d at 607 n.16 ("The term 'TCP' is analogous to '[property of religious and cultural importance]'; it describes lands that Native American tribes have identified as having cultural or religious significance."). This Court has stated that "Bulletin 38 provides the recognized criteria for the . . . identification and assessment of places of cultural significance." *Muckleshoot Indian Tribe*, 177 F.3d at 807; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 861 (10th Cir. 1995) (assessing federal agency's actions against Bulletin 38 to determine whether its efforts to identify TCPs were sufficient).

TCPs do not need to be, or contain, "the work of human beings in order to be classified as properties." Parker & King, *supra* at 9. These places may

be "[a] culturally significance natural landscape," *id.*, or "[a] natural object such as a tree or a rock outcrop[.]" *Id.* Examples of TCPs include:

> location[s] associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world; . . . location[s] where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice; and . . . location[s] where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.

Id. at 1.

For Indian Tribes in particular, traditional religious and culturally important places "are often intimately associated with, tied to, or are, lands." Wesley James Furlong, *The Other Non-Renewable Resource: Cultural Resource Protection in a Changing Energy Future*, 42 PUB. LAND & RESOURCES L. REV. 1, 2 (2020). For many Indian Tribes, their cultural and religious practices are "center[ed] on a principle of stewardship towards a specific place, like a sacred mountain, river, lake, or geological feature." HOFFMAN & MILLS, *supra* at 41. As such, TCPs significant to Indian Tribes are often uniquely and disproportionately threatened by the actions of federal land management agencies, such as the BLM.

Throughout its history, the United States government devised numerous policies aimed at assimilating Native Americans by taking their lands, forcibly relocating them, and attempting to erase Tribal religions,

histories, and cultures. *See* HOFFMAN & MILLS, *supra* at 43. As a result, much of what was once Tribal land across the United States is now managed by the federal government "as 'public lands,' including National Parks and Forests." Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103, 2116 (2021). This legacy of dispossession means that many places of traditional religious and cultural importance to Indian Tribes are located on lands now "under the control of the federal government." HOFFMAN & MILLS, *supra* at 56.

Still, Indian Tribes maintain deep connections to and responsibilities to care for and protect their places of religious, historical, and cultural significance, even if these places are located on lands now under federal ownership or control. *See* NPS, KEEPERS OF THE TREASURES, *supra* at 67. The ACHP's Section 106 implementing regulations specifically alert federal agencies to this history when identifying Indian Tribes with which to consult. *See* 36 C.F.R. § 800.2(c)(2)(ii)(D) ("Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes[.]"). It is essential that federal land management agencies, such as the BLM, meaningfully consult with Indian Tribes about undertakings on federal public lands that have the potential to adversely affect places of traditional cultural importance. Indian Tribes' very "survival" often depends on their "ability to

practice certain religious traditions and ways of life." Carpenter, *supra*, at 2114.

III. The Section 106 process must be initiated early enough to inform the development, evaluation, and selection of project alternatives.

This Court has described Section 106 as "a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs[]" on historic properties. *Muckleshoot Indian Tribe*, 177 F.3d at 805 (quoting *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994)). To that end, the ACHP's implementing regulations make clear that the purpose of the Section 106 process is to ensure that effects to historic properties inform the development, evaluation, and selection of project alternatives.

For example, the ACHP's regulations direct that the Section 106 process must be "initiated early in the undertaking's planning, so that a *broad range of alternatives may be considered* during the planning process for the undertaking." 36 C.F.R. § 800.1(c) (emphasis added). The United States Court of Appeals for the First Circuit has noted that "[t]his directive makes it pellucid that agencies are not expected to delay NHPA review until all details are set in cement." *Safeguarding Hist. Hanscom Area's Irreplaceable Res., Inc. v. Fed. Aviation Admin.*, 651 F.3d 202, 215 (1st Cir. 2011). The ACHP's regulations further note that in coordinating their Section 106 and NEPA

reviews, federal agencies (and consulting parties) should be prepared to consult early, "when the purpose and need for the proposed action as well as *the widest possible range of alternatives are under consideration*." 36 C.F.R. § 800.8(a)(2) (emphasis added). Most importantly, the Section 106 process culminates by requiring federal agencies "to *develop and evaluate alternatives or modifications* to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a) (emphasis added).

The importance of developing and evaluating alternatives in the Section 106 process is highlighted in *Oregon-California Trails Association v. Walsh*, 467 F. Supp. 3d 1007 (D. Colo. 2020). In *Walsh*, the United States District Court for the District of Colorado held that the United States Fish and Wildlife Service ("FWS") violated the NHPA when it failed to consider alternative routes for a proposed transmission line that would entirely avoid areas that would otherwise result in adverse effects to historic properties. *Id.* at 1072. The FWS argued that by the time it initiated its Section 106 review, it was too late to consider rerouting the transmission line to avoid adverse effects because "only minor adjustments c[ould] be accommodated to meet the needs of individual landowners[.]" *Id*. at 1071–72 (citation, quotation marks omitted). The court noted that the FWS's argument "that it was too late to consider rerouting all but admits a violation of the regulation that requires 'initiat[ing] [the Section 106 process] *early in the undertaking's planning*, so

that a broad range of alternatives may be considered during the panning process for the undertaking.'" *Id.* at 1072 (quoting 36 C.F.R. § 800.1(c)) (alterations in original).

The FWS also argued that it was not required to consider alternative routes for the transmission line because it did not have authority "to require rerouting[.]" *Id.* The district court rejected this argument. The district court held that even if the FWS could not *require* the transmission line to be rerouted, it had to consider alternative routes that avoided adverse effects because "it is still useful to consider [those alternatives] when deciding whether to issue the permit." *Id.* The court emphasized that the agency could still deny the permit for the developer's proposed route if it found an alternative route would reduce effects: "[A]n agency could legitimately conclude, 'We see your need for this project but you have not persuaded us that you need to build your project precisely *there*; permit denied.'" *Id.* *Walsh* thus highlights the importance of the Section 106 process informing the development, evaluation, and selection of alternatives.

Likewise, this Court has emphasized the importance of initiating Section 106 early. Analogizing the NHPA with the NEPA, this Court has observed that "dilatory environmental review is insufficient to comply with NEPA because 'inflexibility may occur if delay in preparing an EIS is allowed: After major investment of both time and money, it is likely that

more environmental harm will be tolerated.'" *Te-Moak Tribe*, 608 F.3d at 609 (quoting *Pit River Tribe*, 469 F.3d at 785–86). The same holds true for the Section 106 process and effects to historic properties. If a federal agency delays the initiation of the Section 106 process, it becomes less capable of developing and evaluating alternatives and modifications to the undertaking that resolve adverse effects, and will, therefore, necessarily tolerate more adverse effects to historic properties.

While the Section 106 process must inform the development, evaluation, and selection of alternatives, the ACHP's regulations do allow federal agencies, under certain circumstances, to delay (or "phase") some of their Section 106 obligations until after they make their final decision. *See* 36 C.F.R. § 800.4(b)(2). This phased approach, however, does not grant a federal agency carte blanche to punt the entirety of its Section 106 obligations until after its final decision for a project. Here, the BLM erroneously relied on this authority to delay all of the substantive portions of its Section 106 obligations—the identification of historic properties, the assessment of effects, and the resolution of adverse effects—until after the issuance of the ROW. This had the practical effect of allowing the BLM to sidestep its obligation to identify TCPs, assess the transmission line's potential effects on these properties, and evaluate alternative routes that could have avoided adverse effects. While NATHPO recognizes that linear projects such as

transmission lines may be suited for some level of phased Section 106 compliance, the BLM's approach here failed to comply with Section 106.

A phased approach to linear projects like a transmission line is only appropriate when the resources left to be identified after the issuance of the ROW are discrete, small historic properties such as isolated archaeological sites, buildings, or structures, where potential adverse effects to these properties can be easily resolved by adjustments to the transmission line's siting within the ROW. Delaying Section 106 until after the issuance of the ROW is not appropriate, however, when the project would affect large historic properties, such as districts and landscape-level TCPs (such as those Tohono O'odham Nation and San Carlos Apache Tribe are concerned about, *see* Doc. 9.1, at 22),[8] and where potential effects can only be resolved through avoidance by considering entirely different routing alignments for the transmission line. Multiple federal courts have affirmed that this approach is correct.

In *New Mexico* ex rel. *Richardson v. Bureau of Land Management*, for example, the United States District Court for the District of New Mexico held that the BLM was required to complete its Section 106 review for landscape-level TCPs before holding oil and gas lease sales. 459 F. Supp. 2d. 1102,

[8] For a detailed discussion on landscape-level TCPs, *see* Furlong, *Subsistence*, *supra* at 89–105.

1124–28 (D.N.M. 2006), *vac'd in part on other grounds* 565 F.3d 683 (10th Cir. 2009). The BLM argued that it was not required to complete its Section 106 review before the lease sale because it would have been impossible to identify all of the approximately 130,000 archaeological sites and historic properties within the leased area. *Id*. at 1124. According to the BLM, it was therefore appropriate to delay the completion of the Section 106 process "until the [application for permit to drill ('APD')] stage, when the BLM w[ould] know exactly where the ground disturbance w[ould] occur[.]" *Id*.

The court agreed with the BLM's approach, but only with respect to "historic sites covering relatively small areas, such as discrete archaeological sites[,]" and not for "landscape-level TCP[s]." *Id*. at 1125. For discrete properties, the court found that delaying the completion of the Section 106 process until the APD stage did not necessarily violate the NHPA because the BLM could potentially avoid, minimize, or mitigate adverse effects "simply by moving the proposed drill site to a different location on the leased parcel." *Id*. at 1125. For "landscape-level TCP[s,]" such as "mountains, mesas, and canyons that may special cultural significance to an Indian tribe," *id*. at 1124, however, the court found that the BLM's approach was insufficient. *Id*. at 1124–25.

The court noted that "landscape-level TCP[s] may or may not be located on the leased parcel itself," and that it was possible "that the entire leased

parcel could be located on a TCP." *Id.* at 1125 (citing *Pueblo of Sandia*, 50 F.3d at 857). In these instances, the court found that simply moving the well pad to a different location within the leased parcel "may not be adequate mitigation." *Id.* Importantly, the court found that "[i]n cases where such total preclusion is necessary to protect a TCP, waiting until the APD stage to complete the Section 106 consultation process does not comply with the NHPA." *Id.*

Underpinning the court's decision was its finding that once the BLM leases a parcel for oil and gas development, it loses "a great deal, if not all, of its ability to entirely preclude drilling or other development on the parcel." *Id.* Accordingly, the court concluded that Section 106 review must be completed before the lease sale because "entering into a lease will likely restrict BLM's ability to consider all means of mitigation, including a ban on any disturbance of the leased parcel." *Id.* Regarding landscape-level TCPs like those at issue here, "the point in time by which Section 106 consultation must be completed is the leasing stage of the process." *Id.* at 1128.

Similarly, in *Pit River Tribe*, this Court held that the United States Forest Service ("USFS") and the BLM violated the NHPA when they failed to consult under Section 106 for the extension of a geothermal lease. 469 F.3d at 787. In 1973, the USFS and the BLM issued a geothermal lease to a developer. *Id.* at 773. At the time, the USFS and the BLM undertook NEPA

review for the lease. In 1981 and 1984, the USFS and the BLM authorized "'casual use' exploration" within the lease. *Id.* at 773–74. Each time, the agencies undertook NEPA review. *Id.*

In 1998, the USFS and the BLM issued the lease extension without undertaking any NEPA or Section 106 review. *Id.* at 777; *id.* at 787 ("It is undisputed that no consultation or consideration of historical sites occurred in connection with the lease extensions[.]"). Thereafter, in 2000, the USFS and the BLM approved the leaseholder's development plan for a geothermal power plant located on the lease. *Id.* at 777–78. The agencies did conduct a Section 106 review for the approval of the power plant. *Id.* at 787. The agencies argued that they were not required to undertake Section 106 review for the lease extension, and even if they were, the later Section 106 review for the power plant cured any earlier failures to comply with the NHPA for the lease extension. *Id.* This Court disagreed.

This Court held that the lease extension was an undertaking that required Section 106 review, *id.* at 787, because without the lease extension, the developer "would have retained no rights at all to the lease property" and the extensions "did not reserve to the agencies the absolute right to deny development[.]" *Id.* at 784. This Court concluded that "the later NHPA review cannot cure the earlier violation, because it did not deal with the question of *whether the land should have been leased at all*." *Id.* at 787 (emphasis added).

As this Court noted, by the time the USFS and the BLM undertook their NEPA and Section 106 reviews for the power plant, "'the die already had been cast. The "point of commitment" to this proposal'—the extension of the leases—'clearly had come and gone.'" *Id.* (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000)).

Richardson and *Pit River Tribe* are both consistent with ACHP guidance on the timing of Section 106 reviews for management planning activities. According to the ACHP, planning activities that "commit[] the agency to a decision regarding the use of resources or the location of a project[]" constitute an undertaking because that decision "has restricted the availability of alternatives to avoid, minimize, or mitigate adverse effects." Advisory Council on Hist. Pres., *When Do Project Planning Activities Trigger a Section 106 Review?* (June 28, 2019), https://www.achp.gov/digital-library-section-106-landing/when-do-project-planning-activities-trigger-section-106-review. According to the ACHP, such activities "must be preceded by Section 106 compliance." *Id.*

While *Richardson*, *Pit River Tribe*, and the ACHP guidance do not directly address the BLM's timing of Section 106 reviews for the issuance of ROWs, these authorities are nonetheless instructive and applicable here. The BLM's decision to delay completion of its Section 106 process until after issuing the ROW was premised on the BLM's commitments that it would

identify TCPs and be able to consider routing alternatives that avoided adverse effects to any identified TCPs at the notice to proceed stage. At that stage, however, the BLM took the position that the issuance of the ROW committed it to a final decision regarding the transmission line's location, even though the Section 106 process had not been completed. *See* ER_7 (finding that the BLM "determined the *final* Project route" in 2015 (emphasis added)). In taking the position that the ROW determined the specific lands on which the transmission line could be built, the BLM unlawfully restricted its ability to consider alternatives—specifically, alternative routes—that could avoid (and to a lesser degree minimize or mitigate) adverse effects when it eventually opted to conduct its Section 106 review.

While NATHPO acknowledges that nothing in the NHPA requires the BLM to select an alternative that avoids adverse effects, the NHPA nevertheless requires the BLM to develop and evaluate such alternatives in the planning process. *See Walsh*, 467 F. Supp. 3d at 1072; 36 C.F.R. § 800.6(a). By failing to complete the Section 106 process prior to the issuance of the ROW, and by then later refusing to identify TCPs and consider routing realignments to avoid adverse effects to TCPs, the BLM violated the NHPA's requirements to engage in reasonable and good faith consultation with Tohono O'odham Nation and San Carlos Apache Tribe and consider measures to avoid adverse effects to TCPs within the San Pedro Valley.

CONCLUSION

For the foregoing reasons, the District Court should be reversed.

RESPECTFULLY SUBMITTED this 29th day of July, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2024, I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF. I certify that all participants in the case are registered CM/ECF users.

/s/ Wesley James Furlong
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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