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## Room For a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects

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# ROOM FOR A (SACRED) VIEW? AMERICAN INDIAN TRIBES CONFRONT VISUAL DESECRATION CAUSED BY WIND ENERGY PROJECTS

Allison M. Dussias\*

## Table of Contents

I. By the Dawn’s Early Light: The Wampanoag Tribe and the Cape Wind Energy Project.....	336
A. The Wampanoag Tribe of Aquinnah and Nantucket Sound.....	337
B. The Cape Wind Energy Project and Federal Regulatory Requirements.....	340
C. The Tribe and the CWEP Federal Approval Process.....	348
1. The Permit Application and NEPA Review.....	348
2. NHPA Section 106 Review.....	354
3. The Final Environmental Assessment and Record of Decision.....	361
D. The Tribe’s Challenge to the CWEP Approval .....	366
II. I Saw that It Was Holy: Agency and Court Responses to Visual Impact Threats to Coyote Mountain and Medicine Bluffs.....	371
A. Gazing on Coyote Mountain: The Quechan Tribe and the Ocotillo Wind Energy Facility .....	371
1. The Quechan Tribe of the Fort Yuma Indian Reservation.....	372
2. The Ocotillo Wind Energy Project and Federal Regulatory Requirements.....	372
3. The Quechan Tribe and the OWEF Project Federal Approval Process.....	375
4. The Quechan Tribe’s Challenge to the OWEF Project Approval	380
a) The Complaint.....	380
b) The Court’s Response: Full Steam Ahead .....	384
B. Centering on Sweet Medicine: The Comanche Nation and the Fort Sill Warehouse.....	388

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III. Defending Sacred Landscapes Against Visual Desecration by Wind Turbines: Current Challenges and Future Prospects.....	395
A. Evaluating and Valuing Contemporary Viewscape Protection: American and European Perspectives .....	395
1. The Limitations of American Law .....	395
2. Admitting the True Costs of Wind Energy Facilities.....	397
B. Hope for the Future? Recent Administrative Developments in Sacred Sites Protection .....	402
1. Protecting Sacred Sites and Landscapes .....	403
a) The DOI's Sacred Sites Listening Sessions and the USDA Sacred Sites Report .....	403
b) ACHP and Federal Agencies' Memorandum of Understanding on Sacred Sites .....	410
2. National Park Service Updating of TCP and Cultural Landscape Guidelines .....	413
3. Efforts to Improve Coordination of NHPA and NEPA Review.....	416
IV. Conclusion .....	420

*Renewable energy development is important, but it can and must be responsible and protect valuable historic resources. Additionally, when tribal interests are implicated, these projects must comply with the federal trust obligation to Indian tribes.<sup>1</sup>*

For over a decade, a commercial developer has been engaged in an effort to construct the first offshore wind energy project in U.S. coastal waters. The Cape Wind Energy Project, if completed, would create a wind energy production facility the size of Manhattan in Nantucket Sound, a few miles off the Massachusetts coast. On the other side of the continent, a developer has begun operation of the Ocotillo Wind Energy Facility on federal lands in another environmentally sensitive landscape—the California Desert Conservation Area. Proponents of these projects emphasize the important role that renewable energy sources can play in satisfying the seemingly insatiable American appetite for energy, at a time when the negative impacts of fossil fuel use and production are receiving well-deserved attention. Both projects have prompted lawsuits challenging federal

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1. Letter from Bob Filner, Brian Bilbray, and Duncan Hunter, Members of the U.S. Congress, to Ken Salazar, Secretary of the Interior (Mar. 5, 2012), *available at* <http://eastcountymagazine.org/sites/eastcountymagazine.org/files/2012/Ocotillo%20Letter%20to%20Salazar.pdf> (expressing concerns over the Ocotillo Wind Energy Facility).

agencies' decisions to approve them, based on concerns over the destructive impact that the projects could have on endangered species, the environment, and historical and archaeological resources.

American Indian tribes whose traditional lands are located in the vicinity of these projects share these concerns, but also have objected to the projects because of their potential impact on cultural and religious rights and resources. In addition to explaining the physical threats posed to significant sites and resources, tribes have raised another concern: the projects' adverse impact on a particular view of a landscape (a "viewshed" or "viewscape") with cultural and religious significance.

The controversy over the Cape Wind and Ocotillo projects raises important questions about the role of Indian religious and cultural concerns in the permitting process for wind energy projects. As energy demands make the need for wind and other renewable energy sources more acute, and as developers increasingly turn to wind energy projects to profit from these demands, what kind of role will affected tribes be able to play in the regulatory process? To what extent will tribal religious and cultural concerns have an impact on development decisions and regulatory approvals? The ongoing controversy over the Cape Wind project provides a framework for exploring these emerging questions.

This Article explores the efforts of the Wampanoag Tribe of Aquinnah to protect tribal religious and cultural resources, and in particular the Nantucket Sound viewscape, from the adverse impact of the Cape Wind Energy Project. Amid the rush to approve commercial alternative energy proposals like the Cape Wind facility, there is a significant risk that religious and cultural concerns like those of the Aquinnah Wampanoag will be ignored or downplayed—despite the legal protections to which they are entitled under domestic and emerging international law. Because of their intangible nature, visual impact concerns like those raised by this project may well be particularly vulnerable to being ignored, regarded with derision, or deliberately subordinated to other interests.

The Article begins with an examination of the role of the Wampanoag Tribe of Aquinnah in the approval process for, and litigation challenging the approval of, the Cape Wind Energy Project. In view of continuing litigation challenging the Project's approval, its ultimate fate remains undecided. Part II examines the experiences of two other tribes confronted with the negative visual impacts of federally approved projects on important viewscales: the Quechan Tribe of the Fort Yuma Indian Reservation, which challenged (without success) the approval of the Ocotillo Wind Energy Facility, and the Comanche Nation of Oklahoma,

which objected to (and ultimately succeeded in derailing) a proposed military warehouse that would have marred the viewscape of Medicine Bluffs.<sup>2</sup> Part III discusses challenges facing tribes as they seek to protect significant views from the impact of proposed wind energy projects and touches upon the opposition in some European countries to wind energy projects on the basis of their adverse visual impact. Part III also analyzes recent developments in federal departments and agencies that could increase the odds that tribes participating in the regulatory approval process for wind energy projects will be able to stave off, or limit the effects of, projects that would produce adverse visual impacts. Finally, Part IV offers concluding thoughts on what is at stake for tribes as the visually destructive impact of wind energy projects on sacred landscapes becomes increasingly apparent, and as tribes confront the danger that they will bear the brunt of the uncompensable costs of wind energy projects, while others enjoy the benefits.

*I. By the Dawn's Early Light: The Wampanoag Tribe and the Cape Wind Energy Project*

*[T]he Nantucket Sound viewscape is essential to our spiritual well-being and the Cape Wind Project will destroy this sacred site . . . .*<sup>3</sup>

At first glance, wind energy generated from an offshore site seems quintessentially “green.” What could be cleaner and more environmentally friendly than a project to harness the power of the wind, and convert it into

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2. *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at \*20 (W.D. Okla. Sept. 23, 2008); Nolan Clay, *Comanche Nation Successfully Argued That Medicine Bluffs Area Is Sacred; Army Loses \$650K*, OKLAHOMAN, Oct. 28, 2009, at A1. Although the focus of this Article is on tribal opposition to off-reservation commercial wind energy projects, some tribes have launched projects to develop their own on-reservation wind energy projects, which can be developed in conformity with tribal religious and cultural needs. Given the fact that a number of reservations offer excellent conditions for wind energy facilities, interested tribes could play an important role in this developing energy sector. Revisions to federal regulations on reservation land leasing, designed to streamline the review process for proposed leases for wind and solar energy development and other non-agricultural projects, were published in December 2012. *See Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

3. Complaint for Declaratory and Injunctive Relief at 15, *Wampanoag Tribe of Gay Head (Aquinnah) v. Bromwich*, No. 1:11-cv-01238-RMU (D.D.C. July 6, 2011) [hereinafter *Wampanoag Complaint*] (quoting Letter from the Chairwoman of the Wampanoag Tribe of Gay Head (Aquinnah) to the BOEM Project Manager (June 23, 2009)).

usable energy? And what could be a better site for such a project than the ocean, a location that does not require any acquisition of land for the project, interfere with other land uses, or lessen neighbors' enjoyment of their land? In short, how could anyone concerned about environmental protection oppose an offshore wind energy project? Seen in this light, supporting the Cape Wind Energy Project (CWEP) appears to be an easy decision, and opposition to it seems nonsensical. Examination of the CWEP, however, reminds us that appearances can be deceiving, and shows that wind energy projects should not be assumed to be environmentally cost-free. Despite their green reputation, wind energy projects can negatively impact various components of the environment. Moreover, these projects carry the risk that they will provide profits to developers while others are forced to bear their tangible and intangible costs. At the site proposed for the CWEP, these costs include the desecration of viewscapes that hold religious and cultural significance for tribes that have lived near the sites since time immemorial.

*A. The Wampanoag Tribe of Aquinnah and Nantucket Sound*

The Wampanoags of what is today the state of Massachusetts are, as the translation of their name from Wompanak indicates, “The People of the First Light”—the first people to encounter the light of the sun each day as it appears over the eastern horizon. Nantucket Sound and Horseshoe Shoal—the location within the Sound selected for the CWEP—have historical, archaeological, and economic significance for the Wampanoags. Before the Sound was filled with ocean water, it was a primarily dry coastal plain, which the Wampanoags occupied up to 13,000 years before the present day. Because of this long-term occupation, the Sound is likely to contain submerged archaeological sites not yet discovered. In addition, Horseshoe Shoal continues to serve as a key source of fish for tribal members.<sup>4</sup>

As the CWEP progressed through the regulatory approval process,<sup>5</sup> tribal members repeatedly stressed an additional concern: in order for those who follow traditional practices to properly conduct certain religious ceremonies, an unobstructed view of the rising sun over Nantucket Sound is crucial. In addition to being the locus of religious practices, the Sound and

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4. *Id.* at 7.

5. Various federal, state and local approvals are required for the Project. Jay Wickersham, *Sacred Landscapes and Profane Structure: How Offshore Wind Power Challenges the Environmental Impact Review Process*, 31 B.C. ENVTL. AFF. L. REV. 325, 328 n.20 (2004) (listing federal, state, regional, and local permit and approval requirements for the CWEP).

its landforms are significant because of the relation that they bear to Maushop. The story of the cultural hero Maushop and his relationship with the Wampanoag people, along with the role attributed to him in the creation of the Sound and its islands, have, as the Tribe's federal court complaint challenging the project's approval explained, "spanned many generations and are integral parts of Wampanoag culture."<sup>6</sup>

Ancestors of the two federally recognized branches of the Wampanoag Nation, the Aquinnah and the Mashpee Wampanoag tribes, first found English would-be settlers trespassing on their territory early in the seventeenth century. A sachem of the Wampanoag Confederacy, Massasoit, saved the Pilgrims of the Plymouth Colony from starvation during their first winter.<sup>7</sup> Despite their role in ensuring the colony's survival, Wampanoag communities faced early English demands for their land, corn, and labor, as well as their very souls, as English missionaries sought to win converts to Christianity.<sup>8</sup> Among the missionary efforts aimed at Wampanoags and members of other area tribes were those carried out on Cape Cod at the town of Mashpee and on the island of Martha's Vineyard.<sup>9</sup> As increasing English demands for land whittled away at Indian land holdings over the course of the succeeding centuries, the Wampanoags and other tribes were left in possession of only small portions of their aboriginal lands. Efforts to keep at least some land in Indian hands led to the imposition of colonial—and later state—protective measures, such as those imposed until the late 1860s on Mashpee Wampanoag lands.<sup>10</sup>

The two Wampanoag tribes that have been acknowledged by the federal government as tribes enjoying a government-to-government relationship

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6. Wampanoag Complaint, *supra* note 3, at 7. Maushop is also spelled "Moshop." *Id.* at 6. This description of the Sound's significance is drawn from the Tribe's Complaint.

7. Neal Salisbury, *Native People and European Settlers in Eastern North America, 1600-1783*, in 1 *CAMBRIDGE HISTORY OF THE NATIVE PEOPLES OF THE AMERICAS*, pt. 1, 399, 403 (Bruce G. Trigger & Wilcomb E. Washburn eds., 1996) (stating that Massasoit was the leader of the Pokanoket Wampanoags).

8. The English settlements with which the Wampanoags and other native peoples of what became the state of Massachusetts first had relations were the Plymouth Colony, established in 1620, and the Massachusetts Bay Colony, established in 1629. *Id.* at 402.

9. Frederick E. Hoxie, *The Reservation Period, 1880-1960*, in 1 *CAMBRIDGE HISTORY OF THE NATIVE PEOPLES OF THE AMERICAS*, *supra* note 7, at pt. 2, 183, 196 (discussing the establishment of Mashpee as a Christian Indian settlement); Willard Hughes Rollings, *Indians and Christianity*, in *A COMPANION TO AMERICAN INDIAN HISTORY* 121, 125 (Philip J. Deloria & Neal Salisbury eds., 2004) (discussing the missionary experiences of the Wampanoags of Martha's Vineyard).

10. Hoxie, *supra* note 9, at 196 (describing protections for communal lands at Mashpee and the removal of restrictions in 1869).

with the United States followed somewhat different paths to this status. The Wampanoag Tribe of Gay Head (Aquinnah) was acknowledged by the United States as an existing tribe in 1987,<sup>11</sup> having begun the recognition process in 1978.<sup>12</sup> Following the execution of a settlement agreement addressing the Tribe's pending land claims,<sup>13</sup> a 1987 federal statute provided for land to be acquired and held in trust for the Tribe by the United States.<sup>14</sup> The Aquinnah Wampanoag tribal lands are located in the southwestern portion of Martha's Vineyard.<sup>15</sup>

The road to recognition of the Wampanoag Tribe of Mashpee began inauspiciously, with a federal jury considering a Mashpee Wampanoag land claim suit concluding in 1978 that the Mashpee claimants had not shown that they met the requirements for being considered a tribe within the meaning of the statute that was the basis for the suit, the Indian Trade and Non-Intercourse Act.<sup>16</sup> Despite this setback, the Mashpee Wampanoags successfully completed the federal acknowledgement process, after another trip to federal court to object to the slowness of the process,<sup>17</sup> and were

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11. Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (Feb. 10, 1987). The Office of Federal Acknowledgment published a notice of a proposed finding against acknowledgment in 1986, leading to the submission of additional evidence that established, to the Office's satisfaction, that the Tribe met all of the criteria of the acknowledgment regulations. *Id.*

12. *Tribal Profile*, WAMPANOAG TRIBE OF GAY HEAD [http://www.wampanoagtribe.net/pages/wampanoag\\_planning/profile](http://www.wampanoagtribe.net/pages/wampanoag_planning/profile) (last visited Feb. 22, 2014); *see also* Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1771(7) (2012) (noting that the Secretary of the Interior had acknowledged the existence of the Wampanoag Tribal Council of Gay Head, Inc. as a tribe and ratifying and confirming the Tribe's existence "as an Indian tribe with a government to government relationship with the United States"). The Tribe celebrated the twenty-fifth anniversary of its receiving federal recognition in 2012. George Brennan, *Aquinnah Tribe Celebrates Federal Recognition*, CAPE COD TIMES (Apr. 11, 2012), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20120411/NEWS/204110351>.

13. Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1771.

14. *Id.* §§ 1771(c)-(d) (providing for lands to be conveyed to and acquired by the Secretary of the Interior and held in trust for the Tribe).

15. *Tribal Profile*, *supra* note 12; *see also* Brennan, *supra* note 12 (noting that the Tribe has 480 acres of land on Martha's Vineyard).

16. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 942-43 (D. Mass. 1978); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

17. *Mashpee Wampanoag Tribal Council, Inc., v. Norton*, 180 F. Supp. 2d 130 (D.D.C. 2001), *rev'd*, 336 F.3d 1094, 1097, 1102 (D.C. Cir. 2003) (holding that the district court should not have concluded that the Bureau of Indian Affairs had delayed unreasonably in processing the Tribe's recognition petition, based upon how long the petition had been before the Bureau, without considering the Bureau's limited resources and the impact of advancing consideration of the Tribe's petition on other waiting tribes).



recognized as a tribe in 2007.<sup>18</sup> The process for the United States to take land into trust for the Mashpee Wampanoag Tribe, which does not currently have a reservation or other trust land, is ongoing.<sup>19</sup>

*B. The Cape Wind Energy Project and Federal Regulatory Requirements*

The CWEP is designed to generate electricity, to be delivered to the New England Power Pool, from wind energy resources in the federally-controlled Outer Continental Shelf off the Massachusetts coast. The project calls for the construction and operation (and ultimate decommissioning) of 130 wind turbine generators (WTGs), each with three football-field-length rotors with a maximum blade height of 440 feet. The 257-foot monopiles (steel poles) for the WTGs are to be installed to a depth of about 85 feet into the seabed.<sup>20</sup> The WTGs would be arranged in a grid pattern on

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18. Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Tribal Council, Inc. of Mass., 72 Fed. Reg. 8007 (Feb. 22, 2007). *See also generally* Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. (Feb. 15, 2007).

19. The Mashpee Wampanoag Tribe has applied to have 170 acres of land in Mashpee, Massachusetts and 146 acres in Taunton, Massachusetts taken into trust. Gale Courey Toensing, *Mashpee Gets Preliminary Green Light on Initial Reservation and Casino Land in Massachusetts*, INDIAN COUNTRY TODAY (Feb. 12, 2013), <http://indiancountrytodaymedia.network.com/2013/02/12/mashpee-gets-preliminary-green-light-initial-reservation-and-casino-land-massachusetts>. Assistant Interior Secretary Kevin Washburn informed the tribe in February 2013 that if the land were taken into trust, it would qualify as the tribe's initial reservation for purposes of the Indian Gaming Regulatory Act. *Id.*; *see also Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Transfer of Property and Subsequent Development of a Resort/Hotel and Ancillary Facilities in the City of Taunton, MA and Tribal Government Facilities in the Town of Mashpee, MA by the Mashpee Wampanoag Tribe*, 77 Fed. Reg. 32,132 (May 31, 2012). The Bureau of Indian Affairs released the Final Environmental Impact Statement on the tribe's application in September 2014. Final Environmental Impact Statement for the Proposed Fee-to-Trust Transfer of Property and Subsequent Development of a Resort/Hotel and Ancillary Facilities in the City of Taunton, MA and Tribal Government Facilities in the Town of Mashpee, MA by the Mashpee Wampanoag Tribe, 79 Fed. Reg. 53,077 (Sept. 5, 2014). The Mashpee trust land process has been complicated by the possibility of the tribe operating a casino on the new reservation land and by a 2009 Supreme Court decision, *Carciere v. Salazar*, 555 U.S. 379 (2009), dealing with statutory authority to take land into trust for tribes that were arguably not under federal jurisdiction (a concept that has not been defined by Congress) when the relevant statute, the Indian Reorganization Act, was enacted in 1934. *Id.* at 395; Gail Courey Toensing, *Mashpee's Land-Into-Trust Under BIA Review*, INDIAN COUNTRY TODAY (May 31, 2012), <http://indiancountrytodaymedianetwork.com/2012/05/31/mashees-land-trust-under-bia-review-115884>.

20. 1 Minerals Mgmt. Serv., U.S. Dep't of the Interior, Cape Wind Energy Project Final Environmental Impact Statement at 2-8 (2009) [hereinafter Final EIS]. The rotors are to be

Horseshoe Shoal, a relatively shallow area located in federal waters in Nantucket Sound, just offshore of Cape Cod and the islands of Martha's Vineyard and Nantucket. Inner-array cables from each WTG would interconnect with the grid and with a 100-foot by 200-foot, 40-foot high electrical service platform.<sup>21</sup> A 12.5-mile-long submarine transmission cable system would extend from the electrical service platform to a location on the Massachusetts mainland.<sup>22</sup> As approved in 2010, the CWEP would occupy an area of about twenty-five square miles.<sup>23</sup>

In order to construct and operate the CWEP, its developer, Cape Wind Associates LLC (CWA),<sup>24</sup> needed to obtain a lease, an easement, and a right-of-way from federal regulators.<sup>25</sup> Federal review took place within a

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364 feet in diameter; a football field is 360 feet long. See also *id.* at 2-6 to 2-18 for a description of the construction methodology for the CWEP's offshore and onshore components.

21. *Id.* at 2-2. The northernmost WTGs would be about five miles from the mainland, and the southernmost and westernmost WTGs about fourteen miles and nine miles from Nantucket and Martha's Vineyard, respectively. *Id.*

22. Minerals Mgmt. Serv., Record of Decision: Cape Wind Energy Project, Horseshoe Shoal, Nantucket Sound 3 (Apr. 28, 2010) [hereinafter CWEP ROD], available at [http://www.boem.gov/uploadedFiles/BOEM/Renewable\\_Energy\\_Program/Studies/CapeWindROD.pdf](http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWindROD.pdf). About 7.6 miles of the cable system would be located in Massachusetts' territorial waters rather than federal waters. *Id.*

23. *Id.* at 16. CWA plans to decommission the CWEP after twenty-five years of operation. *Id.*

24. Although the application materials, regulatory approvals, and lease for the CWEP name Cape Wind Associates LLC as the operator of the project and lessee, the CWEP website indicates that the project's developer is the New England-based energy company Energy Management, Inc. *FAQs: Cape Wind Basics*, CAPE WIND, <http://www.capewind.org/faqs/cape-wind-basics> (last visited Sept. 9, 2014).

25. Final EIS, *supra* note 20, at 1-1; see also 74 Fed. Reg. 3635 (Jan. 21, 2009) (notice of the Final EIS's availability). In addition to meeting federal requirements, the CWEP also needed to comply with Massachusetts regulatory requirements, such as obtaining the approval of the state Energy Facilities Siting Board. Final EIS, *supra* note 20, at 1-10 to 1-14 (discussing state requirements); see also *id.* at 1-15 to 1-16 (describing local and regional regulatory review requirements). The Board issued the permit required for the CWEP to move forward in 2005, a decision that was upheld by the Massachusetts Supreme Judicial Court in 2006. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 858 N.E.2d 294, 295, 298 (Mass. 2006). Following the denial of a permit for the CWEP by the Cape Code Commission, the Board issued a new permit that provides authorization under all state and local laws. The Supreme Judicial Court rejected a challenge to this action in 2010. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 814-15 (Mass. 2010). For a list of other suits filed by the Alliance to Protect Nantucket Sound with respect to the CWEP, see Matthew W. Pawa, *The Very Definition of Folly: Saving the Earth from Environmentalists*, 38 B.C. ENVTL. AFF. L. REV. 77, 90 nn.101, 102

regulatory framework shaped by several statutes. The National Environmental Policy Act (NEPA) requires that federal agencies prepare detailed environmental impact statements as to proposed actions “significantly affecting the quality of the human environment.”<sup>26</sup> Agencies need to consider both the environmental impacts of proposed actions and alternatives that would avoid or mitigate environmental damage.<sup>27</sup> The adverse environmental effects that must be assessed under NEPA include “aesthetic, historic, cultural, economic, social, or health” effects.<sup>28</sup> Under NEPA regulations, defining the scope of effects requires engagement with the governments of affected tribes through an “early and open process,” aimed at identifying “concerns, potential impacts, relevant effects of past actions, and possible alternative actions.”<sup>29</sup> Tribal governments are to be consulted concerning environmental effects related to their interests.<sup>30</sup> In addition, the Clean Water Act prohibits discharge of dredge or fill material in U.S. waters without a U.S. Army Corps of Engineers permit.<sup>31</sup> Because of the height of the WTGs and the risks they could pose to air navigation, approval from the Federal Aviation Administration (FAA) was also required.<sup>32</sup> Concerns over air navigation hazards prompted a lawsuit to

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(2011). Pawa, who represents Clean Power Now, a CWEP supporter of the CWEP, takes a very dim view of the Alliance and other CWEP opponents. *Id.* at 89-90 (opining that they “are predominantly a small group of extremely wealthy landowners who own lavish seaside properties, and who are concerned about their view and their yachting areas” and dismissing Cape Cod town officials who oppose the CWEP as having “narrow, parochial, concerns”).

26. 42 U.S.C. § 4332(C) (2012).

27. Final EIS, *supra* note 20, at 1-3 (citing 42 U.S.C. §§ 4321-4370h (2012)).

28. 40 C.F.R. § 1508.8 (2014).

29. *Id.* § 1501.7; 43 C.F.R. § 46.235(a) (2014).

30. 43 C.F.R. § 46.155 (2014) (imposing obligation to “consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities”).

31. Clean Water Act § 404, 33 U.S.C. § 1344(e)(1)-(2) (2012). In addition to permit required under Section 404 of the Act, the CWEP also needed a National Pollutant Discharge Elimination System (NPDES) permit for the installation of onshore transmission lines. *See* Final EIS, *supra* note 20, at 1-4.

32. FAA approval is required for any vertical structure that is greater than 200 feet in height. *See* Final EIS, *supra* note 20, at 1-5 (citing 49 U.S.C. § 44718 (2012); 14 C.F.R. §§ 77.1-77.41 (2014) (*Objects Affecting Navigable Airspace*)). CWA filed a Notice of Proposed Construction or Alteration with the FAA in September 2002. *Id.*

challenge the FAA's sign-off on the CWEP, which forced the FAA to re-examine its approval.<sup>33</sup>

The potential impact of the CWEP's construction and operation on various animal species brought into play the Endangered Species Act, the Marine Mammal Protection Act (MMPA), and the Migratory Bird Treaty Act.<sup>34</sup> The project poses a threat to birds, which can be injured or killed by turbine blades. Lights on wind turbines have also been associated with avian mortality.<sup>35</sup> As for marine mammals, concerns implicating the MMPA have been raised about the CWEP's possible impact on seals, dolphins, and whales.<sup>36</sup> In addition, the constant presence of large quantities of oil on the CWEP's electrical service platform and in its 130 WTGs raises the specter of harmful impacts on various species and their habitats if a tank rupture or a collision of a vessel with a turbine caused an oil spill.<sup>37</sup> Concerns over the CWEP's impact on birds and marine mammals resulted

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33. *Id.* In January 2014, the D.C. Circuit Court of Appeals rejected the Town of Barnstable's challenge to the no hazard determination issued by the FAA in 2012 after additional review of the CWEP's impact on air navigation. *Town of Barnstable, Mass. v. FAA*, 740 F.3d 681 (D.C. Cir. 2014).

34. Final EIS, *supra* note 20, at 1-7 to 1-10.

35. Victoria Sutton & Nicole Tomich, *Harnessing Wind Is Not (by Nature) Environmentally Friendly*, 22 PACE ENVTL. L. REV. 91, 95-97 (2005) (discussing threats to birds from wind generation); *see also id.* at 104-11 (discussing federal bird protection statutes, such as the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act); *id.* at 120 (providing recommendations on guidelines for protecting birds from the adverse effects of wind generation facilities). Concerns about the impacts of wind energy facilities on birds have resulted in lawsuits against a number of wind energy projects. *See, e.g., Controversial Wind Project Threatens Endangered California Condors, Golden Eagles*, DEFENDERS OF WILDLIFE (Apr. 13, 2012), <http://www.defenders.org/press-release/controversial-wind-project-threatens-endangered-california-condors-golden-eagles> (discussing an April 2012 lawsuit filed against the Bureau of Land Management with respect to a California wind energy project); *see also* Jeffrey P. Cohn, *How Ecofriendly Are Wind Farms?*, 58 BIOSCIENCE 576 (2008) (examining the threats posed to birds and bats by wind energy facilities).

36. *Cape Wind Threats: The Environment*, ALLIANCE TO PROTECT NANTUCKET SOUND, [http://www.saveoursound.org/content\\_item/threats-environment.html](http://www.saveoursound.org/content_item/threats-environment.html) (last visited Feb. 22, 2014). In addition to direct physical impacts on individual marine mammals, habitat destruction and negative acoustic impacts are also possible. *Id.*

37. According to the Alliance to Protect Nantucket Sound, "Cape Wind's own computer simulation of a spill reveals that oil would reach Cape Cod and Island beaches within 5 hours." *Id.* An analysis commissioned by the Alliance "showed significant adverse impacts to the Nantucket Sound ecosystem, including harmful impacts to wildlife and shellfish/fish from a spill incident." *Id.*

in the filing of a lawsuit by environmental organizations in 2010.<sup>38</sup> Because of the potential impact of the CWA's preconstruction surveying on marine mammals, which might be the victims of so-called "incidental takings," CWA applied for an incidental harassment authorization under the MMPA from the National Marine Fisheries Service (NMFS).<sup>39</sup> The NMFS issued the authorization in 2012,<sup>40</sup> ignoring the recommendations of the federal Marine Mammal Commission, which had identified a number of flaws in CWA's application.<sup>41</sup> The March 2012 release by the U.S. Fish and Wildlife Service of guidelines for land-based wind energy projects indicates that at least some federal officials are willing to publicly recognize the need to address comprehensively wind energy facilities' threats to wildlife.<sup>42</sup>

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38. Complaint, *Public Employees for Environmental Responsibility (PEER) et al. v. Bromwich et al.*, No. 1:10CV01067 (D.D.C. June 25, 2010), available at <http://marineolog.com/PDF/capewindcomplaint.pdf>.

39. Small Takes of Marine Mammals Incidental to Specified Activities; Cape Wind's High Resolution Survey in Nantucket Sound, MA, 76 Fed. Reg. 80,891 (Dec. 27, 2011); 76 Fed. Reg. 56,735 (Sept. 14, 2011) (notice of proposed issuance of incidental harassment authorization).

40. 76 Fed. Reg. at 80,891. More recently, the NMFS issued an incidental harassment authorization covering pre-construction activities in the Sound from April 25, 2014 through April 24, 2015. Small Takes of Marine Mammals Incidental to Specified Activities; Cape Wind's High Resolution Survey in Nantucket Sound, MA, 79 Fed. Reg. 25,835 (May 6, 2014).

41. Letter from Timothy J. Ragen, Marine Mammal Comm'n, to P. Michael Payne, Nat'l Marine Fisheries Serv. (Oct. 17, 2011), available at [http://mmc.gov/letters/pdf/2011/cw\\_iha\\_geo\\_surveys\\_101711.pdf](http://mmc.gov/letters/pdf/2011/cw_iha_geo_surveys_101711.pdf). The Commission offered several recommendations to the NMFS, such as the recommendation that CWA be required to report immediately any injured or dead marine mammals and suspend survey activities if serious injuries or deaths could have been caused by CWA's activities. *Id.* The Marine Mammal Commission is an independent federal agency established under Title II of the Marine Mammal Protection Act "to provide independent oversight of the marine mammal conservation policies and programs being carried out by federal regulatory agencies." *About the Marine Mammal Commission*, MARINE MAMMAL COMMISSION, <http://mmc.gov/about/welcome.shtml> (last visited Feb. 22, 2014). Opponents of the CWEP have suggested that CWA is trying to avoid full environmental review of the impact of its activities on marine mammals by segmenting specified activities related to the CWEP into smaller pieces, and then seeking approval only for those specific activities, on a piecemeal basis. *See, e.g.*, Letter from Audra Parker, Alliance to Protect Nantucket Sound, to P. Michael Payne, Nat'l Marine Fisheries Serv. (Oct. 14, 2011) (stating that CWA is seeking "a legally defective IHA [incidental harassment authorization] by segmenting the singular, specified activity of the Cape Wind project into smaller pieces to avoid the issuance of Letter of Authorization (LOA) regulations").

42. U.S. FISH & WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES (Mar. 23, 2012), available at [http://www.fws.gov/windenergy/docs/WEG\\_final.pdf](http://www.fws.gov/windenergy/docs/WEG_final.pdf). The document notes that "[t]hese voluntary Guidelines provide a structured, scientific process for

The CWEP's potential impact on subsistence and commercial fishing prompted the filing of a lawsuit by area fishermen, claiming that the CWEP would result in the effective closure of "prime, historic fishing grounds on Horseshoe Shoal" and particularly impact small fishermen, such as plaintiff Jonathan E. Mayhew, a *Mayflower* descendant whose family has earned its livelihood from the sea for generations.<sup>43</sup> The Tribe also raised the issue of the project's potential impact on subsistence fishing in its lawsuit challenging the CWEP.<sup>44</sup>

Finally, section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the potential effects of their undertakings (such as granting a permit for a project) on historic properties that are included, or eligible for inclusion, in the National Register of Historic Places.<sup>45</sup> One type of historic property within the purview of the NHPA is termed a Traditional Cultural Property (TCP), meaning a property that "is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining

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addressing wildlife conservation concerns at all stages of land-based wind energy development" and "also promote effective communication among wind energy developers and federal, state, and local conservation agencies and tribes." *Id.* at vi.

43. Complaint for Injunctive and Declaratory Relief at 1-2, *Martha's Vineyard/Dukes County Fishermen's Ass'n et al. v. Salazar* (D.D.C. June 25, 2010) (No. 1:10-cv-01072). The complaint noted that the approved project's footprint "covers a large portion of Horseshoe Shoal, including its most essential fishing grounds for a number of fisheries, including the best grounds for the conch fishery, which is the largest fishery in Martha's Vineyard in terms of landed tonnage and economic value." *Id.* at 3. Among the concerns noted during the permitting process was the interference of WTGs with "marine radar systems on which vessels rely for safe navigation. Radar is particularly important during periods of reduced visibility, such as fog" (a frequent occurrence in the Sound). *Id.* at 9. The fishermen's lawsuit was settled in June 2012. Steve Myrick, *Two Island Fishermen's Groups Steer Different Courses*, MVTIMES.COM, <http://www.mvtimes.com/2014/09/03/two-island-fishermens-groups-steer-different-courses>.

44. See *infra* note 177 and accompanying text (discussing the Complaint).

45. 16 U.S.C. § 470 (2012); 36 C.F.R. § 800.16(l)(1) (2014). Under section 106 of the NHPA, agencies

shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of the license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f. A site is eligible for inclusion if it meets at least one of four eligibility criteria. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NAT'L REGISTER BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION (1990), available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>.

the continuing cultural identity of the community.”<sup>46</sup> In 1990, the National Park Service released *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (often referred to as Bulletin 38) to provide guidance for evaluation of TCPs as historic properties potentially eligible for the National Register.<sup>47</sup> Amendments to the NHPA in 1992 expressly recognized that properties of religious and cultural importance to tribes are included within the historic properties concept.<sup>48</sup> Under the NHPA, an agency considering an undertaking must: (a) identify the “historic properties” within the area of potential effects; (b) evaluate the potential effects that the undertaking may have on historic properties; and (c) resolve the adverse effects through the development of mitigation measures.<sup>49</sup> The granting of a lease on the Outer Continental Shelf is an undertaking that requires compliance with NHPA section 106.<sup>50</sup>

The NHPA review process requires consultation with affected parties, including tribes.<sup>51</sup> If a reviewing agency is considering an undertaking that would affect a historic property that has “religious and cultural significance” to a tribe or tribes, the agency must consult with tribal representatives at each stage of the regulatory process, beginning early in the process.<sup>52</sup> The Advisory Council on Historic Preservation (ACHP), an independent federal agency created by the NHPA to promote preservation of historic resources, must be given the opportunity to comment on proposed undertakings.<sup>53</sup> Taking into account NHPA-related concerns is also required for NEPA compliance.<sup>54</sup> As discussed below, the Tribe raised several NHPA-related concerns about the CWEP, including its adverse

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46. PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (1998) [hereinafter BULLETIN 38], available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>.

47. *Id.*

48. 16 U.S.C. § 470a(d)(6)(A) (2012) (“Properties 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.”).

49. 36 C.F.R. §§ 800.4, 800.5, 800.6 (2014).

50. *Id.* § 800.16(y).

51. *Id.* §§ 800.1-800.8.

52. 16 U.S.C. § 470a(d)(6) (2012); 36 C.F.R. §§ 800.3(f)(2), 800.4(a)(4), 800.5(c)(2)(iii), 800.6(a), 800.6(b)(2).

53. Final EIS, *supra* note 20, at 1-10 (citing NHPA, 16 U.S.C. §§ 470 to 470-1 (2012)).

54. *See supra* notes 26-30 and accompanying text (discussing review under NEPA).

impact on Nantucket Sound as the centerpiece of tribal religious and cultural life.<sup>55</sup>

The discussion above describes the general regulatory framework for proposed projects like the CWEP. Additional legal requirements, such as those in the “Policy on Consultation with Indian Tribes” developed by the Department of the Interior (DOI),<sup>56</sup> apply to the CWEP because it implicates tribal interests. More generally, Executive Order 13,175 acknowledges that the United States “has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions,” has recognized tribes as being under its protection, and “has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.”<sup>57</sup> Agencies are directed by the order to “strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments” and to provide for “meaningful and timely input by tribal officials” when considering actions with tribal implications.<sup>58</sup> President Obama’s recognition of the need to facilitate tribal input into decisions that affect tribes and their members is embodied in his 2009 Tribal Consultation Memorandum, directing agencies to submit plans as to their implementation of Executive Order 13,175.<sup>59</sup> Federal policy, as reflected in the American Indian Religious Freedom Act of 1978 (AIRFA)<sup>60</sup> and the 1996 Executive

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55. See *infra* Part I.C.2 (discussing the NHPA review process and the Tribe’s concerns).

56. KEN SALAZAR, U.S. DEP’T OF THE INTERIOR, ORDER NO. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 1, 2011), available at [http://alaska.fws.gov/external/pdf/so\\_3317\\_tribal\\_consultation\\_policy.pdf](http://alaska.fws.gov/external/pdf/so_3317_tribal_consultation_policy.pdf).

57. Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000) (section 2(a) of the Order).

58. *Id.* (sections 3(a), 5(a) of the Order). The order refers to “policies that have tribal implications,” 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 Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.* (section 1(a) of the Order).

59. Memorandum from President Barack Obama on Tribal Consultation to Heads of Exec. Dep’ts and Agencies (Nov. 5, 2009), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>.

60. Am. Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2012)); see also Allison M. Dussias, *Friend, Foe, Frenemy: The United States and Am. Indian Religious Freedom*, 90 DENVER U. L. REV. 347, 354-56 (2012) (discussing the enactment of AIRFA and the Supreme Court’s treatment of the statute).



Order on Indian Sacred Sites (Sacred Sites Order),<sup>61</sup> also supports special solicitousness toward tribes where religious exercise is threatened. The Sacred Sites Order directs agencies managing federal lands to have in place procedures for consultation with tribes and religious leaders as to agency actions on federal lands that “may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.”<sup>62</sup> The goal is to accommodate access to and ceremonial use of, and avoid adversely affecting, these sites<sup>63</sup> “in order to protect and preserve Indian religious practices.”<sup>64</sup>

### *C. The Tribe and the CWEP Federal Approval Process*

Examination of the federal approval process for the CWEP demonstrates both the complexity of the process, particularly when a new kind of project is being analyzed to determine its environmental impacts, and the perseverance that is required on the part of tribes that are committed to being involved in the process, in the hope of gaining protection for religious and cultural resources and rights. When tribes are up against industry pressures and consequent political considerations, however, perseverance does not guarantee success.

#### *1. The Permit Application and NEPA Review*

In November 2001, CWA submitted a permit application for the construction and operation of the CWEP to the New England District of the U.S. Army Corps of Engineers (USACE).<sup>65</sup> Wampanoag officials and representatives endeavored to raise tribal concerns about the impacts of the CWEP as the USACE was considering CWA’s permit request. The Tribe’s

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61. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996), *reprinted in* 42 U.S.C. § 1996 (2012).

62. *Id.* (section 2(b) of the Order). “Sacred site” is defined as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.” *Id.* (section 1(b)(iii) of the Order).

63. *Id.* (section 1(a) of the Order).

64. *Id.* (preamble).

65. Final EIS, *supra* note 20, at E-3. The application was submitted pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (2012), which provides for federal regulation of work in or affecting U.S. navigable waters. Section 10 of the Act prohibits unauthorized obstruction or alteration of navigable waters of the United States. *See* 33 U.S.C. §§ 401-467n (2012). The Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1301-1356b (2012) (OCSLA) extended the Act’s coverage to installations located on the seabed to the seaward limit of the Outer Continental Shelf. *See* 43 U.S.C. § 1333(a).

Historic Presentation Officer (THPO) submitted a letter explaining the significance of Horseshoe Shoal and the need for additional surveys to identify potential adverse impacts on cultural resources.<sup>66</sup> Following the USACE's issuance of a Draft Environmental Impact Statement in November 2004,<sup>67</sup> the Tribe submitted comments objecting to the proposed location, disagreeing with the USACE's "Finding of No Effect" as to cultural resources, and requesting that the USACE engage in the required formal government-to-government consultation.<sup>68</sup>

Following the enactment of the Energy Policy Act of 2005, which granted the Secretary of the Interior the authority to issue leases for renewable energy-related activities on the outer continental shelf, the CWEP proposal was referred to the Minerals Management Service (MMS),<sup>69</sup> now the Bureau of Ocean Energy Management (BOEM).<sup>70</sup> The Tribe continued to make its concerns known, submitting comments to the BOEM in 2006 about the CWEP's impact on tribal religious and cultural practices and requesting that the BOEM conduct government-to-government consultation.<sup>71</sup> After the BOEM published a new Draft

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66. Wampanoag Complaint, *supra* note 3, at 8 (citing Letter from the THPO to the USACE (Nov. 9, 2004)).

67. U.S. Army Corps of Eng'rs, Draft Environmental Impact Statement, Cape Wind Energy Project, *available at* <http://www.nae.usace.army.mil/projects/ma/ccwf/deis.htm>; *see also* 69 Fed. Reg. 64,919 (Nov. 9, 2004) (notice of availability of draft EIS).

68. Wampanoag Complaint, *supra* note 3, at 8.

69. Energy Policy Act of 2005, § 388(a), Pub. L. No. 109-58, 119 Stat. 594, 744-47 (amending section 8(p) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (2012)). The Secretary of the Interior delegated the approved authority to the MMS, which developed regulations for the processing and permitting of offshore renewable energy projects. CWEP ROD, *supra* note 22, at 2. Relevant regulations are available at 30 CFR §§ 585.100-585.118 (2014) (known as the Renewable Energy Final Rule).

70. Renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) in 2010, the responsibilities of the BOEMRE were subsequently split among three entities: the Office of Natural Resources Revenue, in charge of revenue collection; the Bureau of Safety and Environmental Enforcement (BSEE), in charge of enforcing safety and environmental regulations; and the Bureau of Ocean Energy Management (BOEM), in charge of "managing development of the nation's offshore resources in an environmentally and economically responsible way." *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/About-BOEM/Reorganization/Reorganization.aspx> (last visited Feb. 22, 2014). For ease of reference, the acronym BOEM is used in this Article to refer to the agency known at various times as the BOEM, BOEMRE, and MMS.

71. Wampanoag Complaint, *supra* note 3, at 9; Memorandum of Points and Authorities in Support of Plaintiff the Wampanoag Tribe of Gay Head (Aquinnah)'s Motion for Summary Judgment at 6, Pub. Emps. for Envtl. Responsibility v. Beaudreau, Civ. Action

Environmental Impact Statement for the CWEP (Draft EIS), which indicated that the problematic Horseshoe Shoal site had been selected as the preferred alternative for the project,<sup>72</sup> the Tribe's Chairwoman attended public meetings in which she explained the basis for tribal opposition to the siting of the CWEP, emphasizing Horseshoe Shoal's archaeological and cultural significance and the importance of the unblemished view of the horizon.<sup>73</sup> Most of the TCPs that the Tribe and the Mashpee Wampanoag Tribe had identified were not included in the Draft EIS's list of properties that would be affected by the CWEP.<sup>74</sup> The Aquinnah Wampanoag Tribe also submitted comments that identified the shortcomings in the Draft EIS's tribal impacts assessment and described the treatment of tribal concerns as "wholly inadequate."<sup>75</sup> The Tribe's position was supported by a resolution of United South and Eastern Tribes, Inc., opposing approval of the CWEP.<sup>76</sup> The Mashpee Wampanoag Tribe also repeatedly expressed concerns about the project.<sup>77</sup> Commenting on the Draft EIS, for example, Mashpee Wampanoag THPO George Green, Jr. noted the reference to the First Light in the name of the Great Wampanoag Nation and explained the Mashpees' culturally and religiously based need for a clear, unobstructed view of the southeast horizon.<sup>78</sup>

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No. 10-cv-01067-RBW-DAR (consolidated) (Oct. 29, 2012) [hereinafter Wampanoag Summary Judgment Motion] (citing Letter from the Tribe to the BOEM (July 26, 2006)).

72. 73 Fed. Reg. 3482 (Jan. 18, 2008) (notice of availability of the Draft EIS). The comment period for the Draft EIS, scheduled to end on March 30, 2008, was extended for an additional thirty days. 73 Fed. Reg. 12,759 (Mar. 10, 2008).

73. Wampanoag Complaint, *supra* note 3, at 10. The public meetings were held by the BOEM on March 12 and 13, 2008. *Id.*

74. Amicus Curiae Brief of the National Trust for Historic Preservation in Support of the Motion for Summary Judgment Filed by the Wampanoag Tribe of Gay Head (Aquinnah) at 8, *Beaudreau*, No. 10-cv-01067-RBW-DAR (consolidated) (Nov. 21, 2012) [hereinafter National Trust Amicus Brief].

75. Wampanoag Complaint, *supra* note 3, at 10 (quoting Letter from the Tribe to the BOEM (Apr. 17, 2008)); Wampanoag Summary Judgment Motion, *supra* note 71, at 6 (citing the letter).

76. Wampanoag Complaint, *supra* note 3, at 10. The organization passed a resolution on February 14, 2008, which called for the denial of the permit by DOI. *Id.* The United South and Eastern Tribes, Inc. is a twenty-six-member intertribal organization. *History of USET, UNITED S. & E. TRIBES*, <http://www.usetinc-wp.org/about-uset/> (last visited Feb. 22, 2014).

77. Beth Daley, *Two Tribes Object to Cape Wind Turbines; Say Nantucket Sound Is Cultural Property*, BOSTON GLOBE, Oct. 26, 2009, at A1 (noting opposition to the CWEP by both Wampanoag Tribes).

78. See Final EIS, *supra* note 20, at 5-238 to 5-239.

In January 2009, the BOEM, after receiving more than forty-two thousand comments on the Draft EIS,<sup>79</sup> finalized the EIS (Final EIS).<sup>80</sup> The Final EIS touched on a number of areas that were of concern to the Tribe, including visual impacts, impacts on cultural, historical, and archaeological resources, and impacts on religious practices,<sup>81</sup> but continued to endorse Horseshoe Shoal as the preferred location for the CWEP.

Considering the CWEP's obvious high visibility, the BOEM could not avoid acknowledging that the facility would have a visual impact during its construction, operation, and decommissioning. The lighting required for the WTGs and the electrical service platform, along with the proximity of the facility to Cape Cod and the Islands, exacerbated the problem.<sup>82</sup> Visual assessment methodology indicated that the CWEP would be visible from surrounding shorelines in all four directions, and that the WTGs would create a new vertical element in the landscape as viewed from the shore, an impact that is understandable in light of Horseshoe Shoal's high elevation relative to the surrounding mainland and islands.<sup>83</sup>

As to the impact on cultural, historical, and archaeological resources, the BOEM concluded that adverse effects would occur to sixteen properties evaluated in the Draft EIS, and also to twelve additional newly evaluated

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79. CWEP ROD, *supra* note 22, at 3.

80. 74 Fed. Reg. 3635 (Jan. 21, 2009) (notice of availability of Final EIS).

81. The Final EIS also addressed the environmental justice implications of the CWEP. Final EIS, *supra* note 20, at 5-234. The 1994 Environmental Justice Executive Order directed each federal agency to make "environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). In evaluating the environmental justice implications of the CWEP, the Final EIS noted that the tribal populations in Aquinnah (Gay Head) and Mashpee constitute environmental justice populations. *See* Final EIS, *supra* note 20. The Final EIS discounted the possibility of direct environmental impacts on these populations because of the distance between tribal lands and the offshore site for the CWEP. *Id.* at 5-234 (noting that the distances were twenty-four miles from Aquinnah Wampanoag tribal land and over ten miles from Mashpee Wampanoag tribal land). The Final EIS acknowledged, but downplayed, tribal concerns over potential interference with subsistence fishing. *See id.* Fishing was not precluded from the area around the CWEP, the Final EIS stated, and the BOEM did not expect the spacing of the WTGs to significantly impact fish populations or fishing. *Id.*

82. Final EIS, *supra* note 20, at 5-235 to 5-236.

83. *See id.* at 5-236. Photo simulations indicated that the WTGs would be visible to the west (Falmouth and Martha's Vineyard), north (Barnstable), south (Martha's Vineyard and Nantucket), and east (Monomoy). *See id.*

National Register-eligible properties.<sup>84</sup> The Final EIS noted that because “the ocean is an important component of the setting for all of the historic properties” in the Area of Potential Effect, “any open view of the proposed project from a historic property is considered to be an adverse visual effect.”<sup>85</sup> The WTGs’ alteration of these properties’ setting “would diminish the integrity of the properties’ significant historic features.”<sup>86</sup>

The Final EIS acknowledged that the Tribe had raised the issue of the CWEP’s potential visual impact on religious practices, stating that tribal “ceremonies, and spiritual and religious practices, are dependent on maintaining the ability to view the first light, [and] the eastern horizon vista and viewshed.”<sup>87</sup> The BOEM dismissed the Tribe’s concerns about the impact of the CWEP on religious and cultural practices tied to the eastern viewshed by stating that its line-of-sight profiles indicated that the WTGs would not be visible from the Tribe’s reservation lands.<sup>88</sup> BOEM officials knew, however, that these lands were not the only areas that were relevant for determining visual impacts on religious practices, because Wampanoag practices also take place at sacred sites located off of tribal lands.<sup>89</sup> The Final EIS did recognize that the altered view to be created by the CWEP would have a “major impact” on a Mashpee Wampanoag sacred site and noted that there might be other affected sites that had not been considered.<sup>90</sup> The Final EIS concluded that the Wampanoag tribes would be able to see the CWEP, and would encounter visual impacts, when they “use areas beyond their tribal lands such as along the eastern/northeastern shoreline of

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84. *See id.* at 5-237. The Final EIS noted that twenty-two additional properties that “were brought to the attention of MMS after release of the [Draft EIS]” were evaluated for potential National Register eligibility; eighteen of the properties “are recommended . . . by [the Massachusetts Historical Commission] as eligible for inclusion”; and it was determined that the CWEP would have an adverse visual effect on twelve of them. *See id.*

85. *See id.*

86. *See id.* (quoting 36 C.F.R. Part 800.5(a)(2)(v) (2014)). Non-historic recreational areas would experience the same visual impacts, but the significance of these impacts on recreational users was more difficult to determine because “the interpretation of visual impacts is subjective.” *See id.* at 5-241. The CWEP would clearly “change the views out to Nantucket Sound from a mostly natural ocean setting, to a setting with manmade features present across a substantial portion of the horizon” – a change that some viewers would consider an unacceptable visual impact, while others could consider it attractive. *Id.* (noting that comment letters reflected both viewpoints).

87. *Id.* at 5-238. The Final EIS also stated the WTGs also would not be visible from lands associated with the Mashpee Wampanoag Tribe. *Id.*

88. *Id.* at 5-238 to 5-239.

89. *Id.* at 5-239.

90. *Id.*

Martha's Vineyard, or the southern Cape Cod shoreline near Mashpee, or the waters of Nantucket Sound."<sup>91</sup>

In discussing the traditional cultural and religious importance of the Sound for area tribes and the potential construction and decommissioning impacts of the CWEP on cultural resources, the BOEM admitted in the Final EIS that "[t]he Wampanoag consider the entirety of Nantucket Sound to be ancestral lands, based on their oral traditions which hold that the Wampanoag people have inhabited the land from the western shore of Narragansett Bay to the Neponset estuaries since time immemorial."<sup>92</sup> Marine remote sensing survey data and vibracores had identified areas in which ancient land surfaces (on which prehistoric cultural material remains might still exist) had survived centuries of marine activities, necessitating changes in the CWEP's wind turbine array.<sup>93</sup> Because the identification of submerged ancient land surfaces raised the possibility that material sites and cultural remains would be inadvertently disturbed, a "Chance Finds Clause" was to be included in all lease and permit documents for the CWEP, requiring CWA to halt operations and notify the BOEM if an unanticipated archaeological discovery occurred.<sup>94</sup> The Mashpee Wampanoag THPO raised concerns about how such inadvertent disturbances would be addressed in comments on the Draft EIS: "[I]f remains were found in 20-60 feet of water, *who would know?* Between the depth and turbulence, *who would see?* Furthermore, *who would care?*"<sup>95</sup> A more cynical observer might add that individuals carrying out the work would have an incentive to *not* see any evidence of remains, given the inconvenience and delay that could result from reporting discoveries. Although the Final EIS cited the "Chance Finds Clause" as providing a basis for prosecution "if a lessee or permittee knowingly disturbs an archaeological site and does not report it,"<sup>96</sup> it seems that there is an incentive to look the other way if any evidence is turned up to suggest that possible archaeological sites exist. While conceding that "in practicality it is entirely possible that unanticipated archaeological sites (e.g., tribal

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91. *Id.* at 5-239.

92. *Id.* at 5-243.

93. *Id.* Vibracores collected in these areas had not yet found evidence of material cultural remains, but as yet undiscovered ancestral sites might still exist there, the Final EIS noted. *Id.*

94. *Id.*

95. Comment Letter Submitted by George "Chuckie" Green, Jr., Tribal Historic Pres. Officer for the Mashpee Wampanoag (Apr. 2, 2008) (on file with the author).

96. Final EIS, *supra* note 20, at 5-243.

ancestral sites) could be inadvertently disturbed during lease activities and it would neither be recognized nor reported,”<sup>97</sup> the Final EIS characterized the CWEP’s expected construction and decommissioning impacts as “minor.”<sup>98</sup>

While the foregoing discussion addressed construction and decommissioning impacts, the operational impacts on cultural resources were less easily dismissed as “minor.” Referring to the “Visual Resources” section of the Final EIS, the document’s cultural resources discussion noted that twenty-nine historic properties would be subject to adverse effects if the CWEP were to begin operations.<sup>99</sup> The WTG array would visually impact onshore historic resources and tribal areas of traditional cultural and religious importance.<sup>100</sup> The visual alterations caused by the WTGs and other CWEP structures would alter “the character, setting and viewshed” of identified historic properties and be visible along the eastern horizon from an identified sacred site.<sup>101</sup> Even if the WTGs were not visible from Aquinnah or Mashpee Wampanoag lands, tribal members would experience the CWEP’s visual impacts when they used areas beyond tribal lands, such as along Martha’s Vineyard’s eastern and northeastern shoreline and the southern Cape Cod shoreline near Mashpee, along with the Sound’s waters.<sup>102</sup> The Final EIS acknowledged that operational phase impacts in cultural properties could not yet be determined, pending the outcome of the NHPA section 106 review of the project.<sup>103</sup> Although the Final EIS recognized that this concern and others remained unresolved, this recognition did not prevent the endorsement of Horseshoe Shoal as the preferred location for the CWEP.

## 2. NHPA Section 106 Review

As noted above, NEPA compliance alone is not sufficient for a project like the CWEP to proceed because the NHPA imposes separate requirements, including early notification of, and consultation with, any

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97. *Id.*

98. *Id.* This conclusion was based on past cultural resource surveys, continued coordination with the MBUAR and the Massachusetts Historical Commission, and hoped for compliance with any further requests that might be made for additional analysis or mitigation. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 5-244. The Final EIS noted that the Mashpee Wampanoag Tribe considered the altered view to be a major impact. *Id.*

102. *Id.*

103. *Id.* at E-12.

tribe that “attaches religious and cultural significance to historic properties that may be affected by an undertaking,” ensuring that the tribe has “a reasonable opportunity to identify its concerns about historic properties, advise on identification and evaluation of historic properties, . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”<sup>104</sup> Consultation must “recognize the government-to-government relationship between the Federal government and Indian tribes” and be “conducted in a manner sensitive to the concerns and needs of the Indian tribe.”<sup>105</sup> In addition, NHPA regulations note that “frequently historic properties of religious and cultural significance are located on ancestral, aboriginal or ceded lands” and that consultation must take place as to culturally and religiously significant historic properties off tribal lands.<sup>106</sup>

In April 2008, the Bureau of Indian Affairs (BIA) raised concerns about whether the BOEM had complied with NHPA section 106’s tribal consultation requirements as to the Wampanoag tribes. The BIA reminded the BOEM that Executive Order 13,175 requires “that each agency ensure meaningful and timely input by tribal officials.”<sup>107</sup> The BIA’s Government-to-Government Consultation Policy, which the BIA termed “particularly illustrative” of what constitutes appropriate consultation, provides that tribes’ input and recommendations on proposed actions are to be “fully considered.”<sup>108</sup> Consultation means more than the right of tribal officials to be consulted or provide comments simply as members of the public. Noting that, as a federal government agency, the BOEM has a trust responsibility to tribes, the BIA encouraged the BOEM to engage the two tribes in the process and provide them with “a meaningful opportunity to consult directly on properties of religious and cultural significance that may be affected” by the CWEP.<sup>109</sup>

Although the Tribe repeatedly sought to draw attention to its concerns pursuant to the NHPA, the BOEM did not begin the formal consultation

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104. 36 C.F.R. §§ 800.2(c)(2)(B)(ii)-(ii)(A) (2014).

105. *Id.* § 800.2(c)(2)(B)(ii)(C).

106. *Id.* § 800.2(c)(2)(B)(ii)(D).

107. Letter from James T. Kardatzke, Acting Dir. of the Eastern Region, Bureau of Indian Affairs, to Dr. Rodney E. Cluck, Alt. Energy Program, Minerals Mgmt. Serv. (Apr. 24, 2008) (on file with the author).

108. *Id.*

109. *Id.*



process required by NHPA section 106 until July 2008,<sup>110</sup> seven years after the filing of the CWEP permit application and only six months before issuance of the Final EIS for the project. The BOEM thus deferred holding the first section 106 consultation meeting until after the preferred alternative for the project had been selected and the comment period for the Draft EIS had passed. The BOEM hosted a meeting in Boston, followed by a visit by the BOEM Project Manager to several ceremonial sites. The Tribe explained the sites' sacred nature, their critical role in the conduct of "the Tribe's most sacred religious ceremonies and practices," and the importance of Horseshoe Shoal as a past habitation and burial site.<sup>111</sup> The ACHP shared the Tribe's concerns and urged the BOEM to fully comply with the section 106 consultation requirements, noting the work that still needed to be done.<sup>112</sup>

On December 29, 2008, the DOI issued a "Finding of Adverse Effect" (2008 FOAE) that identified twenty-nine historic properties (including one tribal TCP) that would be adversely affected by the CWEP.<sup>113</sup> The document identified the tribal TCP as "a sacred historic site of the Mashpee Wampanoag, off tribal land, from which there would be a view" of the WTGs along the eastern horizon, an alteration which the Mashpee had identified as "a significant adverse effect."<sup>114</sup> Five other TCPs that the tribes had identified, including Nantucket Sound, were left off of the list of

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110. Letter from Melanie J. Straight, MMS Federal Preservation Officer, to Susan Nickerson, Exec. Dir., Alliance to Protect Nantucket Sound (July 30, 2008) (indicating that the initial section 106 consultation meeting was held on July 23, 2008).

111. *Id.* at 11, ¶¶ 62-64. The Tribe's Chairwoman also sent an additional letter to the BOEM indicating the Tribe's view that the BOEM's public meetings did not satisfy its obligations to the Tribe and that there had been too little government-to-government consultation. *Id.* at 11, ¶ 65. A follow-up letter urged the BOEM to complete the section 106 process before issuing a Final EIS. *Id.* at 11, ¶ 66.

112. *Id.* at 11-12, ¶ 68. The ACHP's letter noted that while the BOEM had issued its Draft EIS with Horseshoe Shoal as the Preferred Alternative for the CWEP, it had not yet formally documented its Area of Potential Effect to the Massachusetts State Historic Preservation Officer and other consulting parties, or identified the historic properties within that Area that might be affected by the CWEP. *See id.* at 12.

113. Minerals Mgmt. Serv., Documentation of Section 106 Finding of Adverse Effect for the Cape Wind Energy Project (2008) [hereinafter 2008 FOAE], available at [https://web.archive.org/web/20121010062024/http://www.boemre.gov/offshore/RenewableEnergy/PDFs/FAE\\_Final.pdf](https://web.archive.org/web/20121010062024/http://www.boemre.gov/offshore/RenewableEnergy/PDFs/FAE_Final.pdf). The CWEP's potential adverse effects on historic properties were analyzed under the Criteria of Adverse Effect in 36 C.F.R. Part 800.5(a)(1) to determine compliance with NHPA section 106. *Id.* at 1.

114. *Id.* at 25.

affected properties.<sup>115</sup> Although the 2008 FOAE acknowledged that the CWEP would impact religious practices involving the Sound, it did not recognize the Sound itself as an affected historic site.<sup>116</sup>

The 2008 FOAE acknowledged that the CWEP's potential adverse effects on historic properties included impacts on submerged archaeological resources from the installation of the WTGs and the plowing of trenches for the project's cable system.<sup>117</sup> The document described the assessment of Nantucket Sound for both historic and prehistoric resources, including a marine archaeological sensitivity assessment that had noted that much of the area to be affected by the CWEP had been "exposed and available for human habitation" from about 12,500 to 7000 B.P., with some areas remaining exposed after the post-glacial sea level rise until as late as 1000 B.P.<sup>118</sup> Providing confirmation of Wampanoag oral history, a marine archaeological reconnaissance survey and follow-up laboratory analysis revealed that there was undisturbed organic material from well-preserved terrestrial deposits indicative of "deciduous forests, freshwater wetland, and lake settings"—"the types of environments that aboriginal populations would most likely have used for settlement and subsistence activities."<sup>119</sup> The deposits' state of preservation indicated that any archaeological remains were probably still preserved.<sup>120</sup>

Given how much was at stake in the evaluation of the CWEP proposal, both the Tribe and others who were worried about the CWEP's threat to cultural resources continued to voice their concerns. The Executive Director of the Massachusetts Historical Commission, who serves as the State Historic Preservation Officer (SHPO) for section 106 consultation

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115. National Trust Amicus Brief, *supra* note 74, at 8.

116. 2008 FOAE, *supra* note 113, at 30, 35.

117. *Id.* at 2. These resources could be affected not only by the WTG structures' footprints on the seafloor, but also by work around each of the WTGs that might disturb marine sediments; and jet plowing of trenches for the installation of the inner-array cables between the WTGs and the ESP and the transmission cable system between the ESP and the landfall site. The resources could also be adversely affected by associated activities in the marine work areas for the CWEP. *Id.*

118. 2008 FOAE, *supra* note 113, at 26-27; *see also id.* at 27 (noting that "the area that is now Nantucket Sound would have been dry land and available to aboriginal populations for habitation and subsistence activities").

119. *Id.* at 27; *see also id.* at 32 (noting that the archaeological analysis had identified paleosols, i.e., ancient land surfaces, within the planned WTG array).

120. *Id.* at 27.

purposes,<sup>121</sup> pointed out to the BOEM that its documentation was “incomplete and insufficient,” and encouraged the BOEM to continue government-to-government consultation in order to adequately evaluate TCPs and mitigation alternatives.<sup>122</sup> The ACHP also continued to urge the BOEM to fulfill its section 106 responsibilities and to point out the 2008 FOAE’s incompleteness.<sup>123</sup>

The BOEM held additional section 106 public consultation meetings after the issuance of the Final EIS, including a June 2009 meeting at which the BOEM distributed a draft Memorandum of Agreement in an attempt to end the consultation process.<sup>124</sup> The Tribe’s THPO and the Tribal Chairwoman continued to express concerns about insufficient consultation and an otherwise inadequate process, such as the failure to recognize the eligibility of Nantucket Sound itself for listing in the National Register as a TCP.<sup>125</sup> The Chairwoman again highlighted the importance of the view over the Sound:

[T]he Nantucket Sound viewscape is essential to our spiritual well-being and the Cape Wind Project will destroy this sacred site . . . . To date [BOEM] has not come to Martha’s Vineyard to view the project from the vantage point of the viewscape that Cape Wind will destroy. [BOEM] came to our reservation, located at the western end of the Island and made an incorrect assumption that because the wind farm could not be seen from our reservation, it would have no adverse effect on our People or their culture.<sup>126</sup>

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121. State Historic Preservation Offices (SHPOs), created pursuant to section 101 of the National Historic Preservation Act, administer the national historic preservation program at the state level, review nominations for the National Register of Historic Places nominations, and consult with federal agencies during the NHPA section 106 review process.

122. Wampanoag Complaint, *supra* note 3, at 13 (quoting the ACHP letter). The BOEM responded to the letter several months later. The BOEM letter noted that it respectfully disagreed with the characterization of the Finding document as “incomplete and insufficient,” without explanation. *Id.* at 14.

123. *Id.* at 14-15 (describing letters from the ACHP to the BOEM in April and June, 2009).

124. The draft, which was first distributed at the June 2009 meeting in Hyannis, Massachusetts, was re-circulated at a section 106 meeting in January 2010 in Washington, D.C. *Id.* at 67, 69.

125. Wampanoag Complaint, *supra* note 3, at 14-15.

126. *Id.* at 15 (quoting the June 23, 2009 letter from the Tribe’s Chairwoman to the BOEM Project Manager).

BOEM officials subsequently visited sacred and historic sites identified by the Tribe, but continued to deny the eligibility of ceremonial sites and of the Sound for National Register listing as TCPs.<sup>127</sup> Because of the delayed commencement of the consultation process, the issue of the eligibility of the Sound for National Register listing was not determined until a year after the issuance of the Final EIS for the project.<sup>128</sup> Moreover, these visits occurred at a point at which the DOI had already prepared a draft Record of Decision to approve the CWEP.<sup>129</sup>

Further interaction between the Tribe and the BOEM demonstrated the continued disagreement over the status of various sites and their eligibility for National Register listing. After the Tribe requested a determination from the Keeper of the National Register of the eligibility of the eastern view over Nantucket Sound for inclusion in the Register in September 2009,<sup>130</sup> the BOEM issued its own determination that the Sound was not eligible for listing.<sup>131</sup> The Massachusetts Historical Commission reached the opposite conclusion, issuing an opinion that the Sound itself is a TCP that meets the eligibility criteria.<sup>132</sup>

The Keeper of the National Register agreed with the Tribe and the Massachusetts Historical Commission, concluding in January 2010 that the Sound was eligible for listing as a TCP “and as an historic and archaeological property . . . that has yielded and has the potential to yield important information about the Native American exploration and settlement of Cape Cod and the Islands.”<sup>133</sup> The Keeper’s “Determination

127. Wampanoag Summary Judgment Motion, *supra* note 71, at 9.

128. The EIS was finalized in January 2009. *See supra* note 80. The Keeper of the National Register determined that Nantucket Sound was eligible for the National Register in January 2010. *See infra* note 133.

129. National Trust Amicus Brief, *supra* note 74, at 9.

130. Wampanoag Summary Judgment Motion, *supra* note 71, at 9 (referring to Letter to Keeper of the National Register (Sep. 17, 2009)).

131. Wampanoag Complaint, *supra* note 3, at 16.

132. *Id.* at 17. The opinion was issued in in November 2009. The Commission indicated that the Sound is a Wampanoag TCP “under Criteria A, B, C, and D at the local level of significance.” *Id.* It also noted that during the archaeological survey a “major scientific discovery” was made, which confirmed tribal oral history that identified the Sound as a former area of habitation and likely burial ground. *Id.* The BOEM thereafter contacted the Keeper to request a determination. Wampanoag Summary Judgment Motion, *supra* note 71, at 9.

133. Keeper of the National Register, Determination of Eligibility Notification, Nantucket Sound 2-3 (Jan. 4, 2010), *available at* <http://www.nps.gov/nr/publications/guidance/NantucketSoundDOE.pdf>.

of Eligibility Notification” characterized the Sound as “a key definer of the Wampanoag Tribe’s place on and relationship with the earth.”<sup>134</sup>

The BOEM issued a revised Section 106 Finding of Adverse Effect on January 13, 2010, to acknowledge adverse effects on the Sound and on other TCPs, but remained determined to allow the CWEP to proceed.<sup>135</sup> Less than two months later, Secretary of the Interior Salazar, who had visited the Sound and met with tribal officials in February 2010, called a halt to the consultation process on the grounds that, in his estimation, the consulting parties were unable to reach agreement on suitable mitigation measures for the effects of the CWEP.<sup>136</sup> Although a draft Memorandum of Agreement had been presented to the Tribe, the draft did not propose mitigation measures to address adverse effects on all identified TCPs.<sup>137</sup> At this point, consultation encompassing all of the TCPs, including the Sound itself, had been going on for only two months.<sup>138</sup> The termination of consultation triggered a forty-five-day period during which the ACHP could submit formal comments, to which the DOI was required to respond.<sup>139</sup>

The Tribe and the ACHP persisted in raising concerns about the CWEP. A five-member panel of ACHP members appointed to examine the CWEP participated in a site visit and held a public meeting at which the Tribe once again explained that siting the CWEP on Horseshoe Shoal would destroy centuries-old religious and cultural practices.<sup>140</sup> The ACHP’s April 2010 formal comments submitted to Secretary Salazar concluded that the altered horizon view will have a significant adverse effect on traditional cultural practices as carried out in relation to six eligible TCPs; that the CWEP will cause physical destruction, damage, and permanent alteration of part of the Sound’s seabed, in ways that are “not subject to satisfactory mitigation”; and that tribal consultation and archaeological survey efforts had been

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134. Wampanoag Complaint, *supra* note 3, at 18. The Keeper also highlighted the fact that recent sampling projects had “uncovered new and highly significant additional evidence of intact, ancient, terrestrial soils including preserved wood charcoal, plants, and seeds.” *Id.*

135. Revised Documentation of Section 106 Finding of Adverse Effect, 75 Fed. Reg. 3922 (Jan. 25, 2010).

136. Wampanoag Complaint, *supra* note 3, at 19. When a federal agency and the SHPO and ACHP are unable to reach an agreement through consultation, any of the parties may terminate consultation. 36 C.F.R. § 800.7(a)(2014).

137. Wampanoag Summary Judgment Motion, *supra* note 71, at 10.

138. Consultation involving all TCPs began with the Keeper’s January 2010 determination and ended with the March 2010 announcement. *Id.* at 10-11.

139. 16 U.S.C. § 470h-2(l) (2012).

140. Wampanoag Summary Judgment Motion, *supra* note 71, at 20.

inadequate. The ACHP observed that the CWEP's effects, which must be considered together, are "significant, adverse and cannot be adequately mitigated."<sup>141</sup> The Tribe's THPO also requested that Secretary Salazar not approve the CWEP and protested the Tribe's marginalization during the section 106 process.<sup>142</sup>

### 3. *The Final Environmental Assessment and Record of Decision*

Ultimately neither the ACHP's nor the Tribe's views persuaded federal decision makers to resist the push toward approval of the CWEP. On April 28, 2010, the BOEM issued a final Environmental Assessment and Finding of No New Significant Impact<sup>143</sup> and a Record of Decision (ROD) for the CWEP.<sup>144</sup> Secretary Salazar informed the ACHP that he had concluded that, regardless of its findings as to adverse impacts on viewsheds and historic properties, "the public benefits support approval of the Project at the Horseshoe Shoal location."<sup>145</sup> He stated that he was "mindful of our unique relationship" with the Wampanoag tribes and of "their concerns regarding the protection of cultural, historic, and natural resources," and claimed to have "carefully considered the Tribes' concerns."<sup>146</sup> He disputed the ACHP's critique of the section 106 tribal consultation<sup>147</sup> and ended his

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141. *Id.* at 20-21 (quoting the ACHP's comments, submitted on April 2, 2010). Tribal consultation was characterized as "tentative, inconsistent, and late." *Id.* at 21. The comments also concluded that approval of the CWEP would be "inconsistent with the policies and admonitions of NHPA and Executive Order 13287" and that the "Section 106 review was not initiated in earnest during the scoping process for [NEPA] Compliance." *Id.*

142. *Id.* at 21.

143. Notice of Availability of Environmental Assessment and FONNSI, 75 Fed. Reg. 23,798 (May 4, 2010). The Environmental Assessment was conducted in order to determine whether supplementation of the Final EIS was needed. The BOEM issued a draft FONNSI and Environmental Assessment in March 2010. Notice of Environmental Assessment for Proposed Cape Wind Energy Project in Nantucket Sound, MA, 75 Fed. Reg. 10,500 (Mar. 8, 2010).

144. CWEP ROD, *supra* note 22; *see also* Record of Decision for the Cape Wind Energy Project; Sec'y of the Interior's Response to Comments from the Advisory Council on Historic Preservation, 75 Fed. Reg. 34,152 (June 16, 2010). CWA was required to obtain the BOEM's approval of a Construction and Operation Plan (COP) for the CWEP prior to commencing any construction-related activities. CWEP ROD, *supra* note 22, at 4. A COP is required under Subpart F of the Renewable Energy Final Rule. CWA also had to meet prescribed financial assurance requirements before the COP could be approved. 30 C.F.R. §§ 285.511-285.514 (2014).

145. Letter from Ken Salazar, Secretary of the Interior, to John L. Nau, III, Chair of the Advisory Council on Historic Preservation 2 (Apr. 28, 2010).

146. *Id.* at 1.

147. *Id.* at 3.

letter with words seemingly aimed at putting the ACHP in its place: the DOI “is not legally bound to follow the ACHP’s recommendations or conclusions.”<sup>148</sup>

Among the areas of particular concern to the Tribe, as well as to the Wampanoag Tribe of Mashpee, that the ROD addressed were the CWEP’s visual impact and impact on cultural resources, as well as the BOEM’s efforts to consult with the tribes pursuant to NHPA section 106 and the government-to-government consultation obligations imposed by Executive Order 13,175. The ROD noted that the twenty-nine historic properties that would be within the visual Area of Potential Effect would experience adverse effects while the CWEP was in operation, and that the Tribes had explained that “an unaltered eastern region over Nantucket Sound is essential to performing their spiritual rituals and ceremonies.”<sup>149</sup> The document acknowledged that areas within the Area of Potential Effect that the Tribes used for such purposes would suffer major impacts<sup>150</sup> and that the seabed and viewshed over the Sound were threatened by adverse effects.<sup>151</sup> The ROD acknowledged that the CWEP would cause a “visual alteration to the historic Nantucket Sound...[that] would constitute an alteration of the character, setting, and viewshed of some historic properties.”<sup>152</sup> After noting effects of the proposed CWEP on numerous TCPs, however, the BOEM decided to ignore this adverse impact and approved the granting of a license for the project. Given the kind of impact at issue, the mitigation and monitoring requirements that the BOEM could impose on CWA with regard to visual impacts were limited. The BOEM’s requirements that CWA paint the turbines off-white and not use daytime white lighting, while perhaps making the turbines somewhat less glaringly conspicuous, did not prevent them from disturbing the viewscape.<sup>153</sup>

Although the BOEM offered to work with the Tribes on “mitigation” actions, the potential measures mentioned in the ROD—“financial support for to-be-identified cultural and/or historical tribal interests”—would not

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148. *Id.* at 13.

149. Wampanoag Complaint, *supra* note 3, at 23.

150. CWEP ROD, *supra* note 22, at 22. The BOEM acknowledged specifically that the “altered view of the eastern horizon from a place identified as culturally important by the Mashpee Wampanoag Tribe” was deemed by the FEIS to be a “major impact.” *Id.* The BOEM’s December 2008 Finding of Adverse Effect had been revised in January 2010 to list four onshore additional TCPs as affected historic properties. *Id.*

151. *Id.* at 23, 68-69.

152. *Id.* at 23.

153. *Id.* at 41.

undo the damage that would be done to the Nantucket Sound viewscape.<sup>154</sup> Similarly, the ROD's statement that Massachusetts "may agree to restrict any additional structural development in the State waters of Nantucket Sound," in addition to being speculative, did not amount to a proposal to lessen the harmful visual impact of the CWEP itself.<sup>155</sup>

In discussing the CWEP's impact on cultural resources other than the Sound viewscape, the ROD minimized the potential impact on submerged archaeological resources.<sup>156</sup> While acknowledging the concern that the CWEP would destroy archaeological evidence of tribal history throughout the Sound, the ROD claimed that potential adverse effects could be mitigated.<sup>157</sup> The BOEM imposed some mitigation and monitoring requirements with regard to cultural resources, including requiring supplemental surveying of the area on which the generator grid and the proposed transmission line corridor would be located.<sup>158</sup> The ROD also required that any surface-disturbing work within the Area of Potential Effect be monitored by an archaeologist and tribal representative<sup>159</sup> and that the CWA follow the "Procedures Guiding the Unanticipated Discovery of Cultural Resources and Human Remains" if "an unanticipated discovery of cultural resources or indicators likely to suggest the possibility of cultural habitation" occurred.<sup>160</sup> Although these requirements may suggest sensitivity toward cultural resources, the fact that the CWEP was allowed to proceed despite the acknowledgement that the presence of such resources, and damage to them, could not be ruled out further demonstrates that cultural resource protection was deemed less important than satisfying energy demands. Moreover, the requirement of additional sampling, along

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154. *Id.*

155. *Id.*

156. *Id.* at 23 (stating that the impact on historic and prehistoric resources was expected to be negligible and minor, respectively).

157. *Id.* The ROD stated that archaeological and cultural materials had not been found in the areas in which vibracore sampling had been performed, but this statement ignores the fact that the failure to identify such materials where specific samples were collected is no guarantee that materials did not exist elsewhere in the area to be affected.

158. *Id.* at 41. Supplemental surveying was required for an area out to 1,000 feet beyond the Area of Potential Effect because of concerns over the presence of archaeological resources. *Id.* at 42.

159. *Id.* at 42. The monitoring archaeologist needed to meet the DOI's "Professional Qualifications Standards for Archaeology" (set out at Archaeology & Historic Preservation; Sec'y of the Interior's Standards & Guidelines, 48 Fed. Reg. 44,738 (Sept. 29, 1983)). *Id.* The tribal representative was to be selected from a list approved by the two tribes, acting through their tribal councils. *Id.*

160. *Id.*



with supplemental surveying, ignored the fact that the sampling itself would disturb the area and might damage sensitive resources.

The final tribal-specific concern addressed by the ROD was compliance with the section 106 and Executive Order 13,175 consultation requirements. The ROD noted the Tribes' repeated claims that the BOEM had not consulted with them "in a meaningful and good faith manner," and stated the BOEM's belief that it "had worked in good faith on a government-to-government basis" with the Tribes<sup>161</sup> and that the consultation process had been "extensive."<sup>162</sup>

The ROD attributed the decision to offer a lease to CWA for the CWEP to "many factors," including the Obama Administration's giving priority to diversification of the nation's energy portfolio to include renewable energy in an effort to gain energy independence, battle climate change, and create jobs.<sup>163</sup> The BOEM claimed that it had "taken seriously" the concerns expressed by affected tribes and others,<sup>164</sup> but had found that "the benefits to the American public justify the lease."<sup>165</sup> The BOEM rejected an environmentally preferable alternative to the approved CWEP,<sup>166</sup> which would contain half the number of WTGs in the same area, because it would reduce the facility's production capacity and "showed less economic potential."<sup>167</sup> The BOEM also rejected an alternative approach that evaluated using other strategies for addressing New England electricity demands that did not threaten Wampanoag cultural practices and resources

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161. *Id.* at 57, 65-66 (outlining meetings and site visits that the BOEM saw as being part of the section 106 process).

162. *Id.* at 57. The ROD listed the meetings soliciting input related to cultural, historical, or visual impacts, including tribal section 106 and consultation meetings. *Id.* at 66-67.

163. *Id.* at 5.

164. *Id.* at 6.

165. *Id.* at 5.

166. NEPA regulations require evaluation of a project's "environmentally preferable alternative," meaning "the alternative that causes the least damage to the biological and physical environment" and "best protects, preserves, and enhances historic, cultural, and natural resources." Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's Natural Energy Policy Act Regulations (40 C.F.R. §§ 1500-1598 (2014)) Question 6a, 46 Fed. Reg. 18,026-18,038 (Mar. 23, 1981); *see also* 42 U.S.C. § 4331(b) (2012).

167. CWEP ROD, *supra* note 22, at 12-13 (describing the environmentally preferable "Smaller Project Alternative"); *id.* at 16 (identifying the alternative as environmentally preferable); *see also id.* at 61 (discussing comments received by the BOEM about the BOEM's use of economic viability as a screening criterion).

as did the approved proposal.<sup>168</sup> Profit considerations also led the BOEM to decline to engage in detailed analysis and consideration of other renewable energy alternatives, such as solar energy, which the BOEM claimed lack commercial availability.<sup>169</sup> BOEM rejection of such alternatives on commercial availability grounds seems to amount to a self-fulfilling prophecy. By approving projects like the CWEP in spite of their adverse impacts, the BOEM reduces the incentive for prompt development of these alternatives, thus delaying their commercial availability.

The BOEM thus made a decision to approve the CWEP that was purportedly based on environmental considerations, while not seriously weighing such considerations with respect to alternative proposals with less damaging environmental impacts. Wampanoag tribal members were left to bear the cultural and religious burdens imposed by the CWEP. In the hierarchy of factors considered in decision-making, certain environmental concerns could trump tribal religious rights and cultural concerns, but environmental concerns could in turn be trumped by profit maximization considerations.

After the thirty-three-year lease for the CWEP was signed in October 2010,<sup>170</sup> CWA submitted a Construction and Operations Plan (COP) for the project to the BOEM.<sup>171</sup> During the review process for the COP, the Tribe continued to express concerns and to urge that a Supplemental Environmental Impact Statement (Supplemental EIS) be prepared, to no avail.<sup>172</sup> In February 2011, CWA submitted a Revised COP, a nine-hundred-page document that the Tribe and others had little time to review before the BOEM issued a Final Environmental Assessment and Finding of No New Significant Impact for the project in April 2011 (Final 2011

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168. *Id.* at 14 (discussing the “No Action Alternative”). The BOEM concluded that only fossil fuel-fired electricity generating plants were a viable alternative strategy. *Id.*

169. *Id.* at 15. Other technologies – “tidal in-stream energy conversion devices, wave energy, ocean thermal energy, and floating wind turbulences” – were similarly left out of serious consideration on the grounds that they are “new and emerging technologies . . . that have not been tested on a large commercial scale.” *Id.*

170. Commercial Lease for the Cape Wind Energy Project, 75 Fed. Reg. 81,637 (Dec. 28, 2010) (notice of availability of the lease for the CWEP).

171. The COP was submitted on October 29, 2010. *Cape Wind*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/Renewable-Energy-Program/Studies/Cape-Wind.aspx> (last visited Feb. 22, 2014); *see also* CAPE WIND ENERGY PROJECT, NANTUCKET SOUND, MASSACHUSETTS: CONSTRUCTION & OPERATIONS PLAN (Feb. 4, 2011) [hereinafter CWEP COP], available at [http://www.boem.gov/uploadedFiles/BOEM/Renewable\\_Energy\\_Program/Studies/Final\\_Redacted\\_COP.pdf](http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Final_Redacted_COP.pdf).

172. Wampanoag Complaint, *supra* note 3, at 23.

EA).<sup>173</sup> This final document did not mention tribal interests, the properties of cultural and historical concern, the ACHP's comments on the CWEP, or the Keeper's Determination of Eligibility.<sup>174</sup> The BOEM issued a new ROD approving the COP simultaneously with the Final 2011 EA.<sup>175</sup>

*D. The Tribe's Challenge to the CWEP Approval*

In July 2011, the Tribe filed suit in the U.S. District Court for the District of Columbia, asserting claims based on both NEPA and the NHPA.<sup>176</sup> As to NEPA, the Tribe alleged that the Final EIS was inadequate because it did not adequately address the CWEP's potential impact on the Tribe, its TCPs, or on its practice of subsistence fishing.<sup>177</sup> Issuance of the ROD despite these inadequacies violated NEPA, as did the failure to supplement the Final EIS, or to take a "hard look" to determine the need for a Supplemental EIS in light of the evidence showing a greater impact on the Tribe's TCPs than anticipated in the Final EIS.<sup>178</sup> The Final EIS also should have been supplemented, the Tribe argued, to reflect the determinations, comments, and findings of state and federal preservation experts, namely the Massachusetts SHPO, the Keeper of the National Register, and the ACHP.<sup>179</sup>

The complaint asserted that the failure to adequately assess impacts on TCPs violated the NHPA. Alleged specific violations included selecting Horseshoe Shoal as the preferred location prior to engaging in meaningful section 106 consultation with the Tribe; failing to initiate consultation early enough so as to allow consideration of "a broad range of alternatives"; failing to ensure that the consultation process provided the Tribe with a

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173. Cape Wind Energy Project Notice, 76 Fed. Reg. 22,719 (Apr. 22, 2011) (notice of availability of an environmental assessment, a Finding of No New Significant Impact, and a record of decision to approve the COP). The Tribe's THPO wrote to the BOEM to express its concerns and to point out flaws in the review process, such as the BOEM's allowing only fourteen days for review of a 900-page revised COP. Wampanoag Summary Judgment Motion, *supra* note 71, at 12.

174. Wampanoag Complaint, *supra* note 3, at 23.

175. Minerals Mgmt. Serv., Record of Decision: Cape Wind Energy Project, Horseshoe Shoal, Nantucket Sound 2 (Apr. 18, 2011) [hereinafter 2011 ROD], available at [http://www.boem.gov/uploadedFiles/BOEM/Renewable\\_Energy\\_Program/Studies/Record\\_of\\_Decision42011.pdf](http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Record_of_Decision42011.pdf); see also 76 Fed. Reg. at 22,719 (notice of availability of 2011 ROD).

176. Wampanoag Complaint, *supra* note 3, at 24-25 (NEPA claims); *id.* at 25-27 (NHPA claim).

177. *Id.* at 24.

178. *Id.*

179. *Id.* at 24-25 (citing 42 U.S.C. §§ 4321-4370h (2012) and 400 C.F.R. §§ 1500-1508 (2014)).

reasonable opportunity to identify and advise on concerns about historic properties and to participate in resolving the CWEP's adverse effects thereon; and failing to recognize the formal government-to-government relationship between the federal government and the Tribe and to "conduct consultation in a manner respectful of tribal sovereignty and sensitive to the concerns and needs of Indian tribes."<sup>180</sup> The Tribe filed a motion for summary judgment in October 2012.<sup>181</sup>

In March 2014, the court granted summary judgment in favor of the defendants on the NHPA claims, finding that the NHPA section 106 consultation was conducted with the appropriate parties (including the Tribe) and was neither untimely nor conducted in bad faith.<sup>182</sup> Noting the dearth of statutory guidance as to the appropriate timeline for the consultation, the court treated the section 106 consultation process as having begun in 2005, "well before the 2010 Record of Decision,"<sup>183</sup> rather than as having commenced (as the Tribe and the BIA had maintained) in 2008.<sup>184</sup> Treating section 106 consultation as having begun prior to 2008 ignores the fact that the earlier meetings were not focused on NHPA compliance and took place while the BOEM was operating under the erroneous assumption that the Sound and other TCPs were not eligible for National Register listing.<sup>185</sup> Moreover, dating the beginning of consultation to 2005 was inconsistent with statements by Secretary of Interior Salazar that section 106 consultation began in July 2008.<sup>186</sup>

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180. *Id.* at 25-27. The Tribe also faulted the defendants for failing to complete the section 106 process before engaging in planning activities that would restrict the alternatives considered and for failing to properly take into account tribal confidentiality concerns as to sacred sites. *Id.*

181. Wampanoag Summary Judgment Motion, *supra* note 71, at 1.

182. Public Employees for Environmental Responsibility v. Beaudreau, No. 10-1067, 2014 WL 985394 at \*35 (D.D.C. 2014). The opinion in this consolidated case addressed four sets of claims, brought by the Public Employees for Environmental Responsibility (PEER) and allied environmental plaintiffs; the Town of Barnstable; the Alliance to Protect Nantucket Sound and named individual plaintiffs; and the Tribe. *Id.* at \*1; *see also id.* at \*13-\*14 (describing the plaintiffs and their claims).

183. *Id.* at \*33.

184. *See supra* notes 107-111 (discussing the concerns raised by the BIA in April 2008 over the tribal consultation requirement and the commencement of consultation with the Tribe in July 2008).

185. National Trust Amicus Brief, *supra* note 74, at 7-8.

186. Letter from Ken Salazar, Secretary of the Interior, to John Fowler, Exec. Dir., Advisory Council on Historic Preservation (Mar 1, 2010) (stating that "consultation under Section 106 of the National Historic Preservation Act [began] in July 2008"). At the time that he ended section 106 consultation, Secretary Salazar characterized earlier meetings with

The court maintained that the BOEM had “taken into account” the Tribe’s position that Nantucket Sound is eligible for listing on the National Register as a TCP, although none of the administrative documents quoted in support of this conclusion acknowledged the potential TCP designation.<sup>187</sup> The NHPA does not mandate a specific outcome, the court emphasized, but rather just requires an agency to consider the impact of its actions, and the BOEM had satisfied this obligation (notwithstanding the conclusion of the Keeper of the National Register that the Sound was indeed eligible for listing).<sup>188</sup> The court also rejected the Tribe’s claims that the BOEM violated NEPA by failing to address the CWEP’s impact on subsistence fishing<sup>189</sup> and by failing to issue a supplemental EIS after the Keeper’s determination that the Sound is eligible for inclusion on the National Register.<sup>190</sup> Although the BOEM “was ultimately incorrect about the Sound’s eligibility” and “the Keeper’s determination was new information in a sense,” this did not necessitate a supplemental EIS.<sup>191</sup> The BOEM’s repetition of tribal concerns in administrative documents sufficed as taking into account the Tribe’s comments,<sup>192</sup> regardless of their lack of impact on the BOEM’s decision.

The court granted summary judgment to the defendants on all of the other plaintiffs’ claims as well,<sup>193</sup> except for two claims against the U.S. Fish and Wildlife Service and the National Marine Fisheries Service with regard to impacts of the CWEP on certain migratory birds and on the North Atlantic right whale.<sup>194</sup> The court granted summary judgment to the

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the tribes as Executive Order 13,175 government-to-government consultation meetings and listed the July 2008 meeting as the first meeting on the list of “NHPA Section 106 Consultation Meetings.” Termination of NHPA Section 106 Consultation for the Cape Wind Energy Project Briefing Document 3-4 (Mar. 2010).

187. *Beaudreau*, 2014 WL 985294 at \*34. The quoted passages referred to cultural impacts related to tribal history but did not set out the Tribe’s view that the Sound met the criteria to be listed as a TCP. *Id.*

188. *Id.*

189. *Id.* at \*38.

190. *Id.* at \*40.

191. *Id.* The court stated that the fact that the BOEM disagreed with the Tribe about the status of the Sound as a TCP does not mean that the BOEM did not take the comments seriously.” *Id.*

192. *Id.*

193. *Id.* at \*42.

194. *Id.* at \*24-\*26 (claims against the USFWS for violations of the Endangered Species Act with respect to migratory birds); *id.* at \*29-\*30 (claims against the National Marine Fisheries Service for violation of the Endangered Species Act by failing to include an incidental take statement as to right whales in its biological opinion).

plaintiffs on these claims and remanded the case to the agencies for further action.<sup>195</sup>

Additional legal challenges related to the CWEP also remain unsettled, including a federal district court suit filed by the Town of Barnstable in January 2014 to challenge actions of the Massachusetts Department of Energy Resources and the Department of Public Utilities in connection with a purchase agreement for the power expected to be generated by the CWEP.<sup>196</sup> The federal district court's dismissal of the suit on Eleventh Amendment sovereign immunity grounds<sup>197</sup> has been appealed to the First Circuit Court of Appeals.<sup>198</sup>

The uncertainty over the future of the CWEP is not limited to the pending litigation challenging the project's approval. Financial uncertainty exists as well. Although the CWEP has received backing from a Danish pension fund and several foreign lenders for a large part of the more than \$2 billion in financing that is needed,<sup>199</sup> the financing commitments have been made subject to a number of conditions.<sup>200</sup> CWA's eagerness to get the

195. *Id.* at \*42. The court remanded the case to the USFWS for it to make an independent determination as to a seasonal operational adjustment that could minimize the killing of certain bird species and to National Marine Fisheries Service for the issuance of an incidental take statement as to North Atlantic right whales. *Id.*

196. *Town of Barnstable, Mass. v. Berwick*, 1:14-cv-10148-RGS, 2014 WL 1779345, at \*4 (May 2, 2014).

197. *Id.* at \*6.

198. Joint Opening Brief of Appellants, *Berwick*, No. 1:14-cv-10148-RGS (Aug. 25, 2014).

199. Beth Daley, *Danes Fund \$200 Million for Cape Wind*, BOSTON GLOBE, June 19, 2013, <http://www.bostonglobe.com/lifestyle/health-wellness/2013/06/18/cape-wind-announces-million-pledge-from-danish-firm/75i1apmflTeciPqJXuybNM/story.html> (noting that PensionDanmark had pledged \$200 million in financing, "a fraction of the more than \$2 billion the project needs to be built," and that Bank of Tokyo-Mitsubishi UFJ had pledged an undisclosed amount).

200. James Quilter, *Siemens Prepared to Financially Support Cape Wind*, WIND POWER MONTHLY, July 10, 2013, <http://www.windpowermonthly.com/article/1190062/siemens-prepared-financially-support-cape-wind> (noting that PensionDanmark's chief executive had stated that the funding was dependent on securing investment tax credit support). Siemens, which is scheduled to provide WTGs for the CWEP, has stated that it will back the project, but its support is also contingent upon financing conditions being satisfied. *Id.*; see also Erin Ailworth & Laura Crimaldi, *Cape Wind Secures \$600m Loan, Developer Says*, BOSTON GLOBE, Feb. 26, 2014, <http://www.bostonglobe.com/business/2014/02/26/cape-wind-says-has-secured-loan/7CnQIFOU6dQ2HlhL7s4oI0/story.html> (noting additional financing arrangements and uncertainties); Erin Ailworth, *Cape Wind Secures \$400m More in Financing*, BOSTON GLOBE, Mar. 27, 2014, <http://www.bostonglobe.com/business/2014/03/26/cape-wind-secures-million-financing/tsSLCZCrijgAdUQHZFcgjM/story.html> (noting additional financing arrangements and remaining financing need).

project up and running has been shared by U.S. Department of Justice Attorneys, who have urged the hastening of resolution of pending lawsuits in light of concerns over CWA's qualifying for expiring federal tax credits.<sup>201</sup> CWA has also sought federal loan guarantees from the Department of Energy, leading critics to comment that taxpayer money should not be used for loan guarantees for a project that might end up like Solyndra, the failed solar panel manufacturer that received \$535 million in federal loan guarantees before declaring bankruptcy.<sup>202</sup>

Finally, the CWEP's financial viability is tied to the ability to sell the electricity generated from the facility. To date, CWA has not lined up purchasers for all of the electricity that it hopes the CWEP will generate, which will be made available to purchasers at rates that critics say are higher than any previous rates in Massachusetts.<sup>203</sup> Moreover, plans for other wind projects in New England and off the New England coast,

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201. Gale Courey Toensing, *Cape Wind: Justice Department Urges Swift Lawsuit Resolution Before Tax Breaks Expire*, INDIAN COUNTRY TODAY (Apr. 25, 2013), <http://indiancountrytodaymedianetwork.com/2013/04/25/cape-wind-justice-department-urges-swift-lawsuit-resolution-tax-breaks-expire-149020>. The tax breaks in question are the Production Tax Credit and the Investment Tax Credit. *Id.* CWA's President, Jim Gordon, has claimed that CWA is still eligible for the federal tax credit that expired at the end of 2013. Ailworth & Crimaldi, *supra* note 200.

202. Marie Szanislo, *Pols Urge Cash for Cape Wind Amid Blowback*, BOSTON HERALD, Apr. 6, 2013, [http://bostonherald.com/news\\_opinion/local\\_coverage/2013/04/pols\\_urge\\_cash\\_for\\_cape\\_wind\\_amid\\_blowback](http://bostonherald.com/news_opinion/local_coverage/2013/04/pols_urge_cash_for_cape_wind_amid_blowback). In 2011, CWA applied for, and failed to receive, a \$1.97 billion dollar Energy Department loan guarantee under a program that expired in 2011. *Id.* The Solyndra bankruptcy has led to allegations of conflict of interest-tinged political pressure in support of the guarantees and of misrepresentation by Solyndra executives and to federal investigations of company executives and the circumstances surrounding Solyndra's demise. *See, e.g.*, Eric Lipton & John M. Broder, *E-Mail Shows Senior Energy Official Pushed Solyndra Loan*, N.Y. TIMES, Oct. 7, 2011, <http://www.nytimes.com/2011/10/08/us/politics/e-mail-shows-senior-energy-official-pushed-solyndra-loan.html?ref=energy-environment>. The Department of Energy announced a conditional commitment for a \$150 million loan guarantee for the CWEP in July 2014. *Energy Department Offers Conditional Commitment to Cape Wind Offshore Wind Generation Project* (July 1, 2014), <http://energy.gov/articles/energy-department-offers-conditional-commitment-cape-wind-offshore-wind-generation-projec-0>. NSTAR and National Grid have agreed to purchase 77.5% of the power expected to be generated by the CWEP "at a starting price of 18.7 cents per kilowatt hour, well above typical wholesale prices." Erin Ailworth, *Federal Loan Backing Lifts Fortunes of Cape Wind*, BOSTON GLOBE, July 2, 2014, <http://www.bostonglobe.com/business/2014/07/01/federal-loan-guarantee-lifts-fortunes-cape-wind/hS5k4uc4iOSxDhyM06F05N/story.html>.

203. Szanislo, *supra* note 202; *see also* Daley, *supra* note 199 (noting that buyers have been lined up for the power from 101 turbines out of a total of 130 turbines).

including a deepwater project that would not impact the Nantucket Sound viewscape, are moving forward.<sup>204</sup>

In short, the future of the CWEP is uncertain. Consequently, the Tribe is left to continue to wonder whether the Nantucket Sound viewscape will be protected or desecrated.

*II. I Saw that It Was Holy: Agency and Court Responses to Visual Impact Threats to Coyote Mountain and Medicine Bluffs*

*To allow a project of such magnitude to be erected next to one of our sacred sites—which helps form our identity . . .—would be a desecration of our culture and way of life.*<sup>205</sup>

*A. Gazing on Coyote Mountain: The Quechan Tribe and the Ocotillo Wind Energy Facility*

In May 2012, the Bureau of Land Management (BLM) approved construction of a large scale wind energy project near Ocotillo, California.<sup>206</sup> The project site lies within the traditional territory of the Quechan Tribe of the Fort Yuma Indian Reservation (Quechan Tribe).<sup>207</sup> During the approval process for the project, officials of the Quechan Tribe and other area tribes raised concerns about the visual impact of the project on a landscape that relates to several tribes' creation stories, as well as the project's impact on archaeological sites and on human remains present at cremation sites.<sup>208</sup> The Quechan Tribe's experience with challenging the approval showcases the obstacles—which in this case proved insurmountable—to gaining protection of sacred viewsapes that are threatened by wind energy projects.

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204. Szaniszló, *supra* note 202; *see also* Daley, *supra* note 199.

205. Complaint of Quechan Indian Tribe for Declaratory and Injunctive Relief at 2-3, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD) [hereinafter *Quechan Complaint*] (quoting Letter from Ronda Aguerro, Quechan Vice-President, to James Kenna, BLM State Director (Dec. 9, 2011)).

206. *Id.* at 2.

207. *Id.*

208. *Id.* at 2-3 (noting that forensic dogs were being used in inspections of portions of the wind project site, to detect human remains at cremation sites).



### *1. The Quechan Tribe of the Fort Yuma Indian Reservation*

The Quechan Tribe has traditionally lived in an extensive area in what is today Arizona and southern California.<sup>209</sup> The Tribe occupied land and used natural resources of the Lower Colorado River Valley and its confluence with the Gila River Valley, along with resources of the Colorado and Sonora Deserts.<sup>210</sup> The reservation of the Tribe, which has about 3500 members, is located on both sides of the Colorado River near Yuma, Arizona, and just north of the Mexican border; furthermore, an 1884 executive order set aside about 45,000 acres of the Tribe's traditional land in California as the Fort Yuma Indian Reservation for the Quechan Tribe.<sup>211</sup> Because of changes in the channel of the Colorado River, a portion of the Reservation now lies within Arizona.<sup>212</sup>

Although the Colorado River's location has changed over time, the Tribe's location has not, as it "was not moved or conquered by Spain, Mexico, early Yuma settlers, or the United States."<sup>213</sup> Moreover, "[t]he western traditional territory of the Tribe extend[s] to the area surrounding California's Cahuilla mountains and encompasses the lands [selected] for the Ocotillo Wind Energy Facility Project (OWEF Project)."<sup>214</sup> As is the case with many tribes, the land that the United States acknowledges as belonging to the Quechan Tribe fails to include portions of its homeland.<sup>215</sup>

### *2. The Ocotillo Wind Energy Project and Federal Regulatory Requirements*

The OWEF Project is located on over ten thousand acres of BLM-administered public lands (OWEF Project Area) within the California Desert Conservation Area (CDCA) in southwestern Imperial County, about five miles west of the community of Ocotillo and ninety miles south of San

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209. *Id.* at 6.

210. Declaration of John Bathke in Support of Plaintiff's Motion for Summary Judgment at 3, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD) [hereinafter Bathke Declaration].

211. *Quechan Complaint*, *supra* note 205, at 5 (citing 46 Fed. Reg. 11,372 (Feb. 6, 1981)). The original Jan. 9, 1884 Executive Order was subsequently modified by an executive order of December 19, 1900, and confirmed by Secretarial Orders of December 20, 1978, and February 6, 1981. *Id.*

212. *Id.* at 7.

213. *Id.*

214. Bathke Declaration, *supra* note 210, at 4.

215. *Id.* at 3.

Diego.<sup>216</sup> The site is adjacent to California's largest state park, the Anza-Borrego Desert State Park.<sup>217</sup> Although DOI and BLM officials have described the area as simply "vacant and undeveloped desert land," they have also acknowledged that the "site has been identified by a number of Tribes as having a strong spiritual and cultural connection for them."<sup>218</sup> In short, project proponents sought to bring an industrial facility to an environmentally sensitive desert area with longstanding religious and cultural significance.

The OWEF Project, as approved in May 2012, provides for the construction, operation, maintenance, and ultimate decommissioning, by a subsidiary of Pattern Energy Group LP, of a 315-megawatt wind energy facility consisting of 112 450-foot-tall WTGs, with blades that sweep a circle 371 feet in diameter.<sup>219</sup> Accompanying facilities include a 3.4-acre operation and maintenance facility, a 23.5-acre interconnection switchyard, a 2.1-acre substation, and about 42 miles of new access roads.<sup>220</sup>

In addition to successful completion of the review process required for the OWEF Project under NEPA and the NHPA, the project also required the granting of a right of way under the Federal Land Policy and Management Act (FLPMA),<sup>221</sup> which was enacted in 1976 to govern the administration of federally owned public lands.<sup>222</sup> The FLPMA provides

216. U.S. Bureau of Land Mgmt., Record of Decision, Ocotillo Wind Energy Facility and Amendment to the California Desert Conservation Area Plan 1 (2012) [hereinafter OWEF ROD], available at <http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/nepa/ocotillo/express.Par.35134.File.dat/Ocotillo%20Signed%20ROD.pdf>.

217. *Id.*

218. *Id.*

219. Quechan Complaint, *supra* note 205, at 4.

220. *Id.* Other approved components on public lands are a twelve-acre concrete batch plan/construction lay-down area and up to three permanent meteorological towers. *Id.* The right of way grant includes an option to renew after the initial thirty-year term, in accordance with 43 C.F.R. § 2807.22. *Id.* at 1. The applicant submitted a right of way application and initial Plan of Development (POD) to the BLM in October 2010. The most recent version of the POD, which had been revised several times, was submitted in March 2012. *Id.* at 3. San Diego Gas & Electric signed a Power Purchase Agreement, which was approved by the California Public Utilities Commission in December 2011, to purchase up to 315 MW for a twenty-year term. *Id.* at 1-3.

221. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701-1784 (2012)).

222. OWEF ROD, *supra* note 216, at ES-1. The Secretary of the Interior is authorized to grant rights of way "on public lands for systems of generation, transmission, and distribution of electric energy." *Id.* at 3 (citing FLPMA § 501 (a)(4)); see also *id.* at 4 (discussing authority under the FLPMA).

that land managers are to “take any action necessary to prevent unnecessary or undue degradation of [public] lands”<sup>223</sup> and that “public lands [are to] be managed in a manner that will protect the quality of [their scenic values (among other values)].”<sup>224</sup> Public lands’ scenic values are protected under the FLPMA by Visual Resource Management (VRM) classifications, which set objectives with which land management decisions must comply, including “the level of visual change to the landscape that may be permitted for any surface-disturbing activity.”<sup>225</sup> The process of assigning VRM classifications seems fraught with difficulty for concerned tribes, given that it requires the assignment of relative values to visual resources, and tribes’ valuations of viewsapes might well differ from those of development-minded agency officials. Because no VRM objectives had been established previously for the OWEF Project Area, designation of Interim VRM Classes was necessary. Amendments to the California Desert Conservation Area Plan (CDCA Plan), which controls actions on the twelve million acres of land administered by the BLM within the twenty-five-million-acre CDCA, were also required.<sup>226</sup> Approved in a 1980 Record of Decision, the CDCA Plan divided CDCA lands into four use classes based on resource sensitivity.<sup>227</sup> A major concern underlying the CDCA Plan was, as the Environmental Impact Statement for the Plan (CDCA EIS) stated, the “potential irretrievable loss of historic, cultural, and Native American resources and values.”<sup>228</sup> The CDCA EIS indicated that the great majority

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223. 43 U.S.C. § 1732(b) (2012). Regulations define “unnecessary or undue degradation” as “conditions, activities, or practices that . . . fail to comply with . . . Federal and state laws related to environmental protection and protection of cultural resources” and that “fail to attain a stated level of protection . . . required by specific laws in areas such as the California Desert Conservation Area.” 43 C.F.R. § 3809.5 (2014).

224. 43 U.S.C. § 1701(a)(8) (2012); *see also id.* § 1702(c) (identifying “scenic values” as one of the resources for which public lands shall be managed); *id.* § 1711(a) (requiring the Secretary to prepare and maintain an inventory of all public lands and their resource and other values (including scenic values)); *id.* § 1765(a) (requiring that each right-of-way shall contain terms and conditions which will minimize damage to scenic values).

225. Quechan Complaint, *supra* note 205, at 19-20 (quoting the OWEF Final EIS at 3.19-2).

226. OWEF ROD, *supra* note 216, at 4-5.

227. The four classes are: C (controlled use), L (limited use), M (moderate use), and I (intensive use). *California Desert Conservation Area*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., [http://www.blm.gov/ca/st/en/fo/cdd/cdca\\_highlights.html](http://www.blm.gov/ca/st/en/fo/cdd/cdca_highlights.html) (last updated Apr. 27, 2007) (describing the classes and the amount of each).

228. Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 13, Quechan Tribe of the Fort

of cultural resource and Native American values would be protected from “disturbance or desecration” by being included in low intensity use classes under the CDCA Plan.<sup>229</sup> Among the areas studied during preparation of the CDCA EIS was the Coyote Mountain area, which the document described as “one of the most outstanding scenic areas in the CDCA,” providing “diversity and quality that raises it above most others in the desert.”<sup>230</sup> The OWEF Project Area lies within a “Class L” (limited use) area—an area designated for lower intensity uses, in order to “protect sensitive, natural, scenic, ecological, and cultural resource values”—and the site had not been previously designated as suitable for wind energy development.<sup>231</sup>

### 3. *The Quechan Tribe and the OWEF Project Federal Approval Process*

Following the publication of a Draft Environmental Impact Statement for the project (OWEF Draft EIS), area tribes identified the OWEF Project Area, and a larger surrounding area, as a Traditional Cultural Property.<sup>232</sup> Tribal commentators voiced strong concern about the project’s potential effects on certain viewsheds, such as the viewshed from the National Register-listed Spoke Wheel Geoglyph, as well as on newly recorded archaeological sites, sacred sites, and cremation sites.<sup>233</sup> In a December

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*Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD) [hereinafter *Quechan Memorandum*].

229. UNITED STATES BUREAU OF LAND MGMT., FINAL ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED PLAN, CALIFORNIA DESERT CONSERVATION AREA E-33 (1980) [hereinafter *CDCA EIS*].

230. *Id.* at app. III: Wilderness, at 682. The EIS noted further that “[v]ery high ratings were recorded in landform, color, and uniqueness.” *Id.*

231. *Quechan Complaint*, *supra* note 205, at 3 (quoting the CDCA Plan). The CDCA Plan needed to be amended to find that the OWEF Project site was suitable for a wind energy generation project. *Id.* at 4; *see also id.* at 8 (discussing CDCA Plan amendments). The Coyote Mountain area in particular was recommended for Class L designation to “protect the natural and Native American resource values and high scenic quality.” CDCA EIS, *supra* note 216, at app. III: Wilderness, at 684.

232. OWEF ROD, *supra* note 216, at 22-23 (noting that a September 29, 2011 letter identified the project area as a TCP and a November 23, 2011 letter informed the BLM that, in the Tribe’s view, the Project site and a larger surrounding area constituted a TCP).

233. *Id.* at 23. Commentators mentioned “trails, geoglyphs, rock features, habitation areas, previously documented ethnographic resources, the view shed from the Spoke Wheel Geoglyph and other geoglyphs and sacred sites within the Project area, and both known and unknown cremation sites.” *Id.* As a result of tribal consultations and consultations with the SHPO Officer and the ACHP, the BLM decided to expressly assume that the portion of the TCP within the OWEF Project Area is eligible for National Register listing for purposes of analyzing the Project’s adverse effect. *Id.* at 24. The BLM also documented its

2011 letter, for example, Quechan Tribe Vice-President Ronda Aguerro explained the area's importance and the significance of Coyote Mountain in particular:

The Ocotillo Desert is part of the traditional Western Corridor for the Quechan Tribe and . . . holds tremendous spiritual essence for the Quechan Tribe. The [OWEF Project Area] lies at the bottom of the Coyote Mountain (Carrizo Mountain), which is an important cultural component to the Quechan cosmology. The importance of that mountain is recounted and held sacred in our Creation Story, songs, and other oral traditions. To allow a project of such magnitude to be erected next to one of our sacred sites—which helps form our identity as Quechan—would be a desecration of our culture and way of life.<sup>234</sup>

The March 2012 Final Environmental Impact Statement for the OWEF Project (OWEF FEIS)<sup>235</sup> documented the status of the OWEF Project Area as an area with great cultural sensitivity<sup>236</sup> and reported that the entire OWEF Project Area might be eligible for inclusion in the National Register as a TCP—the characteristics of which, including viewsheds to sacred

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understanding of the TCP in the Final EIS/EIR and in a Draft Tribal Values Supplemental Report for the Ocotillo Wind Energy Facility. *Id.*

234. Quechan Complaint, *supra* note 205, at 2-3 (quoting Letter from Ronda Aguerro, Quechan Tribe Vice President, to James Kenna, BLM State Director (Dec. 9, 2011)). The complaint also noted that the Ocotillo Desert “is also an area of transition between the Quechan, Cocopah, Kumeyaay and Kamia/Desert Kumeyaay.” *Id.* at 2.

235. Notice of Availability of a Final Environmental Impact Statement and Final Environmental Impact Report for the Pattern Energy Group's Ocotillo Express Wind Energy Project and Proposed California Desert Conservation Area Land Use Plan Amendment, Imperial County, CA, 77 Fed. Reg. 14416 (Mar. 9, 2012). The seven-volume OWEF FEIS is available at the website of the BLM's El Centro, California Field Office. *Ocotillo Wind Energy Facility (CACA 051552)*, BUREAU OF LAND MGMT., [http://www.blm.gov/ca/st/en/fo/elcentro/nepa/ocotillo\\_express\\_wind.html](http://www.blm.gov/ca/st/en/fo/elcentro/nepa/ocotillo_express_wind.html) (last visited Nov. 10, 2014).

236. *Id.* at 9 (citing the OWEF FEIS at 4.4-9). More than 280 archaeological sites, each encompassing a large area of land and containing numerous individual artifacts, were identified during surveys in the Area of Potential Effects for the OWEF Project, along with a number of other kinds of significant resources. *Id.* Commenting on the large size of some of the sites, the complaint noted that “Site CA-IMP-008/H has dimensions of 4024 meters by 1610 meters; Site CA-IMP-103/H measures 1170 meters by 1180 meters; [and] Site CA-IMP-6988 measures 920 meters by 410 meters.” *Id.* Moreover, “it is estimated that thousands, potentially tens of thousands, of individual artifacts are located within the OWEF Project Area.” *Id.*

mountains, would be destroyed by the OWEF Project.<sup>237</sup> The OWEF FEIS acknowledged that “construction and operation of wind turbines within the TCP would result in visual and auditory effects that have the potential to impact” the area’s use for religious purposes and that the OWEF Project “would alter the character of the property from rural to industrial.”<sup>238</sup> Concerns over the project review process (as well as the review process for other renewable energy projects) prompted the California SHPO and the ACHP to express their concerns to the BLM State Director.<sup>239</sup>

This was not the first time that the Tribe raised concerns about a planned alternative energy facility. In 2010, the Tribe met with success in its challenge to the BLM’s approval of the Imperial Valley Solar Project, a 709-megawatt solar energy facility proposed for a 6000-acre-plus area of public land.<sup>240</sup> If it had been built, the project would have been one of the largest solar facilities in the United States.

Although consultations with tribes, the state historic preservation officer, and the ACHP led the BLM to understand that “the Project, or any of its

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237. *Id.* at 9-10. Subsequent field visits to the OWEF Project Area had resulted in the discovery of additional sites and resources, including burial sites, some of which were in direct impact areas. *Id.* at 10. Included among the significant resources of the OWEF Project Area are “geoglyphs, petroglyphs, sleeping circles, milling features, agave roasting pits, ceramics (including unusual painted and stucco) and rare artifacts.” *Id.* at 9. Also present are “24 pre-historic trail segments and at least six identified burial sites.” *Id.* at 10. The complaint noted that the BLM had not required avoidance of identified sites. *Id.* Moreover, the OWEF ROD “confirms that ‘the Refined Project will, even after implementation of the measures in the MOA [Memorandum of Agreement], still have an unmitigated adverse effect on resources that are spiritually and culturally significant to affected Tribes.’” *Id.* (quoting the ROD at ES-3).

238. Quechan Memorandum, *supra* note 228, at 8. The OWEF Project Area would have “adverse and unavoidable impacts from the conversion of a natural desert landscape to a landscape dominated by industrial character.” U.S. Bureau of Land Mgmt., Executive Summary, Ocotillo Wind Energy Facility ES-15 (Feb. 2012), *available at* <http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/nepa/ocotilloexpress/feis.Par.85285.File.dat/ExecutiveSummary.pdf>.

239. Quechan Complaint, *supra* note 205, at 11. On April 24, 2012, the California SHPO wrote to BLM State Director James G. Kenna to inform him that he was so “concerned and troubled with the process being followed [by BLM] to approve renewable energy undertakings in California,” that he would not execute any further agreement documents with BLM until the issues of concern raised in his correspondence are addressed.” *Id.* On the same day, the ACHP wrote to State Director Kenna to identify a number of concerns with approval of the OWEF Project and the BLM’s NHPA process, describing the BLM’s section 106 consultation schedule as “aggressive.” *Id.*

240. Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1106-07, 1122 (S.D. Cal. 2010).

action alternatives, would result in adverse effects to the TCP that cannot be completely mitigated,”<sup>241</sup> this did not doom the project. Rather, agency officials stated, “the identification of a traditional cultural landscape, or a TCP, and the potential effects of an undertaking on it are one fact that goes into the decision whether to approve the undertaking.”<sup>242</sup>

The Record of Decision (OWEF ROD) signed in May 2012 approved the grant of a thirty-year right of way for the OWEF Project and amendments to the CDCA Plan to identify the affected public lands as suitable for wind energy development.<sup>243</sup> The OWEF ROD noted the BLM’s obligation to consult with tribes to fulfill both its NHPA responsibilities<sup>244</sup> and its “obligation to consult on a government-to-government basis about federal decisions that impact Tribes or identified Tribal resources.”<sup>245</sup> The OWEF ROD emphasized that the project as approved (referred to as the Refined Project) represented a thirty percent reduction in WTGs compared to the original proposal<sup>246</sup> and that consultations with the Tribe and others had resulted in redesign of the Project to avoid direct physical impacts to cultural resources identified during archeological surveys.<sup>247</sup> In addition,

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241. OWEF ROD, *supra* note 216, at 24 (noting that “many tribes attach religious and cultural significance to the Project site and the broader landscape” and “the Project being approved will adversely affect those resources”).

242. *Id.* at 24-25.

243. *Id.* at ES-1. The Secretary of the Interior is authorized to grant rights of way “on public lands for systems of generation, transmission, and distribution of electric energy.” *Id.* at 3 (citing FLPMA § 501 (a)(4)); *see also id.* at 4 (discussing authority under the FLPMA).

244. *Id.* at 21-22 (noting that the BLM must consult with tribes under section 106 in connection with “its responsibilities to identify, evaluate, and resolve adverse effects on cultural resources affected by BLM undertakings”).

245. *Id.* at 22 (citing Exec. Order 13,084 (May 14, 1998)). The OWEF ROD noted that although the scope of considerations covered by NHPA section 106 and government-to-government obligations differs, because “they are derived from different authorities,” the issues discussed in the respective consultations may overlap, as was the case in the OWEF Project discussions. *Id.* In addition to consulting with federally recognized tribes on the OWEF, the BLM also invited one tribal organization (the Kwaaymii Laguna Band of Indians) to consult, “pursuant to the Executive Memorandum of April 29, 1994, and other relevant laws and regulations including NHPA Section 106.” *Id.*

246. *Id.* at 14-15 (noting the reduction in “[i]mpacts to biological, visual, cultural and other resources . . . ; [t]he risk of bird and bat collisions with turbines, including golden eagle collisions; visual impacts . . . ; [t]he number of construction sites, thus reducing the potential for construction related impacts including the inadvertent discovery of previously unknown resources; and [i]mpacts to existing drainages and other hydrologic features by reducing overall disturbance on site”).

247. *Id.* at 21. The redesigns included the relocation of individual turbines, as well as the elimination of some turbine sites, including forty-three sites that were eliminated “to reduce

the CDCA Plan amendments included a provision finding that the area outside of the Refined Project's footprint was unsuitable for wind energy development because of the resources located there.<sup>248</sup> Even the Refined Project, however, would have a significant adverse impact, because the remaining WTGs would still obstruct the viewshed to Coyote Mountain from a number of locations, such as the important Indian Hills archaeological site, and adversely impact the viewshed towards the east to Mount Signal, which is sacred to the Tribe.<sup>249</sup> The imposition of any WTGs between Coyote Mountain and Mount Signal would interfere with the spiritual connection that the Tribe believed existed between them and would "detrimentally impact the ability of the Quechan people to spiritually interact and appreciate these sacred locations,"<sup>250</sup> as the Tribe's Historic Preservation Officer, John Bathke, explained. Also located within the OWEF Project Area is another sacred mountain, Sugarloaf Mountain, and the viewshed between Sugarloaf Mountain, Coyote Mountain, and Mount Signal is also of great importance.<sup>251</sup> Bathke sought to convey what was at stake for the Tribe and the affront that the OWEF represented by explaining that the landscape is "part of these people's spiritual identity, and yet they want to put up turbines and destroy and interfere with that reverence and

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the impact of the Project on cultural resources in the northwest corner of the Project site and the landscape where the Project is located." *Id.*

248. *Id.* The BLM also signed a Memorandum of Agreement (MOA) containing measures that respond to the potential for the post-review discovery of cultural resources during the construction, operation, or decommissioning of the Project. *Id.* (noting that "the MOA includes a Historic Properties Treatment Plan, Plan for Archaeological Monitoring, Post-Review Discovery and Unanticipated Effects, and Native American Graves Protection and Repatriation Act (NAGPRA) Plan of Action."). Also included were "stipulations for the creation of Environmentally Sensitive Areas to protect archaeological sites during construction and a provision that requires the development of a Long Term Management Plan to ensure the continued protection of cultural resources within the ROW for the life of the Project." *Id.*

249. Quechan Complaint, *supra* note 205, at 3 (citing February 2012 statement by the THPO).

250. *Id.*

251. Bathke Declaration, *supra* note 210, at 7 (noting that the viewshed between Sugarloaf Mountain, Coyote Mountain, and Mountain is "extremely important to the Quechan, Kumeyaay, and Cocopah"). Bathke explained that the proposed location was next to Coyote Mountain and that Sugarloaf Mountain was within the project area; furthermore, the Indian Hills archaeological site lies west of (and immediately adjacent to) the project site, while Mount Signal lies east of the project site. *Id.*



the serenity of what the creator gave them.”<sup>252</sup> Although the BLM recognized that the Refined Project would still have “an adverse effect on religious and cultural resources that are significant to many of the tribes consulting with the BLM about the Project,” officials decided nonetheless that its approval was “in the public interest.”<sup>253</sup>

The BLM’s decision provides another reminder of the difficulties tribes face in trying to protect intangible cultural and religious resources. Although the BLM required some changes to the original proposal, in terms of size and location, to reduce somewhat the proposed project’s impact on archaeological sites, adverse impacts on important viewsapes remained part of the approved OWEF Project.

#### 4. *The Quechan Tribe’s Challenge to the OWEF Project Approval*

##### a) *The Complaint*

In May 2012, the Quechan Tribe filed suit against the DOI and the BLM in federal district court in California, seeking judicial support for its efforts to protect the precious resources within its traditional territory that were threatened by the OWEF.<sup>254</sup> The Tribe’s complaint noted that “the public lands within the OWEF Project Area, in their entirety, are themselves of cultural significance to the Quechan Tribe and its members”<sup>255</sup> and consequently qualify, as a whole, as a National Register-eligible TCP.<sup>256</sup>

The Tribe noted its repeated attempts to explain the significance of the OWEF Project Area to federal officials and to advocate for its preservation in a manner consistent with natural and historical resource protection law.<sup>257</sup> The complaint highlighted the context in which the OWEF Project had been approved, explaining that it is just “one of many large utility-scale

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252. Morgan Lee, *Ocotillo Wind Project Advances Despite Tribal Objections*, SAN DIEGO UNION-TRIBUNE, May 12, 2012, <http://www.utsandiego.com/news/2012/May/12/ocotillo-wind-project-advances-despite-tribal-obje/>.

253. OWEF ROD, *supra* note 216, at ES-3, 21. The OWEF ROD summarized the BLM’s version of the tribal consultation process for the OWEF Project. *Id.* at 21-24.

254. Quechan Complaint, *supra* note 205, at 2; *see also id.* at 7 (noting that the “western traditional territory of the Tribe extended to the area surrounding California’s Cahuilla mountains and encompasses the OWEF Project area”). Ocotillo Express LLC intervened in the litigation as a defendant. *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 927 F. Supp. 2d 921, 926 (S.D. Cal. 2013).

255. Quechan Complaint, *supra* note 205, at 2.

256. *Id.* at 3.

257. *Id.* at 8-9 (noting efforts to advocate for the area’s preservation “in a manner consistent with FLPMA, the CDCA Plan, the NHPA, and other federal cultural resource protection laws, regulations, and policies”).

renewable energy projects located on California desert lands that have recently been approved, or are under consideration for approval, by Interior, and which threaten scenic, cultural, and biological resources designated for protection under the CDCA Plan.”<sup>258</sup> The complaint alleged that the DOI had put the OWEF Project on “an artificial ‘fast-track’” and rushed the NEPA and NHPA process, in order to achieve the project developer’s goal of obtaining publicly-funded federal financial benefits, which were likely to expire at the end of 2012.<sup>259</sup>

The Tribe alleged violations of the FLPMA, the CDCA Plan, NEPA, and the NHPA.<sup>260</sup> The OWEF ROD and CDCA Plan Amendment, which approved a project that will result in “the degradation of scenic and culturally significant public lands designated as Class L [Limited Use] under the CDCA Plan” and will impact cultural resources eligible for National Register listing, violated, the Tribe claimed, the FLPMA and the CDCA Plan (the CDCA being the only specific area identified for special management prescriptions in the FLPMA).<sup>261</sup> The DOI violated NEPA by failing to conduct an adequate analysis of cumulative and indirect effects of approval of the OWEF Project, given the approval (and pending approvals) of other large renewable energy projects on Class L lands in the CDCA,<sup>262</sup>

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258. *Id.* at 4.

259. *Id.* at 12.

260. *See generally* Quechan Complaint, *supra* note 205.

261. *Id.* at 14-15. The complaint noted the Tribe’s preliminary success in the case challenging the Imperial Valley Solar Project:

In a previous case, Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior, the Court found that the Tribe’s FLPMA claim, which similarly challenged Interior’s fast-track approval of a utility-scale solar project on sensitive Class L lands located nearby the OWEF Project Area, raised “serious questions” for the purposes of injunctive relief.

*Id.* at 15 (internal citations omitted). The FLPMA, the complaint stated, was also violated by approval of a project that “will permanently degrade and destroy culturally significant lands that qualify as a Traditional Cultural Property, will destroy a significant scenic viewshed, and will destroy habitat for sensitive biological species on lands that have been affirmatively designated and set aside for only low-intensity uses,” which constitutes unnecessary and undue degradation of the public lands, in violation of the FLPMA. *Id.* at 17.

262. *Id.* at 17-18. Environmental impact statements are required to thoroughly analyze the “cumulative impact” of an agency’s proposed action, 40 C.F.R. §§ 1508.7, 1508.25(a)(2) (2014), and the proposed action’s indirect effects, *id.* § 1508.8. The complaint alleged that rather than providing “substantive analysis about how the development of the OWEF Project, in conjunction with the numerous other existing and foreseeable projects, will impact cultural, biological, or scenic resources on desert lands” in the CDCA, especially on Class L lands, “the FEIS provides only conclusory statements about cumulative impacts, without providing substantive analysis of how the numerous proposed energy developments,

and to adequately analyze the significance of the affected cultural environment and the projected impacts upon it.<sup>263</sup> As for NHPA compliance, the Tribe asserted that the DOI violated the statute by executing the OWEF ROD prior to completing the section 106 process (and consequently failing to adequately identify all historic properties),<sup>264</sup> and by failing to meaningfully consult with the Tribe in compliance with both section 106<sup>265</sup> and the DOI's own Policy on Consultation with Indian Tribes.<sup>266</sup>

The OWEF Project's visual impact, which implicates the FLPMA and NEPA, merited particular attention in the complaint. For the Tribe, preservation of the viewshed between Coyote Mountain, Sugarloaf Mountain, Mount Signal, and the Indian Hills archaeological site, a viewshed that is "a critical component of the Traditional Cultural Property," is extremely important.<sup>267</sup> As noted above, compliance with the FLPMA's scenic values protection requirements necessitated the establishment of Interim VRM Classes for the OWEF Project Area, because no VRM

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and associated transmission lines, roads, and support facilities, will affect cultural, biological, and scenic resources on desert lands within the CDCA." Quechan Complaint, *supra* note 205, at 18. The complaint also faulted the DOI for failing to prepare a Programmatic EIS regarding renewable energy development in the CDCA (a step which was required because of the DOI's apparent program of approving renewable energy projects in the CDCA). *Id.* at 25.

263. *Id.* at 23. The complaint charged that the DOI prepared its Draft and Final EIS, and made its approval decision, without "adequately identifying, evaluating, or consulting about, the significance of the cultural resources that exist within the OWEF Project Area in terms of eligibility for inclusion in the National Register and in terms of cultural significance to the Quechan Tribe." *Id.* at 24. The DOI "failed to conduct ethnography, prehistoric trails, and regional synthesis studies that would have provided critical information to the decision-makers about the cultural significance of the OWEF Project Area" (despite repeated requests to do so) and approved the Project without evaluating the eligibility of the Project lands as a whole for National Register listing and protection as a TCP or "the impact of noise and visual pollution on cultural resources and Native American values." *Id.*

264. *Id.* at 26.

265. *Id.* at 27. Agencies are required to recognize the government-to-government relationship between the federal government and tribes, and consult with them in a manner sensitive to the concerns and needs of the Indian tribe. *Id.* (citing 36 C.F.R. § 800.2(c)(2)(ii)(C)(2014)).

266. The complaint charged that the DOI "has rejected or ignored Quechan requests for meetings with the decision-makers" (the Secretary of the Interior and the BLM Director); repeatedly failed to provide critical information on a timely basis; and declined tribal requests for comment period extensions (despite failing to provide the Tribe with critical documents at "the very end of the administrative process"). *Id.*

267. *Id.* at 19.

objectives had previously been established.<sup>268</sup> The Tribe argued that the Environmental Consequences section of the OWEF FEIS treated the OWEF Project as being subject to a VRM Class IV Management objective,<sup>269</sup> which was inconsistent with indications elsewhere in the FEIS (and in the Draft EIS for the project) that the OWEF Project Area was to be managed in accordance with VRM Class II or III objectives, which would allow less disturbance.<sup>270</sup> The VRM Class II Management Objective requires that a project “retain the character of the existing landscape,” that “[t]he level of change to the characteristic landscape should be low,”<sup>271</sup> and that visible activities would “not attract the attention of the casual observer.”<sup>272</sup> The less restrictive VRM Class III Management Objective requires that a project or action “partially retain the existing character of the landscape,” that the level of change to the characteristic landscape is “moderate or lower,” and that any changes “should repeat the basic elements found in the predominant natural features of the characteristic landscape.”<sup>273</sup>

The OWEF FEIS’s Visual Resources Analysis observed that the applicable VRM designation for the OWEF Project Area is Class III Management, that “the level of change from the Key Observation Points resulting from . . . the OWEF Project would be ‘Moderate’ to ‘High’,” and that the proposed OWEF Project is not consistent with the Class III designation.<sup>274</sup> As the Visual Resources Analysis explained, the OWEF Project “would result in the introduction of visually prominent built structures into a landscape generally lacking similar built features of industrial or technological character” and would not meet the Class III objective of a moderate or lower level of visual change.<sup>275</sup> The designation

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268. *See supra* notes 221-25 and accompanying text (discussing FLPMA requirements).

269. Quechan Complaint, *supra* note 205, at 21.

270. *Id.* A table in the OWEF FEIS provided that “the land area encompassing the OWEF project area is to be managed in accordance with Interim VRM Class III objectives.” *Id.* at 20 (quoting FEIS Table 3.19-1, at 3.19-8). An appendix of the FEIS stated that “[f]or the Proposed Project, the Interim VRM Classes was determined to be VRM Class II and VRM Class III.” *Id.* (quoting the FEIS, Appendix E-2).

271. *Id.* at 20 (quoting the FEIS, Appendix E-2).

272. *Id.* (quoting the FEIS, Appendix E-2). Moreover, “[a]ny changes must repeat the basic elements of form, line, color, and texture found in the predominant natural features of the characteristic landscape.” *Id.*

273. *Id.* (quoting the FEIS at 3.19-2). Visible activities “may attract attention but should not dominate the view of the casual observer.” *Id.*

274. *Id.* at 20-21 (citing the FEIS, Appendix E-1) (describing the impact of the OWEF Project as “significant.”).

275. *Id.* at 21 (quoting the FEIS, Appendix E-1).

of the lands as Class L (i.e., limited use) lands, which corresponds with a Class III VRM Class, also indicated that their scenic values must be protected and cannot be significantly diminished.<sup>276</sup> The level of wind development that would be created by the OWEF Project, however, can only, as the DOI conceded in the OWEF FEIS, conform to interim Class IV objectives.<sup>277</sup> The Tribe alleged that the DOI had changed the designation to Class IV shortly before it issued the FEIS and executed the ROD in order to facilitate approval of the project. The Tribe argued that the approval of a proposed project that is not consistent with VRM objectives violates the FLPMA and that the failure to evaluate the environmental consequences of approving the OWEF Project in a Class III VRM area, by taking a “hard look” at its impact on applicable VRM objectives, violates NEPA.<sup>278</sup> The FEIS had also confirmed the proposed project’s violation of state and local visual management guidelines and objectives.<sup>279</sup> The Tribe sought a judgment declaring that the approval of the Amendment to the CDCA Plan, the execution of the OWEF ROD, and the failure to complete the section 106 process and to meaningfully consult with the Tribe violated the applicable statutes.<sup>280</sup>

*b) The Court’s Response: Full Steam Ahead*

In February 2013, the district court denied the Quechan Tribe’s motion for summary judgment,<sup>281</sup> instead granting the motions for summary

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276. *Id.* The complaint also noted that in an April 2012 Draft EIS for the Ocotillo Solar Project, proposed for development on Class L lands in the vicinity of the proposed OWEF Project, the DOI stated as follows: “For Multiple Use Class L visual management prescriptions, the VRM Class with closely corresponding visual management objective is Class III.” *Id.* at 21 (quoting the Ocotillo Solar DEIS, April 2012, at 3-88). The Draft EIS also confirmed that the area’s appropriate VRM Class designation is Class III. *Id.*

277. *Id.* (citing the FEIS at 4.18-2).

278. *Id.* at 22. The Tribe also claimed that the DOI had not disseminated accurate information about the project’s impacts on the applicable VRM objectives. *Id.*

279. *Id.* (referring to those of the Anza-Borrego Desert State Park and the Imperial County General Plan).

280. *Id.* at 30-31.

281. *Quechan Tribe*, 927 F. Supp. 2d at 925. The Tribe had filed an amended complaint in August 2012 to include claims under the Native American Graves Protection and Repatriation Act and the Archaeological Resources Protection Act, in response to post-ROD developments, including the discovery of numerous new cremation and cultural sites, as well as many artifacts, as work on the OWEF Project proceeded, and filed a motion for summary judgment in September 2012. First Amended Complaint of the Quechan Indian Tribe for Declaratory and Injunctive Relief, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD).

judgment filed by the defendants.<sup>282</sup> Addressing the Tribe's claim of inadequate historic property identification and tribal consultation under the NHPA, the court characterized the BLM's efforts to identify historic properties within the area to be affected by the OWEF Project as "significant."<sup>283</sup> In discussing the Tribe's involvement in the review process as part of the analysis of section 106 consultation efforts, the court referred repeatedly to "the involvement of Native American consultants," "Native American monitors," and "tribal monitors,"<sup>284</sup> rather than to specific instances of Quechan Tribe involvement. The court referenced the archaeological survey reports' claims that "Native American participants were observed on occasion to provide input on the importance of resource encounters."<sup>285</sup> These vague descriptions paint a picture of miscellaneous Indians milling around survey sites from time to time, occasionally sharing a comment with the "professionals" as they went about their business, rather than the active involvement of chosen representatives of the Quechan Tribe. Generic references to Native American participants and representatives ignore the separate identities of sovereign tribes and suggest that their knowledge and concerns are identical. The statements do not convey the impression Quechan Tribe representatives were welcomed at the survey sites and regarded as important participants in the survey process.

The Tribe's complaint had cited the court's 2010 opinion addressing the Tribe's challenge to the Imperial Valley Solar Project, in which the court granted a preliminary injunction based on lack of tribal consultation.<sup>286</sup> However, in assessing the tribal consultation efforts to support its claim for relief, the court responded by faulting the Tribe for not responding more quickly to contacts by the BLM in connection with the OWEF Project. The

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(Aug. 31, 2012)); Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD (Sept. 24, 2012)).

282. *Quechan Tribe*, 927 F. Supp. 2d at 925.

283. *Id.* The federal defendants filed a motion for summary judgment in December 2012. Memorandum and Authorities in Support of Federal Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921 (S.D. Cal. 2013) (No. 12cv1167 WQH MDD).

284. *Quechan Tribe*, 927 F. Supp. 2d at 929; *see also id.* at 939 (rejecting the Tribe's arguments that the BLM failed to adequately identify historic properties prior to approval).

285. *Id.* at 930.

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

court stated that the facts in the solar litigation were opposite of those in the current case, in which there were more attempts by the BLM (perhaps chastened by its experiences in the Ocotillo litigation) to consult with the Tribe and, in the court's view, a delayed response by the Tribe.<sup>287</sup> The court criticized the Tribe for not requesting meetings with the BLM until December 2011,<sup>288</sup> despite the fact that it is the BLM's—not the Tribe's—responsibility to initiate and continue contacts. Moreover, the fact that the Tribe was confronted with two significant threats to its cultural and religious rights within a short period of time may have taxed tribal resources and made it difficult for the Tribe to respond immediately to all BLM communications and to adequately assess the voluminous project documentation.

The court rejected the Tribe's arguments under the FLPMA that the Project does not comply with the Class L (limited use) designation and would significantly diminish and degrade sensitive resource values on Class L lands.<sup>289</sup> The court stated that although the Final EIS had admitted that there would be "unavoidable adverse impacts" on visual and other resources, the BLM had not concluded that the impacts amounted to *significant* diminishment of the resource values.<sup>290</sup> It seems, however, that where visual resources with religious significance are at issue, only the affected religious practitioners can judge whether the resources' value had suffered "significant" diminishment. Disturbing the integrity of a sacred viewscape might well have significance for worshippers that was lost on agency officials and judges. The court similarly rejected the argument that the OWEF Project violated the VRM standards through the BLM's last-minute change in the applicable management standard from VRM Class III to VRM Class IV in order to facilitate approval—as the government's attorney had acknowledged in oral argument.<sup>291</sup> In rejecting the argument

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287. *Quechan Tribe*, 927 F. Supp. 2d 921 at 933, 934, 938 (citing *Quechan Tribe*, 755 F. Supp. 2d 1104).

288. The court stated that the Tribe's involvement in the review process "began in earnest starting in December 2011," but that the BLM attempted to initiate formal consultation several years before. *Id.* at 932.

289. *Id.* at 933.

290. *Id.* at 935. The court emphasized the "careful balancing" of interests that the ROD claimed the BLM had conducted and the ROD's mitigation measures. *Id.*

291. *Id.* at 937. The Tribe argued that the BLM had acted arbitrarily and capriciously by changing from a Class III to a Class IV management standard days before it executed the ROD, while the BLM argued that the OWEF Project never had a *final* VRM Class III designation and the BLM had authority to change the classification before finalizing the EIS. *Id.*

that the project would result in unnecessary and undue degradation of a TCP and a culturally significant viewscape, the court emphasized the BLM's extensive discretion.<sup>292</sup> As to the Tribe's NEPA-based claim, the court viewed the BLM as having taken the required "hard look" at the cumulative effects of the Project (which the BLM had admitted would adversely impact visual and other resource values).<sup>293</sup>

The court's discussion of the BLM's balancing of uses and interests at stake in the OWEF Project illustrates the challenges that so often confront tribes whose rights and interests are perceived as being in conflict with non-Indians' demands for economically valuable resources. The court largely took the BLM at its word as to the statements in the OWEF ROD that it had conducted a careful balancing of interests. The FLPMA and the CDCA Plan require, the court noted, "a careful balancing between multiple use and sustained yield management planning with protecting the quality of 'historical, scenic, archaeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources.'"<sup>294</sup> In this balancing, California's desire to meet its renewable energy and greenhouse gas reduction objectives and the goal of implementing the Energy Policy Act outweighed the interest in protecting cultural resources on affected lands, allowing for approval of a project that would impose adverse effects on cultural resources important to a number of tribes.<sup>295</sup> The court declined to intervene in the planned sacrifice of sacred viewsapes on lands that had been set aside for limited use, on which federal agencies were supposed to protect sensitive resource values. The court thus facilitated the subordination of cultural resource protection and tribal religious exercise to the goal of meeting Californians' energy demands—demands that led to profligate energy consumption in the past and created the contemporary need to develop alternative energy resources as fossil fuel resources are exhausted. The court similarly declined to take action to stop the disturbance of cremation sites and other harmful activities that had been occurring as work on the project proceeded.<sup>296</sup>

The OWEF Project was reviewed according to a regulatory process that already had an established place for visual impact analysis, due to the

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292. *Id.* at 939. The defendants had argued that the project would not cause unnecessary or undue degradation because the FLPMA requires that the CDCA "be a multiple-use, sustained yield plan and extensive mitigation measures were implemented." *Id.*

293. *Id.* at 941.

294. *Id.* at 934 (quoting 43 U.S.C. § 1781 (2012)).

295. *Id.* at 935.

296. *Id.* at 928 n.15.



FLPMA's scenic values protection requirements. Nonetheless, the Quechan Tribe's concerns about the adverse impact of the project on sacred viewsapes did not lead to the rejection of the project. Rather, the Tribe was scolded by the court for alleged foot-dragging in bringing forward its concerns. The Tribe's experience suggests that the FLPMA's unnecessary and undue degradation standard and VRM classifications may just be yet another sphere in which decision-makers can ignore or subordinate tribal religious and cultural values to economic interests.

Looking back to the efforts of the Wampanoag Tribe of Aquinnah to participate in the CWEP review process as discussed above,<sup>297</sup> it is difficult to fault the Wampanoag Tribe for foot-dragging in the review process. The Tribe shared its concerns about the impact of the CWEP Project with federal regulators early and often, despite the protracted failure of the BOEM to begin the required section 106 tribal consultation. Moreover, these objections were supported by state and federal preservation experts and were referenced by the Massachusetts SHPO and the ACHP in connection with raising their own concerns about the project.<sup>298</sup> It remains to be seen whether the Tribe's efforts to protect a sacred viewscape from a wind energy project will prove to be more successful than the efforts of the Quechan Tribe.

*B. Centering on Sweet Medicine: The Comanche Nation and the Fort Sill Warehouse*

In contrast to the Quechan Tribe's challenge to the Ocotillo Wind Energy Facility, a lawsuit by the Comanche Nation in 2008 provides an example of what a tribe can accomplish when objections to a federally approved project that are based on adverse impacts on a sacred viewscape are taken more seriously than was the case with the OWEF Project. In addition, the case teaches that an outright legal victory is not always necessary for the vindication of tribal rights and interests.

In *Comanche Nation v. United States*,<sup>299</sup> the Comanche Nation sought an injunction against the construction of a warehouse for use by the U.S. Army's Fort Sill military installation in western Oklahoma. The proposed warehouse would adversely impact the viewscape of Medicine Bluffs, a landform located within Fort Sill. Long used by members of the Comanche Nation, along with members of the Kiowa and Wichita tribes, "for spiritual

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297. See *supra* Part I.C.

298. See *supra* notes 112, 121-23 and accompanying text.

299. No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008).

cleansings, vision quests, healing ceremonies, and as a place of repose for deceased family member bodies or ashes,<sup>300</sup> Medicine Bluffs was added to the National Register in 1974 as a unique geological feature and an area of significance to Indians.<sup>301</sup>

The Comanche Nation's claim, brought under the NHPA and the Religious Freedom Restoration Act (RFRA), alleged that the Army failed to consult with the Tribe about the proposed warehouse's impact on the Medicine Bluffs viewscape, and that the project would impose a substantial burden on the conduct of religious ceremonies and rituals by practitioners of Comanche traditional beliefs, such as individual plaintiff Jimmy W. Arterberry, Jr.—the Comanche Nation's THPO.<sup>302</sup> RFRA provides that the government may not “substantially burden a person’s exercise of religion” unless it “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>303</sup> Although the Supreme Court held in 1997 in *City of Boerne v. Flores* that RFRA exceeds Congress’s constitutional authority as applied to the states,<sup>304</sup> the Court did not invalidate RFRA as applied to the federal government.<sup>305</sup> RFRA does not define the concept “substantially burden,” but the statute’s purpose clause and legislative findings indicated Congress’s intent to provide more far-reaching protection for religious freedom than had some recent Supreme Court decisions,<sup>306</sup> suggesting the

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300. Complaint at 3-4, *Comanche Nation v. United States*, No. 5:08-cv-00849-D, 2008 WL 4426621 (W.D. Okla. Aug. 15, 2008) [hereinafter *Comanche Nation Complaint*].

301. See *Oklahoma National Register of Historic Places*, NAT’L PARK SERV., <http://www.nps.gov/STATE/OK/LIST.HTM?program=9F8DA718-155D-4519-3E1CC7FEEE2868BA> (last visited Feb. 22, 2014); see also *National Register of Historic Places Inventory – Nomination Form*, NAT’L PARK SERV., <http://www.ocgi.okstate.edu/shpo/nhrpdfs/74001659.pdf> (last visited Feb. 22, 2014).

302. *Comanche Nation Complaint*, *supra* note 300, at 4-5.

303. 42 U.S.C. § 2000bb-1(a)-(b) (2012).

304. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that RFRA exceeded Congress’s authority under Section 5 of the Fourteenth Amendment).

305. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (indicating RFRA’s continued vitality as to the federal government).

306. RFRA’s statutory purpose clause identified the act’s goal as follows: “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.” Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b)(1), 107 Stat. 1488, 1488 (citations omitted). Legislative findings made it clear that Congress disagreed with the limitations imposed on religious freedom claims by the Supreme Court in

need for an expansive approach to determining the existence of a substantial burden.

Plaintiff Arterberry explained that Medicine Bluffs is “the heart of the current Comanche Nation” and that the proposed warehouse site would inhibit his view of the three peaks of Medicine Bluffs and prevent him from orienting himself to the peaks and “having a religious experience central to my way of life.”<sup>307</sup> If completed, the warehouse “would completely prohibit members of the Comanche Nation from exercising their religion at the base of Medicine Bluffs . . . as they have done for generations.”<sup>308</sup> It seems difficult to conceive of a complete prohibition on religious exercise as anything less than a “substantial burden.”

After the district court issued a temporary restraining order against construction of the warehouse, the United States sought dissolution of the order.<sup>309</sup> In responding to the plaintiffs’ claim under RFRA, the Government sought to forestall application of the compelling governmental interest test, arguing that *no* burden would be imposed on the plaintiffs’ ability to exercise their religion by the construction of the warehouse. Having argued that no burden would be imposed on religious exercise, the Government did not provide a definition of the “substantial burden” concept in RFRA.<sup>310</sup> Dismissively claiming that “there are numerous other

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a key case interpreting the First Amendment’s Free Exercise Clause, *Employment Division v. Smith*:

(2) laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

*Id.* § 2(a)2-5, 107 Stat. at 1488 (citation omitted).

307. Comanche Nation Complaint, *supra* note 300, at ex. 4, at 1-2.

308. Plaintiff’s Brief in Support of Emergency Motion for Temp. Restraining Order at 5, *Comanche Nation v. United States*, 2008 WL 4426621, at \*5 (W.D. Okla. Sept. 23, 2008) (No. 5:08-cv-00849).

309. *Comanche Nation v. United States*, No. 5:08-cv-00849-D, 2008 WL 4426621, at \*1 (W.D. Okla. Aug. 15, 2008).

310. Fed. Defendants’ Motion to Dissolve Temp. Restraining Order with Brief at 25-26, *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), 2008 U.S. Dist. Ct. Motions LEXIS 97564, at \*39 [hereinafter U.S. Brief,

places where the Bluffs can be viewed,”<sup>311</sup> the Government ignored the evidence that particular viewscapes of the Bluffs are significant to religious practitioners. Moreover, the Government argued that even if the court concluded that religious practitioners were “nominally burdened,” the warehouse construction was in furtherance of a compelling governmental interest: carrying out “an increased mission” at Fort Sill that would require an influx of new soldiers.<sup>312</sup> The Government did not explicitly address RFRA’s “least restrictive means” component, but rather continued to scoff at the plaintiffs’ claim that their religious exercise would be burdened,<sup>313</sup> while emphasizing the alleged financial and other harm to the Government from the restraining order<sup>314</sup> and the interest allegedly to be served by lifting the order:

It is in the public’s interest to have a well-trained and equipped military engaged in the War on Terror. . . [and] to ensure that its environmental laws and historical preservation laws are not ‘highjacked’ and agencies held hostage, based upon frivolous or specious claims.<sup>315</sup>

In considering the impact of the construction of the warehouse on Comanche religious exercise, the court noted that although RFRA does not define the term “substantial burden,” it does define “exercise of religion”

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*Comanche Nation*]. The Government quoted a federal district court case indicating the threshold requirements for a RFRA claim:

Plaintiffs must establish, by a preponderance of the evidence, that the governmental action complained of (1) substantially burdens, (2) a religious belief rather than a philosophy or way of life (3) which belief is sincerely held by the Plaintiffs. Only after Plaintiffs establish these threshold requirements does the burden shift ‘to the government . . . .

*Id.* (quoting *Swanson v. Guthrie Indep. Sch. Dist.*, 942 F. Supp. 511, 517 (W.D. Okla. 1996)).

311. *Id.* at 25 n.14. The Government also scoffed at the claim that moving forward with the construction project would cause irreparable harm to the plaintiffs (a requirement for a temporary restraining order). The Government disputed their “claim that the TSC warehouse site is the only location to view the Bluffs, practice their sacred ceremonies or ascend up the slop [*sic*] to the top of the Bluffs.” *Id.* at 26.

312. *Id.* at 8, 25.

313. *Id.* at 25. The Government characterized the plaintiffs’ use of the site “at least annually” (according to plaintiff Arterberry) as “infrequent use” and claimed that there was “little if any injury to the Plaintiffs.” *Id.*

314. *Id.* at 26. In addition to financial costs, the Government also claimed there was an impact on the Army’s ability to train newly arriving soldiers. *Id.* at 26-29.

315. *Id.* at 29.

and courts have recognized the exercise of Native American traditional religions as an “exercise of religion.” According to the Tenth Circuit’s definition of “substantial burden,” in order for a governmental action to be considered to substantially burden a religious exercise, it must “‘significantly inhibit or constrain conduct or expression’ or ‘deny reasonable opportunities to engage in’ religious activities.”<sup>316</sup> Applying this definition, the court concluded that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their claim.<sup>317</sup> The approach to Medicine Bluffs that the proposed warehouse would impact is, and has historically been, a Comanche sacred site and the situs of traditional religious practices, which constitute a sincere exercise of religion. The court noted that Comanche practices “are inextricably intertwined with the natural environment” and that “an unobstructed view of all of the Bluffs is central to the spiritual experience of the Comanche people.”<sup>318</sup> The proposed site would impact the last open, unobstructed view from the south of the Bluffs and was the only available vantage point for viewing all four Bluffs. Moreover, the warehouse would impact the area representing the central sight-line to the Bluffs, in which practitioners center themselves on the gap between two of the Bluffs, known as “Sweet Medicine.”<sup>319</sup> The obstruction that the proposed warehouse would create in this area, along with the projected accompanying disruptive increase in vehicular traffic, would constitute a substantial burden on the plaintiffs’ religious practices.<sup>320</sup>

Although the court decided to accept (despite conflicting evidence) military officials’ testimony that the proposed warehouse was essential to

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316. *Comanche Nation*, 2008 WL 4426621 at \*3. The court quoted the definition in *Thiry v. Carlson*, which was decided prior to a 2000 amendment to RFRA, but noted that Tenth Circuit cases subsequent to the amendment did “not appear to signal a restrictive application of RFRA.” *Id.* at \*3 n.5 (citing *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996)). The court explicitly rejected a more restrictive definition of the “substantial burden” term that had been adopted by the Ninth Circuit in *Navajo Nation v. U.S. Forest Service*, noting that it had not been adopted by the Tenth Circuit. *Id.* (citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008)). In *Navajo Nation*, the Ninth Circuit stated that a “‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” *Navajo Nation*, 535 F.3d at 1070. For an analysis of *Navajo Nation*, see Dussias, *supra* note 60, at 386-88, 392-94, 396-97, 399, 400-01, 402-04, 407-08, 410-11.

317. *Comanche Nation*, 2008 WL 4426621 at \*17.

318. *Id.*

319. *Id.*

320. *Id.*

Fort Sill's training mission, and therefore its construction was in furtherance of a compelling governmental interest, there was no evidence that construction in the proposed location was the least restrictive means of furthering that interest. The evidence in fact showed that a much less restrictive alternative location had been identified but not seriously considered; indeed, the defendants had failed to consider the plaintiffs' religious practices at all. The court concluded that because it seemed unlikely that the defendants could meet their burden of proof under RFRA, there was a substantial likelihood that the plaintiffs' claim would succeed.<sup>321</sup>

The court reached the same conclusion as to the Comanche Nation's claim that the defendants had violated NHPA section 106. The defendants had virtually ignored the Tribe's concern about the impact that the warehouse would have on the Medicine Bluffs viewscape, a concern that also had been raised by the Fort Sill Museum's Director before the section 106 notice letter was sent to the Tribe, and had buried the project's details in technical attachments to the letter, thus failing to provide the requisite detailed disclosure and information. Moreover, because *good faith* consultation was required, the affected tribes should have been told that the warehouse project was just "the tip of the iceberg," i.e., there were plans for further construction, and should have been informed of the cumulative impact of planned construction.<sup>322</sup> The NHPA requires an agency to "stop, look, and listen" before proceeding with a project, but the defendants had "merely paused, glanced, and turned a deaf ear to warnings of adverse impact," which fell short of "the reasonable and good faith efforts required by the law."<sup>323</sup>

After concluding that the plaintiffs had shown a substantial likelihood of success on the merits of their NHPA and RFRA claims, the court considered the remaining requirements for a temporary injunction: irreparable harm to the plaintiffs if the court denied an injunction; threatened harm to the plaintiffs outweighing harm to the defendants if the court issued an injunction; and issuance of an injunction not being adverse to the public interest.<sup>324</sup> The court concluded that construction of a warehouse that would impose a substantial burden on the plaintiffs' religious practices would constitute irreparable harm and that any financial impact on the defendants from an injunction "pale[d] in comparison to the

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321. *Id.* at \*18.

322. *Id.* at \*19.

323. *Id.*

324. *Id.* at \*2.

prospect of irreparable harm to sacred lands and centuries-old religious traditions that would occur absent injunctive relief.”<sup>325</sup> Finally, the court held that protection of landmarks like the Medicine Bluffs and of the traditional practices connected with them was “consistent with expressions of public policy such as RFRA and the NHPA” and was not contrary to the public interest.<sup>326</sup> Consequently, the court issued a preliminary injunction against any further construction-related activities at the site.<sup>327</sup> Faced with the court’s finding that the Tribe was likely to succeed on the merits of its claims, the defendants abandoned the construction plan.<sup>328</sup>

In confronting a threat posed by a proposed project, the Comanche Nation, like the Aquinnah Wampanoag Tribe, needed to persuade a court that tribal objections to a project that were based on its adverse impact on a religiously significant viewscape merited greater respect than they had yet been accorded by agency officials, whose actions raised concerns that they had not responded in good faith to tribal objections. The tribes’ NHPA-based claims questioned the government’s compliance with the requirement that sites be evaluated for their historical significance, including possible status as TCPs eligible for listing on the National Register. Both tribes argued that agencies had failed to conduct adequate NHPA section 106 consultation. The Quechan Tribe raised similar arguments, albeit without success, in the OWEF Project litigation. As the *Comanche Nation* court noted, the NHPA requires that the government “stop, look, and listen” before approving a project; merely pausing, glancing, and turning a deaf ear to adverse visual (and other) impacts does not constitute “the reasonable and good faith efforts required by the law.”<sup>329</sup>

At first glance, the Wampanoag and Comanche tribes may appear to part company as to other aspects of their claims. Aside from the NHPA-based claim, the key focus of the Comanche Nation’s complaint was the RFRA, which has not figured in the litigation over the CWEF. Closer examination, however, reveals another similarity: both claims involve arguments that in a balancing of the interests at stake in the approval of proposed projects, tribal interests had been give legally insufficient weight. In *Comanche Nation*, the court found that even if the government had a compelling interest in seeing the warehouse built to support its mission at Fort Sill, in

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325. *Id.* at \*19.

326. *Id.* at \*17, \*20.

327. *Id.*

328. Clay, *supra* note 2, at A1 (noting the Army’s decision to suspend plans to build the warehouse and the request to the district court that the case consequently be dismissed).

329. *Comanche Nation*, 2008 WL 4426621 at \*19.

order for that interest to trump tribal religious exercise rights under RFRA, the government had to have selected the means least restrictive to the exercise of religion for furthering that interest. In the case of the CWEP, the Tribe was, in essence, concerned that federal officials' faulty NHPA and NEPA compliance had led them to give insufficient weight to the CWEP's damaging visual impact, in the midst of pressures from the wind energy industry and the Obama Administration to hasten approval of wind energy projects. Although approval decisions were couched in terms of "the public interest" at stake, it was a commercial developer, receiving lucrative federal tax breaks, which would enjoy the greatest benefits from the project. In the case of the OWEF Project as well, the Quechan Tribe lost out in the balancing of interests required under the FLPMA. In short, these three cases suggest tribal interests are vulnerable to being subordinated to commercial and other interests under NHPA- and NEPA-related review processes.

### *III. Defending Sacred Landscapes Against Visual Desecration by Wind Turbines: Current Challenges and Future Prospects*

*The protection of sacred sites must be a value we will strive to protect; it cannot be an afterthought or be less than our other values.*<sup>330</sup>

#### *A. Evaluating and Valuing Contemporary Viewscape Protection: American and European Perspectives*

##### *1. The Limitations of American Law*

Tribes have sought to address viewscape concerns within the frameworks created by a number of federal statutes. Although achieving protection for significant views under these statutes, which were not all drafted with such protection in mind, has proved difficult, viewscape protection is not a wholly new legal concept in American law. Indeed, American law has long recognized that value can be derived from attractive views and has provided some legal protection for them. Nuisance actions, for example, may be brought for blocking a view. Land use statutes and regulations are

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330. USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERV., REPORT TO THE SECRETARY OF AGRICULTURE, USDA POLICY AND PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 11 (Dec. 2012) [hereinafter USDA REPORT], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.



developed with protection of views (among other goals) in mind,<sup>331</sup> and view protection may also result from regulations focused on matters such as tree height or removal and the location of cell phone towers.<sup>332</sup> Neighbors in a residential area may seek to block the construction of buildings whose appearance clashes with the style of existing homes, arguing that the new buildings are not in keeping with the character of the area.

These kinds of measures do not match up well, however, in a number of ways, with what was, and is, at issue in the tribal lawsuits challenging the approval of the Ocotillo, Fort Sill, and Cape Wind projects. First of all, the land use regulations and nuisance causes of action noted above generally are aimed at protecting the interests of neighbors and others in the immediate vicinity of the desirable viewscape. A neighbor, for example, may object to an action on adjacent property that will block an attractive view or create an ugly view. Where sacred landscapes are threatened, however, affected tribes and their members may be located a considerable distance away from the landscape that is threatened by a proposed project. They may have difficulty in successfully making the claim that their interests are at stake as to areas that are far from where they currently reside, and that they may visit only infrequently.

Secondly, the only legal protections available for views under the kinds of measures mentioned above may well be based on property ownership. A landowner can sue for interference with the view from her property caused by a neighbor because it lessens the plaintiff's enjoyment of her property. In the case of tribes, property rights have been diminished by principles stemming from legal decisions like *Johnson v. McIntosh*<sup>333</sup> and from treaties, allotment of tribal land, and other mechanisms that have diminished tribal landholdings—often without genuine tribal consent. The proposed projects are located in areas that overlap with tribes' ancestral lands, but which have been subjected to federal ownership and control.

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331. See 4 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 36:19 (5th ed. 2013) (noting that state planning and land use laws often provide legal protection for scenic views and citing state statutory examples). A Vermont statute, for example, authorizes the creation of Design Control Districts that protect "striking vistas, views across open fields." *Id.* § 36:19 n.1.

332. *Id.* § 36:19 (noting that scenic viewsheds may be implicitly or explicitly protected "through regulations focused on tree height or tree removal, cell towers, open space, building codes, historic preservation, or shoreline planning").

333. 21 U.S. (8 Wheat.) 543 (1823) (holding that pursuant to the "Discovery Doctrine," the United States holds legal title to the lands of American Indian tribes, subject to the use and occupancy rights of tribes, the beneficial owners).

In addition, these protections tend to focus on aesthetic concerns. In other words, the concern is whether an action will block an appealing view, or create an unappealing view. Tribes are concerned about viewscape impacts for reasons far more serious than simple aesthetics. Rather than being based on the perception that a viewscape is “pretty,” tribal concerns relate to cultural preservation concerns and religious exercise needs.

Finally, nuisance actions and land use regulations that provide some measure of viewscape protection are concerned with the financial impact of certain actions on affected property.<sup>334</sup> Actions that negatively impact the view from a parcel of land may lead to a diminution in its commercial value. Tribal concerns about cultural preservation and religious exercise, on the other hand, do not have a price tag tied to them. In short, although American law provides some viewscape protection, there is a poor fit between existing law and tribal needs where sacred viewsapes are concerned.

## 2. *Admitting the True Costs of Wind Energy Facilities*

As Martin Pasqualetti has observed, because the energy of the wind cannot be used in its raw form, extracting and transporting the wind’s energy “requires that we cope with the landscape presence of its development wherever it occurs.”<sup>335</sup> Wind power “cannot be hidden underground, stored in tanks, or moved by trains. It is an energy resource that reminds us that our electricity comes from somewhere.”<sup>336</sup> Renewable resources have costs, just as fossil and nuclear fuels do, and the question that Pasqualetti poses is whether wind energy advocates are willing to continue to back wind energy once they see the landscapes that wind energy produces. As for the public in general, the greater the distance between consumers and their energy sources, the more they are buffered from energy’s environmental costs. As wind turbines are built and the distance between at least some of us and our energy sources shrinks, “this contraction is reminding us afresh of the responsibilities we have for the energy we use.”<sup>337</sup> When most of the energy harvested from a wind energy facility is transported some distance from the facility, however, most

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334. See, e.g., SALKIN, *supra* note 331, § 36:19 (noting that view protections may be created because of “the real property economic value that scenic views provide”).

335. Martin J. Pasqualetti, *Morality, Space, and the Power of Wind-Energy Landscapes*, 90 GEOGRAPHICAL REV. 381, 381 (2000).

336. *Id.*

337. *Id.* at 382.

consumers are *not* reminded of their responsibilities for energy use.<sup>338</sup> Such a reminder is conveyed only to the people who work and live near, or visit locations near, the turbines—as well as to the affected non-human species (for whom the reminder is incomprehensible as well as irrelevant, given their powerlessness).

In the case of the CWEP and the OWEF Project, the differential impact of wind energy generation is experienced by members of the affected tribes, as well as others who live and work in the area impacted by the facility. To use the language of economists, they are forced to internalize the costs that the CWEP and the OWEF Project impose on the environment, including damage to religiously significant elements of the environment, while most of the benefits of the projects accrue to others. Moreover, such projects impose on tribes certain costs—threats to religious freedom, cultural preservation, and archaeological resources—that are not imposed on non-Indians even in communities near wind energy facilities. This is an experience with which other tribes, at other locations of current or proposed renewable energy facilities, are becoming increasingly familiar.

The United States is, unsurprisingly, not the only nation in which the visual impact of wind energy projects on the landscape has prompted public debate, as well as analysis of the costs that they impose. Studies of offshore wind energy projects in Europe have demonstrated that their visual impacts are considered significant disamenities. A 2007 Danish study of public attitudes toward wind energy facilities, in which survey participants viewed photos showing the turbines' visual impact at various distances, indicated a public preference for moving turbines further away from the shoreline. After analysis of the negative and positive impacts of wind energy installations, the study concluded that “overall social benefits will arise from diminishing the overall disamenities of future offshore wind farms.”<sup>339</sup> Similarly, an American study of preferences for different models of an offshore wind project proposed for Delaware presented study participants with manipulated photos that showed windmills at different distances from the coastline. Although participants strongly supported offshore wind project development, they saw turbines' distance from the shore as being very important, with participants living closer to the shore having a much greater willingness to pay significant amounts for moving projects farther

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338. *Id.*

339. Jürgen Meyerhoff, Cornelia Ohl, & Volkmar Hartje, *Landscape Externalities from Onshore Wind Power*, 38 ENERGY POLICY 82, 83 (2010) (citing Jacob Ladenburg & Alex Dubgaard, *Willingness to Pay for Reduced Visual Disamenities from Offshore Wind Farms in Denmark*, 35 ENERGY POLICY 4059 (2007)).

away from the shore than did inland residents.<sup>340</sup> Visualization of the effect of the project on the seascape has regularly been used in evaluation of offshore wind energy projects' effects.<sup>341</sup>

In Scotland, the push for wind energy, as part of the movement toward giving greater weight to renewable energy sources in meeting electricity demands, has led to scrutiny of "the visual despoliation of valued landscape" as a cost imposed by so-called "windfarms."<sup>342</sup> The authors of a 2006 study of the costs and benefits of a proposed onshore windfarm in Scotland noted that while opponents of windfarms have raised concerns about the variability of electricity supply from wind power (which consequently requires backup power sources) and their potential for intrusive noise, the key motivation of most opponents is opposition to the landscape impacts. These impacts are "exacerbated by the fact that the locations are often precisely those . . . which are valued for their scenic qualities and which are often ecologically sensitive."<sup>343</sup> Disquiet about wind projects combines elements of what the study's authors term "use value," and "non-use value." The former term refers to the impact of the altered landscape on the welfare of residents and visitors whose "use experience is tarnished" by seeing (and perhaps hearing) the project. Wind projects' visual impact can also affect the welfare of those who may never see the project, but derive value from having "the option to visit a landscape free of turbines" or from simply knowing "that a 'pristine' landscape exists" (the non-use value).<sup>344</sup> Given the external costs and public concern arising from wind projects, the economic viability of wind projects needs to be analyzed under a more stringent test, using a social cost-benefit analysis (Social CBA). Social CBA offers an analytical framework to help decision-makers determine which option maximizes social welfare—an objective that "encompasses measurable monetary benefits as well as more intangible non-market benefits or public good externalities."<sup>345</sup> Studies like this try to deal with the fact that "the negative effects of wind power are externalities

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340. *Id.* at 84 (citing Andrew D. Krueger, Valuing Public Preferences for Offshore Wind Power: A Choice Experiment Approach (Fall 2007) (unpublished Ph.D. dissertation, University of Delaware) (on file with the author)).

341. *Id.* at 87.

342. Dominic Moran & Chris Sherrington, *An Economic Assessment of Windfarm Generation in Scotland Including Externalities*, 35 ENERGY POLICY 2811, 2812 (2007).

343. *Id.* Concerns extend to visual impacts of construction and required upgrades to the electricity transmission system, along with the impact of the turbines themselves. *Id.*

344. *Id.*

345. *Id.* at 2813.

that are not covered by markets because they do not have a price.”<sup>346</sup> Consequently, non-market valuation techniques need to be used to generate accurate information about the significance of such impacts.<sup>347</sup>

Although there are some obvious differences between the situation analyzed in the Scottish study and the CWEP and the OWEF Project, the method of the study is nonetheless instructive. It clearly identifies visual degradation as a negative externality potentially impacting human welfare and as, consequently, a very real *cost* that needs to be taken into account in determining a project’s *economic viability*. Rather than treating visual impact-based objections as inconvenient “NIMBY” concerns, the study recognizes the significant impact that degradation of viewscapes can have on the lives of human beings, and not just those who live on adjacent land that might decline in value because of the wind energy project. A number of other studies have also shown that wind energy projects can cause substantial negative externalities.<sup>348</sup>

Acknowledging negative visual impacts as a real cost that should be part of the economic analysis of a proposed project is an important step, but adequately quantifying this cost so that it can be included in a project’s cost-benefit analysis is challenging. The Scottish study’s authors proposed a

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346. Meyerhoff, Ohl & Hartje, *supra* note 339, at 82.

347. *Id.* Non-market valuation techniques “try to infer how individuals value changes in their environment from observable behavior (e.g., travel expenses) or by establishing hypothetical markets through surveys.” *Id.* Another technique is choice experiments, a survey-based technique resting on the assumption “that the utility to consumers of any good (i.e., also public goods such as a landscape) is derived from the attributes or characteristics of a good.” *Id.* at 83. Choice experiments ask survey respondents “to make comparisons among environmental alternatives characterized by a variety of attributes and different levels of these.” *Id.* Such experiments typically proceed as follows:

[R]espondents are offered multiple choices during the survey with each choice consisting of alternative designs of the environmental change in question, e.g., two hypothetical programmes and the option to choose neither. Often the latter is represented by the status quo, . . . The record of choices is then used to estimate the respondents’ willingness to pay (WTP) by modeling the probability of an alternative being chosen.

*Id.* The choice experiment method provides “a wide range of information on trade-offs among the attributes of the environmental change in question” and makes it possible for those using the method to vary the level of the attributes of the alternatives in question to gauge individuals’ willingness to substitute one attribute for another. *Id.* Because one of the attributes used is the monetary cost, survey takers can “estimate how much people are willing to pay to achieve more of an attribute, i.e., the marginal WTP, as well as the WTP to move away from the status quo to a bundle of attributes that correspond to the policy outcomes that are of interest.” *Id.*

348. *Id.* at 84.

method to value the visual impacts to the landscape based on damaged use values, i.e., an estimate of the change in the value attached to the landscape resulting from the project.<sup>349</sup> Their method takes into account the nature of the intrusion (how much of a landscape impact does the project cause); the exposure to the intrusion (how many residents and visitors are likely to experience the landscape impact); and landscape value (how much value residents and visitors attach to the landscape).<sup>350</sup> The authors' approach to measuring the visual impact of wind projects based on a formula that they developed<sup>351</sup> has many potential benefits. It clearly hones in on the factors that influence the extent of the damage experienced by those impacted by a wind energy project: the significance of the changes to the landscape's appearance; the number of people who experience the visual impact; and the value of the landscape in question. At the same time, it is apparent that the application of this approach to, for example, the CWEP setting is complex. In applying their approach to a proposed Scottish wind energy project, the study authors assessed its impact on a homogeneous population with similar landscape values (based on environmental sensitivity concerns).<sup>352</sup> Assessing the cost of the CWEP, on the other hand, requires

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349. Moran & Sherrington, *supra* note 342.

350. *Id.* at 2817-19.

351. The authors developed a formula to calculate the change in landscape value that a project would cause: "Damage = site degradation (%) x exposure to visual damage x mean landscape WTP." *Id.* at 2819. The term "mean landscape WTP" ("willingness to pay") is "a value transferred from a valuation study covering resident and visitor valuation of a similar landscape type." *Id.* at 2818. The authors drew on previous landscape studies of environmentally sensitive areas in the United Kingdom. *Id.* In measuring site degradation, the authors relied on a "landscape intrusion scale" that in which the "value of a pristine landscape is reduced successively by higher levels of intrusions." *Id.* Finally, in determining exposure to visual damage, the authors looked at the number of residents and visitors likely to experience the project's visual impact, with impact on residents taking into account the turbine tips visible from residences in different areas and the distance from the project site's perimeter. *Id.* at 2818-19.

352. Some studies of negative externalities of wind energy projects have, however, looked at some survey population characteristics when using the choice experiment method to evaluate impacts of proposed projects. Meyerhoff, Ohl & Hartje, *supra* note 339, at 85 (noting that "in the majority of studies [discussed in the article] preference heterogeneity is investigated via interactions with selected socio-economic characteristics and attributes or alternative specific constants as potential sources of heterogeneity. . . . [N]one has used a latent class approach so far."). One study of renewable energy resources in Scotland found differences between the preferences of rural and urban residents, with rural populations being more accepting of negative landscape impacts and assigning significant positive value to job creation. *Id.* at 84; *see also id.* at 90 tbl. 8 (analysis taking into account socio-demographic factors such as age, gender, and income).

recognition that different segments of the population perceive the impact of the CWEP, as well as the value of the affected viewscape, differently. Members of the Aquinnah Wampanoag Tribe, for example, assign value to Nantucket Sound not only on the basis of the nature of the Sound's physical environment, but also based on cultural and religious values. By the same token, changes in project design that could lessen the visual impact of the CWEP in the eyes of some viewers would not necessarily lessen the impact for tribal members. As a relatively small proportion of the people who will experience the project's impact, tribal members are in danger of having their values and voices drowned out unless the cost calculation formula is applied separately to tribal members and to others.<sup>353</sup> At the same time, it seems significant that not only tribal members see the CWEP as a threat to the viewscape, suggesting that there may be more common ground in assessing the project's impact on different groups than may first appear.

Moreover, the ultimate goal of the authors of the Scottish study is to determine the proposed project's net welfare gain. They seek a bottom line monetary figure that indicates the net welfare gain to society as a whole from the project. This approach does not take into account the fact that a project may ask certain segments of society to accept the visual despoliation of a landscape that they value highly as a cost that is outweighed by the benefits enjoyed by other members of society. In short, broadening out the cost-benefit analysis of wind energy projects to include intangible negative externalities, though a step in the right direction, may still leave minority groups vulnerable to having their concerns ignored so that others can enjoy the projects' benefits (without having to internalize their costs). Still, some of the insights from studies like those described above bear consideration for the guidance they may provide for more effectively injecting tribal viewscape values into the balancing of interests approach of statutes like NEPA and the FLPMA.

#### *B. Hope for the Future? Recent Administrative Developments in Sacred Sites Protection*

The disputes examined in Part I illustrate the limitations, at least from a perspective that sees the protection of sacred sites and landscapes as a goal, that are inherent in a system that focuses on the process of decision-making rather than on fostering particular outcomes—outcomes that protect those

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353. Although the authors separately assess the visual (use) and non-use disamenity of the project, they do not look at characteristics of the population that might, for example, lead some population segments to value the impacted landscape more highly than other groups.

whose rights prompted the requirement that they be included in decision-making to begin with. Concerned tribes may have to fight to be part of the review process for proposed decisions, knowing that their concerns may fall on ears that have decided, in the face of commercial interests and political pressure, to be deaf. Once decisions are made, aggrieved tribes confront a judicial review process that focuses on whether agency personnel seem to have made an effort to jump through the hoops created by particular statutes, rather than on whether the resulting decisions are consistent with the Sacred Sites Order, RFRA, and the trust responsibility, among other policies, statutes, and authorities. When balancing of interests is involved in decision-making, tribal religious and cultural rights and interests may well be outweighed by commercial interests.

Several recent developments in federal agencies, some related expressly to sacred sites protection and others to protection of TCPs more broadly and to better coordination of review of projects under the NHPA and NEPA, suggest that there is hope for improved agency decision-making, both procedurally and substantively, as to projects that would adversely impact significant viewscapes and other tribal religious and cultural resources.

### *1. Protecting Sacred Sites and Landscapes*

#### *a) The DOI's Sacred Sites Listening Sessions and the USDA Sacred Sites Report*

In August 2012, the DOI launched a series of tribal listening sessions around the country, aimed at gathering tribes' input on matters such as potentially developing new policies and procedures for sacred sites on federal lands, defining "sacred sites," and determining which tribal representatives should be consulted when determining whether a site is considered sacred.<sup>354</sup> In announcing the sessions, Acting Assistant Secretary for Indian Affairs Del Laverdure stated that "[o]ur nation-to-nation relationship is one that is based upon mutual respect, and that includes an on-going dialogue about places central to Indian identity and

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354. Marc Dadigan, *Sacred Sites Listening Sessions Planned*, INDIAN COUNTRY TODAY (Aug. 6, 2012), <http://indiancountrytodaymedianetwork.com/article/sacred-sites-listening-sessions-scheduled-127559>; see also Tribal Listening Sessions on Sacred Sites on Federal Lands, 77 Fed. Reg. 46,106 (Aug. 2, 2012) (announcing the dates and times for four listening sessions).



cultural ways of life.”<sup>355</sup> Ultimately a total of six sessions were held in August and September 2012.<sup>356</sup>

Tribal representatives raised concerns over the impact of fast-tracked renewable energy projects on sacred sites at the first listening session, held in Albuquerque in August 2012. John Bathke, the Quechan Tribe’s THPO, who was then actively engaged in challenging the OWEF Project, stated that these projects were “going on with complete disregard to Indians,” who are treated as if they “don’t have any say.”<sup>357</sup> Following the meeting, skeptical tribal members and other attendees questioned whether the sessions were intended only to appease and distract tribes, as the destruction of sacred sites to make way for renewable energy projects “continues virtually unabated.”<sup>358</sup> The remarks by Bathke and others indicate that tribes have suspicions that federal officials are not sincere in their requests for tribal input and will not truly listen, and respond in good faith, to tribal objections to projects. They will just hear and ignore—in essence, turn a deaf ear to—tribal concerns about adverse impacts on religiously and culturally significant sites, under the inexorable pressure from developers (and allied politicians and interest groups) to approve renewable energy projects.

The impact of the DOI’s 2012 listening sessions, and whether they will prove to be as pointless as some participants feared, remains to be seen. An earlier set of listening sessions conducted under the auspices of another federal government department, however, have resulted in a report recommending a number of improvements in how officials address sacred sites protection. In December 2012, the U.S. Department of Agriculture (USDA) released a final report, prepared by the USDA’s Office of Tribal Relations and the U.S. Forest Service, on USDA policies and procedures with regard to sacred sites, which drew on comments from over fifty

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355. Press Release, U.S. Dep’t of the Interior, Laverdure Announces Listening Sessions Regarding Sacred Sites on Federal Lands (July 31, 2012).

356. *Indian Affairs to Hold Sixth Listening Session on Sacred Sites in Indian Country*, NATIVE NEWS NETWORK (Aug. 25, 2012), <http://www.nativenewsnetwork.com/final-listening-session-on-sacred-sites-in-indian-country.html>.

357. *Sacred Sites Hearings Begin with Concerns over Renewable Energy Projects*, INDIAN COUNTRY TODAY (Aug. 14, 2012), <http://indiancountrytodaymedianetwork.com/article/sacred-sites-hearings-begin-with-concerns-over-renewable-energy-projects-129291>.

358. Miriam Raftery, *Feds Draw Criticism for Hearings on Sacred Sites; Tribes Ask Why No Recordings Were Made Nor Notes Taken*, EAST COUNTY MAG. (Aug. 21, 2012), <http://eastcountymagazine.org/print/10781> (quoting Donna Tisdale, cofounder of the Protect Our Communities Found.).

listening sessions conducted in 2010 and 2011.<sup>359</sup> Announcing the release of the report, Secretary of Agriculture Tom Vilsack noted that “American Indian and Alaska Native values and culture have made our nation rich in spirit and deserve to be honored and respected.”<sup>360</sup> As the report acknowledged, private and public lands, including national forests, have been carved out of native peoples’ ancestral land, and their “historical and spiritual connection to the land has not been extinguished despite changes in title.”<sup>361</sup> Moreover, tribes continue to have “responsibilities and mandates to take care of the natural world by performing ceremonies and rites that are linked to specific places.”<sup>362</sup>

Addressing concerns raised by some Indian commenters that the Forest Service lacked sufficient authority to protect sacred sites, the report highlighted legal authorities that support sacred sites protection. The government’s trust responsibility to tribes, for example, “requires the Federal Government to maintain a fiduciary relationship towards” federally recognized tribes and land management and other federal agencies should approach their trust responsibilities in a way that “ensures Tribes’ political and cultural well-being and survival.”<sup>363</sup> Statutes supporting sacred site protection highlighted in the report include AIRFA, the Archaeological Resources Protection Act (ARPA), the Native American Graves Protection and Repatriation Act (NAGPRA), the RFRA, the NHPA, and provisions of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) that were enacted to strengthen support for the protective policy embodied in AIRFA.<sup>364</sup> These statutory provisions are bolstered by the Sacred Sites Order, a key feature of which is contained within the definition of sacred

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359. USDA REPORT, *supra* note 330, app. D (listing the fifty-five listening sessions).

360. Press Release, USDA, Agriculture Secretary Vilsack Releases Final Sacred Sites Report (Release No. 0353.12, Dec. 6, 2012), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/12/0353.xml&contentidonly=true>.

361. USDA REPORT, *supra* note 330, at 6.

362. *Id.* at 8.

363. *Id.* at 31 (emphasis added); *see also id.* at 6 (noting the risk of “fall[ing] short of the Forest Service fiduciary obligation to Tribes”). Moreover, land managers implementing federal law pertaining to federal lands “should also consider how their actions will support Tribes’ ability to protect their own members, manage their resources, and generally maintain their distinct cultural and political identities.” *Id.* at 32.

364. *Id.* at 34-39. Appendix G of the report included summaries of relevant statutes, regulations, and executive orders. *Id.* app. G. The relevant provisions of the “Farm Bill,” the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 8101-8106, 25 U.S.C. §§ 3051-3056 (2012), are set out in Appendix C of the report. USDA REPORT, *supra* note 330, app. C.

sites; this provision states that it is tribes and religious representatives, not the government, that identify sites as sacred.<sup>365</sup> Finally, sacred sites protection is supported by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), for which the United States announced support in December 2010. Although UNDRIP is nominally a “nonbinding, aspirational document,” President Obama stated that the aspirations that UNDRIP affirms, including respect for native peoples’ cultures, are “ones we *must always seek to fulfill*. . . . [W]hat matters far more than any resolution or declaration—are actions to match those words.”<sup>366</sup> The report’s discussion of the “legal landscape” supporting determinations to protect sacred sites concluded by noting that a number of court decisions also support such determinations,<sup>367</sup> such as the 2010 decision in the Quechan Tribe’s challenge to the Imperial Solar Project.<sup>368</sup>

The report offered a number of recommendations that were based on identifying the actions that “will result in the most significant improvements in sacred sites protection” and on trying to “strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability . . . and encouraging the tailoring of local approaches to protection and consultation.”<sup>369</sup> The chosen actions should “educate and empower” decision-makers to “do a better job of protecting sacred sites in a way that is more acceptable to Tribes.”<sup>370</sup> The recommendations also provide, the report stated, “increased accountability for Forest Service employees in carrying out their duties with respect to

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365. USDA REPORT, *supra* note 330, at 40. The report also noted that while the sacred sites definition is “unsatisfactory” to many Indian and Alaska Native people and agency employees, the Sacred Sites Order “is currently the clearest federal policy on sacred sites.” *Id.*

366. *Id.* (emphasis added) (quoting President Obama’s comments in announcing U.S. support for UNDRIP, in contrast with the original vote against it in the U.N. General Assembly). UNDRIP’s articles:

address indigenous peoples’ rights to maintain culture and traditions (Article 11); and religious traditions, customs, and ceremonies (Article 12); to participate in decision[-]making in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25).

*Id.*; see also *id.* at 10 (noting that U.S. support for UNDRIP “provides important context for review of our policies”).

367. *Id.* at 42. Favorable decisions are described in appendix F. *Id.* app. F.

368. *Id.* at F-1 (citing *Quechan Tribe v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)).

369. *Id.* at 24.

370. *Id.*

sacred sites.”<sup>371</sup> Listening session participants suggested that some type of accountability be put in place “so that there is some consequence if agency personnel do not use available tools to protect sacred sites.”<sup>372</sup>

A number of specific steps to foster good relationships and improved communications with tribes,<sup>373</sup> revise USDA direction and policy to enhance protection of sacred sites,<sup>374</sup> and improve on-the-ground protection of, and interpretation of, cultural and sacred areas, were recommended in the report.<sup>375</sup> Although none of the recommendations deals expressly with visual impacts on sacred sites, the report noted that concerns about loss of “views and other ‘intangible’ elements of sacred sites” had been raised by participants in the sacred sites listening sessions.<sup>376</sup> Moreover, some of the recommendations should, if implemented, foster greater awareness of, and willingness to shape decisions in response to, such concerns. Efforts aimed at gaining broader understanding of American Indian and Alaska Native “laws, customs, traditions, and values,” through such actions as enlisting tribal help in training agency personnel,<sup>377</sup> for example, should increase the likelihood of decision-makers learning of the importance of protecting against visual impacts at certain sites and acting accordingly. Recommendations to reconsider the sacred sites definition in the Sacred Sites Order, such as by considering “the broader concept of ‘sacred places,’

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371. *Id.*; see also *id.* at 26 (“[H]old appropriate line officers accountable for fulfilling obligations to Tribes, including those related to sacred sites, through performance measures or other means such as requiring training and coordination.”). “Line officers” are “regional foresters, forest supervisors, and district rangers who are on-the-ground decision-makers for the agency.” *Id.* at 11.

372. *Id.* at D-8.

373. *Id.* at 25-26. The report offered recommendations to improve communication and consultation events and to implement comprehensive training for agency staff and law enforcement personnel “to provide the knowledge to build respectful relationships; to use available tools for sacred sites protection; and to gain a broader understanding of and competency with [American Indian]/[Alaska Native] laws, customs, traditions, and values.” *Id.* at 25.

374. *Id.* at 27-28.

375. *Id.* at 29. The report noted that commenters on the draft report had “suggested many ways to improve on-the-ground sacred sites protection and interpretation of cultural and sacred areas” that can already be implemented, such as suggestions related to enhancing partnership with tribes, increasing awareness of existing authorities providing for accommodation of Indian access needs, and increasing “physical protection of sacred sites, historic properties, and their surroundings during land management activities.” *Id.*

376. *Id.* at D-10.

377. *Id.* at 25.

including cultural landscapes [and] traditional cultural properties,”<sup>378</sup> if followed, could also provide the opportunity to highlight the significance that projects’ adverse visual impacts can have for tribes’ religious and cultural experiences with regard to significant viewsapes.

Several observations and recommendations touched upon other concerns arising from the CWEP and OWEF Project regulatory process, namely, concerns that project approval was a foregone conclusion, and approval was fast-tracked because of commercial and political pressures. The report noted Indians’ comments that “economic values often hold greater weight in agency decision-making than traditional and cultural values,” and Forest Service employees’ statements that they had no way to assign a “value” to sacred sites in the current agency framework for decision-making.<sup>379</sup> Listening session participants commented that the Forest Service’s “[e]conomic valuation of resources was . . . inconsistent with considering spiritual or cultural values”<sup>380</sup> and that in their view, the Forest Service regularly made decisions that favored economic development at the expense of tribes and their sacred sites.<sup>381</sup>

The extent of the concern over the weight given to economic interests was apparent in the fact that numerous comments were made about the Forest Service’s controversial decision to allow the commercial enterprise operating the Arizona Snowbowl ski facility on public land to use treated sewage effluent for snowmaking on the sacred San Francisco Peaks.<sup>382</sup> Listening session participants viewed this decision as demonstrating that “the Forest Service valued development interests over cultural and spiritual values,”<sup>383</sup> while Forest Service employees commented that as a result of

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378. *Id.* at 27. The draft report had included an outright recommendation that work begin to revise the sacred sites definition in the Sacred Sites Order, but the drafters decided that there was a need “for further discussion between the Forest Service, the White House and other federal departments and agencies concerning the scope of” the order. *Id.* at 18-19. The report noted the recognition that “what is sacred to Tribes does not always neatly fit within” the order’s sacred sites definition and the commitment of Forest Service and USDA to “work diligently . . . [to] better understand what is sacred to tribes, whether or not it is explicitly stated” in the order. *Id.* at 19; *see also id.* at 18 (discussing the “sacred places” concept and recommending that it be emphasized in personnel training).

379. *Id.* at 15-16.

380. *Id.* at D-7.

381. *Id.* at J-18.

382. *Id.* at 15. For an analysis of the Navajo Nation’s challenge to this decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), *see* Dussias, *supra* note 60, at 386-88, 392-94, 396-97, 399, 400-01, 402-04, 407-08, 410-11.

383. USDA REPORT, *supra* note 330, at D-11.

the decision, tribes “don’t believe our ‘consultation’ efforts are sincere, and that we are really listening to their concerns about an area.”<sup>384</sup> The report stated that although economic “drivers” are important, they are “not more or less important than sacred sites concerns”—although the Forest Service has not always thoroughly considered these concerns or balanced them with other values.<sup>385</sup> As for concerns that political pressures might lead to pro-development decision-making, at the expense of sacred sites protection, the report recommended strengthened support for “line officers’ use of existing authorities to protect sacred sites,” in response to federal employees’ statements that “high-level support” was needed for decisions to protect sacred sites because of concerns about “repercussions from other local constituencies, Congress, or the Administration.”<sup>386</sup>

Although the report was issued by the USDA and Forest Service, without involvement of other agencies and departments, such as the BLM and BOEM, that make decisions implicating sacred sites protection, the report is meant to be shared “broadly throughout the Federal Government.”<sup>387</sup> Moreover, the promise to “work diligently with Tribes and other agencies and Departments” in order to “better understand what is sacred to Tribes”<sup>388</sup> suggests that the report could have influence beyond the USDA and Forest Service. Greater collaboration among agencies and departments would address commenters’ view that sacred sites protection policy, and consultation mechanisms, should be consistent across land management agencies.<sup>389</sup>

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384. *Id.* at E-3. Employees in the Forest Service’s Southwest Region and surrounding vicinity opined that the Arizona Snowbowl decision compromised relationships across the region and colored tribes’ view of employees’ work: “They do not believe we do a good job.” *Id.* (describing comments from Forest Service survey of line officers and Tribal relations specialists).

385. *Id.* at 9.

386. *Id.* at 28. In June 2013, personnel teams were established to develop strategies and take actions to implement the 2012 report’s recommendations, guided by ongoing interactions with tribal leaders. U.S. Forest Service Tribal Relations Program, FY 2013 Report 11 (2014), available at <http://www.fs.fed.us/spf/tribalrelations/documents/reports/USFSTribalRelationsAnnualReportFY2013.pdf>.

387. USDA Report, *supra* note 330, at 20. The report noted the many requests from Indian and Alaska Native commenters for the Forest Service “to coordinate its activities within the Department and with other Federal land management agencies.” *Id.* at 19.

388. *Id.* at 19.

389. *Id.* at D-9. Many listening session participants indicated that they were “frustrated with the wide range of inconsistent policy for the protection of sacred sites across Federal agencies.” *Id.*; see also *id.* at J-13 (noting that some tribal commenters said that they have

*b) ACHP and Federal Agencies' Memorandum of Understanding on Sacred Sites*

Another December 2012 development that holds the promise of more effective sacred sites protection is the signing by the ACHP and the Departments of Agriculture, Defense, Energy, and the Interior (Participating Agencies) of a Memorandum of Understanding (Sacred Sites MOU)<sup>390</sup> aimed at improving the protection of Indian sacred sites by raising awareness about the importance of maintaining their integrity and at developing ways for federal agencies to better meet their responsibilities under NHPA section 106. Secretary of the Interior Salazar stated that “[i]nter-agency cooperation fosters our nation-to-nation relationship with tribes, and that’s certainly true when it comes to identifying and avoiding impacts to the sites that tribes hold sacred.”<sup>391</sup> The Sacred Sites MOU, in effect for five years,<sup>392</sup> requires participating agencies to determine inter-agency measures to protect sacred sites, sets up a framework for consultation with tribes, and calls for development of guidance for management and treatment of sacred sites including creation of sample tribal-agency agreements.

Aimed at improving “the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration,” the memorandum notes that, among the diverse landscapes and sites that the agencies “hold in public trust” are “many culturally important sites held sacred by Indian tribes,” which also may be eligible for National Register listing because of their religious and cultural significance.<sup>393</sup> Although “the physical and administrative contexts in which Federal agencies encounter sacred sites vary greatly,” there are also

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been “overwhelmed with requests for consultation” and some suggested that federal agencies “coordinate their consultation requests both within and between agencies”).

390. Memorandum of Understanding Among the U.S. Dep’t of Def., U.S. Dep’t of the Interior, U.S. Dep’t of Agric., U.S. Dep’t of Energy, and the Advisory Council on Historic Pres. Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (2012) [hereinafter Sacred Sites MOU] available at [http://www.achp.gov/docs/SacredSites-MOU\\_121205.pdf](http://www.achp.gov/docs/SacredSites-MOU_121205.pdf).

391. Press Release, USDA, Departments of Agriculture, Defense, Energy, and Interior Sign Memorandum to Collaborate to Protect Indian Sacred Sites (Dec. 6, 2012), available at <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2012/12/0354.xml&printable=true&contentidonly=true>.

392. The MOU will be in effect until December 31, 2017, and “may be extended or amended upon written consent from any Participating Agency and the subsequent written concurrence of the others.” Sacred Sites MOU, *supra* note 390, at 3.

393. *Id.* at 1.

similarities, leading to the Participating Agencies' recognition that "consistency in policies and processes can be developed and applied, as long as they remain adaptable to local situations."<sup>394</sup> Because sacred sites "often occur within a larger landform or are connected through features or ceremonies to other sites or a larger sacred landscape," agencies need to "consider these broader areas and connections to better understand" the sites' context and significance.<sup>395</sup> Sacred sites may include geological features and bodies of water, as well as other kinds of TCPs, archaeological sites, burial locations, and stone and earth structures.<sup>396</sup>

The Participating Agencies undertook to review Executive Order 13,175 and the Sacred Sites Order, along with the NHPA, NEPA, NAGPRA, AIRFA, and RFRA, in order to determine their relevance to sacred sites and the potential need for additional inter-agency measures to improve sacred sites protection. The signatories agreed to work together to achieve, and to consult with tribes to develop and implement, a number of actions, including creating sacred sites protection and tribal consultation training programs for federal agency staff;<sup>397</sup> developing best practices guidance<sup>398</sup> and management practices that agencies could adopt, including

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394. The MOU assigns "sacred site" the same meaning as in Exec. Order 13,007: any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

*Id.*

395. *Id.*

396. *Id.*

397. *Id.* at 2. The provision describes the required action as follows: "Creating a training program to educate Federal staff on (a) the legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites and (b) consulting and collaborating effectively with Indian tribes, tribal leaders, and tribal spiritual leaders to address sacred sites." *Id.* Impediments to federal-level protection of sacred sites are to be identified and recommendations to address them are to be made. Protection is also to be facilitated by improved information sharing through creation of "a website that includes links to information about Federal agency responsibilities regarding sacred sites, agency tribal liaison contact information, the websites of the agencies participating in this MOU, and information directing agencies to appropriate tribal contact information for project consultation and sacred sites issues . . ." *Id.*

398. *Id.* ("2. Developing guidance for the management and treatment of sacred sites, including best practices and sample tribal-agency agreements").



collaborative stewardship mechanisms;<sup>399</sup> and developing and implementing outreach plans to the public<sup>400</sup> and to non-federal partners.<sup>401</sup> The MOU specifically mentions “landscape-level cultural geography assessments” as a task for federal-tribal partnerships that are part of federal-tribal “collaborative stewardship.”<sup>402</sup> It also identified other important tasks such as the development of mechanisms for sharing expertise, including tribal expertise,<sup>403</sup> and the building of tribal capacity to participate fully in agency consultation and to carry out sacred sites identification, evaluation, and protection.<sup>404</sup> To facilitate the implementation of its provisions, the Sacred Sites MOU called for the establishment of a working group composed of staff from each of the Participating Agencies.<sup>405</sup> An Action Plan to implement the MOU, which includes a call for the review of existing federal guidance documents, was released in March 2013.<sup>406</sup> A May 2014 report prepared by the Participating Agencies outlined the

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399. *Id.* Management practices could include “mechanisms for the collaborative stewardship of sacred sites with Indian tribes, such as Federal-tribal partnerships in conducting landscape-level cultural geography assessments.” *Id.*

400. *Id.* (“4. Developing and implementing a public outreach plan focusing on the importance of maintaining the integrity of sacred sites and the need for public stewardship in the protection and preservation of such sites”).

401. *Id.* at 3 (“9. Developing outreach to non-Federal partners to provide information about (a) the political and legal relationship between the United States and Indian tribes; (b) Federal agency requirements to consult with Indian tribes; and, (c) the importance of maintaining the integrity of sacred sites”).

402. *Id.* at 2.

403. *Id.* at 3 (“8. Developing mechanisms to exchange and share subject matter experts among Federal agencies and identifying contracting mechanisms for obtaining tribal expertise”).

404. *Id.* Although improved information-sharing is included as a desirable action, there is also recognition that confidentiality issues can arise and must be dealt with properly in order to safeguard sensitive information about sacred sites. *Id.* at 2. The memorandum calls for “identifying existing confidentiality standards and requirements for maintaining the confidentiality of sensitive information about sacred sites, analyzing the effectiveness of these mechanisms, and developing recommendations for addressing challenges regarding confidentiality.” *Id.*

405. The Sacred Sites MOU provided that “Participating Agency representatives will serve on the working group until replaced by their agencies.” *Id.* at 3. The working group, which was tasked with developing an action plan for implementation of the MOU, was to be chaired by a Participating Agency, as chosen by majority vote of the working group. *Id.*

406. Action Plan to Implement the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Mar. 5, 2013), available at [http://www.doi.gov/news/upload/SS-MOU-Action\\_Plan\\_March-5-2013.pdf](http://www.doi.gov/news/upload/SS-MOU-Action_Plan_March-5-2013.pdf).

progress to date on the implementation of the MOU, including the accomplishments of agency-based groups that were assigned responsibility for working on specific action items identified in the MOU.<sup>407</sup>

Federal-tribal interaction with respect to sacred sites is of course nothing new. The Sacred Sites MOU seems to represent a recognition that this interaction has room for improvement, which requires both better coordination among federal agencies and greater opportunities for effective participation in consultation by the true sacred sites experts—the tribes. Finally, the MOU specifically mentions the issue of protection of a landscape and the need to understand that sites are not discrete places that exist in isolation from each other, like separate churches in a diocese. It is the view of the landscape itself that may matter, with views from particular vantage points perhaps having separate significance.

### *2. National Park Service Updating of TCP and Cultural Landscape Guidelines*

A federal endeavor that seems particularly relevant to the viewscape protection concern at issue in the CWEP, OWEF Project, and *Comanche Nation* litigation is a recently launched National Park Service (NPS) initiative to update the National Register Program's guidance for identifying, evaluating, and documenting properties that are historically significant as Traditional Cultural Properties and/or as Native American cultural landscapes. As part of a broader project calling for a comprehensive review and updating of the guidance on TCPs that is provided in National Register Bulletin 38,<sup>408</sup> in 2012 the NPS announced a plan for “[u]pdating National Register Guidelines for Identifying, Evaluating, and Documenting Traditional Cultural Properties and Native American Landscapes.” The NPS began seeking input in April 2012 through

a two-track information-gathering process consisting of: 1)  
conducting formal Government-to-Government Consultations

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407. Progress Report on the Implementation of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites 19-33 (May 2014), *available at* <http://www.fs.fed.us/spf/tribalrelations/documents/sacred/sites/SacredSitesWorkingGroupProgressReportMay2012.pdf>. The action items identified in the MOU were grouped into five areas and were assigned to Participating Agencies as follows: Training (Department of Defense); Confidentiality Standards (Department of Interior); Management Practices and Capacity Building (Department of Agriculture); Public Outreach and Communications (Department of Energy); and Public Review (ACHP). *Id.* at 3-4.

408. BULLETIN 38, *supra* note 46.

with Federally recognized Indian Tribes; and 2) requesting comments and recommendations from State Historic Preservation Officers, NPS regional offices and parks, and Federal land management and permitting agencies, as well as national, state, and local preservation organizations, independent professional preservation practitioners, and the public at large.<sup>409</sup>

Listening sessions have been held in a number of locations, to gather comments and provide updates on the progress made in updating Bulletin 38.<sup>410</sup>

The volume of comments led to the extension of the comment period until April 2013, with webinars to provide updates on progress scheduled throughout the summer of 2013.<sup>411</sup> Comments have been submitted by federal and state agencies, tribes, SHPOs, and organizations such as the American Cultural Resources Association and the Society for American Archaeology, as well as tribal members and other interested individuals. Among the tribes providing comments on revising Bulletin 38 and on developing guidance on Native American landscapes was the Hualapai

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409. Paul Loether, *Updating National Register Guidelines for Identifying, Evaluating, and Documenting Traditional Cultural Properties and Native American Landscapes*, NAT'L CTR. FOR PRES. TECH. & TRAINING (May 4, 2012), <http://ncptt.nps.gov/blog/updating-national-register-guidelines-for-identifying-evaluating-and-documenting-traditional-cultural-properties-and-native-american-landscapes/>. The NPS noted that it

is committed not only to seeking initial comments and recommendations from its national, state, and local partners, but also to providing meaningful opportunities for ongoing substantive dialogue with its partners throughout the duration of the project via multiple regional meetings, webinars, and teleconferences, as well as reviews of drafts of updated guidelines as they become available.

*Id.* Information-gathering was projected to be completed by late January 2013, while development of, and public review and public comment on, an initial draft of updated guidelines was projected for completion by June 2013, with a second draft of updated guidelines projected to be available for review and comment by August 2013 and final guidelines projected to be published in December 2013. *Id.*

410. *See, e.g.*, Nat'l Park Serv., National Register of Historic Places Progress on Updating National Register Bulletin 38 (Traditional Cultural Properties) (n.d.), *available at* <http://www.kingdomofhawaii.info/docs/NPS%20Meeting%20Flyer%20FINAL.pdf> (announcing listening sessions to be held in Hawaii on July 15, 16, and 17).

411. *Nat'l Register of Historic Places Program: Traditional Cultural Properties Request for Comments*, NAT'L PARK SERV., [http://www.nps.gov/nr/publications/guidance/TCP\\_comments.htm](http://www.nps.gov/nr/publications/guidance/TCP_comments.htm) (last visited Feb. 22, 2014) (noting the dates and times of webinars held in the summer of 2013 to provide updates, including those scheduled in response to overwhelming demand for previous ones).

Tribe of Arizona, which was one of the first tribes to establish a THPO after the NHPA was amended in 1992.<sup>412</sup> A comment letter submitted by the Hualapai Department of Cultural Resources in April 2013 (which supplemented a government-to-government consultation letter submitted in May 2012) is instructive both for its specific recommendations and for what it reveals about the common concerns of tribes faced with threats to religious and cultural resources, including sacred landscapes located outside of reservation boundaries. Although the revision process is still very much a work in progress, this letter captures a number of the key issues and provides suggestions that, if followed, could provide meaningful change in the section 106 consultation process.

Loretta Jackson-Kelly, the Hualapai THPO, noted that a major reason for the Tribe's establishment of a THPO program was the need to build capacity to engage in consultation when proposed undertakings "would affect historic properties that hold religious and cultural importance for the Tribe but which are not located on tribal lands." Like many tribes, the Hualapai reservation does not include the entirety of tribal ancestral lands. The Tribe's reservation "encompasses only about one-seventh of the area that the Hualapai people inhabited" before the reservation was established.<sup>413</sup> Highlighting what is at stake for tribes in the section 106 consultation process, Director Jackson-Kelly recommended that NPS guidance documents recognize that historic preservation, in addition to having intrinsic value, "can serve tribal interests in religious freedom and cultural survival." The section 106 process "is the primary procedural mechanism under federal law that tribes can use to advocate for the preservation of places that have ongoing religious and cultural importance."<sup>414</sup> There is "a critical need to make the NHPA process work better," an endeavor that should be viewed "against the background of the lack of substantive protection for American Indian religious freedom in U.S. law" and in the context of the global movement for indigenous human rights recognition manifested in the UNDRIP.<sup>415</sup> The existing "lack of judicially enforceable rights relating to tribal sacred places is a problem that cries out for a remedy [and] [a] real remedy must be more than a procedural

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412. Letter from Loretta Jackson-Kelly, Dir. and THPO, Hualapai Dep't of Cultural Res., to J. Paul Loether, Nat'l Register of Historic Places, at 1 (Apr. 2, 2013) [hereinafter Hualapai Comment Letter].

413. *Id.* at 1-2.

414. *Id.* at 2.

415. *Id.* at 3.

right to be consulted.”<sup>416</sup> Without such a remedy, the procedural rights that tribes have under the NHPA need to be made to work better. Director Jackson-Kelly expressed the hope that the NPS revision initiative “actually does contribute to making the process work better, including the achievement of better outcomes.”<sup>417</sup>

Director Jackson-Kelly proposed that the NPS develop a new guidance document, as a complement to Bulletin 38, which would focus on “historic properties that are of ‘traditional religious and cultural significance’ to a tribe.”<sup>418</sup> The proposed “Bulletin TRCI” (standing for “traditional religious and cultural importance”) would include guidance on Native American cultural landscapes and on other historic properties with tribal religious and cultural significance, to encompass both places that meet the TCP definition and those that do not.<sup>419</sup> Guidance documents should make it clear that agencies have a duty to consult with tribes that is not limited to TCPs.<sup>420</sup>

The comments recommended that guidance documents emphasize the need for consultation with tribes early in the section 106 process. Although some agencies make a good faith effort where consultation is concerned, others do not. For some places, avoidance of adverse effects is much preferred over mitigation, which in certain instances is unacceptable. Early consultation should increase the chances that historic properties will be identified and adverse effects avoided altogether, obviating the need for mitigation measures.<sup>421</sup> Finally, the letter pointed to UNDRIP as a providing relevant guidance.<sup>422</sup>

### *3. Efforts to Improve Coordination of NHPA and NEPA Review*

Both NHPA section 106 and NEPA are frequently described as being procedural in nature, and as not dictating any particular outcome. NEPA requires that an agency take a “hard look” at the environmental consequences of a proposed action before approving it.<sup>423</sup> An EIS is prepared to fulfill the “hard look” requirement. The NHPA requires that agencies “take into account the effect” of a proposed project on a site that is

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416. *Id.* at 4.

417. *Id.* at 4.

418. *Id.* at 5.

419. *Id.*

420. *Id.*

421. *Id.* at 6-7.

422. *Id.* at 8.

423. *Balt. Gas & Elec. Co. v. Nat’l Res. Def. Council*, 462 U.S. 87, 87 (1983).

included in, or eligible for inclusion on, the National Register.<sup>424</sup> Given the procedural focus of the two statutes, agencies have been able to approve projects even though they might have profoundly adverse effects on historically and culturally significant sites, without violating these statutes.

In March 2013, the ACHP and the White House Council on Environmental Quality (CEQ) released a handbook designed to help coordinate the review processes under the NHPA and NEPA. In announcing the release of *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (Handbook),<sup>425</sup> ACHP chairman Milford Wayne Donaldson heralded the Handbook as creating “a means to ensure statutory requirements of two important laws are met while strengthening the coordination of two similar but separate processes that frequently should proceed in tandem.”<sup>426</sup> Commenting on the reach of the two statutes, Donaldson observed that whereas NHPA section 106 requires federal agencies to consider the impacts on historic properties of their actions (such as direct federal involvement in, granting of a permit for, or providing financial assistance for a project), and NEPA mandates broader environmental review of proposed actions, federal efforts often “require adherence to both statutes from the earliest project planning phases.”<sup>427</sup> He noted specifically that section 106 would require consideration of how a project undergoing review might affect cultural landscapes.<sup>428</sup>

The Handbook provides guidance on the implementation of provisions added in 1999 to the section 106 regulations to address the coordination of

424. 16 U.S.C. § 470f (2012).

425. PRESIDENT’S COUNCIL ON ENVTL. QUALITY & ADVISORY COUNCIL ON HISTORIC PRES., *NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106* (2013) [hereinafter *NEPA & NHPA HANDBOOK*], available at [http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf).

426. Press Release, Advisory Council on Historic Pres., ACHP, CEQ and ACHP Create Handbook for Integrating NEPA and Section 106 (Mar. 5, 2013), available at [http://www.achp.gov/docs/ACHP\\_CEQ\\_Press\\_Release.pdf](http://www.achp.gov/docs/ACHP_CEQ_Press_Release.pdf).

427. *Id.*

428. *Id.* Donaldson provided the following example of the kind of review that might be required under both statutes:

For example, review of a project under NEPA would include consideration of the broad range of environmental impacts, ranging from wildlife to air and water quality and including historic and cultural resources. Section 106 of the NHPA would require consideration of how the project might affect the historic resources, such as historic buildings and districts, archaeological sites, and cultural landscapes.

*Id.*

NEPA and section 106 review.<sup>429</sup> The Handbook noted, as ACHP Chairman Donaldson had commented, that section 106 focuses exclusively on impacts to historic properties, including properties of traditional religious and cultural importance to tribes, but NEPA's focus is more expansive. In reviewing a project's effects on the human environment under NEPA, agencies consider aesthetic, cultural, and historic resources, including such resources as sacred sites. The cultural resources to be identified and assessed as part of analyzing the affected environment in an EIS "include a broader array of properties than the 'historic properties' identified in Section 106," and "might include resources such as cultural institutions, resources that embody cultural practices, and sacred sites that do not otherwise meet the definition of a historic property."<sup>430</sup>

Discussing the tribal consultation process, the Handbook emphasized that under NEPA, when a project potentially affects tribal interests, agencies are supposed to consult with tribes early, and to invite them to be cooperating agencies in the preparation of an EIS. Effects calling for consultation include any effects on cultural resources.<sup>431</sup> The Handbook also noted that although an agency may authorize a project applicant to begin consultation with some consulting parties, including THPOs, this "delegation authority does not extend to an agency's government-to-government relationship with Tribes," for which the agency alone remains responsible.<sup>432</sup> Early launching of consultation is also crucial for section 106 review, which should begin before an agency identifies a preferred alternative under NEPA. *Early* engagement with tribes, THPOs, and other consulting parties, to enable them to be involved "in the development of alternatives and consideration of historic preservation issues," will be beneficial to both the NHPA and the NEPA processes.<sup>433</sup> This admonition relates directly to a problem identified by the Wampanoag Tribe of Aquinnah, and other tribes taking part in review of a proposed project: Section 106 consultation began so late that decision-makers had already settled on a preferred alternative and were unlikely to rethink their decision.

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429. NEPA & NHPA HANDBOOK, *supra* note 425, at 4. The Handbook also provides guidance on the substitution of NEPA reviews for the section 106 process, as permitted under 36 C.F.R. § 800.8(c), titled "Use of NEPA process for Section 106 purposes." *Id.* at 4-5.

430. *Id.* at 27.

431. *Id.* at 15. The Handbook reiterated that NEPA review in this regard is not limited to historic properties. *Id.*

432. *Id.* at 17.

433. *Id.* at 16.

By encouraging agencies to provide THPOs with opportunities to engage with agencies under both statutes simultaneously, the approach highlighted in the Handbook could ease the burdens imposed by participation in project review, particularly the burdens experienced by tribes that are confronted with multiple projects simultaneously and find that their resources are stretched to the breaking point. The Handbook acknowledges the challenges imposed by the review process on THPOs and tribes.<sup>434</sup> Ideally the integrated process would lead to earlier efforts to avoid affecting TCPs and other cultural resources. Such efforts, if successful, would obviate the need to seek mitigation measures to try to resolve adverse effects. Where wind energy facilities' adverse impacts are concerned, avoiding such impacts to begin with is crucial.

Finally, it is interesting to note that although the Handbook is aimed at improving coordination of NEPA and NHPA review for all kinds of projects and affected cultural and other resources, the Handbook highlights the challenges associated with considering potential effects on landscapes. The Handbook noted that “[t]raditional cultural landscapes describe an area considered to be culturally significant” and “can and often do embrace one or more of the property types defined in the NHPA.” The Handbook also importantly notes that the challenges associated with managing such sites “do not excuse the consideration of their significance.”<sup>435</sup> This observation was illustrated by a photograph of the “Sacred Sand Dunes in Monument Valley.”<sup>436</sup>

At this early stage, it is too soon to tell whether this initiative to integrate NEPA and NHPA review, or the other recent developments described above, will ultimately lead to better procedures, and better outcomes, where projects that could adversely impact significant viewsapes and other tribal religious and cultural resources are concerned. Nonetheless, these developments represent steps in the direction of better protection of cultural resources and sacred places, and it seems that there is room for at least cautious optimism.

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434. *Id.*

435. *Id.* at 23.

436. *Id.*



#### IV. Conclusion

*[T]he needs of the Earth are not separable from human needs . . . . We need to take care that the spinning windmills do not become like the statues on Easter Island—monuments of a failed civilization.*<sup>437</sup>

Over thirty-five years have passed since Congress enacted the American Indian Religious Freedom Act of 1978, committing the United States to a policy of protecting and preserving for Indians “their inherent right of freedom to believe, express, and exercise” their traditional religions.<sup>438</sup> Over twenty years have passed since Congress amended the National Historic Preservation Act to expressly recognize that properties of religious and cultural importance to tribes are embraced within the statute’s concept of historic properties.<sup>439</sup> And almost twenty years have passed since the Executive Order on Indian Sacred Sites directed federal agencies to develop and implement procedures to consult with tribes as to actions that may adversely affect the use of or the physical integrity of sites that are sacred to tribes by virtue of their religious significance or ceremonial use.<sup>440</sup>

The experiences of the Wampanoag, Quechan, and Comanche tribes with the federal review process for projects that threaten cultural and religious resources indicate that despite these congressional and executive measures, a gap still exists between the support for tribal religious exercise that the measures purport to provide and the protection that tribal religions actually receive. Threats to sacred viewscapes, particularly from wind energy facilities, are but the latest battleground between developers and tribes over projects that would sacrifice ancient religions to profit maximization. It remains to be seen whether the “People of the First Light,” the Wampanoag Tribe of Aquinnah, will succeed in saving the view over Nantucket Sound from the desecration of the Cape Wind Energy Project.

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437. Hayley Dixon, *Wind Farms Could Become ‘Monuments of a Failed Civilization,’ Top Environmentalist Claims*, DAILY TELEGRAPH, Feb. 4, 2013, <http://www.telegraph.co.uk/earth/earthnews/9847324/Wind-farms-could-become-monuments-of-a-failed-civilisation-top-environmentalist-claims.html> (quoting Green Movement founder James Lovelock).

438. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (Aug. 11, 1978) (codified at 42 U.S.C. § 1996 (2012)).

439. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, sec. 101(a), § 1(b)(3), 94 Stat. 2987, 2987 (codified at 16 U.S.C. § 470(b)(3) (2012)).

440. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).