Cultural Resources and Historic Preservation
Before law school, I lived on Nantucket, an island 30 miles off the Massachusetts coast. I worked for an organization dedicated to preserving and interpreting Nantucket’s history. The entire downtown area is a National Register of Historic Places historic district that reflects Nantucket’s evolution from a colonial agricultural community to an eighteenth and nineteenth century whaling capital to a twentieth century art colony and resort. The historic district is composed of homes, businesses, municipal buildings, ferry terminals, boatyards, museums, a lighthouse, places of worship, and cobblestone streets. Several cemeteries—some with graves dating to the late 1600s, and some with native Wampanoag graves—lie just outside the historic district boundary. Thanks to building and land use regulations that strictly control development, redevelopment, and renovations, many of these historic resources have endured for centuries and coexist with the infrastructure necessary for modern life and a growing population.

Like many waterfront historic districts, Nantucket is battling climate change–driven sea level rise on all sides. Stronger and more frequent storms cause flooding that creeps ever farther into town, damaging buildings, disrupting transportation, and causing catastrophic sewer failures. Can the same laws that protect the historic character of places like Nantucket allow for building upgrades, widescale sewer renovations, and green infrastructure while maintaining cohesive historic streetscapes and waterfront areas? Communities within historic districts need to face this question now and pursue creative solutions.

This is NR&E’s first issue on cultural resources and historic preservation, and its articles examine cultural resources and historic preservation law at the local, state, tribal, federal, and international levels. One author predicts that federal and international historic preservation law will need to adapt to protect historic and cultural resources from increasingly frequent disasters. Authors explore how Vermont’s rural character and unique historic preservation and land use laws combine to protect historically significant structures and landscapes. Other authors offer case studies on how National Monuments designations can simultaneously protect fragile and important ecological, historic, and tribal resources while promoting environmental justice. Climate change’s impact on historic and cultural preservation echoes throughout this issue. One author recounts the efforts of a Louisiana tribal community to preserve their sense of culture and place when forced to relocate due to sea level rise, while another author illustrates the complexities of preserving historic cemeteries in the face of coastal flooding. Two authors explore the legal frameworks available to preserve historic structures within National Parks, and another examines new ways of navigating relevant federal laws when dealing with hazardous waste cleanups that involve historic properties.

There is something beautifully and essentially human about protecting historic and cultural resources. Robust historic preservation and cultural resources legal frameworks can allow communities to honor predecessors, preserve sacred lands and meaningful landscapes, and remember and interrogate our individual heritages and collective past.

Erin Flannery Keith
Issue Editor
Coyote Imitates Mountain Lion: A Tribute (and Thank You) to Dean Suagee*
Christine Y. LeBel

“Dear Mr. Suagee,” the letter read. “Thank you for speaking with me this morning about the complexities of environmental justice, Indian tribes, and Superfund.”

It was 1993, I was still a law student, working on environmental justice issues during a D.C. internship. Some wise soul—I don’t recall who—had referred me to Dean Suagee as a recognized expert on issues of tribal environmental law. My neophyte self was bold enough in that letter to forward an article to him, noting that “I thought it would interest you . . . because of your concern regarding the lack of understanding of tribal sovereignty among environmentalists. . . . Perhaps we can speak again at a later date should other questions or issues of concern arise.”

That “later date” did, indeed, arrive, but not, perhaps, as expected.

I wouldn’t even join ABA’s environmental section until 2002, when I was appointed as an editor to the NR&E editorial board. So, perhaps it’s no surprise that I didn’t remember my letter from almost a decade prior. At that point, Dean had been on the board himself since 1994. We served together for several more years. At every meeting and call—a sly, patient smile on his countenance and wry sense of humor at the ready—Dean would tirelessly remind us, his colleagues, to recall and incorporate the importance of tribal sovereignty issues in our work. A prolific writer, he was like water over stone—carving, imperceptibly but inexorably changing the landscape.

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(continued on page 49)
The concept of the “national park” is an American innovation that has led to the preservation of thousands of historic sites and millions of acres of parkland in the United States and its territories for the enjoyment and education of the American public and future generations. The National Park System manages more than 85 million acres of public lands, national monuments, and historic properties, comprising a network of 419 parks and sites that protect historic, cultural, and natural resources and tell the stories of significant people and events in our nation's history. The National Park System protects and interprets an estimated two million archaeological sites, 4,200 historic statues and monuments, and more than 27,000 properties that are listed on or eligible for listing on the National Register of Historic Places (NRHP), including 9,600 buildings. For over a century, domestic and international guests have visited properties in the National Park System. In 2018 alone, over 318 million visitors spent an estimated $20.2 billion in nearby communities, which supported 329,000 jobs and provided a $40.1 billion boost to the national economy.

With this volume of visitors, aging park facilities are incurring increased wear and tear, which is particularly worrisome in the face of growing deferred maintenance backlogs and static agency budgets. To date, the National Park Service (NPS) has a backlog of nearly $12 billion in deferred maintenance projects. This backlog is in tension with NPS's stewardship and preservation responsibilities under the 1966 National Historic Preservation Act (NHPA) and NPS's own mandate in its 1916 Organic Act to promote the use of national parks in a way that conforms to the park's purpose: to conserve the historic objects therein to provide for their enjoyment in a way that will leave them “unimpaired for the enjoyment of future generations.”

Removing historically significant properties from the deferred maintenance backlog is reason enough to seek innovative funding and restoration programs. When historic properties are not properly maintained, they often fall into poor repair, making them unavailable for public viewing or interpretation and hindering the historical context that served as the basis for their designation as or inclusion in the national park. Indeed, Congress has recognized through the NHPA, the historic preservation mandate established in the Organic Act, that preservation for preservation's sake, independent of the actual use of the designated properties, is a public interest priority and legal obligation. Moreover, it is likely that federal funding, to the extent it becomes available, will be directed at “critical care” properties, and not at properties where deterioration is expected to occur in the future due to the absence of maintenance funds, or for properties now subject to private control or management.

Considering the magnitude of NPS's ever-increasing burden to preserve the cultural and historic heritage of the country, what tools can NPS use to achieve this purpose? One such mechanism is NPS's historic leasing program. This program is proving to be a flexible and valuable tool for preserving and maintaining historic buildings and federal structures and bringing underutilized buildings back to public enjoyment and use. Historic leasing encourages private sector engagement and community involvement in historic preservation efforts for historic buildings and other structures in national parks and assists NPS in meeting its historic preservation obligations. This article will provide general background related to NPS management responsibilities and the need to make greater use of the agency's historic leasing program to creatively address renovations of historic assets, deferred maintenance, and park management projects through involvement of the private sector.

National Park System Management
Created in 1916 under the U.S. Department of the Interior (Interior), NPS is charged with managing the national parks established by Congress and monuments designated by presidential proclamation. 54 U.S.C. §§ 100301–502 (originally enacted as Act of Aug. 25, 1916, 16 U.S.C. §§ 1–4, 39 Stat. 535, i.e., the NPS Organic Act of 1916). Under the NPS Organic Act, the mission of NPS includes conservation of historic objects within national parks, monuments, and reservations for the enjoyment by the public and for future generations. This includes preservation of significant places within American history (e.g., Gettysburg National Military Park, Independence Hall, and the Statue of Liberty) and recreational areas (e.g., Cape Cod National Seashore and Cuyahoga Valley National Park). See Carol Hardy Vincent, Laura A. Hanson, and Carla N. Argueta, Federal Land Ownership: Overview and Data, Congressional Research Service (Mar. 3, 2017) at 6.

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The NHPA includes the requirement to identify, recognize, and preserve historic properties through a collaborative approach and partnership between federal agencies, states, tribes, local governments, and interested parties. 54 U.S.C. § 306101. Notably, Congress enacted the NHPA in response to the NPS’s Historic American Buildings Survey, the country’s first federal preservation program, which documented 12,000 places in the United States, half of which had either been destroyed or damaged beyond repair by 1966.

**National Park System Funding**

The NPS budget primarily consists of discretionary congressional appropriations through the annual Interior, Environment, and Related Agencies appropriations bill. NPS also receives certain mandatory appropriations, including recreation fees, concession franchise fees, receipts from leasing, and direct cash donations. However, these mandatory amounts comprised only approximately 19 percent of the total 2019 NPS budget and are not sufficient to address current and backlogged maintenance for historic properties in the National Park System. Over the years, NPS discretionary funding has increased nominally from approximately $2.7 billion in FY2010 to $3.2 billion in FY2019, effectively resulting in a decrease of 5 percent when adjusted for inflation. Congressional Research Service, National Park Service Appropriations: Ten-Year Trends (July 2, 2019) at 1, 5. NPS spends approximately $1.1 billion of its general appropriation funding on deferred maintenance each year, which is insufficient to clear the nearly $12 billion backlog. However, the Repair and Rehabilitation and Cyclic Maintenance accounts have recently seen meaningful increases and, taken together and compared to five years prior, the two accounts would receive approximately $140 million more in the FY 2020 Interior-Environment appropriations bill (H.R. 3052) passed by the House—a roughly 79 percent increase. Consequently, clearing the existing deferred maintenance backlog requires (1) continued increases in dedicated funding distinct from annual appropriations and (2) a strategy to ensure future funding to adequately maintain historic buildings.

**National Park Service Deferred Maintenance Backlog**

Over the past decade, the NPS’s substantial deferred maintenance backlog has grown at a rate of approximately 10 percent annually (from $10.83 billion in FY 2010 to $11.92 billion in FY 2018). This maintenance backlog splits almost evenly between transportation and non-transportation–related infrastructure. Laura B. Comay, The National Park Service’s Maintenance Backlog: Frequently Asked Questions, Congressional Research Service R44924 (Aug. 23, 2017). This backlog, among federal agencies, particularly acute for the NPS. While other federal agencies have deferred maintenance (the Bureau of Land Management and the U.S. Fish and Wildlife Service both reported less than $2 billion and the U.S. Forest Service reported approximately $5.5 billion), NPS’s backlog is the largest.

NPS’s backlog has increased because shrinking, or static, budgets have been unable to keep pace with the increasing number of historic properties requiring maintenance. For example, the Civilian Conservation Corps constructed many assets in the 1930s or in the 1950s and 1960s as part of the NPS’s Mission 66 infrastructure initiative. These structures have reached or exceeded their initially anticipated life span and contribute to the expanding backlog list. Other structures also will continue to age and require maintenance.

**Congressional Fixes to the Deferred Maintenance Backlog**

In response to the growing deferred maintenance backlog, Congress has been in search of potential solutions. As described below, lawmakers from both political parties introduced legislation to address the issue in both 2018 and 2019, but legislation stalled, even with broad political support from both sides of the aisle. Despite Congress’s ultimate failure to pass legislation in the most recent session, the House and Senate Appropriations Committees have been making measurable progress.

The Restore Our Parks and Public Lands Act (H.R. 1225) and the Senate companion bill, the Restore Our Parks Act (S. 500), are widely considered the leading proposals for addressing deferred maintenance and the most likely to move forward. The Restore Our Parks and Public Lands Act was first introduced in the 115th Congress and reintroduced on February 14, 2019; this bipartisan legislation has the support of over 300 members of Congress and would establish a federal fund in the U.S. Treasury to address the maintenance backlog at sites managed by NPS and other federal agencies. The Restore Out Parks Act would direct royalties from energy development on federal lands and waters—not already obligated by law to other programs—into a new federal fund, up to $1.3 billion per year for five years. Eighty percent, or $360 million, of funds would go to NPS. The Act, however, would prohibit funds from being used for land acquisition, employee bonuses, or to replace discretionary funding for facility operations and maintenance needs.

In addition to proposing appropriation legislation to reduce the backlog, in recent years Congress has paid specific attention to the need for greater use of historic leasing. As early as 2011, in the House Conference Report for the Interior Appropriations bill, Congress strongly encouraged NPS “to pursue the use of cost-effective, innovative solutions like historic leasing.” Similar directives accompanied the appropriations process in 2013 and 2017. However, until a congressional solution is reached, the NPS will need to search for other innovative ways to address the deferred maintenance backlog and future maintenance obligations with its current budget and resources. Greater use of the NPS’s authority to lease historic structures is one approach that can help chip away at the maintenance backlog and prevent historic structures from falling into disrepair.

**National Park Service Historical Leasing Program**

Under the NHPA and the National Parks Omnibus Management Act of 1998, NPS is authorized to lease to private individuals or entities those historic buildings and other structures under its ownership and management that are not needed for current or projected agency purposes. 54 U.S.C. §§ 102102(a), 306121(a). The agency then may retain proceeds from such leases to defray the costs of administration,
maintenance, repair, and related expenses for the historic property. Under these leases, NPS can require the lessee to restore and maintain the property.

NPS authority, criteria, and standards to issue historic leases is quite broad and open-ended and, in most circumstances, can be tailored to the situation and to be consistent with the purposes of the park unit. Before leasing property in a park unit, NPS must determine that the lease (1) will not result in degradation of the purposes and values of the unit; (2) will not deprive the unit of property necessary for appropriate park protection, interpretation, visitor enjoyment, or administration of the unit; (3) contains terms and conditions to ensure lease uses are consistent with the law establishing the unit (see 36 C.F.R. §§ 18.11, 18.12); (4) is compatible with NPS programs; (5) provides for rent that is equal to fair market value rent; (6) contemplates activities that are not subject to authorization under a concession contract (see 16 U.S.C. § 5966; 36 C.F.R. pt. 51) or commercial use authorization (see 36 C.F.R. § 5.3); and (7) ensures preservation of any historic properties covered by the lease. 36 C.F.R. § 18.4. As in other lease contexts, NPS can negotiate these terms to ensure that the historic lease meets park unit purposes. NPS also may find that in some cases, private sector involvement may enhance public activities, roles, and enjoyment of historic sites consistent with park unit purposes.

Historic Leasing as a Private Investment Tool
Although underutilized, historic leasing provides a tool that NPS (and other federal agencies) can use to leverage public-private partnerships and private investment to repair and maintain the approximately 9,600 or more historic buildings under NPS authority. See Historic Leasing in the National Park System: Assessing Challenges and Building on Success, Oversight Field Hearing before the H. Comm. of Nat. Res., 115th Cong. (2018). Outside of properties on the deferred maintenance list, NPS can proactively use this tool to prevent properties from falling into disrepair and adding to the current backlog. NPS can further use historic leasing at leaseable sites to generate funding, or hands-on maintenance, that could be invested elsewhere for the preservation of historic properties.

As buildings continue to age and become eligible for listing on the NRHP, NPS along with the private sector should continue to explore opportunities to manage and maintain historic resources for the benefit of the public and future generations before maintenance or rehabilitation becomes cost prohibitive or ineffective. In fact, on an initial review of the over 27,000 assets on the List of Classified Structures, an inventory of NRHP historic and prehistoric structures identified and maintained by the NPS, Interior reported 9,000 structures that could be evaluated for reuse through leasing. As of 2018, the NPS leasing program had approximately 160 leases covering 340 structures, which generated total revenues of approximately $9.3 million in FY2017. Using historic leasing to preserve buildings and generate revenue for the National Park System already has a successful track record. For example, under the 2013 Golden Gate National Recreation Area Residential Master Lease, the NPS receives 71.5 percent of the gross revenue, and 20 percent of the revenue is added to a repair and maintenance reserve that is nearly expended annually. Under the Master Lease, the lessee has rehabilitated and leased out 30 housing units for which the NPS has been paid over $10 million in rent. Accordingly, historic leasing and public-private partnership agreements with nonfederal entities provide an opportunity to preserve and reuse historic buildings that may have been otherwise subject to deterioration, neglect, or loss.

Historic Leasing in Practice
Although the practice is currently underutilized, historic leasing has been successfully used to reinvigorate historic properties by preserving the scenic, aesthetic, and historic character of these structures. These uses can extend beyond sites with a business connection, or that provide public access, to include a wide breadth of other uses, such as residential, agriculture, and educational uses. For example, while some historic buildings continue to be used for their original purpose (e.g., visitor lodges, residential use, or employee housing), other buildings have been adapted to visitor centers or museums. Cuyahoga Valley National Park in Ohio has entered 60-year leases with farmers who pay a monthly rent on restored farmhouses and farm buildings and the underlying land, which currently includes 11 productive farms. Likewise, at First State National Historical Park in Delaware, the park adopted a master lease model, under which it partners with a property management company to lease 11 houses, 2 barns, and 3 pastures. Other buildings on NPS leaseholds have been adapted to visitor centers or museums. At Klondike Gold Rush National Historic Park in Alaska, visitors can tour the Moore House Museum, which was the home of the first family to live in the former gold rush town, and the Mascot Saloon Museum, once the longest-running gold rush era saloon. The section below provides a detailed case study of three of the historic leasing program’s greatest success stories.

As of 2018, the NPS leasing program had approximately 160 leases covering 340 structures, which generated total revenues of approximately $9.3 million in FY2017.

Hot Spring National Park (Arkansas). Hot Springs National Park in Arkansas provides an encouraging example of a historic leasing program that has both proven essential to the vitality of a local community and reduced the deferred maintenance backlog at the park. In the late nineteenth century, developers turned the Hot Springs, Arkansas, area and its 47 geothermal springs into a resort town complete with hotels and bathhouses. First recognized as a unique natural resource deserving of governmental protection in the early 1900s, the Hot Springs area became a unit of the National Park System in 1921. In the 1920s and 1930s, NPS made significant investment in infrastructure at the park. But, by the 1960s, the number of visitors to the area fell. By 1985, all but one of the bathhouses had closed.
NPS began exploring historic leasing opportunities for the park at the turn of the twentieth century. After an initial federal investment of $18 million in the early 2000s, the bathhouses were ready for tenants. Today, seven of the eight bathhouses are leased, and their uses range from a boutique hotel to a craft brewery. The Quapaw, one of the largest bathhouses, had been vacant since the 1980s, but was reopened in 2008 as a luxury spa after an initial $2.5 million investment, aided by the historic tax credit and a year of rehabilitation work. Business remains strong a decade later. Under the 55-year lease, NPS is no longer responsible for monthly utility bills or maintenance costs and 2 percent of annual gross revenue must be set aside for maintenance work. Quapaw Bath and Spa handles the daily maintenance operations of the building, but NPS remains an active partner by ensuring that any work conforms with NPS standards. Despite a devastating fire in the city of Hot Springs in February 2014, tourism in Hot Springs National Park has increased by nearly 18 percent since 2013, while investment in the downtown area surrounding the park has grown by $80 million since the fire.

NPS should utilize all the tools in its toolbox, including historic leasing, to effectively manage and preserve historic structures consistent with the purpose of the Organic Act and NHPA.

Golden Gate National Recreation Area, U.S. Army San Francisco Port of Embarkation (California). Established in 1972, Golden Gate National Recreation Area manages more than 366 historic structures, 5 National Historic Landmark districts, and 13 NRHP properties. Each year, more than 15.6 million people visit the park and spend approximately $392.1 million in local communities. To ensure preservation of the historic buildings, the park began to enter into formal historic lease agreements in the early 2000s. Now the park has approximately 30 leasing partners who operate everything from a hotel and retreat center and housing to a thriving campus for the arts, located at Lower Fort Mason. Lower Fort Mason was previously known as the Port of Embarkation—a logistical and transport hub built in 1912 and used to support American military operations in the 1920s through World War II—and designated as a National Historic Landmark in 1972. By 1976, however, Lower Fort Mason was in an advanced state of disrepair due to abandonment and vandalism.

Despite the state of disrepair, the Fort Mason Foundation, a private nonprofit organization, entered into a cooperative agreement and a 60-year lease in 2005 with NPS to rehabilitate and manage Lower Fort Mason to become a cultural, recreational, and educational center. The 2005 lease requires the Fort Mason Foundation to “generate revenues, raise funds, and secure leasehold financing to renovate, preserve, restore, and rehabilitate the Fort Mason Center to facilitate its continued use as a cultural, recreational, and educational center.” U.S. DOI NPS, Lease: Fort Mason Center at Golden Gate National Recreation Area, Lease No. GOGA006-10 (Dec. 7, 2005). The Fort Mason Foundation administers the Fort Mason Center for Arts and Culture, which subleases to various small business and nonprofit arts organizations, including art galleries, restaurants and cafes, theaters, a museum, and a dance studio and rents space to the public for events, such as music festivals, conferences, corporate retreats, and birthday parties. Lower Fort Mason now receives 1.4 million annual visitors and program services brought in over $13 million in revenue in FY2017.

Valley Forge National Historical Park, Philander Chase Knox House (Pennsylvania). Located in southeastern Pennsylvania within Valley Forge National Historical Park, the Philander Chase Knox House—originally known as Maxwell’s Quarters—is another example of a successful historic leasing outcome. Maxwell’s Quarters has a distinguished history extending back to the American Revolutionary War. In 2015, NPS leased the Philander Chase Knox House to Valley Forge Park Events LLC (VFP) for a 10-year period to generate income to preserve this and other sites within Valley Forge National Historical Park and increase access to a house that is generally closed to the public. VFP was also required to complete certain rehabilitation including, painting, furnishing, and ensuring Americans with Disabilities Act access. In addition to lease rents, the park receives a percentage of the revenue from fees and catering sales. VFP currently operates the historic house as an event venue for wedding receptions and social and corporate events.

While the case studies above provide three encouraging success stories on the value of historic leasing, there are still opportunities to utilize this tool more broadly. For example, in September 2013, the National Trust for Historic Preservation (NTHP), the principal nongovernmental proponent of historic preservation in the United States, made historic leasing a key policy goal based on its potential to play a significant role in protecting the national heritage. NTHP issued a report on Historic Leasing in the National Park System—Preserving History Through Effective Partnerships—which included case studies on the use, or potential use, of historic leasing in 17 national parks, including Delaware Water Gap National Recreation Area, Harpers Ferry National Historical Park, Valley Forge National Historical Park, Cumberland Island National Seashore, Chesapeake & Ohio Canal National Historical Park, Sandy Hook Unit of Gateway National Recreation Area, Apostle Islands National Lakeshore, Cuyahoga Valley National Park, New River Gorge National River, Glacier National Park, Grand Canyon National Park, and North Cascades National Park. The NTHP expanded on this report in its 2018 testimony before the House of Representatives Natural Resources Committee, wherein the NTHP reaffirmed its support for leasing in these parks and identified additional parks for potential leasing, such as Isle Royale National Park and Martin Luther King Jr. National Historical Park. There is significant opportunity nationwide to identify and evaluate circumstances that justify use of historic leasing to maintain and preserve historic structures—many of which fall within well-known national parks.
Barriers to Leasing: Legal and Public Policy Issues

Despite significant congressional and nongovernmental organization support to pursue innovative, cost-effective solutions to NPS’s maintenance backlog, NPS has been slow to fully utilize its leasing authority to preserve historic structures. See FY16, H. Rep. 114-170, H.R. 2822; FY17, H. Rep. 114-632. NPS faces the following barriers to fully implementing the historic leasing program: (1) restrictive statutory, regulatory, and policy interpretations; (2) limited staffing capacity and funding for costs to complete appraisals to prepare and offer buildings for lease; (3) costs for lease administration; and (4) adherence by a few park managers to the “old school” philosophy that NPS should exercise total control over all property within a park and not allow for private sector involvement.

Under the governing statute and the agency’s implementing regulations, NPS may only lease historic buildings and associated property if the uses will be consistent with the purposes of the NPS unit where the building is located and compatible with NPS programs. Accordingly, depending on the proposed use, gray areas and disagreements might exist regarding what uses will qualify, and under a purist perspective, exclusion of the public would be inconsistent with the NPS park unit purpose. However, as a counterbalance to this concern, many historic structures are already in a state of disrepair and, with NPS’s growing deferred maintenance backlog, are unlikely to obtain maintenance, repairs, or funding to offset or address the dilapidation and ultimate loss of these structures for public use. Moreover, some buildings represent a historic purpose, such as a farm or significant residence, that needs to be protected for that very reason. As a result, NPS should strike an appropriate balance to properly maintain historic structures for the enjoyment of the public, even if full public access every day is not available. Preserving buildings that contribute to a park’s scenic and aesthetic values can itself be an important goal.

Further, the current regulatory scheme for historic leasing in the National Park System creates additional hurdles for attracting investors. While current regulations provide for competitive leasing through a Request for Bid or Request for Proposal, or a non-competitive lease to nonprofit organizations at fair market value rental rates, the lease can have a term of no more than 60 years but must “have as short a term as possible, taking into account the financial obligations of the lessee and other factors related to determining an appropriate lease term.” 36 C.F.R. § 18.10. While NPS has authority to find that the shortest term necessary to attract private investment is 50 or 60 years, leases with a shorter term of 10 to 20 years are unlikely to be attractive from an economic standpoint for investing, and for eligibility for the federal Historic Tax Credit to help offset rehabilitation costs. Moreover, fair market value that does not account for the costs of repair and maintenance could be excessive and discourage investment. Notwithstanding these provisions, NPS has found a basis to issue longer term leases in some cases, including a 40-year lease of the Ivy Hollow Farm to the Montessori Children’s House of Valley Forge, which as of 2018 had $1.9 million in revenue. Correspondingly, NPS should consider promoting longer term leases to encourage private investment which could offset NPS long-term maintenance requirements.

Another barrier to NPS’s ability to create a self-sustaining lease program is NPS’s reluctance to relinquish control of its properties to a private party. Yet, these concerns could be addressed with appropriate lease terms and conditions. Historic leasing does not necessarily require an all-or-nothing result (i.e., turning a public site into a private residence or enterprise), and in some cases, private sector involvement can involve public actors. And at its core, preserving historic properties is in and of itself a public service, regardless of the entity completing, funding, or controlling the work. Indeed, NPS is now encouraging creative thinking and more flexible approaches to managing historic properties. For example, NPS has hired a leasing program manager, and convened a national workshop at the Statue of Liberty on better and effective use of all forms of leasing and partnerships.

Recommendations for Increased Utilization of the NPS Historic Leasing Program

Considering the current state of the growing maintenance backlog, NPS has limited options to preserve historic resources without a congressional solution. NPS therefore should utilize all the tools in its toolbox, including historic leasing, to effectively manage and preserve historic structures consistent with the purpose of the Organic Act and NHPA. Because Congress supports and has granted NPS authority to use historic leasing, Congress and NPS should consider: (1) prioritizing funding for staffing, training, and establishment of a historic leasing task force; (2) creating more explicit agency policy directives and guidance promoting preservation and encouraging the use of historic leasing throughout the park system; (3) identifying NPS units and individual properties that should be high priorities for leasing to facilitate the development of an action plan; (4) creating a formal submission process for nonfederal partners to present leasing opportunities for NPS consideration; and (5) drafting guidance that encourages the use of long-term leases (50 or 60 years). These modest steps would help create momentum to assist NPS in meeting its stewardship responsibilities and to ensure that NPS meets its obligations to preserve historic buildings in the National Park System for the benefit of the current and future generations of visitors. ✡
Beyond the Antiquities Act: Can the BLM Reconcile Energy Dominance and National Monument Protection?

John C. Ruple and Heather Tanana

Signed into law on June 8, 1906, the Antiquities Act is concise in its charge but broad in effect, authorizing presidents to designate national monuments to protect “objects of historic or scientific interest” on federally owned or controlled land. 54 U.S.C. § 320301(a). Republican and Democratic presidents have used this authority to designate over 150 national monuments across 32 states, the District of Columbia, and various U.S. territories. Many national monuments—including iconic landscapes like the Grand Canyon in Arizona, Zion in Utah, Joshua Tree in California, and Grand Teton in Wyoming—were subsequently elevated to national park status.

Under the Antiquities Act, the president may reserve monument lands from future mineral development or disposal in order to protect monument objects. Id. at § 320301(b). But the act includes scant additional management direction, dictating only that archaeological excavations cannot proceed absent a government-issued permit. Until recently, national monuments were managed with an understanding that the balance between competing uses tipped in favor of protecting the objects identified in the proclamation. Standard practice ended under the Trump Administration, when the president issued a series of executive orders promoting development of domestic energy resources. See, e.g., Exec. Order No. 13,783 (Mar. 28, 2017) and Exec. Order No. 13,868 (Apr. 10, 2019). This “energy dominance” agenda conflicts with resource protection, and the collision is playing out at two national monuments in southern Utah—the Grand Staircase-Escalante National Monument (GSENM) and the Bears Ears National Monument (BENM).

Establishing GSENM and BENM

On September 18, 1996, President Clinton designated 1.7 million acres as the GSENM to protect a “spectacular array” of sensitive scientific, historic, prehistoric, archaeological, paleontological, cultural, and natural resources. Presidential Proclamation No. 6920 (Sept. 18, 1996). The proclamation creating the monument also withdrew monument lands from mineral development and disposal. President Clinton described the GSENM, which was the last place in the continental United States to be mapped, as an unspoiled frontier and a “geologic treasure” teeming with “world class paleontological sites,” a place “rich in human history,” and containing “an extraordinary number of areas of relict vegetation, many of which have existed since the Pleistocene.” Id. Indeed, the GSENM, which is managed by the Bureau of Land Management (BLM), has produced discoveries of over 45 new paleontological species, including 12 new species of dinosaurs. Two decades later, President Obama used the Antiquities Act to designate the culturally and archaeologically rich BENM in southern Utah. Presidential Proclamation No. 9558 (Dec. 28, 2016). As President Obama explained, for hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.

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the BLM and U.S. Forest Service must continue managing landscapes that are caught in a legal and policy limbo. Setting ongoing litigation aside, we focus on the lands that “remain” within these two monuments according to the revision proclamations and attempt to define the legal sideboards on management of these lands and the “objects of historic or scientific interest” they contain.

GSENMM and BENM Management

The Antiquities Act contains little direction on how monument lands should be managed, leaving those decisions to the presidential proclamations creating national monuments and the discretion of the agencies that manage them. The original proclamations designating GSENMM and BENM both expressly reserved monument lands to protect the objects identified in the proclamations and directed the secretaries of the Interior and Agriculture to manage the two monuments to implement the purposes stated in the proclamations. To guide the agencies in managing monument resources, both original monument proclamations also require resource managers to prepare management plans for the monuments.

While reducing GSENMM and BENM by 50 and 85 percent respectively, President Trump left intact the broad outlines for managing what remains of the two monuments. A few specific exceptions aside, his proclamation modifying the BENM does not “change the management of the areas designated and reserved . . . that remain part of the monument.” Proclamation No. 9681 at 58085–86. Similar language applies to the GSENMM. See Proclamation No. 9682 at 58094. Protecting monument resources, in short, remains the goal of both monuments.

The BLM completed a management plan for the GSENMM in 1999, but a management plan for the BENM was not completed prior to President Trump’s reductions. In January of 2018, federal land managers announced their decision to revise the management plan for the GSENMM and to prepare a management plan for the BENM. Seven months later, the agencies released draft management plans and environmental impact statements (EISs) for both monuments. Proposed management plans and Final EISs for the BENM and GSENMM followed in July and August of 2019, respectively.

The proposed management plan and Final EIS for the GSENMM considers four action alternatives, as well as a no-action alternative that is required under the National Environmental Policy Act (NEPA). The BLM’s proposed plan is generally the least protective alternative, changing little from the preferred alternative in the Draft EIS. The proposed plan “emphasize[s] resource use” and “reduce[s] constraints on resource development.” U.S. Dept. of the Interior, Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Proposed Resource Management Plan and Final Environmental Impact Statement, ES-8 (2019). The GSENMM proposed plan, for example, designates fewer right-of-way avoidance and exclusion areas within the monument more than any other alternative and reduces the size of these protected areas to below the level contained in the no action alternative. Id. at ES-22. It would also increase the amount of land open to commercial livestock grazing and aggressive vegetation treatment while minimizing protections for cultural resources, paleontological resources, wildlife habitat, wilderness characteristics, soil and water resources, and visual resources. Id. at ES-11–ES-27.

An increase in impacts flows logically from reduced protections. As the BLM acknowledges, its proposed plan “may increase the potential for adverse effects on resources” because it includes “the least amount of special designations and allocations that would protect or maintain resource values and designate[s] no [Areas of Critical Environmental Concern].” The proposed plan also does not “specifically manage [any] lands for wilderness characteristics. . . [and represents the alternative] most likely to increase the potential for management conflicts and associated impacts on lands adjacent to the Planning Area.” Id. at ES-9.

The BLM further concedes that the proposed plan poses a heightened potential for impacts on scenic values within the monument; natural soundscapes both within the monument and on adjacent National Park Service lands; suitable Wild and Scenic River corridors within the monument; and both paleontological and soil and water resources that the BLM identifies as “monument objects.” Id.

The draft management plan and Final EIS for the BENM similarly proffered the least protective option as the agency preferred alternative. The proposed plan for BENM refines the preferred alternative in the Draft EIS slightly, but it generally remains the least protective action alternative. U.S. Depts. of the Interior and Agriculture, Bears Ears National Monument: Proposed Monument Management Plans and Final Environmental Impact Statement Shash Jáa and Indian Creek Units, ES-6–ES-11 (2019). Impacts to monument resources at BENM, under the agencies’ proposed management plan, would overshadow those of the other alternatives. Over 38,000 acres of land with medium to high cultural sensitivity, for example, would be open to right-of-way applications under the proposed plan—the most of any action alternative and an amount identical to the proposed alternative in the Draft EIS. BENM Proposed Plan at ES-6. The proposed plan also contemplates expansion of off-highway vehicle (OHV) trails into the Indian Creek portion of the monument, would eliminate limits on the size of groups that can access the sensitive Cedar Mesa and Comb Ridge areas, and “would not manage inventoried lands with wilderness characteristics specifically to protect wilderness characteristics.” Id. at 2-14, 2-18, and 3-48. Law protections for visual quality “could result in adverse impacts on the scenic quality of the Planning Area and diminish the recreational experience of recreational users who visit the Monument to enjoy its scenic resources and desire a more primitive recreation setting.” Id. at 3-48.

Monument Management Requirements Imposed by FLPMA and the Omnibus Public Lands Act of 2009

While the Antiquities Act provides scant direct protection to national monument lands and the objects these lands contain, additional direction and resource protection are contained in other federal laws that apply to national monument management.

Both proposed plans and their accompanying EISs give only passing attention to protections of “objects of historic or scientific interest” that are imposed by either the Federal Land Policy and Management Act of 1976 (FLPMA) or the Omnibus Public Lands Act of 2009 and therefore raise the question: Are the proposed plans consistent with statutory direction?
Section 302(a) of FLPMA directs the Secretary of the Interior to “manage the public lands under principles of multiple use and sustained yield . . . except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.” 43 U.S.C. § 1732(a) (emphasis added). The legislative history of this provision provides scant insight into its origin or congressional intent, though the text appears clear on its face. Broadly speaking, FLPMA modernized and consolidated the BLM’s management authority while increasing the emphasis on resource protection. FLPMA also moved the BLM away from a policy of resource disposal toward a policy that, among other things, “protect[s] the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition.” 43 U.S.C. § 1701(a)(8).

The interplay between FLPMA’s multiple use–sustained yield mandate and provisions of law associated with special designations has received scant judicial attention.

BLM-managed monuments like the GSENM and BENM are also protected as part of the National Landscape Conservation System (NLCS). Created administratively in 2000 and incorporated into federal law as part of the Omnibus Public Lands Act of 2009, the NLCS was established to “conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.” 16 U.S.C. § 7202(a). BLM managed national monuments are part of the NLCS, and the Secretary of the Interior is specifically directed to manage National Conservation Lands “in a manner that protects the values for which the components of the system were designated.” Id. at 7202(c)(2).

BLM’s Manual 6220 provides guidance for implementing these statutory charges. Under Manual 6220, the BLM must “[m]anage discretionary uses within Monuments . . . to ensure the protection of the objects and values for which the Monuments . . . were designated.” BLM Manual 6220 § 1.2(C) (2017). Where language contained in a monument proclamation conflicts with FLPMA’s multiple use mandate, the more protective proclamation language controls. Id. at § 1.6(B)(1). As a result, the BLM’s monument planning and implementation level decisions pertaining to the objects for which the monuments were designated must be consistent with monument proclamations.

The BLM Manual also provides guidance specific to transportation planning. “[T]o the greatest extent possible,” the BLM should “avoid designating or authorizing use of transportation or utility corridors within Monuments,” by designating monuments as “exclusion or avoidance areas,” not designating incompatible corridors, and “relocating any existing designated transportation and utility corridors outside the Monument.” Id. at § 1.6(E)(8). The BLM Manual is equally explicit regarding utility rights-of-way, again requiring that to the greatest extent possible, the BLM “avoid granting new rights-of-way in Monuments,” and “consider routing or siting the ROW outside of the Monument.” Id. at §§ 1.6(E)(2)(b), 1.6(E)(7), and 1.6(G)(4)(f).

The direction contained in BLM Manual 6220 is hard to square with the BLM’s proposed plans for the GSNEM or the BENM. The proposed plan for the GSNEM would establish fewer right-of-way avoidance and exclusion areas than any other alternative, including the no action alternative. Overall, the proposed plan for the GSNEM “may increase the potential for adverse effects on resources” over any other alternative, including the no-action alternative. The proposed plan is also the “most likely to increase the potential for management conflicts and associated impacts on lands adjacent to the Planning Area.” GSNEM Proposed Plan at ES-9.

Similarly, the proposed management plan for the BENM would open more culturally sensitive lands to right-of-way application than any other alternative and would threaten a delicate cultural landscape by increasing OHV access, reducing or eliminating group size restrictions in some of the monument’s most sensitive areas, foregoing management protections for lands with wilderness characteristics, and opening sensitive lands to right-of-way application.

Interpreting the BLM’s Obligations under FLPMA and the NLCS

As previously discussed, FLPMA requires that where a tract of BLM-managed public land “has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law” rather than the BLM’s broad multiple use mandate. 43 U.S.C. § 1732(a). The interplay between FLPMA’s multiple use–sustained yield mandate and provisions of law associated with special designations has received scant judicial attention. Only four cases substantively analyze the BLM’s obligations under section 302(a) of FLPMA, and all hold that the BLM must manage national monuments in accordance with the terms of the monument proclamation. See, e.g., Western Watersheds Project v. Abbey, 719 F.3d 1035, 1042 (9th Cir. 2013). Management must therefore, at a minimum, protect the objects identified in the proclamation. Existing case law has not expressly addressed management of National Conservation Lands, though that statutory mandate appears clear on its face. The question that remains is whether the Trump Administration’s approach to monument management can be squared with congressional direction.

In 2011, the federal district court in Arizona addressed a challenge to the BLM’s management of the Grand Canyon–Parashant and Vermillion Cliffs National Monuments. Plaintiffs contended that the monument management plans allowed vehicle use and livestock grazing that would harm monument objects, and that the BLM’s proposed mitigation efforts were inadequate to address those harms. Wilderness Soc’y v. U.S. Bureau of Land Mgmt., 822 F. Supp. 2d 933 (D. Ariz. 2011). Critically, both monument management plans were approved in 2008, before Congress enacted the Omnibus
Public Lands Act of 2009, which specifically directed the BLM to protect monument values. Monument planning also occurred before the BLM released Manual 6220 with its elucidation of the Act’s direction to prioritize protection of monument values over competing uses. Absent this direction, the BLM arguably had greater discretion in balancing FLPMA’s multiple use mandate with direction contained in the monument proclamations, and the court understandably deferred to the BLM’s expert judgement. However, even when faced with less direction to protect monument values, the BLM’s management plans still made “unavailable approximately 34,000 acres in Parashant that were previously available for grazing . . . and establish new standards and management actions to protect rangeland health.” Id. at 938. The plans also did not open any new routes to motor vehicle use. Such management actions supported the court’s conclusion that the BLM's plans fulfilled its obligations under FLPMA and protected monument resources. Id. at 940.

The Arizona court relied heavily on In re Montana Wilderness Ass’n, 807 F. Supp. 2d 990 (D. Mont. 2011), which involved consolidated challenges to the BLM’s management plan for the Upper Missouri River Breaks National Monument. Plaintiffs in that case challenged restrictions applied to river segments that were part of the National Wild and Scenic River System and to grazing management, claiming that both decisions failed to adequately protect monument resources. As with the challenge to plans for the Grand Canyon–Parashant and Vermillion Cliffs National Monuments, the plan at issue in Montana Wilderness predated both the Omnibus Public Lands Act of 2009 and BLM Manual 6220.

While the monument protections in Montana Wilderness may not have been as stringent as the plaintiffs hoped, the BLM’s management plan closed 146 miles of the Upper Missouri National Wild and Scenic River to jet ski and float plane use, closed four of ten backcountry airstrips, restricted drilling natural gas wells on existing leases, imposed more stringent requirements on livestock grazing permits and leases, and permanently closed 201 of 605 miles of roads while imposing seasonal closures on another 120 miles of roads within the monument. 807 F. Supp. 2d. at 994. Compared to the other five alternatives, the selected alternative “placed more restrictions on motorized use than every other alternative except Alternative E, closed more roads than Alternatives A, B, and C, closed the same or more backcountry airstrips than every other alternative except Alternative E, and imposed more restrictions on oil and gas operations than Alternatives A, B, and C.” Id. at n.3. In light of these restrictions, and the lack of express statutory direction to elevate monument value protection over other uses, the district court had no trouble concluding that the BLM was within its discretion in balancing uses set forth in the proclamation; and the court of appeals agreed. Montana Wilderness Ass’n v. Connell, 725 F.3d 988 (9th Cir. 2013).

Western Watersheds Project v. Abbey, 719 F.3d 1035 (9th Cir. 2013), arose out of the same district court opinion but involved different appellants and focused on livestock grazing. Appellants contended that the BLM erred in incorporating livestock grazing standards that they believed were inadequate to protect monument objects or values. In the only decision to even mention the BLM’s obligations under the Omnibus Public Lands Act or the NLCS, the court concluded without analysis or explanation that the grazing standards relied upon for the monument management plan were not in “conflict” with the NLCS’s intent to “conserve, protect, and restore nationally significant landscapes.” Id. at 1044. The court did not address any other aspect of the NLCS or the direction contained in the Omnibus Public Lands Act. That the court mentioned the NLCS at all is somewhat odd, given that monument planning was completed before the Omnibus Public Lands Act was enacted and the court declined to address guidance contained in the BLM Manual because it was issued after the plan was complete. Id. at n.4.

The final case about monument management involved the Sonoran Desert National Monument, which was proclaimed in 2001. National Trust for Historic Preservation v. Suazo, No. CV-13-01973-PHX-DGC, 2015 WL 1432632, at *1 (D. Ariz. Mar. 27, 2015). Although the BLM began monument planning a year later, it did not publish its draft management plan until 2011. Planning took an inordinately long time because the BLM faced a thorny problem involving recreational shooting within the monument. Existing regulations prohibiting the willful defacement, disturbance, removal, or destruction of sensitive objects and resources within the monument had been insufficient in protecting these resources. Id. at *6. The BLM therefore commissioned a study to better understand the scope and impact of recreational shooting, and to identify management options prior to preparing their monument management plan. The expert report recommended closing the monument to shooting in order to protect visitor safety and reduce ongoing damage to monument objects. This damage was described as “extreme” at sixteen sites within the monument. Id. at *2.

The BLM adopted the shooting ban recommendation in its draft plan and EIS. But while the final EIS was at the printer, the Department of the Interior ordered the BLM to keep the monument open to shooting and the BLM changed its decision without revising its analysis. The final decision was therefore diametrically opposed to the BLM’s own analysis and challenged by plaintiffs because it would lead to irreversible damage to the wildlife and artifacts in the monument. Id. at *1.

The court began its review by recognizing that the BLM must manage the monument in compliance with the terms of the monument proclamation. While the court concluded that the proclamation did not require the BLM to select the most protective management option, the BLM was required to balance the “paramount” purpose of protecting Monument objects with other purposes and needs, such as allowing recreational activities in the Monument.” Though deference was due the BLM’s decision in balancing competing uses, there was “simply too great an incongruity between the information contained in the Final EIS and the decision to allow shooting throughout the Monument.” Id. at *7.

As the court noted, changes to the management plan were driven not by analysis, but in response to lobbying pressure from the National Rifle Association and other supporters of recreational shooting. Id. at *8. The court therefore distinguished the BLM’s actions at the Sonoran Desert National Monument from the cases discussed above by noting that in each case, the BLM had taken at least some concrete steps to protect monument objects. While the management plan predated the BLM Manual 6220 and the court opinion does not mention the NLCS or Omnibus Public Lands Act, those authorities appear to support the plaintiffs’ position and the court’s ruling, had the court needed to reach that argument.
While these cases highlight the deference courts will give to the BLM’s weighing of management options, they are all distinguishable from the GSENEM and BENM plans in at least two important respects. First, in all but Suazo, the BLM’s preferred alternative increased protection for monument objects and values—and in Suazo, reduced protections that were based on political pressure proved to be the plan’s Achilles heel. At the GSENEM and BENM, the agencies proposed management reflects the least protective action alternative, and in many cases, a reduction in protections from the status quo. And as litigants contend, scant protections reflect a policy choice to elevate energy development above other uses.

Second, all these cases predated publication of BLM Manual 6220, and the monument management plan in Suazo was the only one to be completed after Congress enacted the Omnibus Public Lands Act. However, notwithstanding the Act’s explicit directive to the BLM to elevate protection of values identified in monument proclamations over other uses, Suazo failed to analyze any obligations associated with inclusion in the NLCS. Explicit requirements to protect monument resources have increased since these cases were resolved and the adequacy of the GSENEM and BENM management plans must be measured against the current higher standard.

Measuring Impacts against the Proper Baseline

The agencies’ baseline for its NEPA analysis raises an additional question. The comparison of alternatives “is the heart of the environmental impact statement . . . present[ing] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” 40 C.F.R. § 1502.14. The no action alternative is critical, providing a “benchmark, enabling decision makers to compare the magnitude of environmental effects of the action alternatives.” Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). The no action alternative must accurately state what could occur but for agency action, and agencies cannot base the no action alternative on documents that have been invalidated by a court, Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1038 (9th Cir. 2008), nor ignore binding legal requirements. Oregon Natural Resources Council Action v. U.S. Forest Service, 445 F.Supp.2d 1211 (D. Or. 2006).

For both the GSENEM and BENM, the BLM failed to address the limitations imposed by the NLCS, section 302(a) of FLPMA, and BLM Manual 6220 when it formulated its no action alternative. By ignoring the legal requirement to protect monument resources, the BLM overstates the level of impact that could occur under the no action alternative.

Inflated baseline impacts also make the impacts that would occur from implementing any of the action alternatives appear less significant than they may actually be. These are important concerns because the agencies repeatedly state that at least with respect to the BENM, all action alternatives would have less potential for surface disturbance and therefore less potential to impact monument resources than the no action alternative. See, e.g., BENM Proposed Plan at 3-9. They also state that all action alternatives would include more provisions addressing the proper care and management of monument objects and values than the no action alternative. Id. at 3-21. Even if these suspect claims are taken as true, they overlook that the action alternatives are more protective primarily because the BLM failed to prioritize protection of monument objects in its no action alternatives.

The Future of Monument Management

We can only speculate whether the cases addressing national monument management would have turned out differently had Congress formally protected monuments as part of the NLCS earlier, or if the BLM had released Manual 6220 before beginning monument planning. What is clear, however, is that Congress raised the bar for protecting monument values since the cases discussed above were decided. It is also clear that the GSENEM and BENM were reduced following aggressive lobbying by energy development interests. While a federal court will almost certainly be called upon to determine whether energy dominance can be adequately reconciled with monument protection, the Trump Administration does not appear to be setting itself up for success.

The administration’s approach to monument planning may prove to be all for naught if legal challenges to monument reductions succeed. If that occurs, the existing plan for original GSENEM would likely be reinstated, at least until a new plan can be prepared. The BLM and Forest Service would also need to start planning for BENM afresh to address the entire 1.35-million-acre monument area. Such action would almost certainly push planning out past the 2020 election and that, of course, could result in a changed administrative policy focus.

The Trump Administration could decide to change its approach to monument planning and adopt alternatives that are more in line with statutory protections afforded National Conservation Lands in the final management plans. This may be the administration’s best option because even if it chooses to remain focused on resource extraction elsewhere on the public lands, the drive for energy dominance within national monuments is likely to spawn more litigation than development.

Alternatively, the administration may double-down on development and proceed with management plans that minimize burdens on energy development and extractive industries. They may also choose to emphasize active management within national monuments. That would almost certainly lead to more litigation, and litigation would delay plan implementation until after the 2020 election.

More troubling though is the prospect of monument managers continuing to operate without clear direction and with inadequate resources. Almost three years have passed since President Obama designated the BENM and still not a single sign has been installed, no interpretive displays have been built, and the only visitor center is in a renovated bar operated not by the federal government but by a local nonprofit organization. We don’t think that is what Congress had in mind when it told the Secretary of the Interior to “conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.” America’s national monuments deserve better.
Tribal Recognition, Consultation, and Lessons from the First Climate Relocation

Adam C. Crepelle

News outlets across the United States flocked to the Isle de Jean Charles (IDJC), Louisiana, in 2016 and declared the island’s inhabitants the United States’ first climate refugees. Located along Louisiana’s coast, the IDJC is a textbook case on the impact of rising seas and coastal erosion. The IDJC had a land mass of over 22,000 acres in 1955. Presently, the IDJC’s land mass is barely 300 acres. Tremendous land loss combined with recent disasters like hurricanes and the BP oil spill made the IDJC community a prime candidate for a U.S. Department of Housing and Urban Development National Disaster Resilience Competition grant. Media coverage focused on the environmental issues at the IDJC, but completely overlooked the United States and the state of Louisiana’s gross failures in the tribal consultation process.

The IDJC is populated almost exclusively by American Indians. Though the IDJC’s indigenous inhabitants are all related and share the same culture, they claim two different tribal affiliations—but only one of the tribes was named in the relocation grant. The failure to acknowledge that another tribe was present on the IDJC and had strong cultural ties to the IDJC triggered problems as soon as the grant was awarded. These problems could have been avoided had the federal or state government performed a proper tribal consultation.

The federal government, states, and private entities routinely fail to meaningfully consult with tribes. There are a few reasons for this. One is that many people fail to realize that tribes are governments. Similarly, there is often confusion over what constitutes a tribe. Then there is uncertainty over the meaning of consultation. This article begins by discussing the different legal classification of tribes as well as tribal consultation. The article next examines the United Houma Nation’s (UHN’s) attempt to achieve federal recognition, and how this led to the consultation failure at the IDJC. The article then proposes suggestions to improve the tribal consultation process.

What Is a “Tribe”? When working with tribes inside the United States, the most important legal consideration is whether the tribe is recognized. There are two recognition classifications: federal and state. Federal recognition establishes a nation-to-nation relationship between the tribe and the federal government. State recognition can facilitate a similar political relationship between a state and a tribe. Additionally, some tribes are not recognized by any government and are therefore not considered tribes from a legal perspective. Whether a tribe is recognized by the federal government, state, or possesses no recognition at all is consequential.

Federal recognition is the strongest position a tribe can occupy. Federal law considers federally recognized tribes “domestic dependent nations.” Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788, (2014). Federally recognized tribes maintain jurisdiction over their citizens and their land. Accordingly, state law is presumed not to apply on a federally recognized tribe’s land. Under multiple environmental statutes, federally recognized tribes can be treated as states. This enables federally recognized tribes to set environmental quality standards that are more stringent than those in bordering states. Moreover, tribal environmental quality standards can impact off-reservation, non-Indian polluters. For disaster relief, federally recognized tribes can directly seek assistance by requesting a presidential emergency or major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5191(c)(1).

State-recognized tribes do not maintain the same legal standing under federal law. State-recognized tribes do not possess the same sovereign status as federally recognized tribes and must implement alternative governance structures. Many state-recognized tribal governments have extremely limited financial means and struggle to provide services to their citizens. State recognition grants certain benefits, as all state recognized tribes and their citizens qualify for certain federal programs. For example, enrollment in a state-recognized tribe qualifies individuals to participate in the small business development program, 13 C.F.R. § 124.3, and to receive protections under the Indian Arts and Crafts Act. See 25 U.S.C. § 305(e)(3)(B).

State-recognized tribes and nonrecognized tribes can obtain federal recognition. Since the 1970s, tribes have achieved federal recognition in one of two ways, through federal legislation or the administrative federal acknowledgment process (FAP). Congress is said to have plenary power over Indian tribes, and Congress can use this power to confer recognition upon tribes. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”).

Legislative federal recognition has been the most common
way for tribes to achieve federal recognition in recent decades, most recently six Virginia tribes in 2018. Alternatively, the FAP was designed to eliminate politics from federal recognition decisions by requiring petitioners to meet seven criteria. Of the criteria, the elements with which petitioners have the most difficulty are demonstrating the petitioner has (1) consistently exercised “political influence or authority” over (2) the “distinct community” from 1900 to present. See 25 C.F.R. § 83.11.

Although the FAP was well-intentioned, it has proven biased and insensitive to the historical realities that many tribes, particularly those without federal recognition, face.

Although the FAP was well-intentioned, it has proven biased and insensitive to the historical realities that many tribes, particularly those without federal recognition, face. The FAP applies a one-size-fits-all definition of “tribe,” completely disregarding the vast diversity of tribal cultures. The federal government’s FAP criteria interpretation can be problematic. For example, the United States defines “political influence or authority” as the use of formal institutions to significantly influence or control the tribe’s members or make decisions on behalf of the tribe. 25 C.F.R. § 83.11(c). In contrast, many tribes cannot demonstrate that they exercised “political influence” over their citizens because many tribes traditionally lacked formal governance institutions that exercised meaningful control over the tribe’s citizens. As one example, a federal court discussing the tribes in Washington stated, “no formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government.” United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974). As a result, these tribes cannot satisfy the FAP based upon their traditional tribal cultures. Furthermore, the administrative process takes decades to complete, costs millions of dollars, frequently requires Sisyphean levels of documentation, and often produces illogical decisions. Senator Jon Tester (D-MT) has used the Little Shell Tribe to illustrate this point noting: “The Little Shell started their process in 1978. And the process continues on. They are in the appeals process right now in 2012, some 34 years later, $2 million in legal fees, and 70,000 pages of documents.” See “Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before the Committee on Indian Affairs United States Senate,” 112th Cong. 684 (2012), page 2. The FAP is so flawed that John Norwood, former cochair of the National Congress of American Indians, Task Force on Federal Acknowledgement, estimated that approximately 70 percent of the tribes that are currently federally recognized could not successfully navigate the FAP. Id. at 21.

Additionally, the FAP has divided many tribes. The high stakes associated with recognition can cause political infighting among petitioning tribes. This results in tribes “splintering” into multiple groups making it exceedingly difficult for petitioners to demonstrate that they are a unified political entity. A tribe’s odds of successfully completing the FAP dramatically decrease when the tribe splinters. Just as the federal government confers recognition, states have extended recognition to the tribes with whom they share geography. Each state is free to establish its own recognition criteria. Some states, such as Alabama and North Carolina, have formalized state recognition procedures similar to the FAP. Other states have passed resolutions declaring recognition through their legislative process. However, some states do not grant any meaningful rights to the tribes they have recognized. In fact, some states have concluded state recognition is largely meaningless. See La. Att’y Gen. Op. No. 18-0091 (Sept. 13, 2018).

**Tribal Consultation**

Federal agencies have an obligation to consult with tribes when engaging in activities that will have a significant impact on their land, culture, or resources. The federal government’s duty to consult with tribes stems from the trust relationship between tribes and the federal government. The U.S. Supreme Court has stated the trust relationship carries with it “moral obligations of the highest responsibility.” Seminole Nation v. United States, 316 U.S. 286, 297 (1942). But the trust relationship is more than moral, as it can be legally enforced in some instances.

For most of its history, U.S. Indian policy had been aimed at destroying tribes. President Nixon noted that “even the Federal Programs which are intended to meet [Indian] needs have frequently proved to be ineffective and demeaning.” Accordingly, he sought to give tribes greater control over their futures, ushered in the tribal self-determination era, and set the wheels in motion for tribal consultation. President Richard Nixon, Special Message to the Congress on Indian Affairs, The American Presidency Project (July 8, 1970). Nixon’s self-determination policy supported tribal self-government, which, in turn, resulted in tribal consultation as a natural consequence. In 1994, President Clinton issued a memorandum that aspired to strengthen the working relationship between tribes and the federal government by clarifying the parameters of the government-to-government relationship between the United States and Indian tribes. President William Clinton, Memorandum on Government-to-Government Relationship with Tribal Governments (Apr. 29, 1994). In 2000, President Clinton’s Executive Order 13,175 formalized tribal consultation by requiring federal agencies to develop a process to receive tribal input. Presidents George W. Bush and Barack Obama both issued memoranda to fortify Executive Order 13,175. President George Bush, Memorandum on Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004); President Barack Obama, Memorandum for the Heads of Executive Agencies: Tribal Consultation (Nov. 5, 2009).

The ethos of tribal consultation is embedded throughout the federal government. Pursuant to Executive Order 13,175, every federal agency is required to develop a tribal consultation policy; nevertheless, some federal agencies have yet to do...
Several federal laws, such as the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act, and Native American Graves Protection Repatriation Act, explicitly require tribal consultation. The Code of Federal Regulations also contains tribal consultation requirements implementing those statutory obligations.

Despite the executive orders and statutory requirements, the United States has consistently failed to engage in effective consultation with tribes. A 2019 Government Accountability Office (GAO) report found several problems with federal tribal consultation policies. Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects, March 2019. The report noted that federal agencies often commence consultations long after the start of projects and that tribal input is not taken seriously. According to the GAO, federal agencies routinely fail to respect tribal sovereignty. The GAO report notes that Alaska Native Corporations, which hold and exercise some sovereignty over millions of acres of land, are often excluded from tribal consultations. State-recognized tribes are usually excluded from tribal consultations as well. These problems exist because there is no uniform definition of “consultation;” thus, each agency defines the term itself. And although Executive Order 13,175 and subsequent presidential memoranda command tribal consultation, each document explicitly states that it creates no legally enforceable rights.

Federal agencies have yet to respond to the GAO Report; however, some federal bodies are already using a more inclusive definition of tribe. The NHPAs statutorily prescribed Advisory Council on Historic Preservation (ACHP) encourages consultation with state-recognized tribes. “Because non-federally recognized tribes may have information that assists the Section 106 process, consulting with them may enhance the agency’s decision-making process.” ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook at 12 (Dec. 2012). The first principle of the Environmental Protection Agency’s (EPA) environmental justice policy provides all indigenous peoples in the United States with “meaningful involvement opportunities” in the agency’s decision-making process; nonetheless, the EPA “places special emphasis on consulting with federally recognized tribes on EPA decisions that may affect their interests.” U.S. EPA, EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples at 2 (July 2014). Likewise, most federal agencies, such as the Department of Housing and Urban Development (HUD) and Federal Emergency Management Agency (FEMA), which are directly engaged with tribes during natural disasters and emergencies, only consult with federally recognized tribes.

In addition to federal law, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is relevant to tribal consultation. Most notably, Article 19 declares, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” UNDRIP offers a much more inclusive term of “indigenous peoples” than “federally recognized tribe.” Other international laws, such as the American Declaration on the Rights of Indigenous Peoples, have similar consultation policies and broad definitions of indigenous. Nonetheless, courts within the United States “have consistently held that UNDRIP is a non-binding declaration that does not create a federal cause of action,” and have refused to enforce the UNDRIP’s provisions despite the United States being a signatory to the document. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 301 F. Supp. 3d 50, 60 (D.D.C. 2018).

A 2019 GAO report found that federal agencies often commence consultations long after the start of projects and that tribal input is not taken seriously. According to the GAO, federal agencies routinely fail to respect tribal sovereignty.

States have their own tribal consultation policies. Recently, the State of Washington incorporated “free, prior and informed consent” language in its Tribal Consent and Consultation Policy. Washington State Office of the Attorney General, Tribal Consent and Consultation Policy (May 10, 2019). However, the policy only applies to federally recognized tribes even though nonrecognized tribes share geography with the state. Montana requires state agencies to engage in “regular and early communication” when an action may have tribal implications. Mont. Code Ann. § 2-15-142. New Mexico requires the state Indian affairs department to maintain a list of tribal contacts and requires state agencies to designate a tribal liaison. State-Tribal Collaboration Act, N.M. Stat. Ann. § 11-18-1. California’s Environmental Protection Agency requires the agency to engage in meaningful consultation with California Native American Tribes, which includes either a federally recognized tribe listed on the most recent notice of the Federal Register or a non-federally recognized tribe on the California Tribal Consultation List maintained by the California Native American Heritage Commission. See CalEPA Policy on Consultation with California Native American Tribes, Aug. 20, 2015. As some states and international law seek to improve consultation methods, the lack of clear and consistent federal practices continues to create tribal consultation problems. These issues are further illustrated by the failure to consult during the IDJC climate relocation.

Houma Recognition and Its Political Implications

For over two centuries, the Houma have resided along Louisiana’s central Gulf Coast. The Houma entreatted with France and Spain, and in the Louisiana Purchase, the United States vowed to uphold treaties between Spain and the Indian tribes. The first American governor of New Orleans, William C. C.
Claiborne, met with Houma leaders in 1806 and 1811 to formalize relations. In the Battle of New Orleans, the Houma fought alongside the Americans. Nevertheless, the United States refused to recognize the Houma’s land claim in 1817, declaring, “[w]e know of no law of the United States by which a tribe of Indians have a right to claim lands as a donation.”

Summary Under the Criteria and Evidence for Amended Proposed Finding Against Federal Acknowledgment of the Pointe-au-Chien Indian Tribe, BIA 1, 14 (May 22, 2008).

The Houma were able to live in isolated areas in Louisiana’s swamplands until approximately 1930 when oil was discovered on the tribe’s land. Isolation meant most Houma did not speak English and even fewer could read it. As a result, countless Houma were swindled out of their land. Moreover, Louisiana prohibited children born to unmarried parents from inheriting property. Since Houma often married pursuant to tribal custom rather than a state-sanctioned ceremony, many Houma were denied property rights in their land by Louisiana law. Violence was also used to steal Houma land.

Jim Crow Louisiana did not protect Indian rights; in fact, Louisiana declared the Houma “colored” for purposes of discrimination. Terrebonne and Lafourche Parishes, where most Houma reside, formally segregated blacks, whites, and Indians well into the 1960s. A federal court ruled that Terrebonne’s Indian school system must close in 1963, but Houma children remained in segregated Indian schools until 1969. The Civil Rights Movement and President Nixon’s new Indian policy brought about slow positive changes for the Houma. In 1979, the tribe formally organized as the UHN and entered into the FAP process.

Fortunately, most tribal consultation complications can be solved—better yet prevented—by meaningful ongoing dialogue between states and tribes.

The UHN’s federal recognition attempt immediately encountered bureaucratic obstacles and drew the ire of oil companies—which was no surprise given the tribe’s oil-rich lands. Acclaimed anthropologist Frank Speck wrote in the 1930s that oil companies would assiduously fight any action that may give the Houma land rights. Adam Crepelle, Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation’s Struggle for Federal Recognition, 64 Loyola L. Rev. 141, 162–63 (2018). Indeed, as soon as the UHN entered the federal recognition process, oil companies began lobbying to undermine the UHN’s federal recognition efforts.

In 1994, the Bureau of Indian Affairs (BIA) issued a proposed finding against granting federal recognition to the UHN that epitomizes the arbitrariness of the FAP. The agency admitted that “Indian ancestry can be verified for the petitioner without doubt or question.” See Summary Under the Criteria and Evidence for Proposed Finding Against Federal Acknowledgement of the United Houma Nation, Inc., Dec. 13, 1994, at 25. Nonetheless, the BIA determined the UHN could not prove it was a distinct community that exercised political authority over its constituents. The BIA also could not verify that the UHN descended from the historic Houma tribe nor could the BIA confirm that the City of Houma was named after the Houma Indians, although the Houma have had a documented presence there for at least two centuries. Furthermore, research the BIA had previously held out as authoritative supported the UHN’s federal recognition; however, the BIA dismissed these sources as based upon “unfounded assumptions” in the UHN’s case. Id. at 5.

Interestingly, the BIA’s proposed finding against extending federal recognition to the UHN suggested the UHN may be able to achieve federal recognition if it divided into smaller tribes. That suggestion, along with internal political turmoil, splintered the UHN. The split produced a few small tribes including the IDJC Band of Biloxi-Chitimacha-Choctaw (BCC). Although most persons enrolled in the splinter tribes were previously enrolled in the UHN, the splinter tribes now disclaim any connection with the historic Houma tribe. The splinter tribes have also failed in their efforts to navigate the FAP for the same reasons as the UHN.

Ever since they broke from the UHN, the splinter tribes and the UHN have engaged in a political rivalry of sorts, in which the UHN generally prevails. The state of Louisiana has also recognized the UHN as a tribe. The UHN has long been accepted by Louisiana’s four federally recognized tribes as a legitimate Indian tribe; hence, the UHN is the lone state-recognized tribe on the Inter-Tribal Council of Louisiana (ITCLA). On the other hand, the splinter tribes have not been granted membership on the ITCLA, and while Louisiana has passed a resolution recognizing individuals enrolled in the splinter tribes as “Indians,” the resolution does not extend recognition to the splinter tribes. Nonetheless, both the UHN and the splinter tribes are included on Louisiana’s recently created Native American Commission (NAC). The NAC is highly controversial amongst Louisiana’s tribes because it was created without tribal consultation.

Lack of Tribal Consultation Leads to Problems

The BCC leadership scored a significant win in the intertribal feud with the federal relocation grant. Being pronounced “the United States’ first climate refugees” in national news outlets raised the BCC’s profile; moreover, the BCC was the only tribe named in the grant. The provision of federal money to relocate a group of Indians would seem to offer strong support that the BCC is a community and assist in the BCC’s federal recognition effort. However, the BCC’s celebration was short-lived.

The UHN was offended by its exclusion from the grant. The UHN has historical connections to the IDJC, and the UHN was included in Phase I of the grant application. Nevertheless, it was not mentioned in the grant award, sparking a new stage in the intertribal feud. The BCC claimed every resident of the IDJC belonged to it while the UHN said approximately half of the island’s residents are enrolled in it. The state of Louisiana eventually admitted its failure to consult as part of the grant process. Louisiana issued a statement noting the BCC was the sole tribe listed in the grant because...
Louisiana was “under the belief that all inhabitants of the Island affiliate with this tribe.” Louisiana corrected its error, allowing UHN citizens as well as all other island residents to participate in the relocation.

Approximately one year into the relocation planning, Louisiana discovered that nearly a third of the island’s residents openly declared that they will not move. The actual number of island residents who do not want to move may be much higher. Things have gone so poorly with the relocation that the BCC have even attempted to turn down the money and withdraw from the relocation grant. Julie Dermansky, Isle de Jean Charles Tribe Turns Down Funds to Relocate First US ‘Climate Refugees’ as Louisiana Buys Land Anyway, Desmog Blog (Jan. 11, 2019).

Despite the historic significance of the grant itself and the large sum of money involved, both Louisiana and the federal government failed to consult with the tribes that were impacted by the grant. Louisiana and the federal government had multiple options to learn about the IDJC and its residents. Louisiana could have easily contacted the ITCLA, which would have apprised the state of the island’s tribal politics. The Louisiana Governor’s Office of Indian Affairs should have also known of the tribal politics on the island and could have informed Louisiana of the island’s tribal dynamics. Louisiana could have consulted the language of the resolution it passed recognizing the UHN, by far the largest tribal population in the state and encompassing a territory that includes the IDJC. Furthermore, Louisiana could have met with the Islanders prior to applying for the grant. This would have revealed the tribal politics and the fact that many Islanders do not want to move and could have allowed the grant to be focused on a plan that would have garnered community and tribal support. Sadly, the IDJC relocation is just another in a long list of tribal consultation failures by the state and federal government and the challenges that tribal recognition brings to the process.

**Improving Tribal Consultation**

Fixes to the tribal consultation process will remain incomplete if legitimate tribes are excluded from consultation. Efforts have been made in recent years to address the flaws in the FAP; nonetheless, the FAP remains an unsatisfactory answer to tribal federal recognition determinations. State recognition can help fill in the consultation gap, but states must do a better job vetting the tribes they confer recognition upon. Because some states have less stringent and systematic processes for vetting tribal recognition claims, state recognition has often been viewed with skepticism.

One possible solution to the tribal recognition problem is to apply international law. Self-identification as indigenous peoples is the standard used under international law. The Saramaka, for example, are the descendants of runaway African slaves in Suriname, South America, and have been recognized as having rights as indigenous people. Though not indigenous in the conventional sense, the Inter-American Commission on Human Rights concluded the Saramaka’s history and culture entitled them to treatment as indigenous peoples. In making this determination, the court declared that “the members of the Saramaka people are to be considered a tribal community, and that the court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.” Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 86 (Nov. 28, 2007).

In addition to potentially applying an international definition of tribes, those engaged in consultation must understand the land, communities, and local politics of the indigenous communities with whom they are consulting. Consultation requires regular and meaningful communication in order to be effective. It requires embracing all the tribes within the area even though they may appear unaffected by the decision. Maintaining these relationships can provide useful information on the culture, history, and politics of the tribes in a broader context.

Agencies consulting with tribes should recognize the diversity of tribal governments. Some operate like and structurally resemble state governments. Others operate more loosely; that is, even if a formal government exists, the government may have less authority within the tribe than the tribe’s elders. This is pivotal to keep in mind during consultations. Indeed, it would be wise to seek the views of tribal citizens who are not elected leaders while consulting. This is not disrespectful; rather, this action is an acknowledgment that various perspectives are found within tribal communities. The goal should be to obtain the community’s free, prior and informed consent before taking any action that affects the tribe. An inclusive approach affords all tribal citizens the opportunity to voice their opinions, and this facilitates consensus building and compromise.

What does the UHN/BCC situation tell us about consultation? Consultation issues arise because tribes are an afterthought or ignored. Likewise, states need to develop tribal consultation policies long before undertaking a project that may impact a tribe, and the consultation policy must be informed by the tribes that share the state’s geography. In the same vein, states should strive to build positive relationships with tribes. This includes attempting to understand tribal history and culture. It is also important to realize that Indians have a diversity of views; hence, just because a tribal government official takes a position on an issue does not mean the entire tribe shares the leader’s views. Fortunately, most tribal consultation complications can be solved—better yet prevented—by meaningful ongoing dialogue between states and tribes.

Tribal consultation will continue to be an issue until the United States develops an official standard for tribal consultation. However, developing an official tribal consultation policy will not solve the consultation problem as long as legitimate tribes are denied federal recognition. Until a uniform federal tribal consultation policy is developed and bona fide tribes gain federal recognition, tribal consultation problems will persist.

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Bridging the Nature-Culture Gap: Using Cultural Resource Laws for Environmental Protection

Emily Bergeron

Aldo Leopold once said, “[c]onservation is a state of harmony between men and land,” suggesting a need to bridge the gap between culture and nature. *Round River* 145 (1966). Such a “holistic” approach to environmental protection, however, requires a multidisciplinary, multiparty process that must address the “environment” as a whole, instead of considering water pollution, air pollution, climate change, and so on in isolation of one another. Many disciplines have attempted to combine social and natural science as a means of explaining and attempting to resolve problems, recognizing the need to cross disciplines. Unfortunately, those creating and implementing the law have not been as willing to abandon reductionist views despite recognition of the complexity of environmental issues.

Interestingly, the environmental and heritage protection movements in the United States have grown up alongside each other, meaning overlaps in environmental and cultural protections do exist. In fact, several environmental statutes incorporate elements that consider historic and cultural significance. The National Environmental Policy Act (NEPA), for example, considers the man-made environment, including elements such as the impacts of population distributions, economic indicators of human welfare, transportation networks, and infrastructure. NEPA also considers the cultural environment, including historic and archaeological sites and aesthetic resources such as visual quality. Laws protecting particular species have also addressed animals’ cultural relevance. In the Wild and Free-Roaming Horses and Burros Act of 1971, for example, in addition to their importance as “an integral part of the system of the public lands,” Congress declared the animals “living symbols of the historic and pioneer spirit of the West.” 16 U.S.C. ch. 30 § 1331 et seq.

Famously, the endangered status of the snail darter helped to delay the construction of the Tellico Dam on the Little Tennessee River, which would eventually flood the sites of several eighteenth century Overhill Cherokee towns as well as several Archaic period prehistoric sites. Chief Justice Warren Burger wrote for the majority in *Tennessee Valley Authority v. Hill* that endangered species are to be accorded the highest priorities. 437 U.S. 153 (1978). Although political pressure led President Carter to eventually sign a bill exempting the controversial Tellico Dam from the Endangered Species Act, the protection of a tiny fish temporarily served to protect historically and culturally significant sites.

In protecting the ideals of both natural and cultural heritage (required for creating Leopold’s state of harmony), it is relevant to consider that just as environmental laws can be used in a cultural resource protection agenda, so historic preservation laws can be employed to protect environmental ones. With the current administration’s rollback of environmental regulations, there is an increasing need to find alternative strategies for environmental conservation and environmental justice advocacy, and statutes protecting cultural heritage could provide that alternative. This article discusses how two cultural resource protection laws, the National Historic Preservation Act of 1966 (NHPA) and the Antiquities Act, have been used to protect resources from the impacts of extractive industries on private and public lands.

**The National Historic Preservation Act of 1966**

In part a response to the destructive impacts of urban renewal and highway building, NHPA, its accompanying implementing regulations for NHPA section 106 review process, and its establishment of the National Register of Historic Places, require federal agencies to consider the potential adverse effects of agency actions on historic resources. For a site to be included in the section 106 process, it must be listed or eligible for listing on the National Register. The law is not intended to place buildings, sites, or objects as the main priority in the decision-making process, but it does require that heritage resources be given meaningful consideration. Much like the “paper tiger” accusations hurled at NEPA, NHPA has been accused of being toothless. However, as cultural resource management expert Tom King has suggested, “[t]he jaws of Section 106 can’t clamp shut and rip out a project’s guts. But those toothless jaws can gum a project to death, tie it up in knots and keep it tied up while it bleeds itself dry.” Thomas F. King, *Saving Places That Matter: A Citizen’s Guide to the National Historic Preservation Act* (2016), at 18.

Legal scholars have proposed that the NHPA be used for multiple environmental protection and social justice causes. D. S. Pensley has, for example, proposed that Copper River salmon could be eligible for National Register listing as objects, structures (composed of bone, flesh, sinew, and skin), or districts as a group of animals. Danielle S. Pensley, *Existence and Persistence: Preserving Subsistence in Cordova, Alaska*, 42 Envtl. L. Rep. 10366 (2012). Pensley cites *Dugong v. Rumsfeld,*
example, the 1977 Surface Mining Control and Reclamation
ulations applicable to mining operations with little success. For
pushed to update and strengthen environmental laws and reg
lems such as high rates of unemployment and poverty and
 Residents in Mountaintop Mining Counties
Research has shown that mountaintop removal contributes
to significantly higher rates of birth defects, cancer, and car
 cardiovascular and respiratory diseases in individuals living in the region where it occurs. See Keith J. Zullig & Michael Hendryx, Health-Related Quality of Life Among Central Appalachian Residents in Mountaintop Mining Counties, 101 Am. J. of Pub. Health, 848–53 (2011). Reports of increased risk of mental health issues, exacerbated by preexisting socioeconomic problems such as high rates of unemployment and poverty and lower rates of educational attainment are also evident. These communities face risks associated not only with contaminated drinking water, increased flooding, and coal slurry impoundments, but also declining populations. As a result of changes in mining practices and technology, residents have lost jobs or entire towns have been relocated—sometimes forcibly evacuated—to allow better access to the coal seams running through the hills.

Environmental advocates and community groups have pushed to update and strengthen environmental laws and regulations applicable to mining operations with little success. For example, the 1977 Surface Mining Control and Reclamation Act states that mining companies should not cause “material damage to the environment to the extent that it is technologically and economically feasible.” 30 U.S.C. § 1201, et seq. However, the law is silent as to what this means. Further, in 2002, the Bush Administration revised the Clean Water Act’s regulatory definitions of “fill material” and “discharge of fill material,” addressing what the U.S. Army Corps of Engineers (Corps) may authorize to be deposited into streams, allowing mountaintop removal waste to be placed into streams and waterways, thus facilitating the growth of mountaintop removal. 40 C.F.R. Part 232.2.

In 2013, environmental groups, Appalachian advocates, and more than 200 members of Congress supported a Clean Water Protection Act that would have again excluded mining waste from being considered “fill material.” H.R. 1837, 113th Cong. However, this measure was defeated following intense industry lobbying. Positive movement was made in December 2016, when, after years of technical review, outreach to states and the industry, and public comment, the Office of Surface Mining Reclamation and Enforcement finalized the Stream Protection Rule. 81 Fed. Reg. 93,066–445 (Dec. 20, 2016). This rule created restrictions for coal companies seeking permits to expand or start new mines in the future, including provisions establishing stricter limits on dumping waste and debris in surrounding ecosystems and requiring a baseline assessment of nearby ecosystems before any new mining begins, provisions for monitoring affected streams, and plans for restoring damaged waterways post-mining. In February 2017, however, President Donald Trump signed a joint resolution from Congress repealing the rule. Disapproving the Rule Submitted by the Department of the Interior Known as the Stream Protection Rule, Pub. L. 115–5, H.J. Res. 38.

Seeking to combat the economic and political influence of the coal industry and to address the environmental and public health issues associated with the practice, environmental justice advocates have recognized existing laws’ drafting and enforcement limitations. So, they have instead turned to cultural heritage protections to provide an often-overlooked opportunity to protect environmental health and promote environmental equity, finding a valuable tool in the NHPA.

Large-scale earth moving inherently requires damage to resources—both natural and cultural—making historic preservation and extractive industries naturally at odds. This has been recognized, for example, by the West Virginia State Historic Preservation Office, which identified the reclamation or demolition of historic mine properties as well as active mining as specific threats to the state’s archaeological and historic resources. Statewide Historic Preservation Five Year Plan: Specific Threats, W. Va. Dept. of Arts, Culture and History, www.wvculture.org/shpo/fiveyearplan/threats.html (last visited Nov. 12, 2019). Both above- and below-ground cultural resources are impacted. For example, many coal companies are now inadvertently in possession of the generations-old family cemeteries that pepper the Appalachian landscape. Plots have been drilled under, mined over, and gravestones damaged by sulfurous and acidic emissions. States have responded by enacting laws specific to cemetery protections and offer some protection through their own state versions of NHPA. Aboveground cultural resources that lie in the way of mountaintop mining are often removed in anticipation of extractive activities, sometimes being recorded, but not preserved. Historically significant resources such as early twentieth century coal mining
sites like the Dorothy Number 1 Mine in Raleigh County, West Virginia, or supporting towns like Saxon in Nicholas County, West Virginia, have been removed to make way for mining operations. As it can be problematic for a mine to exist where a town does, older towns in proximity to mining sites have seen residents accept buyouts from coal companies to make way for mining, leaving behind churches, downtowns, and homes that served generations. Dan Barry, As the Mountaintops Fall, a Coal Town Vanishes, N.Y. Times, Apr. 12, 2011.

In the heart of West Virginia, at a site intimately linked to the troubled history of coal mining in the region, environmental and historic preservation advocates, recognizing the threats to the community, the environment, and the site of one of the largest, most violent labor battles in U.S. history, fought to protect the many resources threatened by mountaintop removal. Charles B. Keeney, The Battle of Blair Mountain Is Still Being Waged, Cultural Landscape Found. (Feb. 26, 2018).

At the historic site, for five days in late August 1921, more than 5,000 miners seeking better living and working conditions through unionization battled nearly 3,000 men hired by coal companies to lay in wait in trenches, armed with mounted machine guns and homemade bombs to quash the protestors. The conflict was so severe that President Warren Harding sent federal troops to end the fighting and force the miners to surrender. In the present day, the battle was this time taken up by a new set of advocates partnering environmental and historic interests to fight for their community’s health and well-being.

Environmental and historic preservation advocates, recognizing the Blair Mountain battle’s historical significance to the region, the mining industry, and labor history, sought to list the battlefield on the National Register in 1980. Id. Unfortunately, three surface-mining permits overlap the Blair Mountain battlefield. After several unsuccessful attempts, the site was finally listed in 2009. Immediately thereafter, however, the coal companies that held mining permits sued West Virginia state officials who had supported the nomination and formally appealed the listing. Within nine months of having been placed on the Register, the site was delisted.

The site’s delisting was based on a NHPA requirement that before any property or district can be included on the National Register, property owners, or a majority of the owners within a district, must be given the opportunity to concur in, or object to, the nomination. 16 U.S.C § 470(a)(a)(6). A property or district will not be listed if a majority of the owners object. The coal companies, having standing due to their mining permits on the property, raised the argument that the wishes of the area property owners had not been addressed during the nomination process. The decision to delist Blair Mountain was ultimately based in part on evidence presented by the West Virginia Coal Association regarding the names of landowners they claimed objected to the listing; however, these names were submitted to the Keeper of the National Register of Historic Places, the National Park Service official tasked with deciding on Register eligibility, without affidavits of ownership and long after the deadline for appeals had expired. It was later determined that two of the objectors named on the list were deceased, and several others were “life-estate holders,” who lived on the land but did not own the property. Jeff Biggers, Mountaintop Removal Mayhem: Blair Mtn Scandal (Feds See Dead People), Coal Profits Soar, EPA Disses Scientists, HuffPost (May 25, 2011). Further, residents near the site later claimed that company officials warned them that they would lose their land if the battlefield was listed. Ron Soodalter, In the Battle for Blair Mountain, Coal Is Threatening to Bury Labor History, The Progressive (Jan. 31, 2018). These fears were completely unfounded; NHPA is a procedural law that does not restrict what individuals can do with their property, but rather restricts what the federal government can do to the property.

In September 2010, the Sierra Club, Ohio Valley Environmental Coalition, Friends of Blair Mountain, Inc., West Virginia Labor History Association, the National Trust for Historic Preservation, and West Virginia Highlands Conservancy challenged the Keeper’s decision to delist Blair Mountain. The advocacy groups’ claim against the Keeper, the National Park Service, and the Department of the Interior sought to have the delisting annulled under the Administrative Procedure Act, 5 U.S.C. § 500 et seq., calling the decision arbitrary and capricious and an abuse of discretion. Sierra Club v. Salazar, 894 F. Supp. 2d 97 (2012). The district court granted summary judgment against the plaintiffs for a lack of standing and failure to demonstrate the requisite injury, causation, or redressability.

Undeterred, the advocacy groups persisted, calling the District Court’s prior ruling “arbitrary and unlawful,” and further asserting that the West Virginia Department of Environmental Protection (WVDSEP) could not simply skip the public hearing because it was more convenient. In 2016, after nearly seven years, the court determined in 2016 that the actions of the Keeper were “arbitrary and capricious.” However, because the court lacks the authority to place the site back on the National Register’s list, it was remanded to the Keeper’s office. Sierra Club v. Salazar, 1:10-cv-01513-RBW (2016). In June 2018, after years of legal action, the Keeper of the National Register of Historic Places announced the decision to restore the site of the 1921 labor conflict to the National Register.

Although listing on the National Register does not guarantee preservation, the strategy of litigating the listing under the NHPA proved an effective tactic to delay mountaintop removal at Blair Mountain. Litigation has resulted not only in relisting the battlefield, but also prevented mining at the site for 10 years. This delay tactic not only brought a great deal of attention to the case (as well as reminding the public of a crucial moment in labor history), but allowed the WVDSEP to be further empowered to block certain mining permits, as 36 C.F.R. § 60.2 mandates that “If a property contains surface coal resources and is listed in the National Register, certain provisions of the Surface Mining and Control Act of 1977 require consideration of a property’s historic values in the determination on issuance of a surface coal mining permit.” This strategy grants advocates more time to create a permanent solution for the site.

Other recent attempts to utilize the NHPA have not been as successful in preventing extractive industries from harming cultural resources and the environment in their operations. For example, the Dakota Access Pipeline challengers raised concerns that the Corps failed to properly execute the NHPA section 106 review process. Thousands of artifacts, which should have been protected by law, were lost. Although in August 2018 the U.S. Army Corps of Engineers affirmed its original decision to issue a construction permit for the Pipeline, three months later the Standing Rock Sioux Tribe renewed its lawsuit against the Corps challenging its review of the pipeline’s impacts. Jan Hasselman, The Renewed Legal Challenge Against the Dakota Access Pipeline, Earthjustice (Nov. 1, 2018). Similarly, in Havasupai Tribe...
The Department of the Interior manages more than 400 National Monuments and the Antiquities Act Nationwide, the federal government owns 27.4 percent of all land. Federal Land Ownership by State, Ballotpedia, https://ballotpedia.org/Federal_land_ownership_by_state (last visited Nov. 12, 2019). Monument designation sets aside existing federal land for higher level environmental and cultural protections. The federal government under President Theodore Roosevelt, an avid outdoorsman, naturalist, and friend of John Muir, enacted the Antiquities Act of 1906 in response to widespread looting of archaeological sites across the Southwest. 16 U.S.C. 431–33. It was the first law in the United States to regulate archaeological investigations on federal lands and built foundations for public archaeology and historic preservation. The law’s title, Antiquities, is insufficient in explaining what the law accomplishes. Initially, the Antiquities Act was a way not only to protect archaeological resources, but also to regulate the land in the less-settled West. Although the law was created to protect archaeological resources from looters, it also created a provision for the designation of places that contain historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest as National Monuments. It also was the first law that created federal (particularly executive) authority to create large-scale nature reserves for scientific study and those important to the nation’s history. In enacting the law, Congress recognized that swift presidential action was sometimes needed to protect threatened landscapes from private exploitation, delegating the power of declaring national monuments to the president to act on Congress’ behalf to protect the land. The Act protects land from development, recognizes “living landscapes,” allows emergency actions to protect threatened lands, and vests political accountability with the president rather than some other bureaucratic structure. Christine A. Klein, Preserving Monumental Landscapes under the Antiquities Act, 87 Cornell L. Rev. 1333 (2002).

The Department of the Interior manages more than 400 national parks, 560 national wildlife refuges, and nearly 250 million acres of other public lands for a variety of uses including recreation, grazing, oil and gas drilling, and mining. The use of natural resources on public lands (other than for recreation) has become increasingly controversial. The threat of opening up parks and monuments to extractive practices has led to outcry from environmental advocates, Native American tribes, and even outdoor outfitters. Protecting these areas of sometimes extraordinary environmental significance is often more of a political issue than a legal one, subject to the decisions of different administrations. Lands can gain special protections, however, through designation as National Monuments under the Antiquities Act. Matters of contention, monument size, objects protected, level and type of threat, inclusion on nonfederal lands, impacts on land use, interaction with other environmental laws, and questions of monuments management have been ongoing, from the first designations by President Theodore Roosevelt to actions of the current administration.

Large-scale monuments like the Bears Ears National Monument in Utah are vital to protect important “objects,” but they also provide open spaces for recreation or solitude and serve as habitat for thousands of plant and animal species. They are also culturally and spiritually significant to Native Americans and are a major part of the heritage of non-Natives who have lived in the region for generations. Finally, they strengthen surrounding communities’ economies. President Barack Obama named Bears Ears a national monument on December 28, 2016, protecting 1.35 million acres of land encompassing one of the most significant cultural landscapes in the country. At the time of its designation, Bears Ears National Monument was about the size of Delaware, covering roughly 2,000 square miles (5,300 square kilometers). Monument proponents viewed its creation as a victory for indigenous rights. President Obama even established procedures to assure that there was significant public outreach and input from area tribes before the monument’s designation. However, in 2017, through Executive Order 13,792, President Trump dictated that the Bears Ears National Monument be shrink from roughly 1.3 million acres to 228,000, only about 15 percent of its original size. Unfortunately, sites like Bears Ears, Grand Staircase-Escalante, and Bryce Canyon also hold potentially billions of dollars in mineral resources, subjecting them to the threat of significant alteration. The reduction of Bears Ears by nearly 85 percent was at least in part to expand access to oil and gas reserves. Eric Lipton & Lisa Friedman, Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show, N.Y. Times, Mar. 2, 2018.

Monuments are linked more in name than they are in composition and character. Since 1906, presidents have used the Antiquities Act to proclaim 117 monuments managed by seven agencies. These places have safeguarded the natural, historic, recreational, and scenic features of some of the most spectacular places in the country from development, ensuring that public lands remain open to traditional uses, outdoor recreation, hunting, and grazing. They also bring awareness to places, increase visitation, and promote economic opportunity in surrounding communities. Sites have evolved from their archaeological and western roots to include natural sites like Katahdin Woods and Waters National Monument in Maine, and historic places like Stonewall Inn in New York City’s Greenwich Village. These monuments vary in type, size, and intent. Designations have ranged in size from less than an acre, like the recently designated Birmingham Civil Rights National Monument in Alabama, to the more than 10 million acres that President Jimmy Carter designated as the Wrangell-St.

National Monuments and the Antiquities Act

v. Provencio, the Havasupai Tribe sought to challenge uranium mining on the borders of the Grand Canyon using the NHPA. Havasupai Tribe v. Provencio, 906 F.3d 1155 (9th Cir. 2018), cert. denied, 139 S. Ct. 2621 (2019). Although the NHPA claims in this case were unsuccessful, the claim was able to bring attention to the loss of both environmental and cultural resources associated with mining practices. Preventing the destruction of communities from surface coal mining, improving the quality of life for people living near any extractive industry, and helping rebuild sustainable communities requires strategies that use more than just one plan of attack. The ability, as King proposed, of NHPA to “gum a project to death” has led communities, governments, and industries to use the time gained through meeting the law’s procedural requirements to reach some level of compromise that considers historic resources, health, and economic development. While unable to completely halt actions harmful to the environment, NHPA’s stop-and-look requirements have proven an appropriate tactic in protecting lands subject to federal or federally assisted undertakings.
Elias National Monument in Alaska. They include world-class protected natural areas, many of which like the Grand Canyon have become national parks, or internationally recognized cultural sites. Of the 23 World Heritage Sites, eight were (or are) national monuments. There are also marine monuments like the Marianas Trench and Papahānaumokuākea, both off the coast of Hawaii.

Presidential proclamations have at times been contentious—from President Theodore Roosevelt’s eleven-hour Mt. Olympus National Monument to President Jimmy Carter’s massive Alaskan withdrawals during the 1970s. Issues have been raised with the size and significance of the resources, the degree of actual threat to these areas, the impacts on land uses, the managing agency, and even the Antiquities Act’s constitutionality. Opponents have called monuments a “special interest boondoggle that sacrificed local populations and the American taxpayers to appease the demands of quasi-religious special interest groups that the land be cleansed of humanity.” Christine A. Klein et al., Natural Resources Law: A Place-Based Book of Problems and Cases (4th ed. 2018), at 586 (quoting Ranier Huck, Clinton Monument Designations Must Not Be Allowed to Stand, Salt Lake Trib., Mar. 23, 2001, at A15). This is in part because there are few statutory limits other than that the size of the reservation should be “the smallest area compatible with the proper care and management of the object to be protected.” 16 U.S.C. §§ 431–33. Even this restriction has always been quite flexible. The president is under no obligation to make any investigation into whether the area is the smallest compatible with management. Further, at least the Circuit Court of Appeals for the Tenth Circuit has held that “whether the President’s designation best fulfilled the general congressional intention embodied in the Antiquities Act is not a matter for judicial inquiry.” Mountain States Legal Foundation v. Bush, 306 F.3d 1132 (10th Cir., 2002).

Courts have broadly interpreted what monuments may contain and protect. In Cappaert v. United States, 426 U.S. 128 (1976), the U.S. Supreme Court recognized that the Antiquities Act was not limited to protecting only archaeological sites. This broad use of what the Act could protect was revisited in Tulare County v. Bush, a case brought when President Bill Clinton established Giant Sequoia National Monument, part of which was in Tulare County. 306 F.3d 1138 (D.C. Circuit 2002). The county alleged that this was a violation of the Antiquities Act, the U.S. Constitution’s Property Clause (Art.4, Sec. 3, cl. 2), National Forest Management Act, NEPA, and a prior settlement agreement. The county argued that the proclamation failed to identify objects of historic or scientific interest with reasonable specificity, that trees would not qualify under the Act, and that the area reserved was not the smallest area compatible with protecting the resources named. The court held that there was no requirement for “specificity”—rather, it was in the president’s discretion to make decisions as to what constitutes historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.

When presidents create or enlarge monuments, the monuments are generally subject to valid existing rights. In other words, land uses continue unless otherwise barred by the proclamation or conflict with the monument’s purpose. This has included previously existing oil and gas leases, access to private property, valid mining claims, roads and utility infrastructure, and livestock grazing. Newly created monuments have been helpful, however, in prohibiting new mining claims or mineral and energy leases. For example, although President Clinton’s Grand Staircase-Escalante Monument proclamation did not impact grazing rights, it did limit mining leases. Proclamation No. 6920, Establishment of the Grand Staircase-Escalante National Monument (Sept. 18, 1996). The monument has been assessed to sit on top of upwards of nine billion tons of coal deposits. President Trump modified the monument designation in 2017, cutting the monument nearly in half in an attempt to create a mining boom. See E.O. 13792, 82 Fed. Reg. 20,429, (Apr. 26, 2017). Coal is not Utah monument’s only resource: hoodoos, petroglyphs, fossils, and nearly 660 wildlife species inhabit the area. The monument’s 2018 revised boundaries, however, were drawn by Washington-based political appointees and based on input from Utah officials and energy industry lobbyists. Juliet Eilperin, A Diminished Monument, Washington Post, Jan. 15, 2019. With the revised boundaries in place, management plans in the works may open 551,582 acres to mineral leasing with “moderate constraints” and another 108,230 acres to leasing subject to “major constraints.” Id.

The current administration is not the first to reduce monuments for resource exploitation. President Woodrow Wilson, for example, reduced the size of Mount Olympus National Monument by nearly half to provide timber for the war effort for World War I; however, his rationale also included a desire to appease the timber industry and Forest Service. Carten Lien, Olympic Battleground: Creating and Defending Olympic National Park, 51–52 (2d ed. 2000). The Antiquities Act, created for the purpose of protecting antiquities on federal lands from looting, has been used by 17 presidents from both parties; more than a century later, it continues to safeguard the environment for the use and enjoyment of current and future generations.

A Tool for Creative Preservation

Despite the reductions at national monuments like Bears Ears and Grand Staircase-Escalante, the Antiquities Act’s ability to protect natural and cultural resources remains strong. Cultural resource preservation advocates should consider how best to deploy existing statutory and regulatory tools to protect resources that are both environmentally vulnerable and culturally important. Like environmental laws, however, cultural resource protection laws also face scrutiny. From its inception, the Antiquities Act received support from most Americans, with early complaints about setting aside land for public use having been thwarted. There is a movement afoot once again to limit the Antiquities Act’s conservation capabilities. Similarly, a failure to understand the processes and impacts of the NHPA (such as the misinformation about property ownership and control in the Blair Mountain case) have led people to avoid historic designation and the possible benefits it can provide. However, with impending threats to the environment and the regulations that protect it, the path toward a state of harmony will require bridging the gap between nature and culture. ☑
When Historic Resources and Hazardous Substances Collide

Christopher C. Stoneback and Pamela C. Garman

Historic and cultural resource preservation and environmental remediation each possess important and intrinsic value. When these values clash at a site possessing both historic resources and hazardous substances, thorny questions arise: What happens when environmentally hazardous substances requiring cleanup are located in an area possessing significant historic and cultural resources requiring preservation? What happens when the very act of environmental remediation, or even the environmental investigation itself, has the potential to destroy resources of historic or cultural significance? What is the legal construct under which these conflicting values are mediated, and who decides which value predominates?

Where historic and cultural resource preservation and environmental remediation intersect, parties must navigate numerous legal provisions often possessing indeterminate overlap and conflicting demands. Complicating matters is the involvement of numerous federal, state, and tribal agencies, each possessing their own interests and objectives, and where jurisdictional authority is not always clear. But it is possible to successfully navigate these legal requirements and agency demands and chart a course that endeavors to give due consideration to both values.

The intersection of historic and cultural resource preservation and environmental remediation implicates numerous statutes, their implementing regulations, and agency guidance. Principal among the statutes are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) and the National Historic Preservation Act (NHPA). Stalking in the background are the National Environmental Policy Act (NEPA) and land management statutes, such as the Federal Land Policy and Management Act (FLPMA). The relationships between these statutes provide the legal framework in which historic and cultural resources and environmental remediation of hazardous substances collide.

Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA is an environmental remedial statute that provides broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health, welfare, or the environment. CERCLA authorizes two kinds of response actions: (1) removal actions and (2) remedial actions. Removal actions are generally short-term or temporary responses to a release or threatened release of hazardous substances. Remedial actions, in contrast, are considered long-term, permanent solutions. Ultimately, the degree of cleanup of hazardous substances must assure protection of human health and the environment.

When the Environmental Protection Agency (EPA), the agency typically tasked with implementing CERCLA, initiates an environmental cleanup or a pre-cleanup study, CERCLA frequently clashes with contradictory protections in other federal or state statutes, including NHPA. Where historic resources are present in and around cleanup areas, their preservation may be incompatible with the type of remediation required for the site, or it may be impracticable to comply with historic preservation requirements in the context of an urgent threat to human health or the environment. The clash creates conflicting demands that EPA must resolve in the cleanup process.

It is particularly important to address these conflicting demands in the administrative context of the cleanup process, because CERCLA imposes a jurisdictional bar on pre-enforcement review. This pre-enforcement review bar prevents a party from directly challenging EPA’s cleanup activities prior to the cleanup’s completion. 42 U.S.C. § 9613(h). If historic or cultural resource issues are not successfully addressed during the cleanup process, these resources may be lost before there is any opportunity to assess whether the right balance was struck between historic preservation and environmental remediation.

CERCLA attempts to reconcile the conflicting demands presented by various federal and state statutes through the identification and attainment of applicable or relevant and appropriate requirements (ARARs) as part of the cleanup process. 42 U.S.C. § 9621. ARARs are substantive standards derived from federal or state environmental law that establish minimum thresholds for completing a cleanup that adequately complies with the substance of those laws. For instance, substantive provisions of NHPA, the Clean Water Act, or the Endangered Species Act may be identified as ARARs. The identification and attainment of ARARs functions to guarantee that any response action complies with CERCLA’s mandate to attain a degree of cleanup that “assures protection of human health and the environment.” 42 U.S.C. § 9621(d).

At the start of a response action, the lead agency in charge of the site identifies those requirements under federal or state law that specifically address the circumstances found at the site. These requirements generally fall into three categories: (1) chemical-specific, (2) location-specific, or (3) action-specific. Only the substantive elements of any requirement identified in this process apply as an ARAR, although an agency is not prohibited from following the procedural components.

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The extent to which a cleanup must follow the substantive provisions of an identified ARAR depends on whether the requirement is considered either “applicable” or “relevant and appropriate.” Applicable requirements include state and federal requirements that specifically address or respond to hazardous substances or particular circumstances at a site. 40 C.F.R. § 300.5. Essentially, if the requirement would apply based on the site characteristics, regardless of CERCLA, it could be considered applicable. Categorizing a requirement as applicable is a legal and jurisdictional determination, because once a requirement is considered applicable, the cleanup must comply with all substantive portions of the requirement. For instance, a CWA water quality standard would be applied to the cleanup of an impacted stream reach.

If a requirement is not applicable, it may still be relevant and appropriate. Relevant and appropriate requirements are those that may be missing an element or prerequisite to qualify as applicable, but which may still address a problem or apply to situations sufficiently similar that it makes sense to include it in the cleanup. 40 C.F.R. § 300.5. The lead agency identifies relevant and appropriate requirements based on its professional judgment and through consideration of the environmental and technical factors present at a site. Unlike applicable requirements, the lead agency chooses the extent to which relevant and appropriate requirements apply. This may include all substantive provisions, or only certain elements. The flexibility in applying relevant and appropriate requirements is meant to compensate for any missing elements or provisions that prevent it from being applicable, but still would aid in the cleanup process.

The objective of the integration of NHPA into the CERCLA process is to have information available regarding historic resources at various decision points, including the incorporation of these historic and cultural resource determinations into RI and feasibility study work plans.

ARARs, however, should be identified and complied with as soon as possible, and the lead agency should start addressing ARARs at the very beginning of the remedial investigation (RI). 40 C.F.R. § 300.430. An RI is the investigative stage conducted at the start of a long remedial process, but by its nature it is generally categorized as a removal action rather than a remedial action. For removal actions, ARARs must be complied with only “to the extent practicable.” 40 C.F.R. § 300.415. This allows the agency to consider the exigencies of the situation in applying ARARs. While it makes sense in a typical situation to have this additional leniency in identification and application of ARARs during the RI, it poses problems if the clash between environmental cleanup and historic resource preservation begins at the RI stage.

### National Historic Preservation Act

NHPA establishes a federal framework, including a national preservation program and system of procedural protection, for preserving significant historic and cultural resources. The statute requires federal agencies to individually assume responsibility for the impact that each agency’s actions might have on historic or cultural resources and endeavors to use federal, state, and tribal historic preservation efforts and knowledge to ensure that significant historic and cultural resources are adequately addressed. NHPA also requires agencies to account for any adverse effects on historic or culturally significant sites before implementing an action that might affect such sites, and consider alternative actions that will minimize any potential adverse effects.

The NHPA process is initiated prior to a federal agency implementing a project potentially affecting historic or cultural resources. 54 U.S.C. § 306108. Under section 106 of NHPA, an agency must (1) determine whether there is a federal undertaking, (2) identify and evaluate historic properties that may be affected by the undertaking, (3) assess the undertaking’s effects on historic properties, and (4) avoid or mitigate adverse effects.

For a federal undertaking, complying with NHPA’s substantive provisions begins with identifying any historic or cultural resources eligible for, or included on, the National Register of Historic Places located in the area of potential effects of the agency action. The area of potential effects varies in nature and scale based on the different effects caused by a particular action. It includes the geographic area where the action may alter the character or use of the resource, directly or indirectly. 36 C.F.R. § 800.16.

A cultural resource survey identifies historic or cultural resources and allows the agency to develop adequate information to make the substantive determinations necessary under NHPA. The criteria used in the cultural resource survey assist in identifying cultural resources and include an evaluation of the quality of significance in history, architecture, archeology, and culture. Objects that possess integrity based on location, or design, among other considerations, may be identified if they relate to significant events, historical contributions, or distinctive characteristics.

The identification stage also requires consultation with the State Historic Preservation Officer (SHPO) as well as the Tribal Historic Preservation Officer (THPO). The consultation must be an informed process taken in good faith.
Consultation with the SHPO and THPO may also influence the area of potential effects.

Following the cultural resource survey and consultation, the agency must identify possible effects that the action may have on the identified historic or cultural resources and whether those effects may be adverse. An adverse effect occurs where an undertaking alters, directly or indirectly, any of the characteristics of the historic property in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. 36 C.F.R. § 800.5(a)(1). If there is a potentially adverse effect, the agency must examine feasible alternatives and whether those alternatives could avoid the impact. If the impact on the historic resource cannot be avoided, the agency must take measures to minimize or mitigate those effects.

NHPCA can apply as an ARAR at a cleanup where there may be historic or cultural resources. CERCLA guidance contemplates NHPA’s integration into the remedial process at the outset, both during the RI phase and through selection and implementation of a remedial action. The objective of the integration of NHPA into the CERCLA process is to have information available regarding historic resources at various decision points, including the incorporation of these historic and cultural resource determinations into RI and feasibility study work plans. If the cultural resource surveys are not initiated at the start of the process, it prevents the agencies from having the information necessary for identification and consideration of the historic and cultural resources.

**National Environmental Policy Act**

A fundamental principle of environmental law is that any environmental impacts are considered before a federal agency takes an action affecting the environment. NEPA puts this principle into action and requires agencies to follow particular procedures to ensure that the agency has taken a hard look at the environmental consequences of an action. 42 U.S.C. § 4331 et seq. The NEPA process allows agencies to make legally required, reasoned, and conscientious decisions and assess environmental impacts before those impacts occur. The requirement to conduct a NEPA review is triggered by either a federal action or a federally funded, licensed, or permitted action, and applies whether the action is on federal, tribal, state, or private land.

NEPA typically provides a framework in which historic and cultural resources are evaluated. Both NEPA and NHPA require agencies to consider historic and cultural resources and potential impacts to them. Environmental review under NEPA includes an analysis of the affected human environment and the environmental consequences of the proposed action on the human environment. 42 U.S.C. § 4332. The human environment includes aesthetic, historic, and cultural resources. Agencies often integrate NEPA review with other planning and environmental reviews, including NHPA, to coordinate the compliance obligations.

NEPA’s relationship with CERCLA, however, is complicated. The Council on Environmental Quality has stressed that federal agencies should integrate NEPA values into the CERCLA process where feasible and appropriate. U.S. Dept. of Justice, Memorandum Re: Agreed Report of March 31, 1994 Meeting Regarding the Application of NEPA to CERCLA Cleanups (Jan. 23, 1995). Courts, however, have concluded that “EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under ‘organic legislation [that] mandates specific procedures for considering the environment that are functional equivalents of the impact statement process.” Western Nebraska Resources Council v. U.S. E.P.A., 943 F.2d 867 (8th Cir. 1991). This concept of functional equivalence under CERCLA can allow EPA to sidestep formal NEPA compliance if consideration of the proposed action otherwise conforms to NEPA’s underlying policies.

For a cleanup, functional equivalence should provide for a balancing of environmental costs and benefits, meaningful public participation at key points in the decision-making process, consideration of substantive comments, and an agency decision with an explained rationale and that is based on facts in the record. But the ability of CERCLA to achieve this functional equivalence with NEPA (or NHPCA) in a cleanup is hindered by the inherent contradiction in the purpose of the statutes. NEPA, and even NHPCA, are “stop, look, and listen” statutes intended to create a longer, more comprehensive decision-making process for actions impacting the environment or historic resources. CERCLA, by contrast, aims to achieve expeditious cleanup of hazardous substances, which is the purpose of CERCLA’s bar on pre-enforcement review. See, e.g., 42 U.S.C. § 9613(h). If the cleanup is too expeditious and achieves functional equivalence too late in the remedial process, CERCLA itself may risk causing environmental, historic, and cultural resource impacts before stopping, looking, or listening occurs.

**Competing Agencies, Competing Interests, and Jurisdictional Conundrums**

As if applying the competing demands of intersecting statutes were not sufficiently vexing, determining who applies that law adds an additional layer of complexity. Consider, for example, a Superfund site. Generally, EPA is the lead agency for sites on the National Priorities List and its primary mission is the removal or remediation of releases or threatened releases of hazardous substances. But Superfund sites are often large, over inclusive, and possess amorphous boundaries. The definition of a site itself demonstrates its amorphous nature, as it includes any areas “where a hazardous substance has been deposited, stored, disposed, or placed, or has otherwise come to be located.” 40 C.F.R. Pt. 300, App. A, § 1.1. Before the investigation commences, it is difficult to predict exactly where hazardous substances are located, and there may be unaffected areas between sources of hazardous substances. Within that amorphous boundary may be private lands, state lands, and federal lands, including those administered by federal land management agencies whose objectives, interests, and legal obligations may be incongruent with EPA’s goals for the site.

A Superfund site may, for example, include areas under the authority of the Bureau of Land Management (BLM), which administers public lands. Through delegation of authority, memoranda of understanding, or otherwise, BLM may also have jurisdiction for CERCLA response actions involving a parcel, project, or operable unit located on BLM-administered lands. When a site has a number of different federal agencies, not all will agree with EPA’s functional equivalency determination or application of ARARs—or lack thereof—in proceeding with a cleanup.
When disputes arise over EPA’s sidestepping of statutory obligations through functional equivalency arguments or selection of ARARs between EPA and cooperating agencies, it is not always easy to discern whether the cooperating agency is insulated from potential liability under other laws and what impact that may have on the cleanup. This clash can be seen in instances where overlapping jurisdiction occurs, like when BLM has authority to administer a parcel of property, but EPA undertakes a response action pursuant to its delegated CERCLA authority. Whether it is BLM or EPA that must ensure the substance of statutes like NHPA, requiring a decision to “take into account the effect of the undertaking on any historic property” is not entirely clear. 54 U.S.C. § 306108.

At a site with both historic preservation and environmental remediation values in play, determining priorities and the application of ARARs is essential to helping a party navigate these competing values in the context of overlapping and conflicting legal obligations and under the cloud of jurisdictional uncertainty.

In the NEPA context, the Council on Environmental Quality has stressed that federal agencies should integrate NEPA values into the CERCLA process where feasible and appropriate, and EPA has recognized that it would not oppose another federal agency’s attempts to integrate a voluntary NEPA process with the CERCLA process on a case-by-case basis, provided the integration does not impede the timely cleanup of a site. U.S. Dept. of Justice, Memorandum Re: Agreed Report of March 31, 1994 Meeting Regarding the Application of NEPA to CERCLA Cleanups (Jan. 23, 1995). Moreover, the Federal Land Policy and Management Act (FLPMA), BLM’s governing statute, requires BLM to take any action necessary to prevent “unnecessary or undue degradation” of public lands. FLPMA can apply as an ARAR at a cleanup where there may be unnecessary or undue degradation. To comply with FLPMA’s substantive mandates, some type of NEPA equivalent analysis is required. Where the agencies cannot agree, however, the disputes inevitably end up creating a delay in the cleanup process. Id.

These same interagency jurisdictional issues also arise in the context of access to conduct response actions on public lands. BLM’s public lands jurisdiction obligates BLM to comply with certain requirements prior to authorizing private parties’ access to conduct any activity, including an environmental response action. BLM could attempt to require ARAR compliance or impose other obligations as a condition of access. CERCLA, however, largely limits the traditional obligations required under FLPMA or permitting statutes, providing that “[a]n Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite . . .” 42 U.S.C. § 9621(e)(1). EPA construes this to extend to permit equivalency procedures or processes, such as the type of BLM right of access discussed in the example, and is adamant that the permitting authority’s approval is not required for a response action to proceed.

This may assist EPA in effectuating an expeditious cleanup but potentially puts BLM at risk for failure to uphold its obligations under NHPA, NEPA, or FLPMA. In the end, EPA has significant access authority under CERCLA, and CERCLA’s pre-enforcement review bar means that such battles are rarely fought before a court. See 42 U.S.C. 9604(e) (regarding access authority). These issues, however, raise significant concerns for agencies assisting with cleanup activities, and for private parties tasked with carrying out cleanup activities.

The Collision Illustrated
The collision of these competing values and diverse interests is illustrated in a Superfund site that requires invasive sampling work in and around historic properties during the RI phase of an environmental cleanup action. During the RI phase, drilling work associated with installation of groundwater monitoring wells could necessitate the creation of expansion of roads and the disturbance of considerable ground to access the area and place drill pads. This characterization work could result in considerable environmental impact. The area of potential impact could encompass historic properties whose integrity could be placed at risk, or whose setting, feeling, or sense of place could be impacted by the installation of the wells. The environmental cleanup of hazardous substances, moreover, could be addressing an urgent threat to human health or the environment, or only a more tenuous, or less time sensitive, potential threat.

If that drilling, under the oversight of EPA as the lead agency, occurs on a parcel of property administered by BLM, the situation’s complexity only increases. Each agency has its own obligations and interests. EPA is concerned primarily with responding to the release or threatened release of a hazardous substance. BLM is concerned primarily with avoiding unnecessary or undue degradation, or on effecting multiple use concepts.

In this setting, historic and cultural resource preservation as well as environmental impacts must be addressed. NHPA requires that the identification of historic and cultural resources begins at the start of the agency undertaking, which would generally be in the investigative stage. NEPA, too, requires consideration of impacts to the human environment prior to those impacts occurring. At a minimum, functional equivalence must be achieved.

But in the removal action context, including conducting RIs, CERCLA only requires compliance with ARARs to the extent practicable, based on the scope of the action and the urgency of the situation. 40 C.F.R. § 300.415. In making this practicability determination, the agency looks at technical
issues as well as duration limitations in determining the scope of the action.

Removal actions are typically short in duration and limited or temporary in scope. The agency may sense urgency in completing the RI so as to advance expeditiously to a remedial action. Practicability may seem lacking in these transitory stages. Therefore, the agency may not require ARAR compliance at the removal stage. But it is at this stage where historic or cultural resources may be lost.

The incongruence of ARAR applicability at the removal stage is particularly evident where an area of potential effect is large, or where there are a significant number of historic or cultural resources within the removal area. It is precisely in these situations where ARAR compliance is most critical but ARAR compliance is seemingly most impracticable. While the cultural resource survey typically would be required to evaluate these resources, the scope and timing of the removal action may not allow for it to be conducted.

Even in the context of a remedial action, CERCLA does not emphasize compliance with ARARs until later in the cleanup process. It does not offer an independent mechanism to assess historic or cultural or environmental impacts at the investigative stage. Although CERCLA requires an assessment of alternative action during the feasibility study component, it does not provide for an assessment of alternative actions or mitigative measures at the outset of the RI phase, including where it is the investigative actions themselves—the drilling of the monitoring well—that might cause the impacts: the destruction of the historic structure.

Absent appropriate review at the investigative decision-making phase, important agency actions or undertakings may completely fail to undergo environmental or historic and cultural resource review. Failure to identify and consider potential effects to historic or cultural resources in the removal stage may result in their destruction, preventing later protection in the remedial action context, and preventing consideration of historic preservation values. If the agency fails to either include NHPA as an ARAR or waives its application in the RI stage, there can be no functional equivalence and no necessary balancing of historic and cultural resource preservation and environmental remediation.

**The Collision Navigated**

This collision can, however, be successfully navigated, and the threat to historic properties can be reduced. This requires identifying objectives and leveraging those legal and jurisdictional conundrums inherent in the collision of historic resources and hazardous substances to push the process toward one’s objectives.

If you are a potentially responsible party performing cleanup work, including investigative work, focus on achieving certainty and avoid inter-agency conflict. Aim to have ARARs identified, or waived, early in the cleanup process. Bring all applicable agencies to the table so that satisfaction of one agency's requirements does not get you crosswise with another agency's requirements later in the process. If EPA maintains that no permit or permit equivalent is required to drill a well on BLM-administered lands, make sure BLM is cognizant of EPA's position and your intention to act in conformance with it. Regardless of which values the agencies may prefer to effectuate, ensure that appropriate consideration is given to all values, and that the work ultimately assures protection of human health and the environment. If certain ARARs are impracticable to implement and corresponding values impracticable to consider, ensure that the emergent or urgent nature of the hazardous substance cleanup warrants that decision. Document all these efforts in the administrative record.

If the objective is historic or cultural resource preservation, emphasize NHPA. Impress upon the agency the necessity to comply with NHPA’s substantive requirements. Get SHPOs and THPOs engaged. Emphasize public participation and engage the community and stakeholders and their sense of history, culture, and place. “Giving the public an opportunity to communicate their concerns, problems, and alternatives can improve the Agency’s decisions and environmental outcomes.” EPA, *Superfund Community Involvement Handbook* (Jan. 2016).

The public, moreover, must be afforded “appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.” 40 C.F.R. § 300.430(c)(2)(ii)(A)

If the objective is remediating the release or threatened release of hazardous substances, focus on CERCLA. If the objective is to do so quickly, focus on the emergent nature of any release or threatened release of hazardous substances, and emphasize the impracticability of implementing ARARs.

Regardless of who you are or the ends to be achieved, the means are similar. Emphasize the ARARs conducive to achieving your objective. ARARs are substantive standards establishing minimum thresholds for compliance with the law. They cannot be ignored. Ignoring them renders an ultimate removal or remedial action on precarious footing as failing to assure protection of human health or the environment.

Leverage, moreover, the jurisdictional uncertainties. Authority for ARAR implementation is not always clear. Agencies may be reluctant to relinquish control, which could result in irreversible destruction of environmental, historic, or cultural resources.

**Balancing Historic and Cultural Preservation and Environmental Remediation**

Striking a balance between competing values at a site early in the cleanup process is key. At a site with both historic preservation and environmental remediation values in play, determining priorities and the application of ARARs is essential to helping a party navigate these competing values in the context of overlapping and conflicting legal obligations and under the cloud of jurisdictional uncertainty. Attainment of ARARs forces agencies to consider all impacts arising from their response actions and to be fully informed in balancing historic and cultural resource preservation and environmental remediation. In such a situation, it should not be culture or the environment, it should be culture and the environment.
Over the past several decades, historic preservation has become an important component of contemporary land use. There is growing recognition that the retention of historic places can fundamentally define our communities in positive ways. As a result, historic preservation has shaped the appearance of many of our nation’s most significant places. Based on the prevalence in the popular imagination of the role of preservation regulations, historic preservation has been largely viewed as an urban phenomenon. Not surprisingly then, most historic preservation tools, such as the local historic district, reflect this urban-centric focus regarding what and how to preserve historic resources. There are, however, unquestionably important nonurban historic resources—ranging from rural village centers to farms—that also merit serious preservation attention.

How does historic preservation law influence and interact with historic resources in areas that lack the density to rely so predominantly on collective regulation and design review to accomplish preservation objectives? This article explores how historic preservation law works in a rural state, specifically Vermont—a state recognized in the popular imagination for its historic character and brand.

To explore this issue, we first examine why Vermont is unique as compared to many other states. We then discuss why historic preservation law therefore functions differently and, on the main, successfully here. We next focus on the actual laws and programs that influence the protection of the built environment throughout the state that have had lasting and continuing impact. To conclude, we examine what potential lessons historic preservation advocates can learn from the Vermont experience and, in turn, what this tells us about historic preservation law generally. We contend that scale, localism, and incremental progress fundamentally shape historic preservation in a rural state. This is reflected in the operation of various Vermont-focused historic preservation laws and in the state’s general success in preserving its historic character over a sustained period.

**Understanding the Vermont Difference**

Although entire books have been written on Vermont’s distinctiveness and brand, there are some general themes that shape how historic preservation law functions in the state, specifically: (1) Vermont’s rural nature, (2) the degree of interconnectivity, (3) the comparative lack of development pressure, (4) applicable Vermont policy and law, and (5) the overlay between preservation and other state land use goals.

Vermont is a predominantly rural state. In fact, by many measures Vermont is nearly the nation’s most rural state. With a population of fewer than 650,000 residents, the state is amongst the nation’s smallest. This fundamental ruralness shapes the state in countless ways and is fundamental to its identity, character, focus on localism, and sense of place. The state takes pride in its rural symbols and protecting its rural resources and industries such as dairy farming, maple sugaring, and forestry sectors.

Vermont residents are also inherently passionate about their communities. A longtime resident may have driven past or stopped at the local general store 500 times without much thought, but when a national chain retailer shows interest or threatens change, residents will often staunchly defend their community character and their long-held sense of place. The Preservation Trust of Vermont (PTV), a statewide nonprofit preservation organization established in 1980, has played a critically important role as intermediary in these community focused challenges, crafting relationships and paths toward mutually acceptable outcomes.

The late Paul Bruhn, PTV’s director, often identified community valued locations using the sociological term “third places,” or the places outside home and work that define their community and where residents connect. Be it a theatre, opera house, community hall, or community-supported grocery store or restaurant, Vermonters and preservation advocates will identify inventive solutions that turn a threat into opportunity. Typically, the solution addresses more than one community need in a single project. Vermonters, as much or perhaps even more than residents of other areas, embrace the value of local product and character, seeking to support Vermont businesses and local downtowns. This degree of “locavore” care for the future of these historic communities as authentic and livable places fundamentally shapes how historic preservation operates across the state.

Vermont’s small scale allows preservation to work somewhat differently than preservation in larger, more urban states. But equally important is Vermont’s strong value on citizen engagement and small “d” democracy. Vermonters have and expect unparalleled access to local and state decision-makers, especially in the state’s smaller and tightly knit communities where few decisions are made without robust community involvement and input. This emphasis on public involvement elevates ideas that align with community values and allows projects to gain traction, support, and funding quickly. This often slants the playing field toward projects that promote historic preservation and a sense of place.

Another aspect of being small is that advocacy groups easily

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grow and gain influence. One of the primary ways that historic preservation projects work in Vermont is through the network of diverse groups devoted to retaining community character and resources, concomitantly advancing historic preservation. One of the best examples is the PTV, which has been the leader in protecting the built and natural environment in endless ways, ranging from iconic battles over big-box retailers’ entry into the state in the 1990s to preserving smaller-scale community resources. PTV’s initiatives drew national attention, as in both 1993 and 2004, the National Trust for Historic Preservation named the entire state to its Most Endangered List—recognizing its historic importance and the threat of suburban sprawl and land use changes on the state’s iconic landscape. Today, PTV remains active and its summer series of workshops at its Grand Isle Lake House play a clearhouse role in connecting state officials and local advocates to shape the next cycle of preservation projects across the state.

The University of Vermont’s Historic Preservation graduate program has also had an outsized impact on the preservation field in Vermont. Established in 1975 as one of the first programs to focus on this emerging professional discipline, the program has attracted many students to the state. A surprising number of the program’s graduates have stayed. This has provided the state a cadre of trained preservationists and consultants who have facilitated preservation work throughout Vermont as consultants, professional staff to agencies and within state government, and as volunteers in their communities. This infusion of professional preservationists has influenced land use across the state and has helped to ensure that historic preservation has a seat at the table.

Beyond the small population and engaged citizenry, most preservation projects in Vermont are also at a scale that makes success achievable. Size and complexity become manageable to advocates and make it easier for successful preservation outcomes to be achieved. Scale frequently lowers the barrier on the funding needed to achieve these projects.

Vermont’s size additionally allows small projects to stand out, providing tangible evidence of the community benefits of such projects. This creates a snowball effect as each success provides inspiration for the next endeavor and influences other communities to undertake similar initiatives. While the economies of achieving preservation goals on a resource-by-resource basis may be challenging, investments by the state and private philanthropy go further here. One prominent example is the ongoing work of the Freeman Foundation contributing more than 11 million dollars over a 20-year period to 469 projects in every county across the state. Their $20,000 grant toward the rehabilitation of the Vergennes Opera House (with a total project cost of $390,000) helped reinvigorate the community resource that reopened after a 27-year closure as a celebrated community space featuring active performances, weddings, corporate and public meetings, and Vergennes’ own Carnaval.

Though often a challenge, Vermont’s lack of population and density has been an asset to the preservation of its built legacy. Except for a few significant exceptions and areas, there simply is not the same degree of development pressure, compared to that experienced by other states in recent years. In many ways, a lack of development pressure provides a more manageable scale to work within and isolates the challenges of adverse impacts to the individual development project being proposed, rather than forcing preservation advocates to wrestle with widespread and constant threats across various fronts.

Relating to this comparative lack of pressure, through the sustained and parallel efforts of land use planners, there has been a strong and persistent push to locate new development in village centers and downtowns. This has been the focus of state land use laws since the late 1960s, followed by the passage of Vermont’s Land Use and Development Act (known as Act 250; see discussion below). The impact of that legislation still resonates today. Although these efforts come from differing disciplines, the desired outcome is the same—an avoidance of urban sprawl and a deliberate attempt to focus new development in its traditional location within the Vermont landscape. This encouragement through land use regulation and incentive programs also helps lessen preservation challenges through Vermont’s designated downtown program and numerous other regulatory and incentive-based programming.

Vermonters have and expect unparalleled access to local and state decision-makers, especially in its smaller and tightly knit communities where few decisions are made without robust community involvement and input.

Vermont, however, does face significant challenges, both economically and from a historic preservation perspective, in its small towns and villages. While a generation ago, the challenge was protecting characteristic rural and village development from sprawl, it is now to prevent these resources from being lost by abandonment and neglect. In the coming years, these neglect-related concerns may become a bigger threat than development pressure. The former ally (lack of development pressure) may, in fact, turn into the largest adversary. It threatens to require state and local communities to explore new tools and ways for addressing and securing the preservation of these rural village resources in the face of changing demographics, diminishing interest in farming, and an aging populace.

Understanding the Role of Vermont’s Historic Preservation Laws
As in most states, historic preservationists rely on a suite of tools to encourage preservation activity and investment, to discourage insensitive development and the demolition or unconsidered alteration of historic resources, and to foster a sense of place attachment. The discussion below focuses on the state’s principal preservation tools: (1) Act 250 state land use regulation, (2) state and downtown tax credits, (3) state grant programs, and (4) local historic regulation, which are explored in turn.
Unlike many states, Vermont has a statewide land use permitting law known as Act 250. See 10 V.S.A. § 6001 et seq. Enacted into law in 1970, Act 250 was “designed to achieve a balance between economic development and the legitimate interests of citizens, municipalities, and state agencies in protecting the environment.” Id. at § 6001(3)(A)(i). Under Act 250, before starting “development,” which is defined as “the construction of improvements . . . involving more than 10 acres of land (or 1 acre in municipalities without zoning and subdivision laws), . . . for commercial or industrial purposes” or construction of 10 or more housing units, the landowner will first have to obtain a land use permit. If a land use permit is required, the project will be evaluated using 10 statutory criteria by the applicable district commission, which determines whether or not to permit the project.

Federal and state downtown tax credits have fundamentally shaped the appearance of downtown and village centers across the state and have spurred economic development in these vitally important areas.

For historic preservation advocates, Criterion 8, prohibiting undue adverse effects on aesthetics, historic sites, and on rare and irreplaceable natural areas, is the primary hook for challenging a project involving a historic site. See Act 250 District Commission Training Manual, Criterion 8: Historic Sites (Criterion 8), https://nrb.vermont.gov/sites/nrb/files/documents/8historicsitesfinal.pdf. To determine compliance with this criterion, the district commission is required to evaluate whether: (1) the project site or development is or contains a historic site, (2) whether the project will have an adverse effect on the historic site, and (3) whether this adverse effect will be undue. Criterion 8 also provides for challenges to projects with aesthetic impacts—so even projects not directly involving a historic property or site can rely on this factor to intervene or engage with a proposed project.

Criterion 8 has repeatedly demonstrated its ability to shape (or deter) development within the state. It has given preservation advocates a tool for challenging larger scale projects that impact historic sites. It has also been instrumental in ensuring that historic preservation concerns are addressed in project design as well as through the conditions imposed on the project applicant through the permitting process.

As a direct historic preservation tool, however, Act 250’s impact is somewhat limited in that the project has to qualify as “development” before it is triggered. This means that if a project is below a certain threshold or size (e.g., the demolition of a single historic resource on a small lot), it will likely be outside of the Act’s jurisdiction.

Several other Act 250 criteria can advance preservation objectives for larger-scale development proposals. Added in 2014 and revised again in 2016, Criterion 9(L) relates to settlement patterns, specifically intended to promote protection of Vermont’s traditional landscape. See Act 250 District Commission Training Manual, Criterion 9(L): Settlement Patterns (Criterion 9(L)), https://nrb.vermont.gov/documents/manual/criterion9l (last visited Nov. 15, 2019). This criterion is focused on protecting Vermont’s historic settlement pattern of compact village or urban centers separated by rural countryside. It can play a role in tailoring projects that have sprawl impacts or are not designed to conform with these traditional land use patterns. Coupled with definitions for what an “existing settlement” is, Vermont’s state land use law helps defend the big-picture preservation of existing villages and downtowns and supplements the more specific review afforded under Criterion 8 for defined historic resources.

Although some perceive Act 250 as a substantial barrier to projects, it does not necessarily have to be so. For example, the Walmart located in downtown Rutland moved through the entire permitting process (Act 250, state, and local permitting) to open its store within an eight- to nine-month period with community support because the developers made a concerted effort to fit the project into an appropriate local context and scale. This example shows that it is possible, if a project is sensitively designed to be compatible with local character, to meet a collective goal for commercial development within a desired land use context and gain community support for an expedited approval.

Tax credits also play an important role across Vermont. From 2014 through 2018, the Federal Rehabilitation Investment tax credit funded 66 projects in 29 communities— resulting in $71 million in tax credits awarded—fostering a total investment of $358 million in private investment. Since 2012, exercise of the rehabilitation tax credit has contributed more than $28 million specifically to housing, for total project investment of more than $153 million for housing projects across the state. This federal funding, in a small state with corresponding limited resources, has massive impact.

In addition to the federal tax credits, Vermont has a substantial state tax credit program focused on its downtowns. See 32 V.S.A. § 151. Created in 1983, the downtown and village tax credits are available for commercial buildings in designated downtowns and village centers. In 2019, $2.6 million in state income tax credits were made available to projects that enhance the historic character and improve building safety of older and historic commercial and community buildings in designated village centers and downtowns. Intending to target those community spaces in Vermont’s historic village centers, these tax credits support general rehabilitation work, code compliance work, and façade improvements. For example, in the 2019 funding round, a downtown tax credit of $19,850 was awarded to the new owners of Hancock, Vermont’s general store, which helped revitalize and upgrade this critical community resource (out of a total project budget of $145,000). Coupled with funding from federal programs, this seed money can go a long way in a small Vermont community such as Hancock. All told, federal and state downtown tax credits have fundamentally shaped the appearance of downtown and village centers across the state and have spurred economic development in these vitally important areas.

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Although less substantial in terms of dollars allocated, state grant programs play an important role in facilitating preservation work across the state. Vermont offers two small grant programs. Historic preservation grants are offered to towns and nonprofits to support rehabilitation of historic public buildings, and barn preservation grants are available to owners of historic agricultural buildings. Many of these programs have been in place for decades, which has allowed these programs to have incremental impacts. The historic preservation grants program has been in place since 1986 and has provided nearly $5 million for the preservation of over 550 historic community buildings. Historic Preservation Grant Program 201, Vermont Division of Historic Preservation, https://accd.vermont.gov/sites/accdnew/files/documents/HP/HP-Grants-Summaries_FY2018.pdf (last visited Nov. 15, 2019).

The historic barn grant program, first funded in 1992, has allocated over $3 million for small barn projects to restore these iconic features of the Vermont landscape. While the individual grants are relatively small (up to $15,000 and requiring 50/50 match from the landowner), over 360 historic barns and outbuildings have been the beneficiaries of the program. Vermont Agency of Commerce and Community Development, Historic Preservation Barn Grants, https://accd.vermont.gov/historic-preservation/funding/barn-grants (last visited Nov. 15, 2019). While Vermont has its fair share of barns, the state’s landscape has benefitted from the barns that have been brought back to life with this infusion of state resources.

Local preservation regulations are intentionally discussed last in this hierarchy. In Vermont, local regulations vary widely among municipalities, and preservation regulations play a different role or at least have a different impact in Vermont than in many other states.

Some cities and towns in Vermont have adopted design review and local regulations, and where these have been enacted, the regulations are helpful in shaping and protecting historic resources. For example, since 1973, the city of Burlington has included within its zoning ordinance design review or regulation for the treatment of historic buildings and sites, defined as properties listed or eligible for listing on the State or National Register of Historic Places. The city’s Historic Preservation Review Commission retains oversight of alterations to designated historic structures and sites, providing education and guidance to property owners as part of their review. The attentive examination of alternatives can thoughtfully and carefully manage alterations to historic structures without a blanket prohibition to new work and new uses for these properties. The process here, however, is substantially less onerous than that of other urban communities, like the town of Brookline, in Massachusetts, where review of alterations to a listed historic property may require review by several jurisdictionally separate boards and up to four separate local permits. In that community, even a partial demolition may require up to a two-year demolition delay.

Although Burlington is not alone, regulations like these are not widespread. Some communities provide guidance or recommendations to historic property owners or allow a review board to provide guidance to the Development Review Board (the body responsible for addressing zoning determinations in most Vermont communities). However, many more communities have decided not to rely on local historic district regulations. It can be difficult for neighbors in small communities to regulate one another and to pass judgment on a proposed project or proposed repairs or alterations. The density of historic resources that merit a strong historic district ordinance with a historic review board often is lacking. When there is only one project carried out in a village center every other year, it is hard for a regulatory tool or body to function this sporadically in any meaningful fashion. While regulation exists in Vermont at the local level, it is generally not the primary path to accomplishing historic preservation objectives, particularly outside principal “urban” areas such as Burlington, Montpelier, and Bennington.

Most importantly, historic preservation often is just one component in a larger project where the outcomes accomplish many general community objectives. Many projects that historic preservationists point to as success stories are not preservation projects per se, but are projects advanced by other advocates for other reasons—and they achieve a much-desired community use or function, such as providing a general store, performing arts center, or other community need. The fact that a historic building is involved is a function of a desire to repurpose old buildings that have served a community well and can continue to do so. While the typical Vermonter may appreciate the frugality and utility in repurposing a Grange Hall for a community daycare, they may not necessarily attribute the effort to historic preservation, but to common-sense concern for the environment, thrift, need, and a desire to retain activity and services in traditional downtowns and village centers. Contrary to the occasional multimillion-dollar tax credit project, small community initiatives of this size and scale are prototypical for Vermont and are the hallmarks of the state’s strong historic preservation movement.

Historic preservationists in Vermont have been successful in connecting preservation to other social outcomes, including encouraging the reuse of historic resources in meeting the state’s affordable housing goals.

Historic preservationists in Vermont have been successful in connecting preservation to other social outcomes, including encouraging the reuse of historic resources in meeting the state’s affordable housing goals through the Vermont Housing & Conservation Board, and working on land conservation projects with the Vermont Land Trust or Vermont Natural Resources Council. Over the past seven years, 613 housing units have benefited from the Rehabilitation Investment Tax credits in the state of Vermont; 517 of those units identified

(continued on page 34)
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as affordable. The creation of these newly renovated housing units has been possible through the directed efforts of housing advocacy groups like Champlain Housing Trust and Housing Vermont, showcasing the powerful impact of integrating related and aligned policy objectives and programming.

On the land conservation side, an example of a significant recent partnership involved PTV, the Vermont Land Trust, and others to acquire, from a potential developer, a highly visible undeveloped site at exit 4 near Randolph, Vermont, to prevent a proposed hotel and mixed-use commercial development out of scale with the surrounding countryside. Leveraging preservation and land conservation funding is often a powerful combination in accomplishing related objectives that would otherwise be difficult for a single discipline or advocate to achieve alone.

Vermont’s rural identity also impacts how preservation works. Specifically, this rural character means that commonly used regulatory tools often do not work as well as in urban settings because (1) a substantial percentage of Vermont municipalities do not have any zoning regulations, let alone standards for the treatment of historic resources (limiting the opportunity for regulatory or even overlay district regulation); (2) neighbors do not necessarily want to regulate their neighbors and there is a desire to avoid conflict and intrusiveness (and beyond this reticence, individual property rights are highly prized); and (3) in a rural setting, there is less incentive to create complicated historic districts or overlay districts as fewer resources are covered within a single cohesive district or proposed district. What works in a rural state like Vermont is fundamentally shaped by the resources involved and the communities in which they are located.

To summarize, while these factors clearly interrelate, Vermont’s connectivity, small population, lack of development pressure, engaged citizenry, and the interspersed nature of historic preservation within other land use priorities tell the Vermont story. They help explain why this state has long held such a strong attachment to place and has been able to maintain its authenticity in the face of substantial land use and cultural changes over the past several decades. Vermont’s distinctiveness, in turn, feeds into how preservation laws operate in the state.

Three Lessons from the Vermont Experience

Historic preservation may operate differently in Vermont than in many other places. However, the state’s experience offers three important lessons into how advocates can have success in advocating for the protection of historic iconic resources. In reflecting on this, the primary takeaways are as follows.

1. **Scale matters.** Preservation, at its most powerful, is locally driven and led. Defining preservation at a more local scale makes sense as people generally know each other, can work together, and see the tangible returns on their public investments across the state. A drive across Vermont will very clearly show the results of the state’s collective investments in downtowns and village centers and across the rural landscape. Each success has important ripple impacts in sustaining the sense of community and encouraging communal ventures. In other states, determining how to best leverage scale and how to target efforts and laws in such a way to accommodate local goals and objectives may be an important lesson the Vermont experience can offer.

2. **Slow and steady wins the race.** Vermont demonstrates that small, incremental investment pays off in a predictable and tangible fashion over the long run. Small, steady, and reliable investment over time pays dividends, multiplying and compounding the impact of earlier efforts. The importance of this patience also can be seen in the cumulative improvements and success evident in Vermont’s downtowns, village centers, and landscape. The whole of the impacts of sustained investment is hard to quantify, but consistent and long-running focus on these projects from a funding perspective has unquestionably helped preserve the state’s historic character. Vermont’s continued focus on the overall objective of creating meaningful and desirable places to live through sustained funding for preservation initiatives demonstrates the benefit of sticking with what works and leveraging the value of time to accomplish larger goals over a longer horizon.

3. **Partnership matters.** Collaborating with diverse coalitions of individuals and organizations will achieve multiple and compatible integrated objectives. It also cultivates multiple avenues for advocacy and funding from across the spectrum. As noted throughout this article, many of Vermont’s best preservation success stories are not driver initially by preservationists, but by an alliance of interests of which preservation is only one component toward a shared and strongly desired local objective. There can be two—or more—birds killed with any given project stone. Historic preservation is likely only a part of the total sum of the collective achievement. At the end of the day, protecting historic buildings takes consistent care and attention, and each generation must make the decision anew to continue using and preserving its historic resources (whether individually or collectively). For preservationists in other areas seeking to expand their impacts, looking at how to best combine their efforts with the goals of other compatible and aligned disciplines is an important takeaway from how preservation works here in Vermont.

In the end, Vermont, as a very rural state with unquestionable historic significance, demonstrates the inherent localness of preservation efforts and the influence of community-focused programming and partnerships to achieve the state’s long-term planning and preservation goals. Within the hierarchy of relatively robust preservation laws, preservation regulations are situationally important, but they must be combined with other community efforts and values to achieve their aims, particularly in rural areas that might not be inclined to self-regulate. What Vermont offers is an example of the benefits of working at a livable and understandable scale, finding common ground, and leveraging shared priorities that are reflected in preservation laws and policies. The can help achieve the result of allowing a community to maintain its much-valued historic resources and authentic sense of place.
Cultural Heritage: The Silent Victim of Disasters

Kelsea Raether

The April 2019 fire that ravaged the Notre Dame Cathedral in Paris, France, prompted worldwide reactions of shock and grief. The Notre Dame Cathedral is an iconic structure and important piece of cultural heritage that makes up the historic fabric of Paris, drawing millions of tourists from all over the world to visit. The fire sparked an international interest in what happens to cultural heritage after a disaster. I recall sitting at my desk watching live media footage of the firefighters struggling to contain the blaze that threatened to destroy the centuries-old structure. Like me, much of the world watched their fight to save the cathedral. There was an instantaneous outpouring of support to finance rebuilding efforts as media reported the loss of the cathedral’s well-known gothic arches, beams, and spire. Donations poured in to support recovery efforts, and media attention increased regarding the importance of protecting culture heritage.

Cultural heritage is particularly vulnerable in disaster situations because of its general inability to adapt, its significant symbolic and informational value, and the low priority it occupies in disaster law and policy. When disaster strikes and a significant piece of cultural heritage is damaged or lost, people and nations around the world profess their support, leading to worldwide relief efforts and donations. Recovery and rebuilding after a disaster should not be the focus though. To truly protect cultural heritage, preservation cannot be merely an afterthought once a disaster has happened. Overarching national federal law and policy must include provisions recognizing the value of cultural heritage.

Many people think of cultural heritage as big, grand, iconic structures, such as the Notre Dame Cathedral or the Statue of Liberty in New York, or famous paintings, such as the Mona Lisa, but cultural heritage encompasses so much more than historic buildings and venerated works of art. In recent decades, there have been major strides in understanding and defining cultural heritage. No longer is it viewed as simply tangible objects sitting in a museum behind glass, old books gathering dust on a shelf, or imposing and majestic architectural feats.

Cultural heritage includes both tangible and intangible aspects of a cultural system that derive their value from the information they can provide that is representative of or about a culture. Intangible cultural heritage is recognized to include the routines, customs, habits, depictions, and knowledge that a community, group, or individual believes exemplifies themselves or their community. More simply described, it is the way of being or the assets of a defined community. Cultural heritage is not limited in time because it can be 2,000 years old or created yesterday. To compare, tangible cultural heritage can be the historical churches, cobblestone streets, and antique lamps that make up a city, but intangible cultural heritage is how people feel about those aspects of the city and how it impacts their daily lives.

There are many interchangeable terms for cultural heritage, including cultural resources, cultural property, and other terms that in certain contexts may have a specific legal definition under federal, state, tribal, and international laws. Federal law protects cultural heritage through a patchwork of laws and specific legally recognized terms. These terms include, in part, archeological resources under the Archaeological Resources Protection Act of 1979; historic and prehistoric districts, sites, buildings, structures, and objects for the National Register of Historic Places under the National Historic Preservation Act of 1966 (NHPA); and Native American graves and cultural items under the Native American Graves Protection and Repatriation Act of 1990. National policy addresses understandings of cultural heritage in greater detail than the law does. Even more so, international law and policy recognize a broader array of cultural heritage definitions. Cultural heritage is also recognized to include cultural landscapes, ethnographic resources, intangible cultural practices, and traditional cultural properties (living organisms and the condition of sites or areas).

Disaster Threats to Cultural Heritage

Dramatic shifts in the earth’s temperature in the past century have resulted in an increased probability of extreme weather, including a dramatic increase in the frequency, duration, and intensity of natural events. The effects of climate change are making natural disasters, such as floods, earthquakes, landslides, hurricanes, tornadoes, fires, snow, ice, and storms—and even long-term climate changes such as rising temperatures and rising sea levels—more severe and increasing in frequency and duration.

Disasters also can be man-made, such as accidental or intentional fires or acts of terrorism. Recognition of cultural heritage protection is relevant even in the context of disasters resulting from acts of terrorism because of the danger of cultural genocide. International policy termed the withholding or destruction of cultural property “ethnocide” because it is so intrinsic to personal identity.

Cultural heritage that is immovable, such as historic buildings, cities, open spaces, and cultural landscapes, is also exceptionally vulnerable to disasters. These forms of cultural heritage acquire much of their significance from their spatial and contextual location. Consider Venice, Italy, a UNESCO world heritage site, which is facing dangerous and
unprecedented levels of rising water that threaten the very existence of the city. There will be no rebuilding the Venice we know today once the rising water levels force dramatic changes.

Cultural institutions—the homes to significant amounts of tangible cultural heritage—can be hit particularly hard when disaster strikes. Looters and thieves regularly target museums after a disaster because of the priceless objects they contain. The often-fragile items housed within are easily susceptible to damage, such as from fire, smoke, and water. This was the fate of millions of artifacts held in the collections of the National Museum of Brazil, which caught fire in September 2018. Irreplaceable scientific collections were lost, as were the cultural treasures that embody Brazil’s history.

There will always be an ethical conflict between the protection of people and the protection of cultural heritage in the event of a disaster that affects both. To reduce this tension, advanced planning, cooperation, and coordination is essential. To best preserve cultural heritage for generations to come, it is necessary to consider its protection at all stages of a disaster cycle: readiness (prevention, protection, and mitigation), response, and recovery. Protection cannot be merely an afterthought following a disaster when recovery activities have started.

Federal Disaster Law and Policy
The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is the primary source of statutory authority for federal disaster response activities and programs. 42 U.S.C. § 5121 et seq. The president can make three types of disaster declarations under the Stafford Act: emergency declarations, major disaster declarations, and Fire Management Assistance Grant Program declarations. Not all disasters rise to the level of a presidential declaration, but such declarations are mandatory if a community wants to receive federal disaster relief funding. Hurricane Katrina received a presidential declaration due to the natural disaster’s intense and far-reaching impacts. But it is unlikely that an event like the fire at the Notre Dame Cathedral would receive a presidential declaration if it happened in the United States.

The Stafford Act provides for the protection of property, but “property” does not explicitly include cultural heritage. Id. § 5122. Broader definitions for cultural heritage would increase exposure to the requirement of protecting cultural heritage. Policy recognition is also an essential element for improving cultural heritage protection during disasters. Even though national disaster policy accounts for definitions broader than the Stafford Act there is still no legal requirement to protect cultural heritage.

The Federal Emergency Management Agency (FEMA) is the leading federal agency implementing the Stafford Act. FEMA’s regulations recognize the importance of caring for cultural heritage at all stages of the disaster cycle, declaring that “FEMA shall act with care to assure that, in carrying out its responsibilities . . . all practical means and measures are used. . . to attain the objectives of . . . [p]reserving historic, cultural and natural aspects of national heritage.” 44 C.F.R. § 10.4(a) (2) (2003).

The federal government is a major stakeholder in disaster activities because it is the largest landowner in the country, owning or managing over a quarter of the land area in the United States. Moreover, the federal government has a unique responsibility to preserve the United States’ nonrenewable sources of shared historical knowledge because it has a trust responsibility to protect cultural heritage for Native American tribes. State, tribal, county, and local entities own or manage additional hundreds of millions of acres of public and private lands. All of this land is home to an abundant number of documented archaeological sites (some estimates approximate a number in the hundreds of thousands or even millions, but the true number of cultural resources is unknown and likely extraordinarily large).


Disaster policy in the United States is often community driven. When federal assistance is not required, state, tribal, and local entities may act pursuant to their own laws, regulations, and policies. However, a greater flexibility is needed for coordination among stakeholders in times of a disaster, including academia, the private sector, and the government. Disasters often are not singular, isolated events or even localized, but increasingly can have greater impacts. Disasters often recognize no governmental boundaries, which complicates preparation, response, and recovery efforts and requires effective interagency and interdepartmental cooperation among and within federal, state, tribal, and local governments. Successful disaster plans should provide for strong lines of communication to empower coordination among all levels of government and the local community.

National disaster policy encourages disaster plans at the local level that are modeled on national operations. It also recognizes the need to protect cultural heritage as a local community appropriately defines it. Problematically though, when national policy places the responsibility of cultural resources considerations with local governments, coordination between national stakeholders and local level stakeholders may suffer when addressing cultural heritage protections concerns in response and recovery situations if law and policy at the national level is indifferent to the importance of protecting cultural heritage. All federal disaster policies need to integrate recognition of local community understandings of cultural heritage if the policies are to truly be effective when implemented. Federal disaster law and policy must reflect the importance of protecting cultural heritage at all stages of the disaster cycle to provide support for state, local, and tribal government policies and practices.
Proper planning before a disaster strikes can help ensure that cultural heritage is not damaged or destroyed during response and recovery efforts. Such plans should include specific provisions for coordinating with other levels of government and nongovernmental stakeholders. Additionally, disaster plans should not be developed in a bubble but created in coordination with representation from organizations such as historical societies and tribal historic preservation offices. Preparation is key because if a plan only addresses cultural heritage protection in recovery activities, the loss of cultural heritage may already have occurred by the time responders think about it.

One major concern that must be addressed when advocating for greater protection of cultural heritage in the disaster context is the paradox of endangerment through protection, because cultural heritage can be placed in more danger when it is protected. To protect a cultural heritage site when responding to a disaster, the location must be known. But the need for that knowledge is often at odds with the critical need to protect the confidentiality of a site. Confidentiality is a safeguard against unpermitted excavations and looters. Disasters create situations for vandalism and looting of cultural heritage, which on the black market can command significant amounts of money. Federal law criminalizes such behavior, but the situation is heightened in the disaster context, and the remedies these laws provide are likely not practical and have a minimal deterrent effect.

Confidentiality is also important to Indian tribes that have significant religious and cultural ties to much of the land owned by the federal government. Federal land management agencies are frequently required to make public much of the information related to their planning activities and operations. Federal disclosure laws, such as the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., present a barrier to a federal agency’s desire to keep cultural heritage site information out of the public’s hands. Unless the information is categorized as one of FOIA’s nine exceptions, an agency may be compelled to release it. Thus, disaster preparedness plans to protect cultural heritage must be specific enough to provide adequate instruction but vague enough to protect the confidential nature of cultural heritage sites.

Once a disaster strikes, the danger is not over. For example, while fires themselves may cause damage to cultural heritage, suppression and rehabilitation efforts also can cause damage, the most severe of which can be from bulldozers. By working together, archaeologists can help firefighters identify and avoid or affirmatively protect known locations of cultural heritage. When archaeologists or cultural heritage specialists work with firefighters during forest fires, the damage to cultural heritage is minimized. Similarly, cultural heritage, like historic buildings or sites, can be further damaged such as during debris removal if the true nature of the debris is unknown.

Specific considerations for cultural heritage also are important in recovery plans because there is a need for restoration with historical integrity. Inconsistent with the need to fully preserve and protect cultural heritage is the fact that much of what we know about natural disasters in history comes from marks and information derived through the analysis of cultural heritage that resulted from a disaster. Consider Pompeii. If the city had been dug out of the ashes to be rebuilt, there would be no record today of the traumatic event.

Cultural heritage preservation should be a primary focus of disaster plans because cultural heritage is the vehicle through which we track our evolution; it is how we understand our identity and build community ties, and it is the embodiment of our collective history. Once lost, cultural heritage is often irreplaceable. When disaster strikes and a community’s culture is lost, it means a loss of identity for those people. It may not always seem like cultural heritage serves a purpose, but its sudden loss can trigger a loss of identity and collapse of a community. For example, following Hurricane Katrina in 2005, entire neighborhoods were forced to relocate away from New Orleans and even from Louisiana because their homes were destroyed. Media outlets ran numerous stories about how people were adjusting to their new schools, workplaces, and homes. Back in New Orleans, the destruction of historic buildings and sites deprived the city of physical embodiments of the past.

National disaster policies for preparedness and recovery activities advance the importance of cultural heritage to a community. National preparedness policy recognizes that mitigation activities are essential for resilience during recovery. This means that restoration of cultural heritage plays an important role in strengthening a community’s resilience. This way, a community can expect recovery efforts to involve more than simply rebuilding the physical structures in a community to their pre-disaster conditions.

However, the preservation of cultural heritage is often at odds with economic growth and interests. One challenge in finding a balance is that placing a value on cultural heritage, which is often priceless, is difficult and it is especially problematic for intangible cultural heritage. This dichotomy plays out in rebuilding priorities, as the priority often lies with rebuilding an office building as compared to rebuilding a historic building that houses a city hall.

What law and policy fail to consider is that intangible cultural heritage—the everyday practices, behaviors, social trends, and shared values—can be impacted by a disaster. The terrorist attacks on September 11, 2001, illustrate how one disaster has shaped an entire generation. The law must allow for a balance, recognizing that the loss of cultural heritage can often be irreversible and also can lead to detrimental economic impacts.

Tourism is a major economic driver and source of income for many communities, and cultural heritage has immense tourism value. The loss of a historic site or a cultural institution—the home of a significant amount of tangible cultural heritage—can significantly alter economic activity and impact those who live and work in the community. The tourism industry is an immense source of income and creator of jobs. For Paris, the partial loss of the Notre Dame Cathedral and resulting building closures due to repairs means lost revenue. Millions of people are unable to visit the cathedral itself, and some may be choosing to visit Paris later after the cathedral is repaired.

Exemptions to Protection Laws Endanger Cultural Heritage

Despite cultural heritage protections under a number of laws, including the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and the NHPA, as explained below, these laws do not provide adequate protection from disaster response and recovery activities because cultural heritage
often falls through the cracks provided by exemptions. Unfortunately, unless public criticism demands the protection of cultural heritage, it is given a low priority position in efforts to plan for, respond to, and recover from a disaster. To best protect cultural heritage, federal disaster laws must explicitly identify cultural heritage as worthy of protection. If federal law cohesively integrates cultural heritage preservation concerns with protecting human life, cultural heritage concerns are less likely to be handled separately in a vacuum.

In certain situations, throughout all stages of the disaster cycle, cultural heritage faces an adverse threat from waivers, exceptions, and exemptions to law, regulations, and policy. When faced with a disaster, Congress has the authority to issue an exemption to any environmental or cultural heritage protection law, either in whole, in part, or to allow for alternative procedures. The Stafford Act statutorily exempts certain activities by federal stakeholders during a presidentially declared emergency or disaster.

Presidential declarations are habitually sought because they provide the impacted community with access to federal disaster relief funds. However, a presidential declaration also poses a threat to cultural heritage. NEPA requires federal stakeholders to consider the impact of their proposed actions and any alternatives would have on the environment, including the impact on culture, and to ensure that information compiled is made available to the public. However, certain response and recovery activities during presidentially declared emergencies or disasters are categorically exempt from the NEPA. Additionally, NEPA categorical exclusions in FEMA’s regulations can be applied to any disaster activity to exempt it from NEPA.

The exemptions of the Stafford Act and NEPA primarily apply to response activities, such as clearance of roads and construction of temporary bridges, demolition of unsafe structures, and any action to reduce immediate threats to life, property, and public health and safety. However, recovery activities in the form of assistance for the repair and replacement of damaged public facilities to their pre-disaster conditions are also exempt (improvements beyond the pre-disaster condition are subject to the NEPA process). By exempting response activities from NEPA, it is not necessary to consult communities about localized needs to protect cultural heritage.

Unlike NEPA, the NHPA, commonly known for its section 106 process, is not expressly exempt in the Stafford Act. Instead, the NHPA section 106 regulations provide for a streamlined process for compliance in the disaster context. NHPA is a federal law that operates to make agencies aware of the impacts their actions have on the environment and cultural heritage. The regulations categorically exempt response activities necessary to preserve life or property. In other situations, federal stakeholders can comply by using previously developed plans or programmatic agreements setting forth how it will take cultural heritage into account during disaster activities. The federal stakeholders must comply with the NHPA section 106 process if no alternative compliance plan has been adopted.

The primary purpose of NEPA and the NHPA is to ensure that an agency decision maker is as informed as possible before proceeding with a planned undertaking. Advocates for the exceptions emphasize that decisions need to be made quickly in the disaster context and cannot be hindered by a legal process that sometimes takes years to complete. Due to NEPA and NHPA exemptions, adequate preparation through completion of disaster readiness plans or programmatic agreements outlining alternatives is essential. Partnerships between governmental stakeholders and historic preservation bodies also is extremely important. Having these types of readiness plans in place can mitigate the harmful effects NEPA and NHPA exemptions have on cultural heritage.

The International Dimension of Disasters
Disasters are no longer purely singular, unexpected, localized events. The effects may be felt regionally or even internationally and can take many forms and change over time. I remember being on the island of Kauai in Hawaii and evacuating to the center of the island in the aftermath of the 2011 earthquake that shook Japan and caused a tsunami. The wave made landfall on the coast of Japan, but officials were concerned with waves also reaching the coast of Hawaii. The next morning, powerful undertows remained and prompted Hawaiian officials to advise against swimming in the ocean. It was reported that remote locations such as Norway felt the effects of the earthquake, and debris from Japan continues to wash up on the Pacific coast of the United States.

National disaster policy minimally recognizes disasters’ international dimension. It simply states that the policies apply when impacts of a foreign disaster are felt within the United States and recognizes that an incident in the United States may require diplomatic coordination with foreign governments and organizations. To align with international principles and to meet its international treaty obligations, federal law—not just policy—must fully recognize the importance of protecting cultural heritage at all stages of the disaster cycle.

In 2015, the United Nations member states adopted the Sendai Framework for Disaster Risk Reduction 2015–2030 (Sendai Framework), which expressly recognizes culture as an essential element of reducing the risk of disasters and as an “asset for resilience” that deserves protection. The Sendai Framework advocates for cultural heritage protection by promoting the idea that in order to successfully protect cultural heritage, prevention, protection, and mitigation actions must occur before a disaster occurs, not merely during the response and recovery stages. This priority is missing in federal disaster law and is minimally reflected in national disaster policy. Unfortunately, the Sendai Framework is a voluntary, nonbinding agreement, and there is no requirement for the United States to comply with it.

Despite the major role that cultural heritage plays in helping us understand the past and maintaining our sense of place in the present, there is a dire lack of recognition in law and policy to protect cultural heritage from disasters and to repair it after it is damaged. Events like the fire at the Notre Dame Cathedral recently brought to the forefront the emotional and cultural toll such losses have. My hope is that the incident prompts stakeholders to consider cultural heritage protection in federal law and policy so that such losses are not experienced here in the United States.
Burial at Sea: Maryland’s Historic Cemeteries at Risk

Terra Bowling

Benjamin Franklin is widely quoted as having said, “Show me your burial grounds and I’ll show you a measure of the civility of a community.” See, e.g., Mt. Washington Cemetery, Cemetery Index.com, http://cemeteryindex.com/wordpress/featured-cemeteries/mt-washington-cemetery/. Many coastal burial grounds are at risk of being inundated before they can be protected or even properly recorded. Maryland, as a low-lying coastal state with many gravesites dating back to early American history, has its share of vulnerable cemeteries. While shoreline communities and residents may migrate inland or receive government assistance to prevent or repair impacts from coastal storms, flooding, or erosion, historic cemeteries may not have these same safeguards. Landowners may lack the proper funds or interest to preserve a cemetery or even be unaware that a cemetery is located on the property. Communities have a chance to show their civility by taking steps to preserve the history and dignity of these burial grounds before they disappear.

Small historic cemeteries give a unique glimpse at the cultural, historical, scientific, and scenic values of an earlier time. In the United States, early American cemeteries often began as small plots set aside by settlers, usually either family burial grounds or plots connected to small churches and townships. Native American burial practices varied but are similarly dispersed in rural areas. These burial grounds may be located in marshes, woodlands, or farm fields. While some grave markers remain, others are missing or may never have been marked at all. Encroaching development and neglect threaten these gravesites. Even cemeteries that have been protected by designation as historic trust sites face damage once they become tourist destinations, drawing visitors and vandals alike. Cemeteries in coastal areas face additional threats: sea level rise, coastal erosion, and subsidence.

As glaciers and ice sheets melt and warmer water temperatures cause the ocean to expand, sea level rise threatens coastlines around the world. In the United States, the Eastern Shore of Maryland is an area of particular concern due to its low-lying towns and marshes. Over the past two decades, the sea level in Maryland has risen three times faster than the worldwide average. If emissions continue to rise, sea level in Maryland could increase 2.0 to 4.2 feet by 2100. See D.F. Boesch et al., Sea Level Rise: Projections for Maryland 2018, University of Maryland Center for Environmental Science. Even as the ocean is rising, recent geological changes to the Eastern Shore mean that the land is subsiding or sinking. For historic cemeteries facing such risks, there are three primary responses: preserve, move, or record gravesites.

Preservation

Federal, state, and local governments have varying authority to preserve historic cemeteries. In this instance, “preserving” burial sites means to maintain the gravesites and any markers in their current locations. For coastal cemeteries, preserving may also mean efforts to hold back the water using sea walls, bulkheads, or revetments.

Federal protection of cemeteries and their graves is limited to the National Historic Preservation Act and the Federal Emergency Management Act. The National Historic Preservation Act of 1966 (NHPA) established the National Register of Historic Places. 54 U.S.C. § 302101 et seq. NHPA requires any federal agency that owns or controls sites listed on the National Register to assume preservation duties. Under the Act, any federally funded project must be reviewed to determine whether it may result in an “adverse effect” on any cultural resource eligible for or listed on the National Register.

State historic preservation programs may be established under NHPA. The Maryland Historical Trust is the State Historic Preservation Office (SHPO) designated for the State of Maryland under NHPA. Among other responsibilities, SHPOs are charged with conducting a statewide survey of historic property, nominating eligible properties to the National Register, and consulting on federal agency actions concerning historic properties. For state-owned or controlled properties on the state register, the state must ensure that they are not “transferred, sold, demolished, destroyed, substantially altered, or allowed to deteriorate significantly.” Md. Code Ann., State Fin. & Proc. § 5A-326. The state also requires review of actions that affect listed historic properties and compensation if the state damages a historic property.

A cemetery may be eligible for the National Register based on whether it derives its primary significance from “gravesites of persons of transcendent importance, the age of the burials, distinctive design features, association with historic events,” or if the resource has the potential to yield important information. See 30 C.F.R. § 60.4(d). Although cemeteries may be listed on the National Register, listing is uncommon for cemeteries and, therefore, is not the most likely avenue of protection for smaller, lesser-known gravesites. Further, NHPA may prevent development but does not protect a historic cemetery from threats such as water inundation.

If floodwaters have dislodged caskets from cemeteries during a declared disaster, those graves may be eligible for Federal Emergency Management Agency (FEMA) disaster relief on a case-by-case basis. FEMA, Disaster Funeral Assistance Fact Sheet, April 2019. FEMA can assist with reburial expenses if the grave was in a family burial plot on private property. The person who incurred reburial expenses must register for FEMA assistance to request help with these expenses. Public
cemeteries may also be eligible for assistance through FEMA’s Public Assistance program.

As federal protection of historic cemeteries is somewhat limited, many aspects of cemetery preservation fall under state jurisdiction. Maryland’s laws focus on the protection, access, and maintenance of cemeteries. In Maryland, the owner of a burial site (defined as “any natural or prepared physical location, whether originally located below, on, or above the surface of the earth into which human remains or associated funerary objects are deposited as part of a death rite or ceremony of any culture, religion or group”) is responsible for its care and maintenance. Md. Code Ann., Bus. Reg. § 5-503 (e)(1) and Real Prop. § 14-121(2)(i). However, certain parties have the right to request access from the owner of a burial site or of the land encompassing a burial site to restore, maintain, or view the burial site. Md. Code Ann., Real Prop. § 14-121. Such a party, defined as a “person in interest,” includes any person who (1) is related by blood or marriage or domestic partnership to the person interred, (2) has a cultural affiliation with the deceased, or (3) has an interest that is in the public interest after consultation with a local burials advisory board or, if such a board does not exist, the Maryland Historical Trust. Md. Code Ann., Real Prop. § 14-121(a)(4). Property owners are not required to grant access for preserving or recording graves but are required to provide an appropriate easement for any burial site for any individual related by blood or marriage or a person in interest as defined by state law. Md. Code Ann., Land Use § 5-102. The easement is not required, however, to be extended for any improvements on the burial site. Md. Code Ann., Land Use § 5-102. This exception may apply to a limited number of historic cemeteries, depending on location.

In Maryland, local governments can repair or maintain burial sites within their jurisdictions at the request of or with permission of the owner of the burial site.

Under Maryland law, the owner of a burial site or the land encompassing a burial site is not liable for damages to a person who enters the land to view, restore, or maintain gravesites, except for willful or malicious acts or omissions. Md. Code Ann., Real Prop. § 14-121(e). Instead, a person who enters land to view, restore, or maintain gravesites is responsible for ensuring that his conduct does not damage the land, the cemetery, or the gravesites, and will be liable to the property owner for any damage caused as a result of the access. Md. Code Ann., Real Prop. § 14-121(f).

In 2018, Maryland updated its laws to provide as follows:

An owner of a burial site or of the land encompassing a burial site that has been in existence for more than 50 years and in which the majority of the persons interred in the burial site have been interred for more than 50 years shall consult with the Director of the Maryland Historical Trust about the proper treatment of markers, human remains, and the environment surrounding the burial site.


The Act provides, however, that the advice of the Maryland Historic Trust is not binding.

For some cemeteries, the owner of the lot may be unknown, but several resources may help identify the owner of land encompassing a burial site. The county deed recorder's office would likely have records of the current and previous owners of the land in question. Local historical or genealogical societies or libraries may also be good resources for obtaining information on the history of a cemetery.

Local governments also can play an important role in the preservation of cemeteries. In Maryland, local governments can repair or maintain burial sites within their jurisdictions at the request of or with permission of the owner of the burial site. Md. Code Ann., Real Prop. §14-122(b). State law also authorizes local governments to appropriate money, solicit donations, provide incentives for charitable organizations or community groups to donate their services, and develop community service programs to allow those required to perform community service hours to “maintain and preserve a burial site or to repair or restore fences, tombs, monuments, or other structures located in a burial site . . .”. Md. Code Ann., Real Prop. §14-122(c). Local governments also may adopt zoning ordinances that could protect historic cemeteries.

Local historical or genealogical societies are other potential sources for assistance with preservation efforts. At the state level, Preservation Maryland (as stated on its website) is a group “dedicated to preserving Maryland’s historic buildings, neighborhoods, landscapes, and archaeological sites through outreach, funding, and advocacy.” Preservation Maryland, www.preservationmaryland.org/. The Coalition to Protect Maryland Burial Sites also provides information on cemeteries statewide. Local schools, local law enforcement offices that operate a community service sentencing program, community associations, or other local clubs could assist with cemetery preservation.

Although Maryland state law authorizes preservation, there does not seem to be a requirement to do so. This has been the outcome in other states with similar laws. In one New Jersey case, a plaintiff sought to use the state’s Historic Cemeteries Act to protect a small historic African American cemetery connected to the St. James AME Zion Church, which existed from approximately 1851 until 1873. The New Jersey Historic Cemeteries Act authorizes local governments to restore historic cemeteries. N.J. Stat. Ann. § 40:10b1-3. A court ruled that although the act authorized preservation, it did not require any affirmative action by the local government to protect the graveyard from a zoning variance. Harris v. Borough of Fair Haven, 721 A.2d 758 (N.J. 1998). In West Virginia, plaintiffs brought action against a pipeline construction company alleging grave desecration in violation of a state statute that protects gravesites of historical significance. Gen. Pipeline Const., Inc. v. Hairston, 765 S.E.2d 163, (W. Va. 2014). The statute is narrowly tailored to protect unmarked graves
of historical significance. W. Va. Code § 29–1–8a. In this instance, among other rulings, the court found the gravesites were marked and did not meet the requirements for protection under the law.

Maryland’s many historic cemeteries and gravesites reflect its rich history. Early coastal residents often buried their families in small, rural gravesites or churches. Now, encroaching marshland threatens many of those gravesites. Researchers predict that some portions of Dorchester County, Maryland, will be chronically inundated by 2060. Union of Concerned Scientists’ Fact Sheet, When Rising Seas Hit Home: Maryland Faces Chronic Inundation (July 2017). The Town of Smithville, located in Dorchester County on the edge of Blackwater National Wildlife Refuge along the Harriet Tubman Underground Railroad Byway, is one of the threatened communities. At one time, 100 residents lived in Smithville, a historic African American settlement, but only 4 residents remain. Rising water threatens the cemetery at the historic New Revived United Methodist Church in Smithville. As residents have moved away, options for preserving the cemetery have diminished. While many modern cemeteries are “perpetual care” cemeteries, for which families pay into a fund to ensure that gravesites are maintained in perpetuity, this is not usually the case with historic cemeteries where, typically, landowners are responsible for the burial sites on their property. For towns like Smithville, preservation is critical, yet funds and resources to protect the cemeteries may be elusive.

**Relocation**

A second and more permanent solution for burial sites threatened by sea level rise is to relocate the graves. One example of an entire cemetery relocating due to coastal erosion is in North Cove, Washington, more popularly known as “Washaway Beach.” Kathy Park and Tanya Bauer, “Washaway Beach,” Fastest-Eroding Place on the West Coast, Cobble Together a Solution, NBC News (Nov. 24, 2018). The shoreline has eroded more than 100 feet per year since the late 1800s. It is the fastest eroding place on the West Coast, with more than 100 homes, a lighthouse, a Coast Guard station, and a clam cannery already falling into the sea. In 1977, the Pioneer Cemetery was moved across the highway following a citizen’s campaign to save the site from loss due to coastal erosion. Port Heiden, Alaska, is another community that was affected by intense coastal erosion. The coastline along the Bristol Bay community eroded at a rate of 15 to 20 feet each year. U.S. Army Corps of Engineers, Alaska District, Erosion Information Paper—Port Heiden, Alaska (Oct. 24, 2007). The village relocated inland in the 1980s, but a graveyard remained at the coast. In 2003, the beach eroded, washing six gravesites into Bristol Bay. Residents worked alongside state and federal agencies to move the remaining graves inland. Tim Hoffman, Air Force Saves Native Remains, U.S. Air Force (Jan. 26, 2004).

Pursuant to Maryland state law, human remains or a grave-stone, monument, or marker may be removed from a burial site if authorized by the state’s attorney for the county. Md. Code Ann., Criminal Law, § 10-402. Notice of the proposed relocation of remains must be published for 15 days in a newspaper with general circulation in the county in which the burial site is located. Any remains must be reburied in a perpetual care cemetery or a place designated by a person in interest as defined by state law. The law also states that the new location must be “entered into the local burial sites inventory or, if no local burial sites inventory exists, into a record or inventory deemed appropriate by the State’s Attorney or the Maryland Historical Trust.” Id.

**With slow coastal inundation, moving graves is not always possible. In some cases, the only option is to record the location of the graves and allow the inundation to continue.**

For cemeteries like the one in Smithville, Maryland, moving graves is an unlikely option. Finding the funds to do so may be infeasible. Further, if the cemetery is moved, its new location may not carry the same cultural significance as its current location. Violent coastal erosion led to the aforementioned grave movement in Alaska and Washington. Crises and solutions emerged simultaneously. With slow coastal inundation, however, moving graves is not always possible. In some cases, the only option is to record the location of the graves and allow the inundation to continue.

**Recording**

A more common option for managing graves facing inundation is to record the gravesites before they are inundated. This has been the case in Louisiana where coastal towns face sea-level rise, subsidence, and storm-driven erosion. More than a quarter of the state’s wetlands have disappeared since the 1930s. A federal report estimates that Louisiana’s coastal parishes have lost 2,006 square miles of land—an area approximately the size of Delaware. Brady R. Couvillion et al., Land Area Change in Coastal Louisiana (1932 to 2016)—Pamphlet to Accompany Scientific Investigations Map 3381, U.S. Geological Survey, U.S. Dept. of the Interior (2017). Although the living residents of these areas have long since migrated inland, many of the graves and cemeteries have been submerged into the Gulf of Mexico. Instead of attempting to relocate threatened cemeteries, efforts have been focused on recording them so that future historians and genealogists can access the information.

In recent years, researchers have embarked on a project to use GPS to map and record many of the rural cemeteries that are “sinking.” One such example is the community of Isle de Jean Charles, home to the Biloxi-Chitimacha-Choctaw Tribe. The community has lost 98 percent of its land since 1955, and its last connection to the mainland is a narrow, often-flooded road. Michael Isaac Stein, How to Save a Town From Rising Waters, CityLab (Jan. 24, 2018). In 2016, the community received a $48 million National Disaster Resilience Grant from the U.S. Department of Housing and Urban Development to move its 99 remaining residents to a new town. The resettlement plan is focused on maintaining the cultural
Generally, there are three doctrines concerning liability for surface water discharge onto another’s property: (1) the common enemy rule, (2) the civil law rule, and (3) the reasonableness rule.

Most national and international actions for cemeteries threatened by flooding involve community efforts like those seen in Louisiana. Thirty-one villages along the Alaska coastline are at risk of disappearing due to erosion and sea level rise. The town of Newtok, Alaska, has been losing approximately 70 feet of land each year due to coastal erosion. The town has had plans to move the community since 2000 and received some federal funding to do so in 2018; however, the funds are not enough to move the entire community, which does not bode well for its cemeteries.

Recording has been an option for many gravesites in Maryland but is not required. State law notes that individuals may report the location of a burial site to the appropriate county officials, who may note the presence of a burial site on county tax maps. Md. Code Ann., Real Prop. § 14-121(f) (emphasis added). The Maryland Historical Trust maintains the Maryland Inventory of Historic Properties (MIHP). Again, listing has no regulatory impact. As noted in the preservation section, nonprofits, such as Preservation Maryland and the Coalition to Protect Maryland Burial Sites, have funded efforts to map historic gravesites. For cemeteries like the one in Smithfield, recording may be the only option to preserve the history of the graves.

Controversy and Recourse
Despite the availability of resources and authorization under state law, the act of preserving coastal historic cemeteries facing sea level rise or erosion can be controversial. Sea walls, bulkheads, or other hardened structures used to prevent flooding often lead to adjacent shoreline loss. The structures must be constantly expanded to protect from further erosion. For instance, the North Carolina Department of Environmental Quality gave Dare County a grant of $162,000 to construct a bulkhead to protect the Outer Banks Salvo Cemetery, which was slipping into the sea. One commentator noted as follows: Assuming the community is willing to continue to pay for such extensive maintenance, or that the state will pony-up taxpayer funding after future hurricanes, with time, this cemetery will probably protrude into the sound like a mini-peninsula as the adjacent shorelines continue to erode back. With the rising sea, the next big storm with onshore winds from the sound will likely cause the loss of the cemetery, bulkhead or no bulkhead.


If a cemetery’s flooding issues are exacerbated by another property owner’s efforts to preserve their property from coastal threats, there may be legal recourse. Generally, there are three doctrines concerning liability for surface water discharge onto another’s property: (1) the common enemy rule, (2) the civil law rule, and (3) the reasonableness rule. The common enemy rule recognizes that water is the common enemy to all, so a property owner can act to protect his or her property from damage despite any damage to the neighboring property. Eric M. Larsson, Unreasonable Alteration of Surface Drainage, 109 Am. Jur. Proof of Facts 3d 403 (2009). The civil law rule states that an owner is liable for altering the natural flow of water on their land that results in harm to another landowner. The reasonableness rule states that landowners can make reasonable use of their property and will only be liable for damage resulting from altering the flow of surface water if their reason for the change was unreasonable.

In Maryland, courts have used a combination of the civil law rule and the reasonableness rule, stating, for example, “The Court has unhesitatingly recognized the right of the dominant owner to the continuance of natural drainage, thus making clear that, in Maryland, the doctrine of ‘reasonableness of use’ is but a qualification to, and not a substitute for, the civil law rule.” Mark Downs, Inc. v. McCormick Properties, Inc., 51 Md. App. 171, 183–84 (1982). Essentially, the landowner changing the course of the water must use reasonable precautions to protect the other landowner. The application of the rule is fact-specific and therefore varies from case to case. Maryland courts have defined the scope of the rule. It has been applied to prevent the dominant landowner from “(1) increasing materially the quantity or volume of water discharged onto the lower land; (2) discharging water in an artificial channel or in a different manner than the usual and ordinary natural course of drainage; (3) putting upon the lower land water that would not have flowed there if the natural drainage conditions had not been disturbed; (4) causing dirt, debris, and pollutants to be discharged onto the lower land; or (5) otherwise creating a health hazard.” 51 Md. App. at 184.

In one Maryland case, a cemetery filed an action against the upper landowners for periodic flooding of a part of its cemetery lands by the stream that ran through the cemetery. Parklawn, Inc. v. Giant Food, Inc., 262 Md. 148 (1971). The cemetery claimed the upper landowners negligently caused excessive water, silt, debris, and dirt to be deposited on its lands and sought injunctive relief. The appellate court affirmed the trial court’s award of monetary damages against the upper landowner and reversed and remanded the trial court’s order refusing injunctive relief to the cemetery corporation.

In New York, the state attorney general sued a developer
Outlook Unclear

With increased sea level rise, coastal erosion, and subsidence, many coastal graves will be inundated before they can be preserved, moved, or recorded. Historic cemeteries for minority or underserved populations like the ones in Smithville, Maryland, or Isle de Jean Charles, Louisiana, lack funding for preservation efforts. Cemeteries marked with handmade markers or not recorded are particularly at risk, as they have never been recorded. Saving these historic cemeteries will likely require a complex solution.

Currently, government protection for historic cemeteries is limited. At the federal level, only a percentage of the vulnerable cemeteries are listed on the Historic Register under NHPA. Further, an Historic Register listing does not protect cemeteries from coastal inundation or erosion. FEMA helps in cases of disaster, but coastal inundation is often a slow process and many cemeteries would not qualify for protection. In Maryland, the state and local governments may offer some protection for flooded cemeteries, but, again, historic cemeteries threatened by sea level rise or erosion do not have comprehensive protection.

Recent efforts at the state and federal level have recognized the importance of saving historic gravesites. For example, in 2018, an oil company developing Louisiana land discovered two cemeteries containing nearly 1,000 unmarked slave graves. Following the discovery, Louisiana state lawmakers created a commission to outline measures to identify and protect historic cemeteries where former slaves were buried. In 2019, the African-American Burial Grounds Network Act was introduced in Congress (H.R. 1179). The Act would establish a voluntary national network of historic African American burial grounds. It also would create a National Park Service program in coordination with state, local, private, and nonprofit groups to educate the public and provide technical assistance for community members and public and private organizations to research, survey, identify, record, and preserve burial sites and cemeteries within the network.

Currently, government protection for historic cemeteries is limited. At the federal level, only a percentage of the vulnerable cemeteries are listed on the Historic Register under NHPA.

Although state and federal actions like this are important, the best solution likely lies at the local level. States are unlikely to dedicate funds to a local problem. Further, a blanket state rule on historic cemeteries may not be able to respect the nuances of culture and tradition in a way that local solutions could. Nonprofit groups can provide limited funding and assistance to protect, record, or move the cemeteries.

Even if funding is available to protect or preserve historic cemeteries, some of the solutions can be controversial. Support for seawalls or other hardened structures can be contentious, because the “solutions” can ultimately create more problems than they solve. An important consideration when moving any grave is the original wishes of the deceased and their families: Would the move comport with the deceased’s final wishes? Further, if the graves are moved from the original burial grounds, some of the culture and history may be lost. A more common and probably more realistic solution is to record the graves.

At the very least, efforts to record these at-risk graves should be accelerated before they are gone. The loss of these cemeteries is a loss of history and a harbinger of the future for other coastal structures. And, when making long-term decisions about where and how to bury the deceased in the future, selecting a vulnerable coastal location is likely to be an ill-fated choice.
Jesse Iliff is an attorney who obtained his JD with a certificate of concentration in environmental law from the University of Maryland Carey School of Law. A native of Arnold, Maryland, he interned with the Maryland Office of the Attorney General’s Environmental Crimes Unit while studying for the bar exam. He then entered private practice in 2010 and litigated a variety of cases in state and federal court. While in law school, Iliff received a Public Service Award for designing a pro bono project for environmental law students to assist in litigation regarding unsound wastewater treatment and retention practices by surface mining companies in West Virginia. He also served as co-executive of the Maryland Environmental Law Society, designing and implementing conservation and fundraising programs for the student organization, and he completed an Asper Fellowship with the Anne Arundel County office of Law’s land use and natural resources division. Before joining the Arundel Rivers Federation, Iliff provided pro bono counsel and representation to several community groups and nonprofit organizations through the Chesapeake Legal Alliance, most notably securing a permit from the Maryland Department of Environment to construct a living shoreline for the Pines Community Association on the Severn River in 2014.

NR&E: Jesse, what do riverkeepers do?

ILIFF: Riverkeepers are like any other waterkeepers . . . there are lots of different kinds. We’ve got lakekeepers and soundkeepers, even a glacierkeeper, too. Our job is to be the voice and the eyes and ears for the water body that we protect.

NR&E: How do you keep busy?

ILIFF: On the South River here, and then on the state level, I focus a lot of my efforts on enforcement of existing environmental law and the development of new law and policy that will help protect the waterways. As you know, the South River watershed is not very agricultural. It doesn’t have a lot of big, heavy industry. So, for me, that takes the form of advocating for better enforcement of a lot of erosion and sediment control laws for development that goes on in the watershed. Anne Arundel County is a very desirable place to live, and in the state of Maryland we’ve had more development pressure than any other county for several years in a row. The biggest pollutant to the South River is simple dirt sediment, and the largest source of sediment is open construction sites. So, it’s not hard to put two and two together and find out what the dragon I have to slay is.

NR&E: Doesn’t the law prevent that kind of erosion from construction sites?

ILIFF: There are regulations and laws in place, both state and local. I found early on in my tenure as riverkeeper that enforcement was often inconsistent between private property owners and large institutional developers, and even though it was inconsistent, it was still far below the standard that one would expect for enforcement to prevent pollution of such important resources. I took this job in late 2015, and when you’re a professional environmentalist, you have deep green people coming out of the woodwork to tell you about all the horror stories of development close by their homes and how the government either failed to do its duty or decided not to with respect to enforcing laws that should prevent that kind of pollution. Being an attorney, I decided I would take an empirical look at that. Fortunately, in Anne Arundel County, the Department of Inspections and Permits that is in charge of enforcement keeps their data online and available. So, I was able to see how many complaints were opened in a given year. Of those, how many were found to have merit? Of those found to have merit, how many times was a consequence imposed? I found out, disappointingly, that even in cases for which the county acknowledged a violation of environmental law, there was a consequence imposed only about 25 percent of the time. That’s by the county’s own data. So, it became an advocacy platform for me.

NR&E: There are construction sites that erect the silt fences properly and those that don’t put them up properly and they fail. There’s all kinds of excuses of why noncompliance happens.

ILIFF: There are, indeed, yes. You know, the law allows for some discretion as to what consequences, if any, are imposed when there’s an acknowledged violation of these erosion and sediment control laws. I should note, just for the record, that the environmental enforcement issues are not all about erosion and sediment control. A lot of it is, but as many readers may know, Maryland has a Critical Areas Act, which says that within a thousand feet of tidal waters there are a number of different development restrictions. That’s unique to the areas immediately adjacent to tidal waters. There are other states that have similar laws in effect. That was another feature of

INTERVIEW

Jesse Iliff—South Riverkeeper

Interviewed by Milo Mason

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the enforcement review that I did. Yes, sometimes there are honest-to-goodness mistakes that are made. And sometimes there are the sort of nefarious cost-cutting, corner-cutting kinds of efforts that developers do, hoping nobody will notice.

**NR&E**: Fines are the cost of doing business.

**ILIFF**: Exactly. And I've heard off the record from people in that industry that is, indeed, a budget line item. You can assume you're going to have X number of dollars of fines imposed on you. If you don't, then great, you walk away with a windfall. But I think that most of the time there is a certain degree of carelessness involved. It's not that people are intentionally trying to get away with something, it's that the buttoning up of a site and keeping a site clean take a back seat to getting the job done on time and on budget. Many times, that deprioritization of the environment results in pollution, not surprisingly.

**NR&E**: Yes. That's similar to the BP oil spill, right? Cutting corners to get the job done as quickly as they could. That sort of phenomenon extends to all sorts of different industries, certainly above and beyond real estate development.

**ILIFF**: I agree.

**NR&E**: What jurisdiction do you have? How large is this watershed of the South River? Is it five miles by two miles or ...?

**ILIFF**: The area of the South River's watershed is pretty small. It's about 60 square miles, which includes the area of the river itself. Being a tidal estuary, it is broad and flat and has a lot of surface area that is the water itself. So, the land in the watershed is closer to 50 square miles, which even by the Chesapeake Bay standards, is pretty small ... and I should note that it's entirely within Anne Arundel County. The City of Annapolis, of course, drains partially into the South River also, but that is entirely in Anne Arundel County, too. So, it gives me the opportunity to have a real strong focus, to have one municipality, one local government, and one state that I need to deal with. A lot of my counterparts in other parts of the bay, like the Susquehanna riverkeepers and the Potomac riverkeepers, have countless counties, small towns, and several states that they all need to kind of keep an eye on, which has allowed me to become something of an issue expert because I don't have such a diffuse geographic territory to work with. There are different enforcement agencies or subagencies that are vertical.

**NR&E**: Well, you're an attorney. How does that help you do your job here? How did you decide to become a riverkeeper?

**ILIFF**: I went to the University of Maryland, their law school, which has a really robust environmental law program. I always knew that I wanted to do environmental law. I went to law school for that exact purpose and I concentrated my studies there on environmental law. I participated in the Environmental Law Clinic, which gave me the opportunity to represent the former Potomac riverkeeper in litigation related to the disposal of fly ash from a power plant on the Potomac River. In Charles County, there was a facility that had been leaking all sorts of nasty chemicals for decades. The state had not done an adequate job, at least in our view, of preventing and remediating that pollution. So, using the citizen suit provisions of the Clean Water Act, we brought suit in the Circuit Court for Charles County. During that process, I had a number of occasions to be on the phone with my client, the riverkeeper, and get a flavor for what riverkeepers do and what the nature of this movement is. And it is a movement—it's a global movement. We have over 300 waterkeepers throughout the world now on all inhabited continents, and we work every day to ensure that every waterway in the world is fishable, swimmable, and drinkable if you have a fresh water body, for instance. I don't have to worry so much about the drinkable part here because everybody that lives in my watershed gets water from aquifers. However, the interplay between surface water and groundwater is an emerging body of science that definitely will have increasingly important relationships develop as sea levels rise and aquifers get drawn down. The distance, I guess, in time and space that people have enjoyed between groundwater and surface water is shrinking every day. That's sort of an ancillary issue that I've started to learn more about because nothing gets people's attention like expressing how pollution will affect their health and their children's health. If you hear something like, “Well, you know, the fish are dying,” but you're not a fisherman, you might not care. But everybody wants to know that they can have safe water coming out of their tap, and everybody—or at least many people, although perhaps the residents of Flint, Michigan, would argue with me—but most people in this country take it for granted that what comes out of their tap is going to be clean and fresh and palatable. And that is something that I think more and more people are going to find is a misplaced assumption as time goes on.

**NR&E**: Especially when the EPA and the federal standards are ignored, or unenforced.

**ILIFF**: Yes. And, to get back to your original question, how does being a lawyer help in this job. You know, understanding what the rights and the obligations and the duties and the discretionary duties of government actors are, having that basic framework, is incredibly helpful. Because I've had it happen to me already where people have tried to assert that the law says X. Oftentimes they're wrong, and oftentimes what the law says is subject to interpretation and has been interpreted. And you find yourself talking with regulators who have a technical background—engineers and professions like that—who were told one thing at one time in their career and that's for them, and there's this sort of tunnel vision that sets in where what we do is this. When you go to those folks as an advocate, asking for them to do more, there's often sort of a recalcitrance where they say, “We've always done it X way and so X way is the only way it can be.” Being a lawyer and understanding how fluid the regulatory framework around these things is enables me to say, “Well, look, if you're right and it's always been done X way, then I'm gonna go and try to change that and will you help me? Do you think you have a problem or not?” If you change the conversation to ask whether things are going the way that person thinks they should and you open up the door to interpretation for them, you get a lot more valuable feedback from the people that you need to work with who have the actual ability to enforce the law without going to the courts.

**NR&E**: That's sort of asking advice and helping you along and them along instead of creating confrontation.

**ILIFF**: Oftentimes. There are certainly times when you run into either an industry, a private party, or a government
regulator that just will not make any effort to see things your way or to do what’s right by the waterways within which they operate. And in those cases, confrontation is fine. That’s another thing that makes being a lawyer a useful skill set and a useful background to have because I am a litigator by training. That’s what I did before I became a riverkeeper, and I’m not afraid to go to bat if that’s what has to happen. But I find that it often saves me a lot of time and saves a lot of unbridged and broken relationships to try and open doors for people and let them walk through voluntarily rather than trying to push and shove too much.

NR&E: Excellent. You said you’ve been a riverkeeper now for four or five years.

ILIFF: It was four years in October.

NR&E: I want to ask you what needs to be done, but when you’re talking about being an attorney and how that’s helped you, do you have any advice for young natural resources and environmental attorneys or students who are wanting to go into the field?

ILIFF: Yes, and I’ve had occasion to do this already . . . talking to someone in law school, or contemplating law school, fresh out and looking for a job. I’ve talked with them about what it takes to do the kind of work that I do. The first thing that I tell them is that you have to be really damn stubborn because . . .

NR&E: [Laughter]

ILIFF: . . . because you’ve got an uphill row to hoe when you want to take a resource like the Chesapeake Bay that has 18 million people and growing who live there. The forces of development and human consumption are really, really difficult to fight against and to work within when you’re trying to preserve a resource that is being used and exploited for better or for worse in countless ways. And it would be really easy to get discouraged. You’re going to encounter failures as often as you’re going to encounter successes and perhaps more often. But the important thing is that you take the progress you can make and you celebrate it, and you learn from the setbacks you encounter and figure out a better way to do things next time. A lot of times you encounter the same issue over and over again. And to return to the issue for me on sediment and erosion control, not only have I seen the same fact patterns play out of different government bodies pointing the finger at each other about who is responsible for a pollution event, but I’ve seen that exact fact pattern play out at the same site that has been opened up for more than two or three years, and it’s just up the street from where we’re sitting now. You know, people saying that the inspectors say that the Soil Conservation District that approved the plans shouldn’t have approved the plans. And the Soil Conservation District says that the inspectors are free to require more than the plans say. That sort of merry-go-around just goes on and on. And it can be really frustrating because progress often doesn’t come at the rate that those of us who work in this space would like to see. In this particular instance, this is a company that bills itself as America’s largest homebuilder. So, presumably there’s some deep pockets, and if there was some will there, then they might be able to go above and beyond what is required of them. But, again, this company is not a nonprofit environmental group; it is a for-profit development company, and it’s a question of priorities. So shifting priorities is a recurrent effort that I have to engage in. I help educate people and help them understand why what they do matters. And it’s only when it’s very clear that people either cannot understand or will not understand that it becomes time to try and force people to understand.

NR&E: Yes. What are the issues that you’d like to see resolved or dealt with, besides erosion, as a riverkeeper?

ILIFF: One thing that I think is really important is for people to take a critical look at how they use the property they own. And specifically what I’m thinking of is Americans’ fixation with having lawns around their houses, which is something that is a strange anachronism and fallback to feudal England when protectors of castles would clear the forest around their castle so that if there was some marauding horde coming to take over their hold fast, they could see them coming and have a few minutes lead time to get some archers up on the walls or whatever. So, peasantry saw anyplace that had lots of open space around it as a status symbol. And somehow that has persisted throughout the centuries and takes the form now where lawns are the largest irrigated crop in the country by acreage. There’s nine billion gallons of water per day being used to irrigate lawns throughout this country and the amount of fertilizers . . .

NR&E: Fertilizer used. Pesticides, herbicides . . .

ILIFF: Fertilizers, pesticides, herbicides . . . those all run off into the receiving waterways. Another thing that a lot of people don’t think about is the mowers, which emit far more greenhouse gasses than a car would burning the same amount of fuel, and they also emit a lot of nitrogen. Many people don’t realize that in the Chesapeake Bay, the big pollutants that we always worried about every day are nitrogen, phosphorus, and sediment. But one-third of the nitrogen that enters the bay comes from atmospheric deposition. So, all of the lawn mowers going on every weekend in the summer—that particulate matter is settling back down into the waterways, and it’s causing the algae blooms that cause dead zones and deplete the fisheries. Lawns are just an incredible pestilence on the countryside that so many people don’t use. I can’t tell you how many times I cruise up and down the South River and find vast, sprawling lawns in front of multimillion-dollar houses. I’m out on the water at least every week, once a week, for seven months of the year, and I pass houses where I can see two acres of grass that I’ve never seen anyone doing anything on except for hired help mowing the stuff. There are no croquet tournaments going on; there are no children playing pick-up baseball games on these lawns. They are just there for decoration, and that decoration is really harmful . . . there aren’t even archery targets, no trebuchet set up, nothing.

NR&E: Local versus national rules, what works best?

ILIFF: I’d say that local rules are the most directly impactful. Whether they work best or not I suppose is a question of how the locality is enforcing the rules. You know, without enforcement, law is just good advice. That’s a quote from Abraham Lincoln and it holds true. And if your locality takes the protection of your natural resources seriously, they have the local on-the-ground knowledge, they have the historical knowledge, so they can tell. If you have somebody who’s been doing this job of an inspection for environmental law for 20 years, they don’t just know the law and they don’t just

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know the technical and cost considerations that go into its enforcement, they also understand the historical land use and they might know the prior owners and what was done there. So, they might have a better understanding of what is going on now. I would argue they do have a better understanding of what’s going on now than anybody who comes from a local federal field office that might be dozens or hundreds of miles away from the site in question. But, of course, there is agency capture, if you will, at the local level, too. And there are plenty of developers who rightfully feel like they’ve built towns or they’ve built communities because they have, but with that comes this misplaced sense of entitlement that they then get to do whatever they want to pursue their interests because they build a house for someone, or because they employ people in the process. Of course, they would never say that out loud. There is this conflation of private interests with a general, economy-wide public interest that develops all the time, but which is nonetheless false.

**NR&E:** My research on riverkeepers revealed that it’s not fish versus man, but fish versus water pollution. The Hudson River had the first riverkeeper?

**ILIFF:** That’s right.

**NR&E:** And it didn’t ignite like Lake Erie, but it was in real bad shape.

**ILIFF:** Yes, it was. There were a number of industrial facilities along the length of the Hudson that caused its degradation over time. And, in fact, General Electric was just in the news recently because the EPA is going to let them off the hook for cleanup that was required of them that was falling short of the goals that led to the litigation that they were a part of. So, the State of New York is suing the EPA to force them to do better in terms of reaching the objectives for cleanup that G.E. was required to do. But G.E. is just one of many. The waterkeeper movement started in the Hudson with a collection of commercial fisherman whose livelihoods were on the line as the pollution got so bad that the fishery declined such that they couldn’t afford to feed their families anymore. And, in fact, one of them ultimately became a state senator and was able to influence policies on the other side, Terry Baeker. You know, commercial fishermen and really hardcore recreational fishermen—a lot of them are waterkeepers. They come from that background because that working familiarity with the water and watching its progress or its decline over time is what really motivates somebody to say, “You know what? I don’t see the things that I know need to get done getting done, so I’m gonna do it.”

**NR&E:** Does the public trust doctrine play a role?

**ILIFF:** The state holds these tidal waters in trust for the citizens of the state. And, on the one hand, it’s a beautiful idea because it means that even the poorest person in the state still has this treasure trove out there that, at least in legal theory, they can use and they can own and they can use it to improve their lives. They can fish and crab and recreate and drink water. But on the flipside, when everybody owns it, nobody owns it. And then its pollution is not your problem specifically unless, like commercial fishermen, you have a really direct stake in the health of the waterway. It’s sort of a double-edged sword. On the one hand, it is this beautiful idea. You know, in Maryland any citizen in the state can go out during the winter months and fish a bucket full of oysters out of the river. And that’s great. Of course, it’s really difficult to fish for oysters. If you don’t have a boat you can’t do it, and if you aren’t physically well you can’t do it. So, there are a lot of elements of privilege that go into enjoying this right that we have. But at the same time, it becomes the tragedy of the times and everybody thinks that it’s somebody else’s problem. And, of course, when everyone thinks it’s somebody else’s problem, then things go downhill rapidly.

**NR&E:** I had the honor of interviewing Gaylord Nelson. So, tell me what more needs to be done. I know the Arundel Rivers Federation, the Chesapeake Legal Alliance, and the Chesapeake Bay Foundation do good things, and it never seems to be enough.

**ILIFF:** Waterkeeper Alliance is the umbrella organization that holds the licensed trademark waterkeeper or riverkeeper or whatever information you are looking at. And in order to retain that license you need to observe a number of quality standards. You need to be a full-time paid employee. You’re not a volunteer. You need to have a vessel to be able to patrol your waterway and search for sources of pollution. You can’t have conflicts of interests like working for industries that pollute the waterway and other things that are similarly obvious. But for my organization, the Arundel Rivers Federation, we have two waterkeepers on staff, myself and Jeff Holland, the West Rhode Riverkeeper. We’re a staff of nine, and we do lots of other work besides the sort of advocacy and enforcement work that waterkeepers are obligated to do to hold the license. We’re entirely privately funded with the caveat that we have a restoration program that resuscitates degraded streams and does a lot of projects in the ground to fix historical pollution, to rectify the things of the past. And those projects are funded with a lot of government grants, state, local, and federal. And some of the administration of those grants from our shop is funded that way. But we are otherwise entirely privately funded.

As far as what needs to happen, the Chesapeake Bay does have a total maximum daily load that was promulgated by the EPA in 2010, and we are more than halfway through the timetable for completion of the TMDL, and some states are doing better than others. A lot of the Bay watershed lies in Pennsylvania, which is riding behind. There are six states in the watershed and Pennsylvania is the elephant in the room. It is a productive agriculture area in the center of the state that the Susquehanna River runs right through. The Susquehanna delivers something like 40 percent of the fresh water to the Chesapeake and a large percentage of the pollution. And the problem is, again, it’s a question of education; it’s a question of perception. Those of us who live in Maryland, anyone who is familiar with the shape of the state of Maryland knows that it is dominated by the Chesapeake Bay. I’ll tell you, in Anne Arundel County we have over 530 miles of shoreline in one county in one state. But people in Pennsylvania never see it. Nobody in Pennsylvania is out here on a daily basis going sailing or going fishing. And there’s this perception that downstream problems are someone else’s problems. The issue of Pennsylvania is that if you don’t see it and you don’t use it, you don’t care as much. And you can dump whatever you want to dump down the drain or off the road. A big part of that, the nutrient problem, is from agriculture . . . it’s very diffuse. To lay out the difference here: with point sources, pipes and “discrete conveyances,” just depending on where they’re at, there
is a much stronger ability to measure the pollutants that are coming out of the end of that point source and, therefore, they regulate them. But when you have diffuse non-point sources, like stormwater runoff, whether it’s urban or rural agricultural, it’s a lot harder to measure, and since it’s a lot harder to measure, it’s a lot harder to regulate.

Historically, agriculture has been largely overlooked, I’d say, in terms of Clean Water Act enforcement, but that’s changing a lot these days, and there are certain best management practices that have been widely recognized as very effective. One of them, the best one in terms of cost effectiveness, is by planting riparian buffers. So, if you have a farm that extends up to a waterway, plant trees between the cropland and the waterway and you will drastically reduce the amount of nutrient pollution that enters that waterway. The problem is, first of all, if you are a row crop agriculturalist growing corn or soybeans or something like that, you lose acreage right off the bat if you’re starting to plant trees where you used to have product. But on top of that, you don’t just lose the footprint of the trees, there’s a shading problem, where you don’t get as much sunlight for an extra acre of space that is in the shadow of those trees. But there are ways to get around that. There are lower lying shrubs and other sorts of plants that are nutrient thirsty and also water thirsty and so they prevent a lot of that without as much of a shading, but you still lose the acreage that you put into buffers.

All of the governments in the bay watershed are wrestling with how can we keep farmers in business and keep feeding our growing population while, at the same time, creating less of an impact on the receiving waterways. It’s a tough nut to crack and that’s why people who work throughout the Chesapeake Bay are focusing so much on the Delmarva Peninsula, where most of Maryland’s agriculture is, and Pennsylvania, where most of the agricultural activity in the watershed is. And every time you can get a farmer onboard with planting buffers, that’s a permanent solution. It’s a permanent improvement to the land that will reap rewards in the form of pollution savings in perpetuity. That’s a big fight, though, and it’s one that will take time to implement. There’s a lot of whole and flows of water in which all the water conservationists are working on all the time. But as we both know, progress is often slower than a lot of us would like to see.

It’s easy to point fingers at large-scale commercial enterprises, whether they’re agricultural or industrial, whether it’s a government’s wastewater treatment plant or a chemical processing facility, everybody has it in their power to do something to improve the situation. When there’s sufficient education of the 18 million people whose lives get washed into the Chesapeake Bay, they can change those lives to improve how it works. Lawns are a great example. If you own property and you own a lawn, you can make a permanent impact by planting trees instead of grass or by planting other native plants that don’t require watering and don’t require fertilizing and don’t require pesticides and mowing. That’s the biggest one and that’s the soapbox I will always jump on whenever I’m talking to anybody. But even the simple steps that have been around and been talked about for decades matter. Whether it’s walking when you can walk or riding a bike when you can ride a bike instead of driving somewhere—that will cut down on those atmospheric depositions of pollutants and will at least make a dent in pollution, and make you healthier besides. Recycling, using less plastic. Paying attention to the water you use. All of that makes a difference.

NR&E: When I asked you for an interview, we chatted about conservation and preservation of the waterways. There’s always and often been a debate over whether preservation or conservation is best for nature and our natural landscape. What are your thoughts on that debate?

ILIFF: Yes, you know, it’s funny you should put it that way because when I was interviewing for this job, I was asked how my law practice would help me work for the river. And I said, “Well, the first thing that will be easier for me is I will only have one client now and it’s my river. Representing that client daily will require many multifaceted different efforts, sort of like being house counsel, you know? But to get to the preservation and conservation issue, I suppose at bottom, I am more of a conservationist than a preservationist. And I say that because I like to eat crabs, I like to eat oysters, I like to eat fish. And I also like to go waterskiing. And I do that for me. I love the river and I love the animals that live there. But being a human being myself, I tend to think of how it can be preserved for human beings. Now, that said, if you’re going to be a good conservationist, you have to preserve a lot of things. And that old dynamic was first articulated between Gifford Pinchot as the quintessential conservationist and John Muir as the quintessential preservationist. I think that it’s a spectrum, and...
there are a lot of places that deserve to be held inviolate with nothing done to them ever, purely because of other ecosystem services or just because of their raw natural beauty. There are a few places like that still left on the South River, even though it is very suburbanized. There’s nothing that is pristine and untouched by the hands of man around here.

NR&E: Not the wilderness.
ILIFF: No. But, that said, there are some beautiful little spots that, if you close your eyes and you focus really hard, you can pretend you’re a Native American in a canoe and that this is the way it used to be. There are places that don’t have any houses and don’t have any millionaires within sight, where the sounds of birds outweigh the sounds of cigarette boats, and you can really grasp how important it is that those places be kept that way. When you’re in a river where those spaces are becoming fewer and further between, their value only goes up. It’s a supply and demand question. So, I will continue to crab and fish myself and enjoy the fruits of other people’s labor who are professionals fishing the Bay. But there are some places that I think should just have a hard stop, absolutely not allowing building anything or fishing for anything, or any other use besides passive enjoyment of the area. Maryland has been good about this in some ways. We have oyster sanctuaries, for instance, in 52 different tributaries throughout the bay where you do not fish for oysters, period. The only exception is if you put them there. You can still open an oyster aquaculture lease in certain sanctuary areas, but you need to demonstrate there are no oysters in the area you propose for a lease.

NR&E: Thank you, Jesse.
ILIFF: Thank you.

Mr. Mason is a Washington, D.C., attorney who lives in Annapolis, Maryland, and recreates, cruises, and fishes in the Chesapeake Bay. He is a member of the editorial board of Natural Resources & Environment and may be reached at milomason@aol.com.

Tribute
(continued from page 2)

3 Widener Law Symposium Journal, 229 (1998). “It’s built around a coyote story. I have since then realized I should have entitled the article ‘Coyote Imitates Mountain Lion.’ More people would have read it.”

I had heard the rumor that he was sick, but was very saddened to learn of Dean’s passing on June 24, 2019. There will be no more opportunity to correspond. So, I entreat you to read his Widener article and his other work, both as a remembrance and to pay homage to the mission that now must march on without him. And simply because—as an author and scholar—he would have wanted that.

Dean was a citizen of the Cherokee Nation of Oklahoma. Already an expert when I first encountered him, he received a Bachelor of Arts from the University of Arizona with high distinction and honors in 1972, and went on to obtain his JD from the University of North Carolina in 1976 and a Master of Laws from American University in 1989. He built a distinguished career focusing on the very “issues of concern” about which I had written him, practicing since 1988 with Hobbs, Straus, Dean and Walker LLP in Washington, D.C., a national firm at the forefront of legal issues impacting Indian Country.

Initially my mentor, he became my friend. A connoisseur of tequila, he also taught me some of the finer points of that special elixir—leaving, again, an indelible imprint. Indeed, he was a great friend to many, in particular the many tribes he tirelessly helped to build environmental and cultural-resource regulatory programs that function within federal law, yet remain true to fundamental principles of tribal sovereignty.

Dean’s quest was, always, to remind us that a coyote is not a mountain lion; what works for one (the states) may not work for the other (the tribes) in the application and administration of environmental law and justice. If we remember that, we will honor Dean and help ensure his legacy. Rest in peace, my friend.

* NR&E’s great friend and longtime editorial board member, Dean B. Suagee, passed away on June 24, 2019.

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I live in Massachusetts, a state with some of the best solar-energy incentives in the country. It shows. I pass at least five large-scale solar farms sprouting photovoltaic panels on trips between Springfield and Boston, not to mention the nearly one hundred projects that the Massachusetts Department of Environmental Protection has permitted atop closed landfills and thousands of smaller-scale installations statewide. Recently, I even attended a free concert sponsored by a local solar-development company. However one may feel about renewable energy, though, all is not sun and roses on the ground. In my role as a state environmental-agency lawyer focusing on compliance and enforcement, I have noted a troubling trend regarding larger-scale solar development. In the frenzy to diversify the state’s energy portfolio and take advantage of available monies, some developers seem to be blinded by the glow of solar’s “environmentally friendly” visage and forget that the “development” side of solar development has potentially substantial environmental impacts. In the last several months alone, I have encountered several solar-array construction projects that have run awry of applicable law for failure to adequately plan and manage stormwater runoff during construction, sometimes having catastrophic effects. The companies responsible are facing significant enforcement, if not for federal violations, then for violation of state wetland and resource-area laws and regulations. This article is meant as a cautionary tale and provides some pointers on how to avoid having to explain to regulators and the public what went awry with your client’s stormwater planning during its utility-scale solar construction project.

Utility-scale renewable-energy projects may vary in size but generally can be defined as those that are 10 megawatts (MW) or larger. Per industry rule-of-thumb, one MW’s worth of solar photovoltaic (PV) installation requires about four acres of land, so a 10 MW facility would require approximately 40 acres (though it can be far more). Clearly the installation of large PV “farms” takes significant space.

The construction phase of solar development comes at the end of an often complex development phase that involves planning, site acquisition, contracting, and permitting. Ideally, thoughtful planning in this phase will minimize problems during construction. The process, indeed, relies on project proponents and their expert consultants to design the project to mitigate potential environmental impacts during construction and beyond. For construction projects that will disturb over one acre, a National Pollutant Discharge Elimination System (NPDES) Construction General Permit (CGP) is required. See 40 CFR §§ 123.25(a)(9), 122.26(a), 122.26(b)(14)(x) and (15). Depending on the location of the site at issue, either the Environmental Protection Agency (EPA) or the state will administer the permit (e.g., EPA has not delegated the NPDES program to Massachusetts, so EPA remains the permit administrator). To address the stormwater discharges associated with construction activities, the NPDES CGP requires the development of a Stormwater Pollution Prevention Plan (SWPPP).
The SWPPP serves as a kind of “roadmap” for how a project will control its stormwater discharges and otherwise comply with its NPDES permit.

At least in Massachusetts, the stormwater-management problems during solar-facility construction appear to arise not in a failure to obtain permitting up front, but rather inadequate attention given to the unique challenges of solar development in the planning/permitting/SWPPP stage, which then leads to problems on-site. My theory is that solar, as a still-emerging technology, presents a bit of a new animal to developers. While traditional stormwater management techniques still apply, the construction of solar presents new challenges that, perhaps, are not being adequately considered at permitting or implemented in the field during construction. In at least one of my cases, exactly zero stormwater management controls were used during construction, which clearly is unacceptable for any large construction project.

Stormwater moves downhill, and large amounts of stormwater moving at high velocities over large areas of land can do significant damage—washing sediments and pathogens downstream, causing erosion, downstream sedimentation, flooding, and damming. Once that happens, it’s likely too late for the brook trout, and it’s definitely too late for your client to avoid enforcement, significant remediation and mitigation costs, and potentially large penalties. So, what can be better addressed up front to avoid those problems (and a visit to my offices, or worse)?

**Topography.** The existing topography of a solar site should be given much greater attention, given the continuous and long-term disturbance it will experience during construction. Solar-field construction involves the drastic transformation of land, often large continuous swaths of land, possibly steeply sloped. While typically built in uplands, much greater consideration should be given to the constraints of nearby waterways and stability of soils. What had been well-vegetated, little-used upland gently sloping to a nearby watercourse will be stripped of vegetation for the installation of solar panels and compacted during a potentially very long period of construction with machines and workers, atypical of other more traditional types of development. These activities (which often will continue through winter and during spring thaws in order to meet project deadlines) will radically increase runoff from the site. Potentially very large volumes of water will need to be managed for the entire construction period (and beyond). Over a long strip of land, a concentrated flow of water can swiftly erode the ground beneath.

Estimating the quantity of stormwater to detain at a site can be difficult because solar panels are impervious, but the area beneath them less so. Without proper calculations and adequate design and use of erosion and sediment (E&S) controls (e.g., hay bales and sediment fencing) and well-sized detention basins, the flow from an under-construction site can quickly get out of hand, overwhelming inadequate controls and resulting in erosion carving deep escarpments and dragging huge quantities of sediment to nearby waterways, properties, and locations downstream, with an array of accompanying negative impacts on people, wildlife, and the environment. If your project’s sediment gets into one of my state’s cold-water fisheries—as has happened in more than one of the cases before my agency—well, you just don’t want to be in that position. Designers need to actively and adequately plan to avoid such consequences, perhaps by more thoughtfully phasing projects to avoid wholesale denuding and its accompanying runoff increases (e.g., by preserving vegetation wherever possible and using lower-impact techniques, such as conducting construction on a grid-like basis, finishing installation of panels in one smaller area prior to moving to the next, and resealing immediately) and by building in redundancies with site-specific E&S controls and stormwater detention prior to clear-cutting a site, or even by selecting another site better suited (e.g., less steep) to minimize runoff and impacts on nearby resources.

**Vegetation and soils.** The effect of existing preconstruction vegetation should be addressed and sufficient mitigation put into place during construction that attenuates the flow to a similar level. (Although this article pertains to construction impacts, the author notes that post-construction stormwater management considerations merit their own thoughtful consideration.) The removal of topsoil during construction will increase erosion risks during construction and will inhibit vegetative regrowth subsequent to construction, especially if underlain by shallow bedrock. Sites with fine-grain soils may best be avoided. For large sites, a more in-depth understanding of the existing soils and depths to bedrock at the outset (more than is often covered by a SWPPP) will allow better planning to mitigate the effects of grading on runoff and associated erosion.

Various jurisdictions are addressing these sorts of issues head-on. For example, Pennsylvania has a “Frequently Asked Questions” sheet on the permitting of solar farm that recommends best management practices such as minimizing the extent and duration of earth disturbance activity during construction, maximizing the protection of existing drainage features and vegetation, avoiding soil compaction, and utilizing other measures to prevent or minimize increased runoff. Pennsylvania Department of Environmental Protection, Solar Panel Farms FAQ (Jan. 2, 2019), http://files.dep.state.pa.us/Water/BPNSM/StormwaterManagement/Construction-Stormwater/Solar_Panel_Farms_FAQ.pdf. Connecticut’s Department of Energy and Environmental Protection is considering guidance (not yet generally released at the time of writing) on stormwater requirements for the construction of solar projects, which it is expected to incorporate as an appendix into the reauthorization of its general permit. According to those who have reviewed the proposal, it includes having to calculate stormwater volumes for a site by considering the entire solar array as impervious cover unless various design conditions are met, including consideration of vegetated area and slope ratios. See Pullman & Comley Energy Alert, CT DEEP Provides Additional Guidance on Stormwater Requirements for the Construction of Solar Projects (Aug. 1, 2019), www.pullcom.com/newsroom-publications-1054.

Massachusetts has a policy on the review of photovoltaic installations with regard to the state’s wetlands jurisdiction, Photovoltaic System Solar Array Review (MassDEP, Wetlands Program Policy 17-1 (effective Sept. 23, 2017), www.mass.gov/guides/massdep-wetlands-program-policy-17-1-photovoltaic-system-solar-array-review), which “strongly encourages the use of upland properties for locating ground-mounted photovoltaic systems” and highly discourages the placement of same within jurisdictional wetlands. *Id.* at 2. The policy notes that, while large “wooded parcels of land . . . which have been difficult to develop in the past due to steep topography, shallow bedrock, or poor percolation rates, are often targeted for conversion to
solar,” these require special measures to control stormwater and resource-area impacts during construction, to avoid violating the state’s wetlands regulations. 

In this era of climate change, which is impacting the size and severity of the storms that may impact construction sites and is likely to keep renewable energy like solar on the forefront to mitigate greenhouse gas emissions, these issues will continue to arise, likely with more frequency and urgency. Balancing the economic benefit of solar with careful planning for environmental impacts will result in better projects on all fronts. With any luck, some of these still-early lessons learned will significantly improve how stormwater management at future solar projects is designed and implemented. If not, my enforcement docket will, alas, overflow.

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A Misguided CWA Exemption

Mark A. Ryan

Drafting regulations is an enormous challenge, to say the least. I wrote some of the first drafts of the 2015 Waters of the United States (WOTUS) rule when I was at the Environmental Protection Agency (EPA), and it was one of the most challenging assignments I have ever had as a lawyer. Make the rule too simple, and gigantic loopholes emerge. Make it too specific, and compliance becomes overly burdensome. The right spot in the middle is an elusive target. Every new word in a regulation must be tested against reality and checked for internal inconsistencies and unintended consequences, and changes beget more drafting problems. Throw in litigation risk, policy compromises, and politics, and getting it all right can drive one mad. The ditch exemptions in the 2015 WOTUS rule and the proposed Trump administration replacement rule are a good example of this kind of drafting problem, and two recent decisions out of the Ninth Circuit, Pacific Coast Fed. of Fishermen’s Assoc. v. Glaser, 2019 WL 4230097 (9th Cir. 2019), United States v. Vierstra, 803 F. Supp. 2d 1166 (D. Idaho 2011), demonstrate that it is not a hypothetical one.

The Clean Water Act (CWA) regulates discharges of pollutants from point sources to waters of the United States. The regulatory definition of WOTUS has been the source of much litigation since 2015, when the Obama administration finalized its new WOTUS definition (the 2015 rule), and the rule is now the subject of another new rulemaking effort by the Trump administration to replace the 2015 rule. See 84 Fed. Reg. 4154 (Feb. 14, 2019) (revised definition of “Waters of the United States”). On September 9, 2019, EPA signed the rule repealing the 2015 rule, but lawsuits filed as of the date of this writing may result in a stay of the repeal. If the repeal rule is stayed, the 2015 rule will remain in effect in about half of the country. The other half is governed by the pre-2015 rule and the 2008 EPA/Corps Rapanos Guidance. If the repeal rule is not stayed, the entire country will be under the old Rapanos Guidance until the replacement rule is promulgated (and then litigated).

Both the 2015 rule and the replacement rule exempt certain ditches from the definition of WOTUS. Roadside stormwater ditches typically have not been considered to be WOTUS, but agricultural (ag) ditches carrying more than ephemeral flow have for many years been regulated as WOTUS if they connect downstream with a tributary system, as most do. See, e.g., Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); United States v. Vierstra, 803 F. Supp. 2d 1166 (D. Idaho 2011); 62 Fed. Reg. 20,177, 20,180 (1997) (EPA Region 10, Idaho CAFO General Permit). Response to Comments: “Canals and laterals which empty into (or connect with) waters of the United States such as rivers, streams, lakes, etc. are themselves waters of the United States in accordance with the definition of waters of the United States in 40 C.F.R. 122.2(e).”

The ditch exemptions in the 2015 rule and the proposed replacement rule vary considerably in scope. The ag lobby has fought hard against designating ditches as WOTUS, not wanting to be encumbered with the need for 404 permits for filling adjacent wetlands or the need to comply with water quality standards for irrigation ditches and ag drains. EPA bowed to that pressure and the 2015 rule exempted ditches with intermittent flow that are dug in uplands. 40 C.F.R. § 230.3(o)(2)(iii)(B). That includes many, if not most of the irrigation ditches in the arid west because most of those ditches were dug through otherwise dry ground, and they flow typically from April to October each year. The proposed Trump administration replacement rule, which is not yet in effect, would go further and exempt almost all ditches except those that were formerly tributaries to a WOTUS. 84 Fed. Reg. at 4120–4211.

Here comes the drafting problem. By exempting ag ditches from the WOTUS definition, those exempt ditches are now arguably point sources. Under section 502(14) of the CWA, “[t]he term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture” (emphasis added). The point where the ditch enters a jurisdictional river or lake typically is a discernable, confined, and discrete conveyance.

The ag point source exemption may not help here. Ag stormwater and return ag flow from irrigated agriculture are exempt as point sources. That is, the water running off of farm fields is exempt from regulation under the CWA. But the water in the ditches collecting that runoff is another question. If the ditch is 100 percent irrigation return flow, one can argue it is exempt under CWA § 402(1)(1), which exempts from NPDES permitting ditches and drains that are “composed entirely of flows from irrigated agriculture. . .”. First, this exemption applies only to irrigated agriculture. Second, most ditches carry some non-ag stormwater runoff or other point source pollutants. Comingled flows fall outside of the 402(1) exemption, making them subject to regulation.

Most ag drains and tail water from irrigation ditches (i.e.,
water that flows off the end of fields following irrigation) flow back into regulated surface water bodies. It is very common for irrigation ditches to divert water from, say, the Snake River, run it through farm fields for miles where it supplies irrigation water to fields and receives runoff from the farms and often everything else in the area. The ditch then reenters the river some miles downstream. The city of Jerome, Idaho, sewage treatment plant, for example, discharges to the J Canal, which is a man-made ditch that flows only during irrigation season, qualifying it for the 40 C.F.R. § 230.3(o)(2)(ii)(B) exemption. Jerome’s plant has an NPDES-permitted outfall to the J Canal. If the J Canal is no longer WOTUS, does the city of Jerome still need an NPDES permit? Is the J Canal now subject to NPDES permitting requirements where it flows back into the Snake River because it is commingled with sewage treatment plant effluent?

Points where irrigation ditches reenter rivers have not been considered point sources historically because they represent a point where one WOTUS is flowing into another. Regulation occurs where the point source enters WOTUS, not where one WOTUS flows into another. If you own an irrigation ditch or ag drain, you do not want to be a point source subject to NPDES permitting requirements. Many ag ditches are owned by irrigation companies, drainage districts, and the Bureau of Reclamation, to name a few. If those ditches are no longer WOTUS and therefore become point sources, then the owners of those ditches would have to get NPDES permits for their tail water.

The water transfer rule (WTR), may help as long as there is no intervening use. See 40 C.F.R. § 122.3(i) (“water transfer” is defined as “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.”). But if the ditch received stormwater or NPDES-permitted effluent and is not merely moving water from point A to point B, then arguably the WTR does not apply.

These issues came up in Glaser. In that case, the Ninth Circuit held that § 402(1) exempts discharges from all activities that are related to crop production, construing broadly the term “irrigated agriculture,” but limited that holding by concluding the burden under § 402(1) falls on defendants to show they are exempt from NPDES permitting requirements and the district erred in concluding that “entirely” as used in that section means “majority” when construing the phrase “composed entirely of return flow from irrigated agriculture.” It is this last holding that will make it hard for many, if not most ditches to meet the requirements of the exemption.

In Nakia’ikai, the court held that a 100-year-old, man-made drainage ditch designed to drain wetlands via a pump system into the ocean is a point source. The facts of the case are a bit complex, and I will not lay them all out here, but the case essentially turned on whether a man-made drainage ditch that pumped contaminated water (mixed ag drain and non-ag stormwater) into the ocean was a point source or whether it was a water transfer similar to the pump system used in Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist., 541 U.S. 95 (2004). The ditch is not WOTUS, the court held, because it was designed and built to be a conveyance system to remove polluted water from former orchards. The court further held that the WTR does not apply because the system adds pollutants (an intervening use). The court concluded that the ditch was a point source because the entire drain system added pollutants, rejecting the argument that the pumps alone must add pollutants to fall outside of the WTR. This is one of only a few cases interpreting the WTR, so it will be carefully scrutinized, especially by the ag sector.

Having a WOTUS run through your property is not without consequences, and regulatory burdens of meeting water quality standards or dealing with adjacent wetlands can be problematic. But being a point source is much more difficult to deal with, I maintain. Ever since the 2015 rule was promulgated with the ag ditch exemptions, I have argued that it is only a matter of time before an environmental group finds a great fact scenario to bring a case against a ditch owner. That has now happened. Katie bar the door.

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**Tribal Rights: The 1872 Mining Law’s Past and Future**

*Michael Lopes*

To many, miners embody the quintessential narrative of the American West: freedom, individualism, opportunity, and progress. Books, movies, museums, theme parks, and sports franchises celebrate, often with romanticized nostalgia and a nationalistic flair, the hardships endured by miners. In the mid-nineteenth century, the “forty-niners” and hundreds of thousands of other prospectors from all ends of the earth flooded the nation’s western frontier in search of gold, silver, copper, and other precious minerals buried within its vast and unexplored soils.

But to many Indian tribes living in what would become the American West, miners arrived like a colonial juggernaut, legitimizing the forces of dispossession already well underway that would deprive them of their land and resources, family members, and culture for generations to come. An infamous example is the experience of the Nez Perce Tribe, or Nimiipuu, whose homeland—in what is today north-central Idaho, southeastern Washington, and northeastern Oregon—was invaded in 1860 by thousands of gold-seeking squatters in violation of the Nez Perce Treaty of 1855 with the United States. To validate this non-Indian trespass, the United States forced the Nez Perce Tribe to enter into a new treaty, the “steal treaty” in 1863, which reduced the size of the tribe’s reserved homeland, its reservation, by 90 percent to make way for the miners. When Chief Joseph and hundreds of other Nez Perce protested the steal treaty, war erupted between the Nez Perce and United States in 1877. Over 200 Nez Perce men, women, and children...
died or were wounded in the ensuing military campaign that pursued them over 1,170 miles and through four states.

The General Mining Law of 1872 (Mining Law) remains the United States’ principal charter governing hardrock mineral development on federal public lands. Enacted almost 150 years ago during an era in which the country was gripped by a belief in manifest destiny, Congress eagerly used the Mining Law to stoke national fervor for western settlement and to validate decades of wanton trespassing and unlawful prospecting on tribal and federal lands. The Mining Law legitimated the exploration, discovery, and mining of economically valuable minerals on millions of acres of federal—or what would become federal—public land. Today, there are an estimated 1.1 million hardrock mining claims on the public domain.

One lasting contribution of the Mining Law is the 160,000 abandoned and “legacy” hardrock mines throughout the American West. Many of these mines continue to discharge untreated mine waste into surface water and groundwater, contaminating an estimated 40 percent of the headwaters of western watersheds. According to a 2017 University of New Mexico study, more than 600,000 indigenous people live within approximately six miles of an abandoned mine. Johnny Lewis et al., Mining and Environmental Health Disparities in Native American Communities, 4 Curr Envtl. Health Rep. 130–41 (2017), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC5429369/. As a result, they are exposed to dangerous metals and other toxic pollutants left behind by abandoned mines to a greater degree than the rest of the U.S. population.

Indian tribes, including the Nez Perce Tribe, executed more than 370 treaties with the United States between 1778 and 1871. In the mid-nineteenth century, several Indian tribes in the Pacific Northwest signed treaties with the United States in which they ceded millions of acres of land to the federal government in exchange for certain guarantees. These tribes also reserved to themselves certain rights, including the right to continue to hunt and gather throughout their aboriginal homelands on open and unclaimed lands and to continue to fish at all “usual and accustomed” places throughout their aboriginal territory—all extending beyond their newly designated reservations.

Tribal citizens now often exercise these treaty rights on federal public lands, which remain aboriginal lands. These lands continue to support sacred indigenous landscapes and resources and indigenous identity and culture. Tribal citizens rely on federal public lands for subsistence, cultural, spiritual, and economic purposes that long predate federal land management statutes and regulations instituted in the nineteenth and twentieth centuries.

The ongoing effect on indigenous people from legacy mines and proposed mines on federal public land is an important issue, not just to environmentalists or the American taxpayer, but to the indigenous people rooted to these lands. Legacy and proposed mines on federal land continue to expose indigenous people to pollutants, exacerbating numerous existing risk factors, including poverty, education, infrastructure, and health status.

The Gold King Mine wastewater spill in 2015 is one recent illustration of the effect legacy mines have on Indian tribes. The abandoned mine sent a yellow-orange plume of approximately three million gallons of toxic wastewater, containing nearly 540 tons of metals—including iron, aluminum, cadmium, and lead—into the Animas River watershed. The spill entered waters in Navajo Nation, Southern Ute Tribe, and state lands, leading to an emergency river closure and damage to crops, home gardens, and cattle. As a result, the Navajo Nation has filed a lawsuit seeking compensation in the amount of $130 million.

Indian tribal rights on federal public lands are also threatened by contemporary mining interests. The Bears Ears National Monument in southeastern Utah is just one recent example. Designated by President Barack Obama in 2016, the 1.3 million-acre monument encompasses public lands with cultural, historical, religious, and natural resources important to several Indian tribes. President Donald Trump issued a proclamation in 2017 reducing the monument by 85 percent, thus opening previously protected federal land containing sacred areas and artifacts to mineral and other development.

Another proposed mine on federal public lands is the Rosemont Copper Mine in Arizona’s Santa Rita Mountains. These lands hold thousands of years of tribal cultural heritage, including ancestral burial grounds, ancient village sites, and sacred springs. The Tohono O’odham Nation, Pascua Yaqui Tribe, Hopi Tribe, and others challenged the Forest Service’s approval of the proposed mine under various federal environmental laws. On July 31, 2019, a federal district court ruled in favor of the tribes, holding that the Forest Service violated federal law in approving the mine without determining the validity of claims on federal public land. See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. Cv-17-00475-TUC-JAS, 2019 WL 3503330 (D. Ariz. July 31, 2019).

Nez Perce tribal reserved rights on federal public lands are also threatened by mining impacts. In August 2019, the Nez Perce Tribe filed a Clean Water Act enforcement action against Canada-based Midas Gold Corporation and its subsidiary companies. The lawsuit concerns ongoing illegal discharges of arsenic, cyanide, mercury, and other toxic pollutants at their proposed Stibnite gold project site into waters that run through Forest Service lands and the Nez Perce Tribe’s aboriginal homeland. These waters provide irreplaceable habitat for the Nez Perce Tribe’s treaty-reserved fish, wildlife, plants, and resources.

Despite these and numerous other examples of mining conflicts on federal public lands involving Indian tribes, there are some recent positive developments meriting attention. First, the U.S. Supreme Court, from its 1905 decision in United States v. Winans, 198 U.S. 371 (1905), to its 2018 affirmation in Washington v. United States, 138 S. Ct. 1832 (2018), has affirmed that treaty-reserved fishing rights include meaningful protections against interference, whether resulting from fishwheels that interfere with the ability of treaty fishermen to catch fish or culverts that hinder fish passage and thereby diminish the number of fish available for harvest. While these Supreme Court cases were necessarily decided on their specific facts, these landmark decisions construing the treaty language to encompass significant protections for fish illustrate that other land use practices, including mining, are subject to treaty-reserved rights as well.

Congress, in enacting the Mining Law, declared that the federal public domain is “to be free and open to exploration and purchase” so long as such activities are “not inconsistent with the laws of the United States.” 30 U.S.C. § 22. Because Indian treaties are the supreme law of the land under Article VI of the United States Constitution and predate the Mining Law, there is no question that the more than 370 Indian
treaties ratified by the United States constitute “laws of the United States” whose provisions should be faithfully applied in any examination of proposed mineral activities under the Mining Law on federal public lands subject to Indian treaties.

The second development concerns recent congressional review of the Mining Law, which despite numerous efforts has not been significantly updated since its enactment, nearly 150 years ago. In May 2019, U.S. Senator Tom Udall (D–NM) and House Resources Committee Chairman Raúl Grijalva (D–AZ) introduced the Hardrock Leasing and Reclamation Act of 2019. According to Chairman Grijalva, the bill “ends the obsolete system put in place by the Mining Law of 1872 and replaces it with a modern leasing system designed to protect American taxpayers and American public lands.” Raul M. Grijalva, Mining Reform Legislation (2019), available at https://naturalresources.house.gov/imo/media/doc/HR%2020579%20Mining%20Reform%20Fact%20Sheet.pdf. Senator Udall explained that the bill “reforms the outdated laws that have governed hardrock mining since the days of the Gold Rush era, a time when Ulysses S. Grant was president, and westward expansion was the overarching goal.” Tom Udall, Hardrock Mining Reform Act of 2019 (2019), available at www.tomudall.senate.gov/imo/media/doc/HR2579%20Reclamation%20Act%202019,%20One-pager.pdf. The legislation would impose royalties, require abandoned mine cleanup, and reform the requirements for staking claims.

The proposed legislation would also reform the Mining Law in ways that protect Indian tribal interests. The bill would require tribal consultation before authorizing any mineral activities that would affect an Indian tribe’s land or an area of cultural and/or religious significance to Indian tribes. It also would authorize Indian tribes to petition the Secretary of the Interior to withdraw certain lands and to bring enforcement actions in federal district court. This enforcement provision is especially important to Indian tribes to ensure that federal agencies are legally accountable.

The Mining Law, referred to as one of the “lords of yesterday” by prominent western legal scholar Charles Wilkinson in his book Crossing the Next Meridian, has caused profound injury to many Indian tribes’ aboriginal homelands, reserved rights, sacred places, burial sites, and culture. The statute’s antiquated but exalted status continues to resonate on federal public lands, where Indian tribes struggle to preserve deep cultural connections in the face of mining’s destructive historic and environmental legacies. Recent developments, however, suggest cause for optimism. The U.S. Supreme Court has again considered the Mining Law, but this time for the limited purpose of affording additional time to consider the matters raised in the rehearing petitions of the Atlantic Sunrise. The Court’s holding that the FERC’s order granting rehearing is unreviewable, FERC v. Allegheny Defense Project, 932 F.3d 940 (D.C. Cir. 2019) (Allegheny), is notable for, among other things, its attention to FERC’s consideration of downstream greenhouse gas emissions associated with the project, the concurring opinion by Judge Patricia Millett requires a more careful examination. In that opinion, Judge Millett tackles a common practice of FERC to issue “tolling orders” on requests for rehearing of agency orders and challenges the ongoing legality (from both a statutory and constitutional perspective) of that practice. Not surprisingly, Judge Millett’s concurrence has prompted a petition to the D.C. Circuit for rehearing en banc.

For those unfamiliar, the Natural Gas Act (NGA) requires a party aggrieved by a final agency order to file a request for rehearing of the order before seeking judicial review. See 15 U.S.C. § 717r(a)–(b); see also 16 U.S.C. § 825l(a)–(b) (establishing a comparable requirement for judicial review of agency actions under the Federal Power Act (FPA)). Under the statute, FERC must “act” on the rehearing request within 30 days; otherwise, the request is deemed denied as a matter of law. See 15 U.S.C. § 717r(a). When presented with a rehearing request, however, FERC typically issues an order granting rehearing for further consideration, noting that in the absence of action the request would be deemed denied, and the action will “afford additional time for consideration of the matters raised or to be raised . . .” See, e.g., Transcontinental Gas Pipe Line Co., Docket No. CP15-138, Order Granting Rehearings for Further Consideration (Mar. 13, 2017) (granting rehearing for the limited purpose of affording additional time to consider the matters raised in the rehearing petitions of the Atlantic Sunrise certificate order). While such orders serve the stated ends, they also delay access to judicial review until FERC has issued an order on the rehearing request. The result—for pipeline certificate cases, as well as for other proceedings under the NGA and also the FPA—is that the non-aggrieved party may proceed under the authority of the FERC order as a final agency action, while the aggrieved party must wait for FERC to complete its consideration of the rehearing petition and issue an order on the merits. For the parties to the Allegheny petition, this meant that the certificate-holding pipeline could proceed with construction activities (as directed by FERC), including exercise rights of eminent domain on the property of private landowners.

Consider the timeline for Atlantic Sunrise. FERC issued its certificate order on February 3, 2017. Requests for rehearing were filed less than two weeks later, resulting in a FERC-issued tolling order on March 13, 2017. An eventual decision on rehearing did not come until December 6, 2017, with the
property owners only then free to seek judicial review. And appellate review does not happen overnight, of course—Allegheny was not decided until August 2, 2019. In the intervening two-and-a-half years, construction activities on Atlantic Sunrise not only proceeded, but the project was completed and placed into service (two months before the December 2018 oral argument).

FERC frequently advises pipelines (and similarly situated parties) that they act at their own risk when they proceed to act under a final order that remains subject to judicial review. But given the state of Atlantic Sunrise by the time judicial review began in earnest, one cannot help but share Judge Millett’s skepticism as to how well the egg could have been unscrambled, if at all. Cf. Allegheny, 932 F.3d at 953 (Millett, J., concurring). The immediate problem for Judge Millett though is circuit precedent upholding the tolling order practice. See id. at 951; see also Delaware Riverkeeper Network v. FERC, 895 F.3d 102, 113 (D.C. Cir. 2018) (“We have long held that FERC’s use of tolling orders is permissible under the Natural Gas Act, which requires only that the Commission ‘act upon’ a rehearing request within 30 days, 15 U.S.C. § 717r(a), not that it finally dispose of it.”). The concurrence endeavors to chart the path to overturn that precedent, but that path is not so clear.

The first argument pivots off of the statutory language in the NGA. The concurrence reads the text of the statute as requiring the agency to act on the merits of the rehearing petition within 30 days. See Allegheny, 932 F.3d at 950–51. If such were not the case, what purpose would the 30-day deadline have? It is an interesting proposition, particularly when one considers what a U.S. Congress might have been thinking when it enacted the statute nearly a century ago. However, when the D.C. Circuit initially considered this question, it could not find any legislative history elaborating on the point. See California Co. v. FPC, 411 F.2d 720, 721 (D.C. Cir. 1969). And the statute simply says that unless FERC “acts” on the application within 30 days, the request for rehearing may be deemed denied—squarely leaving open the prospect for interlocutory action.

Moreover, the statute is without any indication as to why Congress would want to limit the agency in such a respect—a question that clearly influenced the California Co. court. See id. Not to criticize the sophistication of practitioners 60 years hence, the complexity of proceedings in the modern area render such an expectation wholly impracticable. What is more, the D.C. Circuit has made it abundantly clear that the agency must engage in reasoned decision-making. Thus, reviewing courts require FERC to afford attention to all the matters raised and will remand an order to the agency if it has not adequately addressed parties’ arguments. See, e.g., New England Power Generators Ass’n v. FERC, 881 F.3d 202, 210 (D.C. Cir. 2018) (“It is well established that the Commission must respond meaningfully to the arguments raised before it.”) (internal quotations omitted).

In perhaps an implicit recognition of this reality, the concurrence also scolds the agency for having time to issue orders relating to the pipeline construction process while the rehearing petition seemingly languished. See Allegheny, 932 F.3d at 952 (“[T]he Commission that says it is too busy to act on rehearing applications nevertheless consistently manages to find the time to grant orders authorizing construction to go forward while rehearing is still pending.”). This point, however, glosses over the organization of FERC. The construction orders noted in the concurrence issue from the Office of Energy Projects. In contrast, rehearing petitions typically are handled by the Office of General Counsel (OGC), with input from other areas as appropriate. Indeed, in 2016 under then-Chairman Norman Bay, FERC organized a rehearsals group within OGC in an effort to enhance efficiencies in the agency’s review of rehearing petitions. In any case, while a single agency is acting in both situations, different staff members are handling the respective responsibilities.

The concurrence’s final push is the constitutional one, and as the discussion earlier shows, the circumstances surrounding Atlantic Sunrise serve well to launch the argument. But the same impediment to establishing an intent of Congress to limit FERC review of rehearing requests to only 30 days seemingly frustrates the constitutional argument as well. In short, the tolling order process cannot be said to deny due process, or even create the prospect for such, in every case involving its use. See Delaware Riverkeeper Network v. FERC, 895 F.3d at 113 (“To prevail on its claim here, Riverkeeper would need to show that FERC’s statutorily authorized practice of taking more than 30 days to finally dispose of a rehearing petition violates due process in each and every instance, no matter the reasons for taking more time, the complexity of the application, or the amount of development allowed or blocked in the interim.”). Furthermore, parties have the option of seeking mandamus relief under the All Writs Act, 28 U.S.C. § 1651. See id. at 113; see also Allegheny, 932 F.3d at 955. The concurrence finds that avenue empty comfort, however—a view frankly in tension with the consequential factual portrait presented.

The issuance by FERC of certificates of public convenience and necessity for the construction of new natural gas transportation facilities has become more controversial in recent years, so much so that the pressures prompted the agency to solicit comment on whether it should make changes to its existing certificate policy statement. See Certification of New Interstate Natural Gas Facilities, Docket No. PL18-1, 163 FERC ¶ 61,042 (Apr. 19, 2018); see also Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), order on clarification, 90 FERC ¶ 61,128, order on clarification, 92 FERC ¶ 61,094 (2000). The existing policy statement does, however, take the potential impact on landowners into account (among myriad other considerations) in determining whether the issuance of a certificate would be in the public convenience and necessity. Whether and to what extent the agency chooses to modify its consideration of landowner impacts remains outstanding, but it is unlikely that FERC will abandon its tolling order process.

Which leaves Congress. The concurrence rightly observes the legislative branch as a remedy for the issue—although the concurrence would have FERC first eschew the tolling order approach altogether before obtaining relief from the perceived 30-day clock. Allegheny, 932 F.3d at 956. Harkening back to the California Co. decision though, one cannot help but struggle with the idea of an agency like FERC having only 30 days to address a rehearing request. To be sure, the sanctity of property rights is a foundational pillar of American society. But the right of certain parties to exercise condemnation authority, when properly directed by a regulatory body, is nothing new either, long coinciding with society’s decision to task certain entities with the development of energy infrastructure across
the country. Accordingly, if new procedural requirements are needed to help better fashion a process that ensures all parties’ interests are properly balanced in cases that range across a vast complexity spectrum, the true representative body of the people seems like the best place to start.

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**Municipalities Feel the Chill of Knick in the Air**

Abigail M. Jones

The U.S. Supreme Court recently split over whether a takings challenge to a local zoning ordinance can proceed directly to federal court in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). Short answer: they can, now. This has the potential to open the floodgates of federal litigation over local limitations or bans on high-volume hydraulic fracturing (fracking) technology for extracting oil and natural gas across the country. The resulting chill that could settle over municipalities may stymie local protection of our communities and environment from the dangers of fracking.


Petitioner Mary Rose Knick’s takings claim involved a small family graveyard on her 90-acre farm in northeastern Pennsylvania. Scott Township passed an ordinance that required all cemeteries to be open to the general public during daylight hours, without exception for these family “backyard burial” sites. After the township issued an enforcement order against her, Knick sought declaratory and injunctive relief (but not an inverse condemnation claim to recover the value of the property) in state court, arguing that the ordinance effected a taking of her private property for public use. But because the township stayed the enforcement order against Knick pending outcome of the state court case, the state court declined to rule on Knick’s case, reasoning that without an enforcement action, there could be no irreparable harm necessary to grant the requested equitable relief. So, on to federal court Ms. Knick went.

But in federal court, Knick ran into *Williamson County*, and the federal district court dismissed her claim that the ordinance violated the takings clause of the Fifth Amendment (see 42 U.S.C. § 1983) because she had failed to first bring an inverse condemnation action in state court. On appeal, although noting that the ordinance in question was “extraordinary and constitutionally suspect,” the Third Circuit nevertheless affirmed, citing *Williamson County*. *Knick v. Twp. of Scott*, 862 F. 3d 310, 314 (3d Cir. 2017). Knick then appealed, asking the Supreme Court to overrule *Williamson County*’s holding that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the proper procedure and been denied just compensation.” *Knick*, 139 S. Ct. at 2169 (citing *Williamson*, 473 U.S. at 195). Plaintiffs claiming takings by local governments have long bemoaned this rationale for essentially barring their access to federal courts.

In a 5–4 decision, the Supreme Court overturned the “unjustifiable burden” imposed by *Williamson County*, reasoning that “because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.” *Knick*, 139 S. Ct. at 2167, 2172. No longer does a plaintiff need to show inadequate compensation or have its inverse condemnation claim denied by a state court in order to allege a Fifth Amendment violation. The Supreme Court held that “because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state court action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights.” *Knick*, 139 S. Ct. at 2177.

So, what does a ruling on access to a family graveyard have to do with fracking? By allowing takings challenges to local zoning ordinances to go directly to federal courts, Knick opens the door for oil and gas companies to bring federal lawsuits against municipalities that limit or ban fracking within their borders.

Since the boom years just over a decade ago, there has been mounting evidence of the negative consequences of fracking on our communities. See, e.g., *U.S. EPA, Hydraulic Fracturing for Oil and Gas: Impacts from The Hydraulic Fracturing Water Cycle on Drinking Water Resources in The United States* (Final Report), EPA/600/R-16/236F (2016); *New York State Dept of Health, A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* (2014). In response, more and more state and local governments have been exercising their authority to limit fracking within their borders. Citing negative human health and environmental impacts, New York, Maryland, Vermont, and Washington have all banned fracking statewide. One report states that over 400 municipalities in over 20 states have passed resolutions to ban or to place a moratorium on fracking. See *Local Progress, Policy Brief: Fracking Bans & Moratoriums*, available at https://localprogress.org/wp-content/uploads/2013/09/Fracking-Bans-and-Moratoriums.pdf. In addition, countless other municipalities that may not have the authority to ban fracking outright are using their zoning authority to limit where fracking can occur in order to protect the health, safety, and welfare of their communities.
But with the ruling in Knick, local municipalities may think twice about enacting bans or limits on fracking for fear of being dragged into federal court. The threat of expensive federal litigation and potentially massive “just compensation” awards is an understandable fear for local governments.

However, municipalities generally may be on solid footing when it comes to local zoning regulation of fracking. The regulatory takings jurisprudence recognizes two types of regulatory takings that could apply to local regulation of fracking. One is a total taking that “denies all economically beneficial or productive use of [the] land.” Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). The other is a partial taking where otherwise legitimate land use regulation “goes too far.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). There is a high bar to establish a takings claim, and the federal courts must undertake fact-specific analyses of “quintessentially local cases involving complex state-law issues.” Knick, 139 S. Ct. at 2181 (Kagan, J., dissenting) (internal quotations omitted).

Accordingly, there are strong arguments that municipal regulation of fracking, including bans, will not likely rise to the level of regulatory takings. See, e.g., Kevin Lynch, Regulation of Fracking Is Not a Taking of Private Property, 84 U. Cin. L. Rev. 38 (2016). For a start, depending on the relevant state law, principles of nuisance and reasonable use and local government’s constitutional and statutory police powers could shield municipalities from regulatory takings challenges. And due to the fact-specific nature of takings cases, in the context of fracking, factors such as the scope and nature of the property right, historical or potential future production technology, and valuation issues generally fall in favor of municipal regulations and even bans.

For example, in alleging a total taking, oil and gas companies must overcome the so-called “denominator problem.” The company must construe the scope of its property right (the denominator) so narrowly that a municipal ban would leave the property without any economically viable use. This may seem like a slam dunk in cases where the mineral estate has been severed. And most oil and gas companies merely lease the right to extract the oil and gas, generally for a limited term (e.g., up to 10 years), under leases that typically expire at the end of that term unless oil or gas is produced. However, there is compelling argument under the “parcel as a whole” rule favored by the Supreme Court that the proper scope of the property interest for a total taking is the fee simple estate, even when considering oil and gas leases of severed mineral estates. Thus, if a ban only impacts the short-term lease “strand” of the bundle of rights, then a total taking cannot occur. See, e.g., Tahoe-Sierra Preserv. Council v. Tahoe Reg. Planning Agency, 535 U.S. 302, 331 (2002). Additionally, because municipal bans generally prohibit a specific technology (fracking), a total taking cannot occur if the mineral estate has any remaining value, might one day be used to produce oil and gas via a different technology, or cannot be fracked to produce oil or gas in the first place. Consequently, it may prove difficult for an oil and gas company to define its interest in the mineral estate sufficiently narrowly, in both time and scope, to support a total taking claim. Nevertheless, with the increased evidence of the harms of fracking, state background principles and nuisance laws could likely preclude a total taking, so long as the ban does not “do more than duplicate the result that could have been achieved in the courts.” Lucas, 505 U.S. at 1029.

And even proving a partial regulatory takings claim is not an easy feat. This analysis focuses on the three factors laid out in Penn Central Transp. Co. v. New York, 438 U.S. 104, 124 (1978): (1) “the economic impact of the regulation on the claimant,” (2) “the extent the regulation has interfered with a distinct investment-backed expectation,” and (3) the “character of the governmental action.” As discussed above, depending on the breadth of the regulation and the scope of the property interest, an oil and gas company may face an uphill battle on the first factor. The second factor may be easiest for oil and gas companies to prove, particularly if they acquired their property interests before the municipal ban on fracking was enacted. However, the ever-expanding evidence of the harmful impacts of fracking on human health and the environment cuts strongly in favor of finding no takings under this analysis. Consequently, even if the first two factors weigh in favor of finding a partial regulatory taking, it is likely that a municipal ban still could be upheld as a valid exercise of government’s police powers. Thus, even if oil and gas companies all rush to federal court, it is not clear that they would be successful in asserting their takings claims.

But regardless of whether oil and gas companies jump through the door opened by Knick, the damage may already be done. The mere prospect of a lengthy and expensive federal lawsuit may cause local governments—especially cash-strapped small, rural municipalities—to throw their hands up in defeat. And with little federal case law on point and the inherent fact-specific state law inquiry required for federal Fifth Amendment challenges to local fracking regulations, there will be no bright line rule against which municipalities may weigh their bans. My hope is that, despite Knick, municipalities will not succumb to the chill, but will instead realize the strength of their legitimate authority to regulate land use in order to protect the health, safety, and welfare of their communities and the environment from the inherent dangers of fracking.

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BOOKS

Environmental Litigation: Law and Strategy
Karen A. Brown and Andreas M. Hogan, eds.

This second edition of the ABA Section of Environment, Energy, and Resources publication Environmental Litigation: Law and Strategy is a detailed compendium written specifically for environmental litigators. This book addresses the special nature of environmental litigation by focusing on “how environmental issues are addressed and resolved through litigation.” Editors Karen A. Brown and Andreas M. Hogan start out explaining why—despite certain inherent similarities to litigation generally—environmental litigation presents a “special” case. First, “litigation challenges presented by an environmental case frequently are idiosyncratic if not unique.” Second, “although the courts have been a forum for social change many times in our nation’s history, at this particular time no other litigation discipline presents the same ‘big social questions’ as environmental litigation.” The editors illustrate this point by noting the daily barrage of news coverage on global climate change and the increasing frequency of climate litigation playing out in the courts. Third, “the scope of what qualifies as ‘environmental litigation’ is huge, as evidenced by ‘dozens of federal statutes, scores of state statutes, hundreds of common law rules, and thousands of pages of regulations to be accounted for.’” Addressing this special nature of environmental litigation, the book covers a wide range of topics from the perspectives of over 20 private practitioners, current and former government attorneys, and academic authors.

Structurally, Environmental Litigation includes eight chapters each with practical guidance on key issues in environmental litigation. The first chapter provides a “high-level, practitioner-oriented overview” of judicial challenges to federal agency action. The chapter examines the close relationship between environmental agency regulatory action and environmental litigation by overviewing the types of agency actions commonly challenged in court, identifying threshold issues for judicial challenges to federal agency action. The chapter examines the close relationship between environmental agency regulatory action and environmental litigation by overviewing the types of agency actions commonly challenged in court, identifying threshold issues for judicial challenges, summarizing typical claims raised in regulatory challenges, and discussing remedies available to successful challengers.

Chapters 2 and 3 cover criminal and civil environmental enforcement. The criminal enforcement chapter begins by identifying key distinctions between environmental criminal prosecutions and ordinary criminal cases and then moves through a range of topics, from the initial development of environmental criminal law, case elements, and mens rea to pre-trial, trial, and sentencing considerations. The civil enforcement chapter discusses the broad and frequently used civil enforcement authorities of the major environmental statutes, the often resulting complex litigation, and how such cases can best be defended and resolved.

LITERARY RESOURCES

Reviewed by Madeline June Kass
Kiss, Bow, or Shake Hands: Courtrooms to Corporate Counsels

Terri Morrison

ABA Section of International Law, 2018

Kiss, Bow, or Shake Hands: Courtrooms to Corporate Counsels is a practical resource for environmental lawyers, academics, and students working or studying abroad. It’s a concise, throw-in-your-briefcase or stuff-in-your-back pocket guide that serves up useful tips and insights on cultural norms, customs, and acceptable social behavior in many countries. Author Terri Morrison notes that “[t]imes change. Cultures, however, are remarkably static.” Hence, she asserts that “[d]iscerning how cultures perceive and express truth differently around the world is one reason you need this book.” Point taken!

The first part of Kiss, Bow, or Shake Hands covers intercultural topics, including several chapters on first impressions. For example, at that first critical introduction, just how close is too close to stand, or too far? Morrison explains that while we are all “territorial creatures” with preferences regarding personal space, differences in preferred proximity can vary significantly across cultures (Brazilians prefer greetings at 1 to 1.5 feet, Americans prefer 2 to 2.5 feet, while Chinese prefer at least 2.5 to 3 feet of distance). Accordingly, she explains:

To many US citizens, Latin Americans seem to stand closer than normal. And in the Middle East, male friends may hold hands when walking together and speak with their faces less than a foot apart. In environments like Cairo, Rio, or Buenos Aires, trust and care are demonstrated and reinforced by close proximity. Backing away from a Brazilian may confuse and disturb them as much as touching a stranger in an elevator would alarm a German.

Next, do you kiss, bow, or shake hands? If so, how should you do each? The book offers advice on all three. And, as a “worst move” to avoid, Morrison warns “[d]o not shake hands with a bone-crushing grip, keep going too long, or yank your colleague’s hand toward you in an effort to act alpha.” Luckily, the insights in this section can help you avoid unintended miscommunications, minimize inadvertent slights, and reduce social blunders during your first meeting with new clients and colleagues.

The second part of Kiss, Bow, or Shake Hands contains “Country Briefs.” The briefs overview “intercultural and legal topics in 12 countries,” including “greetings, modus operandi optimus, legal systems, governments and their branches, communications styles, negotiating, decision-making, modus operandi malus,” and legal anecdotes. Each country brief, for example, includes eye contact norms. It’s certainly helpful to know that in France and Germany, eye contact tends to be prolonged and relatively constant, whereas in Japan and China eye contact tends toward more intermittent or sporadic. In another chapter, an anecdote from the Mexico brief impresses the importance and subtleties of even a single word in communications,

I thought [the word ahorita] meant “In a minute!” Or “[I’ll get to you shortly.” But actually, it means “I want to preserve this relationship, so I won’t insult you by flat out telling you I can’t do that.” And if they elongate the word, like ahoriiita, really, fuggedaboutit. To my Mexican associates, saying “ahoriiita” was clearly a polite way of saying “no.” Everyone understood except me.

Readers visiting Russia may benefit as well from the reminder that “drinking remains a large part of Russian culture.” The Russia brief informs us that table settings in this country typically include “a shot glass for vodka, a water glass, and a wine glass” and “once a bottle of vodka is opened, drinking continues until the bottle is empty.”

The final part of Kiss, Bow, or Shake Hands compiles “Country Tips,” single-page hint lists for practicing law in 44 additional countries. Having just returned from living and working in Brugge, I checked out the Belgium list first. The tips aligned well with my actual experience, such as “[f]or some Belgians, north and south are almost separate, rival countries”
and the chapter title itself, “Belgium: Common Sense and Compromise.” The variation and diversity of norms revealed in this part of Kiss, Bow, or Shake Hands highlight potential traps for international lawyers. For business in Israel, Morrison notes “[m]any Israelis have a very direct, emotional negotiating style. Confrontation does not equate to conflict to them.” But if you are in Thailand, she suggests “[b]e flexible and patient, and never lose control of your emotions. Do not be overly assertive or confrontational; it is extremely impolite.”

Here are just a few more examples to contemplate. In Switzerland, “[p]unctuality is absolutely required,” while in Brazil, “[d]o not take umbrage if your Brazilian associates are late.” In Sweden, “[t]ruth is determined by facts,” while in Bolivia, “[f]acts are acceptable as long as they do not contradict a Belizean’s person feelings and ideology.” And, while visiting Romania, “[s]hake hands often,” but in the United Arab Emirates, “[d]o not shake hands with veiled Emirati women.”

Wherever you are headed, Kiss, Bow, or Shake Hands offers practical advice on the culture, customs, and norms of the people you will encounter.

REPORTS

Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services

UNITED NATIONS INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES (IPBES), MAY 2019

The Global Assessment Report on Biodiversity and Ecosystem Services (Global Assessment) was issued in May 2019 as a summary for policy makers (Global Assessment Summary) and a set of six draft chapters. Reporting on the Global Assessment, the New York Times ran the dire headline “Humans Are Speeding Extinction and Altering the Natural World at an ‘Unprecedented’ Pace.” Brad Plumer, N.Y. Times, May 6, 2019. Equally ominous, the Washington Post began its article: “One million plant and animal species are on the verge of extinction, with alarming implications for human survival, according to a United Nations report.” Darryl Fears, One Million Species Face Extinction, U.N. Report Says. And Humans Will Suffer as a Result, Wash. Post, May 6, 2019. Needless to say, much of the report’s findings were not good news.

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) prepared the Global Assessment with the assistance of close to 150 scientists and 250 collaborating experts from 50 countries. Working over a three-year period, the authors reviewed as many as 15,000 scientific, indigenous, and government sources. Described as “one of the most comprehensive assessments of the planet’s health ever undertaken,” the Global Assessment covers changes over the past half century for all land-based ecosystems (except Antarctica). Bill Chappell & Nathan Rott, 1 Million Animal and Plant Species are at Risk of Extinction, U.N. Report Says, NPR All Things Considered, May 6, 2019. Representative of each of the 132 member nations (including the United States) approved the Summary for Policymakers during the 7th Session of the IPDES Plenary held in May 2019. See United Nations Sustainability Goals, www.un.org/sustainabledevelopment/

The Global Assessment Summary sets forth four core messages. First, “[n]ature and its vital contributions to people, which together embody biodiversity and ecosystem functions and services, are deteriorating worldwide.” Second, “[d]irect and indirect drivers of change have accelerated during the past 50 years.” Third, “[g]oals for conserving and sustainably using nature and achieving sustainability cannot be met by current trajectories, and goals for 2030 and beyond may only be achieved through transformative changes across economic, social, political and technological factors.” Regarding prior conservation efforts, the report recognizes that international policies and actions have brought about positive outcomes, but finds that such interventions have not been sufficient to stem the drivers of nature deterioration. The fourth and final core message of the report is that “[n]ature can be conserved, restored and used sustainably while simultaneously meeting other global societal goals through urgent and concerted efforts fostering transformative change.” The Global Assessment Summary and associated chapters flesh out each of these core messages with supporting data, statistics, graphs, and tables documenting loss of biodiversity and deteriorating natural ecosystems, and propose measures, interventions, and levers to achieve the transformative change necessary to conserve nature.

Emphasizing the final message—perhaps the Global Assessment’s only positive news—IPBES cochair Sir Robert Watson stated “[t]he report tells us that it is not too late to make a difference, but only if we start now at every level from local to global.” See United Nations Sustainability Goal. For those looking for measures to help save nature, many can be found in this report. 🌍

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ENVIRONMENT, ENERGY, AND RESOURCES

CALL FOR NOMINATIONS
2020 SEER AWARDS

The Section recognizes individuals, entities, and organizations that have made significant accomplishments or demonstrated recognized leadership in the environment, energy, and natural resources legal area. The awards listed below will be presented at the 28th Fall Conference in Nashville in October 2020.

- ABA Lifetime Achievement Award in Environmental, Energy, or Resources Law and Policy
- ABA Award for Excellence in Environmental, Energy, and Resources Stewardship
- Award for Distinguished Achievement in Environmental Law and Policy
- Environment, Energy, and Resources Dedication to Diversity and Justice
- Environment, Energy, and Resources Government Attorney of the Year Award
- Law Student Environment, Energy, and Resources Program of the Year Award
- State or Local Bar Environment, Energy, and Resources Program of the Year Award

NOMINATION DEADLINE: MAY 31, 2020

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- Superfund and Natural Resource Damages Litigation
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A JIU JITSU APPROACH TO CLIMATE DENIAL

Jonathan P. Scoll

A September 2018, survey by the Annenberg Public Policy Center of the University of Pennsylvania found that as many as 50 percent of those surveyed did not believe in anthropogenic climate change, depending on the how the question was framed. www.science-daily.com/releases/2019/05/190509133848.htm. While some current antiscientific beliefs, such as astrology, creationism, or the faking of the moon landing, have few social consequences, climate denial poses an immediate existential threat to humanity. Overcoming it is an imperative for scientists and policy makers. But how?

Recent work in psychology exploring the motivations underlying climate denial may point to a way. Climate and other science skeptics, write Professors Matthew Hornsey and Kelly Fielding, of the University of Queensland, Australia, engage in what they term “cognitive lawyering”—pursuing a biased search for information to support a preexisting attitude. In a process of “motivated reasoning,” such people sample, critique, and adopt evidence selectively to reinforce what they already want to believe. They thus invert the scientific method, seeking out facts and choosing those that reinforce their attitude. Strong arguments that contradict this attitude are ignored or dismissed, while weak arguments that support it are treated as definitive. Matthew J. Hornsey and Kelly S. Fielding, Attitude Roots and Jiu Jitsu Persuasion: Understanding and Overcoming the Motivated Rejection of Science, 72 American Psychologist 459-473 (2017), https://psycnet.apa.org/fulltext/2017-29745-009.pdf.

While what is on the surface is an anti-science opinion, what is critical to a counter-strategy is the underlying attitude that allows the opinion to survive even when challenged by evidence. Hornsey and Fielding have identified half a dozen such “attitude roots.” These include beliefs, ideologies, fears, worldviews, vested interests, and personal identity issues that may motivate a person to want to reject the consensus position.

While a short Back Page note cannot fully do justice to the depth of Hornsey’s and Fielding’s analysis, one attitude they describe is worth detailing, because, as they suggest, it appears common among Republicans. It is the position of a person’s viewpoint on a spectrum illustrating a “hierarchical” as opposed to an “egalitarian” worldview. They cite studies showing that persons seeing it as legitimate that privileges and obligations be assigned on the basis of social strata defined by demographics such as class, gender, and ethnicity are more likely to favor environmental exploitation that reinforces the dominance of humans over nature and to reject climate science than persons who endorse a social order in which social class is irrelevant to the distribution of entitlements and resources. Similarly, people with a fundamental motivation to see the world as just and orderly (a “just world” attitude), such that rewards and punishments are delivered to those who deserve them, are prone to dismissing or rationalizing away threatening climate information that violates this assumption.

The first step in what Hornsey and Fielding call “jiu jitsu persuasion” is to identify the attitude root; the second is to tailor one’s message accordingly. Their metaphor comes from martial art: jiu-jitsu coaches using an opponent’s force against him, rather than attempting to overcome it head-on. Instead of confronting a climate denier with repeated, forceful explication of the evidence—the default method of the scientist—jiu jitsu persuasion is about using insight into an attitude root to frame a message that harmonizes with that attitude.

Thus, for example, emphasizing green technologies and green jobs as good for business could be seen as consistent with the ideology of a person holding a hierarchical or highly individualistic (entrepreneurial) worldview. Similarly, a message that frames a pro-environmental action as patriotic and system-preserving (“protecting and preserving the American way of life”) could engage someone with what Hornsey and Fielding refer to as a “system justification” attitude, i.e., motivation to protect the prevailing social, political, and economic system. To the extent that climate skepticism is motivated by belief in a “just world,” climate inaction may be presented as a violation of justice to future generations. For a person with a conspiratorial worldview, rejection of science may be presented as part of a conspiracy among powerful vested interests, such as oil companies. To someone motivated to present a self-image as an independent and skeptical thinker, the message could be the inherently skeptical nature of science, or that anti-scientific thinking represents unthinking conformity.

(continued on page 43)
Current guide to environment cases and the courts

*Environmental Litigation*
Law and Strategy, Second Edition

**Kegan A. Brown and Andrea M. Hogan, Editors**

With challenges that are often unique and wide-ranging, environmental litigation can be an especially complex area of practice. *Environmental Litigation: Law and Strategy* provides practical guidance on the most critical issues in this area. With backgrounds in a variety of professional settings, chapter authors examine the most important topics in environmental litigation, including:

- Federal and state agency regulatory actions and the litigation challenging them
- Government enforcement in both the civil and criminal context
- Issues in specialized litigation, including CERCLA cost recovery and damages, citizen suits, toxic torts, pesticides and FIFRA, natural resource damages, and insurance recovery
To protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.

—New York City Landmarks Preservation Commission

If we don’t care about our past, we cannot hope for the future . . .
I care desperately about saving old buildings.

—Jacqueline Kennedy Onassis

How will we know it’s us without our past?

—John Steinbeck, *The Grapes of Wrath*