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**Traditional Cultural Properties:
A Potential Tool for Community-Driven Historic Preservation**

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Abstract

Traditional Cultural Properties: A Potential Tool for Community-Driven Historic Preservation

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National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* was first published in 1990 as a response to the Secretary of the Interior's report *Cultural Conservation*. Submitted to Congress and the President in 1983, *Cultural Conservation* "recommended in general that traditional cultural resources...be more systematically addressed in implementation of the National Historic Preservation Act and other historic preservation authorities."¹ Bulletin 38 defined Traditional Cultural Properties (TCPs), as those "whose significance is derived from the role the property plays in a community's historically rooted beliefs, customs, and practices."² Bulletin 38 provides guidance in determining whether properties of traditional cultural significance are potentially eligible for inclusion in the National Register of Historic Places (NRHP).³ This thesis investigates whether or not the NRHP Criteria, and guidelines set forth in Bulletin 38, provide adequate protection for non-tribal TCPs under the NHPA.

¹ Parker and King, "Bulletin 38," 2.

² Parker and King, "Bulletin 38," 1.

³ Parker and King, "Bulletin 38", 2.

An outline of applicable federal regulations and procedures for identification and evaluation of historic properties provides a framework for evaluating TCPs. Examination of four cases studies, Mt. Graham, Bighorn Medicine Wheel/Medicine Mountain, the Dune Shacks of the Peaked Hill Bars, and Gladesmen Folk Culture, illustrates several fundamental difficulties in the treatment of TCPs. First, emphasis on professionalization within the fields of Cultural Resource Management and Historic Preservation has discouraged consideration of community perspectives in the identification and evaluation of both tribal and non-tribal historic sites. Second, divergent viewpoints between federal agencies, Native American tribes, professional practitioners, and individual communities prevent meaningful consultation and cooperation. Third, the existing standards and guidelines for identification and evaluation of TCPs are vague, and subject to variable interpretation. Finally, a conflict of interest exists between agencies and communities when considering properties located on federally owned land.

In order for TCPs, especially non-tribal TCP's, to receive adequate attention and protection agencies and professionals need to change how they implement and interpret the procedures and guidelines set forth in the NHPA. This thesis concludes with suggestions for improving the process of identifying and evaluating non-tribal TCPs. It advocates creating independent, regional sub-committees to make informed recommendations and determinations of eligibility for TCPs located on federally owned land. Finally, it outlines strategies for promoting more community involvement in the NRHP review process through training programs administered by the Advisory Council on Historic Preservation.

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SECTION I: INTRODUCTION

This thesis explores whether or not the National Register Criteria and National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* are effective for the preservation of sites or places of importance to non-tribal communities. Bulletin 38 defines Traditional Cultural Properties (TCPs) as those “whose significance is derived from the role the property plays in a community's historically rooted beliefs, customs, and practices.”⁴ The inclusion of Bulletin 38 as a guidance document for the National Register of Historic Places (NRHP) was a pivotal development in United States federal preservation procedures. It encouraged government agencies and preservation professionals to consider places with traditional cultural significance as identified by communities themselves. Prior to its publication, historic preservation had primarily focused on properties with identifiable archeological or architectural significance. There was not a method for evaluating or protecting properties based upon the value placed on them by individual communities.

Section I summarizes the historic context that led to the inclusion of TCPs within the framework of the National Register. It outlines relevant federal regulations, in particular the National Historic Preservation Act (NHPA), as a means of understanding the broader context within which TCPs operate. Next, it breaks down the standards and guidelines provided in Bulletin 38 and the fundamentals of TCPs as an area of significance for nomination in the NRHP. This section also provides readers with an understanding of the benefits and risks involved in nominating a property to the National Register, both as a general historic property and, more specifically, as a TCP. It outlines the original intent behind the creation of TCPs, and how it has been implemented.

⁴ Parker and King, “Bulletin 38,” 1.

Section II explores two tribal case studies, Mt. Graham and the Bighorn Medicine Wheel, in order to provide a basis for understanding how TCPs have been used thus far. Using the tribal case studies, Section II identifies problems in the identification and evaluation of properties under the TCP framework. Section III is an in-depth examination of two recent non-tribal case studies, the Cape Cod dune shacks and Florida Gladesmen Folk Culture. In light of the issues identified in the earlier case studies, this section investigates points of divergence and convergence between how identification and evaluation occurs in tribal and non-tribal properties and exposes the specific issues non-tribal communities face when attempting to get federal acknowledgment as a TCP.

Section IV identifies the challenges and barriers to nominating and regulating TCPs under the NHRP, and provides recommendations that may assist government agencies and preservation professionals in dealing with the TCP framework as it applies to non-tribal properties.

Chapter 1: Background

HISTORIC CONTEXT

One of the most significant developments in U.S. federal preservation policy came with the enactment of Section 106 of the National Historic Preservation Act (NHPA). Passed in 1966, the Act requires federal agencies to take into account the effects that any federal “undertakings” may have on historic properties. Under NHPA historic properties are those that are listed, or considered eligible for listing, on the National Register of Historic Places (NRHP). The NHPA outlined four key components in creating a national preservation program. First, it provided grants to states to form ‘State Liaison Officers’, the precursors to the State Historic Preservation Officers (SHPO). Second, it formed the Advisory Council on Historic Preservation (ACHP) to inform Congress and the President about preservation issues. Third, it mandated the creation of the National Register of Historic Places (NRHP) as an inventory of sites of national, state, or local significance. Lastly, and perhaps most importantly, Section 106 of the NHPA outlined a five-step process for identifying, evaluating, and managing impacts to historic properties.⁵

Under the NHPA, Congress directed the Secretary of the Interior (SOI) to create and implement the National Register program. The SOI appointed representatives in each state to: survey and inventory their sites, buildings, and districts, develop statewide plans for their preservation, and to begin the process of restoration and rehabilitation of historic resources. Administered by the National Park Service (NPS), the NRHP was ultimately an expansion of the existing inventory of National Historic Landmarks (NHLs) that had been compiled up until that time, although it broadened the range of property types to

⁵ King, *Cultural Resources Laws*, 15; National Historic Preservation Act (N.H.P.A.), U.S.C. §§ 470 et. seq. (2010)

include archaeological sites, significant works of engineering, and historic districts.⁶ The creation of the NRHP was influential because it extended the scope of historic properties to include those with significance at a state and local level.⁷ It also put in place a tiered system of review for determining eligibility. First, documentation is submitted to the SHPO/THPO. If approved, information is sent to the Keeper (Keeper) of the National Register (the Department of the Interior (DOI) authority on eligibility authority who makes the final determination.

In 1971, Richard Nixon issued Executive Order No. 11593 with the goal of furthering the policies and practices of the NHPA.⁸ The Order directed the National Park Service (NPS) to creating a set of standards and guidelines for identifying and evaluating historic properties. It also required the ACHP to detail a set of non-binding procedures for compliance with Section 106. Lastly, it remedied a loophole in the 1966 regulations that stated agencies must only consider properties already listed on the Register and extended it to include properties determined eligible.⁹ After a series of court cases provided the necessary inertia, the government to granted the ACPH additional rule-making power, cleverly slipped into an unrelated presidential memorandum by President Carter. Thus, in 1979 the Section 106 procedures that had been outlined by the ACPH officially became codified in 36 CFR 800 (later revised in 1986 and 2000).¹⁰

In a 1980 amendment to the NHPA, developed with the help of the American Folklife Center, the NPS was instructed to conduct a report on “preserving and conserving the intangible elements of our cultural heritage such as arts, skills, folklife,

⁶ Stipe, *A Richer Heritage*, 41; 36 C.F.R. § 60.4 (2011)

⁷ Murtagh, *Keeping Time*, 55-56.

⁸ Exec. Order no. 11593, 36 Fed. Reg. 8,921 (May 15, 1971).

⁹ King, *Federal Planning*, 20.

¹⁰ King, *Cultural Resources Laws*, 81-83.

and folkways.”¹¹ In response to this amendment, the NPS issued the report *Cultural Conservation* in 1983, recommending that federal regulations concerning historic properties incorporate “the full range of cultural and historic resources included under the protection of the law by defining cultural and historic resources to include historic properties, folklife, and related lifeways.”¹² In response to this report, the NPS began preparing guidelines and directives for agencies practitioners of Historic Preservation (HP) in order to identify and document these types of cultural resources.

In 1985 Dr. Thomas F. King, then an archaeologist working at ACHP, began drafting a set of guidelines for dealing with sites of community importance, with a special emphasis on Native American spiritual sites. Having witnessed numerous cases where these sites were neglected or overlooked, King wanted to bring awareness to agencies and professionals about the importance of including them in the consideration of potential impacts. With the aid of his wife and National Park Service staffer Patricia Parker they drafted National Register Bulletin #38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, published in 1990.¹³

Upon initial publication, the major federal agencies tasked with Section 106 and National Environmental Policy Act (NEPA) compliance, the Bureau of Land Management (BLM), U.S. Forest Service (USFS), and Bureau of Indian Affairs (BIA), dismissed the bulletin as irrelevant to their work. As a result of how many agency preservation departments had been developed in the 1960s and 1970s, primarily based in archaeology, resources that lacked obvious physical evidence were considered beyond their scope. Upset with agencies’ apparent resistance to consideration of sites with

¹¹ 16 U.S.C. § 470a Section 502 (2010)

¹² Loomis, *Cultural Conservation*, 74.

¹³ King, *Places That Count*, 33-34.

traditional cultural significance, Native American organizations began lobbying to make amendments to the NHPA which would make their consideration mandatory.¹⁴

In 1992 Congress approved several amendments to NHPA which provided clarification, increased protection for tribal sites, and stipulations for tribal involvement in the process. The 1992 amendments established the creation of Tribal Historic Preservation Offices (THPOs), which allowed federally-recognized tribes to assume the responsibilities of the SHPO on tribal lands.¹⁵ They also specifically addressed tribal TCPs, stating that:

(A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register [and] (B) In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).¹⁶

National Environmental Policy Act (NEPA)

Congress in 1969 passed the National Environmental Policy Act (NEPA) in response to the growing trend towards environmental stewardship. NEPA requires all federal agencies to take into account the potential for significant impacts to the human environment for any major federal undertaking.¹⁷ Largely referred to as a piece of ‘umbrella’ legislation, considerations under NEPA spans a vast array of potential impacts, including historic properties.¹⁸

¹⁴ King, *Places That Count*, 35.

¹⁵ Stapp and Burney, *Tribal Cultural Resource Management*, 53.

¹⁶ 16 U.S.C. § 470 Section 101 (d)(6) (2010)

¹⁷ 42 U.S.C. §§ 4321-4347 (2010)

¹⁸ King, *Cultural Resources Laws*, 16.

CULTURAL RESOURCES MANAGEMENT (CRM)

Increased emphasis on historic preservation and the enactment of a series of regulations that promoted it in the latter half of the 20th century demanded a class of professionals equipped to carry out the necessary procedures for compliance. Although the earliest efforts in historic preservation in the United States were largely driven by community and local efforts, it eventually evolved into a professionalized field. Passage of the NHPA and NEPA, with their far-reaching implications and prescriptive requirements, meant that federal agencies needed internal infrastructures to handle the expanding workload. This required creating new departments and hiring qualified staff, and following in historical footsteps, this initially meant an emphasis on archaeology.¹⁹

Largely influenced by previous legislation (Antiquities Act of 1906, Historic Sites Act of 1935, Reservoir Salvage Act of 1960), the NHPA was originally implemented and administered in much the same way that the NPS had dealt with sites through the NHL and Historic American Building Survey (HABS) programs, which stressed commemoration, documentation, and scholarly viewpoints over community values.²⁰

Following the new procedures put in place by Executive Order 11593, NPS hired three archaeologists to serve as liaisons to assist agencies with preparing for the new compliance requirements. Although effective at convincing many of the larger agencies such as the U.S. Army Corps of Engineers (USACE), the BLM, and the USFS to hire preservation-specific staff, their background as archaeologists quickly became reflected in the way many federal agencies viewed preservation.²¹ This, in part, contributed to the association of preservation as archaeology that permeated agency mindsets for decades to follow.

¹⁹ King, *Cultural Resources Laws*, 23.

²⁰ King, *Places That Count*, 22-23.

²¹ King, *Cultural Resources Laws* 24.

By the 1970s, agencies were getting a handle on the procedural compliance requirements and beginning to establish preservation departments to handle them. Simultaneously, the once flexible standards for NRHP nomination became more narrow and systematized.²² While this trend toward specialization served to legitimize the field of preservation it also began to restrict the acceptable definitions of historical significance. Practitioners typically came from one of two backgrounds, architectural history or archaeology. This became readily apparent in the types sites typically considered during Section 106 and NEPA processes and the general lack community involvement in determinations of significance.²³

Many of the archaeologists that began working under the new regulations were forced to redefine their profession in light of its changing scope. Taking a cue from the emerging field of ‘natural resource management’ that had arisen from the environmental movement, some archaeologists began referring to their work as ‘cultural resources management (CRM)’.²⁴

²² King, *Places That Count*, 27.

²³ *Ibid.*, 27-28.

²⁴ King, *Cultural Resources Laws*, 25.

Chapter 2: The Section 106 Process

Regulations drafted by ACHP and codified in 36 CFR 800 provide a detailed, step-by-step process for identification, evaluation, and consultation. They also include specific time frames and procedures that federal agencies must follow.²⁵

STEP 1: INITIATION SECTION 106

The Section 106 process begins when an agency has established that their actions constitute an undertaking as stipulated in the provisions of NHPA. Under NHPA a federal undertaking includes any project, activity, or program that receives federal funding, or requires a federal permit, license, review, or approval.²⁶ Once that has been determined, agencies must notify the appropriate SHPO/THPO and begin plans to involve the public. Finally, the agency must identify and notify any additional persons or groups who may have a vested interest in the project and could be considered consulting parties. If the initial steps of Section 106 reveal that a project has the potential to impact historic properties, agencies must proceed to the next step of the process.²⁷

STEP 2: IDENTIFY HISTORIC PROPERTIES

Next, agencies must identify the scope of the project and determine the area of potential effect (APE). Once the APE has been established, the agency must investigate whether or not there are historic properties present. Agencies must make a ‘reasonable good faith effort’ to identify all potential historic properties.²⁸ Agencies can identify historic properties through background research, consultation with the SHPO/THPO and consulting parties, public comment meetings, and field studies. Identification of historic

²⁵ 36 C.F.R. § 800 (2011)

²⁶ 16 U.S.C. § 470f (2010)

²⁷ 36 C.F.R. § 800.3 (2011)

²⁸ 36 C.F.R. § 800.4(b)(1) (2011)

properties should be completed in accordance with the Secretary's Standards and Guidelines for Evaluation.²⁹ The regulations also provide that, "The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."³⁰

Reasonable Good Faith Effort

The question of what constitutes a reasonable and good faith effort to identify all potential historic properties under Section 106 has become a contentious issue, specifically when it concerns Native American sites. In the court case *Pueblo of Sandia v. United States*, the court found that, "A mere request for information is not necessarily sufficient to constitute the "reasonable effort" Section 106 requires."³¹ Reasonable efforts may include, but are not limited to: mailing letters to local tribes or interested parties, document searches regarding existence of any religious, cultural or historic significance associated with a site, hiring experts to conduct ethnography reports, or taking affidavits of tribal leaders or cultural experts.³² Agencies must understand they may not receive the requested documentation, especially from Native American tribes. In some cases a delayed response, or none at all, does not necessarily mean that a community or tribe is not interested. Concerns about confidentiality, lack of clear group leadership, short deadlines, or inadequate information about the project can all be potential reasons a tribe or community may not respond. Agencies should be aware of these issues as they proceed through the process. As one court stated:

²⁹ 36 C.F.R. § 800.4(b) (2011)

³⁰ 36 C.F.R. § 800.4(c)(1) (2011)

³¹ *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995).

³² 36 C.F.R. § 800.4(b)(1) (2011)

[The] reticence to disclose details of [a tribe's] cultural and religious practices [is] not unexpected. National Register Bulletin 38 warns that 'knowledge of traditional cultural values may not be shared readily with outsiders' as such information is 'regarded as powerful, even dangerous' in some societies.³³

To satisfy the "good faith" requirement an agency must consult with the SHPO/THPO and other potentially affected parties, conduct field investigations and research studies, and abide by all local, State, and tribal laws, standards and guidelines.³⁴As the court in the *Pueblo* case noted, "Indeed, consultation with the SHPO is an integral part of the Section 106 process. Affording the SHPO an opportunity to offer input on potential historic properties would be meaningless unless the SHPO has access to available, relevant information. Thus, "consultation" with the SHPO mandates an informed consultation."³⁵ The question of what constitutes a good faith effort under Section 106 is further discussed in the case study of Mt. Graham.

Evaluation of Eligibility

Once historic properties have been identified it is the agency's responsibility, in consultation with the SHPO/THPO, to apply the National Register Criteria for Evaluation to determine eligibility.³⁶ For the purposes of Section 106, a property does not require formal listing on the National Register; a determination of eligibility (DOE) is sufficient to require its consideration. The National Register states that:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that

³³ Pueblo, 50 F.3d at 861

³⁴ 36 C.F.R. §§ 800.4(b)(1) (2011)

³⁵ Pueblo, 50 F.3d at 862

³⁶ 36 C.F.R. §§ 60.4, 63.2, 800.4 (2011)

represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may likely yield, information important in prehistory or history.³⁷

If disputes arise over the potential eligibility of a historic property, an agency may request a determination from the Keeper of the National Register.

William J. Murtagh, National Trust program director and first Keeper of the Register, acknowledges that one of the fundamental challenges in determining significance is its subjective nature, claiming, "The National Register is essentially a humanistic program functioning in the nonhumanistic political and economic arenas of American society. At all levels, therefore, the value judgments of the professionals working in the program are extremely important."³⁸ States and municipalities identify and evaluate places of significance and then inform the federal government (the Keeper) which sites are most worthy of protection. Although the multi-tiered approach to determining eligibility ensures that trained professionals will be overseeing the process and taking into account differing viewpoints, the National Register process is still subject to value judgments often formed by a rather narrow group of individuals. At the end of the day, the Keeper has the final say and their decision is often based on a number of contributing factors, not all of which involve preservation.

STEP 3: ASSESS ADVERSE EFFECTS

If historic properties are found, the agency must assess what potential effects the undertaking may have on eligible historic properties, "giving consideration to the views...of interested persons," and determine whether the effects will be adverse to the property or community.³⁹ An undertaking has an "effect" when the undertaking "may

³⁷ 36 C.F.R. § 60.4 (2011)

³⁸ Murtagh, *Keeping Time*, 57.

³⁹ 36 C.F.R. §§ 800.4, 805(a) (2011)

directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the National Register.”⁴⁰ An "effect" is "adverse" when it may "diminish the integrity of the property's location, setting, design, materials, workmanship, feeling, or association."⁴¹ Examples of adverse effects include: physical destruction or damage, the introduction of elements that diminish integrity, alterations to the property inconsistent with the Secretary’s Standards, changes to the property’s use or setting, deterioration by neglect, or transfer, sale or lease of the property without adequate provisions for its protection.⁴²

STEP 4: RESOLVE ADVERSE EFFECTS

The regulations provide several methods for resolving adverse effects: continue consultation to develop possible alternatives or evaluate mitigation measures, involve the ACHP, prepare thorough documentation, provide opportunities for public comment, and formulate of Memoranda of Agreements.⁴³

The regulations also offer three conditions where effects normally considered adverse would be rendered not adverse. First, an agency may conduct appropriate research "when the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research."⁴⁴ Second, when the project is “limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property” as defined in the Secretary of the Interior’s Standards.⁴⁵ Finally, an adverse effect

⁴⁰ 36 C.F.R. § 800.5(a)(1) (2011)

⁴¹ 36 C.F.R. § 800.9 (b) (2011)

⁴² 36 C.F.R. § 800.5 (a)(2) (2011)

⁴³ 36 C.F.R. § 800.6 (2011)

⁴⁴ 36 C.F.R. § 800.9 (c)(1) (2011)

⁴⁵ 36 C.F.R. § 800.9 (c)(2) (2011)

becomes "not adverse" when the undertaking is limited to the "transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features."⁴⁶

If agencies and consulting parties are unable to reach a consensus the agency must submit all the relevant documents to the ACHP which will have the opportunity to provide a final comment on the project. Although agencies must take the ACHP's comments into consideration in their final decision-making process, they are not legally required to follow the recommendations. After weighing numerous factors, agencies may decide that adverse impacts to historic properties are necessary in order to facilitate the broader purpose and need of the project

SECTION 110 OF THE NHPA

Section 110 '*Federal agencies' responsibility to preserve and use historic properties*' was added to the NHPA during the 1980 amendments. Section 110 stipulated that federal agencies should, "use, to the maximum extent feasible, historic properties available to the agency" and establish preservation programs for the identification, evaluation, and nomination of said properties.⁴⁷ It also stated that

Such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and *cultural* values in compliance with section 106 of this Act and gives special consideration to the preservation of such values in the case of properties designated as having National significance.⁴⁸ (Emphasis added)

Agencies are required to give their historic properties 'full consideration in planning' in consultation with SHPOs/THPOs, other federal agencies, Native American tribes, and the

⁴⁶ 36 C.F.R. 800.9 (c)(3) (2011)

⁴⁷ 16 U.S.C. § 470h-2(a)(1) (2010)

⁴⁸ 16 U.S.C. § 470h-2(a)(2)(B) (2010)

public.⁴⁹ Although Section 110 mandates even stronger consideration of, and protection for, historic sites located on federally owned land, case studies discussed in subsequent chapters show that agencies don't always adhere to these principles.

⁴⁹ 16 U.S.C. §§ 470h-2(a)(2)(C-D) (2010)

Chapter 3: Bulletin 38 and Traditional Cultural Properties

Since the publication of Bulletin 38 in 1990, Traditional Cultural Properties have gradually become part of the language of Cultural Resources Management (CRM) and Historic Preservation (HP). Over the years, through an often arduous process of trial and error, Native American tribes have been able to achieve some success with using TCPs to protect their important places. Although a positive outcome for tribes, this has led to the narrow understanding of TCPs as specific to tribal properties. In recent years, however, non-tribal communities have begun exploring the possibility of TCPs as a potential preservation tool.

Paul R. Lusignan, historian and TCP specialist at the NPS, outlines some of the fundamental challenges that have arisen during the evolution of TCPs since the publication of Bulletin 38. From the outset, TCPs were never intended to be a separate category for nomination in the National Register. Rather, they were meant to be used as a tool for identifying places that were difficult to recognize, like Native American sacred sites, cultural landscapes, and even neighborhood communities. Bulletin 38 defines “traditional cultural significance” as “significance derived from the role the property plays in a community’s historically rooted beliefs, customs, and practices.”⁵⁰ Over the past 20 years, Lusignan found that the introduction of TCPs made very little change to what actually ended up getting listed on the NRHP. While many historic properties may seek nomination to the NRHP independent of the Section 106 process, TCPs are typically only identified and evaluated when it they appears they might be threatened by a Section 106 or NEPA undertaking, and most do not proceed past a determination of eligibility.⁵¹

⁵⁰ Parker and King, “Bulletin 38,” 1.

⁵¹ Lusignan, “Traditional Cultural Places,” 1.

It is important to clarify that Bulletin 38 is not a document with statutory authority but a guidance document that indicates how an agency (in this case the NPS) has interpreted the law. Thus, the Bulletin's purpose is to supplement existing guidelines for identifying and evaluating historic properties. National Register Bulletin 38 lays out a step-by-step process specific to places of traditional importance to communities.

STEP 1: IDENTIFYING TCPS

When a federal undertaking has triggered Section 106 an agency should conduct background research and field investigations early in the preservation planning process. As discussed previously, agencies should make a reasonable effort to determine the presence of historic properties. According to Bulletin 38, "What constitutes a reasonable effort depends in part on the likelihood that such properties may be present."⁵² This decision should be based on both the investigation of existing documentation and on-the-ground research involving local communities. Thus, "the way to determine what constitutes a reasonable effort to identify traditional cultural properties is to consult those who may ascribe cultural significance to locations within the study area."⁵³ Agencies should be able to identify potentially interested communities and groups through background research of the area's history, ethnography, and social and cultural make-up. Agencies are encouraged to contact the SHPO, conduct research in local libraries and at universities, and solicit information from local community members with a particular interest in the area's history or culture.

Once potential groups or communities have been identified, agencies should contact them directly. It should be noted that many groups or communities may not have clearly defined leadership, and sub-groups within a specific community may have

⁵² Parker and King, "Bulletin 38," 6.

⁵³ *Ibid.*, 7.

varying interests. Once the appropriate community members have been contacted, the agency should conduct fieldwork and documentation, with special attention to cultural sensitivity and confidentiality.⁵⁴

STEP 2: DETERMINING ELIGIBILITY

The first step in determining eligibility is to ensure that the entity under consideration is a “tangible property—that is, a district, site, building, structure, or object.”⁵⁵ Although the NRHP does not extend to intangible properties (resources that lack physical manifestation) it does not require material evidence of associated events or activities to consider a property eligible. This can create some confusion as many TCPs are unrecognizable to people outside of the community that ascribes significance to them. For this reason, consultation and dialogue with local citizens and community members is integral to the process of TCP identification and evaluation.

The second step is to evaluate a property’s integrity. Bulletin 38 advises that in order to determine the integrity of a place, two questions must be answered. First, does the property have an integral relationship to traditional cultural practices or beliefs? Second, is the condition of the property such that the relevant relationships survive?⁵⁶ Answering the first question comes from interaction with the community and gaining an understanding of how they perceive the property. If the community continues to value the property and finds it integral to the retention, transmission, or practice of their traditional practices or beliefs, than it most likely retains its integrity of relationship.

To determine whether the property maintains integrity of condition, agencies must refer to the seven aspects of integrity listed in NRHP guidelines: location, design, setting,

⁵⁴ Parker and King, “Bulletin 38,” 8.

⁵⁵ *Ibid.*, 11.

⁵⁶ *Ibid.*, 11.

materials, workmanship, feeling, and association. Again, evaluating integrity of condition needs to be considered in reference to the community that values it. As Bulletin 38 states, “Cultural values are dynamic, and can sometimes accommodate a good deal of change.”⁵⁷ In the case of TCPs, physical alteration of the structure, property, or setting does not necessarily detract from its traditional significance. For example, the El Tiradito shrine in Tucson, Arizona, has been relocated several times due to threats from urban renewal. Primarily associated with the Mexican-American community in Tucson, it is also revered by many Native Americans and Anglo-Americans. Known to locals as “The Wishing Shrine,” El Tiradito is dedicated to a sinner who died a violent and dishonorable death and it is commonly believed that if you light a candle at night and make a wish, and return to find the candle still lit in the morning, your wish will come true.⁵⁸

Once integrity has been established, the property should be evaluated with reference to the four National Register criteria. TCPs are most commonly nominated under Criterion A (association with events that have made a significant contribution to broad patterns of our history). Agencies should also make sure that none of the NRHP criteria considerations make the property ineligible. As mentioned before, TCPs should be considered on the basis of their value to the community, thus certain criteria considerations may not automatically make a property ineligible.

BENEFITS AND RISKS

In order to determine the efficacy of TCPs as a tool for community preservation, it is important to understand the costs and benefits of listing a property on the National Register and the difference between a typical historic property and a TCP. In some cases,

⁵⁷ Parker and King, “Bulletin 38,” 12.

⁵⁸ Garrison, “El Tiradito (Wishing Shrine),” 2-4.

communities may have may achieve more control and protection from a determination of eligibility (DOE) rather than a full-scale nomination.

Getting a property listed or determined eligible for the NRHP may provide additional protection when a federal undertaking has been proposed. Acknowledgement of a site's eligibility can be a powerful bargaining tool that gives consulting parties leverage to negotiate mitigation measures. In some cases, interested parties have used publicity to garner public support and advocate for its protection. Agencies and companies would often rather work with consulting parties towards finding an acceptable solution than face public scrutiny or lengthy legal battles. Furthermore, some states and municipal laws and regulations provide additional protection for sites listed on the NRHP.⁵⁹

As with all properties nominated to the National Register, listing does not necessarily guarantee that a place or site will be preserved or protected. Under Section 106 and NEPA listing on the National Register or a DOE only requires federal agencies to *consider* potential impacts that their undertaking will have on historic properties. Agencies may determine that in light of the purpose and need of the undertaking or its cumulative impacts, adverse effects to historic properties cannot be avoided. Furthermore, official listing on the National Register can heighten awareness of a site or place, resulting in increased access and tourism. For some properties, this is has proven to be detrimental to the significance and integrity of the site. Although it has been mentioned that publicizing threats to historic properties can be an instrument for preservation, the cases of Mt. Graham and the Cape Cod dune shacks prove that garnering public support does not always lead to a favorable outcome.

⁵⁹ King, *Places That Count*, 159.

Due to concerns about cultural sensitivity and confidentiality Thomas King suggests that most TCPs are better off without ever being formally listed on the National Register.⁶⁰ This is especially true of Native American sacred sites. More than conventional NRHP properties, TCPs can be especially affected by formal designation. A DOE achieves the same consideration under Section 106 and NEPA but does not require publishing culturally sensitive information. As subsequent case studies will illustrate, pursuing formal listing can expose the site to more intensive scrutiny, and a finding of ineligibility by the Keeper may leave communities with little recourse for action.

⁶⁰ King, *Places That Count*, 158-166.

SECTION II: TRIBAL TCP CASE STUDIES

Chapter 4: Bighorn Medicine Wheel/Medicine Mountain, Wyoming

OVERVIEW

The Bighorn Medicine Wheel/Medicine Mountain National Historic Landmark District encompasses over 4,000 acres within the Bighorn National Forest in Wyoming.⁶¹ The district is a diverse complex of historical, archaeological, and cultural resources ranging from cairns, trails, tepee rings, and archaeological sites to contemporary ceremonial staging areas, medicinal plant gathering places, sweat lodges, and vision quest structures.⁶² Historically, it was only the Bighorn Medicine Wheel (Wheel) that excited scholars and scientists; however, Northern Plains tribes considered the entire area and associated features as an extensive and dynamic cultural landscape significant for its traditional and religious purposes.⁶³

At roughly 80 feet in diameter, the Wheel is the largest of its kind in the United States.⁶⁴ It is composed of a central cairn with 28 spokes that radiate outward to a larger rock circle where six additional cairns sit around the perimeter.⁶⁵ Although exact dates are unknown, research suggests the Wheel was constructed over a span of several hundred years during the Late Historic Period and dated samples from the surrounding area indicate consistent use of the Wheel for at least 7,000 years.⁶⁶ Although precise data linking historic users to contemporary Native American tribes is speculative, Northern Plains tribes have proven continuous use for ceremonies, rituals, and vision quests for

⁶¹ Simmons et al., "Medicine Wheel/Medicine Mountain," 4.

⁶² Chapman, "The Bighorn Medicine Wheel," 5-6.

⁶³ *Ibid.*, 5-6.

⁶⁴ Gulliford, *Sacred Objects and Sacred Places*, 135-6.

⁶⁵ *Ibid.*, 135-6.

⁶⁶ Chapman, "The Bighorn Medicine Wheel," 6.

over a hundred years.⁶⁷ Contemporary Native American tribes that ascribe spiritual and cultural importance to the area include (but are not limited to) the Northern and Southern Cheyenne, several bands of the Sioux, the Crow, the Blackfeet, the Shoshone, and the Northern and Southern Arapahoe. The Medicine Wheel and associated area are important in the religious traditions of Northern Plains tribes as a pilgrimage site, the location for fasts and prayer, and for the practice of the traditional sun dance.⁶⁸ A site of peace and neutrality, weapons have always been forbidden at the Wheel, even during times of war, and the sacred nature of the place overrides any tribal hostility.⁶⁹

HISTORIC CONTEXT

Euro-American settlers and prospectors first began arriving in northern Wyoming in the 1880s, and by the 1890s small mining camps and towns began dotting the landscape. Recently cleared of its indigenous occupants, Mormons were recruited from Utah to settle the region, and they eventually founded the town of Lovell, Wyoming.⁷⁰

In 1897 the U.S. government established the Bighorn National Forest, one of the first in the nation. Almost as soon as Euro-American settlers arrived in the region, the Wheel was recognized significant and became an object of interest and scientific study to anthropologists and archaeologists. Historical documents, photographs, and journals from the turn of the century indicate signs of ongoing use at the site, however few tribes were willing to talk about the Wheel, let alone acknowledge they visited it.⁷¹

As early as 1915 the Department of the Interior began receiving requests to consider the Wheel as a potential national monument. In the ensuing decades the U.S.

⁶⁷ Simmons et al., "Medicine Wheel/Medicine Mountain," 24.

⁶⁸ *Ibid.*, 30.

⁶⁹ *Ibid.*, 260.

⁷⁰ *Ibid.*, 39.

⁷¹ *Ibid.*, 40.

Forest Service (USFS) implemented safety measures such as creating a rock barrier wall to prevent livestock damage. Interest in making the site a national monument was renewed in the 1940s, but eventually put on hold during the World Wars. Finally, in 1968, Lovell Mayor Cal Taggart, the Wyoming Archaeological Society, and the State Archives and Historical Department requested federal protection for the site from the USFS. The Bighorn Medicine Wheel was listed on the NRHP in 1969 and designated a National Historic Landmark (NHL) in 1970, both for archaeological significance.⁷²

After almost a century of keeping their traditional and religious associations with the Wheel concealed, in the 1970s and 1980s tribal members began resuming traditional activities at the Wheel, drawing the attention of USFS management staff.⁷³ As the land managing agency of the Bighorn National Forest, the USFS operated in accordance with their policy of multiple-use as mandated by the Sustained Yield Act of 1960. The Act required that the USFS balance economic, environmental, and social objectives to maximize the use of available natural resources including timber, minerals, water, and wildlife.⁷⁴ The National Forest Management Act (NFMA) of 1979 further clarified the duties of the USFS, requiring detailed management plans for each designated Forest and provisions for public participation.⁷⁵ Within this context of viewing the Forests by their potential resource value, it is not surprising that USFS staff had a hard time considering the Wheel and surrounding features as more than an archaeological site. Thus, in 1988, the USFS formulated a proposal to promote tourism and generate revenue. Lovell businessmen supported the USFS's plan for the construction of new access roads, restroom facilities, high capacity parking lots, and huts to accommodate visitors. The

⁷² Simmons et al., "Medicine Wheel/Medicine Mountain," 44.

⁷³ *Ibid.*, 45.

⁷⁴ Multiple-Use and Sustained Yield Act of 1960, 16 U.S.C. § 528 (2010)

⁷⁵ 16 U.S.C. §§ 1600-1614 (2010)

pièce de résistance (and eventual catalyst for a lengthy dispute) was their proposal to install an immense metal platform, cantilevered over the Wheel to give tourists a Birdseye view.⁷⁶

Realizing they finally needed to speak up, tribal leaders began voicing concerns about the impacts that increased visitation and access would have on the religious and traditional cultural significance of the site. They founded the Medicine Wheel Alliance (Alliance) to oppose the project, charging the USFS with failure to fulfill their obligations under the NHPA.⁷⁷ According to the law as amended in 1992, NHLs are afforded additional protection beyond NRHP properties:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisor Council on Historic Preservation a reasonable opportunity to comment on the undertaking.⁷⁸

The USFS contended that because the site was listed solely for its archaeological significance, their proposed plans would have no adverse effect. What followed was one of the most contentious and embittered Section 106 review processes in Wyoming history.⁷⁹

U.S. Forest Service and Northern Plains Tribes

Fraught with tension from the outset, the USFS and Northern Plains tribes entered into formal consultation as mandated by Section 106. From the perspective of the tribes, the USFS's attitude appeared to be, 'as long as we follow protocol, we don't actually have to do much to preserve the site.' Statements like the one allegedly made by a district

⁷⁶ Gulliford, *Sacred Objects and Sacred Places*, 130.

⁷⁷ *Ibid.*, 140.

⁷⁸ 16 U.S.C. §§ 470h-2(f) (2010)

⁷⁹ Chapman, "The Bighorn Medicine Wheel," 3.

ranger at a public meeting that, as far as he was concerned, "that pile of rocks could be bulldozed over the side of the mountain," only widened the divide.⁸⁰ Adhering to their multiple-use land management policy, the USFS understood the value of the Wheel as an archaeological resource, but lacked the ability to comprehend its broader cultural significance. In a salient example, the USFS responded to public comments in a report published in 1989, grouping all 659 Indian petitions (85% of the total comments) into a single comment.⁸¹ After decades of silence, the sudden and vehement assertions of religious and traditional significance must have appeared to come out of nowhere. Instead of fostering communication, however, it appeared as though the USFS was attempting to silence the opposition.⁸² It became evident that vastly different viewpoints and perspectives were preventing successful cooperation.

Finally, in 1990 the USFS and other agency officials began to recognize that part of the problem was an overall lack of knowledge about the site. Although archaeological and anthropological research had been conducted at the Wheel for decades there had never been a comprehensive study exploring the entire area as one inter-connected cultural landscape. Especially problematic was the fact that there had never been an ethnographic or ethnohistoric study of the cultural and spiritual value of the site to Native American tribes. Although reticent, the USFS finally agreed to conduct a comprehensive study of a wider geographic area. Albeit a step in the right direction, the USFS continued to struggle with cultural sensitivity throughout the 1990s, further polarizing the situation and undermining their credibility as a responsible agency in the eyes of the tribes. Another poignant example of misunderstanding, USFS officials attempted to coordinate a

⁸⁰ Gulliford, *Sacred Objects and Sacred Places*, 8.

⁸¹ Chapman, "The Bighorn Medicine Wheel," 7.

⁸² Gulliford, *Sacred Objects and Sacred Places*, 139.

public comment meeting in Riverton, Wyoming. Chosen because of its proximity to the Wind River Indian Reservation, the agency hoped it would foster tribal participation. When no tribal members attended, the USFS assumed they had no interest. In fact, the date of the meeting had been scheduled at a time that was traditionally reserved for ceremonial sun dances.⁸³

While the Section 106 review process was still underway, visitation to the Wheel dramatically increased in the early 1990s, reaching an astounding 70,000 in 1993 (compared to the approximately 2,100 in 1967).⁸⁴ Ill-equipped for the exponential growth in traffic, the site began to exhibit signs of extensive deterioration. Roads and trails were degraded, native vegetation was trampled, and tourists littered the area with random items meant as ‘prayer offerings’. The situation had finally become so desperate that both the USFS and the Northern Plains tribes realized they needed to work together to ensure the area’s protection. In 1994 they created short-term programmatic agreements that could be implemented until the Section 106 process had been completed. It provided protection measures for the site and granted tribes special access for spiritual or traditional use.⁸⁵

RESULTS

Finally, in 1996 the tribes and USFS signed a Memorandum of Agreement to implement the newly drafted Historic Preservation Plan and incorporate it into the overall Forest management plan.⁸⁶ After nearly eight years of consultation, the resulting document was what Andrew Gulliford called, “one of the best models of cooperation among tribes and federal agencies.”⁸⁷ Some major achievements of the Historic

⁸³ Chapman, "The Bighorn Medicine Wheel," 7.

⁸⁴ *Ibid.*, 8.

⁸⁵ *Ibid.*, 8.

⁸⁶ Association of American Indian Affairs, “Medicine Wheel Agreement Reached”, 1.

⁸⁷ Gulliford, *Sacred Objects and Sacred Places*, 141.

Preservation Plan include: the exclusion of USFS multiple-use provisions, increased land-use restrictions, establishment of a 23,000 acre ‘area of consultation,’ special access to the site for Native American tribes, monitoring protocols, an updated NHL nomination to reflect its religious and cultural significance, and the requirement that USFS staff members are educated about the site by tribal members prior to working there.⁸⁸

In 2011, the Secretary of the Interior approved the updated National Historic Landmark nomination for the Medicine Wheel and Medicine Mountain. Whereas the original NHL nomination included only the 110 acres surrounding the Wheel itself, and was considered significant solely for its value as an archaeological site, the updated nomination reflects almost two decades of consultation and negotiation between Native American tribes and federal agencies. The new NHL District encompasses over 4,000 acres and its area of significance was expanded to include its religious and traditional cultural value to Northern Plains tribes.⁸⁹

DISCUSSION

The fight to protect the Bighorn Medicine Wheel/Medicine Mountain District lasted over two decades. The Section 106 consultation process in the 1990s was laden with hostility, and numerous USFS employees either quit or were transferred throughout the course of the project. Proponents of preservation were faced with death threats and local newspaper articles slung personal insults, false accusations, and spread other misinformation to sway the argument.⁹⁰ Eventually, agencies and Native American tribes managed to come together in the creation a mutually beneficial agreement for land management, and presumably all parties learned valuable lessons along the way.

⁸⁸ Gulliford, *Sacred Objects and Sacred Places*, 142; Chapman, "The Bighorn Medicine Wheel," 7-8.

⁸⁹ Simmons et al., "Medicine Wheel/Medicine Mountain," 4-5.

⁹⁰ Gulliford, *Sacred Objects and Sacred Places*, 141.

At the outset, divergences in perspective and worldview kept tribes and agencies locked in adversarial positions. Long-standing USFS land-management policies clashed with Native American notions of holistic and spiritual landscapes. As member of the Medicine Wheel Alliance Nicole Price put it:

Herein lies the great division between the white, dominant culture and the Native Americans, for the dominant society lives with a commemorative religion, which commemorates a person, place or event in the past. The Native American religion, on the other hand, is one of renewal.⁹¹

Rooted in a scientific understanding of significance, adverse effect was determined on the basis of the Wheel's archaeological importance rather than cultural and traditional values. Fortunately, the new Preservation Plan has addressed this problem by requiring new USFS staff to meet with tribal members and learn about the site's sacred meaning.

As evidence of another measure of success on the part of the tribes, the updated NHL nomination includes a comprehensive discussion of the ongoing relationship between Northern Plains tribes and the Medicine Mountain region. Significantly, however, the nomination includes no mention of the drawn-out struggle that preceded its creation. In the section titled 'Efforts to Recognize and Protect the Medicine Wheel,' the authors seem to gloss over this bit of history, preferring to insinuate that the entire process went smoothly and that the agencies were more than willing to cooperate:

In response to improvement plans to accommodate increasing tourism, the Native American community requested increased protection and recognition of the Bighorn Medicine Wheel as an important Native American religious site. Fieldwork conducted by archaeologists subsequent to the 1970 NHL designation strongly suggested the Medicine Wheel was merely part of a much larger complex of sites... The involved government agencies agreed to cooperate in sponsoring a study designed to establish boundaries encompassing all historic, ethnographic,

⁹¹ Price, "Tourism and the Bighorn Medicine Wheel," 261.

and archaeological sites associated with the landscape that included the Medicine Wheel.⁹²

While certainly a NHL nomination is not the appropriate place for a lengthy explanation of the ins-and-outs of the consultation process, the absence of any mention of it diminishes the accomplishment of Native American tribes who had struggled for over twenty years for the site's preservation.

⁹² Simmons et al., "Medicine Wheel/Medicine Mountain," 45.

Chapter 5: Mt. Graham, Arizona

OVERVIEW

Rising to a height of 10,720 feet, Mt. Graham lies within the Pinaleno Mountains of the Coronado National Forest in southeast Arizona. The fourth highest mountain in the state, Mt. Graham is unique in that it contains five distinct ecological life zones, more than any other mountain in the country.⁹³ Mt. Graham also plays a significant role in the religious and cultural traditions of the Western Apache people. The White Mountain, San Carlos, and Yavapai Apache tribes view Mt. Graham (or Dzil Nchaa Si'An) and its surrounding landscape as a holy place whose existence is vital to their spiritual and cultural well-being.⁹⁴ Mt. Graham is associated with traditional practices and beliefs that include medicinal herb gathering, prayer, and the location of burial grounds. According to Apache oral tradition, Dzil Nchaa Si'An is also one of the four sacred mountains that mark the homeland boundaries of Apache territory.⁹⁵ Lastly, the mountain is a spiritual being, the source of sacred power, and the home of the Gaan (supernatural spirits).⁹⁶

HISTORIC CONTEXT

During the systematic containment of Native American tribes during the late 19th century, numerous Apache tribes were placed on the White Mountain Apache and San Carlos Apache Indian Reservations in Arizona. Although the area of the San Carlos reservation initially included Mt. Graham, by 1873 the government had passed an executive order to reclaim the Mountain as part of a Forest reserve.⁹⁷ In the ensuing years the government continued to consolidate their landholdings, rounding up different bands

⁹³ Brandt , "The Fight for Dzil Nchaa Si An," 1.

⁹⁴ Gulliford, *Sacred Objects and Sacred Places*, 132.

⁹⁵ Sanderson and Koprowski, *Mt. Graham Red Squirrel*, 13-17.

⁹⁶ Helfrich, *A Mountain of Politics*, 46.

⁹⁷ Brandt , "The Fight for Dzil Nchaa Si An," 1.

of Apache tribes and forcing them onto the progressively smaller San Carlos Apache Reservation. Different bands of Apache, many of whom were enemies with little or no cultural connections, were placed onto the barren plot of land.

The mountain and surrounding area were quickly put to use for timber harvesting, and arriving settlers began plowing the adjacent land to grow alfalfa and cotton.⁹⁸ In 1885 the nearby city of Tucson chartered the territory's first institution of higher education, the University of Arizona, which began holding classes in 1891. During the Depression era of the 1930s young men flocked to the region to take advantage of Civilian Conservation Corps (CCC) jobs, living in camps and working to clear roads, trails, and improve numerous other park facilities within the Pinaleño Mountains.⁹⁹

The Mt. Graham International Observatory

In 1981 the University of Arizona (UA), in conjunction with a conglomeration of international organizations including the Vatican, the Max Planck Institute in Germany, and the Arcetri Observatory in Italy, began scouting Arizona mountaintops in search of a location to place seven large-scale astronomical telescopes. In 1984 the group announced that they had settled on the Pinaleño mountains as the ideal location for the Mt. Graham International Observatory (MGIO).¹⁰⁰ Located within the federally owned and managed Coronado National Forest, the project triggered review under NEPA, NHPA, and the National Forest Management Act (NFMA).¹⁰¹ While conducting cultural and environmental studies of the area, the USFS identified evidence of three Native American archaeological sites located on Mt. Graham's Hawk Peak and High Peak that were considered eligible for the National Register. After consulting with the Arizona SHPO

⁹⁸ Hefrich, *A Mountain of Politics*, 29.

⁹⁹ "A Little Bit of History," Mount Graham International Observatory.

¹⁰⁰ Gulliford, *Sacred Objects and Sacred Places*, 132.

¹⁰¹ *Apache Survival Coalition v. United States*, 21 F.3d 895 (1994), 3.

regarding mitigation measures, the USFS delegated their Section 106 consultation duties to the UA. The UA sent out notification letters to 19 local Native American tribes, including the San Carlos Apache, to notify them of the archaeological discovery. Only two tribes responded, the Ak-Chin tribe and the Hopi.¹⁰² Acting under the NFMA, in 1985 the USFS completed a Forest Plan draft Environmental Statement that outlining the findings of their environmental and cultural resource surveys. The San Carlos Apache tribe requested a copy of the document and met with the Forest Supervisor to discuss concerns about property rights in the area, however raised no concerns regarding cultural resources on Mt. Graham.¹⁰³ That same year, the UA submitted their cultural resources report to the USFS, indicating that they had notified all potentially interested tribes and had successfully completed consultation with one tribe, the Zuni tribe of New Mexico. The UA, the USFS, the Arizona SHPO, the Zuni tribe of New Mexico, and the ACHP all concurred that there would be no adverse effects to cultural resources within the project area. A draft Environmental Impact Statement was published in October of 1986 a copy of which was sent to the San Carlos Apache for review and comment.¹⁰⁴ In May of 1988 the USFS sent postcards to local tribes asking if they wished to receive copies of the Final EIS. Although the San Carlos Apache indicated no interest and requested removal from the mailing list, the USFS later asserted that they continued to notify the tribe of the project's progress.¹⁰⁵

The first of the project's many major setbacks, in 1986 the USFS discovered the presence of the rare Mt. Graham red squirrel, and in 1987 it was officially included on the

¹⁰² Apache, 21 F.3d at 3.

¹⁰³ Apache, 21 F.3d at 3.

¹⁰⁴ Apache, 21 F.3d at 4.

¹⁰⁵ Apache, 21 F.3d at 4.

Endangered Species list.¹⁰⁶ The UA feared that the endangered animal's discovery might have the potential to delay the project indefinitely and cause their international sponsors to drop out. They began exploring ways to expedite the environmental review process by contacting their extensive political network and hiring powerful lobbyists and lawyers to promote their cause in Washington. The UA contacted U.S. Senators and Congressmen to aid in political maneuvering to circumvent the lengthy process of compliance with federal laws intended to protect natural and cultural resources.¹⁰⁷ On November 18, 1988 their efforts were rewarded when Congress passed the Arizona-Idaho Conservation Act (AICA).¹⁰⁸

Included in Section VI of the Act was a rider that effectively exempt the project from further compliance under the Endangered Species Act (ESA) and NEPA, with the caveat that only the first three telescopes could be built until they showed the project had no adverse effect on the Mt. Graham squirrel.¹⁰⁹ Although the USFS was finalizing their EIS, Section 607 of Title VI stated that as far as the first three telescopes went, "the requirements of section 102(2)(c) of the National Environmental Policy Act of 1969 shall be deemed to have been satisfied."¹¹⁰ The UA had been successful in streamlining the environmental and cultural review process, and in January of 1989 the USFS published their official Record of Decision granting the special use permit outlined in the AICA.¹¹¹

San Carlos Apache Opposition

In 1990, with the backing of the San Carlos Apache Tribal Council, Ola Cassadores Davis, a prominent tribal elder and daughter of a legendary Apache medicine

¹⁰⁶ Apache, 21 F.3d at 4.

¹⁰⁷ Welch, "White Eyes' Lies," 76.

¹⁰⁸ Arizona-Idaho Conservation Act of 1988, 100 Pub. L. No. 100-696, 601; 102 Stat. 4571

¹⁰⁹ Arizona-Idaho Conservation Act of 1988, 100 Pub. L. No. 100-696, 601; 102 Stat. 4597

¹¹⁰ Arizona-Idaho Conservation Act of 1988, 100 Pub. L. No. 100-696, 607; 102 Stat. 4597

¹¹¹ Apache, 21 F.3d at 5.

man, founded the non-profit Apache Survival Coalition (ASC) to officially protest the project. In an August, 1990 letter sent to the Southwestern Regional Forester, Tribal Chairman Buck Kitcheyan informed the USFS of the religious significance of Mt. Graham to the San Carlos Apache people. Kitcheyan claimed the USFS had never contacted the San Carlos Apache tribe about the potential cultural or religious impacts of the project and threatened legal action if construction on the project was not immediately halted.¹¹² The Regional Forester then responded via letter requesting a meeting with the tribe, but received no response.¹¹³ On August 19, 1991 the Apache Survival Coalition filed a legal complaint against the USFS and UA claiming they had failed to comply with their responsibilities under the NHPA and sought an injunction to halt the project.¹¹⁴

Davis and the ASC solicited the expertise of anthropologists Keith Basso and Elizabeth Brandt to assist with the documentation and recordation of the historical and religious significance of the area to the Apache people. Basso and Brandt compiled numerous pieces of written evidence and ethnography to support the ASC's claims, as well as physical evidence manifested in artifacts and shrines.¹¹⁵ Located within the University's own archives were extensive field notes taken by anthropologist Grenville Goodwin in the 1930s linking Apache cultural and religious traditions to Mt. Graham.

Armed with tangible historical evidence, an extensive professional resume (including a position as adjunct professor at UA), and an intimate knowledge and understanding of Western Apache culture, anthropologist Keith Basso attempted to explain the Apache culture and religion in terms that agency officials and University administrators could understand. Basso described how the Apache religion which "rests

¹¹² Kitcheyan to Jolly, 31 August, 1995, *Apache Opposition*, 9.

¹¹³ Apache, 21 F.3d at 5.

¹¹⁴ Apache, 21 F.3d at 5.

¹¹⁵ Brandt, "The Fight for Dzil Nchaa Si An," 5.

upon a set of abstract metaphysical assumptions about the origins of the universe,”¹¹⁶ is fundamentally at odds with Western perceptions and worldviews. For the Western Apache their religious beliefs are intricately tied to their sense of self and cultural identity. They believe that all things on earth possess their own sacred power that must be treated with respect and veneration. In particular, mountains are believed to hold not only their own intrinsic power, but are also the home of other supernatural beings and the lifeblood of an inter-connected ecosystem of spiritual creatures.¹¹⁷ According to Apache beliefs, the proposed project would irreversibly desecrate their sacred landscape and anger the sacred spirits that dwell there.

In stark contrast to Basso’s statement is the noteworthy affidavit of Jesuit priest, astronomer, UA professor, and then Vatican Observatory Director George V. Coyne.¹¹⁸ Both a religious man and an academic, Coyne was unsympathetic to the Apache’s commitment to preserve their sacred traditions. He believed spirituality lay in two dimensions; the interior (personal) relationship and the external manifestation of this relationship. According to Coyne external expressions of faith (attending Church, burning candles) are secondary to the inner relationship which is “one of the most radical, free, expressions of selfhood that one can imagine.”¹¹⁹ He stated that reliance on these outward manifestations for spiritual connection was contrary to both the tenets of faith and the mandates of life in a ‘civil society.’ This perspective is the antithesis of the Apache worldview which considers everything on earth; objects, places, and living beings as connected and integral to living a meaningful existence.

¹¹⁶ Basso, Affidavit, *Apache Opposition*, 59-62.

¹¹⁷ *Ibid.*, 59-62.

¹¹⁸ Coyne, Affidavit, *Apache Opposition*, 68.

¹¹⁹ *Ibid.*, 68.

Ironically, after deriding the need for outward expressions of the holy, Coyne addresses the Apache's claims by stating:

I have said that to the best of my knowledge there is no documentary or archeological evidence or any other reasonable argument that establishes either the sacred character of the specific observatory site or such a sacred character to Mt. Graham as a whole as to preclude other uses of the mountain (in this case an astronomical observatory.)¹²⁰

In demanding physical, scientific evidence of the site's sacred purpose, Coyne contradicts himself. If spirituality is internal, no amount of archaeological data or written documentation could prove it. Fortunately, Coyne goes on to clarify that according to his beliefs, which consider the earth and nature temporal entities and only the human soul eternal, sacred-ness has no business manifesting itself in an earthly, physical location. In an almost perfectly orchestrated demonstration of the cultural barriers at the root of the Mt. Graham controversy, Coyne concluded his statement with surprising fervor, asserting:

While I admit that these are very personal views, based upon a limited religious outlook, I do think that they indicate how extremely important it is, in any view of things, to carefully distinguish: Earth, nature, cultures, human beings....As both an environmentalist and a religious person I find that it is precisely the failure to make the distinctions I mention above that has created a kind of environmentalism and religiosity to which I cannot subscribe and which must be suppressed with all the force I can muster.¹²¹

This statement, frequently referenced by academics, environmentalists, tribes, and project protesters, became a symbol of the deep ideological rifts at the heart of the Mt. Graham controversy.

Despite the compelling evidence of the site's religious and traditional significance, both the district court and the Ninth Circuit Court of Appeals found in favor

¹²⁰ Coyne, Affidavit, *Apache Opposition*, 2.

¹²¹ *Ibid.*, 2.

of the USFS. They made their decision on the basis that the ASC had filed their claim too late, especially considering they hadn't shown interest in participating in the NHPA process anytime from its initiation in 1985 to the Record of Decision in 1989.¹²² Moreover, by the time the ASC had filed their claim, the first phase of the project was already 35% complete and an estimated 4 million dollars had been spent.¹²³ Because their claim was denied, the court was never required to evaluate whether or not the USFS had successfully fulfilled their obligations under the NHPA. Held to the standards of a reasonable and good faith effort and the guidelines for identification efforts listed in Bulletin 38, it seems unlikely the agency was in compliance. Given that a majority of the historical documentation was housed within the UA's own archives, thorough research should have revealed that traditional cultural properties were present.

Following their failure in the court system, the ASC continued to protest the project in the court of public opinion. Over the ensuing years, members of the San Carlos Apache tribal government and the ASC, eventually joined by the White Mountain Apache Tribe and the National Congress of American Indians, sent letters to Congressmen, Italian and German members of parliament, Catholic bishops, federal agency officials, and President Clinton to protest the desecration of their sacred landscape.¹²⁴

In 1995 the San Carlos Apache tribe sent a letter to Charles W. Cartwright, Jr., Regional Forester for the Southwest Region of the USFS, asserting that Mt. Graham was eligible for the NRHP as a TCP. The tribe requested that the USFS conduct an

¹²² Apache, 21 F.3d at 10-13.

¹²³ Apache, 21 F.3d at 18.

¹²⁴ Letters, *Apache Opposition*.

ethnographic report that would include input from the tribe and would ultimately be included in the forthcoming EIS underway for phase two of the project.¹²⁵

RESULTS

In 2002 the NPS determined that Mt. Graham was eligible for inclusion in the NRHP under Criteria A for its significance as a TCP to the White Mountain Apache, the San Carlos Apache, and the Yavapai Apache. The tribes, the USFS, and the NPS all agreed that the existing Forest Service administrative boundary of the Pinaleño Mountains would also be used to delineate the boundaries of the historic site, totalling a whopping 198,879 acres.¹²⁶

In 2004 the USFS and UA proposed replacement of a microwave communications system at the MGIO. Although the AICA was still in effect it did not include exemption from Section 106, and the tribes requested the ACHP assist in consultation efforts. Based on its recent TCP status, the tribes wanted the UA and USFS to outline a plan for removal of the telescopes that had already been built. The tribes also asserted that the microwaves would further interfere with the sacred nature of the site and requested any future structures be constructed of wood rather than metal. After ongoing consultation between the agencies and tribes, in 2006 the USFS terminated consultation.¹²⁷

In 2009 the USFS's special permit expired, requiring the agency to undergo NHPA and NEPA review for renewal. In 2010 the environmental advocacy group Biological Diversity filed a notice of intent to sue the USFS for failing to comply with the Endangered Species Act.¹²⁸ In July, 2011, the USFS and UA were still operating under a temporary permit while environmental and cultural studies were being conducted. As of

¹²⁵ Miles to Cartwright, Jr., 12 July, 1995, *Apache Opposition*, 31.

¹²⁶ National Park Service, "Mt. Graham (DZIL NCHAA SI'AN)," 2-4.

¹²⁷ ACHP Case Digest, "Termination Update," 2-3.

¹²⁸ Mt. Graham Coalition, "Notice of Intent"

2012, the results of these studies and the subsequent fate of the MGIO still have yet to be determined.

DISCUSSION

Although the Mt. Graham project was proposed several years prior to the publication of Bulletin 38, the USFS was nonetheless responsible for complying with Section 106 by making a ‘reasonable and good faith effort’ to identify potential historic properties within the area. Based on the availability of information regarding Mt. Graham’s significance, agency officials should have been aware of its religious and traditional association to the Apache people. Although the San Carlos Apache were contacted several times by the agency and the UA, and didn’t voice any concerns until well into the project’s development, the regulations and guidance documents clearly stipulate that failure to respond should not automatically be considered lack of interest. Section 110 of the NHPA also outlines specific provisions for dealing with historic properties on federally-owned land, requiring agencies to identify potentially eligible historic properties and maintain them in a way that “considers the preservation of their...cultural values.”¹²⁹

The case of Mt. Graham illustrates the failure of an agency to fulfill their obligations under federal law. Had the USFS done their due diligence they might have avoided years of contention and legal battles. In this case, the political and economic motivations of the project took precedence over its implications to cultural and environmental resources. The UA and their partners invested millions of dollars into the project, an undoubted windfall for the state and federal government in the form of leasing agreements and tax revenue.

¹²⁹ 16 U.S.C. § 470h-2(a)(2)(B) (2010)

Although it took over a decade to achieve federal recognition of Mt. Graham's religious and cultural significance, official nomination to the NRHP as a TCP in 2002 did provide the site with some level of protection. The Max Planck Institute pulled their support of the project (although they cited concerns about its position for stargazing), and future construction has been put on hold while environmental and cultural reviews are being conducted.¹³⁰

¹³⁰ Helfrich, *A Mountain of Politics*, 283.

SECTION III: NON-TRIBAL TCP CASE STUDIES

Chapter 6: Dune Shacks of the Peaked Hill Bars, Massachusetts

OVERVIEW

The Cape Cod peninsula stretches eastward from Massachusetts into the Atlantic Ocean, curving inward to enclose a deep bay known as Provincetown Harbor. The neighboring towns of Provincetown, Wellfleet, and Truro that comprise the Lower Cape Community refer to this narrow, windswept strip of land as the Backshore. Scattered along the outer banks, crude wooden shelters stand exposed to the harsh winds and salty sea air. First constructed in the early-to-mid 19th century by a combination of Portuguese/Yankee fisherman and members of the Provincetown Fine Arts Colony, the dune shacks have become a significant fixture in the culture of the Lower Cape. The distinct dune shack society consists of a core group of residents connected by multi-generational kinship ties and close friendships. The extended network of short-term and temporary residents comes from the artist and writer community, through loose associations with core residents, or as recipients of the National Park Service (NPS) lottery system. Traditional cultural significance of the dune shacks is derived from the connection to ‘Old Provincetown’ and its history of Portuguese/Yankee fishermen, the development of the first American Fine Arts Colony, and an environmental ethic that espouses natural living. Specific traditional practices associated with the dune shack society include foraging for wild food, salvaging, fishing, and tranquil contemplation free from the distractions of urban life.¹³¹

¹³¹ Wolfe and Ferguson, *Traditional Cultural Property Assessment*, 6.

HISTORIC CONTEXT

Sheltered from the fierce Atlantic storms, the cozy inlet of Provincetown Harbor provided a safe haven for explorers in the New World. In 1620, the famous Mayflower Pilgrims made their first stop in the Harbor before traveling across the bay to establish the Plymouth colony. Founded almost a century later by English (Yankee) fishermen, the permanent settlement of Provincetown grew rapidly. In the 19th century Portuguese sailors and whalers began arriving in increasing numbers, becoming an integral part of the new community and creating a culturally diverse population.¹³²

In the mid-19th century the Massachusetts Humane Society began constructing a series of “charity huts” along the Cape Code seashore as refuges for shipwrecked mariners. In 1872 the U.S. Life Saving Service was established (a precursor to the U.S. Coast Guard which took over in 1915), and began constructing life-saving stations on the shore. Along the barrier dunes of the outer banks the Peaked Hill Station was constructed to service Provincetown and the surrounding area.¹³³ Solitary ‘surfmen’ took up post in these stations, keeping watch for ships in distress and providing rescue and shelter when needed. Isolated at their posts, Provincetown surfmen (primarily from the Portuguese community) began constructing crude dwellings near their stations to encourage family members or friends to visit them during the summer months.¹³⁴ The coastguardsmen and their families, who typically owned the shacks, eventually began renting them out to fisherman and locals searching for a brief respite from the stress of life in town.

Distinct from its maritime history, in the late 19th century Provincetown became a destination for artists and writers attracted to its rustic simplicity and stark landscape. When the infamous storm the Portland Gale swept New England in 1898 Provincetown

¹³² Wolfe, *Dwelling in the Dunes*, 15.

¹³³ *Ibid.*, 2.

¹³⁴ *Ibid.*, 18.

Harbor was devastated. In response, the local community began a tourism campaign to compensate for the enormous economic losses to the fishing industry. Artists and writers responded to the call, founding art schools in the area and making Provincetown the first American Fine Arts Colony.¹³⁵

As the years progressed however, many of the artists arriving in Provincetown in search of solitude and creative inspiration were poor and, unable to afford housing, constructed crude dwellings from salvage materials or rented out existing shacks. The Portuguese/Yankee community helped support and sustain the starving artists, often renting out their dune shacks at low rates and providing much needed food and supplies. At the fringes of society, this group of bohemian artists found a sense of community in their shared experience as outsiders.¹³⁶ Eventually the Old Provincetown maritime community and the new Fine Arts Colony merged cultures, united in their appreciation of the landscape.

In the 1920s a distinct community linked to the dune shacks of the Backshore began to emerge within Provincetown and the Lower Cape. Between the 1920s and the 1960s the dune shacks of the Backshore were occupied by a close-knit community of over three generations of families and their extended network of friends. Oral traditions passed down by long-term dune dwellers contributed to the unique and deeply personal connection with the shacks and their associated way of life.¹³⁷

Cape Cod National Seashore

With the rise of urban development and the resulting increase in destination tourism in the 1950s, Cape Cod became a desirable location for both full-time and

¹³⁵ Provincetown Office of Tourism, "Timeline"

¹³⁶ Wolfe, *Dwelling in the Dunes*, 25-27.

¹³⁷ *Ibid.*, 29.

seasonal residency. Real estate developers were eager to acquire land along the coast for commercial development. Prior to this turn of events, shack dwellers had no formal system of organization, only a shared appreciation for the values of privacy, autonomy, and personal freedom. Sensing a threat to their peace, solitude, and connection with nature, residents of the Backshore dune shacks began a grass-roots preservation movement to stem the tide of real estate development and tourism. Believing it would ensure protection for the landscape, shack dwellers lobbied for the creation of a national park.¹³⁸ In 1961 Congress established the Cape Cod National Seashore (CCNS) which encompassed 44,600 coastal and inland acres, including the Provincetown Backshore.¹³⁹

Although dune shack residents initially supported the creation of the CCNS, hoping to protect their culture and way of life, it quickly became evident that changes to the status quo were imminent. Operated by the NPS under the Department of the Interior, the CCNS assumed ownership of the Backshore lands through a transfer of title from the State of Massachusetts.¹⁴⁰ Following official park designation, CCNS began the process of acquiring privately owned lands within the park boundaries and determined that the dune shacks did not qualify for private ownership within the park. Although many of the shack residents held deeds for the structures themselves, a majority had no legal claim to the lands beneath them. Residents feared that relinquishing title of their shacks to the federal government would ultimately lead to their destruction, and formed the Great Cottage Home Owners Association to advocate for their preservation.¹⁴¹

The activities of the CCNS dramatically changed the relationship between dune shack residents and the federal government. After numerous attempts to preserve their

¹³⁸ Wolfe, *Dwelling in the Dunes*, 34.

¹³⁹ National Park Service, "Nature & Science

¹⁴⁰ Wolfe, *Dwelling in the Dunes*, 34.

¹⁴¹ *Ibid.*, 35.

rights of use, some resulting in extensive court battles, all but one of the shacks succumbed to legal ownership by the federal government. The CCNS established individual termination dates for families through ‘reservations of use’ that consisted of either a 25-year transferable permit or a lifetime, non-transferable permit depending on the specific family’s proven relationship with the dune shack.¹⁴²

Dune shack resident Paul Tasha, whose family was bequeathed their shack by legendary poet and writer Harry Kemp, acutely described the unfortunate consequences of the implementation of government land management policies. He related:

We didn’t have a real title. You didn’t need one back then. It wasn’t the traditional way of doing things, not to belabor “traditional,” but it just wasn’t. You didn’t need to do that. It wasn’t necessary. And now, oh boy, now, you better have everything lawyerized.... We could have had it done. No one would have objected, because nobody really wanted anything out there [on the dunes]. It was only very eccentric weirdos who wanted to be out there... We had at one point asked the Park to give us life tenancy, for those of us that were alive, because they were giving life tenancy to some people. But they wouldn’t do it. The guy told me, “Frankly, you’re apt to live too long and we’d like to have this all over with within 25 years, so we’ll give you 25 years. Or, you can prove you own it legally with a deed and a title and we’ll leave you alone. But if all you have is that little piece of paper from that drunk poet, then you don’t have a leg to stand on. So you can leave now, if you don’t want to take the 25-year deal.”¹⁴³

Whereas the dune shacks had once been a source of solitude, contemplation, and peace for his family and friends, the knowledge of its eventual loss irreversibly altered its meaning. Tasha described how a place of happiness and fond memories became one of overwhelming sadness and loss. Following these changes in policy and usage, he compared subsequent trips to the dune shack with his experience visiting his dying mother, knowing every time that it might be his last.¹⁴⁴

¹⁴² Wolfe, *Dwelling in the Dunes*, 35.

¹⁴³ *Ibid.*, 42.

¹⁴⁴ *Ibid.*, 42.

In a 1985 event that shocked and horrified the dune shack community, the CCNS demolished the shack of Charlie “Dune Charlie” Schmid just a week after his death. Dune Charlie had been a full-time resident of the Backshore since moving into his shack in the late 1950s. An avid student of birds, Charlie was considered eccentric and reclusive by locals but was nonetheless a fixture in community lore. Charlie had been granted a lifetime reservation for his shack during the 1960s and when he finally succumbed to illness the CCNS wasted little time in bulldozing his shack.¹⁴⁵ Ethnographer Robert J. Wolfe claimed the incident “became an iconic story in the local oral tradition,” making it abundantly clear to residents that the CCNS intended to demolish the shacks once reservation permits expired.¹⁴⁶ This event sparked the revival of the preservation movement and the creation of the nonprofit organization the Peaked Hill Trust.

The Trust began compiling information to support their claim that the dune shacks were a valuable historic resource. When the Massachusetts Historical Commission held a meeting in Provincetown, over 200 people showed up in support of the cause.¹⁴⁷ In a town of just over 3,000 people this was a significant portion of the population. Schecter described the results of the meeting:

Initially the Cape Cod National Seashore found that the shacks were not eligible for listing. By the procedure they follow, the finding goes to the Massachusetts Historical Commission. By and large the Massachusetts Historic Commission has no reason to disagree with the local park service representatives. In this particular instance, they received more comments on this issue than they had received on any issue they ever dealt with in their history.¹⁴⁸

In 1989 the Massachusetts Historical Commission found the shacks and surrounding landscape eligible for the National Register. The area was considered eligible for “its role

¹⁴⁵ Wolfe, *Dwelling in the Dunes*, 38.

¹⁴⁶ *Ibid.*, 38.

¹⁴⁷ *Ibid.*, 39.

¹⁴⁸ *Ibid.*, 39.

in the historical development of American art, literature, and theater, for its association with the life of American poet Harry Kemp, and in the area of architecture.”¹⁴⁹ Although not officially listed at the time, the Peaked Hill Bars Historic District covered approximately two miles of dune ridges and roughly 1,500 acres of dune shack viewsheds. The period of significance was listed as 1890-1960, essentially using CCNS acquisition as the terminal date for historical significance.¹⁵⁰

Once the dune shacks had been officially recognized as an important historic resource and afforded some level of protection, the CCNS started establishing management plans. Following the Dune Charlie incident, other reservation use permits began to expire, and the CCNS made arrangements for continued use and maintenance with selected families, or opted to delegate this responsibility to private entities. Three of the shacks were put in the care of nonprofit organizations (including the Peaked Hill Trust) with the caveat that they include artist-in-residence programs. These federally mandated programs drastically altered the historical patterns of use that had characterized the dune shack community for almost a century.¹⁵¹ In 2005 ten of the shacks had come under the legal management of the CCNS with others soon to follow suit. The CCNS turned to the Cape Cod National Seashore Advisory Committee and the local dune shack subcommittee for advice on how to proceed. In 2003 the Provincetown Board of Selectmen, in response to a report by the subcommittee, inquired about the possibility of the dune shacks as a Traditional Cultural Property for their association with the long-term of community of residents, who under NPS guidelines might be considered “traditionally associated peoples.”¹⁵²

¹⁴⁹ Walters to Matthews, 26 January, 2007.

¹⁵⁰ Wolfe, *Dwelling in the Dunes*, 40.

¹⁵¹ *Ibid.*, 40.

¹⁵² *Ibid.*, 41.

National Register Evaluation

In 2005 the NPS contracted Robert J. Wolfe to conduct an ethnographical study of the Peaked Hill Bars dune shack community. A cultural anthropologist with over twenty years' experience documenting traditional communities on public lands in Alaska, Wolfe made four different trips to the Lower Cape to perform ethnographic research. During one of his visits Wolfe spent over a month conducting formal interviews with 47 shack residents and recorded over 40 hours of interviews, which served as the primary source material for his report.¹⁵³

Published in 2005 the report, *Dwelling in the Dunes: Traditional Use of the Peaked Hill Bars Historic District*, found the dune shacks eligible for listing as a TCP based on their significance to the broad Provincetown/Lower Cape community and its sub-group of dune shack residents. The Massachusetts SHPO concurred with this finding but the NPS requested a second opinion. NPS hired an additional consultant, T.J. Ferguson, to review Wolfe's assessment and to co-author another report specifically evaluating the dune shacks using the Bulletin 38 guidelines. Published in 2006, Wolfe and Ferguson's *Traditional Cultural Property Assessment* reiterated the original finding of eligibility.

In a letter dated January 26, 2007 Chrysandra Walters, the NPS Acting Regional Director Northeast, requested an official determination of eligibility from the Keeper of the National Register. Despite findings in two professionally written reports and concurrence from the Massachusetts SHPO, Walters did not agree that the dune shack society described by Wolfe constituted a cohesive community. Walters argued that because some of the core families had their permanent residences a long distance from

¹⁵³ Wolfe, *Dwelling in the Dunes*, 10-13.

the area, or even out-of state, and the extended network of users also came from diverse locales, they were not clearly linked to the broader Lower Cape Community.¹⁵⁴

Perhaps the most disconcerting assertion to appear in the letter is Walters' interpretation of the guidelines set forth in Bulletin 38. She claimed:

The Regional Office staff concludes that the dune shack 'community' does not fit into the meaning of the term 'community' as used in the National Register Bulletin 38. Bulletin 38 uses the term 'living community' and 'traditional cultural group' but does not define these terms. The guidelines *clearly refer to a traditional community as one that is defined by location related to year-round residences or employment*, and characterized by a distinct cultural organization with cohesion and integration.¹⁵⁵ (Emphasis added)

Walters made a series of value judgments in her interpretation of the guidelines, none of which are found in the text of Bulletin 38. At first acknowledging that the Bulletin never defines community, she then makes an emphatic declaration of what it 'clearly' intended. Bulletin 38 never dictates a community must be defined by its location, only that the location must be important in maintaining their traditional beliefs or practices. It also never implies that year-round residency or employment is required to prove significance. In fact, many TCPs are only visited or used sporadically, as is the case of the Bighorn Medicine Wheel.

In her response to the eligibility request in May of 2007, Keeper Janet Matthews concurred with Walters that the dune shacks were ineligible as a TCP. Matthews claimed that her decision was based primarily on the finding that "the District does not meet one of the most important characteristics of a TCP—that **“the group/community must have existed historically and the same group/community continues to the present.”**¹⁵⁶

(Emphasis original)

¹⁵⁴ Walters to Matthews, 26 January 2007.

¹⁵⁵ Walters to Matthews, 26 January 2007.

¹⁵⁶ Matthews to Walters, 24 May 2007.

The Keeper agreed with Walters that although the ethnographic reports clearly established the Lower Cape Community with its historical roots in both the Portuguese/Yankee and Fine Arts Colony communities, they failed to successfully relate the more narrowly defined dune shack community to this broader context. The Keeper claimed that the reports focused solely on the long-term ‘core’ user group of the dune shacks instead of incorporating the broader spectrum of short-term residents, friends, transient users, and visitors. Matthews cited public comment meeting letters to support the claim ethnographic reports insufficiently outlined the full spectrum of groups associated with the shacks, thus undermining the assertion that the ‘Dune Shack Society’ was a cohesive community with historical continuity. The Keeper stated that, “The groups that are culturally identified with the District were historically (and continue to be) fluid, evolving, and different from one year to the next.”¹⁵⁷

RESULTS

On March 15, 2012 the Dune Shacks of the Peaked Hill Bars Historic District were formally listed on the National Register, but not as a TCP.¹⁵⁸ Covering almost 2,000 acres, the District was found eligible for listing under Criteria A, B, C, and D and was considered significant at both the national and local levels.¹⁵⁹ Although the initial 1989 DOE listed the period of significance as 1920-1961 (interestingly, the year the NPS took over ownership and management), the National Register nomination submitted in 2011 listed it as 1920-1991 (the last year one of the shacks was rebuilt).¹⁶⁰

¹⁵⁷ Matthews to Walters, 24 May 2007.

¹⁵⁸ Burke, “Historic District on the National Register,”

¹⁵⁹ Scofield et al., “Dune Shacks of Peaked Hill Bars Historic District,” 26-27.

¹⁶⁰ *Ibid.*, 26.

DISCUSSION

The case of the Dune Shacks of the Peaked Hill Bars District brings to light a number of disconcerting challenges for the use of TCPs for non-tribal properties. Subjective evaluation standards with little basis in Bulletin 38, conflicts of interest on NPS-owned properties, and adverse impacts of top-down land managing policies all precluded the successful nomination of the shacks as a TCP.

The conclusions of both Walters and Matthews reveal profound problems with the NRHP and TCP process. Whereas Bulletin 38 states that “the traditional cultural significance of a historic property... [is] derived from the role the property plays in the community’s historically rooted beliefs, customs, and practices, ” NPS misinterpreted it to mean ‘the role the community plays in the significance of the property.’¹⁶¹ This had the effect of putting the ‘community’ up for evaluation, rather than the property.

Although the Keeper’s opinion in the case of the dune shacks did not preclude the District’s eligibility for the Register (as determined in 1989), it did set an unfortunate precedent for the future of TCPs. Places that may not otherwise be eligible under the existing four criteria may have a hard time meeting these newly imposed standards of community membership and usage. In a posting on his blog ‘CRM Plus,’ Thomas King responded to the Keeper’s decision, maintaining that Matthew’s self-created standard, which she labeled ‘the most important’ criteria for evaluating a TCP, is not actually present anywhere within Bulletin 38.¹⁶² Rather, King asserted that the Keeper’s actions reveal either failure to understand the purpose and language of Bulletin 38 or the willful imposition of an unattainable requirement.

¹⁶¹ Parker and King, “Bulletin 38,” 1.

¹⁶² King, “Comment on the Keeper’s Opinion.”

Chapter 7: Gladesmen Folk Culture, Florida

OVERVIEW

Southern Florida is home to a vast ecosystem characterized by extensive marshes, wetlands, lakes, and sawgrass prairies known as the Everglades. The most expansive contiguous swamplands in the United States, the Everglades are also notable for being almost entirely flat.¹⁶³ The harsh yet diverse environment has received enormous attention through the designation of numerous National and State Parks, Wildlife Preserves, and Water Conservation Areas.¹⁶⁴ Florida Gladesmen Folk culture developed in response to the unique ecosystem of the Everglades, predicated on the subsistence practices of late 19th century settlers who survived solely off the abundance of its natural resources. Traditional Gladesmen activities consisted of subsistence fishing, livestock herding, moonshine brewing, alligator hunting, bird plume collecting, frogging, and turtling.¹⁶⁵ Conversion into a National Park in the 1940s irreversibly altered the traditional practices of the community, and the relationship with the landscape went from one of subsistence to one rooted in recreation. Contemporary Gladesmen culture is largely based on a shared appreciation for similar activities, including airboating, swamp buggy riding, fishing, and a profound respect for the Everglades environment.¹⁶⁶

HISTORIC CONTEXT

Prior to the arrival of the Spanish, Florida was first occupied by several Native American tribes now known as the Seminole and Miccosukee Tribes of Florida. Eventually, American settlers began migrating into the region at the beginning of the 19th

¹⁶³ New South Associates, “*Modern Gladesmen Culture*” 21-22.

¹⁶⁴ *Ibid.*, 32.

¹⁶⁵ *Ibid.*, 54-60.

¹⁶⁶ *Ibid.*, 69.

century with the desire to incorporate the area into the Union. In pursuit of this goal, Andrew Jackson and his troops invaded Florida in 1818, beginning the First Seminole War. In 1821, having overthrown the Spanish, the Territory of Florida was officially adopted under the control of the United States. Although the Spanish had succumbed to defeat, the Native American tribes refused to relinquish their lands. What followed was the Second Seminole War, a lengthy and brutal battle which ended in devastating losses to the tribes and forced their thinned population to recede into the Everglades.¹⁶⁷

Once hostilities in the region had subsided, the U.S. government began a campaign to attract new settlers. In 1842 the Armed Occupation Act was enacted, promising free land to brave settlers who could improve and protect their parcel of land against Native Americans and the inhospitable environment for at least five years. Settlers began flooding in, enticed by the promise of abundant land and rich soil.¹⁶⁸

The arriving settlers of Anglo and Celtic heritage brought their cultural traditions and values, reflected in their subsistence practices and strong kinship relationships. Known for being outspoken, brash, and fiery tempered, this distinct group of settlers were referred to as ‘Crackers.’¹⁶⁹ Although the connotation of the term ‘Cracker’ evolved over the years, during the 18th and 19th centuries it typically meant lower-class Scottish and Irish ‘rogue settlers’ in the deep South.¹⁷⁰ Uneducated but willing to brave the hostile Florida swamps and coastal areas in search of opportunity and land, this distinct population sustained life in the wilderness through three means; ranching, farming, and fishing.¹⁷¹

¹⁶⁷ New South Associates, “*Modern Gladesmen Culture*” 35-36.

¹⁶⁸ *Ibid.*, 38.

¹⁶⁹ *Ibid.*, 43.

¹⁷⁰ *Ibid.*, 44.

¹⁷¹ *Ibid.*, 44.

Florida really took off during the 20th century as frontier families began to recognize the area's potential as a prime cattle ranching destination. The cattle industry also gave rise to the timber industry, which required clearing vast tracks of land for livestock grazing. Cracker culture that had developed during the 18th and 19th century separated into distinct subcultures based on location, environment, and available resources. The Crackers that inhabited the swamplands bordering the Everglades took advantage of the diverse ecosystem by selling animal pelts and exotic bird plumes, subsistence hunting and fishing. This community, while retaining the hallmark Cracker characteristics of independence, self-reliance, and adaptability, emerged as unique 'Gladesmen' sub-culture.¹⁷²

In addition to the rise of cattle ranching and logging, the early 20th century in Florida was also a period of rapid land development. Sensing the opportunity for growth and expansion, in 1903 the government acquired title to the Everglades and the U.S. Army Corps of Engineers (USACE) began a massive project of canal-building and dredging to open the area for land use. Amidst the land boom of the 1920s, the abundance of infrastructure projects in Florida meant a windfall of jobs and a growing labor force. Employment opportunities abounded at sawmills, for road construction, and in the rising industry of commercial hunting and fishing.¹⁷³

Changes to the social and economic climate of Florida during the mid-20th century altered the traditional Gladesmen lifestyle. It went from one almost exclusively reliant on natural resources to one dependent on the larger Florida economy. Although

¹⁷² New South Associates, "*Modern Gladesmen Culture*" 47.

¹⁷³ *Ibid.*, 40.

many Gladesmen still supplemented their food stores and income with Everglades resources, it was no longer their primary meal ticket.¹⁷⁴

Of huge import to the evolution of Gladesmen culture was the 1934 Act of Congress officially authorizing the creation of the Everglades National Park, although it wasn't officially dedicated until 1947. Once the NPS began overseeing management of the region, new restrictions were imposed that limited or prohibited public access and use. Despite these changes however, Gladesmen still found plenty of opportunities to continue their traditional activities outside the boundaries of the Park.¹⁷⁵

Comprehensive Everglades Restoration Plan

The Central & Southern Florida Project, south Florida's water management plan, was first passed as legislation in 1948 to provide flood control, water conservation, fish and wildlife preservation, and effective water drainage.¹⁷⁶ Unfortunately, however, many of the policies put in place proved highly detrimental to the fragile Everglades ecosystem. Recognizing that the existing plan was causing adverse effects to the environment, in 2000 the Water Resources Development Act was passed. The Act gave the USACE authority to propose a restoration and preservation plan for the Everglades ecosystem, resulting in the Comprehensive Everglades Restoration Plan (CERP).¹⁷⁷ As part of the CERP, the USACE and South Florida Water Management District began putting together a Master Recreation Plan to providing recommendations for improvements and guidance on planning decisions. The USACE's involvement as lead federal agency for the project triggered Section 106 review. During public comment meetings for the CERP, citizens expressed concerns that the agency was not in compliance with NEPA/NHPA because

¹⁷⁴ New South Associates, "*Modern Gladesmen Culture*" 49.

¹⁷⁵ *Ibid.*, 50.

¹⁷⁶ The Comprehensive Everglades Restoration Plan (CERP)," Central & South Florida (C&SF) Project."

¹⁷⁷ The Comprehensive Everglades Restoration Plan, "About CERP: Brief Overview."

they had failed to consider possible impacts to TCPs associated with the “Gladesmen/Swamp Folk Culture”.¹⁷⁸ As a result, the USACE hired the Georgia-based Cultural Resources firm New South Associates (hereafter New South) to conduct an ethnographic study of the possible existence of National Register-eligible TCPs within the proposed project area.

National Register Evaluation

The ethnographic TCP study involved a combination of background research and first-person interviews. The authors consulted existing information, including repositories, internet research, archival and institutional databases, federal archival databases, and academic journals.¹⁷⁹ They also consulted with individuals from agencies and research facilities to assist with the location of pertinent materials, spoke with professional anthropologists and folklorists who had spent significant time studying the region, and worked with the Florida SHPO.¹⁸⁰ Finally, they conducted first-hand ethnographic research consisting of 33 face-to-face interviews with self-identified Gladesmen.¹⁸¹ New South compiled this information into a preliminary draft report which was published in May of 2009.¹⁸²

New South described the Gladesmen culture as a regional variant of Florida Cracker Culture. Contemporary Gladesmen in southern Florida are a group of self-identified group of people, some of whom are connected through lineal kinship ties and others who are transplants or adoptees of the lifestyle. In contrast, Crackers were a group

¹⁷⁸ New South Associates, “*Modern Gladesmen Culture*,” i.

¹⁷⁹ *Ibid.*, 11.

¹⁸⁰ *Ibid.*, 12.

¹⁸¹ Bernard, H. Russell qtd. in. New South Associates, “*Modern Gladesmen Culture*,” 14.

¹⁸² New South Associates, “*Modern Gladesmen Culture*,” 1-2.

with a common Anglo/Celtic heritage and similar values, personality traits, and cultural and ecological traditions. New South explained that:

Gladesmen represent a living culture with a tradition that can be traced back to the nineteenth century but does not have a long written history. Members of this group do not occur in a census as a distinct population, as they represent a subset of modern American culture in southern Florida whose membership numbers are not known. Gladesmen Culture is not a hierarchical one with a leader who can speak for the group as a whole; *instead it is a member-driven group made up of individuals who share behaviors* that have the vast wetlands region as their primary focus.¹⁸³ (Emphasis added)

This description of the Gladesmen culture reflects a group of people without consistent ethnic origins, religious beliefs, or kinship ties that are commonly associated with the term community. Much like dune shack residents, Gladesmen are a group of people from diverse backgrounds who share a common appreciation for their unique environment and the enjoyment of similar activities. No specific mention was made regarding full-time residency patterns of the Gladesmen, although interview statements suggest that at least a portion of the self-identified community members live a substantial distance from the Everglades.

A look at some of the sites identified by New South, and their resulting eligibility determinations, provides some insight into how government agencies evaluate non-tribal TCPs. An explanation of two of the resources initially deemed eligible as TCPs in the 2009 draft report, but later revised as ineligible in the 2011 report, is instructive.

Fisheating Creek is a 60 mile-long waterway that terminates in Lake Okeechobee. Long-standing traditional practices at the Creek such as camping, fishing, hunting, boating, and baptisms are associated with Gladesmen culture. New South determined that the Creek “is a very important component of the local Gladesmen culture.”¹⁸⁴ Despite the

¹⁸³ New South Associates, “*Modern Gladesmen Culture*,” 13.

¹⁸⁴ *Ibid.*, 181.

assertions of numerous self-identified Gladesmen about the resource's integral relationship to their cultural practices and beliefs, New South asserted the Creek was ineligible as a TCP. The justification for this finding is particularly interesting: They claim, "While it is an important natural resource for the local Gladesmen, it does not have a focal point that has particular meaning for the Gladesmen, i.e., that serves to maintain the continuity of Gladesmen Culture."¹⁸⁵ Although traditional significance of the Creek had been proven, it would seem as though the USACE was reticent to acknowledge potential NRHP eligibility for a 60-mile long waterway. Findings in the 2011 report thus seem to suggest that linear resources don't qualify as TCPs because they lack a 'focal point' of continuity. The Medicine Mountain and Mt. Graham case studies, however, indicate that TCPs can be extensive, covering thousands of acres and including a variety of associated features that may lack a distinct center.

Loop Road was another site initially found eligible as a TCP but later revised to be considered ineligible. Historically used as an access point to the swamp, a majority of the 26 mile-long road is now located within the Big Cypress Preserve. New South identified the road as being, "a meeting place for many Gladesmen..., the central location for many cultural activities..., [and] a place Gladesmen frequented and used in the pursuit of traditional cultural practices."¹⁸⁶ Echoing the language used to nullify Fisheating Creek's eligibility, New South asserted that Loop Road was ineligible as a TCP because it, "has no specific focal point or central place...[and] does not serve to maintain the continuity of Gladesmen Culture as a whole."¹⁸⁷ Although the report makes no mention of why the determinations of eligibility had changed between 2009 and 2011, several

¹⁸⁵ New South Associates, "*Modern Gladesmen Culture*," 181.

¹⁸⁶ *Ibid.*, 186.

¹⁸⁷ *Ibid.*, 186.

inferences can be made about possible motivations. Acknowledgement of TCP eligibility for resources that covered large distances might prove problematic to the USACE in the future, as they would be required to consider impacts to them during any undertakings. Thus, it appears that evaluation of eligibility was largely influenced by its potential implications for USACE compliance requirements.

New South also evaluated Monroe Station, a site worth discussing for its implications to non-tribal TCPs. Built in 1928 as one of the original way stations for the Tamiami Trail, Monroe Station continued to serve its original function (with the eventual additions of a restaurant, bar, and swamp buggy storage) until approximately 1992 when the NPS purchased the property.¹⁸⁸ Gladesmen Barbara Jean claimed that once NPS assumed ownership the business shut down and the buildings were left to fall into disrepair. Listed on the NRHP in 1998 for its relation to local transportation and exploration, NPS has since enclosed the property in a chain-link fence and prohibited public access. Numerous Gladesmen interviewed during the study indicated that Monroe Station had been incredibly significant to Gladesmen culture, serving as a gathering place and an entry point from ‘civilization’ into the wilderness of the Everglades. New South recommended that Monroe Station was not eligible as a TCP because “it remains part of the Gladesmen culture as an important historical landmark but its active cultural significance to the Gladesmen diminished after 1992, when the social and cultural practices once enjoyed there came to end.”¹⁸⁹ The authors did suggest, however, that the existing NRHP nomination be updated to include the site’s ‘significance to members of the Gladesmen Folk Culture.’ New South’s evaluation of Monroe Station raises several questions. First, under Section 110 of the NHPA, doesn’t the NPS have the responsibility

¹⁸⁸ New South Associates, “*Modern Gladesmen Culture*,” 171.

¹⁸⁹ *Ibid.*, 177.

to act as stewards to their historic properties? Second, if it is recommended that the existing NRHP nomination for Monroe Station be updated to include its significance to Gladesmen culture, doesn't this make it a TCP? Finally, couldn't restoring the property's traditional function and opening access to the public reestablish its significance as a TCP?

RESULTS

In the initial ethnographic report published in 2009, New South found five of the thirteen sites evaluated eligible as TCPs. However, the 2011 revised draft of the report had narrowed it down to only two; Mack's Fish Camp and the Airboat Association of Florida. New South also recommended that three other sites, the Trail Lakes Campground, the Camp Mack River Resort, and the Everglades Sportsman's Club be re-evaluated if CERP activities had the potential to impact them. Lastly, New South recommended that the NRHP-listed Monroe Station have its historic context updated to include its relationship to the Gladesmen culture (although not officially as a TCP).¹⁹⁰

DISCUSSION

As one of the most recent examples of the evaluation of non-tribal properties as TCPs, the USACE report on the Florida Gladesmen is especially edifying. On the one hand, inclusion of the study in the broader context of long-term natural resource and land management planning is encouraging. It demonstrates changing attitudes among government agencies and a willingness to consider the impacts of undertakings on places of value to traditional, non-tribal communities. On the other hand, the report's findings highlight how different standards continue to be applied to tribal versus non-tribal properties. Whereas Native American tribes have successfully nominated entire

¹⁹⁰ New South Associates, "*Modern Gladesmen Culture*," 195.

mountains and their surroundings, linear resources significant to the Gladesmen such as creeks and roads, were considered ineligible because they lacked a 'focal point.'

Also of import, of the thirteen sites evaluated by New South, the two that were considered eligible as TCPs in the final 2011 report were both properties that maintained private ownership. It is noteworthy that of the three sites initially found eligible but later revised, two were properties located on federal land. Finding no TCPs on land owned by the federal government, the USACE managed to evade any agency reasonability under Section 110 of the NHPA. This is also true of Monroe Station, which by and large appears to be a TCP.

Although the TCP study conducted on behalf of the USACE serves to legitimize the Gladesmen as a distinct traditional community, the evaluations and recommendations of the report proves its functions is largely compulsory rather than objective. New South managed to find no sites located on federal land as potentially eligible TCPs, thus minimizing agency responsibility. Instead of being a valuable planning tool that took an unbiased look at historic properties, the report allowed the USACE to check off all the NHPA compliance boxes with very little effort towards actually protecting these resources.

SECTION IV: ANALYSIS

Chapter 8: Challenges and Recommendations

When Patricia Parker and Thomas King set out to write Bulletin 38 in 1990 they never intended to add a new criterion to the National Register. TCPs had always been eligible for the NHRP but were difficult for agencies and professionals to identify and evaluate using the existing guidance documents. The fields of Cultural Resources Management and Historic Preservation, with their roots in archaeology and architectural history, had a tendency to regard historic properties as static objects and monuments to the past. Bulletin 38 encouraged the consideration of places that were part of a living history, important for their historical and contemporary significance to individual communities.¹⁹¹

Despite Parker and King's intention to broaden the scope of the NRHP, the understanding of Bulletin 38 has only become narrower since its publication. The four previously discussed case studies track the evolution of TCPs and their interpretation by Native American tribes, federal agencies, and local communities and illuminate some of the fundamental problems facing non-tribal TCPs.

PERSPECTIVE AND WORLDVIEW

One of the biggest challenges confronting the preservation of community-valued places is the convergence of different perspective, worldviews, or values. Shaped by unique experiences and circumstances, individuals and communities inevitably come from a diverse range of religious, cultural, and political backgrounds. That is not to

¹⁹¹ King, *Places That Count*, 35

suggest, however, that these differences can't be overcome, or at the very least mitigated, in the spirit of preserving and protecting valuable cultural and historic resources.

Native American tribes have encountered these problems since Europeans first arrived in North America, and they continue to be at the forefront of disputes over TCPs and sacred sites. Leroy Little Bear of the Blood Indian Tribe in Canada describes the differences between how indigenous and non-indigenous societies view time, space, religion, and the environment. Little Bear explains that many western religions (Christianity, Judaism) are predicated upon a chronological history of events and described in written texts. In contrast, many indigenous religions are evolutionary and adaptable, incorporating and adopting other traditions into their existing belief systems. They are often communicated through oral tradition rather than written scripture; origin stories, legends, and rituals are passed down from generation to generation without ever being formally recorded or documented.¹⁹² Unlike churches, mosques or synagogues, many Native American sacred sites are embedded in the land, they cannot be moved, replaced, or rebuilt.¹⁹³

Like the divarication of religious beliefs, various cultures may have different understandings of the relationship between humans and the environment. Euro-American tradition typically considers land in relationship to its economic value, and individual property ownership is one of the founding principles of the United States government. In contrast, many indigenous cultures consider land communal, shared among generations past, present, and future and all the creatures on earth.¹⁹⁴ Native American

¹⁹² Cummins and White, "Towards a Model," 7-9.

¹⁹³ Carmean, *Spider Woman Walks*, 145

¹⁹⁴ Cummins and White, "Towards a Model," 6.

cultures and religions are deeply rooted in a strong sense of place as demonstrated in ethnographer David Samuels' observations of the San Carlos Apache:¹⁹⁵

In the community of San Carlos, history is ubiquitous. It is in the land and the way people respond to the land. It is in the way people talk about their lives and experiences...But if history is ubiquitous and pervasive, it is also disjointed and fragmented. These episodes and bits of knowledge do not find coherence by being drawn together into a chronological statement of events. History here is not about chronology. It is about feeling, the feeling of belonging in a place, knowing that your presence in a place is justified. That feeling is cultivated in San Carlos in cameo moments of aesthetic pleasure, whereby complex and divergent elements are superimposed and linked in instants that are often as short-lived as they are poignant. In these moments, present, past, self, other, knowledge, and feeling coalesce in a richly layered image of historical meaning.¹⁹⁶

Archaeologists, historians, and anthropologists sometimes struggle to understand this connection between place and self-identity. The inability to consider alternative viewpoints as legitimate has led to frustration and discord between federal agencies, land managers, scientists and Native American tribes in the attempt to preserve spiritually or culturally significant places.

It is understandable then, that many cases involving Native American tribes and government agencies are fraught with tension and distrust from the outset. In the case of Mt. Graham, the multitudinous array of motivations, perceptions, and worldviews made the resulting conflict seem almost inevitable. The project pitted scientists, academics, environmentalists, politicians, government agencies, tribes, and religious figures against each other in a virtual hailstorm of opposing ideology. (As a glaring example, the largest of the first three telescopes was insensitively named the 'Columbus,' until public outrage forced UA to change it to the 'Large Binocular Telescope').¹⁹⁷

¹⁹⁵ Gulliford, *Sacred Objects and Sacred Places*, 112.

¹⁹⁶ Samuels, "Apache History in San Carlos," 469-470.

¹⁹⁷ Gulliford, *Sacred Objects, Sacred Places*, 131.

Of course the problem of conflicting viewpoints is not exclusive to differences in religion, ethnicity, race, or cultural affiliation. Opinions about the Mt. Graham telescopes also divided the scientific community. As astronomers forged ahead with their plans to build one of the biggest observatories in the world, biologists fought to protect the uniquely diverse ecosystem of the Pinaleño Mountains.

Having spent centuries grappling with differences in ideology, religion, and land use, tribes have made significant headway in gaining some access to rights concerning their traditional and spiritual places through the passage of legislation such as the Native American Graves Protection and Repatriation Act, Executive Order 13007, and amendments to NHPA. However, the Cape Cod Dune Shacks and the Florida Gladesmen cases illuminate how universally prevalent, and prohibitive, these barriers can be. The clear history of injustice against Native American tribes by the U.S. government makes their need for extra protection self-evident. The specific circumstances of non-tribal TCPs are significantly harder for many people to understand, and tools for their protection are sadly limited.

When the NPS first surveyed the Provincetown Backshore all they found were dilapidated wooden shacks strewn among the dunes. Julie Schecter, Former Director of the Peaked Hill Trust, explained:

The superintendent of the National Seashore told me completely flat out that they wanted to get rid of the dune shacks. They had to certify that the shacks had no historic value, and then they could remove them. He in fact did hire somebody to look at the dune shacks, in the dead of winter when nobody was out there, and take pictures of them, and got an attestation saying the shacks had no historic value. I didn't actually believe that the most interesting thing about the shacks was that they were historic. I don't really know too many people who thought

that's why they were interesting or a resource. But the guy who had control over this had just told me that either they're historic or they're cinders.¹⁹⁸

TCPs are especially difficult to identify for people outside of a specific community, and as the old proverb goes, 'one man's trash is another man's treasure.' Convincing someone else to understand a place whose importance exists in a memory, experience, or feeling is inherently difficult. Compounding the problem, when agencies or professionals approach a project predisposed towards a particular outcome, evaluation of a site's significance can be even more close-minded. In order to overcome this barrier to successful consultation, agencies, professionals, tribes, and communities need to acknowledge the existence of differing viewpoints and attempt to see things from other perspectives. Approaching problems with an open mind will enable the possibility of creative solutions to a complex variety of needs and goals.

CONFLICT OF INTEREST

Agency review under Section 106 and NEPA requires consideration of multiple factors. Operating under the principles of promoting the public good, federal agencies are typically forced to balance a wide array of competing political and economic objectives. Unfortunately however, in many cases these motivations take precedence over the very values and purpose an agency is supposed to uphold.

The Western Apache and Northern Plains tribes both had to compete with the motivations and interests of federal agencies and private entities. Proponents of the MGIO had powerful political and economic backing which enabled them to circumvent a number of federal environmental and preservation laws. Similarly, the USFS were

¹⁹⁸ Wolfe, *Dwelling in the Dunes*, 39.

aligned with the interests of Lovell, Wyoming businesses for their proposal of tourist amenities at the Bighorn Medicine Wheel.

The result of the Cape Cod Dune Shacks is the most poignant example of the conflict of interest problem, and one that raises serious concerns for the future of non-tribal TCPs. Despite the agreement of the Lower Cape community, professional ethnographers, and the Massachusetts SHPO, the Keeper of the National Register found the shacks ineligible as a TCP. It seems that in this case, the NPS decided to extrapolate and re-interpret their own guidelines set forth in Bulletin 38 to serve a specific end, while at the same time disregarding some of the more salient advice it offers. Ironically enough, Bulletin 38 advises critical evaluation of the motivations behind involved parties:

Individuals who have economic interests in the potential development of an area may be strongly motivated to deny its cultural significance... Where there is disagreement about the nature or extent of a property's significance, the motives and values of the parties, and the cultural constraints operating on each, must be carefully analyzed.¹⁹⁹

According to the procedures set forth in of Section 106 of the NHPA, the National Park Service's Keeper of the National Register is the final authority on determining eligibility of historic sites. In the case of the dune shacks this presented a conflict of interest and resulted in an unfortunate outcome for the residents of shacks. With the mission to "preserve unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations," the Keeper's decision exposed an inherent weakness in the Park Service's ability to carry out their purpose.²⁰⁰

¹⁹⁹ Parker and King, "Bulletin 38," 9.

²⁰⁰ National Parks Service, "Mission,"

In order to prevent conflicts of interest and ensure that decisions about eligibility are based solely on the National Register criteria, rather than motivated by political or economic objectives, there should be an independent body that informs decisions in cases where properties are owned or operated by the NPS. Section 106 established the Advisory Council on Historic Preservation (ACHP) as an independent federal agency with the regulatory capacity to enforce federal preservation laws. The ACHP's purpose is to advise on Section 106 review process and ensure that agencies comply with their responsibilities to consider historic properties. When disputes arise over potential eligibility of a property however, the ACHP has no legal authority to interfere. One solution to the problem of conflict of interest could be to set up a process for appeals or grant the ACHP license to assume the role of the Keeper in cases where the property in question is owned or managed by the NPS. The ACHP committee of 23 members, which includes citizens, experts, state and federal officials, and tribal members, could evaluate the property based on its merits according to the National Register criteria. However, ACHP members only meet several times a year, and ensuring that each member was adequately informed about the specifics of the property and its unique characteristics could be problematic. As has been previously discussed, TCP's should be considered on a case-by-case basis and evaluated according to their specific circumstances.

More effective than delegating responsibility to the ACHP might be the creation of regional sub-committees. These could include a diverse constituency of members ranging from municipal historic societies, neighborhood associations, Native American tribes, professional architectural historians or archaeologists, local citizens, and NPS staff. The formation of the sub-committee should be developed in the early stages of the Section 106 process, when the NPS determines that their actions are a federal undertaking

which may have the potential to effect historic properties. The ACHP could be delegated with the authority to approve committee members and ensure that a variety of local and regional interests are represented. In addition to mitigating the issue of conflict of interest, the creation of regional subcommittees may have the added benefit of promoting a broader level of communication and understanding between different groups with varied viewpoints.

AMBIGUOUS STANDARDS

The authors of Bulletin 38 intentionally left its language vague in order to leave room for broad interpretation. While the guidance document does define several terms like ‘culture’ and ‘traditional,’ it purposefully leaves the meaning of ‘community’ unspecified. In fact, ‘Traditional Cultural Property’ itself was coined by Parker and King as “a broad umbrella term to cover everything from Indian tribal spiritual places to traditional urban neighborhoods.”²⁰¹ Bulletin 38 used a diverse range of examples and possible scenarios to promote consideration of TCPs on an individual basis and in response to the specific needs of communities.

This conflict is acutely demonstrated in the outcome of the Cape Cod dune shacks. Once again, imposing scientific standards onto community values, the Keeper cited a definition of ‘society’ taken from *Cultural Anthropology: The Human Challenge*, to legitimize her finding:

While the individual family networks share a common territory and traditional use practices situated in the District, they cannot be characterized as a society, that is, as an organized group of interdependent people who act together for collective survival and well-being.²⁰²

²⁰¹ King, *Places That Count*, 34.

²⁰² Walters to Matthews, 26 January 2007.

Here the Keeper decided to apply an arbitrary standard for community (or in this case, society) that had no basis in Bulletin 38 or NRHP. If this standard were applied to all properties it's doubtful that many TCPs already listed on the register would qualify. Although the Northern Plains tribes who revere the Bighorn Medicine Wheel share similar beliefs and traditional practices associated with the site, it's arguable whether the 'community' as a whole, made up of numerous different tribes, could be considered 'a group of interdependent people.' Similarly, New South asserted that:

Gladesmen Culture is not a hierarchical one with a leader who can speak for the group as a whole; instead it is a member-driven group made up of individuals who share behavior that have the vast wetlands region as their primary focus.²⁰³

Thus, according to the Keeper's standards, the Gladesmen culture is not a valid community.

The Keeper further narrows the criteria for TCP eligibility based on the variability of occupancy patterns between seasonal and long-term users. The claim that this renders the dune shacks ineligible has no foundation in any of the guidance documents. In fact, many TCPs, like the Bighorn Medicine Wheel, are only occupied or used temporarily by the traditionally associated community. Historically, Northern Plains tribes were nomadic, and the Wheel itself has always been a pilgrimage site only used for very important spiritual purposes. Furthermore, access to the Wheel is limited to certain months of the year as a result of harsh weather conditions.²⁰⁴ According to the Keeper's newly defined standards it would be difficult to argue that the Northern Plains tribes, despite proven continuous use of the area, constitute a 'community.'

²⁰³ New South Associates, "*Modern Gladesmen Culture*," 13.

²⁰⁴ Price, "Tourism and the Bighorn Medicine Wheel," 259.

Adding to the confusion, when the dune shacks were officially listed on the National Register in 2011, the nomination form specifically acknowledged that the fluid and adaptable nature of the structures was an important aspect of their historical significance. The nomination stated that:

The Dune Shacks represent a unique type of fragile resource that does not fit into a standard architectural classification. The shacks are simple, unornamented, wood-frame buildings casually erected as basic human shelters and intended for limited occupancy...As a result, the shacks possess a transient quality that parallels the ever-changing landscape. The shacks are additive, evolving structures.²⁰⁵

While the NPS considered the unconventional and flexible characteristics of the shacks themselves, these same qualities were used against the shack residents as justification for dismissing their TCP nomination. Charles Smyth aptly stated, “Indeed, for the long-term dune shack occupants, the potential for new and interested individuals from outside their community to become accepted members of the community was itself seen as a tradition.”²⁰⁶

Although the composition, use, and residency patterns of the dune shack community is undeniably complex, and it is understandable why the Keeper had difficulty recognizing a distinct group with temporal continuity, it does not justify the Keeper’s application of contrived standards for eligibility. The problem with defining the term community for the purposes of the National Register is complicated at best. On the one hand, creating a strict written definition may lead to a more narrowly defined category that excludes certain communities or groups that don’t fit within the guidelines. On the other hand, leaving the term undefined opens the door to interpretation by the

²⁰⁵ Scofield et al., “Dune Shacks of Peaked Hill Bars Historic District,” 4.

²⁰⁶ Smyth, “National Register Framework,” 25.

Keeper and other CRM professionals rather than allowing communities and groups to develop their own terminology.

PROFESSIONALISM AND TOP-DOWN LAND MANAGEMENT

Although the enactment of legislation in the latter part of the 20th century has been instrumental in the consideration of historical and cultural resources, their practical application doesn't always reflect their intended purpose. The professional fields of CRM and HP evolved from grass-roots preservation movements to disciplines that relied upon scientific and academic standards. Consequently, community values and input is frequently overlooked and underappreciated. Section 106 was meant to clarify the purpose of the NHPA and outline procedures for compliance, but many agencies interpreted it as a just another checklist acting as governmental red tape.

When the compliance-driven Section 106 process forgets its broader purpose, the likelihood for successful consultation between agencies and communities is severely diminished. Thomas King aptly states,

We continue to experience conflict between a practice of TCP identification and management that must be very soft, flexible, and organic, and standard practices in CRM based on archaeology, history, and architectural history that—for all their grounding in the social sciences and humanities—tend to see hard-edged, black-and-white solutions.²⁰⁷

This is particularly problematic for the documentation and recordation of TCPs, which may lack physical or written evidence of a site's historical significance. Ethnographic studies often serve as the primary source material for evaluating TCPs, but these can be subject to more intensive scrutiny (as witnessed in the dune shacks case). The significance of many TCPs, and particularly Native American sites, is often passed down

²⁰⁷ King, *Places That Count*, 37, 40.

through oral histories. In a field that values scientific and academic standards, communities may find themselves at a disadvantage if they lack historical ‘proof’ of their ongoing traditions and practices.

Places that are part of our living history have the extraordinary power to benefit the lives of not only the communities who value them, but also the nation as a whole. With decades, or even centuries, of experience and knowledge intricately tied to place, traditional communities can act as vital sources of information. Coined by cultural ecologists and environmental historians, Traditional Ecological Knowledge (TEK) is “a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment.”²⁰⁸ Scientists have argued that TEK is a valuable instrument for effective, regionally specific land management practices because they are based on years of tested experience and an intimate understanding of unique environmental conditions.

Although environmentalists and government agencies depicted traditional Gladesmen activities such as airboating and dune buggy riding as a cause of environmental degradation, the ethnographic study conducted by New South portrayed a different picture. From their earliest historical roots, Gladesmen were defined by their intimate appreciation for, and understanding of, the unique Everglades ecosystem. Many Gladesmen clubs and organizations were founded upon principles of ecological conservation and collaborated with agencies and environmental groups to foster mutually beneficial policies.

²⁰⁸ Berkes, “Traditional Ecological Knowledge,” 1252.

Profoundly protective of their special places, traditional communities have unique insight into how best to preserve them, even if they may seem counter-intuitive to an unfamiliar observer. Requiring employees of federal and state land management agencies to complete training seminars on community outreach might help solve, or at least alleviate, this problem. Training would give staff members the skills needed to communicate effectively with the communities around them, and possibly prevent lengthy disputes and legal battles that result from misunderstandings. If agencies like the USFS and NPS foster relationships with the communities surrounding the National Parks and Forests from the outset, instead of only when federal law requires, they might be better equipped to handle these situations when NEPA or NHPA is triggered.

Likewise, HP and CRM professionals who assist in agency compliance as consultants would be well served by expanding their skill set to include community outreach and participation. All too often HP and CRM practitioners become too narrowly focused on rigid standards and guidelines and forget the broader purpose of the profession, to protect and preserve places that matter to people. Training seminars could be offered by ACHP or the National Trust for Historic Preservation and include both lectures and hands-on activities that cover a range of topics such as public outreach best-practices, conflict resolution, and cultural sensitivity. Sessions could also be open to the public who may have interest in learning more about the Section 106 process and how to be involved.

The relationship between humans and land is complex, emotional, and visceral. Productive land policies require an understanding of and respect for these relationships and should involve dialogue with communities. Preservation as an academic and

professional discipline must rethink its strategy and become more flexible, adaptable and open to outside input.

Chapter 9: Conclusion

It's been over twenty years since Traditional Cultural Properties entered the lexicon of the National Register and the field of Historic Preservation. While some Native American tribes have achieved success using TCPs to protect their traditionally and spiritually significant places, this has largely been aided by a number of other regulations (Executive Order 13007, American Indian Religious Freedom Act) that specifically address tribal sacred sites. Unfortunately, TCPs have been much less successfully applied to sites important to non-tribal communities.

It is generally accepted that Native American tribes constitute a traditional 'community', even though there are often a diverse range of interests, beliefs, and practices within an individual tribe. However, the burden of proof for non-tribal communities has become almost impossible to meet. In an increasingly mobilized society, communities that are rooted in ethnic, religious, or familial ties are no longer the norm. More and more groups of people have begun to form self-identified communities based on a wide range of factors, including shared interests, activities, and beliefs.

Furthermore, as evidenced in several of the case studies examined in this thesis, top-down land management policies implemented by federal agencies have had negative impacts on historic properties and in some cases made them ineligible for the National Register. NPS acquisition of land in the CCNS altered residency patterns for the Cape Cod dune shacks and demolished several of the structures themselves. Creation of the Everglades National Park affected trail accessibility for the Gladesmen and resulted in irreversible loss of significance to some of their TCPs.

Prejudices and biases become superimposed on sites, places, or practices and can obscure or erase precious traditional knowledge. In recent years, numerous practitioners

of CRM and HP have begun to recognize that there is a problem with how federal policy and professional practice have come to define community values. Although ensuring legal protection for properties requires clear guidelines and standards to be defensible in court, narrow-minded interpretations of the guidelines is antithetical to the purpose of historic preservation.

On a positive note, CRM and HP professionals, agency officials, community leaders, and tribal members have begun openly discussing the need to raise awareness about historic places that are valued by individual communities. Journal articles, books, blogs, and numerous other publications about historic preservation have begun to emphasize this gap in the field. Much like the historic properties and communities who value them, the professional fields of HP and CRM are gradually adapting and evolving to meet the changing demands of the public. Although bureaucratic preservation policies can be cumbersome and prohibitive, they do provide a certain level of legal protection for places that are at risk. The challenge and the value of historic preservation professionals is the ability to act as intermediaries and make protection within broad legislative frameworks accessible to communities and local groups.

In a 2009 retrospective, Thomas King suggested that part of the problem with TCPs, and the Section 106 process as a whole, is its link to the National Register. King advocated removing the NRHP from the Section 106 process as it imposes a set of standards that are not necessarily in line with the purposes of the legislation.²⁰⁹ Although this suggestion merits consideration, it may be difficult to achieve given the nature of government bureaucracy.

²⁰⁹ King, "Rethinking Traditional Cultural Properties." 34-35.

As previously suggested, inclusion of a broader range of perspectives and viewpoints in the evaluation process is necessary to foster an environment that is open to non-tribal TCPs. Training programs for agency staff and preservation professionals would be especially valuable in achieving this goal. Although this may require agencies to commit additional funding at the outset, the long term benefits would outweigh any up-front costs. Educating agency staff about how best to deal with local communities will lead to better consultation and cooperation, preventing drawn-out Section 106 review processes and lengthy legal battles.

The creation of regional sub-committees to advise on the identification and evaluation of TCPs would help alleviate some of the concerns regarding conflict of interest and top-down land management. In addition, setting an appeals process in place for determinations of eligibility, especially on NPS-owned properties, ensures an impartial evaluation of community-valued properties that incorporates a wide array of goals, needs, and perspectives.

Although TCPs have been used to some success by both Native American tribes and local communities there are still a number of challenges barring the successful implementation of Bulletin 38's intended purpose. Changes to the NRHP would be difficult to enact, and may only lead to further confusion down the road. Government agencies and preservation professionals need to rethink how they approach the guidelines and procedures outlined in Section 106 and the NRHP and allow room for community involvement and participation.

APPENDIX A: NATIONAL REGISTER CRITERIA

Criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

(b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

(c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.

(d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(g) A property achieving significance within the past 50 years if it is of exceptional importance. [This exception is described further in NPS's "How To" booklet No. 2, entitled "How to Evaluate and Nominate Potential National Register Properties that Have Achieved Significance Within the Last 50 Years," available from NPS.]

GLOSSARY

ACHP	Advisory Council on Historic Preservation
AICA	Arizona-Idaho Conservation Act
AIRFA	American Indian Religious Freedom Act
ASC	Apache Survival Coalition
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
CCNS	Cape Cod National Seashore
CRM	Cultural Resources Management
DOE	Determination of Eligibility
DOI	Department of the Interior
ESA	Endangered Species Act
EIS	Environmental Impact Statement
HABS	Historic American Building Survey
HP	Historic Preservation
MGIO	Mt. Graham International Observatory
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NHL	National Historic Landmark
NHPA	National Historic Preservation Act
NPS	National Park Service
NRHP	National Register of Historic Places (Register)
NTHP	National Trust for Historic Preservation (Trust)

SHPO	State Historic Preservation Office
SOI	Secretary of the Interior
THPO	Tribal Historic Preservation Office
UA	University of Arizona
USACE	U.S. Army Corps of Engineers
USFS	United States Forest Service

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