STANDING TOGETHER: HOW THE FEDERAL GOVERNMENT CAN PROTECT THE TRIBAL CULTURAL RESOURCES OF THE STANDING ROCK SIOUX TRIBE

> But the oil companies and the government of the United States have failed to respect our sovereign rights. Today the pipeline construction continues, although it has temporarily stopped near our Nation. This company has knowingly destroyed sacred sites and our ancestral graves with bulldozers . . . . While we have gone to the court in the United States, our courts have failed to protect our sovereign rights, our sacred places, and our water.
>
> - *David Archambault II*[1]

INTRODUCTION 605
I. HISTORY OF TRIBAL LAND RIGHTS 610
A. The Marshall Trilogy and the Doctrine of Discovery 610
B. The Plenary Power Doctrine 612
C. The Federal Trust Doctrine 614
II. CURRENT STATUTORY PROTECTION OF TRIBAL CULTURAL RESOURCES 617
A. The Modern Federal Trust Doctrine 617
B. National Historic Preservation Act of 1966 618
C. National Environmental Policy Act of 1969 622
D. Archaeological Resources Protection Act of 1979 and Native American Graves Protection and Repatriation Act of 1990 624
III. FUTURE PROTECTION OF TRIBAL CULTURAL RESOURCES 625
A. The Federal Government's Present Failure to Protect Tribal Cultural Resources 625
B. Proposed Tribal Consent Requirement 626
CONCLUSION 629

INTRODUCTION

Before the Europeans arrived in North America, native nations covered virtually all of the contiguous United States.[2] Since that point, Native

1. David Archambault II, Chairman, Standing Rock Sioux Tribe, Address to the United Nations Human Rights Council (Sept. 20, 2016), https://www.youtube.com/watch?v=dW0d_WsuL0Y.

2. ALAN TAYLOR, AMERICAN COLONIES 10 (Eric Foner ed., 2001).

Americans have been subjected to many Euro-American colonial powers.[3] The tribal-federal relationship during the latter half of the 19th century was particularly gruesome in that the federal government forcibly removed tribes from their sacred aboriginal lands and placed them on reservations.[4] Once the federal government removed Native Americans to the reservations, the policy was to transfer their sacred lands to non-native ownership.[5] The effect of the removal was huge, leaving many historic, prehistoric, and sacred objects and sites unprotected from looters and environmental threats.[6] These sacred objects and sites were just some of what scholars often refer to as "cultural resources," a broad term that is difficult to define.[7] For many Native Americans, these cultural resources represent the "heritage, cultural identity, religion, and history" of their tribe and their people.[8] Many Native Americans worship particular sacred sites, believing they hold important spiritual connections to significant historical events or to their ancestors.[9] Presently, one such threat for the Standing Rock Sioux Tribe is the Dakota Access Pipeline (DAPL).[10]

On July 27, 2016, the Standing Rock Sioux Tribe (Tribe) filed a complaint against the U.S. Army Corps of Engineers (Corps) for declaratory and injunctive relief, invoking challenges under the National Historic Preservation Act (NHPA) and the Clean Water Act (CWA).[11] The Tribe argued that DAPL "threatens the Tribe's environmental and economic well-being, and would damage and destroy sites of great historic, religious, and cultural significance to the Tribe . . . . [DAPL] also crosses

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3. *See generally* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 19–20 (6th ed. 2010) (discussing the federal government's relationship with Native nations over time).

4. *Id.* at 21–22.

5. *Id.* at 24.

6. *See* Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 599–600 (1995) (describing how the looting and trafficking of Native American artifacts is a thriving and growing business in the United States).

7. Antonia M. De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 3 (1994); *see also* Hillary M. Hoffmann, *Fracking the Sacred: Resolving the Tension Between Unconventional Oil and Gas Development and Tribal Cultural Resources*, 94 DENV. L. REV. 319, 331 (2017) ("Cultural resources could theoretically include anything of cultural value to any population in the United States, including objects of antiquity, locations of historical significance, or religious sites.").

8. De Meo, *supra* note 7, at 16.

9. Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 732–33 (1989).

10. Complaint for Declaratory & Injunctive Relief ¶¶ 1–2, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 16-1534 (JEB)) [hereinafter *Complaint, Standing Rock I*].

11. *Id.*

waters of utmost cultural, spiritual, ecological, and economic significance to the Tribe and its members."[12]

DAPL is a pipeline that transports crude oil from North Dakota through South Dakota, Iowa, and Illinois.[13] Though DAPL does not pass through the Tribe's reservation, it comes within a half-mile—on what the Tribe considers treaty land.[14] On September 9, 2016, the Federal District Court for the District of Columbia denied the Tribe's request for an injunction, holding that "the Corps has likely complied with the NHPA and that the Tribe has not shown it will suffer injury that would be prevented by any injunction the Court could issue."[15] That same day, however, the Department of Justice—together with the Department of the Army and the Department of the Interior—issued a joint statement halting construction of DAPL and calling for "government-to-government consultations" to discuss tribal input on DAPL and other infrastructure projects.[16] Upon further review, the Corps denied the request for an easement on December 4, 2016.[17]

However, a new President soon took office.[18] On January 18, 2017, the Corps announced it would be taking another look and preparing an Environmental Impact Statement (EIS) regarding DAPL's request for an easement.[19] In its notice, the Corps stated it would allow for a one-month

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12. *Id.* ¶¶ 1, 9.

13. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 7 (D.D.C. 2016) [hereinafter *Standing Rock I*]; *see also About the Dakota Access Pipeline*, ENERGY TRANSFER PARTNERS, L.P., http://www.daplpipelinefacts.com/about-the-dakota-access-pipeline/ (last visited Apr. 9, 2018) ("The pipeline starts . . . in North Dakota and runs southeast through South Dakota, Iowa, and Illinois, ending near Patoka, Illinois.").

14. *Complaint, Standing Rock I*, *supra* note 10, ¶¶ 3, 7 ("The Tribe is a successor to the Great Sioux Nation, a party to the two Treaties of Fort Laramie in 1851 and 1868. In those Treaties, the Sioux ceded a large portion of their aboriginal territory in the northern Great Plains, but reserved land rights 'set apart for the absolute and undisturbed use and occupation' of the Indians.").

15. *Standing Rock I*, 205 F. Supp. 3d at 7.

16. Press Release, Dep't of Justice Office of Pub. Affairs, Joint Statement from the Dep't of Justice, the Dep't of the Army and the Dep't of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing.

17. Memorandum from Dep't of the Army to Commander, U.S. Army Corps of Eng'rs, Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota, ¶ 3 (Dec. 4, 2016), http://earthjustice.org/sites/default/files/files/stmt.pdf.

18. Philip Rucker, John Wagner & David A. Farenthold, *Trump Takes Office, Vows an End to "American Carnage,"* WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/politics/trump-takes-office-vows-an-end-to-american-carnage/2017/01/20/4b2677d8-df4e-11e6-acdf-14da832ae861_story.html?utm_term=.8dad912eb8d6.

19. Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543, 5543 (Jan. 18, 2017).

public comment period.[20] Then, on January 24, 2017, President Trump issued a memorandum pressing the Corps to expedite its review of DAPL's route.[21] Following President Trump's memorandum, the Corps told Congress that it would be waiving the public comment period and granting the easement.[22] Thus, in devastating news, President Trump and his administration decided to allow DAPL to proceed.[23] However, the Tribe and its supporters still protested and pursued legal action.[24]

That spring, the Tribe again challenged DAPL in court claiming that the Corps irreparably harmed the Tribe's religious exercise and violated the Religious Freedom Restoration Act (RFRA) when it granted the easement for DAPL to cross under Lake Oahe.[25] However, the court again denied the Tribe's motion, holding that the Tribe unreasonably delayed its RFRA objection and was thus barred by laches.[26] The court went on to say that, even if the Tribe was not barred by laches, it still failed to show a likelihood of success on the merits of its claim because the Tribe failed to show that DAPL was a "substantial burden" on the free exercise of its religion.[27]

But the Tribe did not stop there. Following these two failed challenges—first arguing that DAPL threatened culturally and historically significant sites,[28] and second claiming that DAPL would irreparably harm the Tribe's religious exercise[29]—the Tribe took a different approach.[30] In its third challenge, the Tribe focused on DAPL's environmental impact, claiming that the Corps violated the National Environmental Policy Act (NEPA).[31] Particularly, the Tribe argued that the Corps failed to take the requisite "hard look" at the environmental impact of the Lake Oahe crossing.[32] Despite agreeing with the Tribe that the Corps violated NEPA in some regards—primarily that the Corps failed to indicate that DAPL's

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20. *Id.*

21. Memorandum on Construction of the Dakota Access Pipeline from the Administration of Donald J. Trump, 2017 to the Secretary of the Army (Jan. 24, 2017).

22. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 82 (D.D.C. 2017) [hereinafter *Standing Rock II*].

23. *Id.*

24. *See id.* at 82 (discussing the Tribe's various legal arguments for preliminary injunction of the easement to stop construction of DAPL).

25. *Id.*

26. *Id.* at 88.

27. *Id.* at 88, 91.

28. *See Standing Rock I*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016) (claiming the Corps violated the NHPA).

29. *See Standing Rock II*, 239 F. Supp. 3d at 82 (claiming that the Corps violated RFRA).

30. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 111 (D.D.C. 2017) [hereinafter *Standing Rock III*] (challenging DAPL's environmental impact).

31. *Id*. at 112.

32. *Id.* at 123.

effects would be "highly controversial" and failed to consider the impact of an oil spill on the Tribe's hunting and fishing rights[33]—the court determined that DAPL's construction could continue and that vacatur of the Corps's environmental assessment was not appropriate.[34] As such, DAPL continues to operate.[35] Additionally, despite court-imposed measures to reduce spill risks,[36] the damage from an oil spill would severely affect the Tribe and its cultural resources.[37]

Unfortunately, the case of the Standing Rock Sioux Tribe is an all too familiar story. For centuries, the federal government has exploited Native Americans and their ancestral tribal lands.[38] Nevertheless, this case brought global attention to a national issue as politicians, celebrities, and tribes have been standing with the Tribe, speaking out, and protesting against DAPL.[39] When the Obama Administration released its joint statement, it proposed to include Native American tribes in future infrastructure and energy development decisions.[40] However, the Tribe found itself in the hands of a new administration—one that clearly supported DAPL. This Note discusses the history of tribal land rights and the current state of statutory protection of tribal cultural resources. Further, this Note proposes that in order to ensure protection of tribal cultural resources, including those of the Standing Rock Sioux Tribe, the federal government must strengthen its consultation requirements.

Part I discusses the history of tribal land rights, focusing on how the current statutory scheme and management of tribal affairs came about. This Part analyzes and discusses the key cases from the past two centuries and the prevalent doctrines that arose. Part II discusses today's relevant statutes

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33. *Id.* at 127, 129, 134.

34. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB), 2017 WL 4564714, at *12 (D.D.C. Oct. 11, 2017).

35. *Dakota Access Pipeline to Remain Operation, For Now*, EARTHJUSTICE (Oct. 11, 2017), https://earthjustice.org/news/press/2017/dakota-access-pipeline-to-remain-operational-for-now.

36. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB), 2017 WL 6001726, at *3 (D.D.C. Dec. 4, 2017) (imposing interim measures to reduce the risk of oil spills from DAPL).

37. Heather Brady, *4 Key Impacts of the Keystone XL and Dakota Access Pipelines*, NAT'L GEOGRAPHIC (Jan. 25, 2017), https://news.nationalgeographic.com/2017/01/impact-keystone-dakota-access-pipeline-environment-global-warming-oil-health/.

38. *See* Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 478 (2010) ("[T]he United States encouraged industry to exploit Indian country's wealth of natural resources, even where not supported by tribes or tribal members.") (internal quotations omitted).

39. *See* Lorraine Chow, *These Celebrities Take a Stand Against Dakota Access Pipeline*, ECOWATCH (Sept. 9, 2016), http://www.ecowatch.com/justice-league-dakota-access-pipeline-2000093607.html (writing about the many celebrities who have gone to Standing Rock or who have spoken publicly against DAPL).

40. *See* Press Release, *supra* note 16 (calling for government-to-government communication).

and how the federal government currently handles tribal affairs. This Part further analyzes the ways in which the federal government succeeds—and more often fails—in protecting cultural resources on tribal lands. Part III concludes the Note by discussing what the federal government can do in the future to ensure protection of cultural resources on tribal lands. Principally, increased consultation rights within the existing statutory framework are necessary to achieve meaningful and adequate protection of cultural resources.

I. HISTORY OF TRIBAL LAND RIGHTS

A. The Marshall Trilogy and the Doctrine of Discovery

In the early 19th century, the U.S. Supreme Court decided three cases establishing a doctrine that remains central to federal Indian law today: the Doctrine of Discovery.[41] These cases—known as the Marshall Trilogy—go well beyond just their holdings to house the foundations of modern Indian law.[42] For example, the Doctrine of Discovery is the basis for all private land rights within the United States.[43] Grounding its reason in the Doctrine of Discovery, the Marshall Trilogy created the basis for the two other principal doctrines of federal Indian law: the Plenary Power Doctrine and the Federal Trust Doctrine.[44]

The first of the Marshall Trilogy, *Johnson v. M'Intosh*, officially brought the Doctrine of Discovery into federal common law.[45] The Doctrine of Discovery, as Chief Justice Marshall stated, is the notion "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . . ."[46] In *Johnson*, Chief Justice Marshall wrote that by excluding all other Europeans, the nation making the "discovery" had the sole right to the land; therefore, the discovering nation was able to take the land from the Native Americans and make its own settlements.[47] The Europeans "discovered" the land in North America, and that

41. Richard L. Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 57 LOY. L. REV. 435, 438 (2011).

42. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628 (2006) ("[T]he 'reasons' for the holdings are more significant than the holdings themselves.").

43. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 3 (2005).

44. *See* discussion, *infra* Parts I.B, I.C (discussing the federal plenary power and federal trust doctrine).

45. Fletcher, *supra* note 42, at 631.

46. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

47. *Id.* at 573.

"discovery" therefore vested title.[48] He stated that "[t]he British government . . . [,] whose rights have passed to the United States, asserted a title to all the lands occupied by Indians . . . . It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them."[49] Hence, the Court in *Johnson* extinguished the Native Americans' property rights by granting absolute title of the land to the federal government.[50]

Following the opinion in *Johnson*, the State of Georgia passed two statutes that appropriated most of the Cherokee Nation's lands and gave the State power over the tribe and its land.[51] Accordingly, in the second case of the Marshall Trilogy—*Cherokee Nation v. Georgia*—the Cherokee Nation sued Georgia and sought to enjoin these laws.[52] There, the Court held that Native American tribes were not considered "foreign nations" under the Constitution, and therefore did not have standing to sue.[53] Chief Justice Marshall began to articulate a relationship between the federal government and tribes by defining the tribes as "domestic dependent nations."[54] The concept of "domestic dependent nations" was Marshall's attempt at reconciling the unique relationship between sovereigns that resulted from his decision in *Johnson*.[55] Because the Court asserted that Native American tribes retained certain aspects of sovereignty as a result of "discovery" in *Johnson*—including the right of occupancy—Marshall found himself in a peculiar situation when deciding *Cherokee Nation* due to these coexistent sovereignties.[56] He addressed this issue by establishing a federal authority over tribes, stating that the relationship between the Native Americans and the federal government "resemble[d] that of a ward to his guardian."[57] This guardian-ward concept continued to appear throughout Supreme Court opinions, most specifically in the Marshall Trilogy's final case—*Worcester v. Georgia*.[58]

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48. *Id.* at 592 ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."); Barnes, *supra* note 41, at 439.

49. *Johnson*, 21 U.S. at 588.

50. *Id.* at 583 (holding that the Native Americans still retained a right to occupancy).

51. GOLDBERG ET. AL., *supra* note 3, at 21.

52. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

53. *Id.* at 20.

54. *Id.* at 17.

55. *See Johnson*, 21 U.S. at 574 (establishing that, while the Doctrine of Discovery gave the federal government exclusive title to the land, tribal sovereignty rights were not "disregarded"; they were merely "diminished").

56. *Id.*

57. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

58. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (establishing the federal government's exclusive authority over tribes).

In *Worcester*, Chief Justice Marshall revisited the guardian-ward concept and presented two contradictory ideas: (1) that the Native American tribes retained certain aspects of sovereignty; and (2) that the federal government had exclusive authority over them.[59] Contradicting himself, Marshall confirmed the Cherokee Nation's "separateness" and sovereignty, but simultaneously reinforced the notion that the federal government was the guardian to its tribal ward.[60] Marshall further established that "[t]he whole intercourse between the United States and [the Cherokee Nation], is, by our constitution and laws, vested in the government of the United States."[61] The Court, effectuating federal authority over all tribal affairs, confirmed that even without tribal treaties, the Doctrine of Discovery gave this overarching power to the federal government.[62]

Thus, the Doctrine of Discovery was born and bred in the Marshall Court, and created the foundations upon which the federal government still relies to manage tribal affairs.[63] The Doctrine of Discovery is a vestige of a time when relations between the federal government and Native Americans were hostile, genocidal, and fierce.[64] Direct language from the Marshall Trilogy reflects the superiority that the federal government felt over Native Americans.[65] The Marshall Court, using the Doctrine of Discovery, thereby put the ball in motion for the other two primary sources of federal power over Native Americans: the federal plenary power and the federal trust responsibility.[66]

B. The Plenary Power Doctrine

Although the Constitution does not overtly state it, the federal government, according to the Supreme Court, has a plenary power over Native American tribes.[67] In fact, the Constitution only explicitly grants

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59. *Id.* at 561.

60. *Id*. at 519, 561.

61. *Id.*

62. *See id.* at 561 (establishing that the ability to formally interact with Native American tribes is constitutionally vested in the federal government).

63. Barnes, *supra* note 41, at 438.

64. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (describing Native Americans as warmongers and "fierce savages").

65. *Id*.

66. *See infra* Parts I.B, I.C (discussing the federal plenary power and federal trust doctrine).

67. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (describing the relationship between tribes and the federal government resembling "that of a ward to his guardian"); United States v. Kagama, 118 U.S. 375, 382 (1886) (holding that Congress has the authority to govern tribes); Nell

Congress power over tribes in one place: the Commerce Clause.[68] Today, however, Congress asserts its legislative authority over Native American tribes by way of this plenary power.[69] Stemming from the Cherokee cases of the Marshall Trilogy, the Supreme Court has upheld nearly unbridled congressional power over tribal affairs in a series of cases using the Plenary Power Doctrine, which some scholars have regarded as a congressional guardianship or paternalistic role.[70]

The first case enumerating the Plenary Power Doctrine was *United States v. Kagama*.[71] There, the Court determined that the Native American tribes were wards of the United States, dependent upon the federal government for food and political rights due to their "weakness and helplessness."[72] The Court found that, "after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern [tribes] by acts of Congress."[73] The Court here diverted from the traditional path of legislative power set out in *McCulloch v. Maryland*—that the exercise of congressional power must be rooted in a textual grant of power to Congress from within the text of the Constitution.[74] Rather, the Court used the now-familiar "guardian-ward" rationale—that Tribes were dependent on the federal government—which therefore gave Congress a plenary power over tribal affairs.[75]

This guardianship approach continued in *Lone Wolf v. Hitchcock*, which directly affirmed the holding from *Kagama*.[76] There, the Court determined that a presumption of congressional good faith existed: Congress's power over the Native Americans was a political question, and therefore could not be subject to judicial review.[77] The Court explicitly stated that the "[p]lenary authority over the tribal relations of the Indians

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Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984).

68. Newton, *supra* note 67, at 199; *see also* U.S. CONST. art. 1, § 8 ("Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

69. Newton, *supra* note 67, at 199.

70. *See, e.g.*, *id.* at 222 (describing the Plenary Power Doctrine as a "guardian's power"); Ezra, *supra* note 9, at 716 ("The Court's decision in *Lone Wolf* cleared the way for Congress to adopt a paternalistic role, determining the Native American's future without regard to the native's own interests.").

71. *Kagama*, 118 U.S. at 382.

72. *Id.* at 384.

73. *Id.* at 382.

74. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

75. *Kagama*, 118 U.S. at 384–84.

76. Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903) (affirming *Kagama*, 118 U.S. at 382).

77. *Id.* at 565; *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 414–15 (1980) (rejecting the presumption of congressional good faith).

has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[78] The Court held that this power gave Congress the authority to abrogate treaties and that changes to federal tribal affairs are within Congress's domain.[79] Thus, while some limitations may exist, Congress retains the sole power to regulate tribal affairs.[80] This plenary power remains a fixture of Congress's authority over Native Americans today, and it would allow Congress to enact—or reject—legislation in the interests of Native Americans and their cultural resources, such as the proposal presented in this Note.[81]

C. The Federal Trust Doctrine

Along with the Plenary Power Doctrine, the Cherokee cases of the Marshall Trilogy also paved the way for another major doctrine in federal tribal affairs: the Federal Trust Doctrine.[82] As previously discussed, Chief Justice Marshall began to define the unique relationship between the federal government and Native American tribes in *Cherokee Nation*, stating that "[tribes] may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian."[83] Next, in *Worcester*, Marshall again reiterated the guardian-ward relationship, claiming that the Native American tribes were "under the protection of the United States."[84] Following the opinions of *Cherokee Nation* and *Worcester*, the Supreme Court in *Lone Wolf* fleshed out the idea that the federal government is the protector or guardian of tribal interests, which imputes a fiduciary duty on the government.[85] The Court stated:

> In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment

78. *Lone Wolf*, 187 U.S. at 565.

79. *Id.* at 566, 568.

80. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibilities to Indians*, 27 STAN. L. REV. 1213, 1218 n.29 (1975).

81. *See infra* Part III.B (discussing the need for a tribal consent requirement).

82. Ezra, *supra* note 9, at 715–16.

83. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

84. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

85. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (discussing Congress's trusteeship, which allowed it to change the form of a Native American investment from land to money); Ezra, *supra* note 9, at 706–07.

> of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government.[86]

Decades later, the Court furthered the Federal Trust Doctrine in *United States v. Sioux Nation of Indians*, meanwhile rejecting its decision from *Lone Wolf*.[87] In *Sioux Nation*, the Court dispelled the presumption of congressional good faith expressed in *Lone Wolf*,[88] arguing this presumption was based on the idea that the federal-tribal relationship is a political matter and therefore not subject to judicial review (i.e., the Political Question Doctrine).[89] The Court concluded that the political question in this respect does not exist, and the federal trust relationship is therefore reviewable.[90] Thus, the Court's decision in *Sioux Nation* limited congressional power over tribes by subjecting it to judicial review, which thereby restricts the Federal Trust Doctrine.[91] By limiting congressional power over tribes, the Court in *Sioux Nation* implicitly granted Native Americans "a participatory role in asserting and determining interests that warrant federal protection."[92] Therefore, when tribes bring claims under the Federal Trust Doctrine, federal courts should acknowledge the tribes' interests as legitimate.[93]

Three years after *Sioux Nation*, another important case regarding the Federal Trust Doctrine appeared before the Court: *United States v. Mitchell*.[94] There, the plaintiffs—the Quinault Tribe and others—argued the federal government breached its fiduciary duty under the General Allotment Act (commonly referred to as the Dawes Act) by mismanaging forest resources on allotted timber lands.[95] The Supreme Court had previously remanded in *Mitchell I*, holding that the Dawes Act did not impose a fiduciary duty on the federal government to manage the allotted timber

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86. *Lone Wolf*, 187 U.S. at 568.

87. United States v. Sioux Nation of Indians, 448 U.S. 371, 412–14 (1980) (holding that the *Lone Wolf* decision could not apply).

88. *Lone Wolf*, 187 U.S. at 568 ("We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.").

89. *Sioux Nation*, 448 U.S. at 413.

90. *Id.* at 414.

91. Ezra, *supra* note 9, at 723.

92. *Id.* at 731.

93. *Id.*

94. United States v. Mitchell, 463 U.S. 206, 206 (1983) [hereinafter *Mitchell II*].

95. *Id.* at 210; *see also* General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (repealed 114 Stat. 2007 (2000)) (allowing the federal government to allot individually or tribally owned parcels of lands, and subject those tribes or individual tribe members to the laws of the state where the land was located).

lands.[96] On remand, the lower court held that other timber statutes, not the Dawes Act, did impose a fiduciary duty to manage the timber lands held in trust; the federal government appealed.[97]

In *Mitchell II*, the Court began by considering "whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[98] The Court affirmed the lower court and held that, while not liable under the Dawes Act, the federal government did have a fiduciary duty as trustee under the other applicable statutes.[99] The Court further determined that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians."[100] Ultimately, the Court ruled that, when the federal government exercises control over tribal property or money, a fiduciary duty exists regardless of whether the statute explicitly states it.[101]

Most recently, in *United States v. Navajo Nation*, the Supreme Court held that, to state a claim, a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties."[102] Some scholars argue that this duty imposes a general duty to protect tribal interests, and "is properly interpreted to include an affirmative duty to take action when necessary to protect Indian property."[103] This general duty to protect tribal interests and resources would therefore include tribal cultural resources, such as those of the Standing Rock Sioux Tribe.[104] Thus, when the federal government authorizes control over tribal property, it has a general fiduciary duty—even when the statute says nothing about this duty.[105]

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96. United States v. Mitchell, 445 U.S. 535, 546 (1980) (remanding because the lower court did not consider the claim that other statutes may impose a fiduciary duty on the federal government).

97. *Mitchell II*, 463 U.S. at 211.

98. *Id.* at 218.

99. *Id.* at 226 (holding that, because the statutes clearly established fiduciary obligations, plaintiffs required damages for breach of duty).

100. *Id.* at 225.

101. *Id.*

102. United States v. Navajo Nation, 537 U.S. 488, 506 (2003).

103. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 743–44 (1995) [hereinafter Wood, *Trust Responsibility*].

104. *Id.* at 744.

105. Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian County: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 YALE L. J. ON REG. 451, 474 (2015); *see also* John Fredericks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 110 (1989) ("The notion that a fiduciary relationship between the United States and Indian tribes can arise by

II. CURRENT STATUTORY PROTECTION OF TRIBAL CULTURAL RESOURCES

A. The Modern Federal Trust Doctrine

Based on the cases from the past two centuries, an undisputed general trust relationship now exists between the federal government and Native Americans.[106] However, the specifics of this relationship have been difficult for courts to define.[107] Today, the federal government holds roughly 56.2 million acres of land in federal trust.[108] The Bureau of Indian Affairs (BIA), as enabled by the Department of the Interior (DOI), is responsible for the management of that land.[109] Accordingly, the BIA has the authority to approve or deny tribal land and property conveyances.[110] Additionally, the BIA regularly supervises and is involved in land and resource development of tribal land held in federal trust.[111] Thus, the BIA and the DOI are the holders of this trust responsibility to the Native American tribes for those 56.2 million acres.[112]

Today, the Federal Trust Doctrine establishes three main duties for the federal government: "(1) to provide federal services to tribal members; (2) to protect tribal sovereignty; and (3) to protect tribal resources."[113] Because the federal government maintains control over tribal resources on lands held in federal trust, the federal government has the duty to protect those lands.[114] The Supreme Court has held:

> [T]he fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an

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implication is an outgrowth of the general trust responsibility that the United States owes to Indian tribes, which properly recognizes the long history of federal control over Indian property.").

106. *Mitchell II*, 463 U.S. at 225.

107. Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. U. L. REV. 1069, 1070 (2006).

108. *Frequently Asked Questions*, U.S. DEP'T INTERIOR: INDIAN AFFAIRS, http://www.bia.gov/frequently-asked-questions (last visited Apr. 20, 2018).

109. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 19 (2004).

110. *Id.*; *see generally* Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy Over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 441 (2006) ("Federal administrative powers include the authority to approve or disapprove sales, leasing, and all other types of property conveyances, including probate.").

111. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1478.

112. McCarthy, *supra* note 109, at 19; US DEP'T OF THE INTERIOR: INDIAN AFFAIRS, *supra* note 108.

113. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 430 (2012).

114. *Id.* at 435.

> obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.[115]

Furthermore, this duty not only applies to "Indian country" ("reservations . . . , 'dependent Indian communities,' and trust allotments"),[116] but also to lands that are off Indian country and affect tribal lands.[117] Additionally, scholars and several courts recognize that the Federal Trust Doctrine imposes a duty, whereby federal environmental agencies must regulate "in the best interests" of the tribes.[118] As such, while federal environmental statutes are the basis of most tribal claims, the Federal Trust Doctrine "fill[s] the gaps left by environmental statutes."[119] Some of these environmental statutes include consultation requirements—what courts consider "stop, look, and listen" provisions, meaning they are only procedural and lack any substantive requirements on part of the agencies.[120]

B. National Historic Preservation Act of 1966

One such environmental statute that tribes often use is the National Historic Preservation Act of 1966, identified earlier as NHPA.[121] Congress enacted the NHPA to preserve historic properties by creating harmony

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115. United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003).

116. GOLDBERG, ET AL., *supra* note 3, at 146.

117. Wood, *Trust Responsibility*, *supra* note 103, at 744.

118. Whitney-Williams & Hoffmann, *supra* note 105, at 474. *See, e.g.*, Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984) (holding the Federal Government must act in the best interest of the tribes); Woods Petroleum Corp. v. Dep't of the Interior, 47 F.3d 1032, 1042 (10th Cir. 1995) (noting federal regulations establish an affirmative duty for the federal government to act in the best interest of the tribes); Burlington Res. Oil & Gas Co. v. U.S. Dep't of the Interior, 21 F.Supp.2d 1, 5 (D.D.C. 1998) ("[W]hen more than one choice would satisfy the 'arbitrary and capricious' standard, [the agency] must choose the alternative that is in the best interests of the Indian tribe.").

119. Berkey, *supra* note 107, at 1071.

120. *See, e.g.*, *Standing Rock I*, 205 F. Supp. 3d 4, 8 (D.D.C. 2016) (describing NHPA's consultation requirements as "stop, look, and listen" requirements); Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 (1st Cir. 2003) (characterizing § 106 as "a requirement that agency decisionmakers 'stop, look, and listen,' but not that they reach particular outcomes"); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (holding that the "stop, look, and listen" provision requires each federal agency to consider its programs' effects); Apache Survival Coal. v. United States, 21 F.3d 895, 906 (9th Cir. 1994) (quoting Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246, 1260–61 (D.C. Cir. 1988)) (describing NEPA and the NHPA's consultation requirements as "stop, look, and listen" provisions).

121. National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (2015); *see also Standing Rock I*, 205 F. Supp. 3d at 7 (stating the Tribe alleges the Corps violated NHPA).

between them and modern society.[122] Section 106 of the NHPA requires federal agencies to consider the effect of a proposed "undertaking" on any historic property.[123] The Advisory Council on Historic Protection is responsible for promulgating the regulations necessary to govern the implementation of the NHPA.[124] The Agency must afford the Advisory Council a "reasonable opportunity to comment" on the undertaking.[125] Further, the Agency must consult with any tribe "that attaches religious and cultural significance to [the historic] property."[126] The NHPA defines a historic property as "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" that is eligible for inclusion on the National Register.[127]

To initiate this process, the Advisory Council must first establish whether the federal action is an undertaking and, if so, whether it would affect the historic property.[128] If the answer to either question is no, then the § 106 process is complete and the Agency may issue the permit.[129] If the Advisory Council cannot make this determination, it must then initiate the consultation process before it allows the undertaking.[130] Under the Agency's regulations, the term "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process."[131]

In this consultation process, tribes that attach religious and cultural significance to the property are considered consulting parties, even when the undertaking would occur off Indian country.[132] During the consultation process, the Agency must ensure that the tribe receives "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the

122. 54 U.S.C. § 300101(1).

123. *Id.* § 306108; *Id.* § 300320 (defining an "undertaking" as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency").

124. *Id.* § 304108(a).

125. *Id.* § 306108. As created under the NHPA, the Advisory Council for Historic Preservation is the primary federal advisor for the Act.

126. *Id.* § 302706(b).

127. *Id.* § 302706(a).

128. 36 C.F.R. § 800.3(a) (2016).

129. *Id.* § 800.3(a)(1). No consultation is required if the agency action is not an undertaking that may cause effects on the historic property. *Id.*

130. *Id.* § 800.2(a)(4).

131. *Id.* § 800.16(f) (emphasis omitted).

132. *Id.* §§ 800.2(a)(4), (c)(2)(ii).

resolution of adverse effects."[133] Furthermore, consultation must occur "early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties."[134]

The Advisory Council then determines whether the property is on or eligible for the National Register of Historic Places.[135] When making this determination, the Advisory Council must recognize the tribe's "special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[136] If the Agency determines it is eligible, then it must assess any adverse effects the undertaking may cause.[137] An adverse effect occurs when the undertaking would alter the characteristics of the historic property in any way that would diminish the property's "location, design, setting, materials, workmanship, feeling, or association."[138] If the potential for an adverse effect exists, the Agency should attempt to resolve those effects through further consultation.[139] If the Agency determines that the follow-up consultation would be unproductive, it may terminate the final consultation and issue the permit.[140] However, while this statute encourages federal agencies to resolve any adverse effects, the lack of any substantive requirement allows the agencies to avoid implementing any mitigation alternatives.[141]

Thus, though the purpose of the NHPA is to encourage harmony between modern society and historic properties, a procedural loophole exists.[142] While the Agency must consult with the tribe and consider the tribe's "special expertise" on the matter, it is not required to implement the tribe's recommendations.[143] This leaves ambiguity and redundancy within the statute. In *Standing Rock I*, for example, the Tribe asserted that the Corps authorized a federal action that would cause environmental and

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133. *Id.* § 800.2(c)(2)(ii)(A).
134. *Id.*
135. *Id.* § 800.4(c).
136. *Id.*
137. *Id.* § 800.5(a).
138. *Id.*
139. *Id.* § 800.5(d)(2).
140. *Id.* §§ 800.6, 800.7(a).
141. *See id.* § 800.7 (requiring only that the agency provides its reasons for termination of consultation to the other consulting parties).
142. 54 U.S.C. § 300101(1) (2012 & Supp. 2015); *see also* Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 223 (2014) (stating that § 106 of NHPA does not guarantee tribal satisfaction with consultations).
143. *Compare* 36 C.F.R. § 800.4(c) (requiring consideration of tribe's "special expertise"), *and id.* § 800.6 (detailing procedures of consultation), *with id.* § 800.7(a) (allowing termination of consultation in favor of the agency).

cultural harm to the Tribe in violation of the NHPA.[144] The Tribe claimed that by issuing Nationwide Permit 12 (NWP 12), which permitted DAPL's construction, the Corps triggered the § 106 process under the NHPA, but did not ensure compliance.[145] It argued that the Corps failed to consider the impacts on historically- and culturally-significant properties that NWP 12 would cause, and additionally failed to engage in the proper consultation process prior to issuing NWP 12.[146]

The United States District Court for the District of Columbia, however, found that the Corps did comply with NHPA by engaging in what it considered adequate consultations with the Tribe.[147] The court held that "[t]he Corps made a reasonable effort to discharge its duties under the NHPA prior to promulgating NWP 12, given the nature of the general permit."[148] The court further stated that, when the Corps promulgated NWP 12, it had no knowledge of DAPL—it just "preauthorize[d] a group of similar activities that, alone and combined, have minimal impact on navigable waterways."[149] Thus, the court found that the Corps did not violate the NHPA because it made a reasonable effort to fulfill its duties, regardless of the adverse impacts that DAPL may cause.[150]

This result goes against the purpose of the NHPA—to preserve historic properties and promote harmony between historic properties and modern society—because it allows for historic sites of tribal cultural significance to potentially suffer harm.[151] The NHPA's consultation requirements proved ineffectual for the Tribe, as they neither preserved the sacred sites nor resulted in meaningful mitigation alternatives.[152] Agencies are therefore able to skirt the issues and ignore real tribal concerns. Because of the ineffectiveness of the NHPA consultation requirement, the consultation process is in need of reform to adequately and meaningfully protect the Standing Rock Sioux Tribe's cultural resources.[153]

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144. *Complaint, Standing Rock I*, *supra* note 10, ¶ 1.

145. *Id.* ¶ 4.

146. *Id.* ¶¶ 2, 4.

147. *Standing Rock I*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016).

148. *Id.* at 28.

149. *Id.*

150. *Id.* at 33.

151. *See* 54 U.S.C. § 300101(1) (2012 & Supp. 2015) (stating the purpose of the NHPA).

152. *See Standing Rock I*, 205 F. Supp. 3d at 37 (holding that the Tribe did not meet its burden to show that injunctive relief would prevent harm to sites of cultural significance).

153. *See, e.g.*, Routel & Holth, *supra* note 113, at 445–46 (quoting former Navajo President Joe Shirley's frustrations with the consultation system).

C. National Environmental Policy Act of 1969

A close relative to the NHPA is the National Environmental Policy Act of 1969, previously referred to as NEPA.[154] NEPA has become the basis for environmental review of federal government agencies.[155] The Act requires a federal agency to provide an EIS before taking any federal action that would significantly affect the human environment.[156] So, if a federal agency action causes environmental impacts, that federal agency is subject to the NEPA procedural process.[157] These procedural requirements of NEPA have made it possible for tribes to participate in federal agency decision-making, which encourages coordination and harmony between the federal government and Native American tribes.[158] However, the downfall is that NEPA does not provide any substantive rights—even though it has "constitutional dimensions."[159]

NEPA's EIS requirement is the most litigated language from the Act.[160] As such, an agency must first determine which actions require an EIS.[161] A screening process helps determine when an EIS is necessary, but the process is tedious because it requires agencies to adopt specific criteria.[162] The specific criteria place actions into one of three categories: (1) those "[w]hich normally do require environmental impact statements"; (2) those "[w]hich normally do not require either an environmental impact statement or an environmental assessment"; or (3) those "[w]hich normally require environmental assessments but not necessarily environmental impact statements."[163] Thus, there is a tendency to limit those actions that would require an EIS.[164] As an example, the BIA has only determined that

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154. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

155. Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 AM. INDIAN L. REV. 297, 298, 301 (1997).

156. 42 U.S.C. § 4332(2)(C).

157. Suagee & Parenteau, *supra* note 153, at 305.

158. Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377, 379 (1990).

159. *Id.* ("Some legal scholars have referred to NEPA as a statute of constitutional dimensions, in the sense that it is a kind of social compact between the people and the government which empowers citizens to participate directly in environmental planning and [which] forces coordination among federal, state, municipal, and private agencies that would not otherwise occur." (internal quotations omitted)).

160. *Id.* at 394.

161. *Id.* at 396.

162. *Id.*; 40 C.F.R. § 1507.3(b)(2) (2016).

163. 40 C.F.R. § 1507.3(b)(2).

164. Suagee, *supra* note 158, at 397.

two types of actions regularly require an EIS: new mines and new water-development projects.[165]

When an agency has determined that an EIS is necessary, the first requirement is "scoping": publishing the EIS in the Federal Register to determine the issues relating to the action that need to be addressed.[166] Next, after a comment period, the agency must prepare a final EIS.[167] The final EIS must address any comments and must attach all substantive comments to the final EIS.[168] Lastly, NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives . . . ."[169] By considering alternative ways to achieve its objective, an agency could avoid or mitigate the adverse environmental impact.[170] A consideration of the alternatives, however, is merely that: a consideration. The agency does not have to implement the alternatives to its decision.[171]

Native American tribes can—and often do—use NEPA as a means of judicial relief.[172] A tribe can proactively use the NEPA process to provide agencies with alternatives that would either avoid or mitigate any environmental impact. Additionally, a tribe can participate during scoping by providing comments or becoming a cooperating agency.[173] By doing so, tribes can proactively protect themselves from the environmental harm federal agency actions may cause. Nevertheless, NEPA is not a substantive law and does not require the agency to implement mitigation alternatives.[174] Thus, the same result occurs as with the NHPA consultation process: though procedurally required to consult tribes, agencies are not required to implement any of the mitigation alternatives discussed and are thus able to harm tribal cultural resources.[175]

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165. *Id.* at 397 n.74.

166. 40 C.F.R. § 1501.7.

167. *Id.* § 1506.8(b).

168. *Id.* § 1503.4.

169. *Id.* § 1502.14(a).

170. Suagee, *supra* note 158, at 418.

171. *Id.* at 419 ("Still, this requirement does not mean an agency must actually carry out a mitigation plan.").

172. *See generally* Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 36 (D.C. Cir. 2015) (discussing the scope of the environmental review requirement under NEPA).

173. 40 C.F.R. § 1508.5 (2017) (providing that, "when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency"); *see also id.* § 1501.6 (establishing rights and obligations of cooperating agencies); Suagee, *supra* note 158, at 403–04 (discussing benefits and responsibilities associated with tribes opting to become cooperating agencies).

174. Suagee, *supra* note 158, at 419.

175. *See supra* Part II.B (discussing ineffectiveness of the NHPA consultation process).

D. Archaeological Resources Protection Act of 1979 and Native American Graves Protection and Repatriation Act of 1990

Two other important statutes focusing on cultural resources are the Archaeological Resources Protection Act of 1979 (ARPA) and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).[176] The purpose of ARPA is to protect archaeological resources and sites located on federal and tribal lands.[177] Under the terms of ARPA, those who excavate or remove "archaeological resources" without a permit are liable for criminal or civil penalties.[178] Further, ARPA requires federal agencies to notify any affected tribe if issuing a permit will result in harm to "any Indian tribal religious or cultural site on public lands . . . ."[179]

Nonetheless, ARPA does not require federal agencies to consult with tribes before issuing its permit.[180] In fact, the only chance for a tribe to substantively limit an agency in its permitting process is if the excavation or removal would occur *on tribal lands*; only after obtaining consent from the tribe may the agency issue a permit to excavate or remove any archaeological resource from tribal lands.[181] Furthermore, ARPA contains a savings provision for activities such as mining operations or mineral leasing.[182] Thus, while the purpose of ARPA is explicitly to protect cultural resources, the Act is unquestionably lacking in any consultation requirements.[183]

Second, after decades of "disparate and disrespectful treatment" of Native American graves and remains, Congress enacted NAGPRA with two primary objectives: (1) to return Native American remains and funerary

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176. Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm (2012); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001–3013 (2012).

177. 16 U.S.C. § 470aa(b).

178. *Id.* §§ 470ee(d), 470ff. "Archaeological resource" is defined as "any material remains of past human life or activities which are of archaeological interest," and includes objects such as "pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items." *Id.* § 470bb(1).

179. 43 C.F.R. § 7.7(a)(3) (2017).

180. Jennifer H. Weddle, *Navigating Cultural Resources Consultation: Collision Avoidance Strategies for Federal Agencies, Energy Project Proponents, and Tribes*, 60 ROCKY MOUNTAIN MINERAL L. FOUND. § 22.02(3) (2014).

181. 16 U.S.C. § 470cc(g)(2).

182. *Id.*§ 470kk(a) ("Nothing in this [Act] shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.").

183. *See id.* § 470aa(b) (stating that the purpose of the Act is "to secure . . . the protection of archaeological resources and sites . . . , and to foster increased cooperation and exchange of information between governmental authorities [and] the professional archaeological community").

objects to the individual's lineal descendants or tribe; and (2) to protect Native American burial sites.[184] Though it predominantly covers Native American remains or burial sites, NAGPRA extends to other cultural resources—what the Act calls "sacred objects" and "cultural patrimony."[185] These terms encompass specific religious ceremonial objects, or objects considered inalienable and having "ongoing historical, traditional, or cultural importance" to a tribe.[186]

Nevertheless, NAGPRA—like ARPA—does not provide substantive consultation requirements unless the cultural resource is on tribal land.[187] Rather, the Act only provides for procedural protections, requiring consultation with the tribe before excavation of Native American remains and objects.[188] Again, nothing in NAGPRA requires the permitting agency to implement the tribe's recommendations about potential harm from excavation or removal—it merely requires the process of consultation.[189] Therefore, just as in the NHPA, NEPA, and ARPA processes, the consultation requirement within NAGPRA provides no affirmative duty for a federal agency to implement any suggested remedial or mitigation measures. Because these statutes impose no substantive requirements on the federal agencies, they not only fail to protect tribal cultural resources, but they also fail to perform the more general congressional purpose in enacting them.

III. FUTURE PROTECTION OF TRIBAL CULTURAL RESOURCES

A. The Federal Government's Present Failure to Protect Tribal Cultural Resources

Today, the four most significant federal statutes for cultural resource protection do not incorporate substantive tribal consultation requirements.[190] Instead, all four merely provide procedural requirements, which place no affirmative duty on the federal agency to incorporate the opinions, suggestions, or mitigation alternatives that tribes may propose

184. Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269, 270, 273 (2000); 25 U.S.C. § 3002 (2012).

185. 25 U.S.C. § 3001(3).

186. *Id.*

187. *Id.* § 3002(c)(2).

188. *Id.* § 3002(c)(1).

189. *Id.*; *see also* 43 C.F.R. § 10.3(c) (2010) (requiring only that the Federal agency determine whether an action may affect Indian tribes and notify them thereof).

190. *See* discussion, *supra* Part II (analyzing the tribal consultation requirements within NHPA, NEPA, ARPA, and NAGPRA).

during consultation.[191] This is a glaring problem because it renders the tribal consultations ineffective.[192] As one scholar put it: "What is the purpose of taking the time and effort to study an issue, develop a position, and then have the federal government give it only modest consideration, if even that?"[193] Moreover, the federal agency has often already made a preliminary decision on its project before the consultation even occurs, only consulting tribes because of the procedural requirements.[194] This poses a problem for tribes wanting to protect their cultural resources because they may not see their input incorporated into the agency's decision-making process.[195]

In the case of the Standing Rock Sioux Tribe, although the court determined that the Corps fulfilled its procedural requirements under the NHPA, the Tribe was ultimately unable to provide meaningful input on DAPL project.[196] This result directly contradicts the purpose of these statutes: to protect cultural resources and the human environment from adverse effects.[197] Without substantive tribal consultation requirements, the federal government is able to weigh corporate and economic interests against the importance of tribal cultural resources. Without effective and meaningful consultation between the tribal and federal governments, agency actions are able to harm or adversely affect tribal cultural resources.

B. Proposed Tribal Consent Requirement

To properly protect tribal cultural resources, the federal government must create more substantive tribal consultation requirements within its statutes. If the federal government cannot accomplish a more meaningful consultation process, it is at risk of further betraying the Native American people.[198] The Federal Trust Doctrine imposes an affirmative duty on the

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191. *Id.*

192. Routel & Holth, *supra* note 113, at 453.

193. Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 67 (2015) [hereinafter Miller, *Consultation*].

194. *Id.* at 65.

195. *Id.*

196. *See Standing Rock I*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) (holding that the Army Corps fulfilled the consultation requirement from the NHPA).

197. *See* discussion, *supra* Part II (discussing the purpose of NHPA, NEPA, ARPA, and NAGPRA).

198. Routel & Holth, *supra* note 113, at 448 ("[O]ne tribal attorney has claimed that consultation is simply a modern means of perpetuating the betrayal of Indians by the federal government."); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 24 (2000) ("[C]onsultations may be one method by which that betrayal is perpetrated today.").

federal government to protect tribal cultural resources on lands held in trust.[199] This duty thus requires the federal government to actively protect these resources from adverse effects that federal agency actions may cause.[200] To properly protect these cultural resources, the federal government needs to meaningfully and effectively consult with the tribes. "[T]he duty to consult with Indian tribes is rooted in the federal government's common law trust responsibility to tribes."[201] Thus, to fulfill its duty under the Federal Trust Doctrine, the federal government must fix its current statutory framework.

To achieve proper protection of tribal cultural resources, Congress should amend the current statutes to require tribal consent whenever a federal agency determines that its actions will affect tribal cultural resources. Some scholars have argued for a uniform consultation statute.[202] However, legislation is a slow-moving process, and it would be more effective to simply amend the existing statutory framework. Because the current statutes, as discussed above, specifically focus on protecting cultural resources, Congress could simply amend them rather than pursue the process of creating an entirely new statute.[203] The proposed amendments should incorporate the following:

> (1) acknowledgment from the tribe or tribal representative that the consultation process has begun;
>
> (2) meaningful discussion, whereby each consulting party is able to present opinions, suggestions, and mitigation alternatives; and
>
> (3) either:
>
> (a) tribal consent allowing the agency to go forward with its action, as adjusted to incorporate each consulting party's input; or
>
> (b) if the agency cannot obtain tribal consent, an adjudication wherein the agency has the burden to prove to a neutral arbiter

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199. Routel & Holth, *supra* note 113, at 448.

200. Wood, *supra* note 111, at 1534.

201. Routel & Holth, *supra* note 113, at 448.

202. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee That Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 895 (2014); Routel & Holth, *supra* note 113, at 473.

203. *See* discussion, *supra* Part II (analyzing the NHPA, NEPA, ARPA, and NAGPRA as they pertain to cultural resources).

> why it was unable to obtain tribal consent, yet should be allowed to proceed.

A statutory tribal consent requirement would create several advantages, not just for the protection of tribal cultural resources, but also for the agencies. To begin with, a tribal consent requirement would encourage agencies to begin the consultation process earlier. Second, the proposed requirement would create an affirmative duty on behalf of the federal government to implement mitigation alternatives, thereby achieving its own goals, while at the same time avoiding harm to tribal cultural resources. Lastly, requiring tribal consent would allow tribes to exercise their sovereignty over matters regarding their cultural resources.

First, if Congress amends the current statutes to reflect a consent requirement within the consultation process, it would urge agencies to engage in the consultation process earlier, thereby allowing for expeditious development projects. Currently, when tribal consultation does not occur until the later stages of a project, the agency is forced to choose between keeping its deadline and adjusting its project to incorporate the tribal input.[204] Typically, the agency chooses to keep its deadline, to the detriment of tribes.[205] However, if Congress makes tribal consent a prerequisite to the project, the consultation process would have to occur earlier. This is because an agency would, theoretically, not invest time and money on a project without first obtaining the necessary approval. Thus, by requiring tribal consent within the consultation process, Congress would not only ensure early and meaningful tribal input, but also prompt development.

Second, by requiring tribal consent, Congress would aid the agency in achieving its own goals while at the same time affording tribes adequate input over their cultural resources. The consent requirement would compel the agency to consider any proposed mitigation alternatives because, without incorporating them into its project, the tribe will likely not grant its consent. This would result in mutual agreement and, in many cases, a win-win. Of course, agencies and development proponents could argue that mitigation alternatives are costly or time consuming, but a consent requirement would likely dispel both of these fears. Because implementing mitigation alternatives will increase tribal consent, there will be fewer longstanding disagreements or lawsuits. This mitigation will reduce the overall cost and time of proposed development projects. Furthermore, the alternative to obtaining tribal consent is for the agency to participate in

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204. *See* Routel & Holth, *supra* note 113, at 469–70 (documenting the tension between timeline-driven projects and tribal consultation).

205. *Id.*

adjudication; this proposal allows the agency to retain its right to proceed with the project without tribal consent if it can prove to a neutral third party that it should be able to.

Third, a consent requirement within the consultation process would reinforce tribal sovereignty. Part of the federal government's duty under the Federal Trust Doctrine is to protect tribal sovereignty.[206] However, the lack of meaningful consultations leads many tribal governments to believe the federal government is not fulfilling this duty.[207] The more deference an agency gives to a tribe's decision, the more the agency respects that tribe's sovereignty. Allowing the tribe to determine a course of action that would affect its cultural resources secures that tribe's sovereignty over its cultural resources. Moreover, truly meaningful consultation allows the agency to understand how its project or action would encroach on a particular tribe's sovereignty.[208] Thus, a consent requirement would aid the federal government in fulfilling its duty to protect tribal sovereignty under the Federal Trust Doctrine.

CONCLUSION

Since the time of first European contact, Native Americans and their culture have been cast aside to make way for development projects.[209] In the case of the Standing Rock Sioux Tribe, the Tribe was unable to obtain relief against an oil and gas pipeline that threatens many of its cultural resources.[210] Often weighing the economic benefits over the tribal cultural importance, agencies choose to pursue their actions rather than mitigate the adverse effects they may have on tribal cultural resources. Though many statutes—the NHPA, NEPA, ARPA, and NAGPRA, in particular—seek to protect cultural resources, they fall short because they lack any substantive

206. *See supra* Part II.A (arguing the modern Federal Trust Doctrine includes the duty to protect tribal sovereignty); Routel & Holth, *supra* note 113, at 432 ("Just as originally conceived [in the Marshall Trilogy], the federal government still has a duty to protect tribal sovereignty against incursions by states and their citizens.").

207. Miller, *Consultation*, *supra* note 193, at 67; *see also* Routel & Holth, *supra* note 113, at 431–32 (discussing the federal government's duty to protect tribal sovereignty).

208. Routel & Holth, supra note 113, at 435 ("Meaningful consultation with federal officials is necessary to determine what services are most needed by tribal members, to understand how federal and state actions may be encroaching on tribal sovereignty, and to analyze whether a federal project will have an adverse effect on tribal resources.").

209. Rosser, *supra* note 38, at 478.

210. *See Complaint, Standing Rock I*, *supra* note 10, ¶ 1 (describing the harm DAPL would cause to the Tribe's cultural resources).

consultation requirements.[211] As a result, many tribal cultural resources (or the environment surrounding those resources) are harmed, destroyed, or removed.[212] The federal government has an affirmative duty under the Federal Trust Doctrine to protect tribal resources, yet it is currently failing to fulfill this duty.[213] In order to correct this wrong, Congress should strengthen the consultation requirements by amending its current statutory scheme to include a tribal consent requirement within the consultation process. By doing so, Congress will not only ensure protection of tribal cultural resources, but will also ensure timely development of a project. This would respect and reinforce tribal sovereignty, as well as provide a win-win for both the federal and tribal governments involved.

If a consent requirement existed for the Standing Rock Sioux Tribe, the near guarantee of future harm to their cultural resources could have been avoided. If the Corps was required to obtain consent from the Tribe prior to issuing its permit for DAPL, the Tribe would have seen either its proposed mitigation alternatives implemented or, at the very least, had the opportunity to challenge the Corps on its reasons for not obtaining their consent. By implementing a consent requirement, Congress can ensure that future harm to tribal cultural resources is reduced. The places and objects that Native Americans hold sacred are immeasurably important to this country's history and people, and the federal government must do everything in its power to protect them.

- *Elizabeth Bower*[*†]

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211. *See* discussion, *supra* Part II (discussing the ineffective consultation requirements within the NHPA, NEPA, ARPA, and NAGPRA).

212. *See* Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 797 (1992) (discussing the destruction of Native American sacred sites).

213. *See supra* Part III.A (describing how the federal government is currently failing to fulfill its duty under the modern Federal Trust Doctrine).

* Juris Doctor Candidate 2018, Vermont Law School; B.A. 2012, George Mason University.

† I would first like to thank Professor Hillary Hoffmann for being an expert in the field and offering her invaluable guidance throughout this process—this Note would have had no direction without her. I would also like to thank Volume 42's excellent production team for making this Note publishable: Rachel Hanson, Julia Muench, Erin C. Bennett, Suraya Williams, Sasha Gainen-Truslow, and Joseph Strain. Lastly, I would like to thank Rachel Oest and Dustin Torrance for reading the many versions of this Note and supporting me each time.