Siloed Environmental Protection:

The Challenge of Incorporating Cultural Values in US Natural Resource Regulatory Compliance

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Critical Essay Submitted for an Application for the
Master of Environmental Studies Program
The Evergreen State College
July 14, 2024

In the field of environmental resource management in the United States of America (US), the regulatory distinction made between natural and cultural resources creates a barrier to equitable environmental resource management. This distinction inhibits the ability to effectively support the management of environmental resources of high value to North American Indian Tribes (Tribes).

The regulatory separation of natural and cultural resources does not exist in a vacuum; instead, it reflects the dominant social and political culture of the US. In English, "cultural" commonly relates to beliefs and material features made by humans (Merriam-Webster 2024a). In contrast, "natural" is typically applied to something that exists without human intervention (Merriam-Webster 2024b). This distinction overlooks the interconnectedness of the environment.

It also assumes that humans are not part of nature. Professor Robin Wall Kimmerer, a scientist and member of the Potawatomi Nation, writes of her surprise when she surveyed her ecology students on the interaction between humans and the environment. She found that not only could they not identify positive interactions between humans and the environment, but that they could not imagine what such a positive relationship would look like (2013:6). Implicit in her students' response is the belief that humans are not part of natural world.

Many cultures do not maintain the view that natural resources are distinct from cultural resources or that they cannot have high cultural significance in another. For instance, Japan's Act on the Protection of Cultural Properties does not only designate buildings, historic districts, and sites. It allows for the designation of a broad range of resources, including gorges, seashores, mountains, animals (including their habitats, breeding places and summer and winter resorts), plants (including their habitats), and geological features and minerals (including the grounds where peculiar natural phenomena are seen) (Chapter 1, Article 2(4)[1]). Alterations to protected natural monument require approval by the Japanese Commissioner for Cultural Affairs (Government of

[1] An English translation of Japan's Act on the Protection of Cultural Properties can be found at: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/jp/jp080en.pdf

Japan 2024). The US regulatory environment is not so integrated in its protections or in its consultation framework. As a result, it fails to provide protections for natural resources that are significant for communities and individuals for whom the resources have cultural significance. It also limits the ability for people with more integrated values to meaningfully engage in public process. This essay addresses in particular the problems this regulatory dichotomy presents for the protection of environmental resources of significance to Tribes.

The dominant, Euro-American separation of the human and natural world overlooks a more holistic Native-American understanding. In his recent book on Northwest tribal treaties and Native fishing rights, Charles Wilkinson (2024) retells with permission a number of stories that illustrate the interrelatedness of all living things such as one told by Lummi Hereditary Chief Bill James in which a man follows a whale into the sea and encounters sea creatures who peel off their skin to reveal that they are his brothers and sisters. Quoting journalist Lynda V. Mapes' observations on the Lower Elwha Klallam Tribe's relationship with the Elwha River, Wilkinson writes, "'the river wound through every aspect of tribal members' lives: what they ate, what they wore, what they built, their art, worship, and healing arts (31).'" While Mapes' comments refer to the Tribe's connectedness to the river in the past tense, the Tribe continues to have a profound relationship with the river today.

Writing from personal experience as a federal cultural resources manager in Kitsap County, I experience the barriers our environmental regulatory framework throws up to prevent integrated, meaningful consultation with affected Tribes over proposed development. During consultation under Section 106 of the National Historic Preservation Act (NHPA) and multiple treaties[2], tribal members and staff frequently voice their frustration that our process does not recognize that natural resources *are* cultural resources. Section 106 and treaty rights consultation processes happen distinct from one another, working with different tribal leaders and asking different questions. For instance, for the planned demolition of a pier, the agency would consult with

[2] Treaty of Point Elliott (1855), Treaty of Point No Point (1855), and Treaty of Medicine Creek (1854)

applicable Tribal Historic Preservation Officers to request input on whether the demolition could affect any tribally-significant cultural resources as defined in the NHPA and its implementing regulations. At the same time, the agency would consult with the appropriate tribal Chairpersons to determine whether demolishing the pier would affect tribal access to fish and shellfish as defined in applicable treaties. With respect to treaty rights and cultural resource protection, the same people are not in the same room discussing the same questions.

With its ability to both designate heritage assets and provide for a process to evaluate for and mitigate adverse effects to important historic places, the NHPA and its implementing regulations could provide a mechanism for protecting natural resources as cultural resources. As described in a best-practices document by the Working Group of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty and Reserved Rights:

> It is not uncommon for Indian Tribes to raise treaty rights concerns during the Section 106 review required by the National Historic Preservation Act for proposed federal undertakings (see 54 U.S.C. § 306108). Cultural resources, including those of religious and cultural significance to Indian Tribes, are considered in the Section 106 process if the property meets the eligibility criteria for listing in the National Register of Historic Places (Advisory Council on Historic Preservation et al. 2022:8).

However, meeting the referenced eligibility criteria for the NRHP can be difficult for natural resources because the criteria are highly place-based, prioritize the past human role in a resource's construction and/or use, and require that the resource be minimally altered over time.

The NHPA focuses on resources defined as "historic properties." Under 54 U.S.C. § 300308, a historic property is any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the NHPA. The very term "property" implies a fixed place that is specifically bounded for ownership, with synonyms of "plot", "lot", "tract", and "plat" (Merriam-

Webster 2024c). Natural resources generally do not start and end within legally-defined boundaries of ownership. They generally do not comfortably fit within the categories of historic district, building, structure, or object, although have been successfully defined as sites, albeit with clearly defined, defensible boundaries (National Park Service 1995).

In terms of the conditions under which a resource is listed or eligible for listing in the NRHP, the district, site, building, structure, or object must have sufficient physical integrity to physically convey its historical significance as defined in four criteria. In brief, the four criteria are:

- **Criterion A**: The property is associated with significant historical events. These events may be single points in time, or broad patterns or trends;
- **Criterion B**: The property is associated with a significant historical person;
- **Criterion C**: The property is significant for its historical design and/or construction; and
- **Criterion D**: The property is significant for its potential to provide additional historical or prehistorical information. This criterion is most commonly used for archaeology (36 CFR Ch 1 § 60.4; National Park Service 1995:12-24)

Provided a natural resource's human use is the focus of its significance, the NRHP criteria can be satisfied. None of the criteria specifically address natural processes without human agency.

More problematically, the regulations require that the property possess sufficient historical integrity to reflect its historical associations. As defined in 36 CFR Ch 1 § 60.4 and further refined in National Park Service guidance (1995:44-49), the seven elements of integrity are:

1. **Location** – The place where the property was built;
2. **Design** – The form, plan, and style of the property;
3. **Setting** – The physical environment of the property;
4. **Materials** – The physical fabric used to create the property;
5. **Workmanship** – The evidence of the craftmanship that went into its creation;
6. **Feeling** – The essence of the historical aesthetics or period of time; and

7. **Association** – The direct link between the historical associations and the property.

The elements of integrity prioritize the role of humans in making the place historically significant, ultimately relying on the retention of the physical remains of human efforts as being the determiner of cultural importance.

With the narrow definition of historic significance provided under the NHPA, the ability to protect natural resources that have cultural value to Tribes is left to treaties and natural-resource regulations. But these have their limits. For instance, treaties only protect the specified tribes' ability to access and harvest natural resources in their historically-defined "usual and accustomed areas." The treaties provide no measure of protection or conservation of the resources, nor do they look beyond the value of the resources as commodities[3]. Regulations such as the Endangered Species Act only provide Tribes with a limited consultation role – such as when an endangered species is located on tribal land – despite the fact that many endangered species are highly significant to Tribes (US Fish and Wildlife Service 2024; National Marine Fisheries Service 2024). While the National Environmental Policy Act attempts to coordinate a centralized consultation process on environmental compliance, treaty rights protection does not fit comfortably within what is essentially a regulatory process tool.

As the federal law that is intended to protect the country's tangible heritage, the NHPA and its implementing regulations are overdue for revision to more holistically encompass natural resources that have cultural significance. Although the laws and regulations of countries like Japan exist within different socio-political contexts, consulting the environmental protection frameworks of other countries may provide helpful points of consideration. Ultimately, however, to be effective, change to our own laws and regulations will require truly meaningful consultation with Tribes and other communities whose cultural resources are currently overlooked by the limitations of the NHPA.

[3] Treaty of Point Elliott (1855), Treaty of Point No Point (1855), and Treaty of Medicine Creek (1854)

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