

Tribally Held Conservation Easements Under Oregon and Washington Statutes and Tax Deductibility Strategies for Cultural Conservation Easements

A land trust operating in Oregon or Washington seeking to use conservation easements to return land or access to Tribes has a set of semi-flexible legal tools at its disposal. In an effort to add to this toolkit, this memo details the legal requirements for tribally held conservation easements and offers strategies for qualifying cultural conservation easements as tax deductible.

I. Requirements for Tribally Held Conservation Easements Under Oregon, Washington, and Federal Law

State statutes authorize the creation of conservation easements, and define which entities may hold them and for what purposes.¹ At the same time, the Internal Revenue Code (“IRC”) establishes requirements for tax deductible donations of conservation easements—a common and often critical incentive. To be deductible, a conservation easement must be held by a defined entity under the IRC and meet defined purposes. Both the holder and conservation purposes under the IRC do not always correspond with the requirements of state law contained in the enabling statutes. Therefore, the first part of the memo compares Oregon and Washington’s enabling statutes with the IRC to determine the eligibility of Tribes to hold conservation easements that are tax deductible in the region.

A. Who may hold a conservation easement?

i. Oregon Law:

Oregon law states a “holder” of a conservation easement includes an Indian tribe as defined in Or. Rev. Stat. § 97.740.² Indian tribe is then defined as “any tribe of Indians recognized by the Secretary of the Interior or listed in the Klamath Termination Act³, or listed in the Western Oregon Indian Termination Act⁴, if the traditional cultural area of the tribe includes Oregon lands.”⁵ Oregon’s definition thus recognizes several “categories” of potential Tribal conservation easement holders. They are listed below.

ii. Current federally recognized Tribes in Oregon:⁶

1. Burns Paiute Tribe
2. Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

¹ See Or. Rev. Stat § 271.715-271.725; Wash. Rev. Code § 64.04.140; Wash. Rev. Code § 84.34.200-260.

² Or. Rev. Stat § 271.715.

³ Klamath Termination Act of 1954, P.L. No. 587, ch. 732, 68 Stat. 718 (1955) (codified at 25 U.S.C. 3564 et seq.).

⁴ Western Oregon Indian Termination Act, P.L. 588, (codified at 25 U.S.C. 3691 et seq.).

⁵ Or. Rev. Stat § 97.740.

⁶ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 19, 4636-4641 (January 28, 2022) (updating 86 FR 7554).

3. Confederated Tribes of Grand Ronde
4. Confederated Tribes of Siletz
5. Confederated Tribes of Umatilla Reservation
6. Confederated Tribes of Warm Springs
7. Cow Creek Band of Umpqua Tribe of Indians
8. Coquille Indian Tribe
9. Klamath Tribes

iii. Federally Recognized Tribes Whose Traditional Cultural Area Includes Oregon Lands:

1. Fort McDermitt Paiute and Shoshone Tribes, Nevada and Oregon⁷
2. Nez Perce Tribe
3. Yakama Nation

iv. Tribes listed in the Klamath Termination Act:

- (a) "Tribe means the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians."⁸

v. Tribes listed in the Western Oregon Indian Termination Act:

"Tribe" means any of the tribes, bands, groups, or communities of Indians located west of the Cascade Mountains in Oregon, including the following:⁹

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| 1. Confederated Tribes of the Grand Ronde Community, | 13. Clatsop, | 28. Lower Coquille, |
| 2. Confederated Tribes of Siletz Indians, | 14. Clowwewalla, | 29. Lower Umpqua, |
| 3. Alsea, | 15. Coos, | 30. Maddy, |
| 4. Applegate Creek, | 16. Cow Creek, | 31. Mackanotin, |
| 5. Calapooya, | 17. Eucchees, | 32. Mary's River, |
| 6. Chaftan, | 18. Galic Creek, | 33. Multnomah, |
| 7. Chempho, | 19. Grave, | 34. Munsel Creek, |
| 8. Chetco, | 20. Joshua, | 35. Naltunnetunne, |
| 9. Chetlessington, | 21. Karok, | 36. Nehalem, |
| 10. Chinook, | 22. Kathlamet, | 37. Nestucca, |
| 11. Clackamas, | 23. Kusotony, | 38. Northern Molalla, |
| 12. Clatskanie, | 24. Kwatami or | 39. Port Orford, |
| | 25. Sixes, | 40. Pudding River, |
| | 26. Lakmiut, | 41. Rogue River, |
| | 27. Long Tom Creek, | 42. Salmon River, |

⁷ <https://researchguides.uoregon.edu/govinfo/oregon-tribal>

⁸ Klamath Termination Act, *supra*, note 3.

⁹ Western Oregon Indian Termination Act, *supra*, note 4.

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|-------------------|-----------------------|--------------------------|
| 43. Santiam, | 50. Southern Molalla, | 57. Upper Umpqua, |
| 44. Scoton, | 51. Takelma, | 58. Willamette Tumwater, |
| 45. Shasta, | 52. Tillamook, | 59. Yamhill, |
| 46. Shasta Costa, | 53. Tolowa, | 60. Yaquina, and |
| 47. Siletz, | 54. Tualatin, | 61. Yoncalla; |
| 48. Siuslaw, | 55. Tututui, | |
| 49. Skiloot, | 56. Upper Coquille, | |

Some Tribes' status is unknown.

vi. Washington Law

In 2013, Wash. Rev. Code § 64.04.140 was amended to add “federally recognized Indian Tribe” as a qualified holder of a conservation easement.¹¹ If the entity of a conservation easement is a tribal non-profit then it must have §501(c)(3) tax exempt status, and must have land conservation as one of its principal purposes.¹²

vii. Tribal Holders of Conservation Easements under Federal Law for Tax Deductibility Purposes

The IRC governs tax deductible charitable contributions.¹³ To qualify as a tax-deductible conservation easement, three elements must be met: 1) a qualified real property interest must be transferred to a 2) qualified organization, 3) exclusively for conservation purposes.¹⁴ The Internal Revenue Service (“IRS”) counts an Indian tribal government as a qualified holder and defines an Indian tribal government as any of the Tribes listed on the Department of Interior’s Federally Recognized Indian Tribe List, which is updated annually in the Federal Register.¹⁵ If a Tribe is not listed on Interior’s Federally Recognized Indian Tribe List, but believes they qualify, they can contact the Office of Federal Acknowledgement in the Department of the Interior to learn how to apply under Interior’s procedures or they may seek a letter from Interior acknowledging their status.¹⁶ Receipt of such a letter will qualify the entity for IRS purposes.¹⁷ Further, tribal entities not appearing on the list may also apply for a ruling on whether they qualify as Indian tribal governments based on the IRS’s determination that the entity exercises

¹¹ A Guided Tour of the Conservation Easement Enabling Statutes, LAND TRUST ALLIANCE, <https://landtrustalliance.org/resources/learn/explore/a-guided-tour-of-the-conservation-easement-enabling?queryID=b465d16c3e271fcf59bea6bdb6c4340e> (last visited Jun 8, 2023).

¹² Wash. Rev. Code § 84.34.250

¹³ I.R.C. § 170(h) (2023).

¹⁴ *Id.*

¹⁵ I.R.C. § 170(h)(3); I.R.C. Code § 7871; §305.7871–; Rev. Proc. 2008-55, superseded by 2008-39 https://www.irs.gov/pub/irs-tege/rev_proc_2008-55.pdf. ; *See supra* note 6.

¹⁶ I.R.C. CFR § 305.7701-1.

¹⁷ *Id.* to 2008-55

governmental functions.¹⁸ Finally, a Tribally created 501(c)(3) organization would also qualify so long as they meet the requirements of 509(a)(2).¹⁹

viii. Conclusion:

Oregon, Washington, and the Internal Revenue Service maintain different lists regarding which Tribes qualify as grantees for conservation easements. However, federal law creates a pathway for state qualified Tribes to gain federal approval if they are not already federally recognized. Currently, it is unclear whether a Tribe not listed under the Western Oregon Indian Termination Act that is also not a federally recognized tribe but has cultural ties to Oregon will qualify as a grantee for a conservation easement under Oregon law. However, the language “including the following” in the statute implies that Tribal entities outside of the list may also qualify.²⁰

B. Qualifying Purposes for Conservation Easements Under Oregon and Washington

i. Oregon Law

Oregon’s enabling statute states a conservation easement may be used for “retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.”²¹

ii. Washington Law

Washington’s enabling statute “wins an award for conciseness, simply referencing “open space purposes” as the permissible conservation easement purpose(s) in Washington.²² In the statute’s declaration, the Washington legislature also stated that preserving and maintaining areas and spaces of traditional productive activities, such as agriculture and timber harvesting, as well as areas of significant recreational, social, scenic, or esthetic values “constitute important assets” the preservation of which “constitutes a public purpose for which public funds may be properly expended.”²³ Washington is also unique in adopting the term “conservation future” instead of “conservation easement.”²⁴ Here, Washington’s statute has been broadly interpreted and readily includes cultural conservation easements as a viable purpose.

¹⁸ I.R.C. § 7701(a)(40)

¹⁹ *Supra* note 13.

²⁰ Western Oregon Indian Termination Act, *supra*, note 4.

²¹ ORS § 271.715(1).

²² Wash. Rev. Code § 64.04.130; A Guided Tour of the Conservation Easement Enabling Statutes, *supra* note 11.

²³ Wash. Rev. Code § 84.34.200.

²⁴ Wash. Rev. Code § 84.34.250.

C. Tax Deductible Conservation Purposes Under Federal Law

Because the point of the tax benefit is to incentivize permanent conservation of land for public benefits, there are specific requirements that any potential easement must meet in order for it to qualify as a deduction. Beyond the restrictions on who may hold an easement (discussed above), under federal law, a conservation easement must be used exclusively for “conservation purposes” to be tax deductible.²⁵ The qualifying conservation purposes are: recreation or education for the general public; protection of a relatively natural habitat; preservation of open space; and historic preservation.²⁶

i. Recreation or education for the general public:²⁷

Easements designed to protect these values must allow “substantial and regular physical access by the general public.”²⁸ These are outside of the scope of this memo.

ii. Protection of a relatively natural habitat:

To qualify, an area must consist of or contain “the protection of a relatively natural habitat or fish, wildlife, or plants, or similar ecosystem.”²⁹ Further, the habitat must be significant, defined as habitat for rare, endangered, or threatened plants, natural areas representing high quality examples of a terrestrial or aquatic community and natural areas included in, or contributing to, the ecological viability of public parks or preserves.³⁰ There is no requirement for public access associated with this value.

iii. Preservation of open space:

“The preservation of open space (including farmland and forestland) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit.”³¹ As to the first category, the regulations cite a non-exhaustive list of eight factors that, among others, may be used in determining whether a view qualifies as scenic.³² Two stand out for their applicability to cultural conservation aims. The first, factor (7) states, “the consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory.”³³ As discussed below, it is possible that a state entity has conducted such inventories when cataloging cultural, historic, or archaeological sites,

²⁵ I.R.C. § 170(h)(1).

²⁶ *Id.*

²⁷ I.R.C. § 170(h)(4)(A)(i).

²⁸ Treas. Reg. § 1.170A-14(d)(2).

²⁹ I.R.C. § 170(h)(4)(A)(ii).

³⁰ Treas. Reg. § 1.170A-14(d)(3).

³¹ I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii).

³² *See* Treas. Reg. § 1.170A-14(d)(4)(ii)(A).

³³ Treas. Reg. § 1.170A-14(d)(4)(ii)(A)(7).

especially in the context of land use or properties surveys. The second factor, (8), states “The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.”³⁴ Again, the same reasoning as applied to factor seven applies equally to factor eight. Considering the regulation stresses the flexibility of applying the subjective test including taking into consideration “regional considerations in... cultural conditions,”³⁵ an argument can be made that indigenous cultural considerations can be applied to a parcel when considering its “scenic” value. When open space is the qualifying value, the easement need only guarantee visual access by the general public, rather than physical access, to qualify for tax deductibility.³⁶ Additionally, the significant public benefit would have to be independently established.

As to the second category, qualifying a cultural conservation easement pursuant to a clearly delineated governmental conservation policy is “not a simple matter.”³⁷ For example, sometimes local zoning ordinances are cited for purposes of this category but because those policies are generalized, they may not meet the clearly delineated requirement.³⁸ As above, while there is no hard and fast rule, some qualities of the cited governmental policies weigh in favor of qualification. For example, governmental review and acceptance of the parcel often qualifies, though acceptance alone is insufficient.³⁹ Next, due to their specificity, governmental resolutions applying to a parcel generally qualify.⁴⁰ Finally, governmental policies that are specific, and involve “significant commitment” from the governmental entity also generally qualify.⁴¹ A land trust hoping to qualify a cultural conservation easement through a clearly delineated governmental policy would need to consider the above carefully. It is presently unclear if a tribal government is considered a state or local government for purposes of this requirement. This question is outside the scope of the memo but may be considered at a later time.

iv. Historic Preservation:

Qualifying easements under this category protect a “historically important land area” or a “certified historic structure.”⁴² Historically important land areas can include: “An independently significant land area that meets the National Register Criteria for Evaluation” such as sites with historic material culture like battlefields or archaeological sites, land within a designated “historic district,” or land adjacent to property listed individually in the National Register of Historic Places (“National Register”) where “the physical or environmental features contribute to the historic or cultural importance and continuing integrity of certified historic

³⁴ Treas. Reg. § 1.170A-14(d)(4)(ii)(A)(8).

³⁵ Treas. Reg. § 1.170A-14(d)(4)(ii)(A).

³⁶ Treas. Reg. § 1.170A-14(d)(4); Audit Guide at 33-34.

³⁷ Author unknown (Ned has book and is bringing in). *A Tax Guide to Conservation Easements*.

³⁸ *Id.*

³⁹ *Id.* at 70.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² I.R.C. § 170(h)(4)(A)(iv).

structures.”⁴³ Thus, satisfaction of the Code’s conservation purposes test is tied to the property’s listing or eligibility for listing on the National Register.⁴⁴ The criteria for evaluating eligibility for the National Register are imprecise creating uncertainty as to whether a conservation easement protecting a culturally significant area lacking other protectable attributes are deductible.⁴⁵ The pertinent sections of the National Historic Preservation Act (“NHPA”), which authorizes the Secretary of the Interior to place properties onto the National Register and prescribes the processes for doing so, are discussed in greater detail below.

Adding to the difficulties of this approach is the requirement for some public access. If a conservation easement seeks to protect historic values and qualify for a tax deduction, there must be “some visual public access” but in the case of historically important land areas, the entire property need not be visible. The likelihood of tax deductibility decreases, however, with less visibility because the public benefit may be deemed insufficient to warrant the reward.⁴⁶ Ultimately, the appropriate amount of public access is determined through a subjective factor test comprised of factors such as: the significance of the site, accessibility and safety issues, as well as a determination as to whether public access would be an unreasonable intrusion into privacy or impair the preservation interests which are the subject of the donation.⁴⁷ As a result, there is some room to preserve privacy interests and meet deductibility requirements.

v. Conclusion

A conservation easement can be held by a Tribe in Oregon and Washington and often can be tax deductible. The rigid requirements imposed by federal law for tax incentivization generally correspond with the integrated conservation values Tribes may seek to protect at a given place such as habitat preservation. Consequently, so long as the Tribe is federally recognized and the easement conserves one of the four purposes under the IRC, the conservation easement should be deductible. In an effort to expand the potential of tax incentives for easements, the next section of this memo offers options for making “cultural conservation easements” tax deductible by applying the National Register criteria to the IRC historic preservation conservation purpose test.

II. **Potential Options for Tax Deductibility for a Cultural Conservation Easement in Oregon and Washington**

A. *Introduction*

A cultural conservation easement can be defined as a subset of easements protected by Oregon and Washington Conservation Enabling Acts which are servitudes held in gross by a

⁴³ Treas. Reg. § 1.170A-14(d)(5)(ii); I.R.C. § 170(h)(4); William F. Paulus & Nancy Duhnkrack, *Conservation Easements*, Lexis Practice Advisor.

⁴⁴ Treas. Reg. § 1.170A-14(d)(5)(ii); Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 Denv. U.L. Rev. 1057,1059 (2006).

⁴⁵ *Id.* at 1060.

⁴⁶ Treas. Reg. § 1.170A-14(d)(5)(iv)(A).

⁴⁷ Treas. Reg. § 1.170A-14(d)(5)(iv)(B).

Tribe that burdens a parcel with cultural significance to that group and gives them some form of access, or stewardship rights for continuing and preserving cultural heritage.⁴⁸ Accordingly, cultural conservation easements can protect a plethora of sites, from those that provide subsistence foods or medicinal plants to those that are culturally or religiously important.⁴⁹ As discussed above, for any conservation easement to qualify as tax deductible, it must meet the holder and purpose qualifications tests under both state and federal law. In Oregon and Washington, a Tribally-held conservation easement will likely be tax deductible if its purpose is conservation of a value defined under federal law like ecological protection of a significant habitat. However, “cultural aspects” as used in Oregon’s conservation easement statute does not have a direct equivalent in federal law. Below, this memo discusses options for addressing the incongruity between the statutes if a land trust or owner were to seek a tax deduction for a cultural conservation easement as a stand-alone goal.

B. Options for Potential Tax Deductible Cultural Conservation Easements:

Option 1: Incorporate Cultural Protections with Natural/Ecological Purposes

The simplest and most likely way to qualify a cultural conservation easement for tax deductibility under the IRC would be to expand the purpose of the easement to include long-recognized values like environmental conservation.⁵⁰ Some cultural practices may not mesh well with strict natural preservationist values so care needs to be taken in drafting the easement so that the two purposes do not clash.⁵¹ Of course, this option is only available if the property contains attributes qualifying it under the other purposes test.

Option 2a: Qualify the Property under NHPA to Meet the Historic Preservation Category

There may be instances where it is impossible to incorporate the values of the proposed easement with other readily accepted purposes. In this situation, a land trust can explore qualifying the proposed burdened property as eligible for listing under the National Register thereby making the property a “historically important land area” under the IRC’s historic preservation requirements. To determine eligibility under this category, a land trust will need to determine if the property can qualify as a “historic property” as defined by the National Register criteria under the NHPA either as a site, district, or maybe even object. Unfortunately

⁴⁸ See Joseph A. Ingraio, *Cultural Easements: A Flexible Tool for Restoring Indigenous Land Rights and Restoring Ecosystems*, 2 (March 19, 2021) (Sustainable Economies Law Center, Student Report), https://docs.google.com/document/d/1F02d9St5rI7_Jy6gSi410hqCJ6lqVipautRcA11STKE/edit

⁴⁹ See Beth Rose Middleton, *Trust in the Land: New Directions in Tribal Conservation*, 149 (2011) (noting how one land trust and Tribe conceptualized cultural easements into two classes: traditional ceremonial use and traditional medicinal gathering).

⁵⁰ Kueter & Jensen, *supra* note 44 at 1059, 1061-62; See also Mary Christina Wood & Zachary Welker, *Tribes as Trustess Again (part I): the Emerging Tribal Role in the Conservation Trust Movement*, 32 Harv. Environ. Law. Rev. 373, 384 (2008) (quoting Hawk Rosales and the inextricable interconnection between culturally significant sites and ecologically significant places).

⁵¹ Jessica Owley, *Cultural Heritage Conservation Easements: Heritage Protections with Property Law Tools*, 49 Land Use Policy, 177, 179 (2015).

for land trusts, this is a matter of statutory interpretation with little guidance that will depend heavily on the nature of the site and protections envisioned in the proposed easement.⁵² Fortunately, agencies have provided some guidance.

The NHPA authorizes the Secretary of the Interior “to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.”⁵³ The National Register provisions under NHPA are administered by the National Park Service which has promulgated regulations defining the criteria and processes for listing eligible properties.⁵⁴ Public or private property is eligible for listing on the National Register if it meets the following criteria: properties must be at least fifty years old⁵⁵ and be one of five property types: districts, sites, buildings, structures, and objects.⁵⁶ Historic properties must also retain “integrity of location, design, setting, materials, workmanship, feeling, and association.”⁵⁷ Lastly, a historic property must meet at least one of the four National Register criteria: that they (1) “are associated with events that have made a significant contribution to the broad patterns of our history” (Criterion A); (2) “are associated with the lives of persons significant in our past” (Criterion B); (3) “embody the 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” (Criterion C); (4) “that have yielded, or may be likely to yield, information important in prehistory or history” (Criterion D).⁵⁸ Critically, in 1992, Congress amended NHPA and explicitly provided that “properties of traditional religious and cultural importance” to American Indian tribes may be eligible for the National Register thereby acknowledging that places cultural conservation easements seek to protect can qualify.⁵⁹

In pursuing a historic preservation tax deduction for a culturally significant site with no “historic structures,” a landowner has at least three options: (1) to apply for National Register recognition of the property as a “historically important land area” as a site or district before claiming a tax deduction if they are confident in the site’s historical significance under the criteria or the property contains some historic structures; (2) to obtain a tax deduction without National Register listing; or (3) designate the property or a larger area as a variant of a “traditional cultural property” under the National Register before claiming a tax deduction.⁶⁰ The first option offers the most certainty for tax deductibility but relies on some physical attributes that will not exist at many sites, while the second option is riskiest because if a grantor claims a deduction, they may face an IRS audit and there is little published guidance on IRS interpretation of the National Register criteria; whereas the third option can be viable but

⁵² See, Kueter & Jensen, *supra* note 44 at 1060-61; See also *Id.* at 178 (discussing the paucity of case law on the meaning of the phrase “historically important land area”).

⁵³ 16 U.S.C. §§ 470 to 470x-6 (1994).

⁵⁴ 36 C.F.R. pt. 60 (1981).

⁵⁵ *Id.* § 60.4 (exceptions exist);

⁵⁶ *Id.*; 54 U.S.C. § 302101.

⁵⁷ 36 C.F.R. § 60.4 (2006) (criteria for evaluation).

⁵⁸ *Id.*

⁵⁹ 16 U.S.C. § 470a(d)(6) (1994).

⁶⁰ Kueter & Jensen, *supra* note 44, at 1066.

carries some risks because a larger designation can be seen as politically charged, may invoke knee-jerk community objections, or violate privacy concerns of a tribe.⁶¹

To conclude, going through the process of listing a site on the National Register is the most straightforward way to qualify the cultural conservation easement for deductibility and provides more assurances to a grantor of the tax deductibility of their donation. Under a historic preservation purpose requirement the IRC relies on the National Register criteria which recognizes properties of traditional religious and cultural importance.⁶²

Option 2b: The TCP Listing

A land trust, working closely with a Tribe, can seek eligibility of a property of traditional religious and cultural importance on the National Register by nominating the property as a traditional cultural place. A related concept to historic properties, traditional cultural places⁶³ (“TCP”) are a subset of National Register eligible properties that can obtain eligibility based on their traditional cultural significance for a given community.⁶⁴ The guiding document on TCPs is Bulletin 38, published by the National Park Service.⁶⁵ NPS issued Bulletin 38 in 1990 to provide guidance on the identification and evaluation of TCPs in recognition of several facts that should resonate with the land trust community. First, that the National Register can contain properties that lack physical features yet are significant to a given community and second, that these places had been systematically overlooked by the NHPA in the past.⁶⁶ Since National Register eligibility is based on historical significance, not sacredness, Bulletin 38 focuses on fitting a site of traditional religious or cultural significance into the framework of historical significance.⁶⁷ Because a TCP designation inherently encapsulates the values being protected via a cultural conservation easement, a TCP that is eligible to be listed on the National Register may be the most appropriate tool for a land trust or Tribe to use when trying to ensure tax deductibility of

⁶¹ *Id.* at 1061.

⁶² Oregon Tribes may prefer the phrase “properties of traditional religious and cultural importance” over any variance of TCP because it is the language in the statute. John Pouley, OR-SHPO, pers. comm. July 11, 2023.

⁶³ See Wesley James Furlong, *Subsistence is Cultural Survival: Examining the Legal Framework for the Recognition and Incorporation of Traditional Cultural Landscapes within the National Historic Preservation Act*, 22 *Tribal Law Journal*, 51, 85 (2023) (noting the objection by some traditional communities to the use of the word property due to the implication of commodification of their heritage. To accommodate, the 2022 updated draft Bulletin 38 redefines traditional cultural properties as traditional cultural *places*. Despite the legitimate concerns of Oregon Tribes, this memo adopts the term traditional cultural place for ease of use.

⁶⁴ Patricia L. Parker & Thomas F. King, National Park Serv., National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, 1 (1990) [hereinafter Bulletin 38]. Bulletin 38’s specific definition of a TCP is a property “that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.” Bulletin 38 at 1.

⁶⁵ *Id.*

⁶⁶ Paul R. Lusignan, *Traditional Cultural Places and the National Register*, 26 *George Wright Forum* 37, 37 (2009) (noting that Bulletin 38 “was never intended that the National Register change into a vehicle for recognizing cultural values that were purely intangible, but rather to provide mechanisms for identifying and documenting those physical places that might be associated with less tangible aspects of cultural identity.”).

⁶⁷ Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 *Vt. L. Rev.* 145, 172 (1996).

the easement under the tax code.⁶⁸ Given this, on their face, TCPs appear to be an optimal tool for pursuing tax deductibility.

i. Advantages

A principal advantage of the TCP approach is its applicability to a wide variety of parcels. As noted in Bulletin 38, “Traditional cultural properties do not have to be products of, or contain, the work of human beings in order to be classified as [historic] properties.”⁶⁹ Thus, there is a flexibility to eligibility both in size and characteristics of a property. For example, both a natural landscape can qualify as a district, or a specific location where significant events, activities, or cultural observances occur, can qualify as a site. Geological characteristics, like a rock outcropping can even qualify.⁷⁰ Moreover, TCPs are not limited to indigenous significance, they are applicable to any community that ascribes them value.⁷¹ In the context of a land trust, this facet of TCPs opens up wider possibilities of application since a given site may represent significance to multiple communities thereby strengthening arguments for eligibility onto the National Register.

Another advantage to the TCP approach is that the procedures of National Register documentation may incorporate Pacific Northwest legal rights and history. For example, line drawing or providing evidentiary proof is a typical challenge in evaluating potential TCPs because no physical remains and can be associated with intangible elements or belief systems or Tribes are unable or unwilling to publicize sites of importance. Since the National Register methods were developed with historic buildings and archaeological sites in mind, which have clearly delineated boundaries, there is an inherent problem in proving the significance of these sites. Yet, as this approach has gained widespread acceptance, its methods of evaluation have evolved to incorporate a broader group of professionals such that now, to be considered sufficient, a survey must include ethnographers, cultural anthropologists, oral historians, and tribal voices.⁷² This expansion of acceptable evidence coincides with Tribal treaty rights in the Pacific Northwest.

Discussed elsewhere, the *Boldt* decision (and its progeny) established the standard (in the Ninth Circuit) by which courts recognize and determine the territorial scope of reserved treaty rights using the same type of evidence as is required in determining the eligibility of a TCP.⁷³ Since the National Register process includes written records establishing areas of Tribal

⁶⁸ Lusignan, *supra* note 66 at 41 (noting “Native American cultural and spiritual sites often fit more easily within the parameters of the current guidance on TCPs and the preservation community has widely accepted their association with Native American culture.”).

⁶⁹ Parker & King, *supra* note 64, at 2.

⁷⁰ *Id.* at 11-12. *See, e.g.* Bulletin 38 also lists other examples of sites that may be eligible that are applicable to cultural conservation easements such as areas along the Russian River in California where Pomo Indians have cultivated high quality sedge roots for basketmaking and groves of trees venerated by local tribes in Micronesia. Both sites are linked by the fact that as a property, the physical features may be indistinguishable but in fact contain features that figure prominently in tribal culture; *See also* Furlong, *supra* note 63, at 87.

⁷¹ Furlong, *supra* note 63, at 87.

⁷² Lusignan, *supra* note 66, at 40.

⁷³ *See, United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974) (*Boldt Decision*); *see also Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F. 4th 766, 768 (Ninth Circ. 2023) (employing J. Boldt’s expansive framework for determining the geographic scope of reserved treaty right locations).

significance, and Tribes are treated as sovereign nations, a strong argument can be made that the presence of a reserved right (fishing, hunting, gathering) for a given place is evidence by itself of significance by virtue of the ratified treaty.⁷⁴ Further, if a given location's significance to a Tribe is disputed, Tribes can rely, at least in part, on the expansive legal formula establishing their reserved rights as evidence of significance.

Finally, in the federal context, a TCP eligibility designation attaches Section 106 federal consultation protection regardless of ownership status of the property. While less important in the private land exchanges than with federal lands (where federal actions can destroy cultural resources), Section 106 consultation could become important in the future if Tribes were to become significant land owners because more interests in land would increase exposure to impacts from significant federal actions.

ii. Disadvantages

There are three primary concerns to the TCP approach land trusts should be aware of. They all stem from the intangible qualities encapsulated in a TCP and the difficulties presented with ascribing cultural value within a system that emphasizes historic qualities and physical structures. The first problem is one of line drawing.⁷⁵ The National Register standards require, as would a property exchange or easement transaction, clearly delineated lines and descriptions of the property. Yet, this type of formal line drawing is often seen as inconsistent and can even be in conflict with traditional perspectives—in essence it presents a clash of two worldviews.⁷⁶ A land trust should be aware that in trying to rely too heavily on the NHPA criteria in a bid to list a property to make a deal work means they may actually be “fitting a round peg into a square bureaucratic hole.”⁷⁷ Viewed from this perspective, *eligibility*, as opposed to *listing*, may be the preferred approach since a determination of eligibility is viewed as less-rigorous, carries the same tax deductibility assurance, and has the added benefit of securing Section 106 consultation.⁷⁸

Another over-arching issue are the privacy concerns of Tribes. For example, the National Register's program currently requires “full narrative descriptions, contextual discussions, photographs, maps, and physical boundaries”⁷⁹ while also allowing for the restriction, under Section 304,⁸⁰ of certain sensitive information from public release. There is a view by many, if not most indigenous communities that these protections are inadequate.⁸¹ Publishing culturally important or sensitive sites could understandably represent an insurmountable obstacle because of the legitimate fears that publication could draw looting or other potential damages to a particular place. Moreover, divulging this information to cultural outsiders may even be

⁷⁴ See Lusignan, *supra* note, at 43 (stating “Such consideration must first rely on a basic grounding in the National Register perspective that boundaries should be derived directly from the *documented significance* of the resource, taking into consideration all of the various lines of evidence (archaeology, ethnography, oral history, *written records*”).) (emphasis added).

⁷⁵ See *Id.* at 42 (describing line drawing as the most problematic issue).

⁷⁶ Furlong, *supra* note 63, at 88.

⁷⁷ Lusignan, *supra* note 66, at 42.

⁷⁸ *Id.* at 39; see Furlong, *supra* note, at 91, 101.

⁷⁹ Lusignan, *supra* note 66, at 39.

⁸⁰ 54 U.S.C. § 300101 et seq. [Section 304].

⁸¹ See Wes Furlong, pers. comm., June 30, 2023; see also John Pouley, OR-SHPO pers. comm., July 7, 2023.

anathema or taboo.⁸² Possible solutions to this problem can include as above, a listing for eligibility only, redaction of documents, inclusion of tribal registers, or establishing MOUs with Tribes about the sharing of culturally sensitive or privileged information.⁸³

Another critique of the TCP approach is that a determination of “significance” and “integrity” as required by the NHPA is arrived at by exterior criteria. Due to this, eligibility depends on the discretion of the nomination evaluator. For some, this is offensive, while others could find this a fundamental breach of sovereignty.⁸⁴ Again, a tribal register or THPO making a determination could assuage some of these concerns.

In conclusion, the federal category of “historical preservation” and the Oregon category, “cultural aspects of real property” or Washington’s “open space values” may have significant overlap in applying to properties that are significant to a community. Although the two statutes contain different terms—historical and cultural—arguably anything of cultural significance can have historical significance. However, landowners seeking a tax deduction to donate their land to preserve cultural heritage should apply for eligibility of listing on the National Register to properly qualify for a tax deduction and use Bulletin 38’s guidance for fitting the property into the NHPA framework. In doing so, however, land trusts need to appreciate that the application would be subject to the vagaries of both the National Register criteria and the Treasury Regulations.⁸⁵ Landowners adverse to risk would probably have to employ a cultural resources consultant to review the application because the Regulations do not mandate NPS review for tax deductibility purposes. This leaves the IRS as the final arbiter of whether a property is historically important.⁸⁶ In this context, there is perhaps some assurance that the lack of litigation over what constitutes historically important land means the IRS strictly follows NPS guidance. Finally, the requirement of providing access, whether visual or physical, may also be a hinderance to a Tribe who may value privacy. Thus, cooperation and coordination between Tribe and land trust are paramount.

Finally, TCPs are frequently used to designate small-scale parcels and this myopic focus does not address the more “holistic” landscape perspectives of many Tribal belief systems.⁸⁷ While it is true that a TCP could be nominated as a large-scale district, analysis of reviews of nominations reveal that TCP’s remain limited to smaller scale properties, often for the reasons cited above. Thus, smaller, individualized TCP’s may actually fail to capture the significance of the property to the culture as a whole, and this fragmented perspective may prohibit implementation. A solution to this, discussed below, is the use of traditional cultural landscapes as a method of determining significance and possible eligibility for tax deductibility. This approach, like the others, is not without its drawbacks.

Option 2b: Work with Tribes to Develop TCLs

⁸² Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 *Ariz. St. L.J.* 483, 122 (1999).

⁸³ Lusignan, *supra* note 66, at 39.

⁸⁴ Furlong, *supra* note 63, at 72.

⁸⁵ Kueter & Jensen, *supra* note 44, at 1061.

⁸⁶ *Id.*

⁸⁷ See Furlong, *supra* note 63, at 88; see also Dean B. Suagee and Peter Bungart, *Taking Care of Native American Cultural Landscapes*, 27 *Nat. Resources & Env’t* 23, 26 (2013).

An emergent concept, a traditional cultural landscape (“TCL”), is distinguishable from a TCP in few important aspects. A TCL is a landscape that shapes the traditional and cultural identity, practices, and beliefs of a community, and, in turn, are shaped by the community’s identity, practices, and beliefs.⁸⁸ Essentially, TCPs represent significance of a place to a community, TCL’s represent significance of landscape to a culture. In this way, a TCL applies the TCP concept of significance to a larger scale and is thus distinguishable. This approach is often more congruent with indigenous self-determined epistemology and practices. Second, a TCL is best understood holistically, as a dynamic system, comprised not only of physical features, but also visual, audio, and atmospheric elements that can contribute to the religious and cultural significance of the landscape.⁸⁹ In doing so, TCL’s offer a flexible approach to what can be listed that is also more grounded in indigenous self-determination and beliefs. Successfully listed sites illustrate this point. For example, the listing of Nantucket Sound highlights the utility of this approach because the site was listed without pre-determined boundaries and includes sound and viewsapes in the determination of significance.⁹⁰

A large scale listing, either as a TCP or TCL, could benefit a land trust because a large area designated as listed or eligible to be listed on the National Register could readily help facilitate numerous tax deductible cultural conservation easements within the district since the historic preservation purpose test under the IRC would theoretically be met everywhere within the boundaries of the eligible or listed space. Take note, this is an untested theory. On the other hand, as NARF attorney Wes Furlong points out, large scale listings often meet significant objections from land owners and industry.⁹¹ As a result, a land trust should be cognizant of the potential political and social objections to such a listing and consider limiting the scope of a potential listing from a TCL to TCP as necessary. It should be emphasized that TCPs can be any size and thus contain the same potential for large-scale tax deductibility.

Finally, other approaches outside of NHPA may provide excellent models for coordination and cooperation with Tribes when working on larger scale preservation objectives. For example, the United States Bureau of Ocean Energy Management (“BOEM”) published guidance “suggest[ing] a means for tribes and other indigenous communities to relate their interests and concepts of landscape to federal agencies and other land and water management entities.”⁹² Among the key differences noted in the BOEM approach is that *tribal* cultural landscapes, compared with *traditional* cultural landscapes, are deemed significant by indigenous communities as opposed to exterior criteria. This then drives the template for indigenous data collection and retention and concomitant MOU agreements for the sharing, redaction, or protection of indigenous knowledge and information (based on the U.N.

⁸⁸ Furlong, *supra* note, at 89.

⁸⁹ *Id.* at 96.

⁹⁰ *See Id.* at 99-104 (discussing and describing the Nantucket Sound TCL).

⁹¹ *See e.g. Id.* at 119 (citing in footnote 403 to successful landowner objections to the attempted listing of Q’alya Ta Kukwis shichdii me/ Jordan Cove on the National Register as a traditional cultural landscape).

⁹² David Ball et al., *A Guidance Document for Characterizing Tribal Cultural Landscapes: OSC Study, BOEM 2015-047 1* (Nov. 30, 2015) <https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Studies/Pacific-Region/Studies/BOEM-2015-047.pdf>.

Declaration of Indigenous Rights). The major drawback to this approach is that it provides no Section 106 procedural rights since it falls outside of the NHPA.⁹³

These methods, especially the creation of information sharing agreements and templates for data collection, along with indigenous-led significance determinations can be readily applied to land trust strategies in prioritizing Tribal land back acquisitions or access agreements. In fact, both the Makah tribe in Washington and the Grande Ronde of Oregon participated in the study with the BOEM so this work is already underway. Figure 3 of the report is illustrative of an example of how data can be shared generically to express significance to a Tribe without revealing culturally sensitive data like specific location.⁹⁴ In moving forward, this model, or one like it, should be employed to help ensure meaningful cooperation and collaboration.

III. Conclusions

Recognition of TCPs on the National Register have gained widespread institutional acceptance making a listing effort less arduous than in the past. In the Pacific Northwest region, land trusts are in a unique position to facilitate protecting potential TCPs through the use of conservation easements or, more specifically, cultural conservation easements because of the significant overlap between what a TCP represents to a community and the cultural values being protected in an easement. Oregon and Washington conservation easement enabling statutes recognize the conservation of cultural values as a viable purpose of an easement and allow for Tribes to hold them. Tension exists, however, between the IRS's reliance on the National Register framework for determining historical significance for tax deductibility if historic preservation is the sole value a donor of a cultural conservation easement is seeking to protect. For many sites that are culturally significant but lack ecological significance, a nomination of listing for eligibility to the National Register may be enough to ensure deductibility, and thus reward a donation of an easement for cultural protections. While relying on arguments of historical significance per the IRC alone may suffice, especially at places that contain fixed physical resources, the presence of which the National Register criteria heavily rely on, it is unclear how precisely the IRS will evaluate the site, so these arguments may still fail to gain deductibility and represent a significant risk to the grantor. Since TCPs are a recognition that places significant to a community can be listed on the National Register even absent any historic physical features, a listing of eligibility under that designation appears to be a better match because the make-up of a TCP will incorporate the cultural values the easement seeks to protect. Despite some drawbacks, like access, privacy, and integrity determinations, a listing of eligibility has the added benefit of ensuring procedural rights under Section 106.

A clear lesson is that a cooperative model, as opposed to a legislative determination of "significance," is the most efficient and applicable method for protecting culturally sensitive places. In the concluding chapter of *Places that Count*, the co-author of Bulletin 38, Thomas F. King, suggested that not only is acquisition of spiritual places the only sure way to guarantee their protection, but in advocating for a consultation centered process, he also described the

⁹³ Furlong, *supra* note 63, at 108.

⁹⁴ Ball et al. *supra* note 92, at 19-20.

type of ideal collaboration between landowner and Tribe (or land trust on behalf of a Tribe) that land trusts regularly engage in to highlight how a better process might work—one that avoids the pitfalls of relying on legislative fixes to the NHPA to protect sites.⁹⁵

Another lesson is that landscape level protections are the ultimate goal for indigenous communities. Empowered by the protections of culturally important sites, Tribes can stand as bridges for landscapes scale conservation across the public-private divide, positioned as they are between federal public land conservation on the one hand, and private landowners on the other. By incorporating approaches and methods from traditional cultural landscapes, or tribal cultural landscapes, especially agreements on protecting sensitive information, and the incorporation of indigenous led determinations of significant sites at the landscape-scale, land trusts have an opportunity to work with Tribes to assist in the realization of this bigger goal, even in a piece meal fashion, by protecting culturally significant sites since these efforts ultimately afford increased protections and sovereign discretion to Tribes.

⁹⁵ See Thomas F. King, *Places that Count: Traditional Cultural Properties in Cultural Resource Management*, 289-91 (2003).