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Coordinating NHPA and NEPA to Protect Wildlife

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COORDINATING NHPA AND NEPA TO PROTECT WILDLIFE

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In addition to its ecological and intrinsic significance, wildlife is recognized as invaluable historic and cultural resources. Current laws protecting wildlife, like the Endangered Species Act ("ESA"), fail to recognize this dimension, and are limited in providing meaningful protection for culturally significant wildlife. The cultural and historic value of wildlife was recognized in *Dugong v. Rumsfeld*, in which the court held that a species of dugong could be considered "historic property" under the National Historic Preservation Act ("NHPA"). NHPA requires federal agencies to evaluate the impact of all federally funded or permitted projects on "historic properties." It is a close statutory analog to the National Environmental Policy Act ("NEPA"), which requires federal agencies to evaluate the impacts of any federally funded or permitted projects that are determined to have a significant impact on the human environment. The government has recognized the close interconnection between these two acts and has provided guidance for coordination of review under the two statutes. The holding in *Dugong* and the eligibility of wildlife as "historical property" encourages enhanced coordination of consultation and review between NHPA and NEPA, in which a major federal action threatens culturally and ecologically significant wildlife, potentially evading categorical exclusions under NEPA.

Part I of this Article addresses some of the gaps in United States federal wildlife protection law through the limitations of federal statutes like the ESA, highlighting harm to culturally significant species, both listed and unlisted. Part II explains how the court in *Dugong* concluded that wildlife could be considered "historic property" under the NHPA. Part III examines the structural and procedural similarities between the NHPA and NEPA, along with federal guidance encouraging coordination of review under the two statutes and potentially avoiding categorical exclusions under NEPA. Part IV concludes that the recognition of wildlife as capable

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of being considered "historic properties" under the NHPA, prompting coordination of review under these statutes in which federal actions threaten culturally significant wildlife, enables more robust wildlife protection where the ESA falls short.

INTRODUCTION

The primary federal tool for wildlife protection, the Endangered Species Act ("ESA"),[1] is limited, only extending to species listed under the Act.[2] It merely offers protection for species threatened with extinction.[3] Additionally, the ESA's limited scope has been considerably weakened over the years. Under the Trump administration, several of the statute's key provisions are under attack.[4] Accordingly, other statutes in the federal regulatory framework need to be engaged to ensure more effective protection of our nation's beloved wildlife. Despite the close relationship

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[1] 16 U.S.C. §§ 1531–1544.
[2] W. Parker Moore, *Back to the Drawing Board: A Proposal for Adopting a Listed Species Reporting System Under the Endangered Species Act*, 24 UCLA J. ENV'T L. & POL'Y 105, 134 (2006); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 59 (2001); Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 15 (1996).
[3] 16 U.S.C. § 1531(a)(4)(b).
[4] *See infra* notes 21–25.

between humans and wildlife, cultural considerations are not addressed in the ESA, nor any other federal statute that protects wildlife.

In *Dugong v. Rumsfeld*, the plaintiffs challenged the United States government's failure "to comply with requirements of the National Historic Preservation Act ("NHPA")."[5] The NHPA requires federal agencies to evaluate the impact of all federally funded or permitted projects on "historic properties."[6] It a close statutory analog to the National Environmental Policy Act ("NEPA"), which requires federal agencies to evaluate impacts of any federally funded or permitted projects that are determined to have a significant impact on the human environment.[7] The government has recognized the close interconnection between these two Acts, and has provided guidance for coordination of review under the two statutes.[8] The Court in *Dugong* held that a species of dugong could be considered "historic property" under the NHPA.[9] Understanding the cultural dimension of wildlife triggering NHPA review prompts a greater breadth of consideration and review if properly coordinated with NEPA, a statute that already considers impacts to wildlife.[10] This sets out precisely the recourse needed to explore new avenues of legal protection in the face of a severely wounded ESA. The holding in *Dugong* and the eligibility of wildlife as "historical property" encourages enhanced coordination of consultation and review between NHPA and NEPA, in which a major federal action threatens culturally and ecologically significant wildlife, potentially evading categorical exclusions under NEPA.

Part I of this Article addresses some of the gaps in United States federal wildlife protection law through the limitations of federal statutes like the ESA, highlighting harm to culturally significant species, both listed and unlisted. Part II explains how the Court in *Dugong* concluded that wildlife could be considered "historic property" under the NHPA. Part III examines the structural and procedural similarities between the NHPA and NEPA, along with federal guidance encouraging coordination of review under the two statutes and potentially avoiding categorical exclusions

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[5] Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *1 (N.D. Cal. Mar. 2, 2005).
[6] National Park Services and Programs Act, Pub. L. No. 113-287, §§ 306102(a)(b)(1), 306108, 128 Stat. 3094, 3225–27 (2014); *see also* National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966).
[7] *See* 42 U.S.C. § 4332.
[8] *See* Part III, *infra*.
[9] National Park Services and Programs Act, Pub. L. No. 113-287, §§ 306102(a)(b)(1), 306108, 128 Stat. 3094, 3225–27 (2014); No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).
[10] *See* Section III.B, *infra*.

under NEPA. Part IV concludes that the recognition of wildlife as capable of being considered "historic properties" under the NHPA prompts coordination of review under these statutes. Such review would apply to federal actions that threaten culturally significant wildlife and provide for more robust wildlife protection at a time when the ESA falls short.

I. GAPS IN FEDERAL LAW PROTECTING WILDLIFE

Wild animals are harassed and killed all over the country, largely due to their perceived interference with industry and development.[11] Absent legal protections, predators and "pests" like wolves, coyotes, and mountain lions, are targeted.[12] Despite this nation's love of wildlife, federal statutes have proved insufficient to provide adequate legal protection. The most prominent federal statute available to protect wildlife is the ESA.[13] The ESA restricts the "taking" of species in danger of extinction or likely to become so;[14] provides authority to acquire a habitat needed for their survival;[15] and mandates that federal agencies consider the impacts of their activities on these species.[16] While seemingly comprehensive in the protections the ESA affords wildlife, it is limited in that it only extends protections to species that are "*endangered"* or "*threatened*."[17] "*Endangered* species means any species which is in danger of extinction throughout all or a significant portion of its range,"[18] while "*threatened* species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[19] Even those species that qualify under these definitions may be denied protection if they are not properly listed under the statute.[20] Thus, the only protections that the ESA affords wildlife are those standing

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[11] Rachel Bale, *This Government Program's Job Is to Kill Wildlife*, NAT'L GEOGRAPHIC (Feb. 12, 2016), https://news.nationalgeographic.com/2016/02/160212-Wildlife-Services-predator-control-livestock-trapping-hunting/ [https://perma.cc/HHS5-CS7K].
[12] *Id.*
[13] *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (calling the act "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.").
[14] 16 U.S.C. § 1533(a)(1)(3)(B)(iii).
[15] *Id.* §§ 1534(a)(1)–(2).
[16] *Id.* §§ 1536(a)(1)–(4).
[17] *Id.* § 1531(b).
[18] *Id.* § 1532(6) (emphasis added).
[19] *Id.* § 1532(20) (emphasis added).
[20] *Id.* § 1533(a)(1).

between them and extinction. It does not concern itself with the well-being of wildlife, nor does it provide unlisted species protection from significant harm, harassment, and death; it only seeks to ensure that listed species do not disappear from existence completely.

Combatants of the act have claimed that the ESA has been ineffective at protecting species and imposes an excessive cost on taxpayers and private landowners.[21] This false narrative has been used to justify gutting the already wounded act by altering it to eliminate language precluding wildlife experts from considering economic impacts when determining when a species should be listed.[22] It also proposes narrowing the definition of "foreseeable future" to only extend as far as wildlife officials "can reasonably determine that both the future threats and the species' response to those threats are probable."[23] The fear in the conservation community is that this narrowed language will allow disregard of climate change in making determinations under the act.[24] The Trump administration seeks to narrow critical habitat protections for species listed as "*threatened*" under the Act, only providing such protections on a case-by-case basis, posing significant obstacles in providing essential protections for countless species.[25]

A. Threats to Unlisted Species of Cultural Significance: Wild Horses

Because the ESA only protects species listed under the Act, it offers no protection for wildlife that the government has not determined is in danger of becoming extinct. For some species, other federal laws are enacted to provide some nominal protection, but often these protections also prove insufficient, as in the case of wild horses.[26] The Bureau of Land

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[21] Jonathan Adler, *Perverse Incentives and the Endangered Species Act*, RESOURCES (Aug. 4, 2008), https://www.resourcesmag.org/common-resources/perverse-incentives-and-the-endangered-species-act/ [https://perma.cc/XBF6-MESH] ("Such [ESA] regulations can reduce private land values and antagonize private landowners who might otherwise cooperate with conservation efforts. This is because Section 9 turns endangered species into economic liabilities. The discovery of an endangered species on private land imposes costs but few, if any, benefits.").

[22] *Endangered and Threatened Species: Listing Species and Designating Critical Habitat*, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 424); Max Matza, *The Cost of Trump's Endangered Species Act Proposal*, BBC (July 20, 2018), https://www.bbc.com/news/world-us-canada-44892275 [https://perma.cc/EB7U-CT4F].

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Edward Hale, *Problems in Federal Wild Horse Management*, REGUL. REV. (Jan. 1, 2019),

Management ("BLM") and United States Forest Service ("FS") have harmed, collected, and harassed horses across the country in order to clear land for livestock grazing.[27] These federal agencies, which are in charge of managing both wild horse and burro herds and grazing allotments, have failed to protect and preserve these species as mandated in the Wild and Free-Roaming Horses and Burros Act ("WFHBA").[28]

Congress enacted the WFHBA "to ensure the preservation and protection of the few remaining wild free-roaming horses and burros in order to enhance and enrich the dreams and enjoyment of future generations of Americans."[29] The WFHBA was a response to public outcry over the uncontrolled harassment and slaughter of wild horses, which Congress recognized as the "living symbols of the historic and pioneer spirit of the West[.]"[30] Additionally, horses hold tremendous cultural, historic, and spiritual significance to Native Americans.[31]

The Act mandates that "wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands."[32] It directs the Secretary of the Interior (for BLM lands) and the Secretary of Agriculture (for FS lands) to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."[33] The Act also requires that "[a]ll management activities shall be at the minimal feasible level . . . in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species."[34] While the agencies are authorized to remove "excess" animals in the event of

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https://www.theregreview.org/2019/01/01/hale-problems-federal-wild-horse-management/ [https://perma.cc/78HG-X6GF] (explaining opposition to BLM's sterilization of wild horses).

[27] Gloria Riviera et al., *Wild Horses Facing Slaughter After US Government Proposes New Regulations*, ABC NEWS (Jan. 23, 2018), https://abcnews.go.com/US/wild-horses-facing-slaughter-us-government-proposes-regulations/story?id=52538898 [https://perma.cc/T7F3-VC2K].

[28] 16 U.S.C. §§ 1331–1340.

[29] H.R. REP NO. 92-681 (1971), *as reprinted in* U.S.C.C.A.N. 2159, 2161. *See generally* Mara C. Hurwitt, *Freedom Versus Forage: Balancing Wild Horses and Livestock Grazing on the Public Lands*, 53 IDAHO L. REV. 425, 427 (2017).

[30] 16 U.S.C. § 1331.

[31] *Spiritual Bonds*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN: A SONG FOR THE HORSE NATION, https://americanindian.si.edu/static/exhibitions/horsenation/bonds.html [https://perma.cc/E5NB-7H8N] (last visited Oct. 13, 2020).

[32] 16 U.S.C. § 1331; Hurwitt, *supra* note 29, at 427.

[33] 16 U.S.C. § 1333(a).

[34] *Id.*; Hurwitt, *supra* note 29, at 428.

overpopulation,[35] they have violated WFHBA by engaging in activities that cause substantial harm to wild horses, relying on skewed data to determine the extent to which wild horses are burdening land and resources.[36]

Despite congressional mandates directing BLM and FS to protect wild horses, under agency management, there has been "significant loss of historical habitat, continuing roundups and removal, the elimination of entire herds, and the growing number of horses and burros in long-term holding facilities."[37] Competition for resources on public lands has prompted pressure on the agencies to shirk their responsibilities to wild horses and burros:

> Livestock grazing is permitted on 155 million of the 245 million acres of public lands managed by BLM. In the western states, approximately 80 percent of BLM-administered lands are authorized for livestock grazing. An additional 95 million acres of Forest Service lands are open to livestock grazing, primarily in the western regions of the United States. Together, these public lands supply less than 3 percent of the total forage for livestock raised in the United States.[38]

Permits are issued and a fee is charged to allow private livestock to graze on public lands, which brings in millions of dollars to the BLM and FS annually.[39] With this in mind, it's not surprising that the BLM attributes range degradation to wild horses and burros, even when livestock greatly outnumber them and have been found to cause much more significant ecological damage.[40]

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[35] 16 U.S.C. §§ 1331(b)(1)–(2).

[36] *BLM Weighs Wild Horse Impact Much More Heavily than Cattle*, PUB. EMPS. FOR ENV'T RESP. (Sept. 16, 2014), https://www.peer.org/blm-weighs-wild-horse-impact-much-more-heavily-than-cattle/ [https://perma.cc/G7QP-S8DS] (explaining flaws in BLM's statistical methodology that exaggerate the environmental impact of wild horses on public hands while minimizing those of livestock).

[37] Hurwitt, *supra* note 29, at 430.

[38] *Id.* at 437–38 (internal citations omitted).

[39] Vickery Eckhoff, *BLM and USFS Livestock Grazing Stats: Examining Key Data in the Debate over Wild Horses on Western Public Lands*, DAILY PITCHFORK 9–10 (Nov. 2015), http://dailypitchfork.org/wp-content/uploads/2015/11/BLM_USFS-grazing-analysis_2014_Daily-Pitchfork.pdf [https://perma.cc/7L48-T3BR].

[40] Hurwitt, *supra* note 29, at 446; Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIO. 3, 630 (1994); *Grazing Punted from Federal Study of Land Changes in the West*, PUB. EMPS. FOR ENV'T RESP. (Nov. 30,

While wild horses have been touted as an invasive species because they were brought to the Americas by the Europeans in the 1400s, horses are inextricably linked to both native and non-native culture. They were brought to the Americas by Christopher Columbus during his second voyage.[41] Horses were obtained and widely used by Native Americans in the early-to-mid-seventeenth century.[42] For tribes that lived in the Plains like the Crow, Lakota, and Blackfeet, horses were used to travel, hunt, and fight battles on horseback, "shap[ing] nearly every step of Plains life for some two centuries."[43] As cultural symbols, horses were given as gifts as part of courtship, or a proposal for marriage.[44] They were also a measure of wealth and status, and have been depicted in native art for more than two hundred years.[45]

The actions of the BLM and FS have been controversial and prompted a slew of litigation under WFHBA and NEPA. Historically, courts have given a wide latitude of discretion to BLM in conducting roundups,[46] even when roundups eliminate entire herds.[47] Courts have mandated that management practices protect the natural and ecological balance of all wildlife species (particularly endangered species), in light of the fact that BLM's excessive issuance and protection of livestock grazing permits has not only negatively impacted the wild horses and burros protected under the act, but a number of endangered species.[48]

2011), https://www.peer.org/grazing-punted-from-federal-study-of-land-changes-in-west/ [https://perma.cc/45BF-6VP5].

[41] *See generally* Cristina Luís et al., *Iberian Origins of the New World Horse Breeds*, 97(2) J. HEREDITY 107 (2006).

[42] Francis Haines, *Where Did the Plains Indians Get Their Horses?*, 40(1) AM. ANTHROPOLOGIST 112, 112–17 (Jan. 1938).

[43] *Power Of The Plains*, AM. MUSEUM NAT. HIST. (last visited Oct. 13, 2020), https://www.amnh.org/exhibitions/horse/how-we-shaped-horses-how-horses-shaped-us/wealth-and-status/power-of-the-plains [https://perma.cc/K9RF-FXVK].

[44] *Id.*

[45] *Id.*

[46] *See* Cloud Found., Inc. v. Salazar, 999 F. Supp. 2d 117 (D.D.C. 2013); Cloud Found. v. U.S. Bureau of Land Mgmt., No. 3:11-CV-00459-HDM, 2013 WL 1249814 (D. Nev. Mar. 26, 2013); Cloud Found. v. U.S. Bureau of Land Mgmt., 802 F. Supp. 2d 1192 (D. Nev. 2011); Kleinert v. Salazar, No. 11-CV-02428-CMA-BNB, 2011 WL 4382614 (D. Colo. Sept. 19, 2011); Hurwitt, *supra* note 29, at 449–50.

[47] *See* Hurwitt, *supra* note 29, at 450; Habitat for Horses v. Salazar, 745 F. Supp. 2d 438, 450 (S.D.N.Y. 2010); Colo. Wild Horse v. Jewell, 130 F. Supp. 3d 205, 213 (D.D.C. 2015).

[48] *See* Harold S. Shepherd, *The Future of Livestock Grazing and the Endangered Species Act*, 21 J. ENV'T. L. & LITIG. 383, 392–93 (2006); W. Watersheds Project v. Bennett, 392 F. Supp. 2d 1217, 1220 (D. Idaho 2005); W. Watersheds Project v. Ellis, 803 F. Supp. 2d 1175, 1177 (D. Idaho 2011); Or. Nat. Desert Ass'n v. Tidwell, 716 F. Supp. 2d 982,

Allowing the wide latitude of discretion afforded to BLM and FS in carrying out these roundups has been detrimental to the environment. There is a pressing need for heightened agency accountability if we want any chance of saving our Nation's wild horses.

B. Threats to Listed Species of Cultural Significance: Wolves

While certain wolf species are listed under the ESA, the Act does not go far enough to provide meaningful protection from harm inflicted by government agencies. Wolves have been historically targets for hunting and culling due to their threat to livestock.[49] Due to their interference with livestock, there have been several attempts to roll back federal protection of wolves.[50]

Absent legal protection, many species, such as the gray wolf, were brought to the brink of extinction.[51] After being listed and afforded protection under the ESA, the gray wolf population started to recover.[52] Unfortunately, the United States Fish and Wildlife Service plans to remove ESA protections to gray wolves, putting their existence in peril once again.[53] In Idaho, Montana, and Wyoming alone, where wolves have already lost federal protections, trophy hunters, trappers, and others have killed more than 3,200 wolves since 2011.[54] Clearly, affording legal protection based on listing status is insufficient to protect wolves, especially in times where the current administration favors business and industry at the expense of wildlife.

1001–02 (D. Or. 2010); Defs. of Wildlife v. U.S. Fish & Wildlife, 797 F. Supp. 2d 949, 953–54 (D. Ariz. 2011).

[49] *See, e.g.*, Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607, 9608, 9609–10 (Mar. 9, 1978) (cautioning that the inability to kill wolves that may be attacking livestock and pets could be creating an adverse public attitude toward the whole species).

[50] *See, e.g.*, Jim Robbins, *Gray Wolves May Lose Endangered Status and Protections*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/science/gray-wolf-protection.html [https://perma.cc/8QTX-FB62].

[51] *See* Josiah Hesse, *Gray Wolves, Once Nearly Extinct, Could Be Coming Back to Colorado*, GUARDIAN (Jan. 23, 2020), https://www.theguardian.com/us-news/2020/jan/23/gray-wolf-colorado-reintroduction-vote [https://perma.cc/6FBN-53J9].

[52] *Trump Administration Proposes Open Season on Gray Wolves*, WILDEARTH GUARDIANS (Mar. 6, 2019), https://wildearthguardians.org/press-releases/trump-administration-proposes-open-season-on-gray-wolves/ [https://perma.cc/T6VA-AW3S].

[53] *Id.*

[54] *Id.*

In 2018, Wildlife Services, a branch of the United States government tasked with killing wildlife,[55] killed 357 gray wolves across five states.[56] Wolf populations are in constant flux, and stabilizing their population is often contingent on legal protection.[57] When wolves are not listed and afforded protections, individual and government culling brings them to the brink of extinction.[58]

Wolves provide a number of essential ecosystem services. The carcasses of animals wolves kill provide food for scavenger animals like bears, bald eagles and badgers.[59] They stabilize grazer populations like elk and deer, allowing plant life to thrive in sensitive ecosystems that provide habitat to other animals.[60] "Their presence also scares off coyotes, and thus increases populations of the species coyotes hunt, like ground-dwelling birds and pronghorn fawns."[61]

Wolves also hold tremendous cultural significance to Native American cultures, which have long seen the wolf as "both a powerful animal and a source of inspiration."[62] "In most Native cultures, wol[ves] are associated with courage, strength, loyalty, and success at hunting."[63] In many native mythologies and origin stories, wolves are depicted as heroes, gods, and ancestors of humankind.[64] For example:

> the Arikara and Ojibwe believed a wolfman spirit made the Great Plains for them and for other animals. The Hopi honor a wolf named Katsina, a spiritual being who serves

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[55] *See* U.S. DEP'T OF AGRIC., WILDLIFE SERVS., https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/SA_Program_Overview [https://perma.cc/RB8S-MFS2] (last visited Oct. 13, 2020).
[56] *Program Data Reports*, U.S.D.A., https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/pdr/?file=PDR-G_Report&p=2018:INDEX [https://perma.cc/M9WP-F226] (last visited Oct. 13, 2020).
[57] WILDEARTH GUARDIANS, *supra* note 52.
[58] *Id.*
[59] Carl Safina & Erica Cirino, *Open Season for Wolves Across the Lower 48? Time and Science Will Tell*, NAT'L GEOGRAPHIC (June 29, 2018), https://blog.nationalgeographic.org/2018/06/29/open-season-for-wolves-across-the-lower-48-time-and-science-will-tell/ [https://perma.cc/9CVL-4LAB].
[60] *Id.*
[61] *Id.*
[62] Erin Edge et al., *The Cultural Significance of Wolves*, PLACES FOR WOLVES 10 (June 19, 2013), https://defenders.org/sites/default/files/publications/places-for-wolves-defenders-of-wildlife-report.pdf [https://perma.cc/327P-ZNZQ].
[63] *Native American Wolf Mythology*, NATIVE LANGUAGES, http://www.native-languages.org/legends-wolf.htm [https://perma.cc/5CXF-GXJD] (last visited Oct. 13, 2020).
[64] *See id.*

> as a guardian for the other sacred dancers. Before battle, White Mountain Apache warriors would sing and pray for the strength, endurance and teamwork of wolves.[65]

Currently, the ESA is not equipped to protect endangered and threatened species like wolves. Accordingly, other federal statutes must be engaged if we want any chance at protecting our Nation's wildlife.

II. RECOGNIZING WILDLIFE AS HISTORIC PROPERTY: *DUGONG V. RUMSFELD*

Where statutes directed solely at protecting endangered species fail to do so, new considerations of wildlife must be applied which reflect the full breadth of their value and significance to the lives of humans, using language that afford them protection elsewhere under federal law. This need is realized in the recognition that wildlife is not limited to its ecological significance, but holds a particular cultural significance worthy of recognition and protection under the law. In *Dugong v. Rumsfeld*, plaintiffs, consisting of the Okinawa Dugong (dugong), American Japanese citizens, and individual Japanese citizens, brought an action against the United States Secretary of Defense, Donald Rumsfeld, and the United States Department of Defense in order to enjoin construction of a United States military base in Okinawa, Japan that would threaten the dugong's habitat and continued existence.[66] The dugong is an herbivorous marine mammal in the Sirenian family.[67] Only a small population of this particular dugong exist. They are found in the waters off the eastern coast of Okinawa.[68] The dugong is listed as "endangered" under the ESA.[69]

Plaintiffs brought a claim for failure to comply with NHPA rather than a claim under NEPA or the ESA.[70] The court acknowledged that plaintiffs were unable to bring a claim under NEPA because the statute could not be applied extraterritorially.[71] It was, however, surprising that they chose not to bring a claim to protect the endangered dugong under

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[65] Edge et al., *supra* note 62.
[66] *See* Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *1 (N.D. Cal. Mar. 2, 2005).
[67] *See id.* at *3.
[68] *Id.*
[69] 50 C.F.R. § 17.11 (2010); Dugong, 2005 WL 522106, at *3.
[70] *See Dugong*, 2005 WL 522106, at *1.
[71] *See* NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 468 (D.D.C. 1993).

the ESA. The ESA shares similar procedural requirements with NHPA.[72] Both statutes mandates and regulate a consultation process and force agencies to take the appropriate steps to minimize that harm when there is a finding of adverse impact, but the ESA specifically protects wildlife where NHPA only protects "historic properties."[73] The choice to forego a claim under the ESA was out of fear that bringing an action under the ESA would compel the Bush administration to further weaken the statute.[74]

In ruling on Defendant's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction, the Court examined whether the dugong could be considered "property" within the NHPA statutory scheme.[75] The dugong holds a great deal of cultural significance to the Okinawan citizens.[76] It is central to the creation mythology, folklore, and rituals of traditional Okinawan culture.[77] The dugong is also a protected "natural monument" under the Japanese "Law for the Protection of Cultural Properties."[78]

The Court acknowledged that while the term property is not defined in NHPA, the statute defines the phrase "historic property" as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource."[79] The Court pointed out that "very little precedent exists governing the question of whether a living thing can constitute property eligible for the National Register."[80]

The Court then pointed to *Hatmaker v. Georgia Department of Transportation*, in which "plaintiffs sought a preliminary injunction against continued construction of a federally funded road widening project that involved destruction of an oak tree of significance in Native American history."[81] In this case, which was held to be analogous to the case at bar,

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[72] *See* Lauren Jensen Schoenbaum, *The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law*, 44 TEX. INT'L L.J. 457, 477 (2009).
[73] *Id.*
[74] *See* Mitsuhiko A. Takahashi, *Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*, 28 ENV'T L. & POL'Y J. 181, 191 (2004).
[75] *See Dugong*, 2005 WL 522106, at *8.
[76] *Id.*
[77] *Id.* at *3.
[78] *Id.*
[79] 16 U.S.C. § 470w(5). *See also* Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1230 (9th Cir. 1999).
[80] *Dugong*, 2005 WL 522106, at *10.
[81] *Id.* (citing Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1047 (M.D. Ga. 1995)).

it was held that "the tree was at least potentially eligible for placement on the National Register."[82] "In assessing the applicability of the statute, the court emphasized the verifiable nature of the contested object's historic qualities."[83] The Court in *Rumsfeld* concluded that while animals differ from trees, "their distinguished qualities are not significant under the plain language of the statute[,]" and that the dugong may, like a tree, fall under the category of "object," as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment."[84]

The Court refuted the defense's arguments that wild animals could not be "owned" by state and federal governments (preventing them from being classified as property) by asserting that whether the government owns the property is irrelevant to a determination of eligibility for the National Register and that "a mere lack of ownership or possibility of ownership does not disqualify a thing from constituting property."[85]

The Court ultimately held that the Dugong could be considered "property" under NHPA and denied the defendant's motion to dismiss, converted into a motion for summary judgement on the issue of the applicability of the NHPA to the protection of the Okinawa dugong was denied.[86] This case has opened the door for broader protection of wildlife for its cultural value, in addition to its ecological value.

III. NHPA AND NEPA: CLOSE STATUTORY ANALOGS

A. NHPA

The NHPA, established by Congress in 1966, establishes:

> [i]t shall be the policy of the Federal Government, in cooperation with other nations and in partnership with

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[82] *Id.*
[83] *Id.*
[84] 36 C.F.R. § 60.3(j); *Dugong*, 2005 WL 522106, at *10.
[85] *Dugong*, 2005 WL 522106, at *10 ("As the Tenth Circuit has noted, while it is 'well settled that wild animals are not the *private* property of those whose land they occupy,' they 'are instead a sort of *common* property whose control and regulation are to be exercised [by the government] 'as a trust for the benefit of the people.'") Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) (emphasis added) (quoting Geer v. Connecticut, 161 U.S. 519, 528–29 (1896), *overruled on other grounds,* Hughes v. Oklahoma, 441 U.S. 322 (1979)). *See also* 36 C.F.R. § 60.2.
[86] *Dugong*, 2005 WL 522106, at *16.

> the States, local governments, Indian tribes, and private organizations and individuals . . . [to] provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations.[87]

The Act authorizes the Secretary of the Interior to maintain a National Register of Historic Places "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[88] It is implemented by the Advisory Council on Historic Preservation ("ACHP").[89] The ACHP "issues regulations to implement Section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the Section 106 process."[90] "The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties."[91]

Under Section 470f of the Act, federal agencies are required, when undertaking any federally assisted action in the United States, to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included, *or eligible for inclusion*, in the National Register."[92] Any such federal agency must provide the Advisory Council on Historic Preservation, established under the NHPA, with a "reasonable opportunity to comment with regard to such undertaking."[93] This is satisfied through a review process set out in implementing relations, referred to as the Section 106 process.[94]

Section 106 review first requires a determination of the undertaking.[95] This involves identifying Consulting Parties, which include the State Historic Preservation Officer ("SHPO"), Tribal Historic Preservation Officer ("THPO"), representatives from local government, applicants for federal assistance, permits, licenses, and other approvals, and any additional individuals or organizations that have expressed interest in

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[87] 16 U.S.C. § 470-1(2) (1992) (repealed 2014) (codified with some differences in language at 54 U.S.C.S. § 300101).
[88] *Id.* § 470a(1)(A) (current version at 54 U.S.C. § 302101 (2014)).
[89] 36 C.F.R. § 800.2(b).
[90] *Id.*
[91] *Id.*
[92] 16 U.S.C. § 470f (1992) (repealed 2014) (codified with some differences in language at 54 U.S.C. § 306108) (emphasis added).
[93] *Id.* (current version at 54 U.S.C. § 306108 (2014)).
[94] *Id.*
[95] *Id.*

participating due to the nature of their legal or economic relation to the undertaking or affected properties,[96] and coordination with other reviews (such as NEPA).[97]

Then, the agency must gather information and identify the historic property or properties that might be affected by the undertaking.[98] In order for the property to be eligible there must be an evaluation of historical significance through an application of the National Register criteria and the SHPO/THPO agree.[99]

Once this is done, the agency must assess adverse effects on the property by determining whether the undertaking would "alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."[100] Examples of adverse effects include physical destruction or damage, alteration, or removal from its historic location.[101] If an adverse effect is found, the agency must consult with Consulting Parties to resolve the effect with participation of the ACHP.[102]

For undertakings with adverse effects, the Federal agency usually executes a legally binding document, a Memorandum of Agreement ("MOA") or Programmatic Agreement ("PA"), that stipulates the resolution of adverse effects agreed to by the signatories.[103] "In those rare circumstances where there is a failure to reach an agreed-upon solution, the ACHP issues formal advisory comments to the head of the agency."[104] "The head of the agency must then take into account and respond to those comments."[105] These procedural requirements serve as powerful tools to protect cultural properties from harm.

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[96] 36 C.F.R. § 800.3(a).
[97] *Id.* § 800.3(b).
[98] *Id.* § 800.4(a).
[99] *Id.* § 800.4(c).
[100] *Id.* § 800.5(a)(1).
[101] *Id.* §§ 800.5(a)(2)(I), (ii), (iii).
[102] 36 C.F.R. §§ 800.5(d)(2), 800.6.
[103] *Id.*
[104] COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, & ADVISORY COUNCIL ON HIST. PRES., NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, 12 (Mar. 2013), https://www.energy.gov/sites/prod/files/G-CEQ-NEPA_NHPA_Section_106_Handbook_Mar2013.pdf [https://perma.cc/TD36-2S99] [hereinafter CEQ].
[105] *Id.*

B. NEPA

The National Environmental Policy Act (NEPA) was enacted in 1970 to "encourage productive and enjoyable harmony between humans and the environment"; "to promote efforts which will prevent or eliminate damages to the environment"; to "enrich the understanding of the ecological systems and natural resources important to the Nation. . . ."[106] The language of the statute enforces the tremendous hold and influence it was meant to have in agency decision-making.[107] In enacting NEPA, Congress recognized "the profound impact of man's activity on the interrelations of all components of the natural environment" and the need (among other things) "to create and maintain conditions under which man and nature can exist in productive harmony."[108] NEPA compels federal agencies to undergo an extensive assessment any time it seeks to undertake an action that is likely to "significantly affect the *human environment*."[109] NEPA is a flexible statute, capable of incorporating a wide range of environmental harms,[110] including protection of wildlife.

NEPA requires any federal agency whose major action will significantly affect the human environment to conduct a formal assessment and consider alternatives to the proposed action.[111] Such actions include those "with effects that may be major, and which are potentially subject to Federal control and responsibility."[112] "Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."[113] Such "actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals."[114]

Once there is a finding that an action qualifies as a "major federal action" under NEPA, the agency must then determine whether the action falls under the "Categorical Exclusion Criteria."[115] This means that the

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[106] 42 U.S.C. § 4321.
[107] *Id.*
[108] 42 U.S.C. § 4331(a).
[109] 40 C.F.R. §§ 1501.4, 1508 (emphasis added).
[110] 42 U.S.C. § 4321.
[111] 40 C.F.R. §§ 1501.4, 1508.
[112] *Id.* § 1508.18.
[113] *Id.*
[114] *Id.*
[115] *Id.* § 1508.4; *National Environmental Policy Act Review Process*, EPA, https://www.epa

action falls under "a category of actions which do not individually or *cumulatively* have an effect on the human environment."[116] If the action does not fall under the Categorical Exclusion Criteria, the agency must undertake an Environmental Assessment ("EA"), which is a preliminary assessment meant to determine whether a longer, more extensive assessment is required.[117] If the Environmental Assessment provides a Finding of No Significant Impact ("FONSI"), the process is over.[118] If there is no FONSI, an Environmental Impact Statement ("EIS") will be required.[119] An EIS is a report that includes a report on "the environmental impact of the proposed action, any adverse impacts that cannot be avoided should the proposal be implemented, alternatives to the proposed action" (one alternative being not to undertake the action at all), "the relationship between the short-term uses of the environment and the maintenance and enhancement of long term productivity, and any irreversible and irretrievable commitments of resources that would be involved."[120]

The "human environment" includes the relationship between humans and the natural and physical environment.[121] The word "significantly" "requires considerations of both *context* and *intensity*."[122] The context could pertain to society as a whole, an affected region or locality, or an affected interest, while intensity refers to the severity of the effect, which considers magnitude, geographic extent, duration, and frequency of the effect.[123] Factors that must be considered in determining whether an action significantly impacts the human environment include:

> impacts that may be both beneficial and adverse; . . . unique characteristics of the geographic area such as *proximity to historic or cultural resources*, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; . . . whether the action is related to other actions with individually insignificant but *cumulatively significant impacts*; . . . the degree to which the action may

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.gov/nepa/national-environmental-policy-act-review-process [https://perma.cc/SC9T-QLN5] (last visited Oct. 13, 2020).

[116] 40 C.F.R. § 1508.4 (emphasis added).

[117] *National Environmental Policy Act Review Process*, *supra* note 115.

[118] *Id.*

[119] *Id.*

[120] 42 U.S.C. § 4332(C).

[121] 40 C.F.R. § 1508.14.

[122] *Id.* § 1508.27 (emphasis added).

[123] *Id.*

> adversely affect districts sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources; the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act; . . . whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.[124]

Clearly, wildlife already falls under NEPA's purview as a feature of the environment.[125] Consideration of wildlife could be accorded more weight and consideration if and when wildlife is recognized for its cultural significance, and warrant preparation of an EIS and assessment of adverse impacts in circumstances where this may not otherwise be the case.

C. Intersection Between NEPA and NHPA

There is abundant evidence of the interconnectedness of NHPA and NEPA.[126] They are similar not only in their structure, but in their purpose and what they cover.[127] "What § 106 of NHPA does for sites of historical import, NEPA does for our natural environment."[128] The Ninth Circuit has previously held that both Acts create obligations that are "chiefly procedural in nature;" both share the goal of generating information about the impact of federal actions on the environment; and both require that the "relevant federal agency carefully consider the information produced."[129] In short, both statutes are designed to "insure that the agency 'stop, look, and listen' before moving ahead."[130]

Both NEPA and NHPA encourage integration with other planning and environmental review.[131] To this end, the CEQ has released a guide

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[124] 40 C.F.R. § 1508.27 (emphasis added).
[125] 42 U.S.C. § 4321.
[126] CEQ, *supra* note 104, at 4–5.
[127] *See* San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1097 (9th Cir. 2005); CEQ, *supra* note 104, at 4.
[128] *San Carlos Apache Tribe*, 417 F.3d at 1097.
[129] Pres. Coal., Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982). *See also* Morris Cnty. Tr. for Historic Pres. v. Pierce, 667 F.2d 271, 278–79 (3d Cir. 1983).
[130] *Id.*
[131] CEQ, *supra* note 104, at 4; 40 C.F.R. §§ 1500–08; 36 C.F.R. § 800.

on the effective integration of NEPA and Section 106 of NHPA.[132] "NEPA and CEQ's regulations require the preparation of an EIS when a proposed Federal action may significantly affect the human environment."[133] The guide notes that "[h]istoric properties, as a subset of cultural resources, are one aspect of the "human environment" defined by the NEPA regulations.[134] "Consequently*, impacts on historic properties and cultural resources must be considered in determining whether to prepare an EIS*."[135]

Both "NEPA and Section 106 reviews may be triggered by a Federal or Federally funded, licensed, or permitted action and apply whether that action is on Federal, private, state, or tribal land."[136] They share the goal of more informed agency decisions with respect to environmental consequences, including the effects on historic and cultural properties.[137] Both encourage coordination with other environmental reviews.[138]

These statutes are so intertwined that substitution of the Section 106 Process for NEPA review is expressly permitted under the NHPA.[139] Section 800.8 of the NHPA, aptly titled "Use of the NEPA process for section 106 purposes," authorizes agencies to use the procedures and documentation required for the preparation of an EA, EIS, or FONSI to comply with Section 106 instead of standard NHPA procedure if the agency gives advance notice and the project meets a number of standards subsequently listed.[140]

"NEPA and Section 106 implementation are overseen by Federal agencies that have promulgated regulations implementing the statutory procedures."[141] "The CEQ oversees 40 C.F.R. Parts 1500–1508, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act."[142] "The ACHP oversees 36 C.F.R. Part 800, Protection of Historic Properties."[143] These regulations are similar in many ways.

> Both regulatory procedures authorize development of agency-specific alternative procedures provided those

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[132] *See* CEQ, *supra* note 104.
[133] *Id.* at 9.
[134] *Id.*
[135] *Id.* (emphasis added).
[136] CEQ, *supra* note 104, at 10.
[137] 40 C.F.R. § 1500.1(c); CEQ, *supra* note 104, at 4.
[138] CEQ, *supra* note 104, at 4.
[139] 36 C.F.R. § 800.8(c).
[140] *Id.*
[141] CEQ, *supra* note 104, at 10.
[142] *Id.*
[143] *Id.*

> procedures meet certain standards and approval requirements, require agencies to gather information on the potential effects of the proposed action on historic properties and consider alternatives that may avoid or minimize the potential for adverse effects . . . emphasize the importance of initiating the environmental review process early in project planning, emphasize notifying the public about the proposed Federal actions and involving the public in the decision making process, and require the process to be completed prior to a Federal decision.[144]

IV. NHPA STRENGTHENS PROTECTIONS UNDER NEPA

A. Wildlife as a Cultural Resource Under NEPA

The similarities and interconnected nature of NHPA and NEPA open up a variety of possibilities for protecting wildlife as a cultural resource or cultural property.[145] First, the precedent set by *Dugong* opens the door to the understanding of wildlife as culturally significant and warrant independent considerations of it as such.[146] When applied in a domestic context, there would be no issue of extraterritoriality that limited plaintiffs' ability to bring a claim under NEPA.

Because of the broad scope of NEPA, earning its consideration as an "umbrella law,"[147] wildlife could be considered a "cultural resource" included within the "human environment."[148] While both NEPA and Section 106 require agencies to consider historic properties and effects to them, NEPA covers the human environment, which includes aesthetic, historic, *and* cultural resources as the terms are commonly understood.[149] NHPA is limited to *exclusively* properties that are listed, or eligible for listing in the National Register of Historic Places.[150] The CEQ explicitly acknowledges that cultural resources that are not eligible for or listed in the National Register may be considered as part of NEPA review.[151]

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[144] *Id.*
[145] *See* CEQ, *supra* note 104, at 4.
[146] *Dugong*, 2005 W.L. 522106, at *17–*18.
[147] CEQ, *supra* note 104, at 12.
[148] *Id.*
[149] 40 C.F.R. § 1508.8(b).
[150] 16 U.S.C. § 470(h).
[151] CEQ, *supra* note 104, at 12–13.

Because NEPA is an environmental law,[152] it is better situated to assess both the ecological and cultural considerations of impacts to wildlife.

Connected actions under NEPA would allow the considerations of wildlife as a cultural resource be paired with other actions impacting the environment.[153] An action impacting wildlife will likely have other environmental consequences. Adding the cultural component to other environmental and ecological considerations will strengthen the case for alterative actions, or the case for undertaking review through an EA or EIS in the event that other considerations alone would have been insufficient.

B. Coordinating NHPA and NEPA to Protect Wildlife

The interconnected nature of NHPA and NEPA, specifically the provisions for early coordination with NEPA review or substitution of NEPA review for NHPA,[154] make a compelling case that, even if we attempt to protect wildlife under the NHPA, we can use NEPA to conduct a comprehensive review that would still account for the full breadth of cultural and environmental concerns of a federal project and provide the best opportunities to protect wildlife. This is a stronger tool than simply attempting to protect wildlife under one of the two statutes. It would allow coordination of efforts, resources, and protections offered by each respective statute, each strengthening the other by filling in gaps in the other—providing for the broadest protections available.

One such gap is found in NEPA's Categorical Exclusions ("CE").[155] As a part of NEPA's implementation procedures, CEs are actions that are classified to typically not have any potential for significant effects and there are no "extraordinary circumstances" that would warrant further analysis in an EA or EIS.[156] Because Section 106 is an independent statutory requirement, compliance with NEPA through a CE would be insufficient to satisfy Section 106.[157] Consultations under 106 could be used to determine whether there would be an adverse effect to historic properties constituting "extraordinary circumstances," which would trigger the need for an EA or EIS, either *alone* or *in combination with other environmental effects*.[158] Thus, recognition of wildlife as "historic

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[152] 42 U.S.C. § 4331(a).
[153] 40 C.F.R. § 1508.25.
[154] CEQ, *supra* note 104, at 18.
[155] 40 C.F.R. § 1508.4.
[156] *Id.*
[157] CEQ, *supra* note 104, at 18–19.
[158] *Id.* at 19.

properties"[159] could serve as an effective tool to navigate around CEs under NEPA.

Another asset of NHPA is that under NEPA, tribal consultation is *encouraged*,[160] while under NHPA, consultation with Indian tribes and Native Hawaiian tribes is *mandatory*.[161] There is abundant evidence of the cultural significance of wildlife in the history of American culture,[162] particularly the cultural and spiritual significance of wildlife in Native American culture.[163] For many indigenous communities, the distinction between the natural and the cultural is largely an artificial one.[164] Their history, spirituality, and cultural identity is inextricably intertwined with that of the natural world, including and largely centered around wildlife.[165] NHPA mandates that "[t]he agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to . . . advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance. . . ."[166]

Courts have already held that environmental features can be protected under NHPA for their cultural value to Native American tribes. The Court in *Dugong* relied on *Hatmaker v. Georgia Department of Transportation*, the plaintiffs sought a preliminary injunction against continued construction of a federally funded road widening project that involved destruction of an oak tree of significance in Native American history.[167] It noted that the Court in *Hatmaker* held that the tree was at least potentially eligible for placement on the National Register and granted the preliminary injunction, emphasizing the "verifiable nature of the contested object's historic qualities."[168] If cultural significance to Native Americans warrants recognition of an environmental feature like

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[159] 16 U.S.C. § 470(b)(3).
[160] *See* DIV. ENV'T & CULTURAL RES. MGMT., INDIAN AFFAIRS NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) GUIDEBOOK 6 (59 IAM 3-H) (Aug. 2012).
[161] CEQ, *supra* note 104, at 18–19.
[162] *See* David Rich Lewis, *Native Americans and the Environment, A Survey of Twentieth Century Issues*, 19 AM. INDIAN Q. 3, 423 (1993).
[163] *See* Anna L. Peterson, *Person and Nature in Native American Worldviews*, *in* BEING HUMAN: ETHICS, ENVIRONMENT, AND OUR PLACE IN THE WORLD, Ch. 5, 119–20 (2001).
[164] *See id.* at 122.
[165] *See id.* at 120.
[166] 36 C.F.R. § 800.2(c)(ii)(A).
[167] Dugong v. Rumsfeld, No. C 03-4350 MHP, 2005 WL 522106, at *10 (N.D. Cal. Mar. 2, 2005).
[168] *Id.* (citing Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1058, 1067 (M.D. Ga. 1997)).

a tree warrants eligibility for placement on the National Register (thus covered by NHPA),[169] it follows that similar coverage should be extended to wildlife such as horses or wolves that share such cultural significance.

Due to their cultural significance to Native tribes[170] coupled with their ecological significance in shaping ecosystems,[171] horses and wolves are the perfect candidates for coordination between NHPA and NEPA. Because horses and wolves are of such cultural significance to qualify as "historic property" or "cultural resources" under NHPA and NEPA after *Dugong*, any government action such as wild horse roundups by BLM or predator culls by Wildlife Services would be subject to increasingly searching environmental review, and must consider impacts to these species in terms of both environmental *and* cultural impacts.

CONCLUSION

Ultimately, in a time where the ESA has been so weakened as to fail to protect wildlife,[172] new federal statutory authority is needed to step in. In the cases of unlisted species like wild horses, and even listed species like wolves, the ESA has failed to provide adequate protection from governmental harm. *Dugong v. Rumsfeld* presents an opportunity for consideration of certain wildlife as historic property conducive to coordination with NEPA as a more comprehensive way of protecting wildlife while recognizing the multifaceted impact wild animals have on our lives both culturally and ecologically. Species like wild horses and wolves hold a great deal of cultural significance to Native American tribes. Environmental elements of cultural significance to Native American tribes have been held as eligible for consideration as historic or cultural properties under NHPA. This cultural dimension highlights the multifaceted importance of these species, and should be considered by both Acts, which both encourage coordination of consultation and review. Assessing both cultural and environmental impacts to important species like wolves and wild horses will encourage a finding of significant impact and prompt review where review may otherwise have been evaded.

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[169] *See id.*
[170] *Spiritual Bonds*, *supra* note 31.
[171] *See* Daniel S. Licht et al., *Using Small Populations of Wolves for Ecosystem Restoration and Stewardship*, 16 BIOSCIENCE 2, 147–48 (2010).
[172] *See* Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, N.Y. TIMES (Aug. 12, 2019).