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# **The Fight Against Graphite: What Tribal Opposition to a Mine in Alaska Teaches Us about The Importance and Limitations of Consultation in the Green Transition**

*Annika Krafcik*

## **ABOUT THE AUTHOR**

Annika Krafcik graduated from UCLA School of Law in May 2024 with specializations in Native Nations Law, Environmental Law, and International & Comparative Law. Having fallen in love with Alaska back in 2018, Annika made it her goal in law school and in her legal career to protect the people and places of Alaska from harmful extractive industry. Since 2023, she has been a member of the volunteer-based Alaska Mining Impacts Network and its specialized Graphite One Consultation Meeting Group. Annika will be working at the Sitka Superior Court starting in Fall 2024. After which, she hopes to pursue work at the intersection of public interest environmental law and Tribal justice in Alaska’s Southeast.

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## I. INTRODUCTION

Just below the Arctic Circle, in the shadow of the Kigluaik Mountains, the Imuruk Basin is one of the most biologically productive areas in the country.<sup>1</sup> It is also a spiritual place to the three nearby Tribes: Native Villages of Teller, Brevig Mission, and Mary's Igloo. Twelve years ago, Tribal members and local residents of the nearby town of Nome fishing in these historic waters started to notice something: an incessant whirring sound circling above them. Helicopters were flying in and out of their Kigluaik Mountains. But why? Unbeknownst to the Tribes or the nearby town of Nome, a Canadian mining company had started drilling in the Kigluaik Mountains, exploring for graphite. In the Kigluaiks, the company discovered the largest known reserve of graphite in North America. The Tribes were never notified of the start of exploration. Adding insult to injury, in July 2023, the Department of Defense (DoD) granted Graphite One \$37.5 million dollars to expedite the feasibility study for this mine. To this day, the DoD has not consulted with the Tribes regarding the Graphite One mine, despite the incredible risk it poses to their subsistence resources, the Imuruk Basin, and the Kigluaik Mountains.

The story of the Graphite One mine is becoming a familiar one. As climate change causes extreme weather events—sea level rise, wildfires, and drought—the global community is becoming more and more amenable to a move away from fossil fuels and toward renewable energy.<sup>2</sup> Renewable energy technology, such as wind turbines, solar panels, and batteries that can store their power, are touted as our saving grace. But often omitted in the discussion of renewable energy is the fact that these technologies, though they harness the renewable energy of the wind and the sun, are made of *non*-renewable transition minerals,<sup>3</sup> such as lithium and graphite.<sup>4</sup> In other words, developing

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1. Letter from Lucy Oquilluk, President of Native Village of Mary's Igloo, to Halimah Najieb-Locke, Deputy Assistant Secretary of Defense for Industrial Base Resilience, U.S. Dep't Def. 2 (Sept. 13, 2023) (on file with the author) [hereinafter DoD letter]; *Petition to List the Alaska Glacier Buttercup as Threatened or Endangered Under the Endangered Species Act and to Concurrently Designate Critical Habitat*, CTR. BIOLOGICAL DIVERSITY (Feb. 1, 2024), <https://www.biologicaldiversity.org/species/plants/pdfs/2024-02-01-Center-AK-Glacier-Buttercup-ESA-Listing-Petition.pdf> [<https://perma.cc/R6S2-9M57>] (“[T]he Beringian Western Alaska subzone is a hot spot of plant species richness, containing more plant species than any other region, and is among the highest Arctic subzones for rare species and endemism. And within Beringian Western Alaska, the Seward Peninsula, a ‘mosaic of rugged mountain ranges, extensive hills, broad valleys, lakes, and lowlands’ and the closest geographic connection between North America and Northeast Asia across the Bering Strait, is the richest ecoregion for plants.”).

2. See e.g., Seth Borenstein, David Keyton, Jamey Keaten & Sibi Arasu, *In a first, delegates at UN climate talks agree to transition away from planet-warming fossil fuels*, AP News (Dec. 13, 2023), <https://apnews.com/article/cop28-climate-summit-negotiations-fossil-fuels-dubai-64c0e39e6ad54a98e05e5201a2215293> [<https://perma.cc/8GD6-UCWH>].

3. Throughout this Comment, the term “transition minerals” will refer to minerals, such as graphite, lithium, cobalt, etc., that are deemed essential to the green transition.

4. Brett A. Miller, *Embracing the Water-Energy Contradiction: The Pebble Mine*

renewable energy technology requires mining, and mining can be extremely harmful to the environment and local communities.

In the U.S., where demand for transition minerals far outpaces supply, law and policy addressing the green transition—such as the Inflation Reduction Act (2022) or the Bipartisan Infrastructure Law (2021)—tends to focus on developing transition mineral mines quickly, without addressing the need for fulsome consultation with impacted communities and environmental impact review. This is particularly troubling when considering that transition mineral mines are disproportionately located on or near Tribal land.<sup>5</sup> Under the federal trust responsibility, the federal government has a legal duty to consult with Tribes whenever a federal undertaking has “tribal implications.”<sup>6</sup> When the federal government expedites the development of transition mineral mines on or near Tribal land and fails to consult with Tribes about this decision—just as the federal government when it granted Graphite One \$37.5 million for its feasibility study—the federal government violates this legal duty. Graphite One is just one example of this.<sup>7</sup>

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*Conflict and Regulatory Implications Associated with Renewable Energy's Dependence on Non-Renewable Copper*, 19 WATER L. REV. 213, 228 (2016).

5. See discussion *infra* in Subpart II(B). “Of 5,097 mining projects globally that involve some 30 minerals used in renewable energy technologies, 54 percent are located on or near Indigenous Peoples’ lands and territories according to Nature Sustainability.” *Five Calls to Action for International Day of the World’s Indigenous Peoples*, CULTURAL SURVIVAL (Aug. 8, 2023), <https://www.culturalsurvival.org/news/5-calls-action-international-day-worlds-indigenous-peoples> [<https://perma.cc/59WY-2W8Z>], citing John Owen et al, *Energy transition minerals and their intersection with land-connected peoples*, NATURE SUSTAINABILITY 204 (2022) and S. Block, *Mining Energy-Transition Metals: National Aims, Local Conflicts*, MSCI (June 3, 2021), <https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947> [<https://perma.cc/7P9V-BV6R>].

6. For relevant law on this topic, see *infra* Subpart III(A).

7. Other examples of the federal government ignoring its mandatory obligation to consult with Tribes before disrupting their lands and resources in the name of the green transition include: the lithium mine at Thacker Pass, located on the site where the 1<sup>st</sup> Nevada cavalry committed a massacre against the Numu tribe in 1965, land now considered sacred by the Numu and other local tribes; and the proposed Resolution Copper mine in Arizona, which will virtually destroy Oak Flat, a site long held sacred by the Apache. Lithium is currently seen as critical to the green transition because of its central role in lithium-ion batteries used in electric vehicles and for battery storage. Copper is critical to the green transition because it is used as a conductor of electricity and is thus a central component in any electrification project. See ‘We were not consulted’: Native Americans fight lithium mine on site of 1865 massacre, GUARDIAN (Oct. 13, 2023), <https://www.theguardian.com/us-news/2023/oct/13/native-americans-1865-massacre-lithium-mine-thacker-pass> [<https://perma.cc/4P9L-S874>]; Gary McKinney, *Our Sacred Sites are More Important Than a Lithium Mine*, CULTURAL SURVIVAL (June 1, 2022), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/our-sacred-sites-are-more-important-lithium-mine> [<https://perma.cc/Z6Q2-3K9N>]; Anita Snow, *How Apache Stronghold’s fight to protect Oak Flat in central Arizona has played out over the years*, AP NEWS (Mar. 1, 2024), <https://apnews.com/article/oak-flat-copper-timeline-72e1ee20580f1ee0e57dd7653b6a770f> [<https://perma.cc/Z4U9-RQD2>].

Another example is the Stibnite Gold mine on Nez Perce Tribal land in the State of Idaho.<sup>8</sup> The facts of the Stibnite Gold mine closely mirror those of Graphite One. While most of the gold mined in the world is used for jewelry (and thus is unrelated to green transition goals),<sup>9</sup> the Stibnite Gold mine also produces a small amount of antimony, which is used for both munitions and energy storage.<sup>10</sup> Interest in this potential antimony supply led the DoD to grant \$24.8 million to Perpetua Resources, the mining company proposing to re-open the Stibnite Gold Mine, to complete environmental and engineering studies for the proposed mine.<sup>11</sup> Just like the Native Villages of Mary's Igloo, Teller, and Brevig Mission, the Nez Perce Tribe was not consulted before the DoD gave the mining company this grant.<sup>12</sup>

Advocates for a green transition stress the urgency of making the switch to renewable energy, pointing out the disastrous consequences climate change has already wrought on our planet. This urgency then translates into a kind of moral imperative: because the harms of climate change are so great, anyone standing in the way of the green transition is standing in the way of all that is right and good. But ultimately, just like the fossil fuel industry it seeks to replace, the renewable energy industry relies on extractivism to function.<sup>13</sup>

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8. Letter to Linda Jackson, Forest Supervisor from Nez Perce Tribal Executive Committee re: Nez Perce Tribe's Comments on the Stibnite Gold Project Draft Environmental Impact Statement (Oct. 27, 2020), <https://nezperce.org/wp-content/uploads/2020/12/2020-10-27-Payette-NF-NPT-Comments-Stibnite-Gold-Project-Draft-Environmental-Impact-Statement-DEIS.pdf>.

9. *The Top 5 Uses of Gold After It Has Been Mined* (Nov. 3, 2022), <https://gildedco.com/blog/top-5-uses-of-gold-after-it-has-been-mined> [<https://perma.cc/GU6Q-68XH>] (estimating that jewelry accounts for 51 percent of total gold demand).

10. *Perpetua Announces Antimony Supply Agreement for Ambri Battery Production* (Aug. 9, 2021), <https://www.prnewswire.com/news-releases/perpetua-announces-antimony-supply-agreement-for-ambri-battery-production-301351287.html> [<https://perma.cc/9M6Z-A7QJ>].

11. The DoD grant used funds from the Defense Production Act, the same source as the DoD funding for Graphite One's feasibility study. Hannah Northey, *Tribes say they're cut out as Biden doles out mining dollars*, POLITICO (Jan. 11, 2024), <https://subscriber.politicopro.com/article/eenews/2024/01/11/tribes-say-theyre-cut-out-as-biden-doles-out-mining-dollars-00135038>.

12. Nathaniel Herz, *Tesla Needs Graphite. Western Alaska has Plenty. But Mining It Raises Fears in Nearby Villages*, ANCHORAGE DAILY NEWS (Sept. 27, 2023), <https://www.adn.com/business-economy/2023/09/27/tesla-needs-graphite-western-alaska-has-plenty-but-mining-it-raises-fears-in-nearby-villages> [<https://perma.cc/AQ56-F8VH>].

13. Extractivism refers to "the industries, actors, and financial flows, as well as to the economic, material a social processes and outputs, associated with the globalized extraction of natural resources. The extractivism economy includes mineral and fossil fuel extraction, and monocultural large-scale agricultural, forestry and fishery operations." UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Global Extractivism and Racial Equality*, A/HRC/41/54 (May 14, 2019). See also Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Inter-Am. Comm'n Hum. Rts., OEA/Ser.L/V/II. Doc. 47/15 (Dec. 13, 2015).

This extractivism, whether it be drilling for oil or mining for transition minerals, disproportionately harms Native peoples.<sup>14</sup> To avoid simply replicating the harms of our fossil fuel past—to truly be a force for good, and not merely another industry mobilizing a sense of urgency for capitalistic gain—the renewable energy future must involve *at a minimum* meaningful consultation and engagement with communities affected by transition mineral mining projects.

To promote this meaningful consultation, this Comment identifies existing tools within environmental and federal Indian law that Tribes affected by mining projects can wield to mandate consultation and participation in mine-related decision-making. Though relevant throughout the U.S., these federal footholds, including the National Historic Preservation Act, the National Environmental Policy Act, and the Clean Water Act, are particularly important in Alaska because: (1) these statutes require the federal government to consult with Tribes using a higher standard for consultation than is prescribed by Alaska state law, (2) these statutes enforce the federal government's trust responsibility<sup>15</sup> with Native Nations, requiring the federal government to act in the best interests of all federally recognized Tribes, and (3) these statutes add procedural barriers to mining on land near Tribes, thus creating a significant deterrent effect for extractive industry.

This Comment focuses on mining<sup>16</sup> in Alaska because the conflict between Indigenous People's Rights and the mining interests for the green transition are deeply at odds in Alaska. Alaska is home to approximately half (229) of all federally recognized (574) Tribes in the U.S.<sup>17</sup> There are roughly 180,000 Tribal members in Alaska, comprising around 15 percent of the State's population.<sup>18</sup> Alaska Native people, particularly those living in rural areas off the road system in places like Nome, rely on subsistence resources like salmon, caribou,

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14. See generally UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Ecological Crisis, Climate Justice, and Racial Justice*, A/77/549 (Oct. 25, 2022); for further discussion, see Section II(B).

15. While this Article focuses on the benefits for Tribes of teaming up with the federal government to slow or stop development on Alaska state land, there is a big caveat that needs to be mentioned. The federal government does not always act faithfully as the trustee to Native American Tribes. Concerns around the federal government's sometimes disingenuous relationship with its trust responsibility and the effect that has on the efficacy of Tribal consultation is discussed in more depth *infra* in Subpart III(A).

16. Throughout this paper, the term "mining" will refer to mining for transition minerals, unless otherwise stated.

17. *Tribal Operations*, BUREAU INDIAN AFFAIRS, <https://www.bia.gov/regional-offices/alaska/tribal-operations> (accessed Mar. 15, 2024); *Federally recognized American Indian Tribes and Alaska Native Entities*, <https://www.usa.gov/indian-tribes-alaska-native> [<https://perma.cc/W5L2-5ESK>] (Mar. 15, 2024).

18. *Alaska Region*, BUREAU INDIAN AFFAIRS, <https://www.bia.gov/regional-office/alaska-region#:~:text=More%20than%20180%2C000%20Tribal%20members,Atka%20in%20the%20Aleutian%20Chain> [<https://perma.cc/8TWZ-HGG6>] (accessed Mar. 15, 2024); *Quick Facts: Alaska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AK/PST045223> [<https://perma.cc/AN8L-FFRT>] (accessed Mar. 15, 2024).

and waterfowl to practice their culture and nurture their bodies.<sup>19</sup> “For Alaska Native communities off the road system, over 80 percent of food consumed comes directly from the surrounding lands and waters.”<sup>20</sup> This reliance on the land is both a function of a thousands-of-years old tradition of living off the land as well as a financial necessity. In the Native Villages of Brevig Mission, Teller, and Mary’s Igloo, the nearest well-stocked grocery store is 200 miles away.<sup>21</sup> Prices in grocery stores reflect the incredible cost of transporting goods into the most rural reaches of Alaska where towns may only be accessible by charter plane or boat.<sup>22</sup> With four in 10 residents in Teller living below the poverty level, these outrageously high-priced groceries are out of reach.<sup>23</sup> Thus, if subsistence resources are wiped out by a mining project, Alaskans living in rural places would have no choice but to leave their homes.

Mining projects in Alaska have a long history of destroying subsistence resources. In Alaska, toxics release from mining is worse than anywhere else in the country. For example, the Red Dog Mine, located around 200 miles north of the proposed Graphite One mine, has produced more toxic substances than any other site in the U.S.<sup>24</sup> Alaskan mines hold the top four places in the Toxics Release Inventory,<sup>25</sup> releasing dioxin, cyanide, mercury, arsenic, lead, cadmium, polycyclic aromatic hydrocarbons, and other toxins into the environment.<sup>26</sup>

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19. Referring to Alaska, “Nowhere else in the United States is there such a heavy reliance upon fish and game.” Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA*, 33 ALASKA L. REV. 187, 216 (2016), citing HEARING TO EXAMINE WILDLIFE MANAGEMENT AUTHORITY WITHIN THE STATE OF ALASKA UNDER THE ALASKA NATIONAL INTEREST LANDS ACT AND THE ALASKA NATIVE CLAIMS SETTLEMENT ACT: HEARING BEFORE THE S. COMM. ON ENERGY AND NAT. RES., 113th Cong. 1 (2013).

20. *Letter to Secretary of Interior Debra Haaland, RE: Federally Recognized Tribal Letter and Consortium Letters in Support of Maintaining ANCSA D-1 Protections* (Oct. 19, 2023), [https://landvoicefuture.org/wp-content/uploads/2023/11/Alaska-D-1-Tribe-Sign-On-Letter\\_October-19-2023.pdf](https://landvoicefuture.org/wp-content/uploads/2023/11/Alaska-D-1-Tribe-Sign-On-Letter_October-19-2023.pdf) [<https://perma.cc/37JQ-2Q6F>] (hereinafter D1 Letter).

21. Herz, *supra* note 12.

22. “At the [Teller’s] main store, the shelves are completely barren of fresh fruits and vegetables. A box of Corn Chex costs \$9.55, and a bottle of Coffee-Mate runs \$11.85—more than twice the Anchorage price.” *Id.*

23. *Id.* In Teller, a typical three-person household survives on \$32,000 a year.

24. Resisting Environmental Destruction on Indigenous Lands (REDOIL) & Alaska Community Action on Toxics (ACAT), *Mining and Community Health* 3 (accessed Nov. 18, 2023), [https://www.akaction.org/wp-content/uploads/Mining\\_and\\_Community\\_Health-1.pdf](https://www.akaction.org/wp-content/uploads/Mining_and_Community_Health-1.pdf) [<https://perma.cc/YP59-P4GN>].

25. The Toxics Release Inventory is a program run by the EPA which “tracks the management of certain toxic chemicals that may pose a threat to human health and the environment.” Facilities that report to the TRI include: manufacturing, metal mining, electric power generation, chemical manufacturing and hazardous waste treatment. *What is the Toxics Release Inventory?*, EPA (accessed Nov. 18, 2023), <https://www.epa.gov/toxics-release-inventory-tri-program/what-toxics-release-inventory> [<https://perma.cc/J3SW-V2P8>].

26. REDOIL & ACAT, *Mining and Community Health*, *supra* note 24; *see also* REDOIL & ACAT, *Mining and Toxic Metals: A case study of the proposed Donlin Creek mine* (accessed Nov. 18, 2023), [https://www.akaction.org/wp-content/uploads/Mining\\_and\\_Toxic\\_Metals-1](https://www.akaction.org/wp-content/uploads/Mining_and_Toxic_Metals-1).



One reason for Alaska's poor track record on toxics release is its inadequate implementation and enforcement of environmental law.<sup>27</sup>

Despite these hazards, the Graphite One proposal in Nome is being fast-tracked, because of graphite's importance for renewable energy and national security. Graphite is an essential ingredient in lithium-ion batteries used in both electric vehicles and electricity storage, so advocates for the green transition, such as electric vehicle manufacturers, support the mine.<sup>28</sup> It is also an essential ingredient in weapons and other defense technologies used for national security purposes, so the DoD supports the mine (to the tune of a \$37.5 million grant). The U.S. has not produced graphite since the 1950s, and currently imports all of its graphite from China.<sup>29</sup> However, China recently imposed restrictions on the U.S. import of graphite (as well as gallium and germanium), which has left U.S. officials concerned about supply chain access to this critical mineral.<sup>30</sup> With all of this demand and pressure to produce graphite domestically, it seems like the Graphite One mine is a done deal.

Not to mention, the Graphite One proposal is located on State land (as opposed to federal or Tribal land) in Alaska. This means that, with some

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pdf [<https://perma.cc/482Q-75PC>].

27. Kate Troll & Hollis French, *Commentary: Alaska's environmental standards are not the best*, ALASKA BEACON (Feb. 3, 2023), <https://alaskabeacon.com/2023/02/03/alaskas-environmental-standards-are-not-some-of-the-best> [<https://perma.cc/8JCR-CB67>].

28. Davis Hovey, *Western Alaskans Concerned about Graphite One Project's Impact on Subsistence*, ALASKA PUBLIC MEDIA (July 26, 2019), <https://alaskapublic.org/2019/07/26/western-alaskans-concerned-about-graphite-one-projects-impact-on-subsistence/> [<https://perma.cc/9QJT-EY6F>]; USGS Updates Mineral Database with Graphite Deposits in the United States, USGS (Feb. 28, 2022), <https://www.usgs.gov> [<https://perma.cc/7SJP-K7YR>].

29. U.S. GEOLOGICAL SURV., USGS UPDATES MINERAL DATABASE WITH GRAPHITE DEPOSITS IN THE UNITED STATES (Feb. 28, 2022), <https://www.usgs.gov/news/technical-announcement/usgs-updates-mineral-database-graphite-deposits-united-states> [<https://perma.cc/HWF6-5RPV>]. Ironically, though Graphite One is touted as essential to solving the U.S.'s supply chain dependency on China for graphite supply, Graphite One is consulting with Sunrise (Guizhou) New Energy Material Co., a Chinese company, to figure out how to design its graphite material manufacturing facility in Washington state. *Graphite One Signs MOU with Experienced Lithium-Ion Battery Producer for Design, Construction and Operation of U.S.-Based Anode Facility*, CO. NEWS, (Graphite One, Vancouver, Can.), Apr. 6, 2022, <https://www.graphiteoneinc.com/graphite-one-signs-mou-with-experienced-lithium-ion-battery-anode-producer-for-design-construction-and-operation-of-u-s-based-anode-facility> [<https://perma.cc/33VA-ME8J>]. One of Sunrise's top executives has said publicly that U.S.-China geopolitics may prevent Sunrise from being able to share the necessary technologies with U.S. companies like Graphite One. Eliot Chin, *China's Graphite Grip*, THE WIRE CHINA (Aug. 6, 2023), <https://www.thewirechina.com/2023/08/06/chinas-graphite-grip-graphite-one-sunrise-new-energy> [<https://perma.cc/M29G-TML4>].

30. *China's Export Controls on Critical Minerals – Gallium, Germanium, and Graphite*, FTI CONSULTING (Aug. 1, 2023), <https://www.fticonsulting.com/insights/articles/chinas-export-controls-critical-minerals-gallium-germanium-graphite#:~:text=China's%20Export%20Controls%20on%20Critical%20Minerals%20%E2%80%93%20Gallium%2C%20Germanium%20and%20Graphite&text=On%20August%201%2C%202023%2C%20China,controls%20on%20high%20Dgrade%20graphite> [<https://perma.cc/Q3DQ-YU3V>].

important exceptions that will be the focus of this Comment, State laws apply for project permitting purposes. Alaska is a State with a long history of extractive industry fueling the economy, beginning with fur trading under Russian rule in the mid 1700s,<sup>31</sup> then the gold rush in the late 1800s,<sup>32</sup> then the discovery of oil in Prudhoe Bay in 1968, which brought riches to Alaska.<sup>33</sup> Sitting on land twice the size of Texas, and bigger than the next three largest states (Texas, Montana, and California) combined, the State of Alaska is obsessed with making profit from its natural resources: drilling for oil, logging for timber, commercial fishing, and most recently mining for transition minerals.<sup>34</sup> To make Alaska more attractive to extractive industry, the State of Alaska has made concerted efforts over the years to remove federal oversight from its land use decisions, including assuming primacy over Clean Water Act § 402 permitting and attempting to assume primacy of § 404 permitting.<sup>35</sup> Without federal jurisdictional hooks

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31. *Alaska Fur Trade*, LIBR. CONG. (2000), <https://www.loc.gov/collections/meeting-of-frontiers/articles-and-essays/alaska/alaska-fur-trade> [<https://perma.cc/K59V-CS3T>] (tracing the start of fur trading in Alaska to 1742).

32. *Gold Rush*, LIBR. CONG. (2000), <https://www.loc.gov/collections/meeting-of-frontiers/articles-and-essays/alaska/gold-rush> [<https://perma.cc/N3H7-KBKU>].

33. For more on how the discovery of oil in Prudhoe Bay changed the history of Alaska, see generally AMANDA COYNE & TON HOPFINGER, *CRUDE AWAKENING: MONEY, MAVERICKS, AND MAYHEM IN ALASKA* (Nation Books: 2011).

34. Even the Alaska Constitution emphasizes the importance of natural resource development (i.e., extractivism) in Article VIII: “It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.” See also *Press Release: Governor Dunleavy Condemns Biden Bureau of Land Management Barrage of Anti-Alaska Actions and Announcements* (Apr. 19, 2024) (referring to the Biden Administration’s decision to prohibit oil and gas drilling in a large portion of the National Petroleum Reserve, which the Republican Governor Dunleavy claims deprives Alaskans of “good-paying jobs” and prevents the State of Alaska from “upholding its constitutional mandate to develop natural resources for the maximum benefit of the people.”); Video: *Safeguarding Alaska’s Public Lands and Waters from Industrial Scale Mining*, Alaska Conservation Foundation (Mar. 21, 2022), <https://alaskaconservation.org/2022/03/mining> [<https://perma.cc/N3AV-WXTS>] (indicating that the Alaska economy’s dependence on extractive industry began in the 1950s).

35. *Frequently Asked Questions*, ALASKA DEP’T ENV’T CONSERVATION, <https://dec.alaska.gov/water/apdes-history/> [<https://perma.cc/KTY5-U5U5>] (last accessed Dec. 14, 2023) (stating that Alaska assumed 402 permitting authority from the EPA in 2008); Mark Sabbatini, *Alaska seeking a 404 redirect for wetlands development*, JUNEAU EMPIRE (Mar. 3, 2023), <https://www.juneauempire.com/news/alaska-seeking-a-404-redirect-for-wetlands-development/#:~:text=State%20regulators%20say%20that%20taking,permits%2C%20and%20regulators%20hope%20the> [<https://perma.cc/RH65-ZQYB>]; James Brooks, *Committee axes funding for Alaska’s effort to take over a federal wetlands permitting program*, ALASKA BEACON (Mar. 28, 2023), <https://alaskabeacon.com/2023/03/28/committee-removes-funding-for-alaskas-effort-to-take-over-a-federal-wetlands-permitting-program> [<https://perma.cc/QR4E-6YFT>].

requiring agencies to complete Tribal consultation<sup>36</sup> or environmental impact statements,<sup>37</sup> State land mining projects can fly through permitting processes.

Because the State of Alaska has built its economy on extractive development, Tribal leaders and environmentalists alike often feel that opposing mining projects on State land in Alaska is like rearranging the chairs on the Titanic.<sup>38</sup> As the head of Teller's Tribal government Lucy Oquilluk said regarding Graphite One's proposed mine, "[i]t just feels like we have nothing to say about it. We don't have a choice. They're going to do it anyways, no matter what we say."<sup>39</sup>

This Comment explores and pushes back against this feeling of inevitability, using the example of Tribal opposition to the Graphite One mine proposal as a case study to better understand why Tribes fear that these transition mineral mines are inevitable and to identify tools Tribes can use or have used to stop or slow mine development. This Comment is structured as follows. Part II provides background on the reasons behind the recent push for domestic critical mineral mining in the U.S., before describing the disproportionate harms of mining on Indigenous Peoples (with a focus on Alaska Natives) and the environmental impacts of mining for transition minerals. Part II ends by discussing the ways in which green transition policies discussed in Part II(A) are inadequately protecting Tribes and other vulnerable communities from the harms of mining.

Part III describes the problem at the heart of this Comment: why Tribes have limited ability to control what happens to their subsistence resources. Part III(A) discusses Tribal consultation requirements, laying out both the importance and limitations of consultation policies, regulations, and statutes. In order to emphasize why Tribal consultation requirements are particularly important for Tribes in Alaska, Part III(B) unpacks the failures of the Alaska

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36. Alaska Department of Environmental Conservation does have its own Tribal consultation policy, but it is not as rigorous as their federal equivalents, nor do it arise from a trust responsibility like the one that binds the federal government to engage in Tribal consultation.

37. Alaska does not have a NEPA-like state law that mandates an agency to create an environmental assessment or environmental impact statement when the agency is considering an action that may have a significant impact on the human environment. Twenty U.S. states, including California, have adopted such a law. *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV (accessed Dec. 14, 2023), <https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/A8ET-RYU5>].

38. The proposed Pebble Mine project in Alaska's Bristol Bay is the exception that proves the rule. Pebble Mine was a proposed copper mine located on State land close to major salmon spawning tributaries of the Kvichak and Nushagak Rivers in the largest commercial salmon fishery in the world. The EPA successfully vetoed permitting for the Pebble Mine after "an unlikely alliance of commercial fishermen, native tribes, environmentalists, 'Redneck Republicans' and worried Alaskans" asked the EPA to intervene. Absent such a powerful coalition of usually un-aligned groups, mining projects on State land usually sail through permitting. See generally, Miller, *supra* note 4 at 233.

39. Herz, *supra* note 12.

Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act to protect Alaska Natives' subsistence rights.

Part IV describes the proposed Graphite One mine, its location on lands significant to the Inupiaq<sup>40</sup> people, and the concerns that local Tribes and environmentalists have concerning the mine. Part V outlines takeaways from the Graphite One story, laying out the paths that local Tribes have already taken and further steps Tribes could take within existing law to protect their way of life from extractivism. Finally, Part VI offers a few ideas for future legislation and regulations, inspired by the UN Declaration on the Rights of Indigenous Peoples, that can better support Tribes' right to free, prior, and informed consent; subsistence; culture; and lands and natural resources.

## II. BACKGROUND ON MINING FOR TRANSITION MINERALS IN THE U.S.

### A. *Why the Domestic Push to Mine for Transition Minerals*

As detailed in the Introduction, the push to mine for transition minerals is motivated in large part by fears concerning climate change. As sea level rise, extreme storms, and other climate change manifestations start to wreak havoc on the lands and people of the United States, politicians are finally starting to realize that mitigating climate change, by moving away from fossil fuels towards renewable energy sources, may actually cost less than sending disaster relief money each time there's a climate-related disaster.<sup>41</sup>

The push to mine *domestically* (or promote mining in U.S.-allied countries) is motivated by fear of global supply chain collapse. The COVID-19 pandemic and the Russian invasion of Ukraine laid bare vulnerabilities in the global supply chain, leading U.S. officials to push for greater control over their essential supplies. In the context of clean energy, China dominates the global supply chain.<sup>42</sup> So, as the U.S. ramps up its renewable energy supply chain, the U.S. is dead set on building supply chain resilience, by finding sources of critical minerals that are located within its own borders or in allied countries.<sup>43</sup> The

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40. Inupiaq is a broad cultural term describing Alaska Native peoples who live in the coastal Arctic, including the Native Villages of Mary's Igloo, Brevig Mission, and Teller. *Indigenous Peoples & Languages of Alaska*, <http://www.alaskool.org/language/languagemap/index.html> (last accessed Dec. 14, 2023) [<https://perma.cc/R67S-DK8J>].

41. CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) [<https://perma.cc/QT4B-6EUD>] (demonstrating that climate *inaction* is more expensive than climate action).

42. Fabian Villalobos, et. al, *Time for Resilient Critical Material Supply Chain Policies*, RAND (Dec. 15, 2022), [https://www.rand.org/pubs/research\\_reports/RRA2102-1.html](https://www.rand.org/pubs/research_reports/RRA2102-1.html) [<https://perma.cc/2QD8-B5W5>].

43. Danny Broberg, et. al, *Framework for Securing American Critical Mineral Supply Chains*, BIPARTISAN POLICY CENTER (Apr. 18, 2023), <https://bipartisanpolicy.org/explainer/us-critical-mineral-supply-framework> [<https://perma.cc/Y9L5-UEQE>]; *Friendshoring Critical Minerals: What Could the U.S. and Its Partners Produce*, CARNEGIE ENDOWMENT INT'L PEACE,

Biden Administration has sought to encourage and expedite mining for transition minerals domestically primarily via the following three instruments: the Presidential Executive Order 14017 on America's Supply Chains (EO 14017),<sup>44</sup> the Bipartisan Infrastructure Law (BIL),<sup>45</sup> and the Inflation Reduction Act (IRA).<sup>46</sup> The next few paragraphs will focus on the ways in which these statutes specifically impact the Graphite One project.

EO 14017 states that regarding critical minerals,<sup>47</sup> the Biden Administration has been working toward three goals: "(1) secure and expand sustainable critical mineral mining and processing capacity in the United States; (2) expand options for recycling and recapture of minerals from waste or mine tailings; and (3) work with allies and partners to develop and diversify mining and processing of critical minerals."<sup>48</sup> Particularly relevant for this Comment, EO 14017 directs the Secretary of Energy to submit a report identifying the risks in the supply chain for high-capacity batteries, including electric-vehicle batteries, and provide policy recommendations to address these risks.<sup>49</sup> The report the Secretary of Energy wrote in response to EO 14017 notes that China controls 100 percent of the processing of natural graphite used for battery anodes.<sup>50</sup> Of course, this helps Graphite One attract federal funding, since it is the first company planning to offer a fully domestic supply of graphite since the 1950s.

The BIL appropriates funds for *inter alia* energy infrastructure, including transition mineral mining. For example, the BIL appropriated \$74 million for the USGS Mineral Resource Program's Earth Mapping Resources Initiative,

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<https://carnegieendowment.org/2023/05/03/friendshoring-critical-minerals-what-could-u.s.-and-its-partners-produce-pub-89659> [<https://perma.cc/886U-KB2R>].

44. Executive Order on America's Supply Chains, WHITE HOUSE (Feb. 24, 2021).

45. Pub. L. 117–58, 135 Stat. 429 (Nov. 15, 2021); 23 U.S.C. § 101 (aka Infrastructure Investment & Jobs Act).

46. Pub. L. 117–169, 136 Stat. 1818 (Aug. 16, 2022).

47. The term "critical minerals" encompasses a broader group of minerals than transition minerals. Critical minerals are defined in the Energy Act of 2020 as "a non-fuel mineral or mineral material essential to the economic or national security of the U.S. and which has a supply chain vulnerable to disruption." 42 U.S.C.A. § 17001. The 2022 Final List of Critical Minerals includes aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium. 87 Fed. Reg. 10381 (Feb. 24, 2022), <https://www.govinfo.gov/app/details/FR-2022-02-24/2022-04027> [<https://perma.cc/2KCO-83DQ>].

48. WHITE HOUSE, EXECUTIVE ORDER ON AMERICA'S SUPPLY CHAINS: A YEAR OF ACTION AND PROGRESS 16 (Feb. 2022) <https://www.whitehouse.gov/wp-content/uploads/2022/02/Capstone-Report-Biden.pdf> [<https://perma.cc/QB8Q-EKW8>].

49. *Id.*

50. U.S. DEP'T ENERGY, AMERICA'S STRATEGY TO SECURE THE SUPPLY CHAIN FOR A ROBUST CLEAN ENERGY TRANSITION: U.S. DEPARTMENT OF ENERGY RESPONSE TO EXECUTIVE ORDER 14017, "AMERICA'S SUPPLY CHAINS" 13 (Feb. 24, 2022).

and gave Alaska \$6.75 million of this money to conduct geological mapping, airborne geophysical surveying, and geochemical sampling in support of critical mineral resource studies in the state.<sup>51</sup> Alaska is directing these funds towards a graphite assessment of the Seward Peninsula, where the proposed Graphite One mine site is located.<sup>52</sup> The BIL also appropriated \$2.8 billion to be apportioned among twenty grant-receiving mining companies that process lithium, graphite, and other battery materials.<sup>53</sup> Graphite One applied for one of these grants, but did not receive it.<sup>54</sup>

The IRA creates tax subsidies to incentivize the transition to renewable energy. For example, the IRA offers a 10 percent production tax credit to mining companies that produce highly-purified “applicable critical minerals,” such as graphite.<sup>55</sup> The IRA also offers a bonus tax credit to any qualified facility<sup>56</sup> composed of manufactured products which are mined, produced, or manufactured in the U.S.<sup>57</sup> In addition, the IRA offers a tax credit worth up to \$7500 for new electric vehicles, if those vehicles sourced 40 percent of the battery materials from the U.S. or from free trade agreements with Canada and Australia.<sup>58</sup> Graphite One will benefit from these policies as renewable energy technology and battery manufacturers compete for domestic sources of

51. *Bipartisan Infrastructure Law helping Alaska map critical mineral resources*, USGS (Aug. 23, 2022), <https://www.usgs.gov/news/national-news-release/bipartisan-infrastructure-law-helping-alaska-map-critical-mineral> [<https://perma.cc/9G86-S9XX>].

52. Megan Gannon, *Graphite One Sets Sights on Bigger Mine than Originally Proposed*, NOME NUGGET (Apr. 28, 2023), <http://www.nomenugget.com/news/graphite-one-sets-sights-bigger-mine-originally-proposed> [<https://perma.cc/8REK-22WB>].

53. BIPARTISAN INFRASTRUCTURE LAW BATTERY MATERIALS PROCESSING AND BATTERY MANUFACTURING & RECYCLING FUNDING OPPORTUNITY ANNOUNCEMENT (DE-FOA-0002678) SELECTIONS, DEP’T ENERGY (Oct. 19, 2022), [https://www.energy.gov/sites/default/files/2022-10/DOE%20BIL%20Battery%20FOA-2678%20Selectee%20Fact%20Sheets%20-%201\\_2.pdf](https://www.energy.gov/sites/default/files/2022-10/DOE%20BIL%20Battery%20FOA-2678%20Selectee%20Fact%20Sheets%20-%201_2.pdf) [<https://perma.cc/8JZ9-EMLB>].

54. Megan Gannon, *U.S. Dept. of Energy Deputy Secretary Visits Nome, Teller*, NOME NUGGET (June 2, 2023), <http://www.nomenugget.com/news/us-dept-energy-deputy-secretary-visits-nome-teller> [<https://perma.cc/T9UD-R7VX>].

55. 26 U.S.C. § 45(x)(c)(6). Matt Farmer, *What’s in the Inflation Reduction Act for Miners?*, MINING TECHNOLOGY (Oct. 3, 2022) <https://www.mining-technology.com/features/whats-in-the-inflation-reduction-act-for-miners> [<https://perma.cc/8TBM-HC82>].

56. I.e., renewable energy facility that satisfies the requirements of 26 U.S.C. § 45 (f)(6) (B)).

57. 26 U.S.C. § 45(b)(9)(B)(iii). To be a manufactured product, “all of the manufacturing processes for the product must take place in the United States” and “all of the components of the product must be of U.S. origin.” 49 C.F.R. § 661.5 (2024). “A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.” *Id.*

58. U.S. DEP’T TREASURY, U.S. DEPARTMENT OF THE TREASURY, IRS RELEASE GUIDANCE TO EXPAND ACCESS TO CLEAN VEHICLE TAX CREDITS, HELP CAR DEALERS GROW BUSINESSES, (2023), <https://home.treasury.gov/news/press-releases/jy1783> [<https://perma.cc/FC74-BPBS>].

graphite and other transition minerals in order to be eligible for these domestic context tax credits.<sup>59</sup>

Ultimately, this Comment argues that laws like the IRA that push for domestic mining fail to adequately protect vulnerable communities, such as Native Villages in Alaska, from disproportionate environmental harm. The next two subsections will discuss the disproportionate harms of mining on Indigenous peoples and the environmental harms of mining, respectively. Then, this Subpart will close with an analysis of the ways in which EO 14017, the BIL, and the IRA have failed to protect against the aforementioned harms.

### B. *Disproportionate Impacts of Mining for Transition Minerals on Indigenous Peoples*

Mining for transition minerals has a disproportionate impact on Indigenous Peoples both quantitatively and qualitatively. Quantitatively, “[o]f 5,097 mining projects globally that involve some 30 minerals used in renewable energy technologies, 54 percent are located on or near Indigenous Peoples’ lands and territories according to Nature Sustainability.”<sup>60</sup> By comparison, Indigenous Peoples are estimated to exercise some form of territorial control over just 30 percent of the world’s land surface.<sup>61</sup> “Just in the United States, 97 percent of nickel, 89 percent of copper, 79 percent of lithium and 68 percent of cobalt reserves are located within 35 miles of Native American reservations, according to MSCI.”<sup>62</sup>

The reasons for this quantitatively disproportionate burden of mining on Native communities in the U.S. and worldwide are multifold.<sup>63</sup> First and foremost, there is the history of colonization, wherein White colonizers dispossessed Native peoples of their land and moved them to undesirable places—only to discover that those places, undesirable because of their lack of capacity for agriculture, were actually the site of massive mineral reserves.<sup>64</sup> These colonial structures disenfranchised Native peoples, making it nearly impossible for them to participate in decision-making processes about their land. As a result,

59. Megan Gannon, *Graphite One Sees Financial Incentives in Federal IRA Bill*, NOME NUGGET (Sept. 9, 2022), <http://www.nomenugget.com/news/graphite-one-sees-financial-incentives-federal-ira-bill> [https://perma.cc/63YW-N9EV].

60. CULTURAL SURVIVAL, *supra* note 5.

61. Owen et. al, *Energy transition minerals and their intersection with land-connected peoples*.

62. CULTURAL SURVIVAL, *supra* note 5.

63. See generally United Nations Special Rapporteur on Racism, *Global extractivism and racial equality*, A/HRC/41/54 (May 14, 2019); Inter-American Comm’n Hum. Rts., *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protections in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc. 47/15 (Dec. 31, 2015).

64. Think for example of the Osage Tribe in Oklahoma, who ended up discovering “black gold” beneath their arid reservation. See generally DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (2017).

establishing a mine on land significant to Native peoples often requires mining companies to jump through fewer hoops than establishing a mine in a place where more politically empowered people could take issue with it. One goal of this paper is to highlight procedural protections (i.e., consultation requirements) available to Native peoples in the U.S. in an effort to deter mining companies from seeing development on or near Tribal territories as the path of least resistance.<sup>65</sup>

Qualitatively, for Tribes in Alaska, mining can be particularly damaging because of the harm it inflicts on subsistence resources—resources upon which they rely for life and culture. “More than any other state, Alaska’s residents rely on subsistence uses of natural resources—including the hunting, fishing, harvesting, tradition, and consumption of fish, wildlife, and plant life—for their daily nutritional needs.”<sup>66</sup> According to one recent estimate, rural Alaskans harvest approximately 18,000 tons of wild foods annually for subsistence uses.<sup>67</sup> In addition to daily nutritional uses, Tribes rely on subsistence resources to connect them with their cultures. Many Tribes in Alaska use subsistence resources for clothing, transportation, trade, ceremonial activities, and other purposes.<sup>68</sup> According to Denise May, Tribal administrator of the Native Village of Port Lions on Kodiak Island, “[s]ubsistence isn’t just the food we eat, it’s our way of life and who we are as a people.”<sup>69</sup>

The injustice of siting transition mineral mines on lands connected to Tribal subsistence resources becomes doubly apparent when considering that Indigenous Peoples have contributed little to greenhouse gas (GHG)

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65. In addition to erecting procedural obstacles, robust consultation requirements can also be costly for extractive industries. Or, better put, refusing to comply with robust consultation requirements can be costly, because it opens extractive companies up to lawsuits. See *Ensuring FPIC Advocacy on Extractive Industry Projects*, C.U. BOULDER, <https://www.colorado.edu/program/fpw/iipwg/ensuring-fpic-advocacy-extractive-industry-projects> (“Ultimately these divestments and reputational harms ballooned the cost of the [DAPL] project from initial estimates of \$3.8 billion to over \$12 billion”); *Social Cost & Material Loss: The Dakota Access Pipeline*, C.U. BOULDER, <https://www.colorado.edu/program/fpw/DAPL-case-study> [<https://perma.cc/VN7U-RM7K>] (quantifying “the numerous costs that companies, financial institutions, and investors faced by failing to account for the human rights of indigenous peoples.”)

66. Mark K. DeSantis & Erin H. Ward, *Subsistence Uses of Resources in Alaska: An Overview of Federal Management*, Congressional Research Service, R47511, 4 (Apr. 20, 2023), <https://crsreports.congress.gov/product/pdf/R/R47511/4> [<https://perma.cc/2VYL-SKMQ>].

67. *Id.* at 1 (citing Department of the Interior (DOI), “Federal Subsistence Management Program,” at <https://www.doi.gov/subsistence> [<https://perma.cc/58SW-2L5K>]). This is down from 22,000 tons, or 375 pounds per person, annually as estimated in a Congressional hearing in 2013. Anderson, *supra* note 19.

68. DeSantis & Ward, *supra* note 67, at 1.

69. Kavitha George, *AFN Convention Centers Subsistence amid a Lawsuit to Protect Traditional Hunting and Fishing Rights*, ALASKA PUBLIC MEDIA (Oct. 23, 2023), <https://alaskapublic.org/2023/10/23/alaska-federation-of-natives-convention-centers-subsistence-amid-a-lawsuit-to-protect-traditional-hunting-and-fishing-rights> [<https://perma.cc/4WFF-J3B2>].



emissions.<sup>70</sup> Indigenous peoples who oppose these mining projects because they pose a significant risk to their cultural sites are often derided by green industry for standing in the way of progress. But why should Indigenous peoples be responsible for “saving the planet” and bearing the environmental cost for transition mineral mining when they had so little to do with the accumulation of GHGs that created climate change in the first place?

### C. *Environmental Impacts of Mining for Transition Minerals*

It is significant that so many mining projects are located in or near Indigenous land because environmental degradation caused by mining for transition minerals is staggering. For example, a typical lithium car battery contains 25 pounds of lithium, 30 pounds of cobalt, 60 pounds of nickel, 110 pounds of graphite, 90 pounds of copper, and 400 pounds of steel, aluminum, and plastic components. Acquiring these minerals to produce one single battery requires mining about 90,000 pounds of ore and digging up between 200,000 and 1,500,000 pounds of earth.<sup>71</sup> Moving that much earth releases heavy metals and other contaminants into the water, harming the environment and human health.<sup>72</sup> After removing this overburden, or waste rock, the next step in the mining process is milling. This involves processing the ore to remove as much of the valuable minerals from the ore as possible. This process produces mine tailings, a liquid or slurry which often contains cyanide and other toxic metals. As the tailings degrade, they may produce sulfuric dioxide in perpetuity.<sup>73</sup>

In the U.S., mining is the leading source of toxics release.<sup>74</sup> The EPA estimates that cleaning toxic waste from abandoned mines would cost American taxpayers \$20–54 billion.<sup>75</sup> As noted in the Introduction, toxics release from mining in Alaska is worse than anywhere else in the country.<sup>76</sup> In addition to polluting the water, mining for transition minerals is highly water-intensive.<sup>77</sup>

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70. United Nations Permanent Forum on Indigenous Issues, *Backgrounder: Climate change and indigenous peoples*, [http://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change\\_FINAL.pdf](http://www.un.org/esa/socdev/unpfii/documents/backgrounder%20climate%20change_FINAL.pdf) [https://perma.cc/9QL4-YURE]; INT’L LABOR OFF., *INDIGENOUS PEOPLES AND CLIMATE CHANGE: FROM VICTIMS TO CHANGE AGENTS THROUGH DECENT WORK* (2017).

71. Barry E. Hill, *Environmental Justice and the Transition from Fossil Fuels to Renewable Energy*, 53 ENV’T L. REP. 10317 (2023).

72. Waste rock in Alaska is known to contain arsenic, mercury, cadmium, and other toxic metals. REDOIL & ACAT, *Mining and Community Health*, *supra* note 24.

73. *Id.* at 2.

74. Jessica Hunt, *EPA Report Identifies Metal Mining as Primary Source of Toxic Chemical Releases in Pacific Southwest*, ENV’T & ENERGY LEADER (Mar. 20, 2023), <https://www.environmentenergyleader.com/2023/03/metal-mining-as-primary-source-of-toxic-chemical-releases-in-pacific-southwest> [https://perma.cc/SZ47-MP4D].

75. *EPA: National Cost of Leaking-Mine Cleanup Could Surpass \$50 Billion*, CBS NEWS (Aug. 13, 2015), <https://www.cbsnews.com/sacramento/news/epa-national-cost-of-leaking-mine-cleanup-could-surpass-50-billion>. [https://perma.cc/DXU6-SXM8].

76. *See supra* notes 21–24 and accompanying text.

77. Miller, *supra* note 4, at 228.

This means that thirsty mines may cause local droughts, lower the groundwater table,<sup>78</sup> or empty streams where salmon once swam.<sup>79</sup>

Mining is highly energy-intensive and is currently responsible for 10 percent of global GHG emissions worldwide.<sup>80</sup> If the power source for these mining operations is derived from fossil fuels, as is often the case in Alaskan mining projects and will likely be the case for the Graphite One project,<sup>81</sup> then mining for transition minerals there may very well produce more GHGs than the renewable energy projects it facilitates can make up for.<sup>82</sup> Mining also becomes more dangerous in the context of climate change.<sup>83</sup> For example, climate change makes tailings dam failures<sup>84</sup> more likely, as extreme storms,

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78. “A water table is the boundary between the unsaturated zone and the saturated zone underground. Below the water table, groundwater fills any spaces between sediments and within rock.” Water Table, Nat’l Geographic, <https://education.nationalgeographic.org/resource/water-table/> [<https://perma.cc/S85R-CGJG>] (accessed May 14, 2024).

79. S. Meißner, *The Impact of Metal Mining on Global Water Stress and Regional Carrying Capacities—A GIS-Based Water Impact Assessment*, 10 RESOURCES 120 (2021), <https://doi.org/10.3390/resources10120120> [<https://perma.cc/C98Z-CB8A>].

80. *Global Resources Outlook 2019 Fact Sheet: Natural Resources for the Future We Want*, United Nations Environmental Program (UNEP) (2019), <https://wedocs.unep.org/handle/20.500.11822/27517?jsessionid=682D56C1DB8E3C41AA8DEAEB33FA986B> [<https://perma.cc/W2EX-PSUQ>].

81. Due to the remote nature of many mining projects in Alaska, it is common for energy required by mining projects to be derived from fossil fuel-based sources, because there are no renewable energy sources nearby. For example, the Red Dog Mine near Kotzebue has its own power plant, run on diesel shipped to its port (roughly 15 million gallons annually). Graphite One’s pre-feasibility study identifies diesel or LNG as the “most likely” electric power generation source, though it also considers wind and geothermal power generation. However, later in the pre-feasibility study, Graphite One states unequivocally that it will use diesel power generators. JDS ENERGY & MINING INC., PRELIMINARY FEASIBILITY STUDY TECHNICAL REPORT: GRAPHITE ONE PROJECT, ALASKA, USA 5–4, 18–5 (Oct. 13, 2022), <https://www.graphiteoneinc.com/wp-content/uploads/2022/10/JDS-Graphite-One-NI-43-101-PFS-20221013-compressed.pdf> [<https://perma.cc/9RC3-WT2F>] [*hereinafter Pre-feasibility Study*].

82. See Roger E. Meiners & Andrew P. Morriss, *Ethical & Strategic Issues in Decarbonization Policy*, 39 GA. ST. UNIV. L. REV. 969, 989–90, citing Emilie Brooks, *Lithium Extraction Environmental Impact*, ECO JUNGLE (Dec. 31, 2021), <https://ecojungle.net/post/lithium-extraction-environmental-impact/> (“The production of an EV battery weighing 500 kg emits over 70% more CO<sub>2</sub> than a traditional car in Germany.”); Heather L. MacLean, Alexandre Milovanoff & I. Daniel Posen, *The Electric Vehicle is Not Enough*, IEEE SPECTRUM 28, 30 (Nov. 2022) (finding that operating an EV in China or the US means about 6 percent more GHG emissions over its lifetime than a conventional gasoline vehicle of the same size, because of the higher emissions resulting from mining and manufacturing of EVs).

83. See Notice of Petition and Petition for Rulemaking: Bringing Hardrock Mining Regulations and Policy into the 21<sup>st</sup> Century to Protect Indigenous and Public Lands Resources in the West 7 (Sept. 16, 2021), [https://www.biologicaldiversity.org/programs/public\\_lands/mining/pdfs/APA\\_Doi\\_Petition\\_091621.pdf](https://www.biologicaldiversity.org/programs/public_lands/mining/pdfs/APA_Doi_Petition_091621.pdf) [<https://perma.cc/3SYA-QD8N>].

84. A tailings pond holds the toxic liquid slurry by-product of the mining process. A tailing dam failure occurs when the dam breaks and the toxic liquid slurry is released into the environment, often killing everything in its path. See Moira Warburton, Sam Hart, Júlia Ledur, Ernest Scheyder & Ally Levine, *The Looming Risk of Tailings Dams*,

more frequent fires, and permafrost thaw all have the ability to weaken mining infrastructure.<sup>85</sup>

To diminish the need for virgin mining<sup>86</sup> and still meet the demand for transition minerals, environmental justice advocates are pushing for recycling and reprocessing of existing mines.<sup>87</sup> Though studies have shown that recycling and reprocessing are inadequate on their own to meet the astonishing demands of the green transition, they may go a long way in reducing the need for virgin mining.<sup>88</sup> Environmental justice advocates are also pushing for changes in consumption, including smaller car sizes, increased access to and use of public transit, and the creation of a circular economy where products (such as car batteries) are designed to use fewer minerals and be easily recycled.<sup>89</sup> Some of these policies are reflected in the Biden Administration's climate and industrial policy, as discussed in the following subsection.

#### D. *U.S. Policy Driving Mining for Transition Minerals*

Currently, U.S. law does not do enough to reduce the need for virgin mining for critical minerals. EO 14017 calls to “expand options for recycling and recapture of minerals from waste or mine tailings,” but so far, relatively little investment has been directed toward recycling critical minerals or re-mining existing mine tailings for critical minerals.<sup>90</sup> The BIL provides \$3 billion in

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REUTERS (Dec. 19, 2019, updated Jan. 3, 2020), <https://www.reuters.com/graphics/MINING-TAILINGS1/0100B4S72K1/index.html> [<https://perma.cc/GN8F-MKWD>]; see also *News and Information on the Mount Polley Mine Disaster*, NARWHAL (accessed May 14, 2024), <https://thenarwhal.ca/topics/mount-polley-mine-disaster/> [<https://perma.cc/RU5G-GES3>] (describing a catastrophic tailings dam failure in Central British Columbia, near Alaska, where 400 tonnes of arsenic was released from the tailings pond).

85. For specific example from the Red Dog mine near Kotzebue, Alaska, see Nathaniel Herz, *As Arctic warming accelerates, permafrost thaw hits Red Dog mine with \$20 million bill*, *Alaska Pub. Media* (Sept. 1, 2020), <https://alaskapublic.org/2020/09/01/as-arctic-warming-accelerates-permafrost-thaw-hits-red-dog-mine-with-20-million-bill/> [<https://perma.cc/2TRH-KLWN>].

86. Virgin mining refers to mining for a material directly from the earth, as opposed to urban mining or recycling, where the material is derived from an already-processed source.

87. Brendan McLaughlin, *Report: Recycling Electric Vehicle Battery Minerals Can Significantly Reduce Need for New Mining*, EARTHWORKS (Apr. 27, 2021), <https://earthworks.org/releases/report-recycling-electric-vehicle-battery-minerals-can-significantly-reduce-need-for-new-mining> [<https://perma.cc/BN48-ABN4>].

88. E. Dominish, N. Florin, and S. Teske, *Responsible Minerals Sourcing for Renewable Energy*, Institute for Sustainable Futures & University of Technology Sydney (2019) [Report prepared for Earthworks]; *Reducing new mining for electric vehicle battery metals: responsible sourcing through demand reduction strategies and recycling*, INSTITUTE FOR SUSTAINABLE FUTURES (Apr. 2021) [Report prepared for Earthworks].

89. *Circular Minerals Economy: Transitioning to Renewable Energy without Increased Mining*, EARTHWORKS (Sept. 2022), <https://earthworks.org/wp-content/uploads/2022/09/Circular-Minerals-Economy-9-2022-final.pdf> [<https://perma.cc/JA63-ZBHC>].

90. Video: *Powering the Future: Critical Minerals and Global Supply Chains*, UCLA EMMETT INSTITUTE (Mar. 15, 2024), [https://youtu.be/Juq8O\\_CsMmA?si=yJycGgm8hYJopGAQ&t=3795](https://youtu.be/Juq8O_CsMmA?si=yJycGgm8hYJopGAQ&t=3795) (Anne Clawson, head of Government Affairs

funding to prioritize EV battery recycling.<sup>91</sup> BIL has also invested \$32 million in extracting critical minerals from coal production waste.<sup>92</sup> To qualify for the Clean Vehicle Tax Credit under the IRA, an EV battery must be sourced either from the U.S. or a country where the US has a free trade agreement, or must be recycled in North America. Advocates for the IRA argue that this recycling provision will encourage the growth of an EV battery recycling economy.<sup>93</sup> But more needs to be done to incentivize such growth of a nascent industry.

The International Energy Agency estimates that by 2040, 10 percent of worldwide demand for critical minerals such as copper, lithium, nickel, and cobalt can come from recycled batteries. The Worldwide Wildlife Fund estimates, more optimistically, that 20 percent of global mineral demand could come from recycled sources between now and 2050.<sup>94</sup> By dedicating more resources to research and development concerning recycling and re-mining, as opposed to virgin mining in remote places like Nome, Alaska, these estimates would likely only increase.

EO 14017, IRA, and BIL also do little to create a circular economy or promote decreased consumption—two tactics that could significantly reduce U.S. dependence on critical minerals mining. At the moment, only 5 percent of lithium-ion batteries are recycled in the U.S.<sup>95</sup> Recycling or reusing lithium-ion batteries (and other technologies that use critical minerals) is a key area for improvement in U.S. policy.

Promoting decreased consumption is, admittedly, a heavy lift. It would require investing in public transit and pedestrian infrastructure to make it easier for people to live in places without needing a car.<sup>96</sup> It may also require cultivating at a social level a culture that is less driven by the need to buy the next new thing. Given that electronic equipment—cars, iPhones, laptops, especially—require critical minerals, our rates of consumption of these drive demand for critical minerals.

Finally, even Biden’s Justice40 Initiative, which includes environmental justice (EJ) language to support a “just transition,” falls short of adequately protecting EJ communities like the Native Villages near Nome.<sup>97</sup> The Justice40

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& Public Policy at Cascade Advisory: “We need to invest way way way more in recycling.”).

91. *The Clean Energy Transition Motivates Innovation and Recycling in Critical Mineral Supply Chains*, JOINT ECONOMIC COMMITTEE, (Jan. 24, 2024), <https://www.jec.senate.gov/public/index.cfm/democrats/2024/1/he-clean-energy-transition-motivates-innovation-and-recycling-in-critical-mineral-supply-chains> [<https://perma.cc/TP36-6ABW>].

92. *Id.*

93. *Id.*

94. Tokollo Matsabu, *Recycling Critical Minerals for Circular Clean Energy Solutions*, EARTH 911 (July 11, 2023), <https://earth911.com/eco-tech/recycling-critical-minerals-for-circular-clean-energy-solutions/#:~:text=The%20Worldwide%20Wildlife%20Fund%20says,the%20strain%20on%20natural%20resources> [<https://perma.cc/G5Z2-KP33>].

95. JOINT ECONOMIC COMMITTEE, *supra* note 91.

96. EARTHWORKS, *supra* note 89.

97. The Justice40 Initiative is a part of Biden’s “Tackling the Climate Crisis at Home

Initiative aims to direct at least 40 percent of Federal climate, clean energy, and other similar investments to disadvantaged communities.<sup>98</sup> In other words, climate technologies cannot solely be sent to wealthy neighborhoods. At least 40 percent of climate investments must directly benefit communities that have experienced disproportionate climate harm. Ironically, though, because Justice40 is additive in nature, it does nothing to *prevent* harm in EJ communities. In particular, it does not prohibit mining companies from siting transition mineral mines in EJ communities. Without such a stipulation, projects like Graphite One can propose to develop a massive graphite mine next to a Native Village where four in ten residents live below the federal poverty level.<sup>99</sup>

In conclusion, current U.S. policy does not do enough to mitigate the need for virgin mining of domestic minerals, thus putting communities near mineral reserves at risk. In this reality, where virgin mining is a present danger, especially for Tribes who tend to be located near these mine sites, consultation procedures become extremely important. Government-to-government consultation enable the Tribe to assert their sovereignty, make their voice heard, and *ideally*, mitigate or avoid the harm from mining all together.

### III. GOVERNMENT-TO-GOVERNMENT CONSULTATION: ITS USEFULNESS AND LIMITATIONS IN ENABLING TRIBES TO PROTECT SUBSISTENCE RESOURCES

This Section delves into the state of Tribal consultation requirements in the U.S. Subpart III(A) explores both the promise and the downfalls of Tribal consultation as it currently exists in federal law. Subpart III(B) lays out the barriers that exist specifically for Alaska Native people seeking to protect their subsistence resources and way of life in Alaska. Subpart III(B) will focus on the failures of the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA) to give Tribal governments a meaningful say in the fate of their traditional lands and resources. Understanding the failures of ANCSA and ANILCA is essential to understanding why Tribal consultation is so critical for Tribes in Alaska.

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and Abroad” 2023 Executive Order. Exec. Order No. 14008, 86 Fed. Reg. 7, 631–32 (accessed Nov. 18, 2023), <https://www.whitehouse.gov/environmentaljustice/justice40> [<https://perma.cc/9W6M-33PF>]. EO 14008 was announced two years after EO 14017.

98. The kinds of investments considered under Justice40 include: climate change, clean energy and energy efficiency, clean transit, affordable and sustainable housing, training and workforce development, remediation and reduction of legacy pollution, and the development of critical clean water and wastewater infrastructure. *Id.*

99. Herz, *supra* note 12 (reporting that in the Native Village of Teller, four in 10 residents live below the poverty level).

### A. *Tribal Consultation: Essential and Inadequate*

Derived from the inherent Tribal sovereignty, the federal trust responsibility,<sup>100</sup> executive orders,<sup>101</sup> agency guidance,<sup>102</sup> and statutes,<sup>103</sup> the federal government has a duty to consult with Tribes on a government-to-government basis whenever it is making decisions that will have “tribal implications.”<sup>104</sup> Despite—or perhaps because of—the many sources of this federal obligation, Tribal consultation is defined differently in different places.<sup>105</sup> In fact, the only consensus in the scholarship on Tribal consultation seems to be that Tribal consultation is both essential and inadequate.<sup>106</sup>

Executive Order (EO) 13175, issued under President Bill Clinton and reaffirmed under the Obama<sup>107</sup> and Biden Administrations,<sup>108</sup> requires the federal government to engage in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications . . . .”<sup>109</sup> It prohibits “to the extent practicable and

100. See generally Elizabeth Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation*, 54 U.C. DAVIS L. REV., 1127, 1138–46 (2020). The federal trust responsibility arises from *Cherokee Nation v. Georgia*, in which Chief Justice John Marshall described the relationship between the Tribes and the federal government as one of a “ward to his guardian.” 30 U.S. 1, 7 (1831).

101. Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000); Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021); Memorandum of Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Dec. 5, 2022).

102. See *Section III(A) and Section V(B)*.

103. This Comment will focus on the National Historic Preservation Act. See *Section V(A)*.

104. Policies with Tribal implications include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

105. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 418 (2013) (highlighting that consultation requirements [at least before the Memorandum on Uniform Standards for Tribal Consultation] do not specify “of what does consultation consist?,” “with whom must consultation occur?,” “when should consultation occur?,” and “how will the tribe be informed of consultation sessions?”).

106. See generally Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Land*, 44 PUB. LAND & RES. L. REV., 49–184 (2021); Kronk Warner, Lynn & Whyte, *supra* note 100.

107. Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009).

108. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021); Memorandum on Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479, § 1 (Nov. 30, 2022).

109. EO 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000). Policies with Tribal implications include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have

permitted by law” agencies from promulgating any regulation that had Tribal implications, imposed substantial direct compliance costs on Indian tribal governments, and that was not required by statute.<sup>110</sup> However, the order creates a number of exceptions: Agencies can issue such promulgations if (1) they paid the direct costs incurred by the Tribal government for compliance, or (2) they engaged in Tribal consultation early in the process of developing the proposed regulation and published a Tribal summary impact statement<sup>111</sup> in the federal register. Similarly, the order forbids agencies from promulgating any regulation that had Tribal implications and that preempted Tribal law unless the agency engaged in Tribal consultation early in the process and published a Tribal summary impact statement in the federal register.<sup>112</sup> For agency action that affected Tribal self-government, the order suggests that the agency “should” explore “where appropriate” consensual mechanisms for developing regulations.<sup>113</sup> In 2021, the Biden Administration revitalized EO 13175, resulting in over 50 agencies submitting a Tribal consultation plan for the very first time.<sup>114</sup>

In 2022, the Biden Administration provided uniform standards for Tribal consultation across all executive agencies.<sup>115</sup> This memorandum states that meaningful consultation requires agencies to make applicable information readily available to all parties, allow adequate time for communication, and keep Tribes advised as to how their input influenced decision-making.<sup>116</sup> The EO also clarifies other points of ambiguity in past Tribal consultation EOs by: designating an agency point of contact for Tribal consultation; addressing how to determine whether consultation is appropriate; laying out guidance for the notice of consultation; conducting the consultation (including guidance to respect and elevate Indigenous Knowledge); maintaining a record of the consultation; and training agency officials engaged in consultation.<sup>117</sup>

Tribal consultation is essential because it allows the federal government to hear directly from Tribes about the impact that a proposed project will have

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substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.* at § 1(a).

110. *Id.* at § 5(b).

111. Tribal summary impact statement consists of “a description of the extent of the agency’s prior consultation with tribal officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met.” *Id.* at § 5(b)(2)(B).

112. *Id.* at § 5(c).

113. *Id.* at § 5(c).

114. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021); Memorandum on Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479, § 1 (Nov. 30, 2022).

115. *Id.*

116. *Id.* at § 2.

117. *Id.* at §§ 3–8.

on their lands and resources. As the trustee for all American Indian Tribes, the federal government has three duties: “(1) to provide federal services to tribal members; (2) to protect tribal sovereignty; and (3) to protect tribal resources.”<sup>118</sup> The federal government simply cannot discharge these duties without hearing directly from Tribes about their needs. Thus, Tribal consultation can be seen as the procedural component of the federal trust responsibility to Tribes.<sup>119</sup> Moreover, Tribal consultation requirements create procedural barriers that may deter mining and other extractive industry players from choosing to put their projects on or near Tribal lands.

It is important to note, however, that the federal government does not always act faithfully as the trustee to Native American Tribes. For example, the General Mining Act of 1872, which governs mining development on federal land, is incredibly deferential to mining interests, often at the expense of Tribal interests.<sup>120</sup> That said, this Comment focuses on the Graphite One mine proposal, which is on Alaska State land. In this context, the federal government is in the position of permitting or overseeing State activity (rather than directly profiting from mineral development). Thus, the federal government can (at least in theory) more earnestly act in alignment with Tribal interests. Still, there should be a heavy dose of skepticism applied any time we assume that the federal government has taken Tribal interests to heart.

Tribal consultation is often considered inadequate because it does not require free, prior, and informed consent (FPIC). The international standard under the United Nations Declaration for the Rights of Indigenous Peoples (UNDRIP) requires that national governments receive FPIC before proceeding with a project that will impact Indigenous People’s land, resources, culture, etc.<sup>121</sup> The word “Free” in FPIC requires that consent be obtained without

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118. Kronk Warner, *supra* note 100, at 1138 (citing Routel & Holth, *supra* note 105, at 430).

119. Routel & Holth, *supra* note 105, at 417.

120. See e.g., *NV tribes will not appeal most recent lithium mining ruling*, ELKO DAILY (Dec. 8, 2023), [elkodaily.com](https://www.elkodaily.com) (stating that the Tribes are now setting their sights on trying to reform the General Mining Act of 1872). In response to calls for reform of the General Mining Act, the federal government created the Interagency Working Group on Mining Reform, that published a 169-page report: RECOMMENDATIONS TO IMPROVE MINING ON PUBLIC LAND, INTERAGENCY WORKING GROUP ON MINING LAWS, REGULATIONS, AND PERMITTING (Sept. 2023) [hereinafter IWG on Mining Reform Report].

121. See G.A. Res. 61/295, U.N. Doc. A/RES/61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007), Art. 10 (forbidding the relocation of Indigenous Peoples without first obtaining their free, prior, and informed consent), Art. 11 (requiring States to provide redress to Indigenous Peoples whose cultural, intellectual, religious and spiritual property was taken from them without their free, prior, and informed consent), Art. 19 (requiring States to obtain free, prior, and informed consent of Indigenous Peoples before adopting and implementing legislative or administrative measures that may affect them), Art. 28 (protecting Indigenous Peoples’ right to redress for lands, territories, and resources which they have traditionally owned or otherwise occupied or use which were confiscated, taken, occupied, used or damaged without their free, prior, and informed consent), Art. 29



any form of coercion, intimidation, manipulation, or application of force by government or non-governmental entities seeking consent. The word “Prior” in FPIC requires that Tribes be engaged early in the planning process so that they have sufficient time to adequately consider proposed measures and. The word “Informed” in FPIC requires that the party seeking consent facilitate the Tribes’ development of a full understanding of the possible impacts and consequences of the proposed action.<sup>122</sup>

In 2011, four years after UNDRIP was adopted by the United Nations General Assembly, the U.S. announced its support for UNDRIP. However, the U.S. claims that UNDRIP is “soft law,” thereby imposing no legal obligations on consenting States.<sup>123</sup> Tellingly, the U.S. has not passed any domestic legislation to implement UNDRIP.<sup>124</sup> The U.S. currently disclaims any legal obligation to institute FPIC, but as UNDRIP is increasingly adopted into customary international law, the U.S.’s argument that it is not bound by UNDRIP becomes increasingly untenable. In a future world where the U.S. complies with international law and operationalizes FPIC domestically, Tribal consultation will be an essential first step in reaching genuine consensus. This hypothetical world will be discussed in Section VI(A). Until then, Tribal consultation (without a requirement for consent) is a Tribe’s primary avenue for influencing federal decision-making.<sup>125</sup>

Another reason Tribal consultation is considered inadequate is that most statutes or agency guidelines creating a Tribal consultation requirement do not create a judicially enforceable right to sue for lack of adequate consultation. Tribes can sometimes sue for inadequate consultation under the Administrative Procedure Act, but they rarely win because an agency need only tick the

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(requiring States to take effective measures to ensure that storage or disposal of hazardous materials does not take place on lands or territories of Indigenous Peoples without their free, prior, and informed consent) [hereinafter UNDRIP].

122. Sasha Boutilier, *Free, Prior, and Informed Consent and Reconciliation in Canada: Proposal to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, 7 W. J. LEGAL STUD. 3 (2017).

123. UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *Indigenous Peoples* (accessed Nov. 18, 2023), <https://www.usaid.gov/indigenous-peoples-0> [<https://perma.cc/798G-LMSV>].

124. By contrast, Canada, also a late adopter of UNDRIP, has passed domestic legislation to implement UNDRIP, the Declaration of the Rights of Indigenous Peoples Act. Unfortunately, in recent litigation, a Canadian court determined that DRIPA imposes no judicially enforceable legal obligations on the State of Canada. *This major court case holds a silvering lining for BC’s mining future*, RES. WORKS (Oct. 15, 2023), <https://www.resourceworks.com/case-holds-silver-lining-for-mining> [<https://perma.cc/9RER-AKF3>] (“Justice Ross found that BC’s DRIPA legislation from 2019 did not technically enshrine the UNDRIP in the province’s legal system.”).

125. Tribes can also participate in public comment periods like any other member of the public to influence federal decisionmaking. Tribal consultation is distinct from public comment because it acknowledges that Tribes are sovereign governments who should be able to influence decisionmaking about projects that affect their lands and resources.

box of offering consultation, even if it is not meaningful.<sup>126</sup> This incentivizes agencies to simply pay lip service to Tribal consultation without substantively involving Tribal leaders in decisions affecting traditional lands and resources.<sup>127</sup> In a similar vein, to comply with Tribal consultation requirements an agency is under no obligation to supply Tribes with capacity-building funds that would allow Tribes to meaningfully engage in the consultation process.<sup>128</sup> As a result, even if agencies reach out to Tribes to start the consultation process, Tribes, especially Tribes in Alaska that are often extremely small and economically marginalized, may not have the staff, time, or money to review the documents the agency sends along. Finally, Tribal consultation requirements laid out in Executive Orders or agency guidelines can easily be revoked by future Administrations.<sup>129</sup> This leaves Tribal consultation requirements that are not entrenched in statutory language, on unstable ground.

Most pressing in the context of Tribal opposition to the Graphite One project is the fact that Tribal consultation requirements are typically only triggered for the federal government when an activity takes place on federal land or when there is a “federal undertaking” such as a Clean Water Act permit, on non-federal land.<sup>130</sup> What constitutes a “federal undertaking,” as will be discussed in depth in Section V, is disputed. If there is no federal undertaking on projects on State land, then those projects could be subject to less (and potentially no) federal oversight. Without federal jurisdictional hooks, Tribal consultation requirements disappear or are replaced with the much weaker state consultation policy. Unlike the federal government, States do not have a trust responsibility to Tribes. In fact, historically, State interests are directly at

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126. Mills & Nie, *supra* note 106, at 99; Kieran O’Neil, *In the Room Where It Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Subsistence Rights in Alaska*, 98 WASH. L. REV. 659, 678 (2023).

127. *Id.* at 676.

128. This is a problem that the recent Interagency Working Group on Mining Reform is seeking to address, suggesting that Congress provide adequate resources to Tribes for Tribal consultation. IWG on Mining Reform Report, *supra* note 120, at 120. However, if Congress enacted this reform, it would only impact Tribal consultation for mining on federal public lands, so Tribes impacted by Graphite One and other state land mining projects would be unaffected.

129. This issue is addressed by the Interagency Working Group on Mining Reform, who called on Congress to “Enact legislation to require meaningful, robust, and early consultation between the Federal government and Tribal governments.” IWG on Mining Reform Report, *supra* note 120, at 119.

130. See e.g., National Historic Preservation Act (NHPA), 54 U.S.C. § 306108 [hereinafter NHPA § 106]; 40 C.F.R. 1501.2(b)(4)(ii) (regarding Tribal consultation for compliance with NEPA).

odds with Tribal interests.<sup>131</sup> So, even if the State or state agency has a Tribal consultation policy, it should be treated with a grain of salt.<sup>132</sup>

In summary, Tribal consultation is deeply imperfect. The federal government is a fair-weather friend to Tribes, acting in their best interest in consultation proceedings or otherwise only when it is convenient for them to do so. The triggers for Tribal consultation are murky at best, leaving room for extractive industry companies like Graphite One to design projects that avoid federal consultation requirements. Moreover, Tribal consultation requirements are difficult, often impossible, to enforce because Tribes usually cannot sue agencies for inadequate consultation or their failure to follow their own consultation guidance. All that said, Tribal consultation is still an important legal tool for Tribes because, when done properly, it affirms that Tribes are sovereign governments on equal footing with the federal government and gives Tribes an opportunity to make their voices heard.

#### B. *Challenges Specific to Tribes in Alaska Seeking to Protect Subsistence Resources*

The first major obstacle disabling Alaska Natives from protecting their subsistence resources is the fact that Tribes in Alaska generally do not have management authority over such resources. In 1971, the Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal land title and traditional hunting and fishing rights throughout the State of Alaska (with the exception of Metlakatla's Annette Reserve).<sup>133</sup> In exchange for the extinction of aboriginal land title, ANCSA created 12 (later 13) regional Alaska Native Corporations (ANCs) and around 200 village ANCs, for-profit corporations

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131. As will be discussed in Subsection III(B) *infra*, ANCSA is a great example of this. ANCSA divided up Alaska's lands between State and Alaska Native Corporations. Any land that the ANCs claimed was by definition land that the State could not claim. Thus, the State and the Native interests were diametrically opposed.

132. For example, the Alaska Department of Environmental Conservation has a Tribal consultation policy that was last updated in 2002. The policy reads: "The department is committed to consulting with tribes as early in the department's decision-making process as practicable, and as permitted by law, before taking department action, except that the department is not committed to consulting with tribes in those instances described in 'Limitations on Consultation' below. Consultation will provide meaningful participation by the affected tribe, with the goal of achieving informed decision-making." Notice, this policy states that the goal is "informed decision-making," *not* consensus. The limitations on consultation include any consultation that could result in infringement of applicable privileges, such as attorney-client privilege, deliberate process privilege, or law enforcement confidentiality requirements or privileges. POLICY ON GOVERNMENT-TO-GOVERNMENT RELATIONS WITH THE FEDERALLY RECOGNIZED TRIBES OF ALASKA, DEP'T ENV'T CONSERVATION (Feb. 27, 2002). The policy includes scant guidance on how agency officials can implement this guidance.

133. See generally DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES & AMERICAN LAWS 165-98 (University of Alaska Press: Fairbanks, 3<sup>rd</sup> ed.: 2012).

with Alaska Native shareholders.<sup>134</sup> ANCSA divided up 45.5 million acres and \$962.5 million<sup>135</sup> in compensation among the ANCs.<sup>136</sup> The ANCs own the land in fee simple absolute title.<sup>137</sup> Notably, ANCs are not Tribes and are not federally recognized as such.<sup>138</sup> So, ANCSA not only shrunk Indigenous land title in Alaska, but it shifted land control from Tribal to ANC hands.

Before ANCSA, Tribes in Alaska claimed 365 million acres of land in aboriginal title.<sup>139</sup> After ANCSA, Alaska Native Corporations owned only 45.5 million acres.<sup>140</sup> With ownership of only 12.5 percent of their traditional lands, many of the Tribes' subsistence resources are now located outside lands owned by ANCs.<sup>141</sup> This mirrors, in some respects, the experience of Tribes in the Lower 48.<sup>142</sup> The staggering acreage of land that the U.S. took from Tribes in the Lower 48 meant that many subsistence and cultural resources are now outside the bounds of Tribes' reservations.<sup>143</sup> However, many Tribes in the Lower 48 have treaty rights that allow them to conduct traditional hunting and fishing outside the bounds of their reservations for subsistence.<sup>144</sup> In contrast, ANCSA extinguished aboriginal hunting and fishing rights and Tribes in Alaska have *no* treaties to point to affirming their sovereign rights to hunt and fish.<sup>145</sup>

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134. After the enactment of ANCSA, one hundred shares each were offered to approximately 80,000 individual Alaska Native individuals who were alive at the date of ANCSA's passage. Shares cannot be sold, but they can be inherited. In addition to the 13 regional ANCs, ANCSA created around 200 village corporations. Generally speaking, village corporations own surface estates, and regional corporations own subsurface estates. *Id.*

135. Adjusted for inflation, this is around \$5.24 billion in current dollars. DeSantis & Ward, *supra* note 66, at 4.

136. CASE & VOLUCK, *supra* note 133, at 172, 175.

137. This is a major distinction between land status in Alaska versus the Lower 48. Whereas Tribal reservations in the Lower 48 are held in trust by the federal government, in Alaska, ANCs own their land outright. Under ANCSA § 14(c), village corporations were required to convey "no less than" 1280 acres to the municipal corporation formed for the village or to the state of Alaska in trust for a future municipal corporation. P.L. 92-103, 85 Stat. 688 (Dec. 18, 1971); CASE & VOLUCK, *supra* note 133, at 175.

138. *Id.* at 178.

139. *Id.* at 168.

140. Natives received 962.5 million in compensation for the extinguishment of aboriginal land title of 319 million acres. That amounts to \$3 per acre. *Id.* at 175.

141. *Id.* at 178.

142. The "Lower 48" refers to the contiguous U.S. "Tribes in the Lower 48" refers to all Tribes living in the contiguous U.S.

143. See e.g., *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024 (9th Cir. 2008) (where the Navajo Nation filed suit against the U.S. Forest Service for allowing the Arizona Snowbowl ski resort to spew treated sewage water over the San Francisco Mountains, peaks which are sacred to the Navajo but which are located just outside the bounds of their reservation).

144. See e.g., Pacific Northwest treaty Tribes like the Klamath. These treaties are often the legal basis on which Tribes assert their right to co-manage subsistence resources.

145. Jack B. McGee, *Subsistence Hunting & Fishing in Alaska: Does ANILCA's Rural Subsistence Priority Really Conflict with the Alaska Constitution?*, 27 ALASKA L. REV. 221, 227-28 (2010); Anderson, *supra* note 19, at 212.

Almost a decade after ANCSA, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which sought to remedy the lack of reference to subsistence needs in ANCSA. ANILCA creates a “rural priority” for subsistence users on federal land.<sup>146</sup> In compliance with ANILCA, the State of Alaska briefly adopted its own rural subsistence priority on State lands. But the State law was struck down by an Alaska Supreme Court decision, *McDowell v. State of Alaska*, that determined that a subsistence priority for rural residents violated the Alaska Constitution’s equal protection clause.<sup>147</sup> Notably, the State of Alaska generally manages subsistence resources on Alaska Native Corporation land, not the Tribes.<sup>148</sup> This means that there is no rural (let alone Native) priority for subsistence on Alaska Native Corporation land. As a result of *McDowell*, there is a complicated checkerboard of subsistence laws in Alaska, where federal land managers apply a rural priority on federal lands and state land managers open up subsistence to anyone in rural places on State and ANC land. In urban locations, there is no subsistence priority. Alaska Natives expressed their frustration with subsistence management in congressional hearings in 2013: “[f]orty-two years after ANCSA passed, and 33 years after ANILCA passed, neither the Department of the Interior nor the State of Alaska has lived up to Congress’s expectation that Alaska Native subsistence needs would be protected.”<sup>149</sup> Thus, ANCSA and ANILCA’s substandard provisions regarding subsistence protections weaken Tribal sovereignty, often leaving Tribes in Alaska with fewer means of protecting their subsistence interests than their counterparts in the Lower 48.

Another way that ANCSA weakens Tribal sovereignty is by pitting Tribal and ANC interests against each other. While division on matters of

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146. The rural priority mandates that rural residents of Alaska be given priority for subsistence uses of fish and wildlife. Notably, ANILCA did *not* create a priority for Native subsistence users. This will be discussed further in Section VI(B). ANILCA also preserved certain lands and waters in Alaska as national parks. CASE & VOLUCK, *supra* note 133, at 295.

147. 785 P.2d 1 (Alaska 1989); CASE & VOLUCK, *supra* note 133, at 297; Jack B. McGee, *Subsistence Hunting & Fishing in Alaska*, 27 ALASKA L. REV. 221, 235 (2010); Elizabeth Barrett Ristroph, *Alaska’s Tribes Melting Subsistence Rights*, 1 ARIZ. J. ENV’T L. & POL’Y 47, 69 (2010); Anderson, *supra* note 19, at 214.

148. *Id.*

149. *Id.* at 216, quoting *Hearing to Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act: Hearing Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 1, 50 (2013) (statement by Subsistence Committee Chair of the Alaska Federation of Natives, Rosita Worl). Currently there is a case before in federal district court addressing the “unworkable” discrepancies between federal and state subsistence policies in salmon management on the Kuskokwim River. Megan Gannon, *Major Subsistence Fishing Rights Case Looms Over AFN Convention*, NOME NUGGET (Oct. 27, 2023), <http://www.nomenugget.com/news/major-subsistence-fishing-rights-case-looms-over-afn-convention> (quoting solicitor of the Department of the Interior, Robert T. Anderson); Kavitha George, *AFN convention centers subsistence amid a lawsuit to protect traditional hunting and fishing rights*, ALASKA PUB. MEDIA (Oct. 23, 2023), <https://alaskapublic.org>.

development certainly exists in many Native communities outside of Alaska, division in the Native community is particularly pronounced in Alaska because ANCSA creates an environment where ANC and Tribal interests are often diametrically opposed.<sup>150</sup> It is in the ANC's interest to develop their land and make a profit for their shareholders and provide economic opportunity and jobs to Native communities in rural places. This is the stated reason that the Bering Strait Native Corporation, the regional ANC representing the region including Nome, has come out in support of the Graphite One project, investing \$2 million in the project thus far.<sup>151</sup> On the other hand, Tribes that are worried about access to subsistence resources tend to oppose development because they fear that tailings dam failures or other environmental hazards incident to mining development will wipe out subsistence fisheries or obstruct traditional hunting grounds.<sup>152</sup>

This lack of consensus between the ANC and the Tribal government also creates issues for consultation purposes. Who should receive Tribal consultation—the ANC or the Tribe?<sup>153</sup> And if there is disagreement, who should receive deference? Under Public Law 108–199 and Public Law 108–447, the Office of Management and Budget and all other federal agencies must engage in consultation with Alaska Native Corporations “on the same basis as Indian tribes under Executive Order No. 13175.”<sup>154</sup> But federal agencies deal with this

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150. See Ristroph, *supra* note 147. See for example, how the development of Red Dog Mine pit the Northwest Arctic Region of Alaska (NANA) Regional Corporation against the Native Villages of Kivalina and Point Hope, or how the development of the Outer Continental Shelf of the North Slope pit the Olgoonik Corporation, Ukpeagvik Inupiat Corporation, and Village Corporation of Barrow against Inupiat Community of the Arctic Slope and Native Village of Point Hope. *Id.* Cf. the development of Pebble Mine which the local Bristol Bay Native Corporation opposed, alongside local Tribes, for its anticipated harm to subsistence resources.

151. Yereth Rosen, *Native Corporations Invests in Mining Project on Alaska's Seward Peninsula*, ALASKA BEACON (Sept. 7, 2023).

152. In addition to Tribal opposition to Graphite One, *see e.g.*, Tribal opposition to the Donlin Mine near Bethel, Alaska. Elizabeth Manning, *Alaska Tribes Wage Bold Fight Against Gold Mine*, EARTHJUSTICE, <https://perma.cc/VXN7-BFDL> (July 21, 2023) (stating that twelve Tribes, the Yukon-Kuskokwim Health Corporation, the Association of Village Council Presidents, and the National Congress of American Indians have passed formal resolutions opposing the Donlin project, which sits on Alaska Native Corporation land and is supported by local village and regional ANCs). That said, Tribal opposition can sometimes win over the ANCs, if it is clear that the community does not support a project. This happened recently with the Ambler Road project. Desiree Hagen, *Alaska Native Corporation withdraws from the Ambler Road project*, ALASKA PUB. MEDIA (May 9, 2024), <https://alaskapublic.org/2024/05/09/alaska-native-corporation-withdraws-from-the-ambler-road-project> [<https://perma.cc/XPY4-SUBQ>].

153. EO 13175 defines “Indian tribe” as “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994.” 65 Fed. Reg. 67249 § 1(b) (Nov. 9, 2000).

154. Pub. L. 108–199, § 161 (188 Stat. 452), as amended by Pub. L. 108–447, § 518 (118

amendment differently. Most agencies state that they will consult with ANCs, but they will give preference to Tribal interests when ANC and Tribal interests diverge because Tribes are sovereign governments and ANCs are corporations.<sup>155</sup> The Department of the Army (DA), on the other hand, wrote its Tribal consultation policy to address consultation with Tribes only, acknowledging in a footnote that it may be required to consult with ANCs “simply because these corporate entities own and manage much of the land in Alaska.”<sup>156</sup> This policy implies that the Army Corps, an arm of the DA, may choose not to consult with the Bering Strait Native Corporation (BSNC) regarding a 404 permit for the Graphite One project (even though the Corporation invested \$2 million in Graphite One), because BSNC does not own or manage the land where the proposed mine sits. Similarly, DoD Guidance also states that “ANCs are not tribes nor sovereign governments. Although ANCs must be informed in a timely and good faith manner as related to their land, they are . . . not granted government-to-government status.”<sup>157</sup>

Because ANCSA and ANILCA fail to adequately protect Tribal subsistence resources, Tribes in Alaska rely on Tribal consultation requirements to make sure the federal government considers the effects its actions have on their subsistence resources. When Tribal consultation does not happen or is inadequate, Tribes’ way-of-life is put at risk. The next Section details the story of the proposed Graphite One mine, where, so far, the federal government has failed to adequately discharge its duty to consult with Tribes regarding actions related to the mine proposal.

#### IV. THE STORY OF THE PROPOSED GRAPHITE ONE MINE

Parts II and III laid out the harm caused by transition mineral mining and the reasons why it is difficult for Tribes living near transition mineral mine proposals to stop or slow the development of those mines. With these lessons in mind, Section IV proceeds by investigating the Graphite One mine proposal and the forms that Tribal opposition to the mine proposal have taken thus far.

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Stat. 3267).

155. See e.g., DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL: PROCEDURES FOR CONSULTATION WITH INDIAN TRIBES, 512 DM 5, (Nov. 9, 2015), <https://www.doi.gov/sites/doi.gov/files/512-dm-5-procedures-for-consultation-with-indian-tribes.pdf> [<https://perma.cc/CR7Y-WY4H>]; DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL: DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS, 512 DM 4.6 (Nov. 9, 2015) (affirming the right to consultation for both Tribes and ANCs, while noting that when ANCs and Tribal interests diverge, it will give “due consideration to the right of sovereignty and self-governance of federally recognized Indian Tribes.”)

156. William S. Cohen, Sec. Def., *American Indian and Alaska Native Policy*, U.S. DEP’T OF DEFENSE (Oct. 20, 1998), [https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf) [<https://perma.cc/7Y2A-TFSR>].

157. Alaska Implementation Guidance for DoD Alaska Native Related Policies and Instructions 6 (Apr. 13, 2020).

### A. *Background on the Proposed Project*

The Graphite One mine proposal is located in the Kigluaik Mountains,<sup>158</sup> lands sacred to the Inupiaq which provide a sense of place and belonging and a source for their legends and culture.<sup>159</sup> The mine proposal is just 35 miles north of Nome, Alaska.<sup>160</sup> Nome is a town of 3699 people,<sup>161</sup> famous for being the final destination for the historic annual Iditarod Trail Sled Dog Race.<sup>162</sup> In the Nome census area, 75.9 percent of residents identify as American Indian & Alaska Native.<sup>163</sup> About 70 miles Northeast of Nome and 27 miles from the Graphite One project lie the Native Villages<sup>164</sup> of Teller<sup>165</sup> and Brevig Mission.<sup>166</sup> The physical home of the Native Village of Mary's Igloo, which used to be located near the eastern edge of the Imuruk Basin about fifteen miles away from the Graphite One site, no longer exists, however the seat of its Tribal government is now found in Teller.<sup>167</sup> With the nearest well-stocked

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158. "Kigluaik" is an Inupiaq word meaning "wind that comes from everywhere." Webinar: *The Falsehood of "Critical and Strategic" Minerals with Bonnie Gestring and Austin Ahmasuk*, ALASKA CMTY. ACTION ON TOXICS (Oct. 25, 2023), <https://www.akaction.org/webinars/the-falsehood-of-critical-and-strategic-minerals-with-bonnie-gestring-and-austin-ahmasuk> [<https://perma.cc/AV7M-6ABX>] (paraphrasing Austin Ahmasuk at 7:40).

159. *Id.* at 7:45.

160. DoD letter, *supra* note 1, at 1.

161. U.S. CENSUS BUREAU, QUICKFACTS: NOME CENSUS AREA, ALASKA, <https://www.census.gov/quickfacts/fact/table/nomecensusarealaska/PST045222> [<https://perma.cc/M77K-QQLW>].

162. *Visit Nome Alaska*, NOME CONVENTION AND VISITORS BUREAU <https://www.visitnomealaska.com> [<https://perma.cc/UML4-QD6A>] (last visited Nov. 18, 2023). Nome is also famous for its gold rush history. In Nome's Anvil Creek, the "three lucky Swedes" struck gold in 1898, a discovery which led to a stampede of White settlement in the following years. *The Three Lucky Swedes*, <https://www.alaska.org/detail/the-three-lucky-swedes> [<https://perma.cc/27YB-3U42>] (last visited Dec. 10, 2023).

163. *Nome Census Area, AK*, DATA USA, <https://datausa.io/profile/geo/nome-census-area-ak#:~:text=Population%20%26%20Diversity&text=In%202021%2C%20there%20were%205.31,third%20most%20common%20ethnic%20groups> [<https://perma.cc/8R3G-7AAF>] (last visited Nov. 18, 2023).

164. The term "Native Village" refers both to the Tribe and physical location of the Tribe.

165. Bureau of Indian Affs., *Teller*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, <https://www.bia.gov/tribal-leaders/teller> [<https://perma.cc/AX24-3MTG>] (last visited Nov. 13, 2023); *Teller*, KAWERAK, INC., <https://kawerak.org/our-region/teller> [<https://perma.cc/S89A-S9U6>] (last visited Nov. 18, 2023).

166. Bureau of Indian Affs., *Brevig Mission*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, <https://www.bia.gov/tribal-leaders/brevig-mission> [<https://perma.cc/7YJQ-SK74>] (last visited Nov. 13, 2023); *Sitaisaq: Brevig Mission*, KAWERAK, INC., <https://kawerak.org/our-region/brevig-mission> [<https://perma.cc/ALG5-LTRZ>] (last visited Nov. 18, 2023).

167. *Mary's Igloo*, KAWERAK, INC., <https://kawerak.org/our-region/marys-igloo> [<https://perma.cc/9D8X-MRS8>] (last visited Nov. 18, 2023) (Mary's Igloo is still a federally recognized Tribe, though the village itself has been abandoned and is now used only as a fish camp during the summer season); Bureau of Indian Affs., *Mary's Igloo*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, <https://www.bia.gov/tribal-leaders/marys-igloo> [<https://perma.cc/3ZGP-T84L>] (last



grocery store a two-hour drive away, these Native villages rely primarily on subsistence for their nutritional needs.<sup>168</sup> Moreover, subsistence is central to their identity and way of life, which the Inupiaq have practiced in Alaska for thousands of years.

In 2011, without ever notifying or consulting with the local Tribes or people of Nome, the Canadian exploration company Graphite One started drilling in the Kigluaik Mountains in search of graphite.<sup>169</sup> There, Graphite One discovered what is believed to be the largest deposit of graphite found in the U.S. so far.<sup>170</sup>

The Graphite One project is two-fold. First, starting tentatively in 2027, Graphite One plans to build a mile-long open pit mine in the Kigluaik Mountains with a 23-year lifespan.<sup>171</sup> At the mine, the company plans to extract, crush, grind, and process the graphite into a 95 percent pure concentrate. Second, the pre-feasibility study states that starting in 2029, Graphite One plans to ship that graphite to an undisclosed location in Washington, where it will refine the graphite further in order to produce lithium-ion battery anode materials on a commercial scale.<sup>172</sup> However, recent reporting reveals that the Graphite One is actually planning to send its graphite to northeast Ohio, not Washington state, for processing.<sup>173</sup>

This Comment will focus on the first part of Graphite One's plan. However, with regard to the second part of the plan, it should be noted that

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visited Nov. 13, 2023) (many Mary's Igloo tribal members now live in Teller or Nome).

168. Herz, *supra* note 12.

169. Pre-feasibility Study, *supra* note 81, at 1–4. Graphite One received a mining permit from the Alaska Department of Natural Resources. *APMA F20142299#4- A Hardrock Exploration Permit Application Amendment within the Kougarak Mining District, Graphite One Project*, STATE OF ALASKA (accessed June 7, 2024), <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=177958> (accessed June 7, 2024). A state agency, the Alaska Department of Natural Resources, was not bound by the federal trust responsibility to consult with Tribes affected by the drilling before issuing the permit.

170. Davis Hovey, *Western Alaskans Concerned About Graphite One Project's Impact on Subsistence*, ALASKA PUB. MEDIA (July 26, 2019), <https://alaskapublic.org/2019/07/26/western-alaskans-concerned-about-graphite-one-projects-impact-on-subsistence/> [<https://perma.cc/9KR8-3DVE>]; U.S. GEOLOGICAL SURV., USGS UPDATES MINERAL DATABASE WITH GRAPHITE DEPOSITS IN THE UNITED STATES (Feb. 28, 2022), <https://www.usgs.gov/news/technical-announcement/usgs-updates-mineral-database-graphite-deposits-united-states> [<https://perma.cc/HWF6-5RPV>].

171. Pre-feasibility Study, *supra* note 81, at 1–1; Gannon, *Graphite One Sets Sights on Bigger Mine than Originally Proposed*, *supra* note 52.

172. Pre-feasibility Study, *supra* note 81, at 1–1 (“The [Secondary Treatment Plant]’s specific location is Washington State has not been defined.”); Gannon, *Graphite One Sets Sights on Bigger Mine than Originally Proposed*, *supra* note 52.

173. Shane Lasley, *Graphite One Selects Ohio for Refinery*, MINING NEWS (Mar. 20, 2024), <https://www.miningnewsnorth.com/story/2024/03/22/news/graphite-one-selects-ohio-for-refinery/8447.html>; *Graphite One picks Ohio's Voltage Valley for graphite anode facility*, Mining Technology (Mar. 21, 2024), <https://www.mining-technology.com/news/graphite-one-ohios-voltage-valley-graphite-anode-facility>.

Nome has three main roads, none of which are connected to the rest of Alaska's road system. To ship the graphite concentrate, Graphite One would need to build a 20-mile road to connect to Kougarok Road that would cut through the Kigluaik Mountains and the beloved local hiking spot, Mosquito Pass.<sup>174</sup> Once the road is built, Graphite One would have to haul the graphite concentrate a total of 55 miles one-way in big trucks on icy, rarely plowed Arctic roads to finally arrive at Nome's as-of-now non-existent deep-water port.<sup>175</sup> From there, the graphite would travel all the way to Ohio for processing.<sup>176</sup> It is clear that the second part of the Graphite One plan comes with enormous environmental costs—harming Tribal subsistence resources, belching GHGs into the air, and carving roads and ports into historic lands and waters.

Due to skyrocketing demand for graphite in conjunction with the green transition,<sup>177</sup> in 2021, Graphite One was designated a High-Priority Infrastructure Project by the Federal Permitting Improvement Steering Committee.<sup>178</sup> This ensures that federal permitting agencies coordinate their project review authorities in order to streamline the permitting process.<sup>179</sup> In 2023, Graphite One received an enormous \$375 million grant from the Department of Defense (DoD).<sup>180</sup> The DoD grant is intended to allow Graphite One to complete its feasibility study by the end of 2024, a year ahead of schedule.<sup>181</sup> As of this writing, Graphite One has only completed a pre-feasibility study.<sup>182</sup>

174. Megan Gannon, *Graphite One Seeks Permit to Create a Winter Access Trail Through Mosquito Pass*, NOME NUGGET (Feb. 24, 2023, 10:02 PM), <http://www.nomenugget.net/news/graphite-one-seeks-permit-create-winter-access-trail-through-mosquito-pass> [https://perma.cc/986K-YLUC].

175. Gannon, *supra* note 52.

176. The pre-feasibility study states that Graphite One plans to ship the graphite concentrate out to Washington and send empty cargo ships back to Nome. How is that an efficient, climate-conscious strategy? *Id.* at 18–9. Of course, if the shipments are actually to Ohio, not Washington, the carbon footprint of the mine only grows.

177. “Last year, US demand for natural graphite for all uses, batteries or otherwise, was just 72,000 tons. Global demand for flake graphite—the natural grade best suited for anodes—is projected by Benchmark Mineral Intelligence to rise more than threefold by 2030, to 4.1 million tonnes.” Liam Denning, *America's EV Ambitions Need a Graphite Plan. Fast*, BLOOMBERG (Feb. 9, 2023, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2023-02-09/biden-s-ev-boom-needs-a-graphite-rush-like-china-s-america> [https://perma.cc/PFR4-ZHFU].

178. Gannon, *Graphite One Sees Financial Incentives in Federal IRA Bill*, *supra* note 59.

179. *US Designates Graphite One Project as “High-Priority Infrastructure Project”*, GREEN CAR CONGRESS (Jan. 24, 2021), <https://www.greencarcongress.com/2021/01/20210124-graphiteone.html>.

180. Megan Gannon, *Department of Defense Awards Graphite One \$375 Million*, NOME NUGGET (July 18, 2023, 10:10 PM), <http://www.nomenugget.com/news/department-defense-awards-graphite-one-375-million> [https://perma.cc/ZY9J-HQPG].

181. The feasibility study is anticipated December 2024. *Id.*

182. Megan Gannon, *Prefeasibility Study Offers Glimpse into Graphite One's Mine Plan*, NOME NUGGET, Nov. 10, 2022, at 5.

The pre-feasibility study estimates that in 23 years of operation, the Graphite One mine will produce 22.5 million metric tons of ore and 50 million metric tons of waste material.<sup>183</sup> When Graphite One shared this information with automotive manufacturers, like Ford, GMC, and Tesla, they responded that 22.5 million metric tons of ore would not be nearly enough to satisfy their EV manufacturing needs.<sup>184</sup> The Tesla representative said they would need to write 40 contracts for projects of Graphite One's size to meet their needs.<sup>185</sup> Graphite One is now promising the creation of a bigger mine (four times the original size) to be analyzed in its 2024 feasibility study.<sup>186</sup>

### B. Tribal Concerns Regarding the Graphite One Proposal

The nearby Native Villages of Mary's Igloo, Brevig Mission, and Teller oppose the Graphite One mine.<sup>187</sup> One of the Tribes' greatest concerns is the effect Graphite One will have on Imuruk Basin, home to all of the subsistence resources that the Tribes rely on for subsistence, including salmon and other fish species, water fowl, marine mammals, and caribou. Graphite One's pre-feasibility study predicts that the mine waste from the project will unearth "potentially acid generating" (PAG) rock.<sup>188</sup> Even though graphite itself is non-toxic, graphite is typically found in PAG rock. The existence of PAG rock triggers a need for water treatment in perpetuity.<sup>189</sup>

Graphite One plans to build an artificial pond to store groundwater and surface water that came into contact with PAG rock, treat it, and then discharge

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183. *Id.*; Pre-feasibility Study, *supra* note 81, at 1–15 and 16–21.

184. Herz, *supra* note 12 (pointing out the irony that Graphite One intends Tesla to be its primary customer, when Graphite One is located in Nome, a place that is not connected to the rest of Alaska by the road system and where no one owns a Tesla).

185. Gannon, *Graphite One Sets Sights on Bigger Mine than Originally Proposed*, *supra* note 52; see also Yereth Rosen, *Proposed Graphite Mine in Alaska's Bering Strait Region Pursues Boosted Production*, ALASKA BEACON (Nov. 10, 2023), <https://alaskabeacon.com/briefs/proposed-graphite-mine-in-alaskas-bering-strait-region-pursues-boosted-production-plan> [<https://perma.cc/P9ND-YGQN>].

186. Gannon, *Graphite One Sets Sights on Bigger Mine than Originally Proposed*, *supra* note 52.

187. Tribal opposition is primarily being voiced by the Tribal heads of government. Some Tribal members are in favor of the mine proposal. Herz, *supra* note 12. In addition, the Bering Straits Native Corporation has come out in support of the mine, so far offering \$2 million to the project. Nathaniel Herz, *A new rush arrives on the Seward Peninsula: for graphite, not gold*, ALASKA BEACON (Sept. 27, 2023, 12:00 PM), <https://alaskabeacon.com/2023/09/27/a-new-rush-arrives-on-the-seward-peninsula-for-graphite-not-gold> [<https://perma.cc/FQE5-4NU8>].

188. Pre-feasibility Study, *supra* note 81, at 1–25, 16–19, and 18–10.

189. As David Chambers, president of the Center for Science in Public Participation and long-time advocate against harmful Alaskan mining projects, notes, it is a "significant risk" for the public to trust that "someone will be there to operate a water treatment plant in perpetuity." Quoted in Gannon, *Prefeasibility study offers glimpse into Graphite One's mine plan*, *supra* note 182.

it back into the ecosystem.<sup>190</sup> Graphite One is considering discharging the water into Imuruk Basin, despite the Basin's importance for both subsistence and spiritual practices. Discharging this treated water into the ecosystem concerns Tribal members and local residents because the State of Alaska has notoriously poor environmental regulations, due to a lack of resources for properly monitoring and enforcing water treatment plans. If the treated water contains unhealthily high rates of contaminants or if the water ends up being discharged without treatment, the subsistence resources Tribes and other rural residents rely on could be irreversibly harmed. Even if subsistence resources do not die out, pollutants in the water from the mine may travel up the food chain, as those pollutants accumulate in plants, then animals, and then humans.

The water treatment system that Graphite One proposes using will require an Alaska Pollution Discharge Elimination System (APDES) permit, issued by Alaska's Department of Environmental Conservation under their assumed CWA § 402 powers.<sup>191</sup> In addition to triggering § 402 permits, the Graphite One project will likely trigger § 404 of the Clean Water Act, which requires an entity to obtain a permit before dredged or fill material can be discharged into waters of the United States (WOTUS).<sup>192</sup> This 404 permit is the last remaining federal foothold in the mining permitting process in Alaska. Applying to the United States Army Corps of Engineers (USACE) for a 404 permit would require Graphite One to comply with the National Environmental Policy Act (NEPA)'s requirement to conduct an Environmental Assessment (EA) or Environment Impact Statement (EIS).<sup>193</sup> However, if Alaska assumes jurisdiction over 404 permitting from the federal government, just as it did

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190. Pre-feasibility Study, *supra* note 81, at 18–16.

191. The APDES permit replaces the National Pollution Discharge Elimination System (NPDES) permit required under Clean Water Act § 402. The State of Alaska, eager to extricate itself from federal oversight, took over the 402 permitting process in 2008. Pre-feasibility Study, *supra* note 81, at 4–11. *Frequently Asked Questions*, ALASKA DEP'T ENV'T CONSERVATION, <https://dec.alaska.gov/water/apdes-history/> (last accessed Dec. 14, 2023).

192. The pre-feasibility study lists a Section 404 Wetlands Permit as a major federal authorization needed for the project. Pre-feasibility Study, *supra* note 81, at 1–27 (Oct. 13, 2022). However, the pre-feasibility study was written before the *Sackett v. EPA* opinion came down. *Sackett v. EPA* holds that the federal government may only assert jurisdiction over “geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’ and to adjacent wetlands that are ‘indistinguishable’ from those bodies of water due to a continuous surface connection.” *Sackett v. EPA*, 598 U.S. 651, 671 (2023). Without more information in the pre-feasibility study about the status of the wetlands at issue for Graphite One, it is difficult to know whether *Sackett* will affect the ability of the federal government to assert jurisdiction over Graphite One's dredge and fill permits.

193. Currently, the State of Alaska is looking to assume jurisdiction over CWA § 404 permitting, currently executed by the United States Army Corps of Engineers. A 404 permit is required before dredged or fill material can be discharged into waters of the United States (WOTUS). The pre-feasibility itself recognizes that a 404 permit is the only way in which the federal government can require Graphite One to complete a NEPA analysis. Pre-feasibility Study, *supra* note 81, at 20–1.

with 402 permitting, this federal requirement to consider the mine's impact on the environment would disappear, along with the requirement for the federal government to engage in consultation with the affected Tribes.<sup>194</sup> So far, Governor Dunleavy's push for Alaska to assume § 404 permitting powers from the federal government has been unsuccessful.<sup>195</sup> But, if it ever succeeds, it could have major consequences for Tribes: removing an opportunity for mandatory Federal-Tribal consultation and making it easier for mining companies to set up shop in Alaska's extractivism-friendly environmental regulatory scheme.

The Imuruk Basin is an eight-mile-long lake, less than 10 feet deep.<sup>196</sup> If Imuruk is classified as a navigable lake, then USACE would retain jurisdiction over it regardless of 404 assumption.<sup>197</sup> If Imuruk is classified as a wetland, or if Graphite One discharges into wetland waters other than the Imuruk, then the 404 assumption process could have a real impact here. Considering that the 404 permit was the mechanism by which the EPA was able to veto the hugely controversial Pebble Mine and thus protect the world-class salmon fishery in Alaska's Bristol Bay, the loss of federal jurisdiction over 404 permitting would have major consequences for Tribes and others who care about the environment in Alaska.<sup>198</sup>

Another reason to be apprehensive about the proposed Graphite One mine is that the last open-pit mine built near Nome was an unmitigated disaster. The Rock Creek Mine was located six miles north of Nome on Native Corporation land.<sup>199</sup> It was operated by the Alaska Gold Company (a subsidiary of NovaGold Resources, another Canadian mining company) for two months before it was shut down, or as the Department of Natural Resources puts it, "placed into care and maintenance."<sup>200</sup> In its two months of operation, the mine went \$20 million overbudget.<sup>201</sup> Two construction workers died in an

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194. Other downsides of the State of Alaska assuming 404 permitting powers include (1) less tribal consultation, (2) less analysis and public participation, (3) reduced ability to litigate bad decisions because of Alaska's loser pays rule, (4) high cost to the state, and (5) easier to push through unpopular development. *What is State Primacy over Wetland Permitting and Why is it a Problem?*, NATIVE MOVEMENT (Mar. 24, 2022), <https://www.nativemovement.org/nm-blog/2022/3/24/what-is-state-primacy-over-wetland-permitting-and-why-is-it-a-problem> [<https://perma.cc/ZEH3-XDPV>]. Governor Dunleavy has so far been unsuccessful in his push for Alaska to assume 404 permitting powers from the federal government. Sabbatini, *supra* note 35; Brooks, *supra* note 35.

195. *See id.*, Sabbatini, *supra* note 35.

196. David Hopkins, *History of Imuruk Lake, Seward Peninsula, Alaska*, 70 BULL. GEOLOGICAL SOC'Y AM. 1033, 1033 (Aug. 1959), <https://pubs.usgs.gov/publication/70211614#:~:text=A%20history%20of%20repeated%20warping,set%20of%20warped%20terraces%20of> [<https://perma.cc/7PVN-JC84>].

197. *See* Sabbatini, *supra* note 35. 43% of Alaska's land is wetlands. *Id.*

198. *See* Miller, *supra* note 4, at 234.

199. *Nanuuq (Rock Creek) Mine*, ALASKA DEP'T NAT. RES., <https://dnr.alaska.gov/mlw/mining/reclamation/nanuuq> [<https://perma.cc/44AJ-6CHP>] (last accessed Dec. 10, 2023).

200. *Id.*

201. Elizabeth Bluemink, *NovaGold forced to suspend operation of Rock Creek Mine*,

accident as a result of inadequate training and unsafe equipment operation.<sup>202</sup> The mine repeatedly discharged sediment in excess of state and federal Clean Water Act permits, resulting in federal fines of \$800,000.<sup>203</sup> Trying to salvage the project once NovaGold bailed on it, the Bering Strait Native Corporation (BSNC) bought the mine in 2012 and planned to make it operational, albeit on a smaller scale. Ultimately though, BSNC determined that the mine was not economically feasible and sold the equipment to another Canadian mining company.<sup>204</sup>

Slightly outside the scope of this Comment, but still worth mentioning, man camps<sup>205</sup> associated with Graphite One also pose safety threats to Native persons living in and around Nome. While Graphite One has promised the local communities that it will create jobs for the people of Nome, in reality, it is common for mining operations to hire mine operators and technicians from faraway places.<sup>206</sup> These non-local employees live in man camps that are notorious for causing increased levels of sexual abuse and violence in the local community.<sup>207</sup> Increased crime levels are compounded in areas of high Indigenous populations because non-Indian men can commit crimes in Indian Country with relative impunity. This impunity arises from (1) the decision to “implicitly divest”<sup>208</sup> Tribes of their sovereign right to prosecute non-Native

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ANCHORAGE DAILY NEWS (Nov. 24, 2008, updated Sept. 29, 2016), <https://www.adn.com/economy/article/novagold-forced-suspend-operation-rock-creek-mine/2008/11/25> [<https://perma.cc/RT8S-3HGW>]; Emily Russell, *Nome Native Corporation Sells Mining Equipment, Reclaims Land*, KTOO (Nov. 20, 2015), <https://www.ktoo.org/2015/11/20/nome-native-corporation-sells-mining-equipment-reclaims-land> [<https://perma.cc/GZZ3-EQ79>].

202. Bluemink, *supra* note 201.

203. *Id.*; Russell, *supra* note 201.

204. *Id.*

205. A man camp provides temporary workforce housing for high-paid laborers in resource extraction industries.

206. Gerry McGovern, *Mining Exploits Rather than Supports Local Communities* (Apr. 21, 2023), <https://www.cmswire.com/digital-experience/mining-exploits-rather-than-supports-local-communities/> [<https://perma.cc/2M7W-S7TT>].

207. See *Resources to Share: Extractive Industry, “Man Camps,” and Violence Against Women and Indigenous Peoples*, SCI. & ENV’T HEALTH NETWORK (Oct. 28, 2022), <https://www.sehn.org/sehn/2022/10/25/resources-to-share-extractive-industries-man-camps-and-violence-against-women-and-indigenous-peoples> [<https://perma.cc/LK2A-RHNA>]; Summer Blaze Aubrey, *Violence Against the Earth Begets Violence Against Women: An Analysis of the Correlation Between Extraction Projects and Missing & Murdered Indigenous Women, and the Laws that Permit the Phenomenon Through an International Human Rights Lens*, 10 ARIZ. J. ENV’T L. & POL’Y 34, 44-5 (2019). For information about why the crisis of Missing & Murdered Indigenous Women is exacerbated in Alaska, see Megan Mallonee, *Selective Justice: A Crisis of Missing & Murdered Alaska Native Women*, 38 ALASKA L. REV. 93 (2021).

208. This phrase arises from one of the most infamous cases in Federal Indian Law, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) which held in an entirely ahistorical opinion that Tribes no longer have authority to try non-Indians who commit crimes on Tribal lands. The Violence Against Women Act (VAWA) is referred to as a “mini-*Oliphant* fix” because it allows Tribes to assert jurisdiction over non-Indian defendants who have committed certain “VAWA crimes”, including domestic violence, sexual violence, child

defendants,<sup>209</sup> (2) the complex criminal jurisdictional patchwork in Alaska (and across Indian Country in the US), and (3) the low priority for State law enforcement in Native Villages in Alaska.<sup>210</sup> Currently, there is a man camp servicing Graphite One that is only accessible by helicopter. If Graphite One builds out a road in order to access the Port of Nome, then the man camp will have easy access to the Native Villages and the town of Nome, which could imperil the safety of local residents.<sup>211</sup>

Another concern for Tribes and other subsistence users in the area surrounding Graphite One is the revocation of D1 lands, currently withdrawn from mineral development by the federal government and managed by BLM.<sup>212</sup> Under ANCSA § 17(d)(1) (hence the name “D1 lands”), the federal government withdrew 158 million acres of land<sup>213</sup> from mineral entry or oil and gas development in the early 1970s.<sup>214</sup> In 2021, the Biden Administration announced in a series of Public Land Orders that it would revoke the

violence, sex trafficking, etc. Aubrey, *supra* note 207, at 44; Mallonee, *supra* note 207, at 93.

209. Tribes cannot prosecute non-Native defendants, unless they have Special Tribal Criminal Jurisdiction under the Violence against Women Act.

210. Aubrey, *supra* note 207, at 44; Mallonee, *supra* note 207, at 93.

211. In the context of Graphite One, concern about man camps has not risen to the level of high concern, perhaps because the man camp that currently exists is only accessible by helicopter and thus somewhat separated from the Nome community. However, opposition to mining projects across Alaska, most prominently the opposition to the Ambler Road project in the Brooks Range, routinely lists man camps as a primary concern. See e.g., Patrick Gilchrist, *Ambler Road Faces Near-Unanimous Opposition at Fairbanks Public Hearing*, KTVF (Nov. 7, 2023), <https://www.webcenterfairbanks.com/2023/11/08/ambler-road-faces-near-unanimous-opposition-fairbanks-public-hearing/> [<https://perma.cc/2W5K-U8WF>]; Colin Arthur Warren, *Take Action. Comment Now!: Ambler Road*, SUN STAR (Dec. 4, 2023), <https://www.uafsunstar.com/featuredarticle/take-action-comment-now-ambler-road> (stating “[m]any people voiced worries that the construction and operation of the mine would bring ‘man camps’ that would bring with them pain and violence to Native women.”).

212. Joaqlin Estus, *Alaska tribes urge protection for federal lands*, ALASKA BEACON (Dec. 7, 2023), <https://alaskabeacon.com/2023/12/07/alaska-tribes-urge-protection-for-federal-lands/> [<https://perma.cc/92XG-2A9L>]; Suzanne Little, *Alaska Tribes Urge Bureau of Land Management to Protect Critical Lands and Waters*, PEW TRUSTS (Nov. 20, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/11/20/alaska-tribes-urge-bureau-of-land-management-to-protect-critical-lands-and-waters> [<https://perma.cc/Q6MF-X8VU>]; Will the Federal Government Reverse Course, *Retain Protections on Intact Alaskan Landscapes?*, PEW TRUSTS (Apr. 6, 2021), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/04/will-the-federal-government-reverse-course-retain-protections-on-intact-alaskan-landscapes> [<https://perma.cc/QT38-R3BD>].

213. This included all land that had not been selected by the Federal, State, or Alaska Native Corporations during the Alaska Statehood Act and ANCSA land selection process, as well as an additional 80 million acres of lands that *had* been selected by one of these three entities. ANCSA § 17(d)(1)–(2).

214. ANCSA 17(D)(1) WITHDRAWALS: DRAFT ENVIRONMENTAL IMPACT STATEMENT ES-1, U.S. DEP’T INTERIOR (Dec. 2023), [https://eplanning.blm.gov/public\\_projects/2018002/200530736/20101297/251001297/ANCSA17d1\\_DEIS\\_508.pdf](https://eplanning.blm.gov/public_projects/2018002/200530736/20101297/251001297/ANCSA17d1_DEIS_508.pdf) [<https://perma.cc/XN9Q-FDT9>].

withdrawal of 28 million acres of D1 lands, including D1 lands that if revoked would become the property of the State of Alaska, that are directly abutting the Graphite One mining proposal.<sup>215</sup> In August 2022, the BLM initiated the process of preparing an Environmental Impact Statement (“EIS”) to consider the effects of opening up these D1 lands to oil, gas, and mineral extraction.<sup>216</sup> In October 2023, seventy-eight Tribes, including Mary’s Igloo and Teller, wrote to Secretary of Interior Debra Haaland asking her to maintain protections for D1 lands.<sup>217</sup> BLM published its Draft Environmental Impact Statement (DEIS) regarding the effects of potentially revoking D1 status from their 28 million acres in December 2023.<sup>218</sup> The Secretary of the Interior will soon make a decision, informed by this DEIS, regarding whether and to what extent to open D1 lands to extractive industry. If the D1 lands surrounding Graphite One are opened to development, environmentalist and Tribal members alike fear that Graphite One would purchase that land and expand its already expanding mine footprint. This could have disastrous effects on subsistence resources in the region.<sup>219</sup>

### C. *Tribal Opposition to the Graphite One Proposal to Date*

So far, Tribal opposition to the Graphite One proposal has taken a few forms. In addition to the letter supporting protections for D1 lands, Native Villages of Teller, Mary’s Igloo, and Brevig Mission filed in-stream flow reservations with the State of Alaska—a measure to protect their subsistence salmon resources from the water-intensive mine.<sup>220</sup> While the State has accepted the applications for filing, it has yet to grant the reservations stating that the Tribes will need to gather more data before it can start processing the applications.<sup>221</sup>

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215. PLO 7899 addresses the D1 lands on the Kobuk-Seward peninsula, where Graphite One’s mine proposal is located. *Public Land Order No. 7899; Partial Revocation of Public Land Orders No. 5169, 5170, 5171, 5173, 5179, 5180, 5184, 5186, 5187, 5188, 5353, Alaska*, 86 Fed. Reg. 5236 (Jan. 19, 2021).

216. See *Map: Lands being evaluated for potential revocation of ANCSA 17(d)(1) withdrawals in the Kobuk-Seward Peninsula Planning Area*, BLM NATIONAL NEPA REGISTER (Oct. 25, 2022), <https://eplanning.blm.gov/eplanning-ui/project/2018002/580> [<https://perma.cc/8MXT-RFCT>].

217. D1 letter, *supra* note 20.

218. ANCSA 17(D)(1), *supra* note 214.

219. Ramona DeNies, *Seizing a Shot to Protect 28 Million Acres of Alaska Public Land*, WILD SALMON CENTER (Jan. 18, 2023), <https://wildsalmoncenter.org/2023/01/18/seizing-a-shot-to-protect-28-million-acres-of-alaska-public-land> [<https://perma.cc/HJ7T-BS4Q>].

220. Press release from Native Village Traditional Councils of Teller, Mary’s Igloo & Brevig Mission: Tribes’ Instream Flow Reservation Applications for Streams At-Risk from Graphite One Mine Accepted by DNR (June 28, 2023) (on file with the author); Gannon, *Department of Defense Awards Graphite One \$375 Million*, *supra* note 180 (describing in-stream flow reservations as a water right, requiring water to be left in a river to protect fish habitat).

221. Email with Hal Shepherd (on file with the author).



The Tribes also recently filed requests with the DoD for consultation, in connection with the DoD's \$37.5 million grant to aid in the Graphite One's feasibility study.<sup>222</sup> In their respective requests, the Tribes argue that the \$37.5 million grant constitutes a "proposed federally assisted undertaking" on historic properties, that under § 106 of the National Historic Preservation Act (NHPA), requires the Department to consult with Tribes before proceeding. The Tribes argue that the feasibility study itself will harm the Tribe because the feasibility study requires land-disrupting activity, such as drilling, that can drain into and impact Imuruk Basin and its many subsistence resources.<sup>223</sup> This request for consultation will be discussed in depth in the next Part.

## V. TAKEAWAYS FROM THE STORY OF GRAPHITE ONE: HOW TRIBES CAN AND HAVE USED EXISTING LAWS TO PROTECT THEIR WAY OF LIFE

This Part discusses the opportunities and limitations posed by the NHPA consultation the Tribes requested of the DoD. It will also lay out further steps that Tribes could take to protect the Imuruk Basin and Kigluaik Mountains, both under the NHPA and under agencies' own consultation policies. The goal of this Section is not only to provide possible next steps to the Native Villages of Teller, Mary's Igloo, and Brevig Mission, but also to point out legal tools that Tribes across the U.S. can use to protect their lands and resources.<sup>224</sup>

### A. *Compelling Federal Agencies to Comply with NHPA § 106 Consultation Requirements*

#### 1. NHPA and Traditional Cultural Properties

Perhaps the most powerful legal tool available to Tribes opposing mining operations like Graphite One is the National Historic Preservation Act

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222. DoD letter, *supra* note 1.

223. *Id.* at 3.

224. In addition to Tribal opposition, environmental groups are working hard to oppose the Graphite One mine. In February, the Center for Biological Diversity filed a petition to list the Alaska Glacier Buttercup, a plant species believed to be found only in the Kigluaik Mountains next to the proposed Graphite One mine site, under the Endangered Species Act (ESA). Cooper Freeman, *Endangered Species Protection Sought for Alaskan Arctic Flower Threatened by Climate Change*, CTR. BIOLOGICAL DIVERSITY (Press Release) (Feb. 1, 2024), <https://biologicaldiversity.org/w/news/press-releases/endangered-species-protection-sought-for-alaskan-arctic-flower-threatened-by-climate-change-2024-02-01/#:~:text=ANCHORAGE%2C%20Alaska%E2%80%9494%20The%20Center%20for,Seward%20Peninsula%20in%20Western%20Alaska> [https://perma.cc/6L8Q-QVXD]; CTR. BIOLOGICAL DIVERSITY, *supra* note 1; Megan Gannon, *Conservationists ask Feds to protect rare Kigluaik Buttercup Flower*, NOME NUGGET (Feb. 9, 2024), <http://www.nomenugget.com/news/conservationists-ask-feds-protect-rare-kigluaik-buttercup-flower#:~:text=The%20Center%20for%20Biological%20Diversity,under%20the%20Endangered%20Species%20Act>. If the Fish and Wildlife Service lists the flower as threatened or endangered, that could limit Graphite One's ability to develop, which would have beneficial consequences for Tribes, though Tribes are not actively involved in the listing process.

(NHPA). The NHPA § 106 requires that federal agencies consult with State and Tribal Historic Preservation Officers (SHPOs and THPOs), Indian Tribes, and local governments whenever a federal action could impact a Traditional Cultural Property (TCP) (hereinafter this process will be referred to as “§ 106 Consultation”).<sup>225</sup> A TCP is defined in National Bulletin 38 as “[a place] that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that are (a) rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”<sup>226</sup> Together the federal agency and affected community shall consider what they can do to manage TCPs and avoid, reduce, and compensate for any damage they do to them.<sup>227</sup> TCPs—as concisely described by Thomas King, one of the authors of the National Bulletin 38<sup>228</sup>—are simply places that communities think are important.<sup>229</sup>

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225. NHPA § 106 (“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.”); 54 U.S.C. §§ 306101(a) and 306102 [hereinafter NHPA § 110]; 36 C.F.R. 800.3 (clarifying that to “take into account the effect of the undertaking on any historic property” the federal agency must engage in consultation with the affected Tribes, the State Historic Preservation Officer and/or the Tribal Historic Preservation Officer, and any other appropriate groups); *see generally*, THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT (Alta Mira Press: 2003).

226. NAT’L PARK SERV., U.S. DEP’T INTERIOR: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 38 (1990) [hereinafter National Bulletin 38]. The National Park Service is currently in the process of updating this bulletin. The draft National Bulletin 38 is available here: *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Places DRAFT October 27, 2022*, NAT’L PARK SERV, <https://parkplanning.nps.gov/document.cfm?parkID=442&projectID=107663&documentID=124454> [https://perma.cc/TX2Z-EXJL] (last visited Dec. 12, 2023). The draft bulletin defines a TCP as “a building, structure, object, site, or district that is eligible for inclusion in the National Register for its significance to a living community because of its association with cultural beliefs, customs, or practices that are rooted in the community’s history and that are important in maintaining the community’s cultural identity.” *Id.* at 7.

227. KING, *supra* note 225, at 5, 183–204. Criteria and examples describing what constitutes an “adverse effect” can be found at 36 C.F.R. 800.5(a). “In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.” *Id.*

228. National Bulletin 38 is published by the Advisory Council on Historic Protection and provides guidelines for evaluating and documenting Traditional Cultural Properties.

229. KING, *supra* note 225, at 1. Any group, Indigenous or not, can claim a TCP and thus a right to consultation under NHPA § 106. *Id.* at 122 (Alta Mira Press: 2003) (“TCPs are, after all, for everyone.”).

Section 106 Consultation is a particularly valuable mechanism for Tribes seeking to stop or slow the development of a nearby mine for the following reasons. First, unlike the agency consultation policies discussed in Subpart V(B), the NHPA is a statute that recognizes a judicially enforceable right to consultation. Moreover, because the NHPA is a statute, it cannot be wiped away by an unfriendly Presidential Administration.<sup>230</sup> The NHPA may also provide stronger Tribal consultation protections than federal agency guidelines do because it triggers consultation requirements whenever a TCP is implicated in a federal decision, regardless of whether the TCP is on Indian land. This creates a more clear-cut rule than the one in EO 13175, which requires Tribal consultation whenever a federal agency is considering a policy with “tribal implications.”<sup>231</sup>

That said, the NHPA is not without its flaws. At its core, the NHPA requires consultation, but it does not require consensus, nor does it require that the agency avoid harming a TCP. Like NEPA, the NHPA is a look-before-you-leap statute, meaning that the federal agency must take steps to understand the consequences of its actions but ultimately can still take those actions if it chooses to. The assumption underlying NHPA is that after federal agencies have worked closely alongside Tribes or other affected communities to understand the significance of their TCPs and identify possible means of avoidance or mitigation, the federal agency will be compelled to act on those findings and protect these “places that count.”<sup>232</sup> Thus, even though the NHPA does not prevent federal agencies from harming TCPs, it plays an important role in ensuring that Tribes (and other affected communities) are in the room when decisions are made about lands significant to them. This gives Tribes considerable power in deciding how to protect their ancestral lands and subsistence resources.

## 2. How Tribes Can Wield NHPA to Work in their Favor

In their letter to the DoD, the Tribes emphasize that the DoD failed to discharge its duty to consult with them before granting Graphite One \$37.5 million for its feasibility study.<sup>233</sup> This is an important first step for the Tribes, but there is more that they can do to maximize the NHPA’s utility in protecting their consultation rights and asserting their Tribal sovereignty.

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230. O’Neil, *supra* note 126, at 678; Dean B. Suagee, NHPA § 106 Consultation: A Primer for Tribal Advocates, *FED. LAWYER* 41 (2018).

231. Elizaveta Barrett Ristroph, *Strategies for Strengthening Alaska Native Village Roles in Natural Resources Management*, *WILLAMETTE ENV’T L.J.* 83 (Spring 2016). That said, the “policies with Tribal implications” may include policies that affect lands outside of Indian Country if an agency says so. *See e.g.*, DoD’s consultation policy discussed in Subpart V(B) (1).

232. *See generally* KING, *supra* note 225.

233. DoD Letter, *supra* note 1, at 5–6.

To make it clear to both the DoD and the federal agencies that will be involved in permitting for Graphite One in the future, the Tribes could try to elevate Imuruk Basin and the Kigluaik Mountains as TCPs. With this recognition, the Native Villages would have guaranteed consultation rights whenever a federal agency takes an action, such as giving Graphite One a sizeable grant for its feasibility study or authorizing a 404 permit for Graphite One, that affects the TCP. Generally speaking, federal agencies, State Historic Preservation Officers, and/or the Tribal Historic Preservation Officers—not the Tribe (or other affected community)—bear the burden of identifying TCPs and reaching out to consult with the affected community.<sup>234</sup> But when, as here, these entities fail to discharge this duty, it is up to the Tribe to right that wrong.

So, how can the Imuruk Basin and the Kigluaik Mountain's obtain TCP status? The most important thing to know is that protecting a TCP *does not require* going through the nomination process to list the property on the National Register.<sup>235</sup> Instead, the Tribes should use the National Register criteria to demonstrate that the Imuruk Basins and the Kigluaiks satisfy the eligibility requirements for the National Register. From there, the Tribes need only receive a consensus determination from the THPO/SHPO and the agency to deem the Imuruk and the Kigluaiks eligible for the National Register for the purposes of § 106 consultation. Alternatively, if the agency and the THPO/SHPO cannot agree that the Imuruk and Kigluaiks are eligible, the Keeper of the National Register may make a formal determination using nomination criteria.<sup>236</sup>

Even at first blush, it is clear that Imuruk Basin and the Kigluaik Mountains, which are integral to the cultural practice of subsistence for the local Tribes, should qualify as a TCP. Pursuant to the definition of a TCP in the National Register, the Imuruk Basin and the Kigluaik Mountains are associated “with cultural practices or beliefs of a living community that are (a) rooted in that community’s history, and (b) are important in maintaining the

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234. KING, *supra* note 225, at 148 (“It’s not the responsibility of a tribe, or any other group, to identify historic properties for an agency; it’s the agency’s responsibility to do so.”); *see also Pueblo v. Sandia*, 50 F.3d 856 (10th Cir. 1995). That said, Ninth Circuit caselaw also suggests that a Tribe cannot sit on its hands and expect an agency to identify its cultural properties without assistance. *See* KING, *supra* note 225, at 155, *citing Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999) and *Morongo Band v. FAA*, 161 F.3d 569 (9th Cir. 1998).

235. KING, *supra* note 225, at 131. It would be time-consuming and possibly unwise for Tribes to try to get the Imuruk Basin and Kigluaik Mountains listed on the National Register because that would shift the burden of proving their TCP’s eligibility for the National Register to the Tribes, when it should be the agency and the SHPO/THPO’s responsibility. *Id.* at 160.

236. *Id.* at 160–61, 167, 169. King highly recommends against this route because nomination criteria, as opposed to eligibility criteria, are extremely nitpicky, and use factors such as property boundaries that are not directly relevant or appropriate for TCPs.

continuing cultural identity of the community.”<sup>237</sup> To be a TCP, a place must fall under one of the four following criteria: (a) Association with Events That Have Made a Significant Contribution to the Broad Patterns of Our History, (b) Association with the Lives of Persons Significant in Our Past, (c) Design or Construction Characteristics, or (d) History of Yielding, or Potential to Yield, Information Important.<sup>238</sup> According to King, most TCPs are found eligible under Criterion A.<sup>239</sup> The National Bulletin clarifies that “broad patterns of our history” include a community’s long-standing interactions with a landscape’s natural environment.<sup>240</sup> Thus, Imuruk Basin and the Kigluaik Mountains, with which the Inupiaq have had a relationship for thousands of years, would likely fall under Criterion A.

TCPs tend to have at least one of the following five attributes: spiritual power, practice, stories, therapeutic quality, and remembrances.<sup>241</sup> The Imuruk Basin and Kigluaik Mountains share many of these qualities. Practice refers to the idea that this place is associated with a ritual (spiritual or not) that *must* be carried out in that place. Subsistence harvesting in the Imuruk Basin and Kigluaik Mountains fits neatly within this category. Stories associated with a place may elevate it to the level of a TCP, whether the stories describe ancestors or an origin story or “write history in the land.” The Kigluaiks play a central role in the creation stories of nearby Tribes, so the Kigluaiks encapsulate this quality.<sup>242</sup> Remembrances refers to the idea that a group of people feel a sense of attachment, or ease, or comfort to this place.<sup>243</sup> This is certainly true of the Kigluaiks which locals refer to as a place that carries with it a sense of belonging and home.<sup>244</sup>

Though the term “property” may make it sound that TCPs have to be a certain size or have to be owned by the affected community, King clarifies this is not the case.<sup>245</sup> TCPs can be whole mountain ranges, landscapes, lakes, and

237. National Register, *supra* note 226. The draft bulletin defines a TCP as “a building, structure, object, site, or district that is eligible for inclusion in the National Register for its significance to a living community because of its association with cultural beliefs, customs, or practices that are rooted in the community’s history and that are important in maintaining the community’s cultural identity.” *Id.*

238. 36 C.F.R. § 60.4 (1981). *See also* NAT’L PARK SERV., *supra* note 227.

239. KING, *supra* note 225, at 167.

240. NAT’L PARK SERV., *supra* note 226, at 30.

241. KING, *supra* note 225, at 100–05.

242. *See generally* WILLIAM A. OQUILLUK, *PEOPLE OF KAUWERAK: LEGENDS OF THE NORTHERN ESKIMO* (1981).

243. KING, *supra* note 225, at 100–05.

244. Webinar: *The Falsehood of “Critical and Strategic” Minerals with Bonnie Gestring and Austin Ahmasuk*, ALASKA CMTY. ACTION ON TOXICS (Oct. 25, 2023), <https://www.akaction.org/webinars/the-falsehood-of-critical-and-strategic-minerals-with-bonnie-gestring-and-austin-ahmasuk> [<https://perma.cc/AV7M-6ABX>] (paraphrasing Austin Ahmasuk at 7:45).

245. KING, *supra* note 225, at 17 n.6 (“We called them ‘properties’ in Bulletin 38 because the National Historic Preservation Act talks about ‘historic properties.’ Some have objected to ‘properties’ because to them it implies commodities that can be bought and sold; some

ivers.<sup>246</sup> TCPs do not have to be the products of, or contain, the work of human beings.<sup>247</sup> Famous examples of TCPs include the Black Hills, a spiritual place to the Lakota, Devil's Tower or Bears Lodge on the margins of the Black Hills, and the San Francisco Peaks bordering the Navajo Reservation.<sup>248</sup> While none of these places are listed on the National Register, they are regarded as TCPs and therefore afforded § 106 consultation.<sup>249</sup> The Imuruk Basin and Kigluaik Mountains thus should trigger the same § 106 consultation requirements.

TCPs do not need to be sacred sites.<sup>250</sup> However, if the Tribes are able to present evidence that the Imuruk Basin or the Kigluaik Mountains are sacred sites, such a showing may afford those places additional protection. While NHPA § 106 requires federal agencies to “take into account” the effects of their actions on sacred sites, EO 13007 sets a higher bar for sacred sites, directing federal agencies to avoid harming sacred sites “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.”<sup>251</sup>

Because the NHPA § 106 consultation process can be triggered simply by a place being *eligible* for listing on the National Register, rather than actually being listed on the Register, it is difficult to know whether there are any TCPs already recognized in Alaska. An article from 2014 suggests that there are no TCPs recognized in Alaska.<sup>252</sup> The type of § 106 consultation that has taken place in Alaska in recent years appears to regard “scoping,” not avoidance and mitigation for projects affecting TCPs. For example, as will be discussed in Section V(B)(2), the BLM says it engaged in § 106 consultation when it conducted an environmental impact statement regarding the revocation of

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such critics prefer ‘places! I . . . use the words interchangeably.’”)

246. *Id.* at 118–20.

247. *Id.* at 167.

248. *Id.* at 119.

249. *Id.* at 118. Notably, these examples also demonstrate the shortcomings of NHPA. As will be discussed *supra*, § 106 consultation does not require the federal agency to avoid or even mitigate harm to the TCP. Even if the Advisory Council on Historic Preservation recommends against harming the TCP, the federal agency still has discretion to act as it pleases. In the case of the San Francisco Peaks, a sacred place for the Navajo Nation, being recognized as a TCP did not prevent the peaks from being covered in treated sewage water in the form of artificial snow. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (holding that covering the San Francisco Peaks in sewage water did not violate the Navajo Nation’s right to practice their religion because the federal government was not conditioning the practice of their religion on a governmental benefit and was not coercing the Tribe into not practicing their religion via civil or criminal sanctions).

250. *Id.* at 7.

251. Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996).

252. Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 233 (2014) (using the term Traditional Cultural District interchangeably with the term Traditional Cultural Property).

D1 withdrawals in Alaska.<sup>253</sup> The Final EIS for the Pebble Mine project also mentions that a § 106 consultation process took place.<sup>254</sup> However, these Environmental Impact Statements do not mention the presence or identification of TCPs.<sup>255</sup> If Tribes in the areas affected by those projects had worked with the SHPO or THPO to declare the existence of a TCP, then the § 106 consultation process for those projects would have revolved around reaching consensus between the Tribes and agencies on how to avoid and mitigate harm to the TCP. In other words, identifying TCPs gives the § 106 consultation process purpose and direction. If § 106 consultation is merely a scoping exercise that does not result in the identification of TCPs, much of the protective potential of NHPA is reduced.

In future consultations with the DoD, or any other federal agency involved in assisting Graphite One,<sup>256</sup> the Tribes may find it advantageous to come to these meetings prepared to discuss *why* their land is a TCP that meets the criteria<sup>257</sup> for the National Register and with *what forms of avoidance and mitigation* the Tribes are comfortable. Notably, identifying a TCP does not require drawing up the boundaries of that property or even stating precisely the religious or spiritual beliefs that give rise to the place's importance.<sup>258</sup> Many Tribes, understandably, do not want to share spiritual information with federal agencies, especially if sharing that information means risking that the location of sacred sites will be leaked to the public.<sup>259</sup> Thus, it is important to note that identifying TCPs should allow Tribes to give enough information to

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253. ANCSA 17(D)(1) WITHDRAWALS: DRAFT ENVIRONMENTAL IMPACT STATEMENT 1–10, BUREAU LAND MGMT. (Dec. 2023), [https://eplanning.blm.gov/public\\_projects/2018002/200530736/20101297/251001297/ANCSA17d1\\_DEIS\\_508.pdf](https://eplanning.blm.gov/public_projects/2018002/200530736/20101297/251001297/ANCSA17d1_DEIS_508.pdf). The DEIS states that BLM will conduct a programmatic agreement (PA) prior to the publication of a Final EIS. The PA “will include measures to minimize and mitigate adverse effects to historic properties”; but the DEIS does not state what historic properties the PA will consider. *Id.* at 1–11.

254. PEBBLE PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT 6–1, 6–12, 6–13, U.S. ARMY CORPS ENG’R (July 2020), [https://pebblewatch.com/wp-content/uploads/2020/12/Ch6\\_ConsultCoord.pdf](https://pebblewatch.com/wp-content/uploads/2020/12/Ch6_ConsultCoord.pdf).

255. *Id.* at 6–1, 6–4 (making no mention of specific TCPs considered throughout the § 106 consultation process); ANCSA 17(D)(1) WITHDRAWALS, *supra* note 253 (stating that “[t]he BLM has determined that revocation of the ANCSA 17(d)(1) withdrawals has the potential to adversely affect historic properties, since the transfer of land (that may contain historic properties) out of Federal ownership is an adverse effect pursuant to 36 C.F.R. 800.5(a)(2)(vii);” but not stating what any of those historic properties are).

256. *See Section V(B)(2).*

257. King notes that the bulletin requires that the association between the place and “events that make a significant contribution to the broad patterns of our history” under Criterion A be documented through “accepted means of historical research.” However, King states that in practice, you don’t need to document this association in great detail, because the SHPO/THPO and the agency can merely choose to agree for the sake of § 106 consultation regulations that the place qualifies. KING, *supra* note 225, at 167.

258. *Id.* at 132, 148.

259. *See e.g., id.* at 250.

identify their lands as TCPs, but not so much information that the Tribes feel the confidentiality of their spiritual or cultural practices is violated.<sup>260</sup>

Looking beyond just the context of Graphite One, Tribes around Alaska should plan to take full advantage of the NHPA. With only one THPO in all of Alaska, Tribes should consider lobbying to create more THPOs across the State who can speak for the interests of Alaska Natives. Tribes should also consider working with the SHPO (or THPO, if possible) to create agreements that more lands around Alaska are TCPs, significant to nearby Tribes.

The utility of TCPs should not be overstated though. Recognizing more lands in Alaska or the U.S. more broadly as eligible to be TCPs will not guarantee that these special places will be protected. Take for example the copper mine threatening the sacred Apache lands at Oak Flat in Arizona.<sup>261</sup> In 2016, the Forest Service listed Oak Flat on the National Register of Historic Places, triggering § 106 consultation requirements before the mining company could acquire the land from the Forest Service.<sup>262</sup> After years of litigation, an *en banc* 9<sup>th</sup> Circuit decision in March 2024 denied the Apache Stronghold's request to enjoin a land transfer that would enable the mining company to start mining, thus paving the way for a listed TCP to be destroyed by extractivism.<sup>263</sup> For this reason, Part VI of this Comment will consider ways to improve protections for Tribal resources beyond protections in the NHPA.

#### B. *Holding Agencies Accountable to Their Own Consultation Guidelines*

In addition to enforcing statutes like the NHPA that mandate consultation, Tribes can benefit from enforcing federal agencies' consultation guidelines anytime a federal agency is engaging in an action with "tribal implications."<sup>264</sup> Recall from Part III that EO 13175 required federal agencies to establish Tribal consultation policies. This subsection discusses consultation guidelines written by agencies that are likely to interact with the Graphite One project.

In addition to holding agencies accountable to their own consultation guidelines, Tribes may also choose to write up their own consultation policies to be signed with the relevant federal agencies.<sup>265</sup> The consultation policy could

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260. *See id.* at 251.

261. *See* discussion of Oak Flat, *supra* note 7.

262. Anita Snow, *How Apache Stronghold's fight to protect Oak Flat in central Arizona has played out over the years*, AP NEWS (Mar. 1, 2024), <https://apnews.com/article/oak-flat-copper-timeline-72e1ee20580f1ee0e57dd7653b6a770f> [<https://perma.cc/PBH9-TF54>].

263. *Apache Stronghold v. United States*, 95 F.4<sup>th</sup> 608 (2024). This case was decided on Religious Freedom grounds, not on the validity of the § 106 consultation. Another case that a lower court decided not to consolidate with *Apache Stronghold* will answer whether the § 106 consultation was deficient. Dissent at n. 5, *Apache Stronghold v. United States*, 95 F. 4<sup>th</sup> 608 (2024).

264. EO 13175, 65 Fed. Reg. at 67,249.

265. *See e.g.*, TRIBAL CONSULTATION POLICY & RELATED DOCUMENTS, USACE TRIBAL NATIONS COMMUNITY OF PRACTICE 4 (2013), [https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20brochure%20](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%20)



address whether the Tribes want to be met with the agency individually or all together, how much time the Tribes need to offer meaningful consultation, whether the Tribes require compensation for their consultation work and how much, etc. The following subsections will introduce the consultation policies for the agencies that the Native Villages of Teller, Mary's Igloo, and Brevig Mission are most likely to engage with in the Graphite One proposal process.

### 1. Department of Defense and the \$375 Million Grant

Even if the Imuruk Basin and Kigluaik Mountains are not considered eligible to be a TCP, the DoD still has a duty to consult with the Native Villages about its \$375 million grant to the Graphite One project. As stated in the letters that Native Village of Mary's Igloo, Brevig Mission, and Teller wrote to the DoD, the DoD violated its own consultation policy when it failed to consult with the Native Villages before granting Graphite One \$375 million for its feasibility study.<sup>266</sup> The DoD's consultation policy states that DoD components must consult with Tribes "whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands."<sup>267</sup> Consultation "will be conducted for proposed actions, plans, or ongoing activities that may have the potential to significantly affect (1) land-disturbing activities . . . (5) management of properties of traditional religious and cultural importance, (6) protection of sacred sites from vandalism and other damage, (7) access to sacred sites and treaty-reserved resources . . . [and] (12) access to subsistence resources."<sup>268</sup>

The consultation policy does not explicitly state that financial grants or incentives trigger a need for Tribal consultation. This is an area where guidance from the Biden Administration, perhaps in the form of an executive order, stating that financial grants and incentives with "tribal implications" do trigger Tribal consultation requirements would help clarify Tribal rights. That said, the Tribes' arguments in their letter to the DoD, stating that the feasibility study

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2013.pdf (recognizing a Tribe's right to establish consultation procedures for a given project); NOAA PROCEDURES FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS 9, NOAA (June 2023) ("it may be useful and expeditious for those tribes and NOAA offices to develop protocols reflecting their mutually preferred timeline for and means of communication and exchange of information.")

266. DoD letter, *supra* note 1, at 2–3. As of the time of this writing, the Tribes have not yet received a response from the DoD.

267. DoD Instruction 4710.02: DoD Interactions with Federally Recognized Tribes 3.1 (Sept. 24, 2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf> [<https://perma.cc/Q9XW-B2JA>]. Note that DoD's policy for Tribal consultation is much more restrictive (requiring a showing of "potential to significantly affect") than consultation policies from the other agencies discussed in this Section. DoD published implementation guidance for the 2018 consultation policy, in compliance with the Memorandum on Uniform Standards for Tribal Consultation, in 2021. U.S. Dep't of Defense Plan of Action to Implement the Policies and Directives of E.O. 13175, Off. Sec. Def. (May 2021).

268. DoD Instruction 4710.02 at 3.2.

that the DoD is funding is itself a “land-disturbing activity,” should suffice to demonstrate that Tribal consultation is required here.<sup>269</sup>

DoD consultation policy states that the agency must involve Tribal government early in the planning process, giving Tribes enough time to provide meaningful comments that may affect the decision.<sup>270</sup> The consultation policy does not require consent, but it does require that DoD reach out to Tribes (multiple times if necessary) to ask for consultation, give careful consideration to all available evidence and points of view, and notify the Tribes of its ultimate decision.<sup>271</sup> Given that Imuruk Basin and the Kigluaik Mountains are critical for subsistence harvesting and a spiritual place for the Inupiaq, DoD had an obligation to consult with the Native Villages before granting Graphite One \$37.5 million.

## 2. Bureau of Land Management and the Opening of D1 Lands

BLM did consult with Tribes in anticipation of its issuance of an EIS regarding opening up D1 lands to mineral development. However, the Tribes argue that the consultation was inadequate.<sup>272</sup>

D1 lands are unique to Alaska, but the phenomenon of promoting mine development by turning federal land into state or private land through a land exchange is becoming an increasingly familiar part of extractive industry practice. For example, Oak Flat, a sacred place to the Apache now slated to become a massive copper mine, is in the process of being transferred from the Forest Service to a private mining company.<sup>273</sup> Demanding consultation from federal agencies like the Forest Service or BLM that engage in these land transfers is critical to ensuring that Tribal governments can influence these agencies’ decisions.

BLM has its own manual and handbook on Tribal consultation.<sup>274</sup> The BLM manual states that the BLM will consult with Tribes when consultation

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269. “DoD is directly supporting a land-disturbing project that will inevitably affect tribal interests in the area. Such a decision requires tribal consultation.” DoD letter, *supra* note 1, at 2.

270. *Id.* at 3.3(a)(1).

271. *Id.* at 3.3(b).

272. D1 letter, *supra* note 20 (seventy-eight Tribes signed on to this letter, including Mary’s Igloo, Teller, and Brevig Mission).

273. As discussed *supra*, a recent en banc 9<sup>th</sup> Circuit opinion denied Apache Stronghold, a nonprofit opposing the transfer of Oak Flat to mining company ownership, a preliminary injunction for the land transfer. *Apache Stronghold v. United States*, 95 F. 4th 608 (2024). Apache Stronghold intends to appeal the case to the United States Supreme Court. Anita Snow, *How Apache Stronghold’s fight to protect Oak Flat in central Arizona has played out over the years*, AP NEWS (Mar. 1, 2024), <https://apnews.com/article/oak-flat-copper-timeline-72e1ee20580f1ee0e57dd7653b6a770f>.

274. BUREAU LAND MGMT., BLM MANUAL & 1780 TRIBAL RELATIONS, MS 1780 (Dec. 15, 2016), <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>; BUREAU OF LAND MGMT., BLM HANDBOOK 1780–1 IMPROVING AND SUSTAINING BLM-TRIBAL RELATIONS (P), H-1780–1 (Dec. 15, 2016), [https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1\\_\\_0.pdf](https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1__0.pdf).

is required by statute, regulation, or policy, and “for any additional action that will have a substantial direct effect on Tribal planning issues, including regulations, rulemaking, policy, guidance, or operational activities.”<sup>275</sup> BLM also “commits to addressing and, where practicable, minimizing potential disruption of the traditional expression or maintenance of these values that might result from BLM land use decisions.”<sup>276</sup> This presents a fairly robust promise for both Tribal consultation and minimization of harm to Tribal interests. Key to making the most of BLM’s consultation policy will be triggering statutory consultation requirements, such as those in the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA),<sup>277</sup> so that Tribes do not have to rely on the troublesome “substantial direct effects” test to trigger consultation.

BLM also “recognizes that Indian tribes are knowledgeable sources and experts concerning their own cultures. They can provide unique insight and explanation of Tribal history and land uses. When provided with such information, the BLM will take this into account when making decisions related to the identification, evaluation, treatment, and management of natural and heritage resources.”<sup>278</sup> According to the manual, BLM has traditionally contracted with Tribes for work on reports and studies related to their resources and “will allow an expansion of compensation to include Native American contributions of information, comments, or input into the BLM’s decision-making processes.”<sup>279</sup> These statements are significant because they recognize Indigenous peoples as knowledge-producers who provide a valuable service to BLM, a service which the BLM should pay for. In future interactions with BLM, the Tribes should be sure to insist upon compensation, pursuant to these provisions.

Frustratingly, with regards to BLM’s EIS concerning the opening of D1 lands, if Tribes were to sue over BLM’s alleged inadequate consultation, their suit would likely fail. This is because the 9<sup>th</sup> Circuit has held that handbook provisions (in this case, provisions regarding consultation) are not binding on an agency unless they “have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress,” and “prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice.”<sup>280</sup> So, the decision by the coalition of Tribes who wrote the D1 letter to appeal directly to the Secretary of the Interior regarding the opening of D1 lands, rather than moving through the Court system, is well-advised.

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275. BLM MANUAL & 1780 TRIBAL RELATIONS, M-1780, BUREAU LAND MGMT. at 1–15(6).

276. *Id.* at 1–15(11).

277. *See* Subpart V(A).

278. BLM MANUAL & 1780 TRIBAL RELATIONS, M-1780, BUREAU LAND MGMT. at 1–15(10).

279. *Id.* at 1–15, 1–16.

280. Ristroph, *supra* note 147, at 71 (citing *United States v. Fifty-Three (53) Eclactus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)).

### 3. U.S. Army Corps of Engineers and § 404 CWA Permits

Assuming Graphite One needs a Clean Water Act § 404 permit (which the pre-feasibility study suggests it will), USACE has jurisdiction over that permitting process.<sup>281</sup> USACE, pursuant to its own consultation policy, must engage with the Native Villages before issuing a 404 permit.<sup>282</sup> USACE consultation policy emphasizes the goal of reaching consensus, rather than merely ticking the box of the consultation requirement: “[t]o the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken.”<sup>283</sup>

The Tribes will want to make sure that they are making their voice heard throughout the 404 permitting process, if Graphite One ever makes it to that stage. One way Tribes can make their voices heard, beyond consultation, is by serving as a “consulting agency” in the NEPA process, discussed in the next subsection.

### 4. Council on Environmental Quality and the National Environmental Policy Act

The Clean Water Act permitting process would trigger the need to complete an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA). The Council on Environmental Quality (CEQ) writes the regulations and guidance that shapes the NEPA process. Section 1501.2 and 1501.7 of CEQ regulations address Tribal consultation.<sup>284</sup> Section 1501.2 requires that each agency conducting NEPA review:

[p]rovide for actions subject to NEPA that are planned by private applicants or other non-Federal entities before Federal involvement so that . . . [t]he Federal agency consults early with appropriate State, Tribal, and local governments and with interested private persons and organizations when their involvement is reasonably foreseeable.<sup>285</sup>

CEQ defers to the Tribal consultation policy of the lead agency conducting the NEPA analysis (in this case, USACE).

281. Notably, if Alaska assumes jurisdiction over the 404 permitting process, then USACE would no longer have jurisdiction and the Tribes would lose this opportunity for government-to-government consultation.

282. U.S. ARMY CORPS OF ENGINEERS, TRIBAL CONSULTATION POLICY & RELATED DOCUMENTS (Nov. 1, 2013), [https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf) [<https://perma.cc/35U5-25EU>].

283. Ristroph, *supra* note 147, at 76.

284. CEQ Guidance and Executive Orders Related to Native Americans, NEPA.GOV (last accessed Dec. 11, 2023), <https://ceq.doe.gov/get-involved/tribes-and-nepa.html>. [<https://perma.cc/S5RV-K5W7>].

285. 40 C.F.R. § 1501.2(b)(4). Alaska Native Corporations are not tribal governments, so they would not be eligible to serve as consulting agencies.

Section 1501.7 authorizes Tribal governments to act as “joint lead agencies” to the preparation of an environmental assessment or impact statement.<sup>286</sup> In a subsequent memorandum, CEQ also urges agencies to “actively solicit” Tribal governments to be “cooperating agencies” in the implementation of NEPA’s environmental impact statement process.<sup>287</sup> Being listed as a cooperating agency would allow the Tribes to have more power to shape the NEPA process, rather than merely consulting on it. However, operating as a cooperating agency could be extremely time- and resource-intensive for the Tribes. CEQ regulations do not guarantee that Tribes will be compensated for their work as cooperating agencies:

Cooperating agencies are normally expected to use their own funds for routine activities. But to the extent available funds permit, the lead agency should fund or include in its budget requests funding for major activities or analyses that it requests from cooperating agencies.<sup>288</sup>

So, Tribes will want to consider whether they have the time, resources, and staff to take up this opportunity.

As sovereigns, Tribes have a right to be consulted when the federal government is considering an action that would affect them. For all the reasons stated in Section III(A), these consultations can be inadequate. But, they are still a Tribal right, and so, Tribes should, if they deem it worth their time and energy, enforce that right whenever they can, looking for footholds in statutes like the NHPA and in agency guidelines that trigger Tribal consultation early and often.

## VI. IDEAS FOR NEW LAW THAT BOLSTERS TRIBAL SOVEREIGNTY IN THE FACE OF THE GREEN TRANSITION

Acknowledging the inadequacies of Tribal consultation provisions, this final Section proposes changes that could be made to Alaska state and federal law to better protect Indigenous people’s rights as the push to mine domestically intensifies. This Part will use the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)—which recognizes rights to *inter alia* self-determination,<sup>289</sup> culture,<sup>290</sup> land and natural resources,<sup>291</sup> consultation<sup>292</sup> and participation<sup>293</sup> in decisions affecting their rights—as a source of inspiration.

286. 40 C.F.R. § 1501.7(b).

287. EXEC. OFF. PRES., MEMORANDUM FOR HEADS OF FEDERAL AGENCIES: DESIGNATION OF NON-FEDERAL AGENCIES TO BE COORDINATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF NATIONAL ENVIRONMENTAL POLICY ACT (July 28, 1999).

288. *Id.* at 2 (citing 40 C.F.R. § 1501.6(b)(5)).

289. UNDRIP Art. 3.

290. UNDRIP Arts. 8, 11, 12, 25, 32.

291. UNDRIP Arts. 26, 27, 28, 29.

292. UNDRIP Arts. 10, 11, 19, 28, 29, 32.

293. UNDRIP Art. 18.

Because the U.S. has yet to ratify UNDRIP, the U.S. has so far done nothing to implement the promises that the Declaration offers. Subpart VI(A) proposes laws that could be implemented at the State level in Alaska to help implement UNDRIP, specifically regarding the use of free, prior, and informed consent (FPIC). Admittedly, it is unlikely that the State of Alaska will embrace the idea of FPIC, so this Subsection will also present ways in which Tribes can create their own FPIC protocols in order to realize the promise of UNDRIP more immediately for their communities. Finally, Subpart VI(B) considers ways that the U.S. or the State of Alaska could implement the positive duties imposed upon the State in UNDRIP to redress harm and justly compensate Native peoples for the activities like those pursued by extractive industry.

#### A. *Implementing FPIC*

UNDRIP mandates that FPIC be the manner in which consultation is conducted.<sup>294</sup> FPIC is referenced in six articles of UNDRIP: 10, 11, 19, 28, 29, and 32. The two most written-about FPIC provisions, and the two most relevant in the extractivism context are Articles 19 and 32.<sup>295</sup> Article 19 states that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>296</sup> Article 32 states that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.” Article 32 imposes a positive duty on the States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>297</sup> In addition to FPIC, UNDRIP recognizes Indigenous Peoples’ right to participate in decision-making processes.<sup>298</sup>

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294. See UNDRIP Arts. 10, 11, 19, 28, 29, 32. For definition of FPIC, see *supra* Subpart III(A), note 134, and accompanying text.

295. Sasha Boutlier, *Free, Prior, and Informed Consent and Reconciliation in Canada: Proposal to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, 7 W. J. LEGAL STUD. 1 (2017); Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALBANY L. REV. 429–92 (2017).

296. UNDRIP Art. 19.

297. UNDRIP Art. 32.

298. “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” UNDRIP, Art. 18.

There is some disagreement in the scholarship on UNDRIP as to whether FPIC requirements are mandatory in all cases and whether FPIC grants Indigenous Peoples' a "veto power" over projects like those pursued by extractive industry. For example, one scholar points out that the phrase "in order to" in Art.19 could plausibly be read in one of two ways. In one interpretation, states *must* obtain FPIC from Indigenous Peoples before proceeding with a project. Or, in another interpretation, that states should *in good faith* seek FPIC from Indigenous Peoples, but may proceed if such consent cannot be obtained.<sup>299</sup> The distinction between these two approaches is sometimes labeled "progressive" v. "flexible." "The 'progressive' approach postulates that all measures affecting indigenous peoples require consent as a manifestation of the right to self-determination, while in the 'flexible' approach, consent is restricted to the cases of profound impact on groups' rights."<sup>300</sup>

Former Special Rapporteur on Indigenous Peoples' Rights, James Anaya, argues that FPIC "should not be regarded as according Indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with Indigenous."<sup>301</sup> The goal of FPIC is to rebalance the scales, so that Indigenous Peoples, who have been historically excluded from decision-making processes affecting their lands and resources since the start of colonization, can have a seat at the table. Centering consent as the goal of consultation uplifts Indigenous Peoples' sovereignty and affirms their right to dictate the conditions of their consent to State or non-governmental entity (such as a mining company) seeking to disrupt their lands and resources.

Acknowledging that FPIC is not intended to give Tribes an *absolute* veto power over extractive industry could help to make the following proposals implementing FPIC in Alaska state law more politically palatable. First, I propose that the State of Alaska adopt state-versions of the NEPA and NHPA that trigger consultation requirements with affected Tribes whenever an Alaska state agency is carrying out or approving a project that may have a significant effect on the environment and/or Tribal cultural resources. This is important in the context of Graphite One because a state-NEPA and -NHPA statute would trigger an EIS and Tribal consultation requirements on *state* land (such as the land where the Graphite One proposal sits), where there is currently a gap in the law.

In enacting these mini-NEPA and NHPA statutes, Alaska would be following in California's footsteps.<sup>302</sup> In 1970, California adopted the California

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299. Dwight Newman, *Interpreting Free, Prior, and Informed Consent*, 27 INT'L J. MINORITY & GRP. RTS. 238 (2019).

300. José Parra, *The Role of Domestic Courts in International Human Rights Law: The Constitutional Court of Colombia and Free, Prior, and Informed Consent*, 23 INT'L J. MINORITY & GRP. RTS. 367 (2016) [internal citations omitted].

301. Boutilier, *supra* note 295, at 7.

302. Twenty states have adopted NEPA-like statutes. *States and Local Jurisdictions*

Environmental Quality Act (CEQA), which “requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect.”<sup>303</sup> In 2014, AB52 was passed, amending CEQA to clarify that a project that may “cause a substantial adverse change in the significance of a tribal cultural resource” is a “project that may have a significant effect on the environment.”<sup>304</sup> To determine whether a project has significant effect on a Tribal cultural resource,<sup>305</sup> the lead agency on the project has a duty under AB52 to consult with any Tribe who requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project.<sup>306</sup> This consultation must take place

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with *NEPA-like Environmental Planning Requirements*, NEPA.GOV (accessed Dec. 14, 2023), <https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/3L3K-URV4>].

303. Legislative Counsel’s Digest, Cal. Assembly Bill 2966 (Feb. 17, 2024), <https://legiscan.com/CA/text/AB2966/2023#:~:text=The%20California%20Environmental%20Quality%20Act,or%20to%20adopt%20a%20negative> [<https://perma.cc/G7D7-5QWG>].

304. Cal. Pub. Res. Code § 21084.2. See generally Heather Dadashi, *CEQA Tribal Cultural Resource Protection: Gaps in the Law and Implementation*, 39 UCLA J. ENV’T L. & POL’Y 231–50 (2021). CEQA, and AB52 which amended CEQA, apply to all projects that a California public agency—whether it be a state, county, municipal, or other public agency—is carrying out or permitting. This means that environmental impact reports and tribal consultation requirements for projects having a significant impact on the environment and/or tribal cultural resources could apply *anywhere* in the State, including on private land.

305. Tribal cultural resources are defined as:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

Cal. Pub. Res. Code § 21074(a).

306. Cal. Pub. Res. Code § 21080.3.1(b). Under AB52, the burden rests with the Tribe to request consultation. This differs from the structure of NHPA, which places the burden of identifying TCPs and sending consultation requests on the federal agency. AB52 specifies that the Native American Heritage Commission must provide Tribes with: a list of all public agencies that may be lead agencies, a list of those agencies’ contact information, and information on how to request consultation. Cal. Pub. Res. Code § 5097.94. If a Tribe wishes to be notified of projects within its geographic area, the Tribe must submit a written request to the relevant lead agency. Cal. Pub. Res. Code § 21080.3.1(b). Once a lead agency identifies a project within that geographical area, it must reach out to the Tribe, who then has 30 days to respond to the agency with a request for consultation. Cal. Pub. Res. Code § 21080.3.2. I imagine that the law is written this way to diminish concerns that Tribal consultation requirements will overburden the CEQA process, based on the (possibly erroneous?)



early on, prior to the release of the environmental impact report (or the finding of no significant impact, which California law calls a “negative declaration”). If the agency determines through the Tribal consultation that the project may cause substantial adverse change to the Tribal cultural resource, then the agency must consider measures to mitigate that impact.<sup>307</sup>

AB52 does not necessarily implement FPIC, but it may come the closest of any state or federal law. Under AB52, Tribal consultation is considered complete when either: (1) both parties agree to measures to avoid or mitigate a significant effect on a Tribal cultural resource, or (2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.<sup>308</sup> This approach approximates consent in a more earnest way that consultation requirements contemplated in agency guidelines or even in the NHPA, which merely state that mutual agreement is the goal, when possible. Here, AB52 puts the onus on the agency to show that it has acted in good faith and made a reasonable effort to reach consensus. Moreover, AB52 emphasizes that the point of Tribal consultation is not consultation for consultation’s sake, but rather, the goal is to reach consensus specifically regarding avoidance and mitigation agreements.

Enacting a state version of NEPA and NHPA, like California has done, in Alaska would be extremely difficult, considering the libertarian politics of the 49<sup>th</sup> state. But it shouldn’t be impossible. While the Alaska State constitution announces a state policy encouraging “settlement of its land and the development of its resources,” it also states that the use of natural resources must always be “consistent with the public interest.”<sup>309</sup> Article VIII of the Alaska State Constitution goes on to specify that “[n]o disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.”<sup>310</sup> It explicitly protects individuals from being “involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.”<sup>311</sup> Enacting state versions of NEPA and NHPA would enable the Alaska state legislature to carry out its constitutional duty of creating “safeguards of the public interest” against the forces of extractive industry.

Given that it is very unlikely that the State of Alaska, under its current Republican leadership, would adopt state versions of NEPA and NHPA, I highly recommend that Tribes in Alaska consider developing their own FPIC protocols, in recognition of their rights under UNDRIP to dictate the terms

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assumption that if lead agencies had to reach out to Tribes, that would be more onerous than if Tribes have the responsibility to reach out to agencies when they want to be consulted.

307. Cal. Pub. Res. Code § 21080.3.2.

308. Cal. Pub. Res. Code § 21080.3.2.

309. Alaska State Constitution, Art. 8, § 1.

310. Alaska State Constitution, Art. 8, § 10.

311. Alaska State Constitution, Art. 8, § 16.

of their consent. Securing Indigenous Peoples' Rights in the Green Economy Coalition (SIRGE), a coalition of Indigenous organizations and leaders and environmental non-profits, wrote a guide for Indigenous communities seeking to design and implement their own FPIC protocols.<sup>312</sup> Among other things, the guide recommends that Tribal FPIC protocols include: an introduction that provides background about the community and why the community decided to develop a protocol; what kinds of projects the community will *not* accept, preconditions for meaningful consultation (including requiring that all parties recognize the lands, territories, and resources as understood by the community, even if not formally titled); practices that would render any FPIC process null and void, timing requirements for FPIC discussions (e.g., before State decision-making, granting of permits, etc.); timeline for FPIC engagement (taking into account Tribes' internal decision-making process); the logistics of the meetings (e.g., location, language, parties/representatives, funding, etc.); what information the community will require to be consider themselves' fully informed; and how to address projects that will affect multiple Native peoples.<sup>313</sup>

#### B. *Implementing Other Substantive Rights Affirmed by UNDRIP*

There are numerous substantive rights affirmed by UNDRIP that are implicated in the context of the Graphite One mine proposal, and really any extractive projects affecting Indigenous people. First, there is the right to subsist. Article 20 states that "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." If deprived of their means of subsistence and development, Indigenous peoples are entitled to just and fair redress.<sup>314</sup>

Next, there are the rights to land and natural resources, enshrined in Articles 26, 27, 28, and 29. Most relevant here is Article 29, which states that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."<sup>315</sup> Moreover, "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance

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312. SECURING INDIGENOUS PEOPLES' RIGHTS TO SELF-DETERMINATION: A GUIDE ON FREE, PRIOR, AND INFORMED CONSENT, SIRGE, <https://www.sirgecoalition.org/fpic-guide> [<https://perma.cc/XAM2-AV3T>] (accessed Apr. 25, 2024).

313. *Id.*

314. UNDRIP, Art. 20(b).

315. UNDRIP, Art. 29(1).

programmes for indigenous peoples for such conservation and protection, without discrimination.”<sup>316</sup>

Finally, the right to culture, which is intrinsically connected for many Indigenous groups with their rights to land and natural resources, is affirmed in UNDRIP Articles 8, 11, 12, 25, and 32. Article 8 states that “States shall provide effective mechanisms for prevention of, and redress for: . . . (b) Any action which has the aim or effect of dispossessing them of their lands, territories, or resources.”<sup>317</sup> The threat of losing subsistence resources to Graphite One mine development could trigger the federal government’s responsibilities for prevention and redress. Articles 11, 12, and 25 all protect Indigenous peoples’ right to practice and revitalize their cultural traditions and customs, access cultural sites, and strengthen their spiritual relationship with their traditionally owned or otherwise occupied lands and territories. This is relevant in the Graphite One context given the spiritual nature of the Kigluaik Mountains, threatened by mine development.

The right to subsist, affirmed in Art. 20 of UNDRIP, imposes a positive duty on the state to provide Indigenous peoples with just and fair redress when they have been deprived of their means of subsistence. The *McDowell* case, discussed in Subpart III(B), violates this right to subsist, because it refuses to prioritize rural subsistence practices (let alone Alaska Native subsistence practices) over other people’s, even in times of scarcity.<sup>318</sup> To redress this wrong, the *McDowell* case needs to be overturned so that protections for subsistence are uniform across all of Alaska, regardless of whether the subsistence resources are on State, Federal, or Alaska Native Corporation land. Moreover, to comply with UNDRIP, the federal government needs to fix the flaw in ANILCA, namely that there is a subsistence priority on federal land for *rural* residents, instead of specifically for Alaska Native residents. Short of overturning the *McDowell* case, Alaska Native people could consider lobbying for a constitutional referendum to carve out an exception in the equal protection clause of the Alaska Constitution for Alaska Native subsistence rights (thus skirting the reasoning in *McDowell*).<sup>319</sup> Unfortunately, this may all be wishful thinking, given that the State of Alaska is currently making arguments as the defendant in a lawsuit against the federal government that there shouldn’t even be a *rural* subsistence priority on federal lands in Alaska.<sup>320</sup>

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316. UNDRIP, Art. 29(2).

317. UNDRIP, Art. 8(b).

318. Gannon, *supra* note 149.

319. The Alaska Constitution requires that every ten years, if the legislature has not called for a Constitutional Convention (which it may do at any time), the lieutenant governor shall place on the ballot for the next general election the question of whether there should be a constitutional convention. This last happened in 2022, but the public voted overwhelmingly in the negative. See Alaska Constitution, Art. XIII.

320. State of Alaska’s Answer to the Kuskokwim River Inter-Tribal Fish Commission’s Complaint in Intervention, *United States v. Alaska*, 1:22-cv-00054-SLG (D. Alaska July 7, 2022); James Brooks, *As Kuskokwim fishing lawsuit grows, lawyers say subsistence could be*

Native peoples have a right to redress under UNDRIP when they are deprived of their rights to culture, land, and natural resources. I suggest that the best way to redress the harm of dispossessing (or threatening to dispossess) Native peoples of their lands, subsistence resources, and culture (that relies on land and subsistence practices), is to justly compensate the Native peoples for those takings. Just compensation can take many forms, beyond mere monetary compensation. This compensation could take the form of royalty payments for Native people living near the proposed mine site and investments in infrastructure in and around the mine site that *actually benefit* the Native people living nearby. However, because the Graphite One project is on State land, not Alaska Native Corporation land, the royalty payment proposal may be difficult to pull off.<sup>321</sup> So, it may make more sense to use a tax-based approach, taxing the mining company for ever metric ton of graphite extracted from the Kigluaiaks.

This tax-based approach could be modeled off of California's lithium extraction excise tax, which is collected into the Lithium Extract Tax Fund.<sup>322</sup> The Fund is distributed in two ways: 80 percent to the counties impacted by lithium extraction activities and 20 percent to Salton Sea restoration projects, as well as grants for community engagement and community benefit projects.<sup>323</sup> The Fund is overseen by a Citizens Oversight Committee, composed of local community members with varying degrees of environmental justice and/or economic development expertise.<sup>324</sup>

If such a tax structure were introduced in Alaska, to benefit communities like those in Nome impacted by extractive activity, Tribal members could play a key role in advocating for "community benefit" projects and infrastructure

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*affected across Alaska*, ALASKA BEACON (July 12, 2022), <https://alaskabeacon.com/2022/07/12/as-kuskokwim-fishing-lawsuit-grows-lawyers-say-subsistence-could-be-affected-across-alaska> [<https://perma.cc/2CPH-G287>]; Yereth Rosen, *Alaska Federation of Natives sides with the federal government in Kuskokwim salmon dispute*, ALASKA BEACON (Sept. 27, 2023), <https://alaskabeacon.com/briefs/alaska-federation-of-natives-sides-with-federal-government-in-kuskokwim-salmon-dispute> [<https://perma.cc/JG88-CMMH>]; Gannon, *supra* note 149 (quoting Solicitor of the Department of the Interior, Robert T. Anderson, "[t]he best we'll hope for this litigation from the Native side of the issue, from the pro subsistence side, is that we'll hold on to this system that is broken [i.e., where the Federal government has a rural subsistence priority on federal lands and the State has no such priority on state lands] . . . The worst case scenario is the Supreme Court will overturn the Katie John cases, and then we'll be left with the only state jurisdiction over fishing and all navigable waters.").

321. The nearby Red Dog Mine in Kotzebue pays royalties to the ANC shareholders, but that is because the mine is on ANC land. Nat Herz, *Many see Red Dog as an ANCSA success story. What happens when the ore runs out?*, KTOO (Dec. 9, 2021), <https://www.ktoo.org/2021/12/09/red-dog-mine-ancsa> [<https://perma.cc/DSP8-VJ7X>].

322. Cal. Rev. & T. Code § 47010 (2022).

323. *Citizens Oversight Committee for Lithium Extraction Excise Tax*, CAL. DEP'T TAX & FEE ADMIN. (accessed Apr. 29, 2024), <https://www.cdtfa.ca.gov/taxes-and-fees/lithium-extraction-excise-tax/citizens-oversight-committee.htm> [<https://perma.cc/RUR2-NYLC>].

324. *Id.*

investments that offset the harm caused by the mine. Ideas for infrastructure investments could include better maintenance and snow plowing of the three main roads in Nome, allowing local residents to use the infrastructure (roads, bridges, port, etc.) that Graphite One plans to build, and giving local residents better access to healthcare and clinics in Nome (especially given the harm that the mine poses to local residents' physical health). Building better health infrastructure would also help the State of Alaska to comply with Art. 29(3) of UNDRIP, which states that "States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by [the storage or disposal of hazardous] materials, are duly implemented."<sup>325</sup>

If the U.S. were to implement UNDRIP, ideally, the substantive provisions of UNDRIP, protecting Indigenous Peoples' land, natural resources, and culture, would have the teeth required to stop harmful mine development. But short of that, the substantive provisions of UNDRIP could be a useful tool for creating and enforcing a duty against the government to justly compensate Tribes for any and all violations of their rights.

## VII. CONCLUSION

The push for domestic transition mineral mining is at risk of missing the forest for the trees. It is absolutely true that renewable energy will play a critical role in helping the world move away from fossil fuels and the GHG emissions that are warming the planet. But, at the same time, we as a global community need to step back and consider *how* we are collecting materials we need for these renewable energy technologies. In our rush to develop renewable energy technologies using critical minerals, are we boxing out the very same people who were harmed by the fossil fuel industry we're seeking to replace? Is the moral urgency surrounding the green transition actually just leading us to recommit the mistakes of the past?

This Comment considered in detail the local impacts of the proposed Graphite One mine on the Native Villages of Teller, Brevig Mission, and Mary's Igloo. These Tribes have a deep relationship with the Imuruk Basin and the Kigluaik Mountains, both threatened by the Graphite One mine proposal. They, like many other remote Tribes in Alaska, rely heavily on subsistence for nutrition and connection to their millenia-old culture. And yet, due to the structure of the Alaska Native Claims Settlement Act, these Tribes have very little control over the fate of their subsistence resources, especially when those resources are impacted by a project on State land. This is another reason why federal jurisdictional hooks are so important in providing an avenue for

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325. UNDRIP, Art. 29(3). Given the risk that man camps for mining sites pose to Native women, health clinics offering rape kits and contraceptive services could be another way to address the harm caused by the mine to the Native community.

opposition to the proposed Graphite One mine. Federal jurisdictional hooks (like the DoD's grant of \$37.5 for Graphite One's feasibility study, BLM's EIS considering opening D1 lands, the Clean Water Act § 404 permit) trigger Tribal consultation requirements, buoyed by the federal trust responsibility that mandates that the federal government look out for Tribal interests. Tribes are the beneficiaries of this government-to-government consultation, empowering them to inform and shape federal decision-making.

This Comment addressed the many ways in which government-to-government consultation can be triggered. A federal agency must consult with a Tribe whenever a potential federal action has Tribal implications, or when consultation is required by statute. The National Historic Preservation Act is one such statute, requiring Tribal consultation when a proposed federal action will impact a Traditional Cultural Property or a place that is culturally significant to a Tribe (or other group). Given that so many of the federal agencies adjacent to the Graphite One project have already failed to conduct or adequately conduct Tribal consultation with the Native Villages nearby, perhaps the strongest recommendation of this Comment is that the Tribes should work together with the State and Tribal Historic Preservation Officers to establish the Imuruk Basin and Kigluaik Mountains as TCPs, thereby reliably triggering consultation requirements for all federal agencies that interact with the Graphite One mine proposal.

Acknowledging the many shortcomings of government-to-government consultation as it currently exists in U.S. law, this Comment argues for more robust protections for Tribes in the face of the green transition, putting forth ideas for legislation implementing the rights to consultation, participation, subsistence, culture, and self-determination as described in United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Though the U.S. has not ratified UNDRIP and deems the declaration to be not legally binding, this Comment argues that the State of Alaska and the U.S. can and must do more to implement UNDRIP. Proposals of how to implement UNDRIP domestically include passing state versions of NEPA and the NHPA that require robust consultation with the goal of reaching consensus on mitigation and avoidance for all extractive projects affecting Tribes. Moreover, this Comment urges Tribes to consider creating their own Free, Prior, and Informed Consent protocols to govern consultation proceedings with federal and state agencies. To protect Indigenous Peoples' rights to subsistence, land, natural resources, and culture, this Comment proposes an expansive understanding of just compensation for communities affected by extractive industry, including the creation of a tax fund that can be used to develop beneficial infrastructure for Native people impacted by mines like Graphite One.