



## **ASSOCIATION ON AMERICAN INDIAN AFFAIRS**

Protecting Sovereignty • Preserving Culture

Educating Youth • Building Capacity

SINCE 1922

**Written Testimony of Shannon Keller O'Loughlin  
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**Submitted to the  
United States House of Representatives Natural Resources Committee  
Subcommittee for Indigenous Peoples of the United States**

**February 24, 2020**

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On behalf of the Association on American Indian Affairs (“Association”), please accept this written testimony for the House Natural Resources Committee’s Subcommittee on Indigenous Peoples of the United States’ February 26, 2020 hearing: “Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration’s Construction of the Border Wall.”

The Association is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building Tribal capacity.<sup>1</sup> The Association was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its 98-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while working at a grassroots level with Tribes to support the implementation of programs that affect real lives on the ground.

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<sup>1</sup> The Association was created by an amalgamation of several non-profit Indian organizations that emerged in the early 1920s. The Eastern Association on Indian Affairs and the New Mexican Association on American Indian Affairs were the first of the predecessor groups to formally organize in 1922. The EAlA and NMAAI were made up of affluent non-Natives, most of whom owned land in Santa Fe and wanted to protect Pueblo culture. The American Indian Defense Association, headed by John Collier, formed to fight against the Bursum Bill and the Leavitt Bill, both bills seeking to end Pueblo ties to their lands, and outlaw cultural practices. These groups merged in the 1930s and eventually consolidated under the name the Association on American Indian Affairs. Today, the Association has an all-Native Board of Directors and Executive Director.

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The Association's vision: *to create a world where diverse Native American cultures and values are lived, protected and respected*, has demanded that the Association dedicate significant resources to protecting Native American cultural and religious practices connected to important land areas across the United States. These special land areas are often called "sacred sites," but are used by Tribes and their citizens in a variety of ways – and always as places that must be protected and secured in consultation with Tribal governments.

Since its founding, the Association has provided legal and other advocacy assistance to protect sacred sites. In the 1920s, it fought to end the takings of Pueblo lands in New Mexico, worked to advocate against the building of dams on Tribal lands, and fought against laws that outlawed the practice of Tribal cultures and use of lands for those purposes. For twenty years, the Association has provided legal assistance to Tribes seeking to protect Medicine Wheel in Wyoming. As the result of these efforts, Medicine Wheel is a National Historic Landmark and an Historic Preservation Plan was developed to ensure its continued protection. The Association has also helped Tribes fight the development of lands that would adversely impact sacred sites, such as the San Francisco Peaks, Bear Lodge, Bear Butte, Medicine Lake, Pyramid Lake, Taos Blue Lake and many others. We stand alongside with the Water Protectors at Standing Rock and elsewhere, as well as with efforts to protect all of Bears Ears National Monument, and with the Tohono O'odham Nation today in their advocacy to protect burial and sacred areas that have been or are threatened to be destroyed due to unilateral acts taken to build the border wall.

Tribal sacred sites have never had the same protections as non-Indian cemeteries, war memorials, churches and other western institutions – though Tribal cultural and sacred sites serve the same purposes as those western institutions. Even with current laws, as explained below, Tribal sacred sites are often seen as an impediment to developers and government agencies because there is no holistic national policy that acknowledges the significance of maintaining these special places. The use by the current administration of the Real ID Act of 2005 to build the border wall to protect against terrorism eliminates any and all protection, right of Tribal consultation and public involvement and leaves no right of action to challenge agency determinations.

Below, we have described: the importance of sacred sites to diverse Native American religious practices and the federal government's role in the sacred site protection; how the Trump administration's ongoing construction of the border wall represents an imminent threat to sacred sites; and the existing federal laws that may be used to protect them.

## **I. The Intersection of Indian Religion, Land, and the Federal Government**

Place-based religious practice is common of all religions and for religious followers across the world. For many, pilgrimage to sites like the Wailing Wall, Mecca, or Mt. Sinai is a religious mandate. These experiences also provide stability, connection, and reassurance in a chaotic and uncontrollable world. These sites provide healing, community, empowerment and unity. Yet, the importance of sacred sites among Native American cultural and religious practices has not been

treated as legitimate and worth protecting compared to other world cultural and religious practices. The primary reason for this is that the tenets and practice of Native American cultures and religions are inextricably tied to the land and Tribes have been removed from their places of worship.

Although typically hidden from plain view, sacred sites and ceremonial grounds abound across the United States. Some are within the exterior boundaries of Tribal reservations, but most are located on federal, state, and privately owned lands. “Earth is a living, conscious being that must be treated with respect and care”<sup>2</sup>—a failure to recognize this results in sickness, destruction, and death for all mankind. Accordingly, ceremonies must be performed at certain locations, unmolested and free from the observance of outsiders. The medicine gathered to bless and protect those participating in ceremonies must be taken from the earth in a specific manner, from predetermined places, and must be completely free from pollutants or genetic alteration. These beliefs and practices are not relics of the past and have continued, even when the federal government has outlawed such practices and has not yet established strong legislation to protect Tribes in their cultural and religious freedoms.

Early United States political leaders and federal officials understood the important role that sacred sites played in Indian life: they incorporated Indian separation from sacred sites, and therefore the destruction of traditional Indian religious practice, into federal Indian policy. The United States’ official policy to Christianize Indians synchronized with the passage of laws that removed Indians from their homelands and confined them to reservations. During that time, federal officials also promulgated regulations like the Indian Religious Crimes Code and the Rules for Indian Courts, which criminalized traditional dances, feasts, medicine men, and barred many Indians from leaving reservations without superintendence.<sup>3</sup> At best, the punishment for visiting a sacred site or practicing one’s traditional religion was imprisonment. At worst, it was slaughter. Moreover, the U.S. allowed its officials and others to enter Tribal lands to desecrate burial and ceremonial places, steal Ancestral remains and their burial belongings, and take important cultural patrimony and sacred objects.

Despite more than a century of religious persecution, Indian communities have continued ceremonial life at sacred sites today, and the ability to do so stems from the perseverance of Tribes and their citizens, and the federal government’s recognition of its moral and legal responsibility to protect sacred sites and American Indian religious freedoms. Beginning in 1978, Congress took notice of the United States’ continued attack on Indian religious freedom and conducted an “extensive investigation” that detailed how “Indian religious practices were often unnecessarily disrupted by state and federal laws and activities.”<sup>4</sup> This led to the American Indian Religious Freedom Act (AIRFA), a joint resolution that declared a policy “to protect and preserve for Native

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<sup>2</sup> Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VERMONT L. REV. 225, 274 (1996).

<sup>3</sup> Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 Am. Indian Quarterly, 35 (1997).

<sup>4</sup> STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 225 (2012).

Americans their inherent right of freedom of belief, and exercise of traditional religions . . . including but not limited to sacred sites . . . .”<sup>5</sup>

Since AIRFA, the federal government has taken a multitude of actions demonstrating that its federal trust responsibility includes the consideration and protection of sacred sites in federal decision-making. Congress has passed numerous, bipartisan laws requiring federal agencies to consult with Indian Tribes before they undertake any action that may threaten a sacred site or other Indian interests.<sup>6</sup> Presidents have issued executive orders prohibiting federal actions that destroy sacred sites and mandating that Indians be given access to sacred sites.<sup>7</sup> Likewise, federal agencies have worked together to develop a memorandum of understanding, reports, and action plans regarding the protection of sacred sites.<sup>8</sup> The Ninth Circuit has also recognized that the federal trust responsibility includes consultation with Indian Tribes when federal actions threaten sacred sites.<sup>9</sup> Thus, the federal government has unquestionably assumed the moral and legal responsibility to protect sacred sites and any departure from this policy flies in the face of established political norms, and civil and human rights.

## II. The Destruction of Sacred Sites

Regrettably, although President Trump has explicitly stated that he “remains committed” to “protecting prayer in public schools”<sup>10</sup> and to providing federal funding to religious groups, his administration has given virtually no weight to concerns that Indian communities have with regard to their sacred sites. For example, the administration has taken action to reduce the size of the Bears Ears National Monument over Tribal objections, as well as push through the Dakota Access Pipeline and other pipelines across the country. Similarly, there has been a disregard of

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<sup>5</sup> 42 U.S.C. § 1996 (1978).

<sup>6</sup> See *infra* Section III.

<sup>7</sup> Exec. Order 13007: Indian Sacred Sites, 61 Fed. Reg. 26771 (1996); Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).

<sup>8</sup> DEP’T OF DEFENSE ET AL., MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (2012); DEP’T OF DEFENSE ET AL., ACTION PLAN TO IMPLEMENT THE MOU REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (2013); DEP’T OF DEFENSE ET AL., PROGRESS REPORT ON THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES (2014); DEP’T OF DEFENSE ET AL., POLICY STATEMENT ON THE CONFIDENTIALITY OF INFORMATION ABOUT INDIAN SACRED SITES (2015); DEP’T OF DEFENSE ET AL., MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES: POLICY REVIEW REPORT (2013).

<sup>9</sup> *Pit River Tribe v. Bureau of Land Management*, 469 F.3d 768, 788 (9th Cir.2006), *on remand*, 2008 WL 5381779 (E.D. Cal. 2008).

<sup>10</sup> WHITEHOUSE.GOV, *President Donald J. Trump is Safeguarding the Right to Religious Freedom for Students and Organizations* (Jan. 16, 2020), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-safeguarding-right-religious-freedom-students-organizations>.

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Tribal concerns with regard to immigration and border security policies. Border patrol officials have “forcibly ripped apart” a sacred deer mask when an Indian Tribal member crossed the southern border to participate in a traditional religious ceremony, desecrating it and rendering it completely unusable for future ceremonies.<sup>11</sup> Federal officials have also harassed Tribal citizens who have treaty and statutory rights to freely cross the southern border to participate in religious ceremonies.<sup>12</sup> And, in January 2020, sacred sites were destroyed as part of border wall construction, including the blasting of Monument Hill—sacred land for the Tohono O’odham Nation located in the Organ Pipe Cactus Monument.<sup>13</sup> These actions are unlawful and morally wrong, violating the federal trust responsibility to Indian Tribes, and federal policies reflecting that obligation that have been incorporated into numerous federal statutes (see discussion immediately below).

In contrast, after Secretary Bernhardt toured Chaco Canyon in New Mexico, where he hiked with Tribal leaders, he put in place a temporary development ban pending further discussions. If more officials visited more of these sites, and consulted more closely with Tribal officials, we believe and hope that they would seek to protect them, rather than consider them inconvenient or insignificant impediments to other goals.

### **III. Existing Federal Laws and Policies Provide for the Protection of Indian Sacred Sites and Should not be Disregarded**

Reflecting respect for Tribal values and Tribal culture, over the years the Congress and the Executive Branch have enacted and implemented a range of federal statutes requiring the federal government to engage in consultation with Indian Tribes when undertaking actions that may harm sacred sites and to either desist or mitigate those actions. Those laws, described below, should not now be abandoned; rather, they should be expanded upon.

#### **National Historic Preservation Act**

The National Historic Preservation Act (NHPA) was signed into law in 1966. The purpose of the act is to “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”<sup>14</sup> Accordingly, the federal government must “contribute to the preservation of both federally owned and nonfederally owned historic property”<sup>15</sup> and must consider historic properties in agency decision-making. Demonstrating Congress’s commitment

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<sup>11</sup> TRIBAL BORDER ALLIANCE, *Tribal Border Alliance Proposal* (last visited Feb. 22, 2020), <https://www.tribalborderalliance.org/wp-content/uploads/2019/03/Tribal-Border-Alliance-Proposal-on-Letterhead-compressed.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Paulina Firozi, *Sacred Native American burial sites are being blown up for Trump’s border wall, lawmaker says*, WASH. POST (Feb. 9, 2020), <https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites>.

<sup>14</sup> 54 U.S.C. § 300101(1).

<sup>15</sup> 54 U.S.C. § 300101(4).

to the protection of sacred objects and sacred sites, NHPA's 1992 amendments provide that sites with religious and cultural significance to Indian Tribes could be eligible for listing on the National Register of Historic Places. Further, under Section 106 of the Act, federal agencies must consult with Indian Tribes when taking into account the effects that a federal action may have on an historic property that is listed or eligible for listing on the National Register.<sup>16</sup>

### National Environmental Policy Act

In 1970, Congress enacted the National Environmental Policy Act (NEPA) to “encourage productive and enjoyable harmony between man and his environment [and to] promote efforts which will prevent or eliminate damage to the environment.”<sup>17</sup> NEPA, and its current regulations, ensure that federal agencies incorporate the appropriate level of environmental review when considering proposed actions. NEPA is often the only statute that allows Tribes to meaningfully participate in the federal decision-making process because it acts as a mechanism for sacred site protection and helps Tribes enforce their off-reservation treaty rights like hunting, fishing, and gathering—all activities essential to traditional Indian religious practice.

### Archaeological Resources Protection Act

Enacted in 1979, the Archaeological Resources Protection Act (ARPA) protects archaeological resources on federal and Indian lands.<sup>18</sup> Indian lands are lands held in trust for Tribes by the federal government or lands that are subject to restrictions against alienation.<sup>19</sup> Archaeological resources include material remains of past human life or activities that are of archaeological interest and are at least 100 years old.<sup>20</sup> To comply with ARPA, parties must receive a federal permit prior to excavation, and federal agencies must provide notice to Tribes prior to the issuance of a permit that may adversely affect a sacred site.

### Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted on November 16, 1990 (and will be 30 years old this year) and protects cultural items like Indian Ancestral remains and their burial belongings, sacred objects, and items of cultural patrimony.<sup>21</sup> The purpose of the law is twofold. First, it is meant to ensure that agencies and institutions receiving federal funds inventory and provide written accounts of cultural items. In addition, federal agencies and institutions must consult with Tribes to repatriate cultural items. Second, the law is meant to provide significant protection for Native American burial sites. The Act prohibits the removal of cultural items from Tribal or federal land without proper permitting.<sup>22</sup>

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<sup>16</sup> 54 U.S.C. § 300308.

<sup>17</sup> 42 U.S.C. § 4321.

<sup>18</sup> 16 U.S.C. §§ 470aa–470mm.

<sup>19</sup> *Id.* at § 470(bb)(4).

<sup>20</sup> *Id.* § 470bb(1).

<sup>21</sup> 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170.

<sup>22</sup> 25 U.S.C. § 3002(c); *see also id.* § 3002(a).

Additionally, it prohibits selling, purchasing, and transportation for sale of cultural items obtained in violation of NAGPRA.<sup>23</sup>

### Religious Freedom Restoration Act

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which provides that the federal government cannot substantially burden religious exercise without a compelling interest.<sup>24</sup> It is distinguishable from the aforementioned statutes because it grants a private right of action against the federal government for religious freedom violations and places the burden of proof on the government to demonstrate that it has a compelling interest in doing so. While RFRA does not explicitly mention Indians or sacred sites, the protection of Indian religious practice is at its core. Congress enacted RFRA in response to the 1990 Supreme Court case, *Employment Division v. Smith*, where two Native American Church practitioners filed a First Amendment free exercise claim against Oregon's unemployment office after they were denied unemployment benefits based on their sacramental use of peyote.<sup>25</sup> The Court held that neutral laws of general applicability that do not expressly target religious practice were constitutional. The decision shocked lower courts and legal scholars, and provoked significant protest from religious rights groups and civil liberties organizations.

### EO 13007: Indian Sacred Sites

Issued in 1996, Executive Order 13007: Indian Sacred Sites mandates that federal land management agencies must "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" and must avoid adversely affecting the physical integrity of such sacred sites."<sup>26</sup> Under the order, sacred sites are identified by Tribes and federal agencies must actively provide notice to Tribes of any actions that may adversely affect a sacred site and consult with them to resolve the issue. It also established a system for holding federal agencies accountable for their actions.<sup>27</sup> It requires the head of each executive branch agency that has the responsibility for managing lands to report to the President.<sup>28</sup> These reports must address changes necessary to accommodate access to and ceremonial use of Indian sacred sites, those changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites, and procedures implemented or proposed to facilitate consultation with Indian Tribes.

### EO 13175: Consultation and Coordination with Tribal Governments

Issued in 2000, Executive Order 13175, Consultation and Coordination with Tribal Governments, articulated the administration's establishment of "regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that

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<sup>23</sup> 18 U.S.C. § 1170.

<sup>24</sup> 42 U.S.C. § 2000bb-1.

<sup>25</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>26</sup> Exec. Order 13007: Indian Sacred Sites, 61 Fed. Reg. 26771 § 1(a) (1996); Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).

<sup>27</sup> *Id.* at § 2(a).

<sup>28</sup> *Id.* at § 2(b).

have tribal implications . . . .”<sup>29</sup> Policies with Tribal implications are defined as “regulations, legislative comments or proposed legislation, or other policy statements or actions that have substantial direct effects on one or more Indian tribes . . . .”<sup>30</sup> Under the order, federal agencies must respect Tribal sovereignty and grant Tribes “the maximum administrative discretion possible.”<sup>31</sup>

#### **IV. Conclusion**

Felix S. Cohen, known as the father of federal Indian law, served the Association as its General Counsel in the 1940-50s. He is well known for the following quote from 1953:

“It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”

The Association fully supports Congress in its effort to correct the direction of our democratic faith and investigate Indian sacred site destruction and religious freedom violations with respect to the construction of the border wall. Our expertise in successfully advocating for sacred site protection has taught us that this is an ongoing issue with the current administration and that federal agencies and officers must fully realize their moral and legal responsibility to protect sacred sites and consult with sovereign Tribal governments. Thank you for the opportunity to submit this testimony.

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<sup>29</sup> Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).

<sup>30</sup> *Id.* at § 1(a).

<sup>31</sup> *Id.* at § 3(a), (b).