Native Sacred Places Protection Legal Workshop

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SACRED PLACES TRAINING MATERIALS

Introduction

These materials are designed to summarize the law and processes that are relevant to the protection of sacred places, including historic preservation and environmental laws and federal agency planning processes, particularly those lands that are not located on reservations or within "Indian country"[1] as it is defined by federal law. The target audience is broad and includes attorneys, tribal leaders, tribal employees, traditional practitioners and tribal activists. Our hope is that these materials will provide useful tools to those who are working to protect sacred places.

I. Overview of Legal Framework for Protecting Native Sacred Places

A. Religious Freedom as a Constitutional Right

Religious liberty is a fundamental American value, with deep roots in American history and with great contemporary importance. The right of religious freedom is enshrined in the First Amendment to the Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; …"[2] This constitutional language addresses two distinct aspects of religious liberty: first, the government may not force individuals to practice a particular religion; and, second, the government may not prohibit a person from believing and practicing his or her own religion. The prohibitions in these clauses apply not just to Congress, but also to the states and their political subdivisions.[3]

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[1] 18 U.S.C. § 1151.

[2] U.S. Constitution, Amendment I.

[3] *Cantrell v. Connecticut*, 310 U.S. 296, 303 (1940).

Throughout the course of American history, courts have been called upon to decide cases involving these two constitutional clauses. A few of the cases are discussed in these materials, although much of this body of case law is beyond our scope. What is important to understand is that the courts have held that neither clause is absolute. Instead, the courts have fashioned tests for determining whether challenged government action is constitutional in particular cases.[4]

Despite the fundamental nature of the right to religious freedom, during an extended period of American history from the late nineteenth century through the first third of the twentieth century, the federal government prohibited or otherwise suppressed the practice of traditional religions by American Indians.[5] The legacy of this history has many implications for contemporary efforts to protect the integrity of tribal sacred places and to accommodate the use of such places by Native religious practitioners. One lasting effect of this history is the reluctance of some traditional practitioners to become actively engaged in legal processes that can be used for protection of sacred places.

1. The "Free Exercise" Clause

The portion of the First Amendment known as the "Free Exercise Clause" is the part providing that "Congress shall make no law … prohibiting the free exercise thereof." In several 20th century cases, the Supreme Court ruled that the challenged government action had crossed the line.[6] In this line of cases, the Court formulated and applied a three-part test that became known as the "compelling governmental interest test": (1) if the challenged government action constitutes a burden on the free exercise of religion, then (2) the government must show that its action is intended to achieve a compelling interest that (3) cannot be achieved by a less restrictive means.

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[4] JOHN E. NOWAK AND RONALD R. ROTUNDA, CONSTITUTIONAL LAW, *6th Ed.* (West Pub. Co. 2000) at 1307-1428.

[5] *See, e.g.*, Jack F. Trope, *"Protecting Native American Religious Freedom: The Legal, Historical and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act",* 20 N.Y.U. REV. L. & SOC. CHANGE 373, 374 (1993) and sources cited therein.

[6] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state compulsory school attendance law); *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits to a person who had refused to accept a job requiring her to work on the Sabbath); *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 (1981) (unemployment benefits for applicant whose religion prohibited making weapons); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987) (unemployment benefits for applicant who resigned rather than work on the Sabbath).

Recent rulings by the U.S. Supreme Court have rendered the Free Exercise Clause of little use for protecting tribal sacred places located on federal lands, however. In 1988, in *Lyng v. Northwest Indian Cemetery Protective Association,*[7] the U.S. Supreme Court effectively held that the Free Exercise Clause of the First Amendment is not available to protect Native sacred places located on federal lands. The case involved the proposed construction of a paved logging road in the high country of the Six Rivers National Forest in northern California, through an area that is sacred in the religious traditions of three tribes, where religious practitioners have carried out a range of ceremonial practices for countless generations. Because of the importance of this sacred place for ongoing religious practices, the area had been listed on the National Register of Historic Places as the Helkau historic district. The federal district court and the Ninth Circuit Court of Appeals had both ruled in favor of the Indian claimants.[8] Applying the compelling governmental interest test, both the district court and Ninth Circuit Court of Appeals held that the proposed road would constitute a burden on religion and that the government had not shown a compelling interest.[9]

The Supreme Court, however, in ruling that the challenged governmental action did not violate the Free Exercise Clause, did not apply the compelling governmental interest test. Stressing the word "prohibit" in the Free Exercise Clause, the Court instead ruled that unless the government's action coerced individuals to act contrary to their religious beliefs or penalized religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens, then the First Amendment provided no protection against governmental action, regardless of the impact upon Native American religious practitioners. While noting the line of cases in which the compelling interest test had been applied, the Court instead relied upon case law that had held that the Constitution does not afford an individual a right to dictate the conduct of the Government's internal procedures.[10] Utilizing this theory, the Court held that the First Amendment did not "divest the government of the right to use what is, after all, its land" and would not prevent the government from building the proposed road.[11]

A dissenting opinion by Justice Brennan described the result of the majority's refusal to apply the compelling governmental interest test as "cruelly

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[7] 485 U.S. 439 (1988).

[8] *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F.Supp. 586 (N.D. Cal. 1983), *aff'd,* 795 F.2d 688 (9th Cir. 1986), *revd.*, 485 U.S. 439 (1988).

[9] 565 F. Supp. at 594-96, 795 F.2d at 693, 695.

[10] *Lyng v. Northwest Cemetary Protective Assn.*, 485 U.S. 439, 448 (1988).

[11] *Id.* at 435. It is worth noting that the court also said that "the Government's rights to the use of its own land…need not and should not discourage it from accommodation of religious practices like those enjoyed in by the Indian respondents." 485 U.S. at 454. This dicta is meaningful in the context of Establishment Clause claims that have been raised in a number of cases. *See* section I.A.2.

surreal" in that "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' religion."[12] Justice Brennan concluded that the real reason for the majority's "refusal to recognize the constitutional dimension of respondents' injuries [is] its concern that acceptance of respondents' claims could potentially strip the Government of its ability to manage and use vast tracts of federal property."[13]

Two years after *Lyng,* the Supreme Court decided a second case in which Native American religious practitioners sought to invoke the Free Exercise Clause, *Employment Division, Department of Human Resources v. Smith*.[14] In the *Smith* case, two adherents of the Native American Church were fired from their jobs with a private drug rehabilitation organization because they had engaged in the sacramental ingestion of peyote. After they were fired, the two religious practitioners applied for unemployment benefits, but their applications were denied on the ground that they had been fired for work-related misconduct (i.e., the crime of consuming peyote).

In the *Smith* case, the U.S. Supreme Court essentially disavowed the compelling governmental interest test.[15] The Court held that laws of general application are not unconstitutional simply because they infringe upon the free exercise of religion.[16] The Court stated that "because we are a cosmopolitan nation … we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[17] In short, the Court determined that leaving the protection of the religious liberties to the legislative process is an "unavoidable consequence of democratic government," notwithstanding the First Amendment.[18]

Thus, unless the government's action directly targets a religious practice[19] (as opposed to being a general law or activity that happens to have an impact upon religion) or implicates other rights in addition to the right of free exercise[20],

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[12] *Id.* at 472 (Brennan, J., dissenting).
[13] *Id*. at 473, citing a passage of the majority's opinion at 452-53 (Brennan, J., dissenting).
[14] 494 U.S. 872 (1990). This was the second time that the case was heard by the Supreme Court. In the initial proceeding before the court, the Supreme Court remanded the case to the Oregon Supreme Court so that it could interpret a provision in Oregon state law that was relevant to the legal issue presented in the case. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 485 U.S. 660 (1988).
[15] *Id.* at 883-90.
[16] *Id.* at 883-884.
[17] *Id.* at 888 (emphasis in original, internal quotations and citation omitted).
[18] *Id.* at 890
[19] *See Church of the Lukumi Babalu Aye., Inc. v. City of Hialeah*, 508 U.S. 520 (1993).
[20] *Smith*, *supra* note 14, 494 U.S. at 881-882.

the Free Exercise clause is no longer available as a tool for the protection of sacred places.

2. The "Establishment" Clause

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[21] The standard test utilized to determine whether governmental action violates the Establishment Clause is a three part test. An action is constitutional if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive entanglement between the government and religion.[22] In recent years, the first two parts of the test have been refined to focus upon whether a particular government action endorses religion, i.e., has the purpose or effect of conveying a message that religion or a particular religious belief is preferred.[23] In the case where government action allegedly prefers one religion over another, courts have also used an analysis similar to that used in equal protection cases involving suspect classifications, namely whether a compelling governmental interest is present and the governmental action is narrowly tailored to further that interest.[24]

It has been long recognized, however, that government may accommodate religious practices without violating the Establishment Clause.[25] In the *Lyng* case, the Court suggested that the lack of protection under the Free Exercise Clause does not mean that federal agencies do not have discretion to manage places where such sites are located in ways that avoid adverse effects. Indeed, the Court specifically stated that the "Government's rights to the use of its own land … need not and should not discourage it from accommodating [Native American] religious practices."[26]

These principles provide the backdrop for an issue that has been raised in a number of recent cases – namely, the extent to which the Establishment Clause of the First Amendment limits the ability of federal agencies to make land use decisions for the purpose of protecting the religious and spiritual integrity of a sacred place and accommodating religious use of the place by Native practitioners.

a. What are the arguments that have been made?

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[21] U.S. Constitution, Amendment 1.
[22] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[23] *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 592-594 (1989).
[24] *Larson v. Valente*, 456 U.S. 228 (1982).
[25] *See, e.g., Hobbie v. Unemployment Appeals Comm/n of Fla*., *supra* note 6, 480 U.S. at 144.
[26] *Lyng*, *supra* note 10, 485 U.S. at 454.

In a number of recent cases, governmental actions designed to protect sacred lands and accommodate free exercise of Indian religions have been challenged as violations of the Establishment Clause.[27] The arguments raised have included assertions that the government has violated the Establishment Clause because its actions have (1) constituted an endorsement of Native religions, (2) abandoned the principle of government neutrality toward religion, (3) deprived the public of its normal use of an area, and (4) coerced the public into supporting Native religions.[28]

b. What are the counter-arguments?

The standard arguments against these claims are that the actions are permissible accommodations, do not constitute an endorsement of religion and have numerous secular (non-religious) purposes, particularly since almost all sacred sites also have cultural and historic significance. In addition, there are counterarguments that can be made that are specific to Native American religions. In short, the arguments are based upon the theory that traditional Indian religions are unique and, thus, measures which address only Indian religious concerns reflect this uniqueness and do not constitute special treatment. Indian religions are the only religions in America that have all of the following characteristics: (1) their practice is inextricably connected with sites in the natural world that are affected by governmental activity; (2) their sacred sites – or churches, if you will – were in effect transferred or seized by the federal government; (3) their religious practices predate the adoption of the Establishment Clause; and (4) their religions have been subjected to a long history of government oppression and suppression.[29] Moreover, it has been argued that the special relationship between Indian tribes and the United States and the concomitant responsibility this relationship places on the United States in terms of protecting and preserving Native communities and cultures also mandates a different legal analysis than would be the cases for non-Native religions.[30]

c. How have the Courts ruled?

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[27] *See, e.g., Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Wyoming Sawmills v. United States Forest Service*, 179 F.Supp.2d 1279 (D. Wyo. 2001), *aff'd.* 383 F.2d 1241 (10th Cir. 2004), *cert. denied* 546 U.S. 811 (2005); *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207 (D. Wash. 2002), *aff'd*., 98 Fed. Appx. 711 (9th Cir. 2004), *cert. denied sub. nom. DeWaal v. Alston*, 543 U.S. 1145 (2005).

[28] Briefs on file with author from *Bear Lodge* and *Wyoming Sawmills* cases.

[29] "Hearing on S. 1021, the Native American Free Exercise of Religion Act", United States Senate, Committee on Indian Affairs, 93rd Cong., 1st Sess., (Sept. 10, 1993) at 268-270 (reprint of National Indian Policy Center paper entitled "Application of the Establishment Clause of the First Amendment to the Native American Free Exercise of Religion Act (NAFERA))

[30] *See, e.g., Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991); *Rupert v. Director, U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992).

Thus far, efforts to overturn governmental actions protecting sacred places have had limited success. In many of the cases to date, those challenging these actions have been found to lack standing to sue.[31] Standing is a prerequisite for any court to decide a litigated matter. In order to have standing, a plaintiff must have suffered an injury that is caused by the conduct complained of and which can be remedied by the court.[32]

Where the Courts have reached the substance of the claim, they have generally ruled that the governmental action was a permissible accommodation. *Cholla Ready Mix, Inc. v. Civish*[33] involved a case where the State of Arizona refused to purchase materials for road construction contracts from a company that mined its materials in a manner that had an adverse impact upon a sacred site that had been found to be eligible for the National Register of Historic Places. The Ninth Circuit upheld the State's refusal against a claim that it violated the Establishment Clause. The Court found that the State had a valid secular purpose (protection of a site of religious, historical and cultural importance), its action did not have a primary effect of advancing or endorsing religion (carrying out state construction projects in a manner that does not interfere with religious practices is a permissible accommodation of religion) and there was no excessive state entanglement with religion (noting that tribes are not solely religious in nature, but are ethnic and cultural as well).

Access Fund v. U.S. Department of Agriculture[34] involved Cave Rock -- a large rock formation located on National Forest land near Lake Tahoe. The site is sacred to the Washoe Tribe. The site is also of archeological and historical significance. Following a lengthy process, the Forest Service decided to ban rock climbing at the site. The Access Fund, an organization that advocates on behalf of rock climbers, filed suit arguing that the ban on rock climbing at Cave Rock violated the Establishment Clause. The Ninth Circuit rejected this claim, holding that (1) the Forest Service's limitation on climbing was a permissible secular purpose in that it protected the cultural, historical and archeological features of Cave Rock, (2) the ban could not be viewed as an endorsement of the Washoe religion – particularly because other activities that are incompatible with Washoe beliefs are still allowed, and (3) oversight of recreational activities by the Forest

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[31] *Bear Lodge*, *supra* note 27, 175 F.3d at 821-822; *Wyoming Sawmills*, *supra* note 27, 179 F.Supp.2d at 1290-1297; *Natural Arch and Bridge Society v. Alston*, 98 Fed. Appx. 711 (9th Cir. 2004), *cert. denied sub. nom. DeWaal v. Alston*, 543 U.S. 1145 (2005).; *Native American Heritage Commission v. Board of Trustees*, 59 Cal.Rptr.2d 402, 51 Cal.App.4th 675 (Cal.App. 2 Dist. 1996).

[32] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[33] 382 F.3d 969 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1828 (2005).

[34] 499 F.3d 1036 (9th Cir. 2007).

Service cannot be viewed as excessive entanglement between church and state.[35] The Court distinguished two Federal District Court decisions which had previously addressed the Establishment Clause issue. Both courts had upheld voluntary measures to limit recreational activities, but had suggested that mandatory bans might violate the Establishment Clause claims.[36] The Ninth Circuit found that those cases involved measures that advanced solely sacred goals, not secular goals as in the case of Cave Rock.[37]

There is no reported case that has reached the merits of an Establishment Clause claim that has ruled in favor of those challenging the government's action, although there were two lower court unreported rulings referenced in reported cases where First Amendment claims were upheld.[38]

Thus, the scope of the Establishment Clause in regard to placing limitations on the authority of the government to protect sacred sites is evolving in a direction that is broadly favorable in terms of upholding government action to protect sacred places, although the exact parameters of the Establishment Clause in this context have not yet been definitively established.

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[35] *Id*. at 1042-1046.

[36] *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F.Supp.2d 1448, *aff'd*,. 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Natural Arch and Bridge Society v. Alston*, *supra* note 27, 209 F.Supp.2d at 1223-1225. The framework for both cases was that the government could not constitutionally coerce the public to refrain from certain activities, but that it could take actions to voluntarily encourage people to act respectfully. The courts found that the government actions met this test (although one of the courts had issued an injunction at a preliminary phase based upon a finding that one part of the government's plan did not meet this test.) *See* footnote 38. This approach to the Establishment Clause is questionable as a legal proposition.

[37] *Access Fund v. U.S. Department of Agriculture*, *supra* note 34, 499 F.3d at 1046. The voluntary/mandatory approach to the Establishment Clause is questionable as a legal proposition. The concept of "unconstitutional coercion", as used in cases such as *Lee v. Weisman*, 505 U.S. 577, 587 (1992), refers to actions which would force a non-believer to affirmatively provide support for or participate in a particular religion, not to governmental restrictions that accommodate religious free exercise by preventing actions that would interfere with that exercise. Although the court in *Access Fund* chose to distinguish the District Court rulings that had utilized this distinction, as opposed to disavowing those decisions, it is unknown whether the appellate court would fully adopt this reasoning if such a case were squarely presented to it.

[38] In *Bear Lodge*, *supra* note 27, 2 F.Supp.2d at 1450, the District Court in its final decision made reference to a preliminary decision in which it had issued a preliminary injunction against a portion of a Rock Climbing Management Plan at Devils Tower National Monument, a plan that had provided that no commercial climbing licenses would be issued during the month of June in order to accommodate Native American religious needs at the site. That preliminary decision can be found on some web sites, even though it is an unreported decision. In *Native American Heritage Commission v. Board of Trustees*, *supra* note 31, 59 Cal. Rptr. 2d at 404, the court made reference to the trial court decision finding unconstitutional a California statute empowering the court to issue an injunction against activities that would damage sacred sites on public property. *See* Section III.B. It suggested in dicta, however, that it would have had a broader view of what is permissible under the Establishment Clause than the trial court. *Id*. at 409-410.

B. Federal Indian Law

To make the most effective use of the federal laws that are potential tools for protecting sacred places, it is helpful to have some familiarity with the basic principles of federal Indian law. This section of the Materials presents a brief introduction to this subject matter.[39] Federal Indian law includes doctrines on inherent tribal sovereignty, the federal trust relationship, and treaty rights and other kinds of reserved tribal rights, and these doctrines should serve as a backdrop for the application of many of the provisions in the laws and regulations that are discussed in these Materials.

Federal common law has long recognized that "Indian nations" are "distinct political communities retaining their original natural rights…"[40] Indian tribes possess "attributes of sovereignty over both their members and their territory."[41] As summarized by one court, "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate… [and are] qualified to exercise powers of self-government…by reason of their original tribal sovereignty."[42] Congress has been recognized as having the authority to limit the exercise of this sovereignty[43] and the courts have held that tribes have been implicitly divested of certain powers by reason of their "dependent status."[44] In recent years, however, Congress has reaffirmed the principle of tribal self-government repeatedly.[45]

In exercising its authority over American Indian and Alaska Native affairs, there is a "distinctive obligation of trust incumbent upon the [federal] Government that "involves moral obligation of the highest responsibility."[46] The basis for this special legal relationship between Indian people and the federal government is found directly in the Constitution[47] and memorialized in treaties. This trust relationship applies to all Federal agencies and to Federal action

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[39] *See generally* DAVID H. GETCHES, *ET AL.*, CASES AND MATERIALS ON FEDERAL INDIAN LAW (5th ed., 2005); ROBERT N. CLINTON, *ET AL.*, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM; CASES AND MATERIALS (4th ed., 2003); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (3rd ed., 1998).

[40] *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[41] *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[42] *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (citations omitted).

[43] *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

[44] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-209 (1978).

[45] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq*.; Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq*.

[46] *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

[47] *See* Art. I, § 8, par. 3.

outside Indian reservations.[48] Although the Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people,"[49] for the Federal government to be held liable in damages for breach of trust, the Court has held that fiduciary duties must be based on a relevant statute or regulation, or a network of statutes and regulations.[50] Regardless of whether the federal government can be held liable in damages, however, the trust relationship should taken into account when federal agencies consult with tribes. As stated in guidance issued by the Department of the Interior:

> In the event an evaluation [of a proposed agency action] reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), … Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making process. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty.[51]

A key point that can be taken from this DOI guidance is that tribes can become proactively engaged in the evaluation of whether a proposed DOI action will affect a trust resource and the nature of any such effects.[52]

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[48] *See, e.g., Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), *cert. den.* 454 U.S. 1081 (1981); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). *See, e.g.*, internal guidance documents issued by the Department of the Interior in its Departmental Manual (DM), at 303 DM chapter 2, 512 DM chapter 2 (acknowledging that all bureaus and offices within DOI are subject to the federal trust responsibility when their actions affect "tribal trust resources, trust assets, or tribal health and safety." 512 DM §2.2. The DOI Departmental Manual is available in the Electronic Library of Interior Policies at: elips.doi.gov.

[49] *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (often referred to as "*Mitchell II*" to distinguish this decision from *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*").

[50] *Id.* at 224 (finding liability based on a network of statutes and regulations); *United States v. Navajo Nation*, 537 U.S. 488, 493, 502-07 (2003) (holding that the Indian Mineral Leasing Act, 25 U.S.C. § 396a *et seq*., and implementing regulations do not mandate compensation for alleged breach of trust); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468, 472-76 (2003) (holding that the Court of Federal Claims does have jurisdiction over claim for compensation based on statute declaring that former military reservation would be held in trust for Tribe subject to use of land and improvement by Secretary).

[51] 512 DM §2.4.B.

[52] For example, tribal advocates may want to assert that certain kinds of items that hold religious importance, such as Native American human remains and cultural items covered by the Native American Graves Protection and Repatriation Act (NAGPRA), are, in fact, held in trust by federal land managing

In addition to the trust responsibility, for some tribes, legal theories for the protection of tribal sacred places might be based on treaties. During the 18th and 19th Centuries, Indian tribes signed numerous treaties with the federal government. A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[53] If a treaty does not expressly delineate the reserved tribal powers or rights, that does not necessarily mean that they have been divested.[54] To the contrary, "when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights are consistent with the tribe's sovereign status."[55] This legal principle is generally applicable to tribal rights and powers within reservation boundaries, but it has also been applied in the interpretation of treaty clauses reserving off-reservation rights.[56] Moreover, the judicially-established rules for interpreting treaties ("canons of construction") require a court to interpret the treaties as understood by the Indians, given their practices and customs as of the date that the treaty was consummated.[57]

Besides treaties, some tribes have rights in particular units of federal lands specified in statutes, and some tribes have off-reservation rights based on executive orders. Indian law canons of construction also apply to statutes and executive orders, which generally call for resolving ambiguities in favor of Indians (language restricting Indian rights is to be construed narrowly, language preserving or granting Indian rights is to be construed liberally).[58] There are, however, many countervailing legal principles that may come into play in the application of the Indian law canons of construction. In numerous cases over the past two decades or so, the Supreme Court has shown a tendency of avoiding reliance on the Indian law canons. [59]

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agencies. The reasoning behind such an assertion would be that, under NAGPRA, if any such items are removed from federal land, the lineal descendant or culturally affiliated tribe has a statutory right to take custody, and so the land managing agency is a trustee with respect to such items.

[53] *United States v. Winans*, 198 U.S. 371, 381 (1905).

[54] *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert denied*, 466 U.S. 926 (1983).

[55] *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1984).

[56] *E.g.*, *U.S. v. Winans*, 198 U.S. 371 (1905), involved off-reservation rights to take fish at usual and accustomed places, and the Court found that this included a reserved right to cross private property to get access to such fishing places.

[57] *See, e.g., Washington v. State Commercial Fishing Ass'n*, 443 U.S. 658, 675-676 (1979); *Cherokee Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

[58] *See generally* Clinton, *et al*, *supra* note 39, at 212-18; Getches, *et al*, *supra* note 39, at 329-40; Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1139 (1990).

[59] E.g., *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) (applying the "plain meaning" rule to avoid applying the Indian law canon on ambiguities), *Rice v. Rehner*, 463 U.S. 713, 724-25 (1983) (canon protecting tribal self-government inapplicable to a subject matter not traditionally regulated by

II. Federal Statutes and Regulations

A. Religious Freedom Legislation and Executive Order 13,007

Congress has attempted to supplement the constitutional guarantees by enacting specific statutes pertaining to religious free exercise in general and Native American religious freedom concerns, specifically. In addition, President Clinton issued an Executive Order on sacred sites that has been retained by the Bush Administration.

1. American Indian Religious Freedom Act (AIRFA)

In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), which includes the declaration that it is:

> the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Ekimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship though ceremonials and traditional rites.[60]

AIRFA can provide land managers with the authority to take action to protect sacred lands. It does not provide for an enforcement mechanism, however, and the Supreme Court has held that AIRFA cannot be used to provide legal redress to Indian individuals or tribes who disagree with a decision by an agency that will have a negative impact on a sacred place.[61]

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tribes); *contra Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (off-reservation fishing rights upheld based on interpretation of treaties and executive order; 5-4 decision).

[60] Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996). In addition to the codified policy statement quoted above, AIRFA also includes a number of "whereas" clauses and a section directing the Secretary of the Interior to prepare a report to Congress. That report, captioned American Indian Religious Freedom Act Report, was completed in 1979 and was submitted to Congress.

[61] *See Lyng*, *supra* note 10, 485 U.S. at 455 (noting floor statement by congressional sponsor that AIRFA "has no teeth"). In *Lyng*, the Court held that the Forest Service was not required by the Free Exercise Clause of the First Amendment to demonstrate a compelling need to complete a paved logging road through an area sacred to several tribes. *Id.* at 447. In spite of its "lack of teeth", enactment of AIRFA was still significant as it was an official repudiation of a long history of suppression of Indian religions by the federal government. *See generally* Rayanne J. Griffin, *Sacred Site Protection against a Background of Religious Intolerance*, 31 TULSA L.J. 395 (1995). *Trope*, *supra* note 5; HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (CHRISTOPHER VECSEY, ed., 1991).

2. Executive Order 13,007

For tribal sacred places located on federal lands, the policy statement in AIRFA has been reinforced through Executive Order 13,007, Indian Sacred Sites, issued by President Clinton in 1996.[62] The Bush Administration has retained this order in force. This Executive Order directs federal land managing agencies to:

> (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and
> (2) avoid adversely affecting the physical integrity of such sites.[63]

This mandate is limited by the qualifying language that federal land managing agencies shall carry out this policy "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions."[64]

As with Executive orders generally, EO 13,007 does not create any enforceable rights against the federal government or any enforceable responsibilities on the part of the federal government.[65] Similar to AIRFA, EO 13,007 may be useful in persuading agency officials to engage in meaningful consultation with tribes and the representatives of traditional religious practitioners, and to accommodate access and avoid adverse effects, but it does not serve as the basis for an order by a federal court if the federal agency official decides to take an action that causes damage to a site or interferes with access.

3. Religious Freedom Restoration Act

a. Background

As previously noted, in the 1990 *Employment Division, Department of Human Resources of Oregon v. Smith*[66] *(Smith)* case involving the ceremonial use of peyote, the U.S. Supreme Court severely limited the test that had previously been applied in First Amendment cases in which persons challenged facially neutral[67] governmental activities or laws that indirectly affected religious

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[62] Executive Order 13,007, Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996) (reprinted in notes at 42 U.S.C. § 1996). The Clinton Administration issued this Executive Order in response to the efforts of a coalition of Native American and other organizations that were seeking legislation to protect the religious freedom of traditional Native Americans after the Supreme Court's decisions in the *Lyng* and *Smith* cases.
[63] *Id.* § 1(a).
[64] *Id.* § 1(a).
[65] *Id.* §§ 3, 4.
[66] 494 U.S. 872 (1990).
[67] A facially neutral activity or law is one that does not target religion *per se*. Rather it has a valid secular purpose, *e.g.*, building a road to facilitate logging, although it may also have an impact upon religious exercise. This is contrasted with a law that specifically targets religion, which would continue to be subject

activity, a test known as the "compelling governmental interest or strict scrutiny" test.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA),[68] which re-established by statute the compelling governmental interest test that had been rejected by the Supreme Court in *Smith* as a matter of constitutional law. Specifically, the Act provides that governmental activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[69] Under RFRA, any person whose free exercise is burdened by a governmental activity may seek judicial redress.[70]

b. Constitutionality

The U.S. Supreme Court held RFRA unconstitutional as applied to the states in *City of Bourne v. Flores*.[71] Since the decision in *Flores*, however, many federal court decisions have explicitly or implicitly upheld the constitutionality of RFRA as applied to the federal government.[72] Ultimately, this issue may be resolved by the U.S. Supreme Court.[73]

c. Application to Federal Land Use Decisions

Assuming that RFRA is constitutional as applied to the federal government, the question is whether it applies to federal land management decisions that substantially interfere with the free exercise of religion by Native religious practitioners. When interpreting any statute, a court must first look at

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to strict scrutiny under the First Amendment. *See*, *e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[68] P.L. 103-141 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

[69] 42 U.S.C. § 2000bb-1(a), (b).

[70] 42 U.S.C. § 2000bb-1(c).

[71] 521 U.S. 507 (1997).

[72] See, *e.g.*, *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999) (*Flores* does not bar application of RFRA to the federal government), *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002) (RFRA constitutional as applied to the Federal government and a federally administered territory), and *Kikamura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (RFRA constitutional as applied to the federal government); but *cf. La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6th Cir. 2000) (questioned whether RFRA is unconstitutional as applied to the federal government).

[73] *City of Bourne*, *supra* note 71, was based upon a finding that RFRA exceeded the power of Congress to enact legislation binding upon the states under the Fourteenth Amendment. 521 U.S. at 520-536. Claims that RFRA are unconstitutional as applied to the federal government are generally based upon the Establishment Clause. 521 U.S. at 536-537 (Stevens, J. concurring) The Supreme Court has upheld the constitutionality of the prisoner provisions in the Religious Land Use and Institutionalized Persons Act, rejecting an Establishment Clause in the context of that statute. *Cutter v. Wilkinson*, 544 U.S. 709, 122 S. Ct. 2113, 2120-2125 (2005). RLUIPA is a companion statute to RFRA.

the statutory language.[74] Each statutory provision must be read by "looking to the provisions of the whole law and to its object and policy."[75]

On its face, the legislative language of RFRA would appear to provide a judicial mechanism for traditional religious practitioners to challenge harmful federal land use decision as the statute does not provide for any exceptions to its application. Moreover, in RFRA's findings it is specifically stated that the policy of the legislation is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[76] Given this underlying policy and the absence of any explicit limiting language in the law, the most straightforward interpretation of RFRA would seem to be that it applies to impacts on religious free exercise caused by federal land management to the same extent that it applies to other federal actions.[77]

The main reason that there is some uncertainty about this conclusion is that there is language in the Senate committee report and a statement made in the floor debate in the Senate to the effect that the bill was meant to reverse the *Smith* case and that pre-*Smith* First Amendment case law *(i.e., Lyng v. Northwest Indian Cemetery*[78]) had made it clear that the strict scrutiny test did not apply to "the use and management of Government resources."[79] In short, the implicit assertion was that the holding in *Lyng* would govern the interpretation of RFRA.

In the *Smith* case, however, the Supreme Court noted that it had "declined (in *Lyng*) to apply *Sherbert* analysis to the Government's logging and road construction activities on land used for religious purposes by several Native American tribes, even though it was undisputed that the activities 'could have devastating effects on traditional Indian practices.'"[80] It was this refusal of the

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[74] *Shannon v. United States*, 512 U.S. 573, 580 (1994).

[75] *John Hancock Mut. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993).

[76] 42 U.S.C. 2000bb(b).

[77] Indeed, applying RFRA as written, fulfills the axiom of statutory interpretation that civil rights statutes should be interpreted on behalf of the persons on whose behalf they have been enacted. See, *e.g.*, *Green v. Dumke*, 480 F.2d 624, 628 n.7 (9th Cir. 1973). It also prevents an interpretation that would greatly diminish the ability of Native Americans to effectively utilize RFRA as compared to non-Indians, a discriminatory impact that would arguably be at odds with the trust obligation that the United States has to Indian people in general. See, *e.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

[78] 485 U.S. 439 (1988) The *Lyng* decision in effect precluded Native religious practitioners from challenging federal land use decisions on First Amendment Free Exercise Clause grounds, as discussed above. *See* Section I.A.1.

[79] SEN. REP. NO. 103-111, 103d Cong. 1st Sess., at 9, n. 19 (1993), reprinted at 1993 U.S.C.C.A.N. 1892-1912; 139 CONG. REC. S 14470 (Oct. 27, 1993) (Statement of Senator Hatch).

[80] The Court went on to say "it is hard to see any reason in principle or practically why the government should have to tailor its health and safety laws to conform to the diversity of belief, but should not have to tailor its management of public lands", *Lyng*, *supra,* 494 U.S. at 885, n.2.

Supreme Court to apply the *Sherbert* balancing test in religious freedom cases that Congress specifically rejected when it enacted RFRA.[81] Further support for an interpretation of RFRA that eschews reliance upon *Lyng* is language in the House committee report which indicates that the "definition of governmental activity covered by the bill is meant to be all inclusive. All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill" regardless of whether the governmental activity "coerce(s) individuals into violating their religious beliefs … [or] penalize(s) religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen."[82] This language is inconsistent with the key legal basis for the decision in the *Lyng* case and intent to cover all governmental actions that have an external impact is inconsistent with the holding in *Lyng* that the use of government land can never trigger the strict scrutiny test, regardless of the impact of a land management decision. Of note, the Forest Service manual is consistent with the House Report's interpretation of RFRA as it requires consideration of RFRA by Forest Service land managers.[83]

d. Navajo Nation v. United States

This issue of the applicability of RFRA to federal land management decisions is currently being litigated in the case of *Navajo Nation v. U.S. Forest Service*.[84] This case involves the San Francisco Peaks in Northern Arizona. Native Americans from at least 13 different tribes consider the Peaks sacred. It is an active ceremonial area, the abode of spirit beings, contains numerous "shrines" and is the source of water and plants of medicinal and spiritual significance. A ski area that covers 777 acres is located on one part of the Peaks. In 2005, the Forest Service approved a proposal that would allow for the use of treated sewage effluent for snowmaking at the site.

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[81] It is worth noting that the version of the bill that originally passed the House of Representatives provided that the purpose of RFRA was to "restore the compelling interest test as set forth in Federal court cases before *Employment Division v. Smith*" See Section 2(b)(1) of H.R. 1308 EH, available at http://thomas.loc.gov. This section was changed in the enacted version of RFRA to specifically reference *Sherbert* and *Yoder*, which indicates a clear intent that the compelling interest test in RFRA should be applied in a manner consistent with those cases. *Sherbert* and *Yoder* represented the "zenith" of free exercise jurisprudence.

[82] H.R. Rep. No. 108-88, 103d Cong., 1st Sess., 6 (1993).

[83] *Forest Service Manual 1500*, Section 1563.11, Exhibit 1. Moreover, the BLM has prepared Environmental Impact Statements (EIS) which include a RFRA analysis. *See*, *e.g.,* BLM, Final Environmental Impact Statement, Zortman and Landusky Mines, Vol. 1, p. 1-16 (March 1996).

[84] 408 F.Supp. 866 (D.Ariz. 2006), *revd.*, 479 F.3d 1024 (2007), *en banc review granted*, Oct. 17, 2007.

A lawsuit was filed by five tribes, two traditional practitioners and a few supporting organizations to prevent this development. The Federal District Court utilized the analysis in *Lyng* to rule against the tribal claimants.[85]

On appeal, a three judge panel of the Ninth Circuit Court of Appeals found that the development at the San Francisco Peaks violated the RFRA. The Ninth Circuit found that the burden from the project on the religious practices of the tribes, fell "roughly into two categories: (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated — physically, spiritually, or both — for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."[86] It concluded that *Lyng* did not govern the application of RFRA to the case and issued an injunction against the project as it found that the government did not have a compelling interest in going forward.[87]

The government and ski area requested that the Ninth Circuit review the panel decision *en banc*. The court granted this motion and an eleven judge panel heard the case in December 2007. A decision is expected sometime in 2008.

Although the *en banc* decision will be binding only in the Ninth Circuit,[88] it will be an important precedent in terms of whether RFRA will be available for sacred lands protection. The only other circuit that has made reference to this issue is the Tenth Circuit Court of Appeals raised the issue in *Thiry v. Carlson*,[89] but the Court did not need to resolve the question in order to render a decision in that particular case.

Thus, it is currently uncertain whether RFRA will serve as a tool for Indian practitioners and tribes to utilize when development threatens sacred places.

e. Who Can Make a Claim?

Assuming that RFRA is available for sacred lands protection, clearly any religious practitioner whose ability to freely exercise his or her religion has been

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[85] *Navajo Nation*, *supra* note 84, 408 F.Supp. 2d. at 904-905.
[86] *Navajo Nation*, *supra* note 84, 479 F.3d at 1039.
[87] *Id.* at 1043-1048.
[88] The states in the Ninth Circuit are Nevada, Arizona, Idaho, Montana, Washington, Oregon, California, Hawaii and the Territory of Guam.
[89] 78 F.3d 1491, 1495 (10th Cir. 1996).

burdened by a governmental action would have a right to raise a claim under RFRA.

Although the cases are few, religious organizations have also brought actions under RFRA.[90] This would suggest that traditional societies would have standing under RFRA.

As was the case in the *Navajo Nation* case, tribes have the ability to bring a claim based upon either a showing that its religious freedom rights have been burdened or that it has the authority to assert such a claim on behalf of its members.[91] There appears to be at least one case where a church has filed suit for its members under RFRA.[92]

f. How is the RFRA test applied in practice?

There are a number of fact specific decisions that have analyzed the question of what is a substantial burden. Analyzing that case law is beyond the scope of this analysis. Courts have used different, but similar, words to describe the test to be applied in determining what "substantial burden" means. One typical example is the test utilized in *Guam v. Guerrero* -- in order for a

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[90] *See, e.g.*, *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994).

[91] The other possible way in which a tribe might assert a claim for its members would be through the use of the doctrine of *parens patriae*, a doctrine which provides that a sovereign may file an action on behalf of its citizens. There are no cases of which we are aware where a tribe has successfully used the *parens patriae* doctrine, however, although there are several cases where tribes have attempted to do so without success. In some instances, the cases were decided on other grounds. In other cases, the tribe's attempt to utilize the *parens patriae* doctrine was rejected based upon a theory the tribe was not asserting the collective interests of all its members in the case before the court. *See, e.g.*, *Standing Rock Sioux v. North Dakota*, 505 F.2d 1135 (8th Cir. 1974) and *Pueblo of Isleta v. Lucero*, 570 F.2d 300 (8th Cir. 1978) (did not address the issue); *Assiniboine & Sioux Tribes v. Montana*, 568 F.Supp. 269 (D.Mt. 1983) and *Alabama & Coushatta Tribes v. Trustees of Big Sandy Independent School District*, 817 F.Supp. 1319, 1327 (E.D. Tex 1993) (rejecting the tribe's effort to use *parens patriae*). The rejection of tribal claims in these cases is questionable. For example, the Supreme Court upheld the use of the *parens patriae* doctrine by the Commonwealth of Puerto Rico even though only 787 of its citizens were affected by the controversy before the court, finding that the key test is whether the sovereign has a "quasi-sovereign interest" in the dispute – in that case, advancement of the health and well-being of its citizens. The Court stated that "[a]lthough more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607-609 (1982). Based upon this reasoning, a *parens patriae* argument might be a basis for tribes who want to make a claim under RFRA to establish standing. Protecting places of traditional cultural and religious significance to the tribe would be an appropriate exercise of the tribe's sovereign powers. Preserving such places is not only of direct significance to a certain segment of the tribal population that actively practices traditional religion, but also indirectly significant to the entire tribal population as these are places reflective of and integral to tribal culture and history in general.

[92] In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 126 S.Ct. 1211 (2006), the church sought an injunction prohibiting the United States from enforcing the Controlled Substances Act against its members who engage in the sacramental use of hoasca, a psychotropic plant.

government action to place a "substantial burden" upon religious exercise, it must "put substantial pressure on an adherent to modify his behavior and violate his beliefs."[93] The legislative history of the Religious Land Use and Institutionalized Persons Act (RLUIPA), RFRA's companion statute, indicates that the purpose of the "substantial burden" requirement was to exclude "trivial, technical or *de minimis* burdens on religious free exercise", not to create an onerous barrier to the application of the statute.[94] As stated by one District Court judge recently, however, it is "easy to identify these general principles as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts."[95] In short, what is required is a fact-specific inquiry in each case measuring the extent of the impact of the government action upon the religious practice in question. This may involve the presentation of testimony by traditional practitioners, tribal officials and scholars.

One important issue involving the application of RFRA to sacred sites should be noted. In pre-*Lyng* case law, many courts that were faced with sacred lands issues imposed another element to the First Amendment balancing test – a requirement that the aggrieved religious practitioners show that the religious practice or geographic area affected was "central" or "indispensable" to their religions.[96] This additional hurdle made it more difficult for Native American religious practitioners to prevail in legal challenges to preserve sacred places.

A 2000 amendment to RFRA is an indication that this test is not applicable under RFRA. That amendment[97] changed the definition of "religious exercise" to cross-reference the definition in RLUIPA, *viz.*, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[98] The "indispensability" test would appear to be inconsistent with this rejection of the concept of centrality in the 2000 amendment.[99]

Once a substantial burden has been shown, approval of the proposed expansion by the Forest Service is only legally permissible if it is justified by a

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[93] *Guam v. Guerrero*, *supra* note 72, 290 F.3d at 1222.
[94] House Report 106-219 (1999) at 13.
[95] *Guru Nanak Sikh Society v. County of Sutter*, 326 F.Supp.2d 1140, 1152 (E.D. Cal. 2003).
[96] See, e.g., *Wilson v. Block*, 708 F.2d 735, 742-744 (D.C. Cir. 1983), *cert. den.* 464 U.S. 956 (1983) and 464 U.S. 1056 (1984); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1163-1164 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).
[97] 42 U.S.C. 2000bb-2(4).
[98] 42 U.S.C. 2000cc-5.
[99] Of note, all of the judges in the *Smith* case (the majority, concurrence and dissent) also rejected the concept of courts evaluating the centrality of a particular religious belief or practice as part of a First Amendment analysis. See *Smith*, *supra* note 14, 494 U.S. at 887-888 (majority opinion), 906-907 (O'Connor concurring), 919 (Blackmun dissenting).

compelling governmental interest that cannot be achieved by a less restrictive means. The burden of showing compelling interest rests upon the government.

Compelling interest was defined in *Sherbert v. Verner*, *supra*,[100] as an interest that poses "some substantial threat to public safety, peace and order". In *Wisconsin v. Yoder*, *supra*,[101] it was defined as "only those interests of the highest order." Cases interpreting RFRA have ruled that the compelling interest test cannot be met through generalized assertions of government interest, but must be measured by the specific action that would apply to the affected individuals. [102]

If a compelling interest is established, then the government must show that it has chosen the least restrictive alternative to achieve its goals.

B. Federal Cultural Resources Laws

Some of the most effective legal tools for protecting tribal sacred places are found in the body of federal statutory and regulatory law dealing with the general subject matter of cultural resources. The term "cultural resources" is commonly used as a generic term for places and things that hold importance because of their association with the history or prehistory of human cultures. There is no standard definition for this term,[103] and other terms such as "heritage resources"[104] or "cultural heritage"[105] are sometimes used to describe this broad category of places and things. Within this broad category, federal statutes address certain kinds of places and things, using defined terms that are somewhat more narrowly tailored. Three of these federal cultural resources statutes that are particularly relevant for protecting tribal sacred places are the

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[100] 374 U.S. at 406

[101] 406 U.S. at 215

[102] *See, e.g., Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegeta, supra* note 92, 126 S.Ct. at 1223-1225 (government's interest in banning hallucinogen drugs in general is not enough; government must show that it has a compelling interest in not providing an exception for the ceremonial use of hoasca, the actual substance needed for the tea utilized in plaintiff's religious ceremony). *See also Wisconsin v. Yoder*, *supra*, 406 U.S. at 213, 221 (while accepting the premise that education is a paramount state interest and "despite its admitted validity in the generality of cases", this was not enough to show a compelling interest; rather the government needed to specifically show it had a compelling interest in Amish children attending school after eighth grade).

[103] The term is not defined in any of the statutes discussed in this part of the Materials, although some federal agency regulations include definitions for the term, *e.g.*, BLM regulations at 43 C.F.R. § 2300.0-5(e).

[104] SHERRY HUTT, ET AL., HERITAGE RESOURCES LAW: PROTECTING THE ARCHAEOLOGICAL AND CULTURAL ENVIRONMENT (1999).

[105] *Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 47th Sess., U.N. Doc. E/CN.4/Sub.2/26 (1995).

National Historic Preservation Act (NHPA),[106] the Archaeological Resources Protection Act (ARPA),[107] and the Native American Graves Protection and Repatriation Act (NAGPRA).[108]

These statutes are relevant to sacred lands protection because some of the places that are regarded as cultural resources may be used in tribal religious ceremonies or cultural practices or featured in tribal oral traditions relating to tribal religious beliefs. In addition, objects that were used in religious ceremonies or otherwise imbued with religious significance may be embedded in the ground at such places. Burial sites of tribal ancestors are widely regarded as sacred, as are items that were ceremonially interred with deceased ancestors. All three of the statutes discussed in this section include some recognition of such interests.

While NHPA, NAGPRA and ARPA are each concerned with a particular subset of the broad category of cultural resources, there is a considerable degree of overlap. There are also some ways in which the provisions of one statute do not correspond to one or both of the others. NHPA establishes a review requirement that is triggered by proposed federal agency action and is administered by an independent agency, the Advisory Council on Historic Preservation (ACHP); ARPA applies to archaeological resources located on federal "public lands" and "Indian lands"; and the graves protection provisions of NAGPRA apply to Native American human remains and "cultural items" located on "federal lands" and "tribal lands."

1. National Historic Preservation Act (NHPA)

The National Historic Preservation Act (NHPA)[109] provides the legislative authority for a multi-faceted national program to identify, evaluate, and preserve historic properties. Under NHPA the terms ***"historic property"*** and ***"historic resource"*** share a single statutory definition, namely, a "district, site, building, structure or object" that is included in, or is eligible for, the National Register.[110] This paper explains the procedural mechanism mandated by NHPA section

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[106] 16 U.S.C. §§ 470 – 470x-6.

[107] 16 U.S.C. §§ 470aa – 470mm.

[108] 25 U.S.C. §§ 3001 – 3013.

[109] 16 U.S.C. §§ 470 – 470x-6. *See generally* Adina W. Kanefield, *Federal Historic Preservation Case Law, 1966 – 1996; Thirty Years of the National Historic Preservation Act* (Advisory Council on Historic Preservation, 1996) and Javier Marques, *Federal Historic Preservation Case Law Update 1996-2000* (Advisory Council on Historic Preservation, 2002), both of which are available from the Advisory Council. *See* www.achp.gov. *See also* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996).

[110] 16 U.S.C. § 470w(5). The statutory definition also includes "artifacts, records, and material remains related to such a property or resource."

106,[111] commonly known as the "section 106 process," which provides a measure of protection for historic properties that would be affected by a proposed federal or federally-assisted undertaking.

a. What is the basic statutory requirement?

The section 106 process, triggered by a proposed federal or federally-assisted undertaking or the issuance of a federal license, is based on section 106 of the statute, which provides:

> 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 shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.[112]

NHPA section 106 has been implemented through regulations[113] issued by the Advisory Council on Historic Preservation (ACHP or Advisory Council), an independent agency established by NHPA section 201.[114] The mandate of section 106 must be read in conjunction with other provisions of the Act, some of which are discussed in these materials. With respect to the preservation of Native sacred places, the key statutory language is found in section 101(d)(6), which provides, in part:

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[111] 16 U.S.C § 470f.

[112] 16 U.S.C. § 470f.

[113] 36 C.F.R. part 800. Revised final rules implementing the NHPA Amendments of 1992 were published in December 2000. Advisory Council on Historic Preservation, Protection of Historic Properties, 65 Fed. Reg. 77697 (Dec. 12, 2000). In July 2004, the Council published final amendments to certain provisions of the regulations, 69 Fed. Reg. 40544 (July 6, 2004), in response to the court decision of *National Mining Ass'n v. Slater*, 167 F.Supp.2d 265 (D. D.C. 2001), *rev'd in part sub nom National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

[114] 16 U.S.C. § 470i. The Advisory Council is composed of 23 members, all but two of which are appointed by the President (including the Secretaries of Interior and Agriculture and the heads of four other federal agencies or their designees). Information on the Advisory Council is available on its internet site at: www.achp.gov.

> In carrying out its responsibilities under section 106, a federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties [that may be eligible for inclusion on the National Register].[115]

In addition, NHPA section 110 mandates that each federal agency "shall establish" a program for the "identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties" and that each agency's program "shall ensure … that the agency's preservation-related activities are carried out in consultation with … Indian tribes [and] Native Hawaiian organizations…"[116] Section 110 also provides that each agency's preservation program "shall ensure" that "the agency's procedures for compliance with section 106 … "are consistent with regulations issued by the Council" and "provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with … Indian tribes [and] Native Hawaiian organizations … regarding the means by which adverse effects on such properties will be considered."[117]

b. What is an "Undertaking"?

As defined in the statute, the term "undertaking":

> means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –
>
> (A) those carried out by or on behalf of the agency;
>
> (B) those carried out with Federal financial assistance;
>
> (C) those requiring a Federal permit, license, or approval;
>
> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[118]

A number of court decisions have addressed the question of whether any particular "project, activity, or program" is an undertaking.[119] Some of the trends among these cases are that federal financial assistance generally does render a non-federal project an undertaking as does a federal permit, license or

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[115] 16 U.S.C. § 470a(d)(6)(B).
[116] 16 U.S.C. § 470h-2(a)(2).
[117] *Id.*
[118] 16 U.S.C. § 470w(7).
[119] *See generally* Kanefield, *supra* note 89, at 16-21.

other approval. Some court decisions have strictly construed the word "required" in clause (C), holding that where a federal approval is not a legal prerequisite for a project, the approval does not render the project an undertaking.[120] Similarly, a project for which federal agency action was viewed as a ministerial act was held not to be an undertaking.[121]

Clause (D) of the statutory definition has been deleted from the definition in the ACHP regulations[122] in response to a decision by the D.C. Circuit.[123] The court reasoned that it had previously held that the jurisdiction of the ACHP under section 106 is limited to "federally funded or federally licensed undertakings" and did not apply to a situation in which a federal agency had discretionary authority to stop a project but the agency's approval was not a legal requirement.[124] Relying on this earlier holding, the court held that regardless of how expansively Congress defines the term "undertaking," the authority that Congress conferred on the ACHP in section 106 is limited to federally funded or licensed undertakings.[125] In the preamble to its rulemaking document changing its regulations in response to this court decision, the ACHP expresses the view that clause (D) undertakings should not be exempt from section 106 review and that, rather:

> [I]t is the opinion of the ACHP that the Federal agency approval and/or funding of such State-delegated programs does require Section 106 compliance by the Federal agency, as such programs are 'undertakings' receiving Federal approval and/or funding. Accordingly, Federal agencies need to comply with their Section 106 responsibilities regarding such programs before an approval and/or funding decision on them. Agencies that are approaching a renewal or periodic assessment of such programs may want to do this at such time.[126]

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[120] *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443 (D.D.C.), *recons. denied*, 834 F. Supp. 453 (D.D.C. 1993), *aff'd in part. rev'd in part sub nom*. *Sheridan Kalorama Historical Ass'n v. Christopher,* 49 F.3d 750 (D.C. Cir. 1995); *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987).

[121] *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508 (4th Cir., 1992). In addition, a federal permit that authorized activities considered to be inconsequential was held not to be an undertaking. *Vieux Carré Property Owners, Residents & Assocs. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

[122] 36 C.F.R. § 800.16(y) as amended at 69 FED. REG. 40555 (July 6, 2004).

[123] *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

[124] *Id.* at 759, *citing Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755-56 (D.C. Cir. 1995).

[125] *Id.* at 760.

[126] 69 FED. REG. at 40546 (July 6, 2004).

c. What are the criteria for eligibility?

The criteria of eligibility for the National Register, as set out in regulations issued by the National Park Service (NPS),[127] specify that "districts, sites, buildings, structures, and objects" may be eligible for the National Register if they "possess integrity of location, design, setting, materials, workmanship, feeling, and association" and if they:

> (a) are associated with events that have made a significant contribution to the broad patterns of our history;
>
> (b) are associated with the lives of persons significant in our past;
>
> (c) embody the distinctiveness of a type, period, or method of construction, or … represent the work of a master, or … possess high artistic values, or … represent a significant and distinguishable entity whose components may lack individual distinction; or
>
> (d) have yielded, or may be likely to yield, information important in prehistory or history.[128]

The regulations also say that certain kinds of properties ordinarily are not considered eligible for the National Register, including cemeteries, graves of historical figures, and properties that are owned by religious institutions or used for religious purposes, but if such a property fits within one of seven "criteria considerations" set out in the regulations, then such a property may nevertheless be eligible.[129] The "criteria consideration" for religious properties reads as follows: "A religious property deriving primary significance from architectural or artistic distinction or historical importance."[130] Similarly, a cemetery may be eligible if it "derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events."[131]

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[127] 36 C.F.R. part 60. Statutory authorization is NHPA § 101(a)(2), 16 U.S.C. § 470a(a)(2).
[128] 36 C.F.R. § 60.4. The regulations also set out six "criteria considerations" to be applied to certain kinds of properties that ordinarily are not considered eligible. In addition to the regulations, NPS has issued a number of guidance documents on a variety of topics, which are available on an internet site maintained by NPS: www2.cr.nps.gov.
[129] 36 C.F.R. § 60.4.
[130] *Id*.
[131] *Id*.

These "criteria considerations" serve to highlight one of the conceptual problems in using NHPA to protect tribal sacred places: it is a round peg – square hole kind of problem. From the perspective of Native religious practitioners, the primary significance of a sacred place is that it is sacred, but for a place to qualify as a historic property it is its historic significance that matters. For the most part, this is a problem of terminology and perception that can be overcome by emphasizing that what makes NHPA applicable to such places is their historic significance. It is also worth noting that the criteria of eligibility have not been amended since the enactment of the NHPA Amendments of 1992,[132] which added section 101(d)(6), see discussion of traditional cultural properties below.

Whether a property is eligible for the National Register involves judgment by one or more federal, state or tribal government officials, judgment that may be exercised in several different contexts. One context is through the formal nomination of a property. A State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) may nominate a property for listing on the National Register, or a federal agency may nominate a property under its ownership or control, or a federal agency and SHPO or THPO can jointly nominate a property.[133] Nominations may be made as part of a state, tribal or federal agency historic preservation program, regardless of whether there is any pending threat to such a property.

Determinations of eligibility may also be made during the section 106 process. In this context, the federal agency that is considering a proposed undertaking is responsible, in consultation with the SHPO or THPO and other consulting parties, for identifying properties that may be eligible for the National Register and determining whether they are eligible.[134] Final authority for determinations of eligibility – and thus whether a property is a "historic property" – is vested in a National Park Service official known as the "Keeper of the National Register."[135] To be eligible, a property need only qualify on one criterion, although historic properties often qualify on more than one. When considering effects on historic properties in the section 106 process, all of the characteristics that invest a property with historic significance must be considered, including characteristics that may not have been considered when a property was initially determined to be eligible for the National Register.[136]

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[132] Pub. L. No. 102-575, title XL.
[133] 36 C.F.R. §§ 60.6, 60.9, 60.10.
[134] 36 C.F.R. § 800.4.
[135] 36 C.F.R. §§ 60.6(l), 60.12, 800.4(c)(2).
[136] 36 C.F.R. § 800.5(a)(1).

d. What are traditional cultural properties?

NPS has a long-standing policy of treating places that hold religious or cultural importance to Indian tribes as potentially eligible for the National Register, using a category of historic properties known as ***"traditional cultural properties"*** (TCPs). As defined by NPS in *National Register Bulletin 38,* a TCP is a property that is:

> eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.[137]

A TCP need not be characterized by some physical evidence of human activity, but rather may be a place in which the natural environment is relatively undisturbed. While there must be an identifiable place,[138] the cultural values that invest a place with historic significance may be intangible, and oral tradition is usually important in evaluating the historic significance of TCPs.[139] While the living community that gives a TCP its significance need not be an Indian tribe, attention to TCPs has grown in recent years as an increasing number of tribes have become engaged in historic preservation.

The provisions in the NHPA Amendments of 1992 relating to tribes no doubt also have contributed to the increased attention to TCPs. In particular, section 101(c)(6) of the NHPA, added in 1992, provides for the following:

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[137] National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (no date, but first issued in 1990) (hereinafter *Bulletin 38*), available at www.cr.nps.gov/nr/publications/bulletins/nrb38/htm. Although not a regulation, failure to follow the guidance in Bulletin 38 has been held to violate the ACHP regulations. *Pueblo of Sandia v. United States*, 50 F.3d 856, 860-62 (10th Cir. 1995) (holding that failure of Forest Service to follow Bulletin 38 guidance after having been given information indicating that TCPs existed in the area affected by a proposed undertaking amounted to a failure to make a "reasonable and good faith effort" to identify historic properties, as required by ACHP regulations). *Cf.*, *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999) (acknowledging Bulletin 38 as the "recognized criteria" for identification and assessment of TCPs, finding no violation of ACHP regulations in that regard, but enjoining action of private party for other violations of ACHP regulations by Forest Service).

[138] In *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1230 (9th Cir. 1999), although the historic significance of a trail referred to as the "survival march" was not in dispute, no violation of NHPA occurred since location of the trail could not be established despite Forest Service efforts to do so.

[139] *Bulletin 38*, *supra* note 137, provides guidance on methods for documenting and evaluating places that may qualify as TCPs, including consultation with persons who have knowledge of oral traditions.

> Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.[140]

This statutory language constitutes legislative recognition of the use of the TCP category as applied to historic properties that hold religious and cultural importance for tribes and Native Hawaiian organizations. It must be stressed, however, that a historic property may hold religious and cultural importance for a tribe without qualifying as a TCP. For example, an archaeological site may be eligible for the National Register under criterion d (for the information it could yield), and a tribe or Native Hawaiian may regard the site as holding religious and cultural importance regardless of whether the property is also eligible for the National Register as a TCP. The statutory duty under NHPA section 101(d)(6) quoted earlier [141] for federal agencies to consult with tribes in the section 106 process is triggered by a tribe (or Native Hawaiian organization) attaching "religious and cultural significance" to a property that may be eligible for the National Register. Such a property does not need to be a TCP for the duty to consult to apply.

Tribal sacred places that have been in use for at least several generations and that continue to be used by traditional practitioners generally can be determined eligible for the National Register as TCPs, as long as they meet at least one of the criteria and retain sufficient "integrity," as that term is used in the NPS regulations. Tribes and practitioners may not agree with other governmental entities (e.g., NPS, federal land managing agencies, SHPOs) regarding the boundaries for TCPs. A tribe may believe that an entire mountain should be considered a TCP, or the landscape that can be seen from a vision quest site. Other governmental entities generally tend to take a more restrictive approach to setting the boundaries of a TCP.

Many, perhaps most, "Indian sacred sites" as that term is used in Executive Order 13,007[142] could also be determined eligible for the National Register as TCPs, if practitioners and others concerned about such sites are willing and able to compile the necessary documentation. Such documentation is not needed for such sites to be treated as sacred sites under the Executive Order. The Executive Order, however, does not provide a basis for judicial relief, while eligibility for the National Register can in instances where the procedural requirements of the NHPA have not been met.

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[140] 16 U.S.C. § 470a(d)(6).
[141] 16 U.S.C. § 470a(d)(6), *see* text accompanying note 115 *supra*.
[142] *See* text accompanying notes 62-65, *supra*.

e. What entities have roles in the Section 106 process?

As provided in statutory language, the federal agency with direct or indirect jurisdiction over, or with authority to issue a license for, the proposed undertaking has the lead responsibility for carrying out the section 106 process. A variety of other entities can become involved in the process for a given proposed undertaking, some of which are required to be involved, some have a right to be consulting parties if they so choose, and others may become involved if the federal agency official approves their request for consulting party status.

i.) Federal Agency Officials

The regulations require the agency to designate an official with "approval authority for the undertaking and [authority to] commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance."[143] In some cases the "agency official" may not be a federal employee, but, rather, may be a "State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law."[144] If more than one federal agency is involved in an undertaking, the agencies may designate a lead agency.[145] The agency may use contractors to prepare documents for use by the agency, but the agency official "remains legally responsible for all required findings and determinations." [146]

ii.) Advisory Council on Historic Preservation

The statutory language requires the federal agency to afford the Advisory Council an opportunity to comment, but under the regulations, the Council does not participate in the review of most undertakings. The Council retains the discretion to become involved in the review of any particular undertaking, but for the most part it relies on the State Historic Preservation Officer(s) (SHPO) for the state(s) where an undertaking is planned to perform the lead role in reviewing the proposed undertakings. An Appendix to the ACHP regulations sets out "Criteria for Council Involvement in Reviewing Individual section 106

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[143] 36 C.F.R. § 800.2(a).
[144] 36 C.F.R. § 800.2(a).
[145] 36 C.F.R. § 800.2(a)(2). The lead agency bears the compliance responsibility for other agencies that sign on to such an arrangement; any agency that does not designate another agency as lead remains responsible for its own compliance.
[146] 36 C.F.R. § 800.2(a)(3).

Cases.[147] One of the four criteria for Council involvement is when an undertaking:

> Presents issues of concern to Indian tribes or Native Hawaiian organizations. This may include cases where there have been concerns raised about the identification of, evaluation of, or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious or cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.[148]

iii.) State Historic Preservation Officers

State Historic Preservation Officers (SHPOs) perform a prominent role in reviewing proposed federal undertakings. In most of the cases in which the ACHP does not participate, the SHPO has the lead responsibility for reviewing the federal agency's findings and determinations. The duties the SHPO are set out in section 101(b)(3) of the statute,[149] including consulting with federal agencies in carrying out the section 106 process.[150]

iv.) Tribal Historic Preservation Officers

Since the enactment of the 1992 NHPA Amendments, Indian tribes have had the option of designating a Tribal Historic Preservation Officer (THPO) and, with respect to their "tribal lands," taking over all or part of the functions that would otherwise be performed by the SHPO. As defined in statutory language, the term "tribal lands" means "all lands within the exterior boundaries of any Indian reservation; and … all dependent Indian communities."[151] As of February 2008, seventy-six tribes have THPO programs that have been approved by the Secretary of the Interior to perform some or all of the functions that would

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[147] 36 C.F.R. part 800, Appendix A.
[148] 36 C.F.R. part 800, Appendix A., §(c)(4).
[149] 16 U.S.C. § 470a(b)(3).
[150] 16 U.S.C. § 470a(b)(3)(I).
[151] 16 U.S.C. § 470w(14). This definition incorporates two of the three clauses of the statutory definition of "Indian country," 18 U.S.C. §1151.

otherwise be performed by the SHPO.[152] In recognition of the fact that this lead role in reviewing undertakings may be performed by either the SHPO or the THPO, the regulations routinely refer to both kinds of officers, as "SHPO/THPO."[153]

If a tribe has an approved THPO, the SHPO may nevertheless participate in the section 106 process as a consulting party in certain situations: if the undertaking would affect historic properties not on tribal lands; if the tribe agrees to participation of the SHPO as a consulting party; or if a landowner other than the tribe or a tribal member invites the SHPO to participate in addition to the THPO.[154]

v.) Tribes

On tribal lands. For an undertaking within an Indian reservation where the tribe does not have a THPO who has assumed SHPO functions, the ACHP regulations provide that the tribal government has the right to be a consulting party with the "same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part [i.e., the standard section 106 process, 36 C.F.R. §§800.3 – 800.13], except that such consultations shall be in addition to and on the same basis as consultation with the SHPO."[155] This provision reflects the ACHP's response to concerns expressed by tribes during the rule-making

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[152] A list of THPOs, with contact information, is available at an internet site managed by the National Park Service: http://grants.cr.nps.gov/thpo/thpoaddressfull.cfm. The National Association of Tribal Historic Preservation Officers (NATHPO) also provides information on the internet: www.nathpo.org.

[153] This choice of terminology is explained in the preamble to the version of revised final rules published in May 1999: "By using this reference, Federal agencies will be reminded that they must not only determine if their actions are on or will affect historic properties on tribal land, but they must also determine whether or not the tribe's THPO has formally assumed the role of SHPO." 64 FED. REG. 27043, 27053 (Dec. 18, 1999). As explained in the preamble to the December 2000 final rule, the May 1999 final rule was challenged in court by the National Mining Association, which argued, in addition to substantive issues, that the final rule was invalid as a violation of the Appointments Clause of the Constitution, in that two members of the Council (President of the National Conference of State Historic Preservation Officers and Chairman of the National Trust for Historic Preservation) are not appointed by the President. 65 FED. REG. 77699. The Council responded to this argument by repeating the rule-making process, using the May 1999 final rule as a proposed rule, with the two non-appointed members recusing themselves from the voting. *Id.* The December 2000 final rule adopted some changes from the May 1999 rule, but the preamble to the May 1999 rule remains a key source for discussion of public comments and the Council's responses to comments.

[154] 36 C.F.R. § 800.2(c)(1)(ii), cross-referencing 36 C.F.R. § 800.3(c)(1) (requests by landowners for the SHPO to participate in addition to the THPO, citing statutory provision of NHPA § 101(d)(2)(D)(iii), 16 U.S.C. § 470a(d)(2)(D)(iii)) and 36 C.F.R. § 800.3(f)(3) (decision on request to be consulting party to be made by federal agency official, in consultation with SHPO/THPO and any tribe "upon whose tribal lands an undertaking occurs or affects historic properties").

[155] 36 C.F.R. § 800.2(c)(2)(B).

process that the role of the SHPO within reservation boundaries where a tribe has no THPO is an intrusion on tribal sovereignty.[156]

Not on tribal lands. When a proposed undertaking might affect a historic property to which the tribe attaches religious and cultural importance outside reservation boundaries, NHPA section 101(d)(6) provides that the tribe has a statutory right to be a consulting party, and the federal agency has a statutory duty to invite the tribe to be a consulting party.[157] The ACHP regulations provide that the federal agency has a duty to make a reasonable and good faith effort to identify any such tribe(s)[158] and that any such tribe that asks in writing to be a consulting part "shall be one."[159] Historic places that hold religious and cultural significance for a tribe may be traditional cultural properties (TCPs), which, as discussed earlier, are places that are eligible for the National Register in part because of their ongoing significance for a living community, but a place need not be a TCP to trigger the requirement for consultation. Rather, the legal requirement is triggered by the tribe or Native Hawaiian organization attaching religious and cultural significance to a property that may be affected by a proposed undertaking.

As discussed in section II.A.1, the American Indian Religious Freedom Act (AIRFA) of 1978 declares it to be national policy to protect and preserve religious freedom for American Indians and recognizes that this must include access to sacred places.[160] AIRFA, however, does not establish a procedural mechanism to ensure that federal agencies consider whether their actions are consistent with its policy declaration.[161] To some extent, the NHPA review mechanism has evolved to serve this function, at least in the context of tribal sacred places that qualify for treatment as historic properties.

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[156] 65 FED. REG. at 77702 (Dec. 12, 2000). In essence, the Advisory Council interprets the statute as authorizing SHPOs to perform their role in the section 106 process and provides a way for tribes to perform this role in lieu of the SHPO. *Id*. For the statutory basis of the SHPO role in the section 106 process, *see* NHPA § 101(b)(3)(I), 16 U.S.C. § 470a(b)(3)(I).

[157] 16 U.S.C. § 470a(d)(6). The statutory language states this right to be a consulting party broadly and does not does not limit it to historic properties that are not located on tribal lands. Accordingly, a tribe that attaches religious and cultural importance to a historic property located on the tribal lands of another tribe has a right to be a consulting party in the section 106 process for a proposed undertaking that would affect such a property.

[158] 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.3(f)(2).

[159] 36 C.F.R. § 800.3(f)(2).

[160] Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996). *See* Section II.1.A

[161] *See Lyng*, *supra* note 10, 485 U.S. at 455 (noting floor statement by congressional sponsor that AIRFA "has no teeth"). *See* notes 60-61, *supra*, and accompanying text.

vi.) Native Hawaiian Organizations

Native Hawaiian organizations (NHOs) have a set of rights comparable to those of tribes with respect to places outside reservation boundaries.[162]

vii.) Other Interested Persons and Entities

In addition to the federal agency and the SHPO/THPO, a number of other kinds of entities may become consulting parties for a given proposed undertaking. In many cases, more than one federal agency may be involved, as proponents, regulators, or providers of funding. State agencies other than the SHPO and local government agencies are often involved as well. Local governments with jurisdiction over the area where the effects of an undertaking will occur are entitled to be represented as consulting parties.[163] State, local and tribal government agencies carrying out projects funded by federal agencies, particularly projects funded by the Department of Housing and Urban Development (HUD), may have been delegated the legal responsibility for performing the functions that would normally be the role of the federal agency official.[164]

Applicants for federal assistance, permits, licenses, and other approvals are entitled to be consulting parties.[165] Federal agencies may authorize applicants to initiate consultation with the SHPO/THPO and others, although if it does so, the agency remains responsible for its government-to-government relationship with tribes.[166] Organizations and individuals with particular interests in an undertaking may ask to be consulting parties.[167] The National Trust for Historic Preservation, a private non-profit national preservation organization, frequently joins in the section 106 process as a consulting party, as do similar organizations at the state and local level. Persons whose property interests may be affected may also ask to be consulting parties. With the exception of entities that are entitled to be consulting parties, the federal agency official decides whether or not to grant such requests, in consultation with the SHPO/THPO and with any tribe whose tribal lands would be affected.[168]

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[162] NHPA § 101(d)(6), 16 U.S.C. § 470a(d)(6); 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.3(f)(2). With respect to Native Hawaiian organizations, the statute imposes some specific responsibilities on the SHPO for the State of Hawaii. 16 U.S.C. § 470a(d)(6)(C).
[163] 36 C.F.R. § 800.2(c)(3).
[164] 36 C.F.R. § 800.2(a).
[165] 36 C.F.R. § 800.2(c)(4).
[166] *Id.*
[167] 36 C.F.R. § 800.2(c)(5).
[168] 36 C.F.R. § 800.3(f)(3).

In the context of historic properties that are tribal sacred places, Native religious leaders and organizations representing traditional practitioners would be appropriate candidates for consulting party status.

f. What are the steps in the section 106 process?

The section 106 process consists of a number of steps, which the federal agency official takes in consultation with other consulting parties. The basic steps are: initiation of the process; identification of historic properties; assessment of adverse effects; resolution of adverse effects.[169]

There is no specific time frame for concluding the step of identifying historic properties. If the area of potential effects includes traditional cultural properties (TCPs) or other historic places that hold religious and cultural importance for tribes (or Native Hawaiian organizations) that have not been previously documented and evaluated for National Register eligibility, a reasonable and good faith effort to complete this step in the process may take a considerable amount of time.

i.) Initiation of the Process, § 800.3.

The process begins with the federal agency official determining whether the proposed action is an undertaking and whether it has the potential to cause effects on historic properties. The regulations leave this determination to the federal official with no procedure for second guessing by the SHPO/THPO or ACHP. The agency may be challenged in court, though.[170] Having determined that the proposed action is an undertaking subject to section 106, the agency official must identify the appropriate SHPO and/or THPO. For an undertaking that may affect historic properties on "tribal lands," if the tribe does not have a THPO performing the functions of the SHPO, the agency must nevertheless consult with the tribe.[171] The agency official must also make a "reasonable and good faith effort to identify any Indian tribe or Native Hawaiian organization

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[169] 36 C.F.R. §§ 800.3, 800.4, 800.5, 800.6. The Council's regulations encourage agencies to coordinate the section 106 process with the NEPA process, while recognizing that section 106 is a separate requirement. 36 C.F.R. § 800.8. In the event that NEPA documents are used for section 106 purposes, the regulations set out standards that must be met. 36 C.F.R. § 800.8(c)(1). The regulations also authorize agencies to adopt "alternate procedures," subject to review and approval by the Advisory Council. 36 C.F.R. § 800.14(a).

[170] *E.g., Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1153 (2004) (holding that a lease sale for oil and gas extraction on public lands is an undertaking subject to NHPA section 106, setting aside the determination by the Bureau of Land Management that the lease sale itself was not an undertaking because the agency believed that effects on historic properties could be taken into account at the stage of considering an application for a permit to drill).

[171] 36 C.F.R. § 800.3(d).

that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties."[172] Any such tribe or NHO that requests in writing to be a consulting party "shall be one."[173] For other individuals and organizations that request to be consulting parties, the federal agency official makes the determination in consultation with the SHPO/THPO and, if the undertaking would occur or affect historic properties on tribal lands, the tribe.[174]

ii.) Identification of Historic Properties, § 800.4

The step of identifying historic properties consists of several component parts, including: (a) determining the level of effort that is required; (b) identifying properties that are listed on or known to be eligible for the National Register as well as properties that have not yet been evaluated for eligibility; (c) evaluating historic significance, including determining eligibility; and (d) determining whether historic properties may be affected by the undertaking. All of these components are carried out by the agency official in consultation with the SHPO/THPO. The level of effort will vary according to factors such as the geographic scope of the project (the "area of potential effects") and how much information already exists about historic properties within that area. For some undertakings, a phased approach to identification and evaluation may be acceptable.

The identification and evaluation effort is always supposed to include gathering information from, and consultation with, any tribe or NHO that has been identified as being concerned that the undertaking may affect historic properties to which it attaches religious and cultural significance.[175] Gathering the necessary information may require oral history interviews and other techniques suggested in *Bulletin 38*.[176] Expertise in identifying and evaluating TCPs varies widely among agencies (and from region to region for particular agencies). While it is the federal agency's responsibility to identify historic properties, the section 106 process is more effective in protecting TCPs when tribes know how to get information about TCPs into the record at this step of the process.

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[172] 36 C.F.R. § 800.3(f)(2).
[173] *Id.*
[174] 36 C.F.R. § 800.3(f)(3).
[175] 36 C.F.R. § 800.4(a)(4), (b).
[176] 36 C.F.R. § 800.4(b). This subsection specifically lists oral history interviews among the kinds of efforts that may be appropriate and says that the "Secretary's standards and guidelines for identification provide guidance on this subject." *Bulletin 38* is one such guidance document issued by the Secretary.

This step concludes with a determination by the federal agency official that historic properties may be affected or that none will be.[177] If the former, then the process moves on to the next step, the assessment of adverse effects. If the agency official makes a "no effect" determination, the agency must document the determination, provide the documentation to the SHPO/THPO, notify all consulting parties, and make the documentation available to the public.[178] The regulations had previously provided that either the SHPO/THPO or ACHP could object to a "no effect" determination and require the federal agency to move on to the next step,[179] but this provision was struck down in litigation as exceeding the authority of the ACHP.[180] Under the revised procedure, the ACHP can object to the agency official's determination and provide a written opinion to the agency (which may be directed to the head of the agency), and the agency is then required to prepare a summary of its decision which contains "a rationale for the decision and evidence of consideration of the Council's opinion" and provide the summary to the ACHP, SHPO/THPO, and all consulting parties.[181] If, after receiving the ACHP's opinion, the federal agency changes its determination and finds that historic properties may be affected, the process moves on to the next step. If the agency does not change its determination, the regulations provide that, once the summary of the decision has been sent to the ACHP and others as required, the agency's "responsibilities under section 106 are fulfilled."[182] An agency decision to end the section 106 process at this step over an objection by the ACHP would seem to be subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[183] but this point has not yet been litigated.

iii.) Assessment of Adverse Effects, § 800.5

At this step in the section 106 process, the federal agency official applies the criteria of adverse effect to historic properties in the area of potential effects, in consultation with the SHPO/THPO and any tribe or NHO that attaches religious significance to identified historic properties. The criteria of adverse effect are stated broadly, and followed with examples. An effect is considered adverse if the undertaking "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

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[177] 36 C.F.R. § 800.4(d).
[178] 36 C.F.R. § 800.4(d)(1), as amended at 69 FED. REG. 40553 (July 6, 2004).
[179] As promulgated on December 12, 2000, 65 FED. REG. at 77729 (Dec. 12, 2000).
[180] *National Mining Ass'n v. Slater*, *supra* note 112.
[181] 36 C.F.R. § 800.4(d)(1)(iv)(C), as amended at 69 FED. REG. at 40553 (July 6, 2004).
[182] *Id.*
[183] 5 U.S.C. § 706.

Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register."[184] Thus, for example, if during the step of identifying and evaluating historic properties, a property listed on the National Register as an archaeological site is determined to also be eligible as a TCP, then an effect that would diminish the integrity of the property as a TCP would be adverse. If a property is eligible for the Register because of its importance to a tribe or NHO, including but not limited to importance as a TCP, then the tribe or NHO may be uniquely qualified to assess adverse effects on those characteristics of the property.

If the federal agency finds that the effects will be adverse, then the process moves on to the step of resolution of adverse effects. The process may end at this step if the federal agency makes a "finding of no adverse effect."[185] Like the identification step, the regulations had previously provided that the SHPO/THPO, any consulting party, or ACHP could disagree with a "finding of no adverse effect" and the ACHP could require the federal agency to move on to the next step,[186] but this provision was struck down in litigation as exceeding the authority of the ACHP.[187] The recently revised regulations maintain the provision authorizing the SHPO/THPO, any consulting party, or ACHP to disagree with such a finding, but now the ACHP can only provide a written opinion to the agency rather than require the agency to move on to the next step.[188] The revised regulations specifically provide that the agency should seek concurrence of any tribe or NHO that attaches religious and cultural significance to a historic property and that, if the tribe or NHO disagrees with a no adverse effect finding, it may ask the ACHP to review and object to the finding.[189]

As with a "no historic properties affected" finding, an agency must prepare a summary of its decision with a rationale for the decision and evidence that it considered the ACHP's objection.[190] An agency decision to end the section 106 process at this step over an objection by the ACHP would seem to be subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[191] but this point too has not yet been litigated.

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[184] 36 C.F.R. § 800.5(a)(1).
[185] 36 C.F.R. § 800.5(b).
[186] As promulgated on December 12, 2000, 65 FED. REG. at 77730 (Dec. 12, 2000).
[187] *National Mining Ass'n v. Slater*, *supra* note 113.
[188] 36 C.F.R. § 800.5(c)(3), as promulgated at 69 FED. REG. 40554 (July 6, 2004).
[189] 36 C.F.R. § 800.5(c)(2)(iii), as promulgated at 69 FED. REG. 40553-54 (July 6, 2004).
[190] 36 C.F.R. § 800.5(c)(3)(B), as promulgated at 69 FED. REG. 40554 (July 6, 2004).
[191] 5 U.S.C. § 706.

iv.) Resolution of Adverse Effects, § 800.6

If the agency official finds that the effects will be adverse, the next step is "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties."[192] Like the other steps in the process, this step is to be taken in consultation with the SHPO/THPO and other consulting parties, including any tribes or NHOs. The ACHP must be notified and may decide to enter the process at this step, provided that the undertaking fits criteria set out in an appendix to the regulations.[193] The SHPO/THPO, and Indian tribe or NHO, or any other consulting party may request the ACHP to participate.[194] The objective of this step is to reach an agreement on acceptable measures to resolve the adverse effects, recorded in a Memorandum of Agreement (MOA). If no agreement is reached, the final step in the process is to document the failure to resolve adverse effects. Provisions of the regulations regarding MOAs and failure to resolve adverse effects are noted below under the heading "Outcomes of the Process."

g. What if NEPA Documents Are Used for Section 106

Many undertakings subject to the section 106 process are also federal actions subject to the review under the National Environmental Policy Act (NEPA)[195] as implemented though the regulations issued by the President's Council on Environmental Quality (CEQ).[196] The CEQ NEPA regulations require that, "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental analyses and related surveys and studies required by … the National Historic Preservation Act … other environmental review laws and executive orders."[197] If the NEPA documentation is not an environmental impact statement (EIS) and Record of Decision (ROD) but is rather an environmental assessment (EA) and finding of no significant impact (FONSI), there is no corresponding requirement, except that those agencies that have been consulted in the preparation of an EA must be listed in the EA.[198]

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[192] 36 C.F.R. § 800.6(a).
[193] 36 C.F.R. part 800, App. A. Criterion (4) applies to undertakings that present "issues of concern to Indian tribes or Native Hawaiian organizations."
[194] 36 C.F.R. § 800.6(a)(1)(ii).
[195] 42 U.S.C . §§ 4321 – 4370e.
[196] 40 C.F.R. parts 1500 – 1508.
[197] 40 C.F.R. § 1502.25.
[198] 40 C.F.R. § 1508.9.

The ACHP regulations include a section on "Coordination with the National Environmental Policy Act."[199] This section provides that the process and documentation used for compliance with NEPA – whether an EA and FONSI or an EIS and ROD – can be used for compliance with NHPA §106, but only if the agency notifies SHPO/THPO and the Council in advance that it intends to do so and if the following standards are met requiring the federal agency official to:

> (1) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent with §800.3(f);
> (2) Identify historic properties and assess the effects of the undertaking … in a manner consistent with the standards and criteria of §§800.4 through 800.5, provided that the scope and timing may be phased …;
> (3) Consult … with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;
> (4) Involve the public in accordance with the agency's published NEPA procedures;
> (5) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.[200]

This section of the regulations also sets out requirements for: review of environmental documents, resolution of objections,[201] approval of the undertaking, and modification of an undertaking after approval of the FONSI or ROD. In any case in which the review process identifies adverse effects on historic properties, then section 106 compliance has been achieved if either: (1) a binding commitment to measures to avoid, minimize or mitigate adverse effects, is incorporated into the ROD (if such measures were proposed in the draft or

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[199] 36 C.F.R. § 800.8.

[200] 36 C.F.R. § 800.8(c).

[201] The provisions for resolving objections in 36 C.F.R. § 800.8(c)(3) were revised in July 2004, to correspond with changes in the provisions in the regulations for objections to findings of no historic properties affected and findings of no adverse effect. 69 FED. REG. 40554 (July 6, 2004). *See* notes 113, 179-182, 186-189, *supra*, and accompanying text.

final EIS) or into an MOA in compliance with §800.6(c); or (2) the Advisory Council has commented under §800.7 and received the agency's response.[202]

h. What are the possible outcomes of the process?

i.) Early Endings

As discussed above, the process may end with a determination by the federal agency that no historic properties will be affected, either because there are no historic properties within the undertaking's area of potential effects or because, although historic properties are present, they will not be affected.[203] Another way in which the process may come to an early end is if the federal agency official makes a finding of "no adverse effect" at the conclusion of the step of assessment of adverse effects.[204]

ii.) Memorandum of Agreement (MOA)

If the process does not end with a finding of no historic properties affected or a finding of no adverse effect, then the most common outcome is a Memorandum of Agreement (MOA), through which the "signatories" agree on acceptable measures to avoid, minimize, or mitigate adverse effects.[205] The "signatories" are the federal agency, SHPO/THPO, Advisory Council (if it has chosen to participate), and tribe (if the undertaking would affect historic properties on tribal lands of a tribe without a THPO).[206] The federal agency official may invite other consulting parties to be "invited signatories," but such invited parties, including tribes that attach religious and cultural importance to historic properties that are not on tribal lands, do not have the authority to insist on changes in the terms of the MOA and cannot prevent an MOA from taking effect by refusing to sign.[207] If a tribe or other consulting party assumes responsibilities for helping to carry out an MOA, then the federal agency "should" invite that party to be a signatory.[208] An example of such assumption

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[202] 36 C.F.R. § 800.8(c)(4).
[203] 36 C.F.R. § 800.4(d). *See* notes 155-159, *supra*, and accompanying text.
[204] 36 C.F.R. § 800.5(b), (c), (d). *See* notes 163-167, *supra*, and accompanying text.
[205] 36 C.F.R. § 800.6.
[206] 36 C.F.R. § 800.6(c)(1). While this subsection does not expressly provide that a tribe is a required signatory for an MOA for an undertaking affecting tribal lands, this requirement is stated in 36 C.F.R. § 800.2(c)(2)(B). In addition, if the SHPO terminates consultation, the federal agency official and ACHP may continue to consult and execute an MOA without the SHPO, but if a THPO terminates consultation, an MOA without the THPO's signature is not an option. 36 C.F.R. § 800.7(a)(2), (3).
[207] 36 C.F.R. § 800.6(c)(2). A consulting party that is an invited signatory may be able to increase its leverage over the terms of an MOA by offering to assume some responsibility for carrying out the terms of the MOA. 36 C.F.R. § 800.6(c)(2)(iii).
[208] 36 C.F.R. § 800.6(b)(2)(iii).

of responsibilities would be where a tribe and a federal land managing agency enter into an agreement through which the tribe and agency cooperatively manage an area where a sacred place is located.

Where an MOA has been executed pursuant to the Council's regulations, that agreement "shall govern the undertaking and all of its parts."[209] Failure of an agency to comply with the terms of an MOA may be challenged in court.[210]

iii.) Programmatic Agreement (PA)

In a variety of circumstances, the section 106 process may be concluded with a programmatic agreement (PA) rather than an MOA, particularly situations that are regional in scope and those for which all of the effects on historic properties cannot be fully determined before approval of the undertaking.[211] A PA can only be applied to tribal lands if the tribe is a signatory. In cases where a tribe has a THPO, it is essential that the THPO sign the PA.[212] For a proposed PA affecting historic properties not on tribal lands but to which tribes attach religious and cultural importance, the regulations include requirements to consult with tribes and Native Hawaiian organizations.[213]

iv.) Failure to Resolve Adverse Effects

For any undertaking for which an agreement (either MOA or PA) has not been executed pursuant to the Council's regulations, the statute allows the federal agency to proceed with the undertaking, but the decision to proceed in the absence of an agreement can only be made by the head of the agency – it cannot be delegated.[214]

i. Additional Requirements in Certain Cases

In addition to the procedural requirements that give the section 106 process some semblance of "teeth," there is one situation that imposes specific

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[209] NHPA § 110(l), 16 U.S.C. § 470h-2(l).

[210] *See* Kanefield, *supra* note 109, at 30. *Don't Tear It Down, Inc. v, Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527 (D.C. Cir. 1980); *West Branch Valley Flood Protection Ass'n v. Stone*, 820 F. Supp. 1 (D.D.C. 1993); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992).

[211] 36 C.F.R. § 800.14(b).

[212] 36 C.F.R. § 800.14(b)(2)(iii). While the regulations say that the THPO "or" tribe must sign on, in light of the duties of THPOs under the statute and regulations, it is imperative that the THPO be a signatory – either as a representative of a tribe or as a separate signatory in addition to the tribe.

[213] 36 C.F.R. § 800.14(f).

[214] NHPA § 110(l), 16 U.S.C. § 470h-2(l). The regulations establish procedures for documenting the comments of the Council in such situations and for documenting that the decision to proceed is made by the head of the agency.

substantive requirements upon agencies. If the historic property is a National Historic Landmark, the agency has a duty to "minimize harm" to such landmark.[215]

j. Judicial Review and Attorney Fees

NHPA does not expressly create a private right of action or waive federal sovereign immunity, but in an extensive body of case law[216] courts have issued rulings in cases that have challenged federal agency actions, applying the standards of judicial review in the Administrative Procedure Act.[217] The NHPA does explicitly authorize recovery of attorney fees to any person who substantially prevails in a civil action to enforce the provisions of the Act.[218]

k. Confidentiality

National Register Bulletin 38, which provides guidance for how agencies should deal with traditional cultural property, recognizes that

> Particularly where a property has supernatural connotations in the minds of those who ascribe significance to it, or where it is used in ongoing cultural activities not readily shared with outsiders, it may be strongly desired that both the nature and the precise locations of the property be kept secret…However concerned one may be about the impacts of…a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one's cultural system provides no acceptable mechanism for doing so.[219]

Section 304 of the NHPA[220] authorizes federal agencies or any other public official that is the recipient of a grant to:

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[215] NHPA § 110(f), 16 U.S.C. § 470h-2(f). See 36 C.F.R. § 800.10, special requirements for protecting National Historic Landmarks.

[216] *See generally* Hutt, *et al*. *supra* note 104, Kanefield, *supra* note 109, and Marques, *supra* note 109.

[217] 5 U.S.C. § 704. The scope of judicial review is generally limited to the administrative record, see Kanefield, *supra* note 109, at 57 (collecting cases), although under certain circumstances a court will allow plaintiffs to supplement the agency record. *National Trust for Historic Preservation v. Blanck*, 928 F.Supp. 908 (D. D.C. 1996).

[218] 16 U.S.C. § 470w-4. Attorney fees in NHPA cases are based on market rates, in contrast to attorney fee awards authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412. See Kanefield, *supra* note 109, at 37-39.

[219] Bulletin 38, *supra* note 137, at 17.

[220] 16 U.S.C. § 470w-3(a).

> withhold from disclosure to the public, information about the location, character or ownership of a historic resource if the Secretary and the agency determine that disclosure may—
>
> (1) cause a significant invasion of privacy;
> (2) risk harm to the historic resources; or
> (3) impede the use of a traditional religious site by practitioners.

This is the primary mechanism for addressing the confidentiality concerns of Native Americans within the context of the NHPA. See also Section II.B.3. which discusses the confidentiality section in the Archeological Resources Protection Act. If these provisions are not sufficient to satisfy the confidentiality needs raised by Native Americans, however, Bulletin 38 also recognizes that an agency may choose "not to seek formal determinations of eligibility [in regard to a specific site or area], but simply to maintain some kind of minimal data in planning files.[221]

2. Native American Graves Protection and Repatriation Act (NAGPRA)

NAGPRA provides various repatriation, ownership and control rights over human remains and cultural items to descendants of a deceased Indian individual and to Indian tribes and Native Hawaiian organizations. NAGPRA is, first and foremost, human rights legislation. It was designed to address the flagrant violation of the "civil rights of America's first citizens."[222] NAGPRA was enacted after years of legislative efforts by tribal representatives and their supporters,[223] driven in large part by the widely held belief that the graves of tribal ancestors should not be disturbed and, in cases in which they have been disturbed, the human remains and funerary objects should be returned to descendants for reburial or other religiously prescribed treatment. Thus, the basic purposes of the statute are to declare that tribes and individual lineal descendants have rights in the remains of their ancestors and in certain kinds of cultural property and to

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[221] Bulletin 38, *supra* note 137, at 17. See also Section IV.A.8. of these materials that discusses some of the practical considerations that arise in terms of confidentiality.

[222] 136 CONG.REC. S17174 (daily ed. Oct. 26, 1990) (statement of Senator Inouye).

[223] See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992). Committee Reports for the bill as enacted are: H.R. REP. NO. 877, 101st Cong., 2d Sess. 111-12 (1990), reprinted in 1990 U.S.C.C.A.N. 4367; S. REP. NO. 473, 101st Cong. 2d Sess., at 1-3 (1990), (describing series of hearings and other events beginning in February 1987); H.R. REP. NO. 101-877, 101st Cong., 2d Sess., at 9-11 (1990) (describing background of the bill), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368-70. Both the Senate Report and the House Report are available on a web site maintained by the National Park Service: www.cr.nps.gov/nagpra/MANDATES/INDEX.HTM (Legislative and Regulatory History).

establish procedures for vindication of these rights.[224] Congress expressly stated in the statute that it viewed NAGPRA as part of its trust responsibility to Indian tribes and people, specifically stating that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations."[225] Nonetheless, the bill that was enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities.[226] Notwithstanding the accommodations made to scientific and museum interests, however, it is clear that the central purpose of NAGPRA – in fact, in the end, the only reason that it even exists – was to rectify centuries of discrimination against Native Americans. As such, the canons of statutory construction applicable to Indian legislation apply here and warrant the interpretation of any ambiguities in favor of Indian people.[227]

NAGPRA applies in three different contexts: repatriation of items from the collections of federal agencies and museums to tribes and to lineal descendants where known;[228] protection of burial sites and "cultural items" located on federal lands and "tribal lands";[229] and trafficking in Native American human remains and cultural items.[230] NAGPRA covers both items already in possession of museums and federal agencies, as well as grave sites. As the purpose of these materials involves the protection of sacred lands, this description of NAGPRA will focus upon the provisions dealing with grave sites as such sites are sometimes considered to be sacred. These sections of the Act provide partial

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[224] Both the H.R. REP. NO. 101-877 and SEN. REP. NO. 101-473, *supra* note 223, acknowledge the importance in the legislative history of a document captioned *"Report of the Panel for a National Dialogue on Museum/Native American Relations"* (Feb. 28, 1990). S. REP. AT 2, H.R. REP. AT 10. The Senate Report endorses the *Panel Report*: "The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations." S. REP. AT 4. The *Panel Report*, which is reprinted in the Symposium, 24 ARIZ. ST. L. J. 487 (1992), expresses the belief that "human rights should be the paramount principle where claims are made by Native America groups that have a cultural affiliation with remains and other materials." *Id.* at 494. The *Panel Report*, however, does not articulate this belief with reference to specific human rights norms. Although neither the *Panel Report* nor the Senate Report explicitly articulates ways in which human rights norms are implicated by NAGPRA, norms relating to freedom of religion are clearly implicated. In addition, in the non-Indian context, items of cultural property and interred human remains are subject to common law principles of property law, and the rights of tribes and Indian lineal descendants can also be framed as property rights that should be protected by the U.S. Constitution. *See* Sherry Hutt and Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L. J. 363 (1999).

[225] 25 U.S.C. § 3010.

[226] 136 CONG. REC. S17173 (daily ed. Oct 26, 1990) (statement of Sen. McCain)

[227] *See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F.Supp.2d 1047 (D.S.D. 2000).

[228] The statutory provisions relating to repatriation are set out, for the most part, in 25 U.S.C. §§ 3003, 3004, and 3005.

[229] The statutory provisions relating to graves protection are set out, for the most part, in 25 U.S.C. §§ 3002.

[230] The statutory provisions relating to illegal trafficking, enacted as section 4 of NAGPRA, are set out in 18 U.S.C. § 1170.

protection to Native grave sites on tribal and federal lands, and, in one specific instance, state-owned land.

a. Who has rights under NAGPRA?

Lineal descendants of those who have been interred, Indian tribes and Native Hawaiian organizations have rights under NAGPRA.

"Lineal descendants" can be traced not only through the common law system used by Federal and state courts, but "by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization."[231]

"Indian tribe" is defined to mean "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[232] A Federal District Court found that this definition includes both tribes recognized by the Secretary of Interior and other "aggregations" of Indians which have receiving funds and assistance from other departments of the Federal government.[233] However, the Department of Interior, in regulations adopted after this court case, has indicated that only those tribes commonly thought of as "federally-recognized," as well as Alaska Native corporations, are included under NAGPRA.[234]

Although an overall reading of the law would suggest that any culturally-distinct tribal entity with the authority to decide traditional cultural issues should be able to make a claim under NAGPRA, the commentary to the implementing regulations indicates that bands, tribes and other sub-groups should make NAGPRA claims through an Indian tribe, rather than directly.[235] Tribes have banded together and established organizations to act collectively on their behalf.[236]

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[231] 43 C.F.R. § 10.2(b)(1); 43 C.F.R. § 10.14(b).
[232] 25 U.S.C. § 3001(7).
[233] *Abenaki Nation of Missiquoi Indians v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992), *aff'd* 990 F.2d 729 (2nd Cir. 1993)
[234] 43 C.F.R. § 10.2(b)(2).
[235] 60 FED. REG. 62139 (December 4, 1995).
[236] *See* Timothy McKeown and Sherry Hutt, *"In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After",* 21 U.C.L.A. JOURNAL ENV. LAW AND POLICY 155, 185-186 (2003).

Moreover, many of the claims that have been filed under NAGPRA have been joint tribal claims.[237]

"Native Hawaiian organization" is defined as an organization which:

1. Serves and represents the interests of Native Hawaiians;
2. Has a primary purpose of providing services to Native Hawaiians; and
3. Has expertise in Native Hawaiian Affairs.

The Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei are specifically included as Native Hawaiian organizations.[238]

b. What Types of Sites are Covered?

NAGPRA covers sites that contain Native cultural items. Cultural items are defined as human remains, funerary objects, sacred objects and cultural patrimony.

Human remains are not defined in NAGPRA, but the term has been interpreted to include bones, teeth, hair, ashes and preserved soft tissue.[239] The regulations make clear that body items that were freely given or naturally shed by an individual (e.g., hair made into ropes) are not considered to be human remains.[240] To date, human remains that have been repatriated pursuant to NAGPRA include "complete and partial skeletons, isolated bones, teeth, scalps, and ashes."[241]

Funerary objects are "objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later…"[242] The regulations make clear that objects placed near human remains as part of a death rite or ceremony are covered by NAGPRA as funerary objects, in addition to those placed with human remains which is the explicit statutory language. This provision reflects the variances in tribal funerary practices. In addition, the regulations clearly recognize rock cairns, funeral pyres and other customary depositories for human remains which may not fall within the ordinary definition of a grave site.[243] This is consistent with the

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[237] *See* Jason C. Roberts, *"Native American Graves Protection and Repatriation Act Census: Examining the Status and Trends of Culturally Affiliating Native American Human Remains and Associated Funerary Objects Between 1990 and 1999",* TOPICS IN CULTURAL RESOURCE LAW 79, 84-85 (2000).
[238] 25 U.S.C. § 3001(11).
[239] 43C.F.R. § 10.2(d)(1).
[240] 43 C.F.R. § 10.2(d)(1).
[241] McKeown and Hutt, *supra* note 236, at 164-165.
[242] 25 U.S.C. § 3001(3)(A) and (B).
[243] 43 C.F.R. § 10.2(d)(2).

definition of "burial site" in the statute which includes "any natural or prepared location, whether below, or, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited."[244]

There are two categories of funerary objects – associated and unassociated. Associated funerary objects are those where both the human remains and objects are in the possession of a federal agency or museum or those "made exclusively for burial purposes or to contain human remains."[245] Unassociated funerary objects are those that can be related to specific human remains or a burial site where the human remains are not presently in the possession of an agency or museum.[246] Funerary objects that have been repatriated to date include beads, pottery, tools, trade silver, weapons and clothing.[247]

"Sacred objects" are those objects which are

- Ceremonial in nature, and

- Needed by traditional Native American religious leaders for the present day practice of traditional Native American religions.[248] This includes both the use of the objects in ceremonies currently conducted by traditional practitioners and instances where the objects are needed to renew ceremonies that are part of a traditional religion.[249]

This definition recognizes that the ultimate determination of continuing sacredness must be made by Native American religious leaders themselves since they must determine the current ceremonial need for the object.[250] Sacred objects that have been repatriated to date include "medicine bundles, prayer sticks, pipes, effigies and fetishes, basketry, rattles, and a birch bark scroll."[251]

"Cultural patrimony" are those objects which

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[244] 25 U.S.C. § 3001(1)
[245] 25 U.S.C. § 3001(3)(A).
[246] 25 U.S.C. § 3001(3)(B).
[247] McKeown and Hutt, *supra* note 236, at 165.
[248] 25 U.S.C. § 3001(3)(C).
[249] 43 C.F.R. § 10.2(d)(3).
[250] "Traditional religious leader" is defined as a person "recognized by members of an Indian tribe or Native Hawaiian organization" as an individual who is "responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization", or who exercises "a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial or religious practices." 43 C.F.R. § 10.2(d)(3).
[251] McKeown and Hutt, *supra* note 236, at 165-166.

- Have "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself", and

- Were the cultural property of the tribe, or a subgroup thereof such as a clan or band, and could not be sold or given away by an individual.[252]

Congress intended cultural patrimony to refer to items of "great importance" such as Iroquois wampum belts.[253] Items of cultural patrimony repatriated under NAGPRA to date include "a wolf-head headdress, clan hat, several medicine bundles and ceremonial masks."[254]

c. What kinds of lands are covered?

Sites located on federal land, tribal lands, and in one special instance, state land are covered by NAGPRA.

"Federal land" is defined as non-tribal land controlled or owned by the United States, including lands selected by, but not yet conveyed to, Alaska Native corporations and groups pursuant to the Alaska Native Claims Settlement Act of 1971.[255]

"Tribal land" is defined to include

- all lands within the exterior boundaries of a reservation, whether or not the land is owned by the tribe, Indian individuals or non-Indians,

- all dependent Indian communities, and

- any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill.[256]

Of note, the commentary to the regulations clarifies that lands held in trust by the United States for an Indian tribe that are not within a reservation boundary or an

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[252] 25 U.S.C. § 3001(3)(D).
[253] S.Rep. No. 473, 101st Cong., 2nd Sess. (1990), at 7-8.
[254] McKeown and Hutt, *supra* note 236, at 166.
[255] 25 U.S.C. § 3001(5).
[256] 25 U.S.C. § 3001(15).

Indian community are considered to be federal lands.[257] The regulations exclude non-tribal land within reservation boundaries if application of the statute to that land would constitute the unconstitutional taking of land without just compensation.[258]

The one circumstance in which burial sites on state-owned lands are covered is found in the Water Resources Act[259] which transferred certain federal land to the State of South Dakota, but requires the federal government to comply with NAGPRA if any covered sites are located on the transferred land.

d. What are the legal requirements that pertain to covered sites?

Whenever a party intends to intentionally excavate a site for any purpose:

1. That party must obtain a permit pursuant to ARPA.[260] An ARPA permit may be issued by the agency managing the land upon which a burial site is located (or in the case of tribal lands, by the Bureau of Indian Affairs)[261] if

    - the applicant is qualified

    - the undertaking is designed to advance archeological knowledge in the public interest

    - the resources will remain the property of the United States and be preserved in an appropriate institution (except where NAGPRA provides for ownership or control by tribes, Native Hawaiian organization or lineal descendants), and

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[257] 60 Fed.Reg. 62142 (December 4, 1995). The commentary also expresses the Secretary's interpretation that allotted Indian lands that are not located within the boundaries of a reservation or dependent Indian community are not "tribal lands." *Id.* at 62140. Presumably they would be federal lands, although the commentary is not explicit about this. The commentary also suggests that lands held in fee simple by an Indian tribe that are not within the reservation or part of a dependent Indian community are not covered by NAGPRA. *Id.* at 62142.

[258] 43 C.F.R. § 10.2(f)(2)(iv). This is a questionable interpretation of the law. The "Fifth Amendment takings" exception in NAGPRA is found in the "right of possession" definition, 25 U.S.C. 3001(13), which applies only to repatriation of remains and objects which are in the possession of museums or Federal agencies and not to the issue of the excavation of cultural items that are still imbedded on tribal lands.

[259] 43 U.S.C. § 1198-1200e.

[260] 25 U.S.C. § 3002(c)(1).

[261] 43 C.F.R. § 10.3(b)(1).

- the activity is not inconsistent with the applicable land management plan.[262]

2. If tribal lands are involved, the items may be excavated only after notice to, and consent of, the tribe or Native Hawaiian organization.[263]

3. If federal lands are involved, the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization.[264]

Where buried cultural items are inadvertently discovered as part of another activity, such as construction, mining, logging or agriculture,

1. The person who has discovered the items must temporarily cease activity and notify the responsible federal agency in the case of federal land or the tribe on whose land the site is located in the case of tribal land.[265] In the case of Alaska Native Claims Settlement Act lands (still owned by the Federal government) selected by, but not conveyed to, the Alaska Native corporation or group, that corporation or group is the appropriate organization to be notified.[266]

2. When notice is provided to the Federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native Hawaiian organization.[267]

3. Activity may resume thirty days after the Secretary of the appropriate federal department, the Secretary of Interior, if authority has been delegated to her, or the Indian tribe or Native Hawaiian organization certifies that notice has been received.[268] The activity which resulted in the inadvertent discovery may also resume prior to the 30 day period specified in the statute if a written agreement on a recovery plan is executed by the Indian tribe or Native Hawaiian organization and the Federal agency

[262] 16 U.S.C. § 470cc(b).
[263] 25 U.S.C. § 3002(c)(2).
[264] 25 U.S.C. § 3002(c)(2).
[265] 25 U.S.C. § 3002(d)(1).
[266] 43 C.F.R. § 10.4(d)(1)(iv).
[267] 43 C.F.R. § 10.4(d)(1)(iii)
[268] 25 U.S.C. § 3002(d)(1) and (3).

> prior to the expiration of the 30 day period.[269] This requirement must be included in Federal leases and permits.[270]

The intent of this provision is to "provide for a process whereby Indian tribes...have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony...[and to afford] Indian tribes...30 days in which to make a determination as to appropriate disposition for these human remains and objects."[271] (Of note, there are special provisions dealing with Native Hawaiian land and organizations, as well as land owned by Alaska Native Corporations.)[272]

The commentary to the regulations indicates that one goal of NAGPRA is "in situ" preservation, and that this should be considered whenever possible.[273] However, "in situ" preservation of sites is not required by NAGPRA or the regulations except in the case of intentional excavations on tribal lands where the required tribal consent has not been obtained.[274] This is a significant limitation of NAGPRA particularly where a site is considered to be an "obstacle" to completion of an unrelated development project.

Nonetheless, the ownership and control rules established by the statute, laid out below, should in some instances diminish the incentive to excavate such sites simply for the purpose of excavation. Based upon a questionable interpretation of the statute, however, the regulations permit recording and analysis before unearthed items are "disposed of" to the tribe or lineal descendant with the right of control or ownership; this may lessen the disincentive to excavate to some extent.[275] Moreover, the recent decision in *Bonnichsen v. United States*[276] may also lead to increased excavation of sites, see section II.B.2.h. below.

e. What procedures are required?

The regulations spell out in detail the notice and consultation that is required in the case of excavations on Federal lands. Consultation is meant to be a

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[269] 43 C.F.R. § 10.4(d)(2).
[270] 43 C.F.R. § 10.4(g)
[271] S. REP. 101-473, *supra* note 223, at 10.
[272] 25 U.S.C. § 3001(15)(c); 25 U.S.C. § 3002(d)(1).
[273] 60 FED.REG. 62141, 62146 (December 4, 1995).
[274] 25 U.S.C. § 3002(c) and (d); 43 C.F.R. § 10.4.
[275] 43 C.F.R. § 10.5(e).
[276] 367 F.3d 864 (9th Cir. 2004), amending an earlier opinion 357 F.3d 962 (9th Cir. 2004) and denying rehearing *en banc*.

process involving open discussion and joint deliberation.[277] Written notice must be sent prior to the issuance of any approval or permit

- proposing a time and a place for meetings and consultation, and
- describing the planned activity, its location, the basis for believing that excavation may occur and the government's proposed treatment and disposition of the objects which are to be excavated.

This notice must be sent to:

- any known lineal descendants,
- Indian tribes and Native Hawaiian organizations that are likely to be culturally affiliated with the items at the site,
- any Indian tribe which aboriginally occupied the area where the activity is taking place, and
- any Indian tribe or Native Hawaiian organization that may have a cultural relationship with the imbedded items.[278]

Written notification should be followed by telephone contact if there is no response within 15 days of the notice.[279]

At the consultation, the Federal officials

- must provide a list of all lineal descendants, Indian tribes and Native Hawaiian organizations that have been consulted, and information stating that additional documentation on cultural affiliation is available if requested.[280]
- seek to identify traditional religious leaders (although tribal officials are under no obligation to identify such leaders), lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations, as well as methods for contacting lineal descendants,

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[277] HOUSE REPORT NO. 101-877, *supra* note 223, at 16 (1990).
[278] 43 C.F.R. § 10.3(c)(1), 43 C.F.R. § 10.5(b)(1) and (2).
[279] 43 C.F.R. § 10.3(c)(1).
[280] 43 C.F.R. § 10.5(c).

- obtain the name and address of the tribal contact person,
- obtain recommendations on how the consultation process should be conducted, and
- identify the kinds of objects that may be considered unassociated funerary objects, sacred objects and cultural patrimony.[281]

Federal agencies are required to develop written action plans following consultation which include the following:

- kinds of objects considered cultural items,
- the information used to determine custody and how items will be disposed of in accordance with that determination,
- the planned care, handling and treatment (including traditional treatment) of cultural items,
- the planned archeological recording and analysis of items and reports to be prepared, and
- how tribes will be consulted at the time of excavation.[282]

The regulations also encourage the development of comprehensive agreements between Indian tribes, Native Hawaiian organizations and Federal agencies which would

- "address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery" of NAGPRA items, and
- establish processes for consultation and determination of custody, treatment and disposition of such items.[283]

In the case of inadvertent discoveries, the responsible Federal official must be immediately notified by telephone in the case of federal land, or the tribal official in the case of tribal land. Telephone notification must be followed by written

[281] 43 C.F.R. § 10.5(b)(3), (d) and (g).
[282] 43 C.F.R. § 10.5(e).
[283] 43 C.F.R. § 10.5(f).

confirmation.[284] In the case of federal lands, the Federal official has three working days to:

- certify receipt of the notification,
- take steps to secure and protect the items, and
- provide notice to the same categories of tribes and Native Hawaiian organizations specified in the intentional excavation section.[285]

The regulations governing consultation are similar to those pertaining to intentional excavations and specifically encourage tribal-federal agency agreements in terms of specific discoveries and more generally in advance of a project that involves an area that could include such sites[286] and require the agency to develop a written plan for excavation within a 30 day period in the case where excavation is necessary.[287]

f. Ownership and Control Rights

Under NAGPRA, as it has been generally understood, Indian tribes, Native Hawaiian organization or descendants of the deceased will usually have ownership and control over human remains and cultural items which may be discovered or excavated on federal and tribal lands in the future, regardless of whether such discovery or excavation is intentional or inadvertent.[288]

In the case of human remains and associated funerary objects, any lineal descendant of the buried person has the initial right of ownership or control of that person's remains and funerary objects associated with the remains.[289] Where descendants of the human remains and associated funerary objects cannot be determined and in the case of unassociated funerary objects, sacred objects and items of cultural patrimony, NAGPRA establishes the following rules:

1. The tribe or Native Hawaiian organization owns or controls all cultural

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[284] 43 C.F.R. § 10.4(b).
[285] 43 C.F.R. § 10.4(d). In the case of tribal lands, the tribe may (but is not required to) certify receipt of the notice, take steps to secure and protect the items and ensure proper distribution of the items if excavated. 43 C.F.R. § 10.4(e).
[286] 43 C.F.R. § 10.4(d)(iv); 43 C.F.R. § 10.5(f).
[287] 43 C.F.R. § 10.4(d)(v); 43 C.F.R. § 10.3(c)(2).
[288] However, the case of *Bonnischen v. United States*, discussed in section II.B.2.h. below, raises some problematic questions about whether this intent of the legislation will be fully fulfilled.
[289] 25 U.S.C. § 3002(a)(1).

items discovered on tribal land.[290]

2. In the case of federal land, the tribe or Native Hawaiian organization with the closest cultural affiliation to the items has ownership or control.[291] Agreements between tribes regarding disputed items are possible and the NAGPRA Review Committee may serve as a mediator if there is an intertribal dispute.[292]

3. Where cultural affiliation of the items cannot be established, but the objects are discovered on federal land which the Indian Claims Commission or United States Court of Claims [now known as the United States Court of Federal Claims] has determined to be the aboriginal land of a particular tribe, the tribe which obtained the judgment has the right of ownership and control over the items unless another tribe can show a stronger cultural relationship.[293]

   In order for "cultural affiliation" to be established,

   - it must be determined that it is likely that the remains are those of a member of a particular tribe or group which existed at the time that the deceased lived, and

   - based on all of the circumstances and evidence, a reasonable connection ("shared group identity") must be shown between the present-day tribe or organization making the request and the earlier tribe or group based upon the totality of the circumstances and evidence.[294]

The identity of the earlier group can be established by such factors as its cultural characteristics, its production and distribution of materials item and its biological distinctiveness.[295]

A finding of cultural affiliation

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[290] 25 U.S.C. § 3002(a)(2)(A).
[291] 25 U.S.C. § 3002(a)(2)(B).
[292] 25 U.S.C. § 3006(c)(4); 43 C.F.R. § 10.17
[293] 25 U.S.C. § 3002(a)(2)(C). This clause has been interpreted by the Department of the Interior to include preliminary findings of fact, and not just final judgments, and the Department ruled that joint aboriginal use is sufficient to meet the criteria of this section; a finding of exclusive use and occupancy is not required. This interpretation was rejected by the Federal Magistrate Judge in *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or. 2002), *affd.* 357 F.3d 962 (9th Cir. 2004), *modified and rehearing en banc denied*, 367 F.3d 864 (9th Cir. 2004). That part of the Magistrate's decision was not addressed in the Ninth Circuit opinion.
[294] 25 U.S.C. § 3001(2); H.R. Rep. 101-877, *supra* note 223, at 14; 43 C.F.R. § 10.14(d).
[295] 43 C.F.R. § 10.14(c)

- is based upon an overall evaluation of the evidence
- should not be precluded solely because of gaps in the record, and
- is warranted when the evidence shows that it is more likely than not that there is an affiliation.[296]

A finding of cultural affiliation can be based upon geographical, kinship, biological, archeological, linguistic, folkloric, oral traditional or historical evidence.[297] It need not be established with scientific certainty.[298]

Prior to transferring ownership or control of embedded cultural items to lineal descendants, tribes or Native Hawaiian organizations, the Federal agency must publish at least two general notices, a week apart, of the proposed disposition in a newspaper circulated in an area where the members of the tribe or organization reside. Transfer may not take place until 30 days after the second notice. If competing claimants come forward, the proper recipient must be determined in accordance with the statutory preferences.[299] The transfer of items must take place using appropriate procedures which respect traditional customs and practices.[300]

Unlike the regulations dealing with repatriation from museum and federal agency collections, there are no time limits placed upon the transfer of excavated items to the appropriate claimant. Indeed, the notice provisions and the written plan requirements build a significant delay into the process, beyond the 30 days contemplated by the NAGPRA statute itself, during which various types of recording and analysis can occur.[301]

There is no time limit for submitting a repatriation claim.[302] However, a claim is waived if it is made after a valid repatriation of human remains or cultural items has already taken place.[303] If more than one tribe makes a claim and the federal agency cannot clearly determine which party is the appropriate claimant,

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[296] 43 C.F.R. § 10.14(d) and (f)
[297] 43 C.F.R. § 10.2(e); 43 C.F.R. § 10.14(e).
[298] 43 C.F.R. § 10.14(f).
[299] 43 C.F.R. § 10.6(c).
[300] 43 C.F.R. § 10.6(c).
[301] It is conceivable that this will give rise to a legal dispute in a case where the ownership or control of the items to be excavated is clear and the claimant wants immediate return of the items without analysis.
[302] 60 Fed.Reg. 62154 (December 4, 1995)
[303] 43 C.F.R. § 10.15(a)(1).

the agency may retain the item until the parties agree or a court decides who should receive the items.[304]

Since 1990, 70 Notices of Intended Disposition have been published repatriating 315 human remains, 876 funerary objects and 4 objects of cultural patrimony unearthed from grave sites covered by NAGPRA.[305]

The statute provides that Native American cultural items not claimed pursuant to these provisions will be disposed of in accordance with regulations adopted by the Secretary, in consultation with the Review Committee established by the Act.[306]

g. Trafficking

NAGPRA prohibits trafficking in Native American human remains for sale or profit unless the remains have been "excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization."[307] It also prohibits trafficking in funerary objects, sacred objects and items of cultural patrimony obtained in violation of the Act.[308] This section may be violated by removing cultural items from federal or Indian lands without a permit or in a manner inconsistent with the ownership provisions in NAGPRA.[309]

h. Ancient human remains

Recently, the Ninth Circuit Court of Appeals issued a decision in the case of *Bonnichsen v. United States*.[310] *Bonnichsen* is a case involving the discovery of human remains in Kennewick, Washington that are approximately 9,000 years old. Several tribes filed a claim for repatriation of the remains, asserting that they are culturally affiliated with the remains or, alternatively, that they were discovered on their

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[304] 43 C.F.R. § 10.10(c)(2); 43 C.F.R. § 10.15(a)(2).

[305] http://www.nps.gov/history/nagpra/NOTICES/NID%20Table%20Current%20for%20web%20starting%2012-06-2007.pdf

[306] 25 U.S.C. § 3002(b). The Review Committee consists of seven members appointed by the Secretary of the Interior – three (two of whom must be traditional Native American religious leaders) from nominations submitted by Indian tribes, Native Hawaiian organizations and traditional Native American religious leaders, three from nominations submitted by national museum and scientific organizations and one person chosen from a list compiled by the other six members. 25 U.S.C.§ 3006(b)(1).

[307] 18 U.S.C. § 1170(a), as amended by section 4(a) of P.L. 101-601; 25 U.S.C. § 3001(13).

[308] 18 U.S.C. § 1170(b), as amended by section 4(a) of P.L. 101-601.

[309] McKeown and Hutt, *supra* note 236, at 208.

[310] 367 F.3d 864 (9th Cir. 2004), amending an earlier opinion, 357 F.3d 962 (9th Cir.2004) and denying rehearing *en banc*.

aboriginal territory. These claims were upheld by the Secretary of the Interior. A lawsuit was filed by scientists seeking to study the remains.[311]

The Ninth Circuit vacated the Secretary's judgment. It did so on the grounds that the term "Native American" in NAGPRA, which modifies the terms "human remains, objects and cultural items" in the grave sites section of the Act, refers only to aboriginal tribes, peoples and cultures that exist in modern times. Thus, in order for NAGPRA to apply to human remains and cultural items found on federal and tribal lands, there must be an initial showing that the remains or items "bear a significant relationship to a *presently existing* tribe, people or culture."[312] It is not clear from the opinion how this standard differs from the concept of "cultural affiliation." [313]

Until this decision, it was thought that NAGPRA provisions automatically applied to any grave site on federal or tribal land (except for those that are clearly non-indigenous in nature, e.g., Euro-American). The *Bonnischen* requirement of some preliminary showing before the Act applies could change this paradigm, at least in the states of the Ninth Circuit.[314] At present, it is unclear how this will play out in practice. Thus far, no regulations have been altered by the Department of Interior as a result of this decision.[315]

3. Archaeological Resources Protection Act

The Archeological Resources Protection Act (ARPA)[316] regulates the issuance of permits for excavations of archeological sites on federal and tribal lands. ARPA defines ***"archaeological resource"*** as:

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[311] *Bonnischen*, *supra* note 293, 217 F.Supp. at 1120-1121, 1130-1131.

[312] *Bonnischen*, *supra* note 265, 367 F. 3d at 874-876.

[313] The *Bonnischen* decision is highly suspect as a matter of law given that it would render numerous sections of the Act almost superfluous, e.g., 25 U.S.C. § 3002(a)(2)(C) (claims based solely upon aboriginal occupation), 25 U.S.C. § 3006(c)(5) (disposition of culturally unaffiliated remains) Thus far, no regulations have been altered by the Department of Interior as a result of this decision.

[314] See footnote 87.

[315] In another case involving ancient remains, *Fallon-Paiute Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F.Supp.2d 1207 (D. Nev. 2006), the NAGPRA Review Committee found that the Fallon Paiute-Shoshone Tribe had provided sufficient evidence for it to conclude that it was likely that the Tribe was culturally affiliated (within the meaning of NAGPRA) with 1,500 to 2,000 years old human remains that were found in Spirit Cave in Nevada. *Id.* at 1211-1212. The BLM had come to the opposite conclusion and refused to reconsider that decision after the Review Committee's findings. *Id.* at 1212. The tribe filed suit and the Federal District Court found that although the BLM was not required to review its prior decision based solely on the Review Committee findings, it was arbitrary and capricious for the BLM to not review all of the evidence that was considered by the Review Committee. It remanded the case for a further review. *Id.* at 1222-1225.

[316] 16 U.S.C. § 470aa-470mm

> "any material remains of past human life or activities which are of archaeological interest," provided that the term only applies to items that are at least 100 years of age.[317]

The statutory definition explicitly includes graves and human remains, which are also the subject matter of NAGPRA, as discussed above. The phrase ***"of archaeological interest"*** is defined in regulations[318] as:

> capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observations, contextual measurement, controlled collection, analysis, interpretation and explanation.[319]

The regulatory definition also provides numerous examples of the kinds of material remains that usually are archaeological resources as well as a few examples of material remains that are not considered to be of archaeological interest and, as such, are not treated as archaeological resources.

The permit requirement has been implemented through uniform rules applicable to all federal land managers.[320] The criteria for the issuance of a permit are as follows: (1) the applicant is qualified, (2) the undertaking is designed to advance archeological knowledge in the public interest, (3) except as modified by NAGPRA, the resources will remain the property of the United States and be preserved in an appropriate institution, and (4) the activity is consistent with the applicable land management plan.[321] Permits that are issued under ARPA may be issued with such conditions and restrictions as may be

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[317] 16 U.S.C. § 470bb.

[318] ARPA § 10 directs the Secretaries of Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority to issue uniform rules to implement the Act; this section also authorizes each federal land manager to issue rules as may be appropriate for carrying out the act, consistent with the uniform rules. 16 U.S.C. §470ii. The uniform regulations (identical except for numeric designations) are codified in three different titles of the Code of Federal Regulations: 18 C.F.R. part 1312 (Tennessee Valley Authority), 36 C.F.R. part 296 (Agriculture), and 43 C.F.R. part 7 (Interior). The uniform regulations were also previously codified at 32 C.F.R. part 229 (Defense), but this codification has been removed. 71 Fed. Reg. 12280 (Mar. 10, 2006). The Federal Register notice says that part 229 and numerous other regulatory provisions being removed were "obsolete," an statement that we find incomprehensible with respect to the uniform ARPA regulations. Regardless of part 229 having been removed, Defense Department agencies remain subject to ARPA and the uniform regulations. For convenience, throughout these materials section citations are only given for the Interior regulations (title 43) unless the context requires otherwise. Department of the Interior supplemental regulations are codified at 43 C.F.R. §§ 7.31 – 7.37, and Bureau of Indian Affairs supplemental regulations are codified at 25 C.F.R. part 262.

[319] 43 C.F.R. § 7.3(a)(1).

[320] 18 C.F.R. § 1312.7; 32 C.F.R. § 229.7; 36 C.F.R. § 296.7; 43 C.F.R. § 7.7.

[321] 16 U.S.C. § 470cc(b).

necessary to carry out the purposes of ARPA, including mitigation and avoidance measures.[322]

The regulations specifically require each federal land manager to identify and initiate communication with all "Indian tribes having aboriginal or historic ties to lands under the Federal land manager's jurisdiction."[323] Tribes must receive notice of proposed excavations on federal lands if the activity may result in "harm to, or destruction of" a site of religious or cultural importance.[324] Permits that are issued under ARPA may be issued with such conditions and restrictions as may be necessary to carry out the purposes of ARPA.[325] Of note, the Act specifically requires the agencies charged with rulemaking to take into consideration the policy of the American Indian Religious Freedom Act of 1978.[326]

"Indian lands" are defined more narrowly than the term "tribal lands" used in NAGPRA. "Indian lands" as defined in ARPA include only lands of Indian tribes or individuals held in trust by the federal government or subject to a restraint on alienation imposed by the United States.[327] Tribes must consent to excavations on Indian lands that are under their jurisdiction.[328] For excavations on allotted land, landowner consent is also required.[329]

Excavating, removing, damaging, or otherwise altering or defacing archaeological resources on public lands or Indian lands is prohibited except pursuant to a permit or an exemption from the permit requirement.[330] The exemption applies to any Indian tribe excavating a site on its own land and any

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[322] 16 U.S.C. § 470cc(d).
[323] 43 C.F.R. § 7.7(b)(1)
[324] 16 U.S.C. § 470cc(c)
[325] 16 U.S.C. § 470cc(d).
[326] Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996), cited in ARPA § 10, 16 U.S.C. § 470ii(a).
[327] 16 U.S.C. § 470bb(3).
[328] 16 U.S.C. § 470cc(g)(2).
[329] 43 C.F.R. § 7.8(a)(5). The BIA supplemental regulations provide a means for an official acting under authority of the Secretary of the Interior to grant consent on behalf of individual Indians in certain circumstances, such as multiple ownership. 25 C.F.R. § 262.6.
[330] 16 U.S.C. § 470ee(a). In addition, subsections (b), (c), and (d) of this section of ARPA specify other prohibitions: (b) the actual or attempted sale, purchase, exchange, transport or receipt of archaeological resources excavated or removed from public lands or Indian lands in violation of ARPA or other applicable federal law; (c) the sale, purchase, exchange, or transport of archaeological resources in interstate or foreign commerce in violation of any state or local law; and (d) counseling, procuring, or soliciting anyone to violate the other prohibitions of ARPA. Subsection (c) is the only sense in which ARPA applies to archaeological resources that are not on, or were not removed from, public lands or Indian lands.

tribal member if the tribe has a law regulating the excavation or removal of archeological resources.[331]

Violations of ARPA are subject to criminal penalties, including imprisonment, and civil penalties, although ARPA does not include a provision allowing private parties to enforce these rights.[332] Thus, federal officers and tribal law enforcement personnel operating pursuant to Indian Self-Determination Act (638) contracts have the authority to arrest those who loot sacred archeological sites. This is a tool that may be valuable in certain circumstances. Enforcement of ARPA presents a range of practical problems, however, such as the difficulties associated with catching looters in the act and, when they are not caught in the act, proving that archaeological resources were illegally removed from federal or Indian lands. ARPA does not include any mechanism for enforcement by persons other than those operating under federal authority, although it does include authorization to pay rewards of up to $500 to any person who furnishes information that leads to the assessment of a civil penalty or conviction for a criminal violation.[333] ARPA also provides that, for violations occurring on Indian lands, all civil penalties collected are to be paid to the "Indian or Indian tribe involved" and that any items seized through civil forfeiture shall be transferred to the "Indian or Indian tribe."[334] These provisions provide at least some incentives for tribes and others concerned about looting to establish their own monitoring and surveillance programs for known sites. In addition, if the "archaeological resources" at issue in a violation are also human remains or "cultural items" covered by NAGPRA, the section of NAGPRA authorizing a private cause of action[335] appears to provide a way for persons with standing to get into federal court.

In the event that a federal land manager does impose a civil penalty, the regulations provide for a process through which the penalty can be reduced. If the violation for which the penalty was assessed involved a "known Indian tribal religious or cultural site on public lands," the regulations provide that the federal

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[331] 16 U.S.C. § 470cc(g)(1); 25 C.F.R. § 262.4. The BIA supplemental regulations provide that tribal employees are covered by the exemption for the tribe if the excavation or removal of archaeological resources is "within the normal scope of their duties or otherwise carried out by direction of the tribal government" and that consultants and others working for tribes by contractual arrangements are not covered by the exemption for tribes. 25 C.F.R. § 262.4(c)(2), (3).

[332] 16 U.S.C. §§ 470ee(d), 16 U.S.C. § 470ff. Penalties collected for violations on Indian lands are to be paid to the tribe or individual Indian landowner. 16 U.S.C. § 470gg(c). *See also* 43 C.F.R. § 7.17(c).

[333] 16 U.S.C. § 470gg(a).

[334] 16 U.S.C. § 470gg(c). The statute does not expressly address whether such penalties would go to the individual owner(s) of allotted Indian land or to the tribe with jurisdiction, and the regulations simply refer to the statutory language. Arguably, this is an issue that should be determined according to tribal law.

[335] 25 U.S.C. § 3013.

land manager "should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty."[336]

Finally, Section 9 of ARPA[337] provides additional authority for withholding information from disclosure. This section of ARPA states in part:

> Information concerning the nature and location of any archaeological resources for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under [the Freedom of Information Act] or any other provision of law unless such disclosure would –
>
> (1) further the purposes of this Act or the Act of June 27, 1960 (16 U.S.C. §§ 469-469c) [commonly known as the Archeological and Historic Preservation Act], and
> (2) not create a risk of harm to such resources or to the site at which such resources are located.

Thus, if archaeological resources covered by ARPA are at issue (that is, if such resources are on Federal land or Indian land), the Federal agency is directed not to release information unless two affirmative findings are made that would authorize release. In other words, the presumption regarding disclosure is the reverse of that under NHPA section 304, which calls for an affirmative finding (and consultation between the agency and the National Park Service) before a decision is made not to release the information.

C. Federal Environmental Laws

A range of other federal environmental laws may apply to activities that would adversely affect tribal sacred places on federal lands. Federal environmental laws may also be rendered applicable by federal agency actions or funding decisions regardless of the ownership status of lands on which tribal sacred places are located. This section of these materials focuses on the National Environmental Policy Act (NEPA), the federal statute which established a review process for proposed federal actions that result in environmental impacts. In addition to NEPA, this section briefly notes a few of the other federal statutes that may be applicable, either because there is a proposed federal action or because of the kinds of impacts associated with a proposed project.

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[336] 43 C.F.R. § 470hh.
[337] 16 U.S.C. § 470hh.

1. National Environmental Policy Act

Actions under consideration by federal agencies that cause environmental impacts are subject to review under the National Environmental Policy Act (NEPA)[338] and the regulations issued by the President's Council on Environmental Quality (CEQ).[339] The review process established under NEPA and the CEQ regulations has become a fairly standardized process used by all federal agencies. Accordingly, if a tribal sacred place on lands managed by a federal agency is threatened by a proposed land management decision, or if a tribal sacred place on private land is threatened by proposed development that involves federal funding or permission, the proposed federal action will generally be subject to review under the NEPA process.

Given that NEPA is triggered by federal agency action, many kinds of activities within Indian country are subject to review under the NEPA process, including activities for which an action by the Bureau of Indian Affairs (BIA) is required. In this era of self-determination, NEPA may apply to a proposed development project because a federal agency has provided funding to a tribal government, or because a tribe or tribal enterprise has arranged for private financing but still needs BIA approval for a transaction involving trust land,[340] such as accepting title to land in trust. NEPA may also be triggered because a tribe needs authorization from a federal agency other than the BIA, such as a permit from the Army Corps of Engineers to fill wetlands or approval of a gaming management contract by the National Indian Gaming Commission. Since the emphasis in these materials is on tribal sacred places that are not within Indian country, the discussion in this section does not dwell on NEPA compliance by BIA and other agencies within Indian country. Rather, we simply note here that in the event that a tribal sacred place within a reservation is under threat, and the threat involves an action by a federal agency, the proposed action will generally be subject to review under the NEPA process.

a. When an Environmental Impact Statement (EIS) Is Required

NEPA requires that an environmental impact statement (EIS) be prepared prior to any major federal action that would result in significant environmental

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[338] 42 U.S.C. §§ 4321 – 4347. *See generally* THE NEPA LITIGATION GUIDE (KARIN P. SHELDON AND MARK SQUILLACE, EDS, 1999); DANIEL R. MANDELKER, NEPA LAW AND LITIGATION (2d ed., 2003).

[339] 40 C.F.R. parts 1500 – 1508.

[340] *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (holding NEPA applicable to BIA approval of a lease of tribal trust land).

impacts.[341] The CEQ regulations set out procedural requirements for an EIS, including provisions for seeking involvement of tribes at various steps in the process.[342] The preparation of an EIS proceeds through a number of required steps, including:

- a notice of intent published in the *Federal Register*,
- a "scoping" process;
- the identification of cooperating agencies (federal, state, tribal);
- preparation of a draft EIS;
- release of the draft EIS for public review and comment;
- preparation of a final EIS, including responses to comments; and
- a decision based on the final EIS, recorded in a "record of decision" (ROD).

When an EIS is prepared for a proposed federal action that threatens a tribal sacred place, it is important for the concerns of tribes and Native religious practitioners to be reflected in the EIS and the ROD. The agency may determine that it would be more appropriate to address such concerns in the context of NHPA compliance, which should then be coordinated with preparation of the EIS.

In the event that an EIS is prepared, applicants are typically required to provide information for use in preparing the EIS and may be required to contribute to the cost of having the EIS prepared by a contractor that has no interest in the outcome of the project.[343] A tribe, however, may be directly involved in the preparation of an EIS as a cooperating agency, even if the tribe is an applicant.[344]

Under the CEQ regulations, when the minimum time frames and practical realities are taken together, the process of preparing an EIS requires at least about nine months from the decision to prepare an EIS to a decision based on a final EIS. In many cases, the process may stretch out for two or three years or more. In light of the time and money involved in doing an EIS, federal agencies and non-federal developers who need federal agency approval tend to try to

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[341] 42 U.S.C. § 4332. The basic statutory requirement of NEPA is that, before a federal agency takes a major federal action "significantly affecting the quality of the human environment," it must prepare an environmental impact statement.
[342] *See* notes 332-36, *infra*, and accompanying text.
[343] 40 C.F.R. § 1506.5(c).
[344] 40 C.F.R. §§ 1501.6, 1508.5.

avoid deciding that a particular proposed action requires that an EIS be prepared. The CEQ regulations have created a mechanism for making such decisions.

b. Determining Whether an EIS Is Required

The key question in determining whether NEPA requires an EIS for a proposed federal action is whether the proposed action may "significantly" affect the "quality of the human environment."[345] To help agencies avoid doing EISs for proposed actions that will not have significant impacts, the CEQ regulations establish a screening procedure to determine if an EIS is required. Each federal agency is supposed to adopt procedures to implement the CEQ regulations, which are to include lists of the kinds of actions the agency takes, sorted into three categories:

> (1) those that normally have significant environmental impacts and thus require an EIS;
> (2) those that normally do not have significant environmental impacts and thus do not require an EIS (known as "categorical exclusions"); and
> (3) those that the agency must consider on a case-by-case basis and decide whether an EIS will be required.[346]

For proposed actions in the third category – the case-by-case category – the federal agency must prepare an environmental review document known as an "environmental assessment" (EA),[347] as discussed below.

Some agencies publish their procedures in the Code of Federal Regulations[348] while others publish theirs as internal guidance documents.[349]

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[345] 42 U.S.C. § 4332. Human environment is defined "to include the natural and physical relationship of people with that environment." Thus, while social and economic effects alone don't require the preparation of an EIS, when "economic and social and natural or physical environment effects are interrelated, then the environmental impact statement will discuss all of these effects." 40 C.F.R. § 1508.14. Indeed, some EISs include an analysis known as a "Social Impact Statement."

[346] 40 C.F.R. § 1507.3(b)(2).

[347] 40 C.F.R. §§ 1501.3, 1508.9.

[348] *E.g.*, Department of Energy, 10 C.F.R. part 1021; Department of Housing and Urban Development, 24 C.F.R. parts 50, 58; Department of Defense, 32 C.F.R. part 188 (and Air Force, 32 C.F.R. part 989, Army, 32 C.F.R. part 651, Army Corps of Engineers, 32 C.F.R. part 230, Navy, 32 C.F.R. part 775); Environmental Protection Agency, 40 C.F.R. part 6,; Federal Highway Administration (Department of Transportation), 23 C.F.R. part 771.

[349] *See, e.g.*, for agencies within the Department of Interior, procedures are found in the Departmental Manual, at Part 516, chapters 1 through 15, available on the internet in the Electronic Library of Interior

The CEQ maintains a web site that provides citations for, and access to, the NEPA procedures for many federal agencies.[350] When engaging in the NEPA process as administered by any given federal agency, that agency's NEPA implementing procedures must be found and reviewed. When federal agency involvement in a project or activity renders NEPA applicable, it is the agency with authority over the proposed action that is responsible for determining what level of NEPA documentation will be required.

c. Categorical Exclusions

Actions that fit within the second category – "categorical exclusions" – generally require only enough document preparation to determine that they qualify for such treatment. Each agency is required to have a procedure in place to determine whether any extraordinary circumstances apply that render the specific proposed action inappropriate for treatment as a categorical exclusion.[351] The only documentation that is typically prepared for a proposed action that fits within a categorical exclusion is a record that no extraordinary circumstances apply.[352] If any extraordinary circumstance does apply, then an EA is required. An EA may be required for a proposed action that would normally be a categorical exclusion because of state, local or tribal law.[353]

In a recent revision in NEPA implementing procedures for agencies within the Department of the Interior, an extraordinary circumstance has been established to take into account the policy of Executive Order 13,007, Indian Sacred Sites. As stated in the DOI NEPA procedures, a proposed action that

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Policies at http://elips.doi.gov. Interior has recently proposed to move at least some of this information to a new 43 C.F.R part 46. 73 Fed. Reg. 126 (Jan. 2, 2008).

[350] CEQ NEPAnet. http://ceq.eh.doe.gov/nepa/regs/agency/agencies.cfm; *see also* http://ceq.eh.doe.gov/nepa/nepanet. htm.

[351] 40 C.F.R. § 1508.4. In the NEPA implementing procedures for Department of the Interior agencies, the list of "exceptions to categorical exclusions" correspond closely to the "intensity" factors listed in the definition of "significantly" in the CEQ regulations. *Compare* 516 DM 2, Appendix 2, with 40 C.F.R. § 1508.27.

[352] There is no standard format for such documentation, nor is there any standard term for such a document, and such a document is not expressly included in the term "environmental document" as defined in the CEQ regulations, which includes an EIS, EA, FONSI, and a Notice of Intent to prepare an EIS. 40 C.F.R. § 1508.10.

[353] *See* 516 DM 2, Appendix 2, §2.10 (providing that an EA must be prepared if the proposed action threatens to violate a state, local or tribal law). This corresponds to intensity factor (10) in the CEQ regulatory definition of "significantly," which provides that, in determining whether the impacts of a proposed action will be significant, one factor to consider is "Whether the action threatens a violation of a Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). DOI also added tribal law to this list; arguably, a threatened violation of tribal law by an agency outside of DOI should also operate to require an EA for an action that would normally be a categorical violation.

would otherwise qualify for treatment as a categorical exclusion will require an EA if it may:

> Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007).[354]

It is probably too soon to tell whether the adoption of this new extraordinary circumstance will actually result in more EAs being prepared for actions that would otherwise be treated as categorical exclusions. Since the documentation prepared by agency staff when determining whether an extraordinary circumstance applies is not subject to public notice, the effectiveness of this requirement may well depend on pro-active involvement by tribes and other advocates for Native religious practitioners.

d. When an Environmental Assessment (EA) Is Prepared

The basic purpose of an EA is to determine whether an EIS is required. If the responsible federal official determines, based on an EA, that the impacts will not be significant, the official signs a finding of no significant impact (FONSI). The EA and a FONSI fulfill the requirements of NEPA, unless a higher level federal official reverses the decision – or unless someone files an administrative appeal or sues the federal agency and obtains an order from an appeals board or a federal court directing the agency to prepare an EIS.

Many of the kinds of federal actions that require this level of documentation for compliance with NEPA are actions taken in response to applications or proposals from entities other than federal agencies, sometime referred to as "external applicants" for federal action. In such cases, most agencies authorize or require the proponent of the project to prepare the EA (which is often done by a consulting company hired by the applicant). For proposed actions within the jurisdiction of the Department of the Interior, including BIA, the DOI implementing procedures authorize the agency to adopt an EA for a proposal before the Department "by another agency, entity or person, including the applicant."[355]

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[354] 516 DM 2, Appendix 2, § 2.11.

[355] 516 DM 3, § 3.6A. NEPA implementing procedures for the Department of Interior are published in the Departmental Manual, which is available on the internet in the "Electronic Library of Interior Policies: http://elips.doi.gov. In addition to authorizing the adoption of an EA prepared by an applicant, 516 DM 1, § 1.4C provides: "Officials responsible for … loan, grant, contract, lease, license, permit, or other

If an EA is prepared by the applicant for federal action, the federal agency is responsible for the content of the EA and for the determination of significance based on it.[356] If an EA leads to a "finding of no significant impact" (FONSI), then an EIS is not required. Conversely, if an EA does not support a FONSI, then an EIS is required (unless the proposal is re-designed to avoid significant impacts).

The original intent behind the screening process in the CEQ regulations was to help federal agencies focus the human and financial resources that they have available for environmental review on proposed actions that will have significant impacts. As envisioned by CEQ, if a proposed action will not result in significant impacts, the preparation of an EA and FONSI would let the agency move ahead with that action, while enabling it to devote more of its resources to proposed actions for which an EIS must be prepared. An EA would be a brief analysis used to decide whether an EIS is required.

The CEQ regulations only prescribe the minimum requirements for an EA. When the NEPA document for a proposed federal action is an EA rather than an EIS, the CEQ regulations do not require any public involvement in the preparation of the document. Rather, the regulations only require that the EA be made available after it is completed and a FONSI has been signed. Some agencies do more than this, for example, routinely circulating draft EAs and using a public scoping process at the beginning of preparing an EA. [357]

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externally initiated activities shall require applicants, to the extent necessary and practicable, to provide environmental information, analyses, and reports as an integral part of their applications."
The BIA NEPA Handbook provides that an applicant for an externally initiated proposal "will normally be required to prepare the EA" and provide supporting information. 30 BIAM 4 sec. 4.2B. A tribe seeking BIA action is considered such an external applicant. 516 DM 6, app.4, sec. 4.2A.1.a., 4.2A.2.a. In addition, tribes that have taken over BIA programs through Indian Self-Determination Act contracts or self-governance compacts, routinely prepare EAs that would otherwise be the responsibility of the BIA. Similarly, tribes may assume responsibility for preparing NEPA documents for projects funded by the Department of Housing and Urban Development. 25 U.S.C. § 4115; 24 C.F.R. § 1000.20(b).

[356] 40 C.F.R. § 1506.5(a), (b).

[357] Agencies are required to publish notice of availability of "environmental documents," 40 C.F.R. § 1506.6(b), a term that includes EAs, EISs, FONSIs, and Notices of Intent (NOI) to prepare an EIS. 40 C.F.R. 1508.10. There is no requirement in the CEQ regulations to publish a notice of availability for an EA prior to issuing a FONSI; thus, both documents can be noticed simultaneously. Despite the lack of a requirement to do so, during the preparation of an EA, consultation with government agencies (federal, tribal, state, local) that may have jurisdiction by law over some aspect of a proposed action or alternative is often advisable. Such consultation gives such agencies the opportunity to advise the applicant whether they believe they have jurisdiction over some aspect of the proposal, such as authority to issue a permit or otherwise grant authorization or impose conditions. Whether a particular agency has jurisdiction over a proposal may not be readily apparent and may be subject to disagreement. Regardless of whether such agencies have jurisdiction by law, they generally do have special expertise, and their review of a draft EA

For a proposed action for which the required NEPA document is an EA, when an applicant prepares its own EA, it usually follows the guidance of the agency with jurisdiction over the project, if the agency has issued any such guidance.[358] Tribes and other advocates for Native religious practitioners should become familiar with the lead agency's procedures and make use of whatever opportunities are offered for involvement in the development and review of an EA. Even if not required, tribes and other advocates should consider asking for a draft EA to review. This practice may be useful for identifying impacts that the drafters may have missed, and identifying environmental review and consultation requirements that may apply because of the nature of the impacts. Tribes may be able to negotiate agreements with land managing agencies to ensure that they do receive notice of proposals that may affect sacred places of concern to them.

In practice, agencies and non-federal applicants for federal agency funding and/or approvals have devoted much of their resources to preparing lengthy EAs with mitigation measures in response to identified environmental impacts, with the objective of finding enough mitigation that the federal agency can determine that the impacts of the proposed action do not cross the threshold of "significance" so that the agency can conclude that no EIS will be required. The FONSI in such cases is known as a "mitigated FONSI."[359] As a result of this practice, for the vast majority of proposed actions for which a NEPA document is prepared, the document is an EA and the responsible federal officials signs a FONSI based on the EA. This practice can result in the preparation of an EA taking as much time as it takes to complete the EIS process, but nonetheless an action taken on the basis of such an EA and FONSI is still more likely to be set aside by a court than an action based on an EIS.[360]

A practical implication of these practices for the review of proposed federal actions that present threats to tribal sacred places is that tribes and other advocates for the protection of such places must be pro-actively involved. Pro-active involvement generally requires the development of staff capacity within one or more tribal government agencies, such as a tribal historic preservation

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can contribute to interdisciplinary analysis and help to determine whether any of the impacts of a proposed action approach or cross the threshold of significance.

[358] The accessibility of agency guidance documents varies for different agencies.

[359] *See generally* James M. McElfish, Jr., *The Regulations Implementing NEPA*, *in* THE NEPA LITIGATION GUIDE, *supra* note 305, at 177-85.

[360] *E.g*, *Anderson v. Evans*, 350 F.3d 815 (9th Cir. 2003), amending an earlier opinion, 314 F.3d 1006 (9th Cir. 2002), and denying rehearing *en banc* (holding that an EA and FONSI prepared under direction of National Oceanographic and National Marine Fisheries Service prior to authorizing a quote under which the Makah Tribe could resume hunting gray whales pursuant to treaty rights was inadequate for NEPA compliance and that an EIS was required).

officer (THPO), with a mission that includes monitoring proposed federal actions outside reservation boundaries.

e. Using NEPA Documents for NHPA Compliance

Because the NHPA section 106 process often provides more effective opportunities for involvement of tribes, especially for proposed actions outside of reservation boundaries, tribes and other advocates may prefer to use that process instead of NEPA to raise their concerns. As discussed in the NHPA section of these materials, an agency can decide to use NEPA documents for achieving compliance with NHPA section 106, although the Advisory Council on Historic Preservation (ACHP) regulations impose some procedural requirements when agencies choose to do so.[361] Advocates for the protection of tribal sacred places may need to be vigilant to ensure that agencies fulfill the requirements of the ACHP regulations. This may be particularly important in situations in which the agency allows or requires the applicant for federal agency action to prepare the EA (or to arrange for its preparation through the use of a contractor). When tribal sacred places are at stake, tribal representatives and advocates for Native religious practitioners will generally prefer to be consulted by the relevant federal agency, not by the applicant. The ACHP regulations include a provision that takes this into account: "Federal agencies that provide authorizations to applicants [to initiate consultation] remain responsible for their government-to-government relationships with Indian tribes."[362]

f. The Federal Agency Action Requirement

For NEPA to apply there must be a federal agency action. If there is no proposed federal action, then NEPA compliance is not required.

Even in some cases in which there is a proposed federal action, NEPA compliance may not be required. For example, federal courts have ruled NEPA inapplicable to agency actions in certain kinds of circumstances, such as a "ministerial" exception when the agency has been directed by Congress to take an action without room for agency discretion[363] and a similar exception when the agency action is not a legal requirement to authorize action by a non-federal

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[361] *See* 36 C.F.R. § 800.8. *See generally* Section II.B.1.

[362] 36 C.F.R. § 800.2(c)(4).

[363] *See generally* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW (2d ed., 1994), at 899, note 237. In the context of federal actions relating to Indian tribes, Acts of Congress providing for, or restoring, federal recognition of a tribe, or settling land claims, on occasion direct the Secretary of the Interior to except title in trust for a certain parcel of land, and such statutes may fit within the ministerial exception to NEPA. *See Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (land acquisition pursuant to statute implementing Claims Court judgment); *Nevada v. United States*, 221 F.Supp.2d 1241 (D. Nev. 2002) (land acquisition pursuant to settlement act).

entity.[364] For some projects, federal action may not be anticipated at the outset but may nevertheless come into play, for example, if a source of federal funding becomes available or if the environmental impacts of a project trigger the applicability of a federal permit requirement. In addition, an EA may be required by state, local or tribal law, even if not required by federal law.

g. Tribal Government Involvement in NEPA Documents

In the event an EIS is prepared, the CEQ regulations require the lead federal agency to seek the involvement of affected tribes at several points in the process, beginning with the scoping process.[365] A tribe can be a cooperating agency and be directly involved in preparing the EIS.[366] The lead agency must invite comments from potentially affected tribes[367] and must provide notice to potentially affected tribes of NEPA-related events (hearings, public meetings) and the availability of NEPA documents.[368] In addition, if a proposed action would affect a reservation, the EIS must include discussions of possible conflicts with tribal land use plans, policies and controls for the area concerned.[369] In addition to the regulations, the CEQ guidance document on environmental justice[370] specifically includes Indian tribes among the kinds of communities in which environmental justice concerns may arise.

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[364] *E.g.*, *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) (secretarial approval of contract between tribe and city concerning parking ramp not a legal requirement, and too incidental to require compliance with NEPA).

[365] 40 C.F.R. § 1501.7 (requiring the lead agency to invite "any affected Indian tribe" to participate in scoping).

[366] 40 C.F.R. §§ 1501.6, 1508.5 (providing that a tribe may be a cooperating agency when effects of the proposed action may occur "on a reservation"). CEQ has issued a guidance memorandum on cooperating agencies that encourages federal agencies to approve requests from tribes to be cooperating agencies. Council on Environmental Quality, Memorandum for Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002), available at: http://ceq.eh.doe.gov/neap/regs/guidance.html. This guidance document stresses that the key factors in considering non-federal government agencies (state, tribal, and local) for cooperating agency status are jurisdiction by law or special expertise with respect to alternatives or impacts, and it does not mention the language in the regulations referring to effects occurring on a reservation. Thus, tribes can be cooperating agencies when they are concerned about off-reservation impacts and tribes without reservations, such as most Alaska tribes, can be cooperating agencies. The Bureau of Land Management (BLM) recently adopted this position in revising its land use planning regulations. BLM, Land Use Planning, 70 Fed. Reg. 14561, 14563 (March 23, 2005) (to be codified at 43 C.F.R. §1601.0-5(d).

[367] 40 C.F.R. § 1503.1(a)(2) (comments must be invited from tribe "when effects may be on a reservation").

[368] 40 C.F.R. § 1506.6(b)(3) (requiring notice to tribes "when effects may occur on reservations").

[369] 40 C.F.R. § 1502.16(c).

[370] COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 10, 1997) (herein "CEQ EJ Guidance"), available at: http://ceq.eh.doe.gov/neap/regs/ guidance.html.

Like state and local governments, tribal governments typically include different subdivisions and agencies, some of which may operate with relative independence. Accordingly, more than one entity of tribal government may be involved in preparation and/or review of an EA or EIS, with interests that may not be aligned with each other. If a tribe has establish a Tribal Historic Preservation Officer or a similar office with expertise in cultural resources and advocacy for tribal interests outside of reservation boundaries, the engagement of such an office as a cooperating agency could be a useful way to ensure that the tribe's interests are accurately and adequately reflected in the EIS and ROD.

If an EA is prepared rather than an EIS, the CEQ regulations establish no specific requirements for seeking the involvement of tribes other than the requirement that, for any notice about NEPA-related events or documents that the agency does publish, if the proposed action may result in effects on a reservation, the agency must provide notice to the tribe.[371] Accordingly, having on-going consultative relationships with land managing federal agencies may be crucial for becoming engaged in the NEPA process when there are no hard and fast requirements to provide notice to tribes. It is generally useful to negotiate written agreements on how such on-going consultative relationships are to be carried out.

h. Identifying Other Environmental Review Requirements

In the event that an EIS is prepared for a proposed action, the CEQ regulations require that other environmental review and consultation requirements that apply to the project be discussed in the EIS.[372] Such other requirements may include the Endangered Species Act, the National Historic Preservation Act, and various permit requirements under the Clean Air Act, Clean Water Act or Resource Conservation and Recovery Act. Any such requirements that do apply to a proposed action are legally distinct from NEPA. The CEQ regulations seek to ensure that any requirements that apply to a proposed action or alternatives are identified in the EIS and to encourage that compliance with other requirements is achieved concurrently with preparation of the EIS if practicable or at least that such requirements are identified and discussed.

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[371] 40 C.F.R. § 1506.6(b)(3). The *CEQ EJ Guidance*, *supra* note 345, does encourage agencies to seek involvement of tribal representatives in the preparation and review of EAs as well as in EISs.
[372] 40 C.F.R. § 1502.25.

If the NEPA document for a proposed action is an EA, there is no such requirement in the CEQ regulations.[373] Even though not required, any other requirements that do apply to a proposed action often are discussed in the EA. Advocates for Native religious practitioners, if given the opportunity to comment on a draft EA or otherwise provide input into an EA, should insist that the EA identify all applicable requirements.

i. Appeals and Judicial Review of Agency Decisions

NEPA does not include a statutory provision authorizing private parties to file lawsuits in federal court against federal agencies for failure to comply with the statute. Not long after NEPA was enacted, however, federal courts ruled that judicial review is authorized.[374] Such court decisions found a basis for jurisdiction in the judicial review provisions of the Administrative Procedure Act (APA).[375] Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be … arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; [or] … without observance of procedure required by law."[376]

In order for a NEPA claim to be ripe for judicial review, the federal agency must have taken a "final agency action for which there is no other adequate remedy in a court."[377] The CEQ regulations state that judicial review should not be available until one of three kinds of events has occurred: (1) the agency has made a final FONSI; (2) the agency has filed a final EIS; or (3) the agency "takes action that will result in irreparable injury."[378] In addition to these three categories, courts have heard claims based on the failure of an agency to prepare a supplemental EIS, failure to supplement an EA, the decision to use a categorical exclusion to avoid the preparation of an EA, and failure to begin the NEPA process at all.[379] For federal agencies that provide for an administrative appeal

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[373] 40 C.F.R. § 1508.9 (requiring that an EA include a listing of the agencies and persons consulted, but not requiring that agencies with possible jurisdiction over a proposed action be included in the listing).

[374] *E.g.*, *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

[375] 5 USC §§ 701-706 (1994).

[376] 5 USC § 706(2)(A), (B) (1994). For an explanation of why the other four APA judicial review standards do not apply in NEPA cases, *see Mandelker*, *supra* note 338, at § 3:4.

[377] 5 USC § 704.

[378] 40 CFR §1500.3.

[379] *See* Federico Cheever, *Decision Making and Judicial Review of Agency Decisions under NEPA*, *in* NEPA LITIGATION GUIDE, at 132, 140-41, and cases cited therein. *See also* William Cohen and Andrea Berlowe, *Litigating NEPA Cases*, *in* NEPA LITIGATION GUIDE, at 189.

process, such as the BIA, the final administrative appeal decision is considered the final agency action.[380]

The Supreme Court has ruled that the mandate of NEPA is essentially procedural. NEPA "does not mandate particular results, but simply prescribes the necessary process."[381] Consequently, when courts consider challenges to the adequacy of an EIS, they focus on procedures followed in preparing the EIS rather than its substantive content. The D.C. Circuit has said that a challenge to the adequacy of an EIS is in effect a claim that the agency's decision was "without observance of procedure required by law."[382] Other courts have adopted the arbitrary and capricious standard, and the Supreme Court has not yet ruled on which standard is correct.[383]

Regardless of which APA standard a court cites, the nature of the inquiry conducted to apply the review standard tends to be similar. For example, the First Circuit, applying the arbitrary and capricious standard, says that "the reviewing court must determine that the decision 'makes sense.' Only by 'carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision' can the court 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'"[384] Similarly, the Ninth Circuit has said that an EIS must include a "reasonably thorough discussion of the significant aspects of the probable consequences" of a proposed action.[385] The circuit courts continue to say that judicial review is not a "rubber stamp"[386] of agency action and that courts must take a "hard look."[387]

If an agency produces an EA and then issues a FONSI, it is foregoing the more stringent documentation and public participation requirements of an EIS. Thus, a potential NEPA claimant challenging an action based on a FONSI would most likely seek a court order that an EIS must be prepared, alleging that the agency was wrong in concluding that the impacts of a proposed action will not

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[380] *See* 25 CFR § 2.6.

[381] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 44 U.S. 223 (1980).

[382] *Natural Resources Defense Council v. Securities & Exchange Comm'n*, 606 F.2d 1031, 1049 (D.C. Cir. 1979) (citing the Administrative Procedure Act, 5 USC §706(2)(D)).

[383] *See Mandelker, supra* note 338, at §10.16.

[384] *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1285 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 2510 (1997) (internal citations omitted).

[385] *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

[386] *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1285 (1st Cir. 1996); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995).

[387] *All Indian Pueblo Council v. United States*, 975 F.2d 1437 (10th Cir. 1992); *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137 (D.C. Cir. 1991).

be significant. The Supreme Court has ruled that the arbitrary and capricious standard applies in such cases.[388] Decisions in these cases go both ways and tend to turn on the facts of the case.[389] Courts typically put the burden on the plaintiff to allege facts that the agency omitted from its consideration which, if true, might have resulted in a conclusion that a FONSI was not warranted.[390] If an agency's EA is superficial or based on assumptions or conclusions,[391] a court is likely to take a harder look than in cases in which the EA contains meaningful analysis.

The key issue in cases asserting that an EIS should have been prepared is whether the probable environmental impacts may be significant, and so the courts often focus on the definition of "significantly" in the CEQ regulations, which calls for consideration of both context and intensity.[392] Some courts have said that the existence of one intensity factor does not in and of itself render the impacts significant.[393] The D.C. Circuit has applied a four-part test to review agency decisions not to prepare an EIS, after having prepared an EA and issued a FONSI:

> First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA. Third, if a [FONSI] is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.[394]

Although this test was formulated prior to the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council,* it is not inconsistent with that decision, and this test continues to be cited and applied.

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[388] *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).
[389] *Mandelker, supra* note 338, at §§ 8.2-8:13.
[390] *E.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980).
[391] *Public Service Co. of Colorado v. Andrus*, 825 F.Supp 1483 (D. Idaho 1993); *Sierra Club v. Babbitt*, 15 F.Supp. 2d 1274 (S.D. Ala. 1998).
[392] 40 CFR § 1508.27.
[393] *E.g., Presidio Golf Club v. National Park Serv.*, 155 F.3d 1153 (9th Cir. 1998); *North Carolina v. Federal Aviation Admin*., 957 F.2d 1125 (4th Cir. 1992); *Friends of Fiery Grizzard v. Farmers Home Admin*., 61 F.3d 501 (6th Cir. 1995).
[394] *Sierra Club v. U.S. Dept. of Transportation*, 753 F.2d 120, 127 (D.C. Cir. 1985).

When an agency prepares an EA instead of an EIS, the consideration of alternatives is based on section 102(2)(E) of the act,[395] which requires agencies to: "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement has been interpreted by courts in only a few cases,[396] and so what it means is not entirely clear. Some courts have held that when section 102(2)(e) applies, the alternative analysis for an EA should be comparable to that for an EIS.[397]

If an agency uses a categorical exclusion, and that constitutes final agency action, then an aggrieved plaintiff would have the opportunity to appeal that decision. Categorical exclusions are intended to apply to a limited set of actions that are not likely to have a significant effect on the environment.[398] Courts generally do not set aside an agency's use of a categorical exclusion, and they also defer to an agency's interpretation of its own regulations identifying its categorical exclusions[399] unless the activity clearly does not fit within the categorical exclusion.[400]

Plaintiffs in NEPA cases usually seek injunctive relief to order an agency not to go ahead with an action until the alleged failure to comply with NEPA is cured.[401] Obtaining a preliminary injunction may be critical to success on the merits because, without a preliminary injunction, the agency can proceed with the action, and the complaint may be moot by the time the case is heard on the merits. A preliminary injunction is an injunction that is granted before a court rules on the merits of a case. It is a way to maintain the status quo pending final resolution of the case and involves consideration of the strength of the plantiff's legal and factual arguments and potential harm to the parties if a preliminary injunction is or is not granted, as well as the public interest.[402]

After a court has heard the entire case, it may issue a permanent injunction against the federal action, although such an injunction may allow the project to go forward if certain conditions are subsequently met.

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[395] 42 USC § 4332(2)(E). This subsection is worded somewhat differently from the language in section 102(2)(c), which is the basis for consideration of alternatives in an EIS.
[396] *See Mandelker*, *supra* note 338, at § 9:22.
[397] *E.g.*, *Society Hill Towers Owners Ass'n v. Rendell*, 210 F.3d 168 (3d Cir 2000); *Sierra Club v. United States*, 23 F.Supp.2d 1132 (N.D. Cal. 1998).
[398] 40 CFR §1508.4.
[399] *Mandelker*, *supra* note 338, at § 7:10.
[400] *See generally* Cohen and Berlowe, *supra* note 379, at 189, 203-207.
[401] *See generally Mandelker*, supra note 338, at §§ 4:52-4:65.
[402] For a discussion of the factors that are applied in seeking preliminary injunctive relief in NEPA cases, *see Mandelker*, *supra* note 338, at §§ 4:53-4:61.

2. Other Federal Environmental Laws

A project or other activity that would affect (or has already affected) a tribal sacred place may be subject to the provisions of one or more of a number of other federal environmental laws in addition to NEPA and the cultural resources statutes that have been discussed in these Materials. The programs under other federal environmental laws, however, are beyond the scope of these Materials. In this section we offer only some brief comments.

Some federal environmental laws are rendered applicable because of the nature of the environmental impacts of a project, regardless of whether there is a federal agency action. Some such statutes, including the Clean Air Act[403] and Clean Water Act,[404] authorize environmental regulatory permit programs. Both of these statutes also authorize the establishment of substantive standards to protect environmental resources. The regulatory programs under these statutes are administered through "environmental federalism," in which federal agencies (mainly the Environmental Protection Agency (EPA)) and states (and tribes treated as states) have roles. Whether the programs under these environmental laws may be useful in any particular matter involving a tribal sacred place will depend upon the nature of the threat to the sacred place. For example, if a sacred place would be damaged by water pollution or by filling in wetlands, the permit programs under the Clean Water Act may prove to be useful. In addition, if a project would result in impacts on protected environmental resources, there may be opportunities to form alliances with groups that are concerned about those kinds of impacts. If there is a proposed federal action to render NEPA applicable, and if an EIS is prepared, all the applicable federal environmental laws should be identified in the EIS. As discussed in the preceding section, if the NEPA document is an EA rather than an EIS, the other applicable federal laws may be identified, but there is no requirement to do so.

One other federal environmental law that should be noted is the Endangered Species Act (ESA).[405] The ESA is intended to protect endangered and threatened species from going extinct. Like NEPA and NHPA, the ESA includes a consultation process that is triggered by federal agency action,[406] but it also includes a prohibition on "taking" of an endangered species that applies to all persons regardless of whether a project involves a federal action.[407] Modification or destruction of critical habitat may constitute a "taking" endangered species. One of the ways in which the ESA may be relevant for the

[403] 42 U.S.C. §§7401 – 7671q.
[404] 33 U.S.C. §§1251 – 1387.
[405] 16 U.S.C. §§1531 – 1544.
[406] ESA §7, 16 U.S.C. §1536.
[407] ESA §9, 16 U.S.C. §1538.

protection of tribal sacred places is that many sacred places, more particularly many TCPs, are located in places that remain relatively undisturbed by human activity.[408] As such, some of these places may be within the habitat of species that are protected under the ESA. If that is the case, the ESA may be useful in protecting the tribal sacred place, and the citizen suits provision of the ESA[409] may be used to seek judicial enforcement of compliance. Tribes and other advocates for the protection of tribal sacred places might consider the habitat mitigation banks[410] in areas where the habitat of protected species overlaps areas where sacred places are located. This would be one approach to establishing long-term protection for such areas.

We should note that in one high profile case in which opponents of a project did rely on the ESA, the proponents of the project secured legislation exempting their project from the ESA.[411] We should also note that in contexts other than the protection of tribal sacred places, the experiences of tribal government in dealing with the ESA have been mixed.[412]

D. Land Use Planning Laws

1. Forest Service

a. Laws

In the case of Forest Service lands, the primary operative statute is the National Forest Management Act (NFMA).[413] NFMA requires that each National Forest promulgate a Land and Resource Management Plan (also known as a Forest Plan). All "[r]esource plans and permits, contracts and other instruments

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[408] *See generally* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483 (1999).

[409] ESA §11(g), 16 U.S.C. § 1540(g).

[410] *See* U.S. Fish and Wildlife Service, Notice of Availability, Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24753, 24753 (May 8, 2003) (hereinafter *Conservation Banking Guidance*) available at www.endangered.fws.gov/policies/conservation-banking.pdf. The U.S. Fish and Wildlife Service allows for habitat mitigation banks as a way of mitigating impacts on the habitat of listed species. How this mechanism works is that the developer of a project that will cause harm to such habitat mitigates those impacts by purchasing credits in another privately owned area that has potentially been made available for habitat preservation.

[411] *See* Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994).

[412] *See generally* Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights—Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063 (1997); Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381 (1998).

[413] 16 U.S.C. §§ 1600 to 1614.

for use and occupancy of National Forest lands shall be consistent" with the Forest Plan.[414]

Forest Plans must conform with the Multiple Use and Sustained Yield Act of 1960.[415] "Multiple use" is defined to mean the management of the renewable surface resources of a forest "in the combination that will best meet the needs of the American people."[416] Multiple use principles call for "harmonious and coordinated management" of resources "without impairment of the productivity of the land." Not all lands must be used for all purposes and the land need not be managed to "give the greatest dollar return or the greatest unit output."[417] The principle of "sustained yield" means the use of resources in a manner that will ensure "a high-level annual or regular periodic output of the various renewable resources" in perpetuity.[418]

Forest Plans consider how much timber will be harvested, by what means and in what locations.[419] The statute makes clear, however, that Forests must also consider other concerns in the planning process beyond logging. The statute requires the Forest Service to "provide for outdoor recreation, range, … watershed, wildlife and fish and wilderness."[420]

Forest Plans are to be developed through an "interdisciplinary approach"[421] and both public hearings and participation are contemplated before the adoption of a Forest Plan.[422]

b. Regulations

Recent planning regulations adopted by the Forest Service provide local land managers with great flexibility in preparing Forest Plans and in implementing them. The regulations provide for Forest Plans that contain a description of desired conditions in the Forest, objectives, guidelines for considering projects and activities, identify the suitability of areas for various uses and identify special areas in the Forest.[423] However, the regulations state that Forest Plans are not meant to create legal rights or final decisions about land

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[414] 16 U.S.C. § 1604(i).
[415] 16 U.S.C. §§ 528 to 531.
[416] 16 U.S.C. § 531(a).
[417] *Id.*
[418] 16 U.S.C. § 531(b).
[419] *See* George C. Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 COLO. L. REV. 307, 340-42 (1990).
[420] 16 U.S.C. § 1604(e)(1).
[421] 16 U.S.C. § 1604(b).
[422] 16 U.S.C. § 1604(d).
[423] 36 C.F.R. §§ 219.3 and 219.7(a)(2).

management except in extraordinary circumstances.[424] The requirements for what are to be incorporated in Forest Plans are kept very general – essentially the regulations restate the statutory requirements in the Multiple Use and Sustained Yield Act of 1960.[425] Sustainability is defined to include social, economic and ecological components.[426] Unlike earlier regulations that required Forest Plans to address specific issues such as Native American religious freedom and the protection of cultural resources[427], the new regulations are silent about these issues. The commentary to the new regulations recognizes that these types of issues "are important", but defers decisions about how and whether to address these issues to the local level.[428] In short, the Forest Service regulations view the new forest planning system as "more strategic, less prescriptive".[429]

The process established for the adoption or revision of a plan, or an amendment thereto, specifically includes a requirement of tribal consultation, *viz*.

> The Forest Service recognizes the Federal Government's trust responsibility for federally recognized Indian tribes. The Responsible Official must consult with, invite and provide opportunities for federally recognized Indian Tribes to collaborate and participate in planning. In working with federally recognized Indian Tribes, the Responsible Official must honor the government-to-government relationship between Tribes and the Federal Government.[430]

The regulations also provide for public participation in the planning process, particularly "updating the evaluation report, establishing the components of the plan, and designing the monitoring program."[431] How to implement these requirements has been left to the Responsible Official.[432] This is usually the Forest Supervisor, although a higher level official such as a Regional Forester or the Chief of the Forest Service has the discretion to act as the Responsible Official.[433] The commentary to the regulations indicates that the process of developing Forest Plans, revisions and amendments should be a "collaborative"

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[424] *Id*.
[425] 36 C.F.R. § 219.1(c).
[426] 36 C.F.R. § 219.10.
[427] 36 C.F.R. §§219.1(b)(5) and (6) (1982 regulations); 36 C.F.R. §§ 219.12(b)(2)(ii) and (iv), 219.21 and 219.36 (2000 regulations).
[428] 70 FED.REG. 1036 (2005).
[429] *Id*. at 1024.
[430] 36 C.F.R. §219.9(a)(3).
[431] 36 C.F.R. §219.9(a).
[432] *Id*.
[433] 36 C.F.R. § 219.2(b)(1).

one between the public and the agency.[434] There is also a 90 day notice and comment period once a plan has been formally proposed.[435]

Although NFMA subjects Forest Plans to the requirements of the National Environmental Policy Act,[436] the Forest Service has determined in the new regulations that Forest Plans fall within the Categorical Exclusion category.[437] Thus, except in rare instances, Environment Impact Statements will no longer be prepared when Forest Plans are adopted, revised or amended, unless the amendment pertains to a specific project or activity.[438]

c. Legal Challenges to Forest Plans

Except in two circumstances, the only administrative review provided for in the case of Forest Plan adoptions, revisions or amendments is during a 30 day "pre-decisional" period.[439] Any person or organization that submitted written comments may file an objection which is reviewed by the supervisor of the official that has decision-making authority.[440] The final decision on the Forest Plan is issued through a document known as a "plan approval document".[441]

The two exceptions to this process deal with situations where a plan amendment applies only to a specific project or activity – in which case there is a more formal post-decision appeal process – or where the Forest Service is a participant in a multi-Federal agency effort in which case the Forest Service may agree to allow utilization of another agency's appeal process.[442]

Legal challenges to a Forest Plan may be brought in federal district court pursuant to the Administrative Procedure Act.[443] Unlike NEPA and NHPA, the National Forest Management Act is a substantive statute, as well as a procedural statute.[444] In other words, it places certain substantive requirements upon the agency that it must follow. If it does not, a Plan may be challenged in court, although such legal challenges must be based upon decisions that allow or prohibit

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[434] 70 FED. REG. 1028 (2005).
[435] 36 C.F.R. § 219.9(b)(1)(ii).
[436] 42 U.S.C. §§ 4321 – 4347.
[437] 36 C.F.R. § 219.4(b).
[438] 70 FED. REG. 1039-1042 (2005).
[439] 36 C.F.R. § 219.13.
[440] 36 C.F.R. § 219.13(a).
[441] 36 C.F.R. § 219.7(c).
[442] 36 C.F.R. § 219.13(a)(1) and (d).
[443] 5 U.S.C. § 551 *et seq.*; *see, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565, *cert. denied*, 532 U.S. 1051(2001).
[444] *See, e.g.*, *Sierra Club – Black Hills Group v. United States Forest Service*, 259 F.3d 1281, 1287 (10th Cir. 2001); *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059 (9th Cir. 2002).

specific activities. They cannot be based solely upon a legally flawed Forest Plan; a party must wait until the "illegal" part of the Plan actually leads to a decision that will have an impact upon the person or entity bringing suit.[445]

2. Bureau of Land Management

The Federal Land Policy and Management Act (FLPMA)[446] includes two components that are particularly important for purposes of these materials: (a) FLPMA is the act of Congress that provides the basic set of mandates for the Bureau of Land Management (BLM); and (b) FLPMA governs the withdrawal of public lands from multiple use by the Secretary of the Interior.

a. BLM Planning

Under FLPMA, the BLM is required to develop Resource Management Plans (RMPs) which use a multiple use-sustained yield interdisciplinary approach, considering present and potential uses and long-term and short-term goals.[447] Among the goals of planning are to protect "scenic, historical, ecological, environmental, air and atmospheric, water resource and archaeological values … where appropriate [to] … preserve and protect certain public lands in the natural condition" and to provide for habitat for wildlife, domestic animals, outdoor recreation and human use.[448] In addition to these preservation-oriented goals, BLM also has resource production-oriented goals. BLM planning must "recognize the Nation's need for domestic sources of minerals, food, timber and fiber."[449] The RMPs are also required to inventory and consider the scarcity of resources, and comply with pollution control laws.[450]

The plans must be coordinated with "the land use planning and management programs of Indian tribes" and other governments,[451] and the BLM has a responsibility to periodically review those programs to determine if they have been significantly changed.[452]

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[445] *Ohio Forest Assn. Inc. v. Sierra Club*, 523 U.S. 726 (1998). The commentary to the new regulations specifically refers to language in this case where the Court indicated that plans are "tools for agency planning and management"... that "create no legal rights or obligations, i*d*. at 733, as support for the approach in the new planning rules and presumably to suggest that legal review of Forest Plans ought to be extremely limited. 36 FED.REG. 1025 (2005).

[446] 43 U.S.C. §§ 1701 to 1784.

[447] 43 U.S.C. § 1712(a), (c)(1), (c)(2), (c)(5), and (c)(7).

[448] 43 U.S.C. § 1701(8).

[449] 43 U.S.C. § 1701(10).

[450] 43 U.S.C. § 1712(c)(4), (6) and (8).

[451] 43 U.S.C. § 1712(b).

[452] 43 C.F.R. § 1610.4 – 1610.9.

The RMPs must also "give priority to the designation of areas of critical environmental concern" (ACECs), which include areas that require special management attention or the prohibition of development in order to "protect and prevent irreparable damage to important … cultural values."[453] In general, an ACEC requires distinctive qualities "of more than local significance."[454] The designation of an ACEC, however, does not in itself change the management of land so classified.[455] Rather, the BLM State Director must first publish a notice in the *Federal Register* specifying any resource use limitations proposed for the ACEC. After a sixty-day comment period, formal adoption of the plan may take place. The plan must include the general management practices and uses in the ACEC as well as mitigation measures to protect the area.[456]

BLM is required to provide opportunities for public participation in the development of RMPs. The regulations specifically require meaningful involvement of Indian tribes in the development of RMPs. Whenever an RMP is prepared or revised, BLM is required to provide notice to any Indian tribe that has requested notice or that the BLM land manager has reason to believe would be concerned. The tribe and other interested governments must be given an opportunity to "suggest concerns, needs, resource use, development and protection opportunities" in the area covered by an RMP[457] and to provide "review, advice and suggestion on issues and topics" that may affect them.[458]

Except where it is not possible due to valid rights existing at the time of adoption of the RMP, all contracts, permits, cooperative agreements and other instruments shall conform to the RMP within a reasonable period of time after its adoption.[459] Thus, the inclusion of provisions in an RMP to protect a sacred place would mean that the various kinds of documents specifying how particular land uses are to be carried out must include provisions to protect that sacred place.

RMPs are approved by BLM State Directors.[460] Any party to the planning process may appeal the approval of a RMP to the Director of the BLM, whose decision is considered the final decision for the Department of the Interior.[461] According to the regulations, approval of a RMP is not a final implementation

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[453] 43 U.S.C. §§ 1712(3), 1702(a).
[454] 43 C.F.R. § 1610.7-2(a)(2).
[455] 43 U.S.C. § 1711(a).
[456] 43 C.F.R. § 1610.7-2(b).
[457] 43 C.F.R. § 1610.4-1.
[458] 43 C.F.R. § 1610.3-1(b).
[459] 43 C.F.R. § 1610.5-3(b).
[460] 43 C.F.R. § 1601.0-4(c) and 1601.5-1.
[461] 43 C.F.R. § 1610.5-2.

document in regard to activities that will require further action by the BLM before it can proceed.[462]

FLPMA does not provide for a private cause of action. Thus, any judicial appeal is governed by the Administrative Procedure Act.[463] The Supreme Court has held that an action may not be brought to compel agency action specified in an RMP unless the language in the plan creates a commitment binding on the agency and found that in general a land use plan is "a statement of principles; it guides and constrains actions, but does not (at least in the usual sense) prescribe them" and thus is not enforceable through a lawsuit.[464] The court suggested, however, that an action would lie if the BLM were acting in a manner "inconsistent" with binding provisions of a land use plan.[465]

Unfortunately, there is considerable evidence that BLM compliance with FLPMA has been erratic at best. Many BLM resource districts have yet to develop RMPs more than twenty-five years after the enactment of FLPMA.[466]

b. Withdrawal of Public Lands

The other significant aspect of FLPMA for the protection of tribal sacred places concerns the provisions for withdrawal of land from the public domain. "Withdrawal" is defined, in relevant part, as "withholding an area … for the purpose of limiting activities … in order to maintain public values in the area or reserving the area for a particular public purpose of program."[467]

The withdrawal process may be a mechanism that can be used to protect tribal sacred places that are at risk, if it is invoked before rights have been vested in the land that is the subject of a withdrawal application. For example, a sacred place may be subject to a claim under the Mining Law of 1872,[468] a law that permits an person to explore land in the public domain in search of valuable mineral deposits and to file a "mining claim" that entitles the claimant to the exclusive use of the site for mineral development. Withdrawal is only mechanism available for removing lands from the operation of the 1872 Mining Law.[469]

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[462] 43 C.F.R. § 1601.0-5(k).
[463] *See*, *e.g.*, *State of Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998).
[464] *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373, 2381-2384 (2004).
[465] *Id.* at 2382. This would be based upon the statutory directive that the BLM manage its lands in accordance with land use plans and thus management decisions inconsistent with a RMP would be "contrary to law."
[466] GEORGE C. COGGINS AND ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, (West, Thomson, 2004), sec. 10F-17.
[467] 43 U.S.C. § 1702(j).
[468] 30 U.S.C. §§§ 22 – 47.
[469] 43 C.F.R. § 2300.0-3(b)(3).

The statutory scheme differentiates between withdrawals of more than 5,000-acres and those less than 5,000 acres. In the case of the latter, the Secretary of Interior or her designee (who must be a Presidential appointee) has broad discretion to approve such withdrawals for any legitimate public purpose, subject to the following time limits – five years if the purpose is to preserve the land pending legislation, twenty years for facility use and an unlimited time period for resource uses.[470] A withdrawal may be broad-based and restrict all activities on a particular parcel of land or narrow in scope and restrict only a single activity or a few activities that would be particularly destructive of the values of the site.[471]

In the case of land in excess of 5,000 acres, the statute allows withdrawal for up to 20 years, but subjects that authority to the possibility of a legislative veto,[472] a procedure that has since been held unconstitutional by the U.S. Supreme Court.[473] This ruling has been interpreted by the Department of the Interior to provide the Secretary with wide discretion to withdraw larger parcels so long as Congress is notified,[474] although some commentators believe that this ruling may also make such actions more vulnerable to legal challenge.[475]

The process for obtaining land withdrawal is triggered by an application to BLM by the relevant federal agency.[476] Upon publication of a notice of application for land withdrawal, the land is segregated from the public domain for a period of up to two years while the review process takes place.[477] The application must include a comprehensive analysis of the reasons for the withdrawal request, the nature of the withdrawal sought and reasons why alternatives to withdrawal are unsatisfactory; the applicant bears general responsibility for any studies or reports that document the need for the withdrawal.[478] Public notice is required and, in the case of a withdrawal of 5,000 acres or more, a public hearing as well.[479] BLM makes recommendations to the Secretary of Interior, who has the final authority to decide upon the application.[480] Where another federal department or agency manages the land in question (*e.g.,* the Forest Service in the Department of Agriculture), that department must also approve the withdrawal.[481]

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[470] 43 U.S.C. § 1714(a), (b).
[471] *See* 43 U.S.C. § 1702(j).
[472] 43 U.S.C. § 1714(c)(1).
[473] *INS v. Chadha*, 462 U.S. 919 (1983).
[474] *Cf. State of New Mexico v. Watkins*, 969 F.2d 1122, 1126-27 (D.C. Cir. 1992).
[475] *See* Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, *supra* note 466, at sec. 10D-15.
[476] 43 C.F.R. §§ 2310.1-1(l), 2310.1-2, 2310.1-3.
[477] 43 U.S.C. § 1714(b)(1); 43 C.F.R. §2310.2(a).
[478] 43 C.F.R. §§ 2310.1-2, 2310.3-2.
[479] 43 U.S.C. § 1714(h); 43 C.F.R. §§2310.3-1.
[480] 43 U.S.C. § 1714(a); 43 C.F.R. §§2310.3-2(f), 2310.3-3(a).
[481] 43 U.S.C. § 1714(i).

Emergency applications for withdrawals of up to three years may be filed directly with the Secretary where a situation exists which requires "extraordinary measures to preserve values that would otherwise be lost.[482] In addition, land may be withdrawn for up to 5 years to preserve the lands for a specific use under consideration by Congress.[483] Withdrawals must be reviewed at least 2 years before they expire and may be renewed by utilizing the regular withdrawal procedure.[484]

When land is withdrawn, an environmental assessment (EA) or environmental impact statement (EIS) must be prepared that includes, among other things, a report on cultural resources.[485] BLM regulations define the term "cultural resources" to include "physical remains of human activity," including "burial mounds, petroglyphs, artifacts, objects, ruins…or natural settings or features which were important" to prehistoric and historic land use events.[486]

c. BLM Consultation Protocols

The BLM Handbook includes a detailed section on "General Procedural Guidance for Native American Consultation.[487]" The goal of the Guidance is to "assure (1) that federally recognized tribes and Native American individuals, whose traditional uses of public land might be affected by a proposed BLM action, will have sufficient opportunity to contribute to the decision, and (2) that the decision maker will give tribal concerns proper consideration."[488] The Guidelines define consultation as having four components:

- Identifying appropriate tribal governing bodies and individuals from whom to seek input.
- Conferring with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals or other pending BLM actions that might affect traditional tribal activities, practices or beliefs relating to particular locations on public lands.
- Treating tribal information as a necessary factor in defining the range of acceptable public-land management options.

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[482] 43 U.S.C. §§ 1714(e).
[483] 43 C.F.R. § 2310.3-4(b)(3).
[484] 43 C.F.R. § 2310.4(a).
[485] 43 C.F.R. § 2310.3-2(b)(3)(i).
[486] 43 C.F.R. § 2300.0-5(e).
[487] Bureau of Land Management Manual, part H-8120-1 (2004).
[488] *Id.*, ch. I.A..

- Creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM's decisionmaking process.[489]

The Handbook notes that "[t]he best time to foresee and forestall conflicts between BLM-authorized land uses and tribally significant historic properties is during land use planning and its associated environmental impact review…Tribal preservation concerns should be identified in spatial and programmatic terms, to address in general the locales and types of land use activities that would and would not be of further tribal concern…Agreements on criteria and procedures for consulting with tribes about individual land use actions may be discussed at this time." [490]

In terms of the process of consultation, the Handbook provides the following guidance:

- Consultation usually demands more effort than routine public participation.

- It is not enough to simply publish notices or send a letter. At a minimum, such written documents must be followed up by telephone contact.

- A reasonable effort should be made to accommodate requests for onsite visits or face-to-face meetings.

- Land managers should seek to develop relationships with tribal leaders before specific actions are contemplated.

- Each BLM office should maintain lists of (1) tribal officials and traditional religious leaders whom have been designated as contact people by tribes interested in the geographic area in question and (2) other Native American individuals and representatives of non-recognized groups who want to be informed about pending BLM actions.

- "[T]ribes should be notified and invited to participate at least as soon as (if not earlier than) the Governor, State agencies, local governments and other Federal agencies."

- "Tribal government officials are the appropriate spokespersons where proposed actions might affect tribal issues and concerns…If the BLM has established a consultation relationship with traditional leaders through

[489] *Id.*, ch. I.C.
[490] *Id.*

previous contacts, these individuals should be contacted at the same time as tribal government officials are contacted. If there is no existing consultation relationship with traditional leaders, tribal government officials should be asked to identify individuals who might have special knowledge related to traditional uses of BLM lands."[491]

Although these provisions are found in a Handbook and are not regulations, they have been given additional legal force through a Programmatic Agreement between the BLM and Advisory Council for Historic Preservation that specifies alternative procedures for the BLM to use in lieu of strict compliance with the NHPA section 106 process.[492] Section 3(e) of that agreement states, in part, that "procedures to ensure timely and adequate Native American participation" will comply with both NHPA statutory requirements and BLM Manual and Handbook sections pertaining to Native American consultation.[493]

3. National Park Service

The Park Service Organic Act[494] vests the Secretary of Interior with broad authority over the management of the national parks. The Park Service has a dual mission – recreation and preservation.[495] Amendments enacted in the 1970s have been interpreted as emphasizing the preservation component of the Park Service's mission and some recreational activities have been curtailed since that time in order to better preserve national parkland.[496]

Pursuant to the Organic Act, each national park is directed to prepare a General Management Plan (GMP). This plan is required to include preservation measures, address development within the park, identify how visitors will be accommodated and indicate whether it would be beneficial to modify the boundaries of the park.[497] Although the Act authorizes the Secretary to promulgate regulations, in practice the implementation of these requirements has taken place pursuant to Director's Orders (issued by the Director of the National Park Service) and Management Policies.[498] These Orders and Policies

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[491] *Id.*, ch. V.

[492] 36 C.F.R. § 800.14 allows for the development of alternative procedures by agencies to comply with section 106 NHPA requirements. The procedures must meet certain requirements laid out in the regulation and the Advisory Council on Historic Preservation must approve the procedures.

[493] The Programmatic Agreement can be found at http://www.blm.gov/heritage/docum/finalPA.pdf.

[494] 16 U.S.C. §§ 1 *et seq*.

[495] *See*, *e.g.*, Winks, *"The National Park Service Act of 1916: A contradictory mandate?"* 74 DENVER L.REV. 575, 579 (1997).

[496] *See*, *e.g.*, *Michigan United Conservation Clubs v. Lujan*, 949 F.2d 202, 204-205 (6th Cir. 1991).

[497] 16 U.S.C. § 1a-7(b).

[498] Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy and Science in a Dynamic Environment*, 74 DEN.L.REV. 649, 676 (1997).

include requirements that the Park consult with the public, including people with traditional cultural ties to park lands, and provide guidance as to the actions that the Park Service should take to comply with Executive Order 13,007 on sacred lands protection. The requirements provided for in the Manual section implementing the Executive Order include notice to Indian tribes when plans, projects or activities may affect the physical integrity of sacred sites or restrict access or ceremonial use of sites and authorize the development of Memoranda of Agreement with Indian tribes to provide a mechanism for the early resolution of disputes, to provide a process for resolving tribal complaints and to enable the tribe to appeal any decision that it believes to be contrary to the Executive Order.[499]

The Organic Act has much less specificity in terms of land management and planning requirements applicable to national parks as compared to the statutes governing the Bureau of Land Management and the Forest Service. It has been interpreted as providing the Secretary (usually acting through the Director of the Park Service) with great discretion.[500] The actions of the Park Service can be challenged only pursuant to the Administrative Procedures Act and have been reviewed under the arbitrary and capricious standard of the APA – which is the standard most deferential to an agency.[501] In terms of General Management Plans themselves, there is some case law (albeit limited) that indicates that there is no cause of action to challenge a GMP under the Organic Act.[502] Instead, it is probable that challenges to Park Service actions would need to be brought under NEPA, NHPA or other statutes included herein that are broadly applicable to all agencies. Of note, Environmental Impact Statements are routinely prepared as part of the GMP development process.[503]

Many national parks have specific statutes that govern their operation.[504] A few directly address sacred lands issues, specifically continued access to sites for ceremonial purposes, and they frequently authorize the Park Service to temporarily prohibit access to such sites to facilitate their ceremonial use.[505]

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[499]Department of the Interior Departmental Manual Part 512 which can be found at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3214

[500] *See, e.g., Lesoeur v. United States*, 21 F.3d 965 (9th Cir. 1994); *National Wildlife Federation v. National Park Service*, 669 F.Supp. 384 (D.Wy. 1987).

[501] *See, e.g., Wilkins v. Secretary of Interior*, 995 F.2d 850 (8th Cir. 1993); *Udall v. Washington, Va. and Md. Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968).

[502] *Jackson Hole Conservation Alliance v. Babbitt*, 96 F.Supp.2d 1288 (D.Wy. 2000).

[503] National Park Service Director's Order 12, sec. 7.1 which can be found at http://planning.nps.gov/document/do12handbook1.pdf

[504] See generally Title 16 of the United States Code.

[505] 16 U.S.C. § 410ii-4 (Chaco Canyon National Park – nothing shall prevent the continuation of traditional Native American religious uses of properties); 16 U.S.C. § 410aaa-75 (California Desert Lands Park and Preserve – recognizes Indian religious use, requires continued access, authorizes temporary closures); 16

4. Department of Defense

The Department of Defense also manages a significant amount of public lands. Summarizing all of the law applicable to DOD is beyond the scope of these materials at present. Some of the more significant regulations are the following. Defense Department regulations for "Environmental Protection and Enhancement" are available in the Code of Federal Regulations.[506] With respect to Native sacred places, the Defense Department regulations for historic preservation are the most directly relevant,[507] and those regulations acknowledge that the ACHP regulations are applicable.[508] The Army has adopted "Army Alternate Procedures for Historic Properties" (AAP).[509] Under the AAP, each installation is directed to prepare a Historic Preservation Component (HPC) for its Integrated Cultural Resources Management Plan (ICRMP), and once its HPC has been certified, the installation complies with NHPA section 106 through its HPC rather than through the ACHP regulations. Any installation that does not have a certified HCP "shall continue to comply with section 106 by following 36 CFR part 800."[510]

E. Other Federal Laws

1. Transportation Act – Section 4(f)

Section 4(f) of the Department of Transportation Act of 1966[511] allows the Secretary of Transportation to approve transportation projects that will use "publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge…or land of an historic site of national, State or local significance…only if there is no prudent and feasible alternative" and the project includes "all possible planning to minimize harm." A project falls within this restriction if it uses a site directly or if there is a "constructive use" of the site; a "constructive use" is a use that would substantially impair the value of a protected site even though it doesn't directly impact upon that site in a physical sense.[512]

U.S.C. § 460uu-47 (El Malpais National Monument – requires access for religious purposes, requires the involvement of the Acoma Pueblo, allows temporary closures).

[506] 32 C.F.R. part 650.

[507] 32 C.F.R. subpart H, §§ 650.181 – 650.193.

[508] 32 C.F.R. § 650.191, referring to 36 C.F.R. part 800.

[509] 69 Fed. Reg. 20576 (April 16, 2004).

[510] AAP § 1.2(c), 69 Fed. Reg. 20578.

[511] 49 U.S.C. § 303(c).

[512] 23 C.F.R. § 771.135(p); *see also Coalition Against a Raised Expressway, Inc. (CARE) v. Dole*, 935 F.2d 803, 811 (11th Cir. 1988); *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 427-428, 441 n.2 (5th Cir. 1985).

The United States Supreme Court has provided parameters to guide interpretation of the statute in *Overton Park v. Volpe*.[513] The Court stated that "feasible" means that an alternative is grounded in "sound engineering." The Court's interpretation of "prudent" was phrased in the negative, focusing on what would disqualify an alternative from consideration by the Secretary: a "prudent" alternative is one that would not present "unique" or "truly unusual" problems, or "costs or community disruption of extraordinary magnitude."[514] The *Overton Park* decision stressed that protection of 4(f) lands was of "paramount importance" under the statute.[515]

Since 1984, however, there has been a trend across many federal circuits toward increased deference to FHWA interpretations of what constitutes an "imprudent" transportation project alternative; one prominent aspect of this trend involves courts' acceptance of agency determinations that an alternative's ability to satisfy the transportation project's stated purpose or need is dispositive when evaluating its prudence.[516] This suggests that agencies may try to satisfy the 4(f) criteria by narrowly crafting their purpose and need statements so as to preclude consideration of anything other than the agency's own preferred alternative plan.

Recent amendments to this section have sought to eliminate projects that have only a *de minimis* impact upon historic sites. A finding of *de minimis* impact can be made if there is a finding that there will be no adverse effect on the historic site or no historic properties affected by the project. This finding can be made only after consultation with all appropriate parties (which includes tribes when a property has cultural or religious significance[517]) and with consent of the SHPO (or THPO where applicable) and the Advisory Council on Historic Preservation if it has taken part in the consultation process.[518]

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[513] 401 U.S. 402 (1971).
[514] *Id.* at 413.
[515] *Id.* at 412-413.
[516] *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991) (because the purpose was to build a new cargo hub for the airport, it was appropriate to limit consideration to the plan and a no action alternative); *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999) (10 lane bridge alternative not considered because 12 lane proposal the minimum necessary to meet projected traffic demands); *Arizona Past and Future Foundation v. Lewis*, 722 F.2d 1423 (9th Cir. 1983) (purpose narrowly defined as improving traffic services for Central Phoenix); *Alaska Ctr. for the Environment v. Amrbrister*, 131 F.3d 1285 (9th Cir. 1997) (since purpose of project was to increase traffic to Prince William Sound, improving rail service option would not meet the needs and purpose of the project); *but see Stop H-3 v. Dole*, 740 F.2d 1442 (9th Cir. 1985), *cert. denied*, 471 U.S. 1108 (1985) and *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (finding inadequate consideration of alternatives).
[517] See notes 115, 157-159 and accompanying text.
[518] 49 U.S.C. 303(d)(1) and (2).

In spite of these limitations, section 4(f) is still one of the very few statutes that imposes a substantive limitation upon government action in a context that may be relevant to sacred lands protection. Thus, it should be considered whenever the threatened activity involves a project requiring Department of Transportation approval.

2. Federal Power Act

The Federal Energy Regulatory Commission (FERC) has authority over a range of energy subjects, including non-federal hydroelectric power projects; interstate transmission of electricity, oil and natural gas; and interconnection of small electricity generating facilities with the power grid operated by electric utilities.[519] While actions taken pursuant to FERC's regulatory authority may affect sacred lands, the discussion in these materials is limited in scope to FERC's authority over licensing of non-federal hydropower facilities pursuant to the Federal Power Act (FPA) as amended.[520]

The Energy Policy Act of 2005 (EPAct 2005)[521] made some sweeping changes in the requirements for hydropower licenses issued by FERC, by limiting the authority of the Secretary of the Interior to impose conditions on licenses to protect the purposes for which an Indian reservation was established. Under prior law, if the Secretary of Interior specified certain conditions to protect the purpose of a reservation, and if project works were to be located on trust or restricted land, FERC was required to include the conditions in a license.[522] Section 241 of EPAct 2005 changed this by granting the applicant for a license and any party to the proceeding a right to a trial-type hearing in which the applicant, or any other party, can propose alternative conditions to those proposed by the Secretary.[523] The Secretary is required to accept an alternative

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[519] FERC's legislative authority is found in a variety of acts of Congress, generally codified in title 16 of the U.S. Code, and its regulations are codified in title 18 of the Code of Federal Regulations, as well as in publications issued by FERC. Information on the range of FERC programs is available on the FERC web site: www.ferc.gov.

[520] The provisions of the Federal Power Act dealing with hydroelectric facilities are codified at 16 U.S.C. §§ 791a – 823c.

[521] Pub. L. No. 109-58, 119 Stat. 594.

[522] The statutory authority is codified at 16 U.S.C. §797(e). This statutory provision applies to all federal reservations, not just Indian reservations. For Supreme Court decision applying this staturory provision in the context of an Indian reservation, see Escondido Mutual Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765 (1983).

[523] Pub. L. No. 109-58, §241, 119 Stat.674 (amending 16 U.S.C. §§797(e), 811).

[524] 70 FED. REG at 69804 (Nov. 17, 2005).

condition if the Secretary determines that the alternative condition would provide adequate protection for the use of the reservation and would either cost less to implement or improve the project's electricity production. If the Secretary rejects the alternative condition but FERC finds that the condition requested by the Secretary is inconsistent with the Federal Power Act, then FERC can refer the matter to its Dispute Resolution Service, although the Secretary retains the ultimate decision-making authority. Section 241 of EPAct 2005 makes a similar change in the authority of the Secretaries of Interior and Commerce to direct FERC to require that fishways be incorporated into hydroelectric projects. The Departments of Interior, Commerce, and Agriculture issued joint final rules implementing Section 241 of the Energy Policy Act on November 17, 2005.[524]

Prior to the enactment of EPAct 2005, FERC had revised its process for hydropower licensing to create "a new licensing process in which a potential license applicant's pre-filing consultation and the Commission's scoping pursuant to [NEPA] are conducted concurrently, rather than sequentially."[525] FERC refers to this new process as its "integrated process."[526] The regulations for the new integrated process include numerous provisions with specific references to Indian tribes and impacts on tribal lands, resources, and interests. For example, FERC requires applicants to consult with tribes, provide tribes with copies of requested documents, notify tribes throughout the process and to include Indian tribes, tribal lands and interests that may be affected in their pre-application documents.[527] The Commission commits to having its staff meet with any Indian tribe likely to be affected by a project early in the process.[528] In

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[525] *See* Federal Energy Regulatory Commission, Hydroelectric Licensing Under the Federal Power Act; Final Rule, 68 FED. REG. 51070 (Mar. 8, 2004) (to be codified in various sections of 18 C.F.R. parts 2, 4, 5, 9, 16, 375 and 385).

[526] 68 FED. REG. at 51071. The new "integrated" process is an alternative to the two processes that currently exist, referred to by FERC as the "traditional process" and "alternative licensing procedures" (ALP). The ALP is a consensus-based process, see 18 C.F.R. § 4.34(i), and as such cannot be used in all circumstances. During a two year period, applicants will be able to choose between the new integrated process or the traditional process, or to ask FERC's authorization to use the ALP; after two years, the integrated process will become the default, although the ALP will still be available with FERC's approval. 68 FED. REG. at 51070. FERC says that it will review the effectiveness of all three processes on an ongoing basis and may decide to phase out or eliminate the traditional process. 68 FED. REG. at 51072.

[527] 18 C.F.R. §§ 5.1(d) (requirement for applicant to consult with tribes, among others), 5.2(b)(3) (provide copies of requested documents), 5.5(b)(8)(v) (requirement to notify), 5.6(d) (pre-application document required to show tribal lands and describe Indian tribes, tribal lands, and interests that may be affected). There are numerous other explicit and implicit references to tribes and tribal interests throughout the regulations for the new integrated process. *See also* the discussion of tribal issues in the preamble to the final rule. 68 FED. REG. at 51096-99.

[528] 18 C.F.R. § 5.7 (published at 68 FED. REG. at 51127).

addition, the Commission has established a national position of Indian liaison[529] and has adopted a policy on consultation with tribes.[530]

Despite the numerous provisions in the regulations relating to tribes, the establishment of a tribal liaison, and the adoption of a tribal consultation policy, tribes may nevertheless encounter some difficulties in their dealings with FERC. For example, tribes may experience difficulties regarding FERC's rules on "off-the-record" or *ex parte* communications.[531] As an independent regulatory agency, FERC has established these rules to ensure that its decisions are not influenced by off-the-record communications between interested parties and the Commission (and its staff). One implication of these rules is that FERC does not allow an agency that chooses to be a cooperating agency (federal, state, local or tribal) for the preparation of an EIS to also be an intervenor in the same licensing procedure.[532] Another implication is that consultation between Commission staff and tribes regarding historic properties that hold religious and cultural importance for tribes is likely to be severely inhibited.[533]

In one noteworthy case, an administrative law judge denied a permit for a proposed hydroelectric development involving Kootenai Falls in Idaho – finding that because of the impact upon traditional religious and cultural practices, as well as recreational and aesthetic impacts, the development was against the public interest within the meaning of the statute.[534]

III. Other Relevant Law

A. State Unmarked Burial Statutes

The vast majority of states have enacted laws pertaining to unmarked burial sites. Thus, in dealing with burial sites that are not covered under the relevant federal statutes, it may be beneficial to refer to state statutes. These

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[529] *See* 68 FED. REG. 51098.

[530] FERC Order No. 635, Policy Statement on Consultation with Indian Tribes in Commission Proceedings (PL03-4-000), III FERC Stats. & Regs., Regulations Preambles 104 FERC ¶ 61,108 (July 23, 2003); 68 FED. REG. 46452 (Aug. 6, 2003) (to be codified at 18 C.F.R. § 2.1(c)).

[531] 18 C.F.R Part 385.

[532] *See discussion* in the preamble to the final rule on the integrated process, 68 FED. REG. at 51099-51100.

[533] The regulations for the integrated process require the applicant to delete from any information made available to the public specific site or property locations regarding historic properties and archaeological resources. 18 C.F.R. § 5.2(c). In practice, tribes tend to be more reluctant to reveal sensitive information to the applicants for federal licenses and their consultants than to representatives of federal agencies; the rule against off-the-record communication, however, makes it difficult to share sensitive information with FERC staff.

[534] *In re Northern Lights, Inc*. 39 FERC ¶ 61,352 at ¶ 62,107-08 (1987). The legal section involved is codified as 16 U.S.C. § 803(a).

statutes differ widely and a summary of them is beyond the scope of these materials.[535]

B. California Sacred Lands Statutes

California is the only state that has a number of statutes that specifically address sacred lands issues. One statute provides that

> no public agency, and no private party using or occupying public property, under a public license, permit, grant, lease or contract…shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.[536]

The legislation also creates a Native American Heritage Commission. The Commission consists of nine members appointed by the Governor, at least five of which must be California Native American elders, traditional people or spiritual leaders. Among other things, the Commission is charged with identifying places of special religious or social significance to Native Americans, as well as grave sites, assisting Native Americans in obtaining access to sacred places and to make recommendations in regard to sacred places on private lands. The statute also provides that if "any Native American organization, tribe, group, or individual" informs the Native American Heritage Commission

> that a proposed action by a public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, the commission shall conduct an investigation as to the effect of the proposed action. Where

[535] Although it is a few years out of date (produced in 1997), the U.S. Department of Agriculture, Natural Resources Conservation Service, Ecological Services Division has produced a pamphlet entitled "Compilation of State Repatriation, Reburial and Grave Protection Laws, 2nd Edition" which summarizes all state unmarked burial laws.

[536] CALIFORNIA PUBLIC RESOURCES CODE § 5097.9

> the commission finds, after a public hearing, that the proposed action would result in such damage or interference, the commission may recommend mitigation measures for consideration by the public agency proposing to take such action. If the public agency fails to accept the mitigation measures, and if the commission finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property... [the Commission may] take appropriate legal action…to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.[537]

Under the statute, if a court finds based upon evidence that includes a "showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community" that "severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise."[538]

Thus, in the case of public lands, California's statute provides for enforceable substantive limitations upon activities that may negatively impact upon sacred lands. It should be noted that the law has some explicit limitations in that it

- Excludes the public property of cities and counties, except for parklands in excess of 100 acres, and does not include private property[539]; and

- Specifies that judicial enforcement of this provision is delegated to the Native American Heritage Commission. It is unclear if there is a private right of action.

California also recently adopted legislation that attempts to address sacred lands concerns in the context of city and county planning processes. It

[537] CALIFORNIA PUBLIC RESOURCES CODE §§ 5097.97 and 5097.94(g)
[538] CALIFORNIA PUBLIC RESOURCES CODE §§ 5097.94(g).
[539] CALIFORNIA PUBLIC RESOURCES CODE § 5097.9.

requires that cities and counties must consult with Indian tribes that have traditional lands within the city's or county's jurisdiction before the adoption or amendment of a general plan by the city or county.[540] The definition of Indian tribes includes both Federally recognized Indian tribes and non-Federally recognized Indian tribes who are on a list compiled by the Native American Heritage Commission.[541] From the date on which a tribe is contacted about the proposed city or county action, it has 90 days to request consultation.[542] As part of that process, the city or county must take steps to protect the confidentiality of the information provided by the tribe and to facilitate voluntary landowner participation as necessary.[543] Consultation is defined to mean

> the meaningful and timely process of seeking, discussing and carefully considering the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.[544]

The purpose of consultation is to preserve or mitigate the impact to the traditional cultural and religious places that are within the scope of the plan or amendment.[545]

Tribes are also included on the list of entities that must receive notice of a proposed action as part of the 45 day notice and comment period required prior to the adoption or substantial amendment of a plan.[546] The statute also provides that sacred places must be considered and tribal consultation must occur before cities and counties designate open space if the affected land contains a cultural

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[540] CALIFORNIA GOVERNMENT CODE §§ 65352(a)(8) and 65352.3. This process also applies to the adoption of specific plans to implement a general plan. CALIFORNIA GOVERNMENT CODE § 65453.

[541] CALIFORNIA CIVIL CODE § 815.3(c); CALIFORNIA GOVERNMENT CODE §§ 65092(b), 65352(a)(8) and 65352.3(a)(1).

[542] CALIFORNIA GOVERNMENT CODE § 65352.3(a)(2).

[543] CALIFORNIA GOVERNMENT CODE § 65040.2(g)(3) and (4).

[544] CALIFORNIA GOVERNMENT CODE § 65352.4.

[545] CALIFORNIA GOVERNMENT CODE § 65352.3 (a)(1). The Tribal Consultation Guidelines (Interim) for implementing the law issued by the California Governor's Office of Planning and Research ("Guidelines") as a Supplement to General Plan Guidelines suggest that mitigation is feasible "when capable of being accomplished in a successful manner within a reasonable time taking into account economic, environmental, social and technological factors."

[546] CALIFORNIA GOVERNMENT CODE § 65352 (a)(8).

place and the tribe has requested that it receive notice of any public hearings pertaining to activities affecting a particular land area.[547] Finally, the new law authorizes tribes to acquire and hold conservation easements.[548]

As required by statute[549], the California Governor's Office of Planning and Research, in consultation with the Native American Heritage Commission, has developed tribal consultation guidelines.[550] Among other things, the Guidelines provide for the following:

- The local government should contact the Native American Heritage Commission as soon as possible to determine which tribes to notify

- Notices to tribes should be clear, concise and include all necessary information about the plan or amendment

- Tribes and cities/counties may develop consultation protocols

- Cities and counties must consult with all tribes with an interest and said consultation should take place on a one-to-one basis unless the tribes decide that they prefer to consult jointly; consultation should normally be face-to-face consultation unless otherwise agreed

- Initial contact should be made to the tribal representative identified by the NAHC by a local government official of similar rank, but those leaders may choose to delegate the consultation responsibilities to their staff or other appropriate individuals

- Consultation continues until there is agreement or a party concludes in good faith after a reasonable effort that agreement cannot be reached

- Private landowners may be invited into the process

- Local governments are encouraged to develop an on-going collaborative relationship with tribes prior to the need for consultation on a specific plan or amendment[551]

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[547] CALIFORNIA GOVERNMENT CODE § 65562.5. The Guidelines instruct local governments to contact both the NAHC and tribes to ensure that cultural places that are located in open spaces are appropriately identified.
[548] CALIFORNIA CIVIL CODE § 815.3 (c).
[549] CALIFORNIA GOVERNMENT CODE § 65040.2(g).
[550] State of California, Governor's Office of Planning and Research, *Tribal Consultation Guidelines (Interim), Supplement to General Plan Guidelines*, March 1, 2005 (hereinafter "Guidelines")
[551] See generally *id*.

Of note, the Guidelines also provide detailed guidance on the issue of confidentiality and how this requirement might be implemented consistent with other statutes such as the California Public Records Act. The guidelines indicate that the following findings must be made by the local government if public access to information provided to the government is to be denied:

1. disclosure of the information would create an unreasonable risk of harm, theft, or destruction of the resource or object…; or
2. disclosure is inconsistent with other applicable laws protecting the resource or object; or
3. …on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.[552]

The Guidelines also suggest that procedures be established so that information can be shared in a confidential setting and that participating landowners should be encouraged to sign non-disclosure agreements before gaining access to sacred site information.

California has also acted in other ways to prevent desecration of sacred sites. Recently, a statute was passed to require that open pit mining operations near sacred sites be back filled and restored to "pre-mining conditions."[553] The intent of the bill was to make such operations economically prohibitive.

IV. Consultation and Negotiation – Practical Considerations

A. General Guidance on Pro-Active Engagement with Federal Land Managers

1. What is consultation?

The word "consultation" means different things to different people. The definition used by the National Park Service in its guidance for Federal historic preservation programs is a useful one in this context. It states:

[552] *Id*. at 27.
[553] CALIFORNIA PUBLIC RESOURCES CODE § 2773.3.

> Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.[554]

The term "consultation" is often used by Federal agencies without considering whether a particular process includes the key aspects set out in the NPS definition quoted above. Sometimes the term is used almost interchangeably with other terms that describe efforts to facilitate public input into government decision-making, terms such as "public participation," "stakeholder involvement," "public-private partnerships," and "collaborative processes." Terms such as these might be seen as points on a spectrum, from a minimal level of effort to inform the public about what a government agency is doing to providing genuine opportunities for concerned people and groups to influence government decisions. Regardless of how the various terms are used by Federal agencies, at a minimum "consultation" should mean a real opportunity to affect the Federal agency's decision and a process that includes the key aspects of the National Park Service definition.

Consultation does not mean that agreement will always be reached. In cases in which, in spite of good faith efforts, consultation does not lead to an agreement, and the federal agency retains the authority to make the decision, consultation may end when it becomes clear that an agreement cannot be reached.

2. What are the different types of consultation?

a. Government-to-Government Consultation

This term applies to consultation between a federal agency and a tribal government. Each agency is required by Executive Order 13,175[555] to have an established process for consultation with tribal officials in the development and implementation of "policies that have tribal implications" based upon the "unique legal relationship" between the United States and "Indian tribal governments as set forth in the Constitution of the United States, treaties,

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[554]National Park Service, *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs pursuant to the National Historic Preservation Act*, 63 FED. REG. 20496, 20504 (Apr. 24, 1998).

[555] 65 FED. REG. 67249 (Nov. 6, 2000) (also published at 25 U.S.C. § 450 notes).

statutes, Executive Orders, and court decisions." Many Federal agencies have adopted policies on government-to-government consultation.

Many statutes and regulations also include requirements that the federal government engage in government-to-government consultation with tribal governments. For example, the National Historic Preservation Act requires consultation with tribes when the tribe "attaches religious and cultural significance to a property which falls under the Act."[556] Regulations implementing the Act require that tribes, in the context of the regulatory process created by the Act, be treated as consulting parties in such circumstances, as well as in cases where the federal undertaking impacts tribal land.[557]

b. Consultation with Native Religious Practitioners

When proposed Federal actions may result in impacts to places that are sacred in Native American religions, Federal agencies will generally need to consult with Native American religious leaders and practitioners in addition to consulting with representatives of tribal governments. Native religious practitioners and other people or organizations may have particular interests in, and extensive knowledge about, sacred places that are under Federal jurisdiction. Agencies must achieve some degree of access to such knowledge in order to make informed land management that avoid, or at least mitigate, adverse impacts on Native sacred places. Consultation with Native American religious leaders and practitioners does not take the place of government-to-government consultation with tribes, but it must also be noted that consultation with religious leaders and practitioners is not inconsistent with the government-to-government relationship between the United States and each Indian tribe. Rather, the two kinds of consultation should be complementary. Consultation with Native religious practitioners, in addition to consultation with tribal government representatives, is not contrary to the policy of maintaining government-to-government relations with tribes. Rather it is an essential step in fulfilling the federal responsibility to identify historic properties that may be affected by an undertaking and to take into account the effects of the undertaking on such properties.

If it is clear that tribal government representatives are in a position to raise issues and concerns on behalf of the interests of traditional practitioners in a specific matter that is subject to consultation, it may not be necessary for the Federal agency to make special efforts to seek the views of traditional practitioners. However, in any matter in which traditional practitioners, or their

[556] 16 U.S.C. § 470a(d)(6)(B).
[557] 36 C.F.R. §§ 800.3(d) and (f)(2) and 36 C.F.R. § 800.2(c)(2)(ii).

representatives, want to be consulted, they should have a right to consult with the agency.

From the standpoint of successful consultation, involvement of traditional tribal people directly in negotiations may serve another important purpose. When practitioners communicate their concerns about why it is important to protect a particular place, it has the potential to affect the opinions of federal officials in a way that technical and legal arguments may not -- particularly in the case of officials who are well-intentioned, but may not be well-informed about the nature of Indian religion and culture and the importance of sacred sites.

3. What are the different types of negotiations?

There are two basic ways that federal agency decisions affect Native sacred places:

(1) Many Native sacred places are located on lands managed by Federal agencies and can be affected by a wide range of land management activities.

(2) Many other Native sacred places are not located on Federal lands, but may nevertheless be affected by Federal agency decisions, including providing financial assistance to non-federal entities and issuing permits, licenses and other authorizations to non-federal entities.

The distinction between these two ways that federal agency decisions affect Native sacred places is important. Land managing agencies have opportunities to engage in consultation regarding Native sacred places as part of their pro-active planning processes, long before specific proposed actions are subject to review under such laws as the National Environmental Policy Act and National Historic Preservation Act.

a. Agency Planning Processes

The planning processes of land managing agencies provide the context for a critical facet of consultation. Consultation during the development or revision of land management plans can reduce the likelihood of conflicts over specific development proposals. Existing statutes and regulations generally provide authority for agencies to implement such an approach.

By consultation early in agency land management planning processes, conflicts between the protection of sacred places and other allowable uses can be minimized. Sacred places need not be specifically identified to be managed for

their protection, but rather can be identified as being located within areas of sensitivity. Areas so designated can then be placed in a land management classification designed to protect their integrity and allow for access by Native religious practitioners, allowing only such multiple uses as may be consistent with the sacred nature of the area and religious practices that may be conducted at such places. Land management planning documents can also provide for the involvement of a tribe or organization of Native religious practitioners in helping to carry out the land management plan.

Specific components of some of the more important land management planning statutes are included elsewhere in these materials.

b. Consultation on Specific Projects

In cases where proactive planning by land management agencies has not taken place, consultation will occur in the context of specific proposals for the development or management of land. This is also generally true in the case of agencies that do not manage land, but which issue permits or provide financial assistance to non-Indian entities. In these situations, consultation on specific proposed actions often takes place within the framework of the NHPA section 106 process and the review process established pursuant to NEPA. Both laws are discussed elsewhere in these Materials.

4. What are the possible outcomes from consultation/negotiations?

Consultation about Native sacred places can lead to a range of outcomes, which to some extent are framed by the context in which the consultation has taken place. For example, if the consultation has taken place in the context of the NHPA section 106 process for a particular proposed federal undertaking, and the undertaking would result in adverse effects on a historic property, the section 106 process will typically conclude in a memorandum of agreement (MOA).[558] The consultation may result in a programmatic agreement (PA) instead of an MOA in certain kinds of circumstances, such as when the "effects on historic properties cannot be fully determined prior to the approval of an undertaking."[559] If the consultation concerns a proposed federal action for which an environmental impact statement (EIS) has been prepared, the decision will be recorded in a record of decision (ROD). If the consultation has taken place in the context of federal land management activities or pro-active efforts to carry out

[558] 36 C.F.R. § 800.6(c).
[559] 36 C.F.R. § 800.14(b).

the policy of Executive Order 13,007 on Indian Sacred Sites, then the outcome should be recorded in appropriate land management documents.

In cases where a tribe or organization representing Native religious practitioners wants to be involved in the management of the area where a sacred place is located, or be otherwise involved in carrying out the decision that a Federal agency has made after consultation, negotiation of a MOA or PA is appropriate. If a tribe or organization assumes substantial responsibilities, it may be appropriate to refer to such an arrangement as "cooperative management" or "co-management," or perhaps some other term such as "shared stewardship." A separate agreement for cooperative management may be necessary, particularly if the Federal agency provides financial assistance to the non-federal partner or if user fees are collected and used for management purposes.

In some cases, such as those involving sacred places on privately owned land, the range of possible outcomes may include the acquisition of title to the land or lesser interests such as conservation easements. In cases in which land is proposed to be transferred out of Federal ownership, restrictions on the transfer of title may be effective to protect the integrity of sacred places and to ensure access by religious practitioners. Alternatives involving interests in land can be quite varied, and could be combined with a form of cooperative management.

5. Can consultation procedures be institutionalized?

In some instances, it may be feasible to develop written agreements with agencies in advance setting out the protocols for how consultation will take place. Such agreements can be designed to anticipate any kind of matter that might arise, or they can be fashioned to fit a variety of specific circumstances.

In addition, it may be useful to establish training programs on consultation with tribes and Native religious practitioners for agency personnel. Such training can help ensure that agency staff is familiar with the agency's consultation policies, and the relevant laws and polices that shape the need for consultation. Another aspect of training can be cultural sensitivity training. In providing such training, it may be particularly useful for agency staff and Native people to interact in training programs both as participants and instructors.

6. How about confidentiality?

Often there are sensitive issues pertaining to disclosure of information about sacred lands by tribal representatives for reasons having to do with

potential harm to the resource and/or internal tribal restrictions against the release of such information. While NHPA and ARPA authorize withholding some kinds of information from disclosure in certain circumstances,[560] the provisions of these laws are less than ideal with respect to Native sacred places. Thus, it is important to determine what information can or cannot be revealed to the agency in advance. Moreover, if it appears that there may be the possibility that sensitive information will be revealed during consultation, it is important to make sure that there is an understanding with the agency at the beginning of the consultation that the information that is revealed should be kept confidential to the maximum extent permitted by law. Agreements in advance about how such information will be handled and how much documentation needed to be compiled can be very useful. For example, if avoidance by choosing an alternative location is an option, determinations of eligibility for the National Register may not be necessary.

When information about sacred places is documented, findings necessary for withholding pursuant to NHPA section 304 should be made and kept with the documentation. The confidential information should be identified as such within the agency's record-keeping system, and distribution of confidential information should be restricted within the agency. If a sacred place is located at a site where archaeological resources subject to ARPA are also known to exist, the documentation kept by the agency should note that disclosure is prohibited under ARPA, unless the agency affirmatively finds that disclosure would not risk harm to the resources or the site at which they are located.

When information about a sacred place is needed for Federal agency decision making, it is possible for a version of the relevant documentation to be prepared for release to the public that does not include all of the information that has been shared.

B. Multi-Stakeholder Collaborative Processes

Over the past two decades or so, we have seen the emergence of an approach to environmental conflicts that emphasizes the use of collaborative processes and the engagement of representatives of a wide range of interested groups and governmental entities. There have been at least two different communities of interest driving this development. One is a community of professionals who have been applying the various methods of alternative dispute resolution (ADR) to environmental conflicts. Among this community of interest, the most widely used term to describe the approach they advocate is "environmental conflict resolution" (or "ECR"). ECR includes a range of

[560] NHPA § 304; 16 U.S.C. § 470w-3; ARPA § 9; 16 U.S.C. § 470hh.

processes, including standard ADR methods such as mediation and arbitration and other techniques such as neutral evaluation, conflict assessment, consensus building, joint fact-finding, and collaborative monitoring. Information on ECR is available from a variety of sources, including the U.S. Institute on Environmental Conflict Resolution (Institute).[561] Among its programs, the Institute has established a Native Dispute Resolution Network to provide a referral system of resolution practitioners with knowledge and experience relevant to environmental disputes in which American Indians, Alaska Natives and Native Hawaiians are primary parties.

The other community of interest that has been driving the growth in the use of collaborative processes in the environmental conflicts is the environmental justice (EJ) movement. The EJ movement is comprised of activists, advocates and scholars affiliated with (or concerned about) minority and low-income communities and the disproportionate impacts that such communities have historically suffered as a result of the environmental degradation caused by industrial activities and various kinds of development. The EJ movement has produced a great deal of literature, and for the past dozen years, there has been a federal advisory committee, the National Environmental Justice Advisory Committee (NEJAC) affiliated with the U.S. Environmental Protection Agency (EPA).[562] One of the subcommittees of the NEJAC, the Indigenous Peoples Subcommittee, is particularly concerned with EJ issues in the context of Indian, Alaska Native and Native Hawaiian communities. There are also a number of academic entities that focus on EJ.[563] In addition to the NEJAC, the federal government has established an Interagency Working Group (IWG) on Environmental Justice.[564] Over the past several years, the IWG and the NEJAC have been promoting the use of collaborative processes in which all affected communities are represented as a way of fashioning resolutions to environmental conflicts that are both equitable and durable.

While generalized statements about the community of ECR professionals or about the EJ movement are bound to be misleading, it is nevertheless accurate to say that both communities recognize potential benefits in convening processes that bring all affected communities to the table well in advance of the time when a governmental agency is charged with making a decision that will affect them. By convening such multi-stakeholder collaborative processes, there is the possibility that the various entities and organizations will become invested in the

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[561] *See* www.ecr.gov. The U.S. Institute on Environmental Conflict Resolution was created by an act of Congress and is affiliated with the Morris K. Udall Foundation. The Institute's federal advisory committee has prepared a report which can be downloaded from the Institute's web site.

[562] *See* www.epa.gov/compliance/environmentaljustice/nejac/index.html.

[563] *E.g.*, Clark Atlanta University's Environmental Justice Resource Center. *See* www.ejrc.cau.edu.

[564] *See* www.epa.gov/compliance/environmentaljustice/interagency/index.html.

decision, and will come to understand each other's interests, so that an outcome can be crafted that will be acceptable to all. If that happens, the process may work better for all concerned than the standard process of all parties telling the government agency what they want, letting the agency decide, and then going to court to fight it out.

It is generally accurate to say that most advocates of collaborative processes for ECR recognize that it does not work for all conflicts, and that one of the keys is to ensure that all affected communities of interest be engaged early in the process.

Multi-stakeholder collaborative processes can also be used in the implementation of a decision. This may be particularly appropriate when the decision made by a federal agency involves long-term monitoring and/or adaptive management. In these kinds of cases, the implementation of a decision tends to require an on-going decision-making process. One prominent example of the involvement of tribes in such a process is the Glen Canyon Dam Adaptive Management Program.

Advocates for the protection of Native sacred places need to be aware of the growing use of collaborative ECR processes. If a particular sacred place could be affected by a proposed action that is the subject of such a collaborative process, then it will probably serve the interests of those seeking to protect the sacred place to participate in the collaborative process. Failure to do so could result in some options for protection being foreclosed. It may also result in the other affected communities becoming invested in a particular outcome that does not take into account the effects on a tribal sacred place. To put a more positive spin on this, participating in a collaborative process may be a way to build a strong coalition for the protection of a sacred place. Moreover, by becoming engaged in a collaborative process early, advocates for the protection of sacred places may be able to help fashion alternatives that will be acceptable to others and that will not cause damage to the sacred place they are seeking to protect. In some situations, advocates for sacred places may want to take the initiative by proposing the use of a collaborative process.